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1 OCTOBER 20, 1998; 10:00 A.M.
2 MR. GRADESS: Good morning, Justice Denman.
3 JUSTICE DENMAN: Good morning.
4 MR. GRADESS: I would like the members of the
5 dais to introduce themselves. I'm Jonathan Gradess,
6 Executive Director, New York Defenders Association.
7 MS. HATHAWAY: Marion H. Hathaway, Chair of
8 the Advisory Board.
9 MS. JONES: I'm Ann Jones from the League of
10 Women Voters, Rochester.
11 MS. BANKS: I'm Lenore Banks, League of Women
12 Voters, New York State.
13 MR. LEWIS: I'm David Lewis. I'm a board
14 member of NYSDA.
15 Good Morning, Judge.
16 MR. GRADESS: What we have been doing is
17 entertaining statements and then -- for about ten
18 minutes and then questioning, and we'd love you to
19 proceed.
20 JUSTICE DENMAN: Thank you, fine. I
21 appreciate the opportunity to come and speak to you
22 this morning. When Mr. Nowak called me and asked me

23 if I were going to speak, I told him I would be very
24 happy to do that because we probably more than
25 anybody get to see the work of the public defenders

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1 here at least as far as their appellate division goes
2 because they're in front of us almost every day that
3 we're in session, and they do an absolutely superb
4 job. I have to say that. They're really outstanding
5 lawyers, and they do a wonderful job.

6 The 4th Department Appellate Division, just
7 to fill you in on who I am and what we do, I'm the
8 presiding justice of the Appellate Division 4th
9 Department. As you probably know, the State is
10 divided into four appellate departments, and the 4th
11 Department is comprised of 22 counties of Western and
12 Central New York. Of those 22 counties, for reasons
13 that I'm not quite certain of, Monroe County has the
14 highest number of indigent criminal appeals.

15 We have what we call an ICAMP program in our
16 court -- which is Indigent Criminal Appeals
17 Management Program -- which we began in the mid '80s
18 as a result of crisis in criminal appeals where there
19 was a tremendous back log. Our court had not been
20 keeping track of the time that it took to perfect
21 appeals; that is, how long from the time an appeal
22 was filed by a criminal defendant, most of whom are
23 incarcerated, of course, until the time that that
24 appeal was perfected. There were back logs then of
25 three and four years. There were a number of Federal

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1 Habeas Corpus proceedings brought. The Federal
2 courts said that they were going to order that the
3 criminal defendants be released from incarceration
4 unless these appeals were perfected. So we did a
5 blitz. We brought in members of the private bar to
6 do pro bono work and to try to get the back log
7 caught up. We did that, and we vowed that that would
8 never happen again, and we instituted this ICAMP
9 program by which we track all the indigent criminal
10 appeals.

11 At that time there was a slight increase in
12 the staff of the Public Defender's Office here and in
13 other places. It has never been increased since.
14 That was in the late '80s, and I believe that their
15 staffing is exactly the same today as it was then,
16 despite the fact that their case load has more than
17 doubled since that time.

18 I think we're reaching another crisis stage
19 unfortunately. I see a lot of things happening all

20 at once. A tremendous increase in appeals, the
21 highest number of criminal appeals, incidentally, are
22 in Monroe County, and I -- there are a number of
23 reasons for that, I suppose, but that is a fact. The
24 Public Defender's Office in Monroe County now has 463
25 cases waiting to be perfected on appeal.

7

1 I also see -- and I don't think these things
2 are unrelated -- we have noticed we get prison
3 disciplinary proceedings. That is prisoners who are
4 brought up in prison on disciplinary charges.
5 There's a hearing officer in the prison. They take
6 an administrative appeal to the superintendent, and
7 then they can take the appeal to the court and we get
8 those appeals. We have noticed a tremendous increase
9 in rioting, fighting, attacks on corrections
10 officers; not just in one prison, but in all the
11 facilities within our jurisdiction.

12 I don't think those things are unrelated,
13 that there is a back log in criminal appeals at the
14 same time a great deal of unrest in the prisons. We
15 know that there is a great deal of overcrowding in
16 the prisons, and that certainly contributes to it,
17 also; but I think that some of these prisoners who
18 are sitting, waiting their for appeals to be
19 perfected and wait two, three and-a-half, four years
20 for their appeal to be perfected, that may not seem
21 like a lot to people on the outside, but to them it's
22 an eternity, and it's wrong, and if we believe, as we
23 do in this country, that every prisoner has a right
24 to take an appeal, then he certainly has a right to
25 have that perfected in a timely manner and get --

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1 and, you know, there is a good portion that we
2 reverse for ineffective assistance of counsel, for
3 errors by the trial court, errors by the prosecutor,
4 any number of errors that can occur that deprive a
5 defendant of due process or a fair trial, and those
6 people have a right to have those cases viewed by us
7 in a very timely fashion.

8 None of this is any indictment of the Public
9 Defender's Office here. They do an amazing job it
10 seems to me with only six people on their appellate
11 staff -- and I believe some of those are only
12 part-time people. To review and write briefs and
13 argue that number of appeals is simply a tremendous
14 task.

15 As I've said, they have now 463 cases. In
16 1990 each attorney had about 26 cases per year. In
17 1998 each attorney has about 54 cases. So exactly

18 doubled. The back log is increasing exponentially as
19 those things tend to do. They now have a back log of
20 507 cases that are waiting to be perfected. So I
21 think it's obvious that they need greater funding,
22 more staffing. They do a yeoman's task with the
23 staff they have, but they simply need more people.
24 That is not popular obviously. If you ask the
25 average taxpayer whether he'd rather have a new

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1 football stadium or provide more money for indigent
2 criminal defendants, I think we all know the answer
3 to that. It is not politically a popular thing to
4 fund public defender offices, and we know that that's
5 happening across the State, that funds are being cut.
6 But I certainly urge you to do whatever is in your
7 power to see that this Public Defender's Office gets
8 more funding so that they can have increased
9 staffing. Thank you.

10 MR. GRADESS: Thank you. Questions?

11 MS. BANKS: What is the situation in Erie
12 County?

13 JUSTICE DENMAN: We don't have as many from
14 Erie County, which is interesting to me. We have
15 only 237 cases now in the Erie County Public
16 Defender's Office, and the cities are roughly
17 comparable in size now. Rochester, I think, has
18 grown and Buffalo has shrunk, so I think they're
19 probably about the same size now.

20 One of the reasons for that is that the Erie
21 County District Attorney's Office extracts a waiver
22 of the right to appeal when they take a plea.

23 MS. BANKS: Is that universal, or is that his
24 decision?

25 JUSTICE DENMAN: Is it universal? I really

10

1 can't say. It's been done in Erie County for some
2 time. If you want to take a plea you waive your
3 right to appeal. It's explained thoroughly to a
4 criminal defendant, you understood -- the judge says,
5 "You understand that if you enter this plea you'll be
6 giving up your right to appeal? That is you can't
7 take this case to a higher court. No other court is
8 going to review your plea except for the sentence if
9 it's illegal," and so they voluntarily enter into
10 that waiver. That is not done in Monroe County.

11 MS. BANKS: That is not done. Did I read
12 somewhere there was a court case that set this
13 precedent and if it became universal it would throw
14 the criminal justice system in complete --

15 JUSTICE DENMAN: Yes, you did read that. I

16 think that's on its way to the Supreme Court. It
17 would throw the criminal justice system into havoc if
18 you couldn't -- that was on getting a plea from a
19 co-defendant or an accomplice in return for their
20 cooperation with the prosecution, and it would give
21 them a reduced plea, and that is what is going up on
22 appeal.

23 MR. LEWIS: That's United States against
24 Singleton, which is out of the 10th Circuit --

25 JUSTICE DENMAN: That's right.

11

1 MR. LEWIS: -- that was vacated by the
2 Circuit. So it was a sixth-day decision.

3 There is some concern in the 1st and 2nd
4 Departments because it's far more of the practice to
5 obtain or extract a waiver, and it seems that the
6 2nd Department, I believe it is, has recently said
7 that it's perfectly proper procedure.

8 I would like to ask you, your Honor, about
9 other departments and back logs. I know that the
10 presiding judges often meet as a board and whether or
11 not there's been some discussion on the -- it seems
12 to be called the Board of Judges. I don't know if --

13 JUSTICE DENMAN: No, it's the Administrative
14 Board. It's comprised of the four presiding
15 justices, the Chief Judge, Judge Kaye, and the Chief
16 Administrative Judge, Judge Lippman. That's the
17 Administrative Board for the Courts.

18 MR. LEWIS: Thank you. I was curious about
19 whether there's been a discussion about the back log
20 issue.

21 JUSTICE DENMAN: Well, we've had various
22 discussions about back logs, particularly in the
23 2nd Department. As you probably know, the
24 2nd Department went with 5,000 case back log up until
25 a couple of years ago, and the other three

12

1 departments voluntarily took over some of their cases
2 to try to do away with that back log; and we were
3 taking, I think, 125 cases a year -- each of the
4 other three departments was taking 125 cases a year.
5 Those were all civil, however. They kept all of
6 their criminal, but they were able to get through the
7 criminal because we were taking the civil off their
8 hands. We have never distributed criminal appeals in
9 that manner, and I don't know what their back log is
10 frankly. I don't know whether -- I would guess the
11 2nd Department probably has a back log as we do.

12 MR. LEWIS: The other question is whether or
13 not there's been some thought in wrestling with the

14 issue of the Federal habeas relief. There was a time
15 where out of the 2nd Department because of the back
16 log there was a steady stream of Federal applications
17 in which Federal courts in effect ordered the
18 2nd Department --

19 JUSTICE DENMAN: Yes.

20 MR. LEWIS: -- to either hear or in effect
21 reverse whether or not the crises reaches the
22 proportion where that becomes, of course, not the
23 court's suggestion for remedy, but the external
24 world's --

25 JUSTICE DENMAN: I certainly hope before it

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1 reaches that stage, that we're able to do something
2 about it ourselves. I don't think that it has
3 reached the stage as yet where we will do what we did
4 in the mid '80s, which was call on the private bar to
5 provide pro bono services to do away with the back
6 log. They did a wonderful job, and they were really
7 terrific about it, and indeed the large firms were
8 very generous and enjoyed it. They rather liked
9 doing it. It isn't the kind of thing that most large
10 firms do, criminal appeals, and they seem to enjoy
11 doing it.

12 I hope it hasn't reached that stage yet. I
13 don't believe it has. Although, as I look at these
14 figures I wonder if perhaps in Monroe County we
15 should do something of that nature to try to cut down
16 the back log.

17 MR. LEWIS: Thank you.

18 MS. HATHAWAY: Could you tell me maybe what
19 is the status of appeals that are perfected in the
20 interest of the indigent?

21 JUSTICE DENMAN: I'm not sure I know what
22 your looking for.

23 MS. HATHAWAY: You probably, maybe, don't
24 have any idea. The data that you quoted, the back
25 logs and the processing, were you just encompassing

14

1 Monroe County?

2 JUSTICE DENMAN: I'm just talking about
3 Monroe. I have the figures for the other counties,
4 but I thought we were speaking this morning only of
5 Monroe County.

6 MS. HATHAWAY: Well, I guess, what I'm trying
7 to ask is appeals that are -- that have been
8 completed --

9 JUSTICE DENMAN: That have been perfected?

10 MS. HATHAWAY: Yes.

11 JUSTICE DENMAN: We put them on right away as

12 soon as they're perfected. There's no back log in
13 our court. As soon as the brief is filed it's
14 calendered, and we hold it -- well, if it were filed
15 today it would be calendered for our January term.
16 It would be heard in January. It might be decided in
17 January. It would be decided no later than February,
18 if it's a case we have to take home after oral --
19 sometimes -- we work our cases in advance, so at the
20 time of oral argument we generally have a judge's
21 report indicating how the judge believes it should
22 go, and that goes to all the other members of the
23 panel. There's a reporting judge on each case, five
24 members of the panel, and those reports are sent to
25 the other members of the panel, and if -- so they've

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1 had a chance to read it in advance of oral argument.
2 But very frequently on oral argument, if you have a
3 good oral argument and you have a good persuasive
4 appellate argument, you'll say, wait a minute I
5 better take another look at this case. I thought I
6 knew where I wanted to go with this, but I'd like to
7 take the record home; and I've done that many times,
8 thought I knew where I was going to come out and what
9 I was going to recommend, and on oral argument I
10 think, "I better take another look at the record and
11 see if that argument holds water." Then I'll take it
12 home and circulate my report between terms, but it
13 will be decided by the next term. So no longer than
14 a month after oral argument is heard the decision is
15 out.

16 MS. HATHAWAY: And the percentage of the
17 appeals that are out, is the percentage higher for a
18 affirming or reversal or...

19 JUSTICE DENMAN: Well, most of them are
20 affirmed. I don't have a statistic on that, but just
21 generally ball park, I'd say we probably affirm 85
22 percent, maybe even higher than that. But it's that
23 other 10 to 15 percent. Those are the ones that --
24 if somebody has been sitting in jail waiting for an
25 appeal to be heard for three years and it's reversed,

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1 then that person thinks I could have been out of here
2 three years ago if that appeal had been heard
3 properly.

4 MS. HATHAWAY: Thank you.

5 MR. GRADESS: Justice Denman, let me, if I
6 might, pick up on something you were talking about
7 and ask you to amplify it a little bit more for the
8 record. I'm sure that you're aware that Prisoner's
9 Legal Services has been for the moment and perhaps

10 for the future, as a result of the Governor's veto,
11 closed for all intents and purposes. I wonder if you
12 might reflect upon, if you know, the relationship
13 between their closing and your concern regarding
14 riots and the disciplinary case. Do you see a
15 relationship there?

16 JUSTICE DENMAN: Oh, I think undoubtedly
17 there's a relationship there, certainly. You have
18 somebody who's doing 8-1/3 to 25 years and with very
19 little hope of getting out even at 8-1/3, but at the
20 very least 8-1/3, or doing a 25 to life, and these
21 are common sentences. These aren't unusual
22 sentences. They're very common. Sitting in prison
23 with no -- no hope for relief, any legal remedies,
24 obviously, you're going to get a very frustrated
25 person. You put a bunch of those frustrated people

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1 together, and you're going to have trouble. I don't
2 think there's any question that there's a
3 relationship.

4 MR. GRADESS: I wonder if you could also --
5 could you share with us the situation in the other
6 counties in the Department regarding back log?

7 JUSTICE DENMAN: Well, as I say, the highest
8 number of appeals are in Monroe County. It's -- I
9 don't know the figures between the population of Erie
10 and Monroe, but they're probably roughly analogous I
11 would say, and yet we have only half the number of
12 appeals out of Erie County; and in Onondaga County,
13 which is the other larger county -- of the 22
14 counties Monroe, Erie, and Onondaga are the three
15 most populous counties. Onondaga has only about, oh,
16 a quarter of the number of appeals that we have in
17 Monroe. Erie County has only about half the number
18 of appeals; and I can only attribute that to the fact
19 that -- the waiver that I referred to earlier, that
20 the waiver is extracted from indigent criminal
21 defendants -- or all criminal defendants in Erie. So
22 that they do not have the kind of back log we have
23 here. There is some -- there is some back log also
24 there. The Public Defender's Office there,
25 obviously, is underfunded, also.

18

1 MR. GRADESS: I wonder if we could ask you to
2 share or provide us with the back log figures from
3 each of the jurisdictions in the 4th Department at
4 some point, if you could do that for us?

5 JUSTICE DENMAN: Surely. Oh, I could send
6 you our whole ICAMP report if you'd like to have it.

7 MR. GRADESS: We would love to have it.

8 JUSTICE DENMAN: Okay, I'll get it to you.

9 MR. GRADESS: Let me ask you one more
10 question if I might, and then we'll let you go.

11 We had a fair amount of testimony in our
12 downstate New York City hearings concerning practices
13 in both the 1st and 2nd Departments, wide ranging
14 practices concerning the handling of vouchers,
15 decisions in the Department regarding them, cuts to
16 vouchers after filing, and such and so forth. I
17 wonder if you might address the question in the 4th
18 Department whether or not such policies exist
19 regarding handling of vouchers.

20 JUSTICE DENMAN: We review those vouchers
21 very carefully. These are for assigned counsel. If
22 there's a conflict and the Public Defender's Office
23 is not able to handle it for some reason, then we
24 assign counsel.

25 What we have found recently -- and it's sort

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1 of an interesting result -- is that we are not
2 getting the excessive vouchers that we once did. We
3 did a lot of cutting back on vouchers because
4 assigned counsel have to understand that there is
5 some pro bono component to what they're doing. We
6 pay them, but not the way you would pay a retained
7 private counsel. So we were cutting back a lot on
8 those vouchers and explaining to them why we were
9 doing that; that it wasn't that they didn't do the
10 work that they were claiming, it was just that we
11 felt we couldn't pay that kind of money. Now we're
12 finding as a result of that, that the attorneys who
13 want the assignments are not putting in the excessive
14 vouchers. They're keeping the vouchers within the
15 limits so that we don't cut it back, and they feel
16 that they are more likely to get the assignments if
17 they don't overcharge.

18 MR. GRADESS: Thank you very much for coming.
19 Daniel Henry and Bob Lonski?

20 MR. HENRY: Good morning. My name is Daniel
21 Henry. I am an attorney in private practice from
22 Buffalo, New York. I'm also chair of the Criminal
23 Law Committee of the Erie County Bar Association and
24 also on the Board of Directors of New York State
25 Association of Criminal Defense Lawyers.

20

1 I guess what I just wanted to address is one
2 of the concerns that many members of the Bar
3 Association of Erie County have concerning the
4 assigned counsel cases in the private practice are
5 the fees. Currently, I think as you're aware,

6 in-court rates are at \$40 an hour, and out-of-court
7 rates are at \$25 an hour, and there's been no
8 increase in that rate since 1986, even though there's
9 been cost of living increases over that 12-year
10 period.

11 The concern we have is that what this is
12 doing is discouraging competent, skilled, and
13 experienced attorneys from taking these type of
14 cases. In fact, a number of attorneys in private
15 practice have taken their names off the assigned
16 counsel program because they just indicate they
17 cannot afford to take these cases at such rates. And
18 what the concern is, is that it's at the expense of
19 indigent defendant. It's reducing the access to
20 justice for these defendants. I don't think in any
21 situation do you see a prosecutor or government
22 attorney having their fees reduced or their
23 compensation reduced when prosecuting an indigent
24 individual, and in an attempt to have -- more or less
25 even the playing field, I think these rates have to

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1 be increased. I know that's a tough call at this
2 time when you see the Governor cutting rates for
3 public defense, and it's not a popular factor that's
4 presented to constituents or the public opinion
5 concerning defense of indigent individuals or defense
6 of criminals in general, but the State does pay when
7 they have to retain counsel outside of their
8 government agencies at rates that's not unusual
9 between 150 to \$300 an hour. Fees for attorneys
10 working under the state agency contracts, civil
11 rights cases, also the New York Public Officer's Law,
12 Sections 17 and 19, where legal services are provided
13 to state employees and agencies in civil and criminal
14 cases it's not uncommon for a fee to be paid at 150
15 to \$300 an hour; but when you turn to the defense of
16 indigent individuals, you're looking at \$25 to \$40 an
17 hour.

18 So that's a concern that I just wanted to
19 bring forth from what I hear as the chair of the
20 Criminal Law Committee of the Bar Association Erie
21 County, and if there's anything that your committee
22 or your hearing can bring forth when addressing this
23 issue, we would greatly appreciate any help that you
24 can give.

25 MR. LONSKI: Good morning. I would like to

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1 thank the League of Women Voters and the New York
2 State Defenders Association for giving all of us the
3 opportunity to speak and for going around the State

4 and gathering this most important information. My
5 name is Robert Lonski, and I'm the administrator of
6 the Assigned Counsel Program in Erie County.

7 In contrast to many other counties across the
8 state, Erie County provides counsel to indigent
9 defendants primarily through the assigned counsel
10 program, and to a much lesser extent through a public
11 defender system. Our program handles between 11,000
12 and 13,000 cases a year, maintaining an attorney
13 panel of between 300 and 400 private attorneys.

14 There are three areas that I want to address my brief
15 remarks to this morning. The first is payment rates
16 for attorneys; the second is training; and third is
17 payment caps for attorneys and experts.

18 I think that over the past year it's become
19 clear that there's very little disagreement across
20 the State that the proposition that the payment rates
21 for assigned attorneys need to be increased
22 significantly. The current rates, as Dan said, 25 an
23 hour for time spent out of court and \$40 an hour for
24 time spent in court are patently inadequate. As the
25 administrator of a major assigned counsel program, I

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1 am finding it more and more difficult to keep the
2 more experienced attorneys on the panel. There are a
3 limited number of attorneys who have the experience,
4 the skills, the knowledge, and the desire to do
5 serious felony cases; and at a slow but steady rate
6 more and more of our best criminal defense attorneys
7 are finding that they can no longer make their
8 talents available to our program by representing
9 indigent clients simply because they cannot afford to
10 invest significant amounts of time for rates at which
11 they are losing money. These are seasoned, skilled,
12 criminal defendant attorneys who are committed to
13 helping to provide representation to the people who
14 need it the most and can afford it the least, and
15 they understand well that quality criminal defense,
16 even though it might be politically unpopular, is
17 absolutely essential to the functioning and even the
18 survival of the system of government created through
19 the Constitution over 200 years ago. Unfortunately,
20 we have reached a point at which the cost of paying
21 for the overhead needed to run an effective but a
22 modest law office are much more than the rates
23 authorized by the statute. An increase in the rates
24 is necessary.

25 At the same time, however, it is essential

24

1 that the funding of the increases over and above the

2 current rates be paid by the State, not the counties,
3 and not just for some categories of cases, but for
4 all levels of cases across the board. Local funding
5 of indigent defense services is subject to local
6 political concerns. This can lead to tremendous
7 pressure to control costs which can easily affect the
8 quality of representation available to the poor. It
9 also leads to inconsistency between and among
10 different counties in the amount of resources and the
11 quality of representation available to those who are
12 accused of a crime and cannot afford to hire their
13 own attorney. Which county a person happens to live
14 in or what the current local political climate is
15 should not determine whether or not that person,
16 accused of crime but convicted of nothing and
17 presumed innocent, receives the full benefit of basic
18 constitutional guarantees.

19 The rights to counsel guaranteed by the
20 Supreme Court in Gideon are a state responsibility.
21 The State has historically chosen to pass that
22 responsibility on to local counties to the ultimate
23 detriment, I think, of citizens accused of crime and
24 of the system itself.

25 Now at a time where there's an absolute need

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1 to increase the statutory attorney fees, there's more
2 pressure on the local governments and counties to
3 control their expenditures than ever before. It is
4 absolutely imperative that the State agree not only
5 to increase the rates, but that the State fund the
6 difference between the current rates and the
7 increased rates for all categories of cases,
8 including misdemeanors, felonies, family court, and
9 parole revocation.

10 Secondly, there's been an increase in the use
11 of prosecutors -- or by the use of prosecutors of
12 scientific evidence, including but not limited to DNA
13 evidence. In order to achieve fair results in
14 criminal trials, it is essential that the defense be
15 fully trained in scientific, medical forensic
16 evidence and that it have access to experts to help
17 them to understand technical scientific evidence and
18 to present a balancing viewpoint at trial. In this
19 area as well as in basic and advanced trial skills,
20 continuing training is necessary to ensure that the
21 playing field is level, that there are fair trials
22 and fair results in our criminal justice system.
23 Without fairness to everyone there is no justice in
24 the criminal system.

25 The New York State Defenders Association

1 Backup Center does a tremendous job of providing
2 assistance, backup, and training to all attorneys
3 doing public defense work in this state. Their
4 funding, however, is simply inadequate. The local
5 bar associations and other organizations, while
6 they're extremely effective, simply can't pick up all
7 the slack. Full and dedicated funding for the Backup
8 Center, insulated from political threats and attacks
9 from year to year is essential to our ability to
10 provide effective or even adequate defense
11 representation. There must be a commitment to fund
12 this center adequately, which means significantly
13 more than it has been in the past, on a long-term
14 basis, not year to year basis.

15 Finally, there must not only be increased
16 funding for the assistance of the medical, scientific
17 and forensic experts for the defense, but it, too,
18 must be subsidized by the State. The \$300 cap on
19 defense expert expenditures are unrealistically low
20 and ensure an inadequate ability to defend against an
21 accusation. The caps on expert fees as well as on
22 attorney fees must be raised in light of and in
23 conjunction with my earlier comments; fundamental
24 fairness and justice demand no less. Thank you.

25 MS. BANKS: You mentioned the inconsistencies

1 in the present system where the quality of justice
2 depends on where you live. What are your views on
3 creating a statewide system similar to civil legal
4 services?

5 MR. LONSKI: I think that there are pros and
6 cons to that kind of a concept. I think that at the
7 very least there should be more of a homogenization
8 of funding in all areas of the state, a greater
9 ability to provide equal levels of training
10 opportunities throughout the State, and perhaps some
11 sort of an oversight system to ensure that the
12 quality of representation is at least adequate all
13 across the State.

14 MS. BANKS: Standards?

15 MR. LONSKI: Certainly, absolutely.

16 MS. BANKS: What are the negatives?

17 MR. LONSKI: Well, I think that whenever
18 you -- the pros of being funded and overseen by a
19 higher level of government, I've already spoken to
20 those. Sometimes the cons, the negatives, are sort
21 of the flip side of the pros in that sometimes when
22 you get high level bureaucracies they also can be
23 controlled politically, and sometimes large
24 bureaucracies themselves can get out of control; and

25 unless there's a proper method for sort of an

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1 appointment, non-political appointment of defense
2 oriented or defense representatives on an oversight
3 board, then I would have concerns about politi --

4 MS. BANKS: It would be a different kind of
5 politics.

6 MR. LONSKI: Right.

7 MR. LEWIS: Bob, you indicated that seasoned,
8 experienced lawyers are coming off the panel. Were
9 we to ask you for bios or names, would you be able to
10 tell us who some of those people would be, because at
11 some point it's essential to go from the anecdotal to
12 the actual. This isn't, of course, the forum for
13 that.

14 MR. LONSKI: Right. I could provide you with
15 the names of some people who are highly experienced,
16 valuable people who have chosen over the last year or
17 two -- or decided that they simply can't continue;
18 and yes, I could do that. I can't do it right now --

19 MR. LEWIS: Right, that's why I didn't ask
20 you for it right now.

21 MR. LONSKI: But I'm not sure if I would be
22 the right -- as you say the right forum, but
23 certainly I could do that.

24 MR. LEWIS: On a more global basis, is there
25 a way to show or quantify how defendants are harmed

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1 by the loss of an experienced lawyer? When we face
2 the reality of the Strickland effectiveness standard
3 being almost insurmountable in an area of law in
4 which there is no definition of malpractice, and yet
5 we have this intuitive sense that there is a problem,
6 and one of the things we're thinking about is trying
7 to figure out how to measure or quantify that
8 problem.

9 MR. LONSKI: Well, it's very difficult to do
10 that. I'm sure that you know, having thought about
11 it yourself -- sometimes when you quantify things
12 they're easier to dismiss without -- without dealing
13 with the problem adequately. I think that the real
14 serious -- to my mind in order to quantify that kind
15 of a problem you would almost have to be able to say
16 here is a conviction, had we had this other lawyer
17 we wouldn't have had a conviction, and that's -- you
18 know, how can you say that? The real problem, I
19 think -- or one of the real problems is sort of an
20 insidious erosion of confidence in the system that
21 results when -- when for very serious matters you may
22 not be able to put the most experienced and skilled

23 attorneys forward to handle those matters. And what
24 that results in is people in our business are very
25 well aware of the common attitude among indigent

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1 defendants that they're not getting a real lawyer;
2 and when confidence in a system of justice is -- is
3 eroded and is undermined -- and I'm not saying that's
4 the only cause of the erosion; there are others --
5 but it -- it doesn't result, I don't think, in an
6 immediate crisis. And that's the threat of it,
7 because it's insidious. It builds up over time, and
8 I think it contributes to a subtle but important
9 change in the way people view the judicial system and
10 our government and the sense of justice that they
11 feel that they're getting or not getting.

12 Now, I'm certainly not in a position to
13 predict anything, but you alluded earlier to the
14 violence within prisons, and I would suggest --
15 having worked for quite a number of years some time
16 ago for Prisoner's Legal Services, I would suggest
17 that there is a direct relationship between violence
18 and problems in prison on the one hand and lack of
19 representation for civil matters related to
20 incarceration on the other hand. If people feel that
21 they don't have a vehicle by which to legally address
22 their concerns about how they're being treated in
23 prison, I think inevitably those frustrations will
24 come out in another way. Prisoner's Legal Services
25 was created as a spin-off result of the Attica riots,

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1 and I pray that we don't have to have another
2 horrible situation like that before people realize
3 that this is not -- it's not a frill, it's not an
4 extra. It's an essential component of the system,
5 and what I'm getting to is that quite often because
6 of such an intense and focused environment in prison,
7 what you see in prison sometimes is a precursor of
8 what you might see in the larger society, and if you
9 develop over time an increased -- or decreased level,
10 actually, of confidence in the justice system, there
11 can be other spin-off problems that we'll see in our
12 society as well.

13 MR. LEWIS: Let me ask you about something
14 else. The first witness indicated that the cutting
15 of vouchers is appropriate, it seems, because lawyers
16 who do court-appointed work make, I believe the words
17 were, a pro bono contribution. As the administrator,
18 as opposed to the signing judge, do you think that's
19 correct?

20 Let me ask it a different way; that's not

21 fair. Do you have an opinion about that opinion?
22 MR. LONSKI: I think that the expectation
23 that there should be a significant pro bono
24 contribution to -- on the part of criminal defense
25 lawyers is probably a concept that we need to move

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1 away from. Criminal defense is an essential piece of
2 the criminal justice system which dominates political
3 and popular discussion these days, it seems, and I
4 don't know that anyone has ever asked a district
5 attorney to provide pro bono services. So I think
6 that clearly -- I think the reality is that we all,
7 in any field, have to try to control our costs, but
8 I'm not sure that expecting pro bono work on the part
9 of attorneys is necessarily the best way to do it.

10 MR. LEWIS: Thank you.

11 MS. HATHAWAY: Just one question. You have
12 certainly a problem that is not unique in the
13 funding, so I'm just wondering, though, in the
14 meantime what is the alternative for the indigent --
15 and that's a very nice name; but let me say, what is
16 the alternative for the poor that can't receive
17 services because of the shortage of attorneys that
18 will not take their cases because the money is so
19 low? What happens in the meantime with them?

20 MR. LONSKI: Well, there are those of us and
21 many of us in the defense system who work very hard
22 to try to make sure that despite the funding and
23 other problems that are -- that we have to deal with,
24 that we give the best level of representation that's
25 possible. And again, with the ongoing help of the

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1 Backup Center and the bar associations we -- and
2 other innovative vehicles that we've been developing,
3 we have significantly stepped up, I think, over the
4 past several years the amount of training that we
5 have been able to make available to attorneys and
6 especially younger attorneys who want to do this kind
7 of work.

8 Despite the fact that I don't think that we
9 should necessarily expect or force attorneys to do
10 pro bono work, there are many criminal defense

11 attorneys in Erie County who routinely do work that
12 they don't get paid for in criminal defense and do it
13 because they have a strong sense of duty and
14 obligation and commitment to doing work for the poor.

15 So I don't think that it's accurate to
16 suggest that there are people who are not being
17 represented. The playing field is certainly not

18 level.
19 MS. HATHAWAY: No, that wasn't my intent. I
20 was just asking, you said the word "commitment," and
21 that's very important that the persons who take on
22 these obligations are committed and they know from
23 the beginning that it's either pro bono or the money
24 is very, very low. So it's how committed that
25 attorney is to the situation that he or she is taking

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1 on.
2 MR. LONSKI: Well, I think what we see is
3 when people get in, they're in, and they represent
4 people to the very best of their ability. We need to
5 increase that ability, we need to increase the
6 resources that allow them to do that, and we also
7 need to increase the resources so that we don't --
8 people who are leaving are not choosing to go
9 somewhere else where they can make more money.
10 They're leaving because they cannot afford to do what
11 their doing, and the more experienced attorneys are
12 the ones who take the two, three, and four-week
13 felony trials, and that takes a huge bite out of our
14 ability to maintain practice.

15 MS. HATHAWAY: Thank you. I'm aware of that,
16 because its also the same in the civil area. Thank
17 you very much.

18 MR. GRADESS: We need to move quickly. I
19 just want to ask you one question to clarify the
20 record on your earlier remark. Is it the case that
21 in Erie County under 722(c) of the County Law, expert
22 services are in fact capped at \$300 at this moment?

23 MR. LONSKI: There's an initial cap beyond
24 which the attorney can make application under, quote,
25 "extraordinary circumstances" for money beyond that

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1 cap, so that the reality is that in most cases when
2 an expert is used the \$300 cap is exceeded, and when
3 it needs to be it is. However, it is not viewed as a
4 blank check, and I know from my experience that there
5 are good experts who declined to work for -- on
6 assigned cases because of the rates that they're
7 paid.

8 MR. GRADESS: Thank you very much.

9 MR. LONSKI: Thank you.

10 MR. GRADESS: Judge Kohout?

11 JUDGE KOHOUT: I'm Joan Kohout and I'm here
12 as president of the New York State Family Judge's
13 Association, and our concerns may be a little bit
14 different from any of your speakers. We are
15 concerned that adults and other parents in Family

16 Court receive the quality services that are necessary
17 to present and defend, because all of these cases are
18 not defense cases, but important issues concerning
19 their children. That includes cases regarding
20 domestic violence where both the prosecution and the
21 defense is paid for by assigned counsel, termination
22 of parental rights, child abuse cases, custody cases,
23 and the like. These are very essential cases that
24 require a high level of expertise.

25 There are three areas I would like to

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1 highlight this morning. One is our commitment to
2 increased compensation for assigned counsel, which
3 I'm sure you've heard from many other speakers across
4 the State, then the funding stream issues, case load,
5 and finally training.

6 In some areas of our State it's reported by
7 Family Court judges that there is a severe shortage
8 of attorneys who are willing to take assigned counsel
9 cases. This is particularly true in the New York
10 metropolitan area according to judges who I've
11 consulted with. It is our feeling that the rates are
12 insultingly low and that anything that can be done to
13 increase them to an appropriate level of compensation
14 should be done. Realizing that there are political
15 issues involved and difficulties that have interfered
16 with proper compensation, we still feel this is
17 something that the State needs to look at urgently.

18 Family Court often gets overlooked in funding
19 issues by the counties for assigned counsel. In
20 counties where agencies are used, defender offices or
21 legal aids are used, sometimes the Family Court
22 sections do not get the type of support that the
23 criminal defense sections of the office do. It is my
24 suggestion that perhaps a state guideline be provided
25 that would assist offices to advocate with their

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1 county legislature's for proper funding. I do not
2 suggest today that the State system would provide
3 anymore reasonable or well-reasoned compensation for
4 Family Court cases than we do now, because frankly,
5 in our experience Family Court has been tragically
6 and consistently underfunded through State systems,
7 and that includes the Office of Court Administration
8 and the State Legislature. So I have no reason to
9 think if we had a state defender system, that the
10 allocation would be anymore fairly distributed; but I
11 do think that some guidelines might be of help.

12 Case load, ideal case loads might be part of

13 these guidelines as well. Again, this might help
14 agencies to advocate with their legislators.

15 Training is very key, particularly for the
16 18-b assigned counsel. In Family Court, law
17 guardians, who are attorneys who agree to represent
18 children, are paid by the State and they are required
19 by the different departments to undergo training. If
20 they do not do the training they can't be on the
21 list. Of course, we know that is not the case for
22 assigned counsel. The training that seems to occur
23 for assigned counsel across the State is oriented
24 more toward criminal defense than Family Court. So
25 it is our request that any guidelines that might be

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1 suggested here would include a component for training
2 in Family Court. It's a very specialized area, and
3 just because you're a skilled criminal defense lawyer
4 does not mean you could present a custody case
5 effectively well.

6 These are the three issues that I wanted to
7 point out today. These are very key issues for the
8 Family Court judges, and we hope you would consider
9 them, and I would be glad to answer some questions.

10 MS. BANKS: I can't resist asking this
11 question because the League of Women Voters has
12 worked for over 40 years to get -- what are we
13 calling it now, consolidation of the major trial
14 courts, and we've been emphasizing the benefits to
15 Family Court.

16 JUDGE KOHOUT: Family Court judges have
17 throughout the years firmly and articulately, I
18 think, have expressed our desire to have a
19 consolidated system. We testified last year and
20 presented our view publicly that we think that that
21 will help families and children. The current system
22 is so confusing and it results in duplication of
23 judicial services sometimes and even in the potential
24 of having conflicting court orders, that it really
25 doesn't make a lot of sense. It's my firm hope that

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1 in the next years some type of consolidation, even if
2 it's only on the family cases, may be able to occur.
3 There's certainly a lot of interest.

4 MS. BANKS: We'll certainly try to make it
5 less than 40 years.

6 MR. LEWIS: Forgive my ignorance, but why is
7 it that criminal defense and Family Court issues tend
8 to be addressed together at least under the 18-b
9 statute?

10 JUDGE KOHOUT: As you may know, the County

11 Law requires counties to provide attorneys for
12 certain kinds of cases, and it includes the cases in
13 Family Law that are constitutionally -- we're
14 constitutionally required to file -- provide
15 attorneys, but also a range of other cases that
16 statutorily it's required.

17 Additionally, Surrogates Court is suppose to
18 receive assigned counsel as well in certain kinds of
19 cases that they share responsibility with, with
20 Family Court. It's statutory.

21 MR. LEWIS: Like guardianship.

22 JUDGE KOHOUT: Guardianships or sometimes
23 they do adoption cases where there are termination of
24 parental rights issues.

25 MR. LEWIS: Has there been any thought to

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1 trying -- and I understand the court consolidation,
2 but now I'm talking about the lawyer end of things --
3 any thought to trying to enforce a split system? And
4 what I'm talking about is more and more counties are
5 negotiating with legal aid offices to, in effect,
6 throw Family Court in as the representation as if it
7 were a perk for the maintaining of the legal aid
8 budget, the idea being it's additional services for
9 the same money.

10 JUDGE KOHOUT: I don't know.

11 MR. LEWIS: I guess what I'm asking is
12 whether or not the Family Court judges have given any
13 thought to a separate system of lawyers and
14 compensation. We have that now with the Capital
15 Defender --

16 JUDGE KOHOUT: We don't have any
17 recommendations to how these services be provided.
18 That really is up to the Legislature and the counties
19 to decide, but it is our concern that it be done in a
20 way that will assure consistently high qualified
21 people representing these individual parents. It
22 could be done in a separate system. Across the State
23 defenders offices have Family Court sections. Monroe
24 County does, for instance. I was the head of that
25 section at one time, and other counties elect to use

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1 18-b attorneys. It varies from county to county;
2 and, you know, our concern is not so much how it's
3 provided, it's just that the attorneys be well
4 qualified. And I really don't have any suggestions
5 as to the delivery of services. That's beyond my
6 expertise.

7 MR. LEWIS: Thank you.

8 JUDGE KOHOUT: Thank you very much.

9 MR. GRADESS: Judge, I'm sorry.
10 Are there any other questions?
11 I just would like you -- I know you're
12 running to court, and we won't hold you long; but I
13 wonder -- your experience goes before you, and I
14 wonder if you might, for the record, if we're going
15 to be thinking about training lawyers whose
16 experience in Family Court is not great, if you could
17 address the kinds of questions about cognitive
18 dissonance and what the elements of good Family Court
19 representation for these adults might consist of,
20 what that looks like to you as a judge. That I think
21 it would be very helpful to be stated for the record,
22 if you might do that.
23 JUDGE KOHOUT: Sure. The child welfare
24 issues, which include the neglect, abuse, foster
25 care, termination of parental rights cases, are very

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1 specialized areas. They're the kind of areas that a
2 private practitioner probably never would get
3 involved in. Almost exclusively are those areas
4 involving indigent respondents. They are incredibly
5 technical. They involve knowledge of mental health,
6 education, medical information, and certainly those
7 areas need to be covered.
8 To give you an idea of the kind of training
9 that's provided to Family Court judges, which I think
10 would dovetail into the kind of the training that a
11 practitioner would need, because we all need to have
12 expertise, certainly updates in the law are important
13 because it's an area of the law that changes
14 regularly; expertise in some of these ancillary areas
15 such as medical, educational, mental health is very
16 critical in advocating for our parents and in
17 understanding the witnesses who come into the court,
18 particularly psychological and psychiatric testimony
19 which may have a slightly different bend than it
20 would in the criminal area. Knowledge of child
21 development and training in that area is helpful as
22 well as these attorneys counsel clients as to what
23 would be best for their children, particularly in the
24 area of custody.
25 So this goes beyond just knowing the law.

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1 Certainly a survey of the law would be very
2 important. There are so many different types of law
3 that are present in Family Court for assigned
4 counsel, that probably you would have to have a
5 variety of different training programs to make sure
6 you had complete coverage. We do everything from

7 domestic violence to foster care cases, to adoption,
8 to child abuse and sexual abuse cases, to child
9 support contempt. It's real a wide variety.

10 MR. GRADESS: Thank you very much.

11 JUDGE KOHOUT: Thank you so much.

12 MR. GRADESS: Dominic Mazza.

13 MR. MAZZA: Good morning. I want to
14 acknowledge the Defender's Association and the League
15 of Women Voters for conducting these hearings
16 throughout the State. I think this is a very
17 important issue and very important topic, and I
18 believe that after hearing some of the previous
19 testimony while I waited for my turn, there's a
20 commonality of interests and issues and problems.

21 I am a county administrator. I'm not an
22 attorney. I have not -- I don't claim to be an
23 expert in how the court system works or all the
24 issues. As a county administrator I'm the person who
25 is responsible for the day-to-day operations of a

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1 rural county government. I've noticed most of your
2 speakers have come from larger metropolitan areas,
3 and you've conducted hearings; but we, too, in the
4 rural counties face many of the same problems that
5 are faced by larger counties in providing adequate
6 defense for indigent defendants.

7 I've been the county administrator in
8 Livingston County for almost 10 years. I am the
9 first county administrator. As part of that I think
10 it might be good for you to know the background. I
11 accepted the position, and as part of that, the form
12 of government, the directive was to sort of organize
13 things in a different fashion. One of the areas that
14 the board of supervisors expressed concern about was
15 the cost of providing indigent defense. Budgets were
16 routinely set and routinely exceeded by very large
17 amounts.

18 In reviewing that system what we had was an
19 assigned counsel program, an exclusively assigned
20 counsel program with a part time -- and I stress the
21 word "part time" -- administrator of the assigned
22 counsel program. What I observed was in general the
23 attorneys who took these assignments routinely handed
24 in vouchers to the clerk of the board, and if the
25 assigned counsel administrator was available he would

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1 come in before a board meeting and spend a few
2 minutes scribbling his signature on vouchers on top
3 of a file cabinet, and that was the extent of any
4 review that took place, and the bills were simply

5 paid.

6 Obviously, you can understand the concern on
7 the part of those people that are elected to pay the
8 bills and to raise property taxes and other types of
9 taxes with a system such as that. So I worked with
10 the local bar association and with the attorneys and
11 the judges in the county to come up with a better way
12 of providing these services. The end result of that
13 discussion was the establishment of a Public
14 Defender's Office, a staffed Public Defender's Office
15 where we have a public defender and several
16 assistants. These are generally salaried positions
17 and have been welcomed by the Bar Association and the
18 attorneys. Most of the -- I should say all of the
19 assistant public defenders are part-time positions
20 with salaries.

21 One of the frustrations that the Bar
22 Association themselves expressed during this review
23 process was the inconsistencies and the duplication
24 that occurred. A lot of the courts that they
25 represent in Livingston County are town courts,

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1 justice courts, village courts. They're routinely
2 done at night and handled at night. The fees have
3 been discussed. We all understand that they're not
4 high rates and attractive from a financial
5 standpoint. But the frustration that they expressed
6 was they would show up at a justice court or a
7 village court and there would be three assigned
8 counsel sitting there all on the clock at the same
9 time waiting to handle violations and misdemeanors
10 and those types of offenses.

11 We developed a system and not only provided
12 defense, but saved some money too, and allowed us to
13 get experienced attorneys to take this work because
14 if they were assigned to certain courts that were
15 scheduled on certain nights and certain days of the
16 week, predictability of their life was an advantage
17 to them, and they were all willing to do that. So in
18 essence, we have -- we had a problem and we begun to
19 address it.

20 From the county's perspective we were able to
21 control our cost to a great extent. The salaried
22 public defenders are just that, salaried public
23 defenders. The costs become more predictable to us.
24 Our case load, while fluctuates, is somewhat
25 predictable, and we're able to control those costs.

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1 It is in the interest of the board of
2 supervisors and myself to provide adequate defense.

3 We've been able to find some experienced attorneys,
4 and at the same time those with less experience have
5 been brought into the system and have been nurtured
6 by a public defender who runs the office. However,
7 our system does need some help.

8 We still in some cases have assigned counsel
9 where conflicts exist, and we have found what we
10 consider to be not proper billing practices by some
11 attorneys, and they're very difficult to deal with,
12 to question the accuracy or the validity of a voucher
13 that gets turned in.

14 Another issue that we face statewide as an
15 issue is that Livingston County fortunately -- or
16 unfortunately for us -- we have two state prisons,
17 and the issue of providing parole violation services
18 and parole appeals is a costly one and one that I
19 think unless addressed by the State properly and the
20 cost properly paid for by the State of New York,
21 casts a negative tone on public defense services in
22 general in a small county. Our board of supervisors
23 had passed a resolution. I gave the lady when I came
24 in some documentation for your records, that we have
25 reviewed this. We have found that we are paying a

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1 tremendous amount for parole violation hearings and
2 appeals.

3 In general, privately the Bar and the members
4 of the Bar will tell you that this is not fruitful,
5 that in general it's a routine type of occurrence and
6 that these appeals are generally not handled at the
7 State or not taken seriously, and I asked them how
8 many of them ever had one of these overturned, and
9 they kind of said they don't know of any. The board
10 of supervisors however, myself, express frustration
11 with that type of a system. The State of New York
12 while choosing to fund some of this is not choosing
13 to fund all of it, and it's a system that is in sore
14 need of attention.

15 Like I said, I have given you the resolution
16 that the board of supervisors passed, but let me read
17 more importantly, after discussion at the board of
18 supervisors, an editorial opinion written in the
19 county news about this issue.

20 "State prisoners should not be our
21 responsibility. Conesus Town Supervisor Donna Avery
22 summed up the shafting Livingston County and every
23 other county housing state inmates is getting very
24 appropriately last week.

25 "When commenting on the State's latest

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1 practice of forcing counties to foot the legal bills
2 for state health prisoners, Avery told the Board of
3 Supervisors, 'It appears prisoners serving sentences
4 in this county have more rights than the taxpayers in
5 this county do.'

6 "She is absolutely right. And although the
7 Board of Supervisors had a resolution stating that
8 the people they represent -- us -- would no longer
9 pay legal bills for prisoners having violated or
10 seeking parole shoved right back down their throats,
11 they too were absolutely right for taking a stand
12 against something that is wrong.

13 "Their idea -- to make the state pay for its
14 own inmates' legal fees -- perhaps made too much
15 sense to our so-called Albany representatives.

16 "Although Assemblyman Jerry Johnson said he
17 fully agreed and had spoken at length with fellow a
18 assemblyman who was sponsoring a similar bill, he
19 said there is only so much he could do, or anyone
20 else in the Assembly can do.

21 "Johnson has been there. He knows what it's
22 like, and he deserves credit for sticking up for us.

23 "But that's where we need help from our state
24 senators we apparently aren't going to receive. In
25 acknowledging the County's resolution, Senator Jess

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1 Present who represents the southern portion of our
2 county, said although it sounds like a good idea
3 unfortunately there's no senate sponsor to the bill.
4 Our county may not be the biggest holding block in
5 the region, but isn't that what our representatives

6 are there for, Senator? Help us by sponsoring" --
7 "To help us by sponsoring us in Albany? Apparently
8 not.

9 "For Albany having our county shell out
10 roughly \$65,000 every year for this probably doesn't
11 sound like a big deal, but if home owners sit down
12 and do the math it becomes much more clearer.

13 "For instance, the average assessment in the
14 county being roughly" -- "with the average assessment
15 in the county being roughly \$70,000 and figuring the
16 average tax bill on that amount to be \$500, it would
17 take 130 homeowners to pay this bill. That's right,
18 130 homeowners see their county tax money lining the
19 pockets of litigious lawyers defending mostly people
20 from New York City. Not fixing our county's
21 highways. Not funding our health and community
22 programs. Not benefiting anyone in this county in
23 any way.

24 "For the time being the county said it will
25 still pay for the legal services, but they have also

1 said they will continue to fight this unfunded
2 mandate. We wish them luck."

3 That is an editorial, not everything in there
4 do I personally agree with. But I think it's very
5 important that this task force, and in conducting
6 your hearings, understand what this issue means.
7 Many of the state prisons are located in rural
8 counties. Most of the prisoners that are there are
9 not from these counties; they're not our citizens.
10 We should take care of our citizens. We have a right
11 and responsibility to do that, and when the indigent
12 of our county are in need of legal services we should
13 help pay for that. We should help pay that bill.
14 That's the way the system works, and we're willing to
15 work with it.

16 However, the issue of parole costs and parole
17 appeals in no way can be considered to be a local
18 cost. These are not our citizens. These are not our
19 responsibilities -- these folks are not our
20 responsibilities. And I would ask that this group
21 address that in whatever report you give. I have
22 been a member of the Legislative Committee of the
23 Association of Counties. While we have put this in
24 our legislative agenda it has virtually gone nowhere
25 in Albany. On both sides of the aisle, Democrats and

1 Republicans continue to promise us no more mandates
2 without money. This is clearly a mandate without
3 money.

4 And with that I will close my remarks. The
5 only other issue that I would -- I guess I won't
6 close them, because there's one more issue I want to
7 make and that is the whole issue of indigency. A
8 problem in our county, which may not be of concern
9 and elsewhere, but I know is in other rural counties,
10 is that -- the definition of indigency.

11 We have had in many cases judges, assigned
12 attorneys, request public defenders for individuals
13 who in essence are not indigent. When questioned on
14 that, I have actually letters that I have given to
15 you that have been written by the public defender to
16 some of our judges saying, "This individual is not
17 indigent. The forms were not approved; but however,
18 you assigned the case." The response we get is, "I
19 don't want my court to turn into a circus. I don't
20 want people defending themselves. I do not want my
21 decisions overturned. I do not want appeals," and
22 they do not qualify.

23 However, the attorneys that take these cases

24 have provided the representation, and we feel a moral
25 obligation that they should not be penalized and not

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1 be paid. But the whole issue of defining indigency
2 and enforcing indigency in a county such as ours that
3 is small, people know their neighbors, the
4 supervisors know their constituents, and when they
5 leave the courthouse in a new vehicle with knowing
6 that they're homeowners and knowing that they're
7 employed and they receive these services, it puts a
8 black mark on the entire system, which it does not
9 deserve. It puts the whole system into question. It
10 shouldn't be done that way. And the same with parole
11 services. What happens, in essence, is that people
12 grab a hold of some of these inconsistencies and
13 problems with the system, and the whole system gets
14 attacked and that shouldn't be the case.

15 With that, I've probably taken up enough of
16 your time and I'll answer any questions you might
17 have.

18 MS. BANKS: I was under the impression that
19 communities such as yours welcomed the building of
20 prisons as a boon to the economy. Now, from what
21 you're saying I gather that the costs associated with
22 prisons being located in your area, that you feel
23 these costs outweigh any economic benefit. Is that
24 your feeling?

25 MR. MAZZA: Well, it's a mixed reaction. I

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1 have been asked -- it's interesting that you bring
2 that up. I have been asked at times to speak to
3 other counties on this matter, and while I'm not sure
4 I chose to bring that from my file this morning, I
5 have -- I know I have a letter -- or newspaper
6 article from the Leader Herald, which is a newspaper
7 in Fulton County, and one of my peers at the county
8 administrator in Fulton County called me and asked me
9 about how we felt about the prison.

10 Other than the employment that a prison
11 brings to a community such as ours there is little
12 benefit, economic benefit.

13 Let me -- as a matter of fact, I do have -- I
14 don't have this copied, but I certainly could send it
15 to the Committee if it's something you're interested
16 in, where I address this -- what I consider to be the
17 pluses and minus.

18 "At best it's a mixed bag to have a prison in
19 your community, based upon some of the costs that you
20 incur with a State prison that are hidden and those
21 that you receive." I address the whole issue of

22 indigent legal fees, earlier, parole cost, parole
23 defense, rescission hearings, \$65,000 of property tax
24 dollars goes to that one particular area.
25 The other area is the cost of the District

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1 Attorney's office. The District Attorney's office --
2 the local District Attorney's Office is required to
3 prosecute crimes that are committed in the prison.
4 You know, it's expected by the prison guards who work
5 there if they're assaulted, or assaults take place,
6 contraband, those types of laws are broken, the local
7 District Attorney's Office is expected to prosecute
8 those cases. That brings a case load into the local
9 courts, and in a rural county that's significant -- a
10 significant cost that requires additional time and in
11 many cases staffing for the District Attorney's
12 Office that wouldn't otherwise be there if it wasn't
13 for the prison.

14 The whole issue of public health is another
15 cost related to housing a state prison. You should
16 be aware that inmates have the civil right to refuse
17 to be tested for communicable diseases such as HIV,
18 hepatitis, and tuberculosis. Prison guards who are
19 exposed to those types of diseases leave the prison
20 and come out into the community and can spread those
21 types of diseases, and prisoners are not required to
22 be tested. That is an exposure and an expense to
23 local government.

24 Economic activity related to prisons, most of
25 the prisons are -- they are run by the State of New

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1 York. Their purchasing is done on the statewide
2 purchasing system, the statewide procurement, Office
3 of General Government Services. There's very little
4 local purchasing done, and I know of no business that
5 was created in Livingston County as a result of the
6 location of the prison. I don't know of one private
7 sector job that was created as a result of the
8 location of a prison -- of two prisons in our
9 community.

10 MR. LEWIS: Can you tell us how many public
11 sector jobs were created?

12 MR. MAZZA: The prisons in Livingston County
13 have created 300 jobs.

14 MR. LEWIS: And can you tell us please in
15 Livingston County how many prison guards, officials,
16 or other people own houses in which they pay property
17 taxes such as or not that may equalize the numbers
18 you gave us for the costs?

19 MR. MAZZA: Well, I can address that if you'd

20 like.
21 MR. LEWIS: Yes, please.
22 MR. MAZZA: "The prison pays no sales tax as
23 a --"
24 MR. LEWIS: That's not what I asked. I
25 just --

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1 MR. MAZZA: I'm going to get to that.
2 "We have seen no measurable increase in local
3 economic activity as a result of the prison being
4 located in Livingston County. While there is some
5 local purchasing made on behalf the prison being a
6 state institution and the vast majority of its buying
7 is done through the state contracting process with
8 state-wide and even national vendors. I know of no
9 local businesses that have been created due to the
10 prison. Property values and housing starts in
11 municipalities closest to the prisons Groveland and
12 Mt. Morris have not kept pace with the rest of the
13 county.
14 "For example, from 1990 to 1995 the average
15 selling price of a single-family home in Groveland
16 declined by 7.9 percent; in Mt. Morris, by 3.1
17 percent, while the overall county average increased
18 by 51/2 percent."
19 MR. LEWIS: And the correlation between the
20 prison being there...
21 MR MAZZA: Is a mixed bag.
22 MR. LEWIS: Wait a minute. I'm asking you a
23 specific question. Can you tell us how many people
24 who work at the prison have bought homes in
25 Livingston County? If you can't, that's --

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1 MR. MAZZA: I don't have the answer to that
2 question.
3 MR. LEWIS: And if you could you'd agree that
4 would be able to allow you to tell us the amount of
5 property taxes that were raised in effect by the
6 presence of residents who would otherwise not be
7 there.
8 MR. MAZZA: I could do that. I will submit
9 to you from a full knowledge of our county, that
10 houses have not been built and housing tracts have
11 not been created as a result of prison employment.
12 MR. LEWIS: But you understand the difference
13 between new housing starts and purchases in which
14 individuals pay property tax.
15 MR. MAZZA: How is that a growth in the local
16 economy? It's still the same taxes.
17 MR. LEWIS: The question is whether you have

18 a loss in the --
19 MR. MAZZA: I said earlier there is no loss.
20 It's a mixed benefit at best.
21 MR. LEWIS: But I was listening to the
22 property tax numbers you gave us, and I trying to
23 find out whether or not there is a legitimate basis
24 for some of the numbers that we heard in the article
25 that you read us. And while you said you didn't

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1 agree with all of it, I was very curious if there a
2 way to check those numbers.
3 MR. MAZZA: There certainly is.
4 MR. LEWIS: At the moment there isn't an
5 answer. Let me ask you --
6 I'm sorry, I didn't know whether you were
7 done or not.
8 MS. BANKS: No, go ahead.
9 MR. MAZZA: I didn't come to talk about
10 prisons, but we can do it.
11 MR. LEWIS: No, but you opened the door to
12 it, so I thought I'd like to know what those numbers
13 are; and since you disclaimed part of the opinions in
14 the article I was concerned whether or not you could
15 help us with the dollar-for-dollar numbers that seem
16 to be the concern of the author of the editorial.
17 You mentioned that with regard to billing
18 practices, you said there are questions of accounting
19 accuracy and validity. With regard to accuracy, I
20 assume you're talking about dollars and numbers and
21 addition, but I'm --
22 MR. MAZZA: No, I'm talking about hours
23 billed, too.
24 MR. LEWIS: Well, dollars and addition. But
25 let me tell you what I'm really most concerned with.

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1 How does a -- and forgive me if this sounds rude, but
2 I don't know how else to ask it. How does a
3 non-attorney, a non-criminal defense attorney, assess
4 the validity of the decisions made by criminal
5 defense counsel which are then represented by billed
6 time?
7 MR. MAZZA: How do you assess it? You simply
8 talk to the attorneys and the public defender and the
9 judges, and you say how much time should this take?
10 Is this a reasonable bill?
11 Let me give you an example.
12 MR. LEWIS: Sure.
13 MR. MAZZA: Two attorneys providing parole
14 appeal services. This is from one period of time,

15 July of 1997. The average bill from one attorney who
16 provided six appeals was 157 dollars. Another
17 attorney, the average bill was 823 dollars.
18 MR. LEWIS: Who did the better job?
19 MR. MAZZA: Well, neither one of them had
20 successful appeal, so you be the judge of that.
21 MR. LEWIS: But who did the better job?
22 MR. MAZZA: You be the judge of that.
23 MR. LEWIS: No, but here's the problem. If
24 it's successful appeals -- if it's successful appeals
25 then neither one of them maybe should have been paid.

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1 MR. MAZZA: I think I would go for that
2 system. That's a good suggestion.
3 MR. LEWIS: Let me ask you this. In terms of
4 the question of indigency, has the county or you
5 explored the concept of recoupment, which is provided
6 by statute?
7 MR. MAZZA: Yes.
8 MR. LEWIS: Has anything been done about
9 that?
10 MR. MAZZA: It is not very seldomly applied
11 by the judges.
12 MR. LEWIS: Well, the judge isn't the only
13 one who can apply it. The county can do it under the
14 statute. The question is why hasn't that either been
15 recommended to the county or...
16 MR. MAZZA: It is in place. It's an
17 insignificant sum of money.
18 MR. LEWIS: It is a...
19 MR. MAZZA: It's insignificant in terms of
20 the cost. I'm not complaining about the recoupment
21 of -- and I did not file -- complain about the cost
22 of us providing public defense.
23 MR. LEWIS: No, but I'm saying in those
24 situations where --
25 MR. MAZZA: It can be done.

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1 MR. LEWIS: -- where there's a question about
2 indigency, the vehicle discussion --
3 MR. MAZZA: We have a system that
4 applications are supposed to be filled out, and
5 before the attorney is assigned the Public Defender's
6 Office approves it.
7 MR. LEWIS: I'm talking about something else,
8 and that is at the close of the case if there's a
9 determination that indigency wasn't properly
10 assessed, then the statute allows for recoupment in
11 which the --
12 MR. GRADESS: We ought to clarify that. The

13 statute in New York does not allow for recoupment.
14 What it allows for is partial payment which is very
15 different under County Law Section 722(d), and you
16 may well be taking advantage of that, but we ought to
17 have the record here clear.

18 MR. LEWIS: Then the county can seek
19 that partial --

20 MR. GRADESS: Well, I think that's an open
21 question, and I would like to discuss it any time
22 with Mr. Mazza, but I think we ought to -- are you --

23 MR. LEWIS: Yes, I'm done.

24 MR. GRADESS: Marion has a question then I
25 think.

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1 MS. HATHAWAY: Well, I have a concern with
2 the -- and correct me if I'm wrong, I sort of picked
3 up with the discriminatory attitude of the people --
4 the people who are in prison -- in these prisons are
5 not of your community. Prisoners have no choice of
6 where they are sent. They are sent wherever the
7 system says they must go, and there's a disadvantage
8 for that prisoner as well as coming into a community
9 that they know don't want them. So if this is -- how
10 can this be dealt with? You know, it bothers me
11 because if you feel that way, you stated how you
12 feel -- not personally --

13 MR. MAZZA: It's what the editorial says.

14 MS. HATHAWAY: -- then the community overall
15 has to feel that way.

16 MR. MAZZA: I would agree with you.

17 MS. HATHAWAY: And if they feel that way, it
18 spills over into the prisons from the prison guards,
19 because the Downstate prison guards are trained
20 Upstate and sent back Downstate, the Upstate prison
21 guards are trained Downstate and sent back Upstate to
22 their communities, so my concern is hopefully that
23 there are sensitivity trainings that are going on,
24 or -- because when a human being gets frustrated and
25 they are frustrated with their job, then certainly it

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1 spills over whether they want it to spill over or
2 not. So I don't know how else to say it. I'm
3 concerned.

4 MR. MAZZA: I think I understand your
5 statement, and I agree with it. The question -- I
6 don't believe it's a discriminatory statement. It's
7 more of who is responsible to pay the cost for people
8 who are in essence non-residents of Livingston
9 County. They are wards of the state when they are in

10 state prison, and it's the feeling that that cost
11 should be borne by the State; and, you know, we
12 certainly feel that they should have every legal
13 right that's available to them in the best way -- the
14 best form, best attorneys that they can receive. The
15 frustration comes from the fact that the locality,
16 because you have a state prison, is forced to pay
17 those costs first dollar. And my recommendation is
18 that the State of New York -- and I'm not sure how
19 well informed you are about that -- but they choose
20 in some cases to pay it, and in other cases they
21 don't. If you're not part of this system that was
22 created several years ago where certain counties are
23 under contract to receive some level of reimbursement
24 for parole -- we are not one of those -- it does. I
25 mean, such a system where the locality sees the fact

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1 that they're paying cost for a state institution for
2 individuals that are not their citizens, that don't
3 live in their community, come from their community,
4 and won't come back to their community, be part of
5 it, it creates a frustration. As I said earlier, I
6 think then that becomes the question of the entire
7 system, and what I suggest is that the State of New
8 York live up to its responsibilities. It has done in
9 the past, but budget cuts and passing through costs
10 to localities has resulted in this system.

11 MS. HATHAWAY: I just have one more
12 statement. You said economically that the prisoners
13 don't really generate, then I wonder why is there so
14 much upheaval when downstate, there's a legislator
15 downstate that requested that some funds be given to
16 them so that a prison could be built downstate and
17 all hell broke loose. Now, in my way of thinking if
18 something isn't balancing out up here then it seems
19 that someone should be glad that they want to move
20 some of this frustration someplace else.

21 MR. GRADESS: Let me ask you a couple
22 questions if I might.

23 MR. MAZZA: Yes.

24 MR. GRADESS: Do I take it from your remarks
25 that your county is not filing under Correctional Law

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1 Section 606 vouchers for the State to --

2 MR. MAZZA: We are filing those.

3 MR. GRADESS: And are they fully paid?

4 MR. MAZZA: They're partially paid.

5 MR. GRADESS: The 606 vouchers are partially
6 paid?

7 MR. MAZZA: Yes,
8 MR. GRADESS: For representation, by your
9 district attorney and assigned counsel --
10 MR. MAZZA: Right, and some annual funding
11 and what the allocation provides for.
12 MR. GRADESS: So do you know how much there
13 is a short fall in 606 cases this year.
14 MR. MAZZA: I can check that.
15 MR. GRADESS: Could you supply that to us?
16 MR. MAZZA: Yes.
17 MR. GRADESS: And I understand from your
18 testimony, you mentioned the figure \$65,000, I
19 understand that you filed something like \$29,000 of
20 vouchers with the State of New York for the Indigent
21 Parolee Program and were paid 44-1/2 percent on the
22 dollar, if I'm correct, something like \$13,000?
23 MR. MAZZA: Possibly \$13,000.
24 MR. GRADESS: Something like that.
25 MR. MAZZA: It should be 100 percent. It was

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1 about 44 percent of whatever the allocation is.
2 MR. GRADESS: I didn't notice whether you
3 were here when Justice Denman spoke, but the issue
4 has come up twice this morning concerning State
5 takeover of the entire system of public defense
6 services. I wonder if you have a thought about that
7 generally?
8 MR. MAZZA: In general in our county --
9 certainly, we would welcome that. I guess from where
10 I sit, why not. If the State was going -- I'm
11 always, after 20 years of running local government,
12 dubious of a state takeover of anything because those
13 promises and those types of things tend to erode over
14 time. I certainly would support a state takeover.
15 That would, you know, require a good deal of review
16 and understanding as to how that would work. I think
17 we have a cost effective Public Defender's Office
18 that does a good job and has qualified attorneys, and
19 I would not want to see that system eroded; but if
20 the State was willing to fund some of that or all of
21 it we would certainly welcome it.
22 MR. GRADESS: One last question if I might.
23 Is it -- I take it we're talking about
24 Groveland and Livingston are your two institutions?
25 MR. MAZZA: Yes.

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1 MR. GRADESS: Are the populations of the
2 prisoners in Groveland and Livingston used for any
3 purposes in census purposes to increase the revenue
4 or the rights of Livingston County that you're aware

5 of?
6 MR. MAZZA: They may be in certain grant
7 applications, as are, I think, college students.
8 MR. GRADESS: I think that's right. Thank
9 you very much.
10 MR. MAZZA: Okay.
11 MR. GRADESS: We need to take a five-minute
12 break if we could, and then we will have John Kennedy
13 in.
14 (The proceeding was recessed at 11:28 a.m.)
15 (The proceeding was resumed at 11:37 a.m.)
16 MR. GRADESS: John Kennedy and Bob Zimmerman?
17 MR. KENNEDY: John Kennedy, I'm from Ontario
18 County. I'm the administrator of the Assigned
19 Counsel Program down there. Ontario County adjoins
20 Monroe County. It's a rural county with two
21 metropolitan centers, several outlying townships.
22 Bob Zimmerman was my predecessor as administrator,
23 and he's our most experienced assigned counsel
24 participant at this time. When we have a real
25 serious felony matter, Bob usually gets the first

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1 call.
2 I don't have any prepared remarks. I'm only
3 here to more or less weigh in and add my two cents
4 and confirm what I've heard others speak of this
5 morning.
6 The primary problem from my standpoint in
7 Ontario County is the fee structure. We have
8 approximately 35 to 40 attorneys in our program
9 participating. We have no public defender office.
10 It's strictly assigned counsel. Many of these
11 attorneys are young. They start out with assigned
12 work. We start them with light cases, petit
13 larcenies, disorderly conducts, harassments. We work
14 them up the ladder. We have in our plan a
15 requirement that they have tried at least two cases
16 before they're even considered for felony work.
17 I have tried over the past two years since
18 taking over this position to install a mentoring
19 program where an older attorney can work with a
20 younger attorney, but I've got to tell you before you
21 write that down, that the County doesn't want to pay
22 for two attorneys. So right off the bat you're
23 asking somebody to give up free time.
24 We have a very serious rape case last spring,
25 a Rape 1 case, where we knew -- "we" meaning myself

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1 and the attorneys involved -- that this man was not
2 guilty, that the proof just wasn't there; but the

3 District Attorney insisted on prosecuting this case
4 to trial. I went to the presiding judge and asked
5 permission to have a second attorney sit in because
6 it was a very serious case and it involved down in
7 Ontario County, if I might say, it was a man of
8 color, and we were concerned about the jury make-up
9 and the selection of the jury. That was a three-day
10 trial. The man was acquitted, as we felt he would
11 be, but I caught quite a bit of grief from the County
12 for having two attorneys assigned to that case. The
13 judge okayed it, but made it clear to me that was not
14 to establish a precedent.

15 So we are continually balancing with the
16 County government, as the last gentleman spoke, the
17 unfavorable opinions and attitudes about paying for
18 this program with the need to assure that the
19 attorneys participating are paid.

20 I want to tell you on the record that I
21 reviewed very carefully every voucher from every
22 attorney, and with one exception of an attorney who
23 has left our area when I first took over two years
24 ago, I'd see no pattern whatsoever of any attorneys
25 abusing the vouchering system. I talk with them. I

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1 know them. I talked with the judges. I've invited
2 the judges to let me know if they think somebody is
3 abusing the vouchering system. I see no evidence of
4 that; and I'm a bit upset that the message is left by
5 other speakers that attorneys perhaps routinely take
6 advantage of the system. I see no evidence of that.

7 If anything, I confirm what Judge Denman
8 said, that there is a component -- I think that was
9 the word she used -- a component of pro bono service.
10 It shouldn't be that way. It's a compulsory pro
11 bono. It's forced down the throats of the attorneys
12 that participate. That \$25 an hour out of court and
13 \$40 an hour in court, you can imagine a three-day
14 felony trial at \$40 dollars an hour, you can imagine
15 what a private attorney would demand as a retainer
16 just to consider taking that case. Typical DWI case
17 demands a \$1,500, perhaps a \$2,000 retainer just to
18 talk with an individual. Our cost on a typical DWI
19 case may run 4 to \$500 dollars. So there's no
20 comparison with the private realm.

21 As far as losing some experienced attorneys,
22 we are also experiencing that. Bob Zimmerman to my
23 left has stayed on, very committed individual, but he
24 can't take the number of cases he once did. His
25 hourly overhead exceeds what he gets as a

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1 participating attorney.

2 So I just want to weigh in on that issue, and
3 the other issues are less important. I would agree
4 with Judge Kohout, that the use of assigned counsel
5 in Family Court does raise different kinds of issues.
6 I think we have found some attorneys expressing an
7 interest in only doing Family Court or only doing
8 criminal, because I think the Bar Association, the
9 Bar itself has recognized that these are different
10 fields and go off in different directions. So we try
11 very hard to identify attorneys that are strong in
12 certain areas and assign them to the kinds of cases.
13 But the cost of this program, the cost to the
14 attorneys, it is a compulsory pro bono element.
15 There's no question about that. And I think the
16 State has to take a serious look at that.

17 Bob, perhaps you've got a couple of comments.
18 MR. ZIMMERMAN: Just a couple of specifics in
19 terms of our office where there are two attorneys; we
20 have four support staff. We did a study looking over
21 the last at three years, the cost of running the
22 office not including attorney draws, and that
23 averages in 1997 about \$94 dollars an hour. So both
24 my partner and I were working on, say, an assigned
25 appeal at \$40 dollars an hour. The combined income

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1 on those two assigned appeals wouldn't cover our
2 office overhead. So when we do these cases,
3 especially appeals -- and both of us take assigned
4 appeals -- we do them at night or on weekends. My
5 partner will take transcripts to court if he's going
6 to family court, especially in our county, and be
7 reading transcripts while he's waiting for his case

8 to be called in Family Court.

9 There is a pro bono component in every case
10 that one takes as assigned counsel. I think that I
11 wouldn't agree with the idea that a voucher that gets
12 before a judge for approval, the approving judge
13 should be considering reducing a certain voucher in
14 order to make sure that there's a pro bono component.
15 There is a pro bono component in every single case we
16 take. We voucher only the time we spend, and that
17 doesn't cover us. We do it because we're committed
18 to doing it. I've been doing it for 16 years, and my
19 partner has been doing it longer than that.

20 MR. GRADESS: Let me just ask you a couple of
21 questions. Is it ever the case that there's more
22 than one prosecutor on a case in Ontario County?

23 MR. KENNEDY: Yes. I think once a case gets
24 into the courtroom not so much, but they have that --

25 obviously, that team component. They have

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1 investigators at hand. They have the research --
2 researchers in the DA's office. The office is
3 combined at one location. So there's very much a
4 team effort by the time this case gets out into the
5 open courtroom, no question about it.

6 MR. GRADESS: I don't know if you were here
7 earlier with Judge Denman; I take it you were. Could
8 you enlighten us at all for the record in terms of
9 the voucher cuts that she was referring to or the
10 time when appellate vouchers were cut routinely in
11 the 4th Department?

12 MR. KENNEDY: Bob would have to address that.
13 I don't remember.

14 MR. ZIMMERMAN: There was a time when the
15 vouchers were -- I mean, there were a number of
16 vouchers from Ontario County that were cut. There
17 was one particular attorney whose vouchers were
18 always cut. There was one particular -- that same
19 attorney I was told by the then appellate justice who
20 was running the ICAMP program not to -- not to
21 suggest that attorney's name for assignment anymore.
22 Several exchanges of letters to try and get a reason
23 for that; no reason was ever given. I'm not sure,
24 but I -- I kind of think that they didn't like the
25 vouchers that were coming in from that individual,

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1 but that was never said; and the quality of the work,
2 because I reviewed those vouchers, was there. So I
3 was trying to find out what the yardstick was for
4 determining what vouchers should be cut and which
5 shouldn't, and there was never an articulation of
6 what the yardstick seems to be. I have a feeling
7 that it's kind of a subjective criteria that the
8 justices may feel, well, this particular issue and
9 expenditure of time over a certain amount of time
10 probably isn't warranted when you're only dealing
11 with issue A, B, or C. I really don't know. I still
12 don't know.

13 MR. KENNEDY: I want to add something to
14 that, again, without naming any names. That
15 individual attorney is still in our program. Besides
16 Bob he is the most experienced, dedicated attorney in
17 our program. He is a gentleman almost 60 years old
18 and yet does not have a secretary. He does strictly
19 assigned work. He will take a case on a moment's
20 notice. He will take any kind of case. He works
21 seven days a week. He is totally dedicated to this
22 field of work, and he works alone. He has a tape

23 machine on his phone. He does his own typing. He
24 has no secretarial help. I have reviewed his
25 vouchers, and they're right in line. He just happens

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1 to take more cases and work more hours, so his
2 vouchers are higher, and we verified that. But to
3 somebody on an appellate level that maybe just sees
4 the voucher and doesn't understand what's been done,
5 they may look high. But I can tell you for the
6 record that this is a perfect example of an injustice
7 to an individual who works literally seven days a
8 week at this work.

9 MR. GRADESS: Thank you very much.
10 Deborah Indivino?

11 MS. INDIVINO: I wish to thank you for this
12 opportunity today. I received a notice from a
13 Richard Youngman, who is the Assigned Counsel Program
14 director regarding this upcoming meeting, and my
15 letter said there was a form attached. I did not
16 have a form, and I'm sorry I didn't contact
17 Mr. Youngman before today; but I had this in my book
18 and felt it was very important for me to be here.

19 I'm an attorney in private practice in
20 Spencerport, New York. I've been a practicing
21 attorney for 19 years. Just by way of some
22 background, I was in a law firm until 1984. Then I
23 worked for the City of Rochester in the Corporation
24 Counsel's office until 1990. After my position was
25 cut there I went in with another attorney in

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1 Spencerport, and I do primarily private matrimonial
2 work and Family Court work. I am on the Assigned
3 Counsel Program. I do primarily Family Court work
4 for the Assigned Counsel Program, and I'm also on the
5 Law Guardian Panel, so I'm well aware of what we've
6 been discussing today.

7 I'm not going to be redundant, but I wish
8 to -- I have to state I agree with Judge Kohout's
9 remarks. I listened to all the speakers, and they've
10 all stated it much more eloquently than I can. I do
11 not have any prepared remarks, but I did want to be
12 here and give you my side as a private attorney. I
13 know some of the speakers coming here this afternoon
14 such as -- people who are scheduled to be here such
15 as Mr. Hinman, you're going to be hearing from,
16 Mr. Thompson, Michael Tallon, Gary Muldoon, people
17 I've all worked with very closely in Family Court,
18 and I can just anticipate what they're going to be
19 addressing; but I feel fortunate that I'm able to do
20 a lot of the law guardian work and the judges have

21 the confidence to assign me to the Assigned Counsel
22 Program and law guardian work; but again, I must
23 reiterate the comments of the prior speakers
24 regarding the rates of the pay.
25 My normal hourly rate as a practicing

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1 attorney of 19 years will be \$150 dollars. I do a
2 lot of these cases at this rate. I myself have never
3 had a voucher returned to me, but I have been told
4 stories of my colleagues, and I find that very
5 disheartening because I know the quality of work of
6 most attorneys. I myself don't bill for every
7 telephone call and everything I do. I just told
8 Mr. Horton back here, who's the Genesee County Public
9 Defender, that the other day I received a phone call
10 from a woman; I'm the law guardian for her daughter.
11 The case is long closed. She called me. Of course,
12 I talked to her and advised her of some things which
13 she could do, knowing I could not give her advice as
14 a law guardian, but I didn't bill something like that
15 and I would have no intention of doing that. So I
16 can understand the concerns of perhaps some excessive
17 vouchers of some people who may abuse the system; but
18 my experience has been that that's very, very minor;
19 and again, it's never happened to me, but I know
20 people it's happened to. And for us to be told that
21 we need to either cut back on the quality of services
22 is something that the Bar Association, legal
23 community would find very, very difficult. I know
24 the kind of work I do; I know the kind of work that
25 most of the attorneys in Family Court are doing.

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1 We're asked to do some very, very difficult work.
2 Especially representing children as Judge Kohout
3 alluded to.

4 Again, the level of expertise and skill that
5 we're expected to show to indigent clients or to
6 represent children, the rates should be somewhat
7 more -- of course, I think should be raised at a
8 higher level, and I understand monetary
9 considerations and everything.

10 I also have to agree with some of the
11 comments made by Mr. Henry and
12 Mr. Lonski, that very good experienced attorneys
13 can't do a lot of this work anymore. I know I've had
14 to cut back a little bit more, but also I've gotten
15 more experienced in doing other kinds of work; but
16 I'm still committed to doing this kind of work, but
17 really the rates should be much more commensurate
18 with the level of skill. I have a full-time

19 secretary. I have an office that I do maintain. I
20 have to maintain a library. I go to all the training
21 sessions the Law Guardian Program has. I welcomed
22 some of Judge Kohout's remarks regarding perhaps some
23 training sessions for assigned counsel. When there
24 are seminars and things like that, I try to attend as
25 many as I can.

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1 But, again, I wish to thank you for the
2 opportunity to make some remarks. I'll be happy to
3 entertain any questions. I'll have to be honest with
4 you, I'm not into a lot of the political side of this
5 issue, but I'm certainly well aware of the issues and
6 the -- of the attorneys that have spoken here today,
7 what their experiences have been; and again, I must
8 echo many of their comments. I have to agree with
9 their comments wholeheartedly. Thank you.

10 MR. GRADESS: I wonder if you could just,
11 before you leave, if you could just for the record
12 give us the view for an assigned counsel practitioner
13 of some of the concrete problems that you face that
14 you wouldn't otherwise face if you were being paid
15 \$150 dollars an hour.

16 MS. INDIVINO: My office is in Spencerport
17 New York, even though I reside in the City of
18 Rochester, and sometimes people don't have public
19 transportation. On both end of that spectrum, Mr.
20 Gradess -- am I pronouncing your name correctly?

21 MR. GRADESS: Gradess

22 MS. INDIVINO: Gradess. Sometimes I'll meet
23 people downtown. I'll meet them at their homes.
24 I'll do things like that. That would be at \$25
25 dollars an hour. If they cannot get to my office in

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1 Spencerport I make myself available perhaps to see
2 them where it's going to be more convenient for them.
3 I am still expected to maintain a level of -- if
4 people call me I need to return their telephone
5 calls; and that would be whether or not I'm retained
6 or through the Assigned Counsel or Law Guardian
7 Program.

8 I'm not quite sure of any other concrete
9 problems except that I need to make myself probably
10 more available, and a lot of times I'll meet people
11 at the Hall of Justice, for example; in other words,
12 they can't get to my office. I'll tell them, "I'll
13 meet you down at the third floor." That's at, again,
14 the lower rate. I'm out of my office, away from
15 doing other cases that I need to be responsible to my
16 private clients, but I'm down there at the Hall of

17 Justice meeting people at the lower rate. I have to
18 do consultation or we have to meet so I can hear
19 their side of the story or, again, interview if it's
20 my own client, the adult. A lot of times with the
21 children, either I have to make the home visits or
22 sometimes people are able to get to my office. But,
23 again, that's for the law guardian program.

24 I hope I was able to answer your question. I
25 think we still have -- you still have to give the

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1 same, really, level of quality of professionalism and
2 competence to your client whether or not the person
3 is through the Assigned Counsel Program or privately,
4 but a lot of times people can come right to my
5 office. It's not going to be any kind of problem.

6 MR. GRADESS: Let me just ask you the
7 question this way. As you go about taking an
8 assigned counsel case, are there costs which you
9 simply think about, oh, I'm going to have to
10 subsidized the State on this one. This is the cost
11 I'm going to have to eat. I might use a messenger in
12 this case, but I certainly -- you know that sort of
13 thing?

14 MS. INDIVINO: I've had advance costs many
15 times, which I'm able to do, so I know some attorneys
16 in the program had a problem with that. I've had to
17 advance my own cost. I am sure I have eaten a lot of
18 time -- like I told you, I don't write down every
19 telephone call. I'm not going to sit here and
20 document every single moment that I did something for
21 someone. So inevitably a lot of times I feel my
22 vouchers are probably not where they could be anyways
23 because I'm not that much of a stickler. But you're
24 absolutely correct. I've been told of other people
25 who have had their vouchers cut back. I've never had

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1 anything rejected because I used a messenger service,
2 not to say it's not going to happen. But I think as
3 long as you document everything you're doing in terms
4 of having to advance certain monies within the
5 guidelines and the law, that I have not had a
6 problem; but I'm sure it's been a consideration
7 where, again, my colleagues may have had a negative
8 experience regarding that, which I think is
9 unfortunate, because again, I know what we're doing
10 every day and trying to maintain that level. So I
11 guess maybe I'm more fortunate than most; but again,
12 I know the stories from other people and it's very
13 disheartening.

14 MR. GRADESS: Can you give us sense where

15 this \$40 rate might migrate to in order to attract
16 people to the work?

17 MS. INDIVINO: Sir, all I can say is that I
18 am aware of that -- well, it's a straight \$40 rate
19 when you do appellate work. So if I am working on a
20 brief I believe it is a straight \$40 rate. I know
21 what the Federal rates are. I believe they're \$40
22 out of court and \$60 in court time. Me personally, I
23 would like to see something raised maybe 50, 75, that
24 type of thing. I was also recently asked to perform
25 a service as conflict counsel for the Monroe County

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1 Department of Social Services where two women had
2 children by the same man and would have been a
3 possible conflict. I'm doing that at \$50 dollars an
4 hour capped at 500. For that I did a hearing, met
5 with my client, prepared the order. I'm doing things
6 like that, and I was -- I was honored that the people
7 there asked me to do it and felt that I was competent
8 enough to do that; but again, I am aware of the money
9 constraints and the cap limit on that. I would also
10 like to state that I think the \$800 limit is very,
11 very unrealistic. Listening to the other speakers,
12 if you do any kind of court work and if you do a
13 trial you're going to exceed the \$800. That, also, I
14 believe needs to be raised, too, if the rates are
15 going to be raised, that you exceed the \$800 unless
16 something is settled very, very quickly. Again, it's
17 not because we're milking time or anything like that.
18 A lot of times I'm in court. I need to be other
19 places. I'm sitting there for a full hour. Even
20 though you've told the deputy we're here, you're
21 waiting for other people. Sometimes the public
22 defender has other court rooms, you're waiting for
23 other attorneys. That's just part of the system.
24 But you're trying to get out of court. You don't
25 want to sit there three hours. You'll hear most, I'm

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1 sure, private practitioners tell you that; they don't
2 want to sit in court. This is inevitably a problem
3 with Family Court, not to say in the criminal court.
4 That moves along, I think, a little more quickly; but
5 it's just the nature of the beast sometimes.

6 MR. GRADESS: Well, thank you for coming.

7 MS. INDIVINO: Well, thank you very much, and
8 I appreciate your time. Thank you.

9 MR. GRADESS: Tom Terrizzi?

10 MR. TERRIZZI: Good morning, everyone. My
11 name is Tom Terrizzi. I'm the associate director of
12 what's left of Prisoner's Legal Services in New York,

13 and I would like to speak to you today on behalf of
14 New York State prison inmates who just experienced
15 virtually overnight the loss of their right of
16 meaningful access to the courts in this state and
17 their ability to address their serious concerns in
18 the appropriate way in a civil society.

19 When the governor vetoed the legislative
20 appropriation for Prisoner's Legal Services, and the
21 Legislature decided not to override that veto or
22 negotiate with the Governor, prisoners lost their
23 voice. Some would say that was a good veto, that
24 prisoners should not have free lawyers to sue the
25 prison system, that prisoners should not have the

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1 same access to court that's fast becoming out of the
2 range of ordinary citizens. While public anger at
3 those men and women who are confined in prison is
4 often understandable, a public policy which does not
5 promote the orderly redress of grievances is a policy
6 which does not promote public safety. It is the
7 responsibility of elected officials to look beyond
8 rhetoric and prejudice and make decisions in order to
9 avoid repeating costly mistakes.

10 Prisoner's Legal Services of New York was
11 started in 1976 through the efforts of the New York
12 State Bar Association and State legislators as a
13 direct result of the Attica riot in 1971. Every
14 study of that event has recognized that at the time
15 of the riot there were no effective means for inmates
16 to voice their concerns within the system, which led
17 to a genuine loss of hope that there was anyway to
18 change oppressive conditions other than through a
19 violent rebellion. While the riot was spontaneous,
20 the problems underlying the anger were present and
21 festering for years without being addressed. The
22 devastating loss of life during the retaking and the
23 cruel and sadistic retaliating against the inmates
24 who participated -- most of whom, by the way, are
25 still waiting for their in day in court 27 years

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1 later -- have left a permanent mark against the
2 administration of justice in this state.

3 The New York State Bar Association and
4 several thoughtful State legislators recognize that
5 to avoid a repeat of this disaster, to ensure that a
6 prison system is run in an orderly and safe manner
7 for prisoners and staff alike there had to be a way
8 to resolve problems, serious problems before men
9 became so desperate.

10 PLS grew out of that recognition that in a

11 modern society we do not lock up men and women in
12 jail and just turn our backs on them. Most of these
13 men and women will serve their time and return to
14 their families and neighborhoods. Providing these
15 men and women with information regarding their rights
16 and responsibilities, a voice to express their
17 concerns in an appropriate forum, and a better
18 understanding of the legal process will only improve
19 their chance of rejoining society as productive
20 citizens rather than a destructive force.

21 It is no coincidence that since the Attica
22 rebellion in 1971 New York State has developed one of
23 the better correctional systems in the country. It
24 is due in no small part because of the greater public
25 scrutiny of its operations. Public scrutiny has come

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1 about to a large degree as a result of administrative
2 advocacy on behalf of inmates and lawsuits filed
3 against the Department of Correctional Services.

4 As a result of the pressure of courts
5 requiring answers to institutional conditions almost
6 every aspect of prison life has been affected. While
7 there still may be many areas of friction, many more
8 have been addressed either through negotiation with
9 PLS and the correction system and private attorneys
10 or through other mandates of the court. Prison
11 administrators have become better managers as a
12 result of having to answer in court for their
13 actions. They have become professionalized over the
14 past 25 years as a result of the outside scrutiny.

15 But the Department of Correctional Services,
16 as you all know, is a huge bureaucracy and some
17 problems easily addressed will go years without
18 resolution unless there are advocates for prisoners
19 to raise the issues and move the system to a
20 resolution of the problem.

21 I'm going to give you a couple of examples of
22 the type of work that PLS does and how we are able to
23 cut through that bureaucracy.

24 An inmate at Albion is concerned that her
25 release date is not correct. She believes the prison

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1 is not giving her credit for six months of time she
2 spent in a local jail before coming to prison. It
3 takes her months to find out who to contact about the
4 error, and then she writes to the local jail perhaps
5 four or five times without a response, and can't
6 figure out where to go to get this problem resolved.
7 She is desperate to get the matter resolved because
8 her release date -- her correct release date is

9 coming up, and she wants to be reunited with her
10 children who are currently in foster care. Only a
11 local jail can correct the problem, and no one at the
12 prison has the power to do that and help her.

13 In similar cases throughout our history PLS
14 has been able to cut through that bureaucracy, speak
15 to the local jail administrators, search the records
16 if necessary, and get the correct jail time
17 certification sent to the prison. In 1997 alone over
18 36 years of jail time was properly credited to
19 prisoners' sentences as a result of our efforts.
20 When you figure the costs of incarcerating a prisoner
21 in New York is close to \$30,000 a year, simply
22 correcting the paperwork to credit the time already
23 served in local jails and permitting prisoners to be
24 released on their correct release dates saved the
25 State over a million dollars in 1997.

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1 Ensuring that sentences are correctly
2 calculated also reduces the tension in prison because
3 legitimate requests are being heard and dealt with in
4 a timely fashion. With PLS's help in identifying the
5 problem and knowing who to contact prison officials
6 and jail administrators have been able to resolve
7 jail time requests in a timely fashion reducing their
8 own staff time needed to respond to what turns out to
9 be multiple requests from inmates.

10 Another example of the type of work that we
11 have performed over the years, a prisoner at Clinton
12 was involved in a fight with another inmate which was
13 broken up quickly. Both inmates were handcuffed and
14 taken to the Special Housing Unit to await a
15 disciplinary hearing. One of the inmates was placed
16 in a cell, but the other, apparently at random, was
17 taken to an empty corridor by four guards who
18 proceeded to administer a brutal beating to him while
19 he was handcuffed leaving welts and cuts and bruise
20 marks on his body from his head to his toe. The
21 guards threw him into a cell naked and left him there
22 despite his obvious need for medical attention. The
23 guards wrote up reports covering up their involvement
24 in the action, and those reports were approved
25 without scrutiny by their supervisor. When the

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1 supervisor from the next shift saw the inmate hours
2 later, he immediately called for medical assistance
3 and the inmate was transported to the hospital. The
4 prisoner's complaints that he was beaten, however,
5 fell on deaf ears.

6 Unfortunately, the abuse of inmates, both men

7 and women, by guards is a fact of life in prison.
8 While only a small number of guards are active
9 participants in physically abusing prisoners, many
10 other guards allow it to take place and do not report
11 incidents of abuse. The internal disciplinary system
12 run by the Department of Correctional Services to
13 police itself is inadequate and often results in a
14 weak punishment or reprimand after a finding not of
15 abuse, but of filing a false statement. Even where
16 action is taken, prisoners are never informed of the
17 outcome of that. They are left scarred, angry, and
18 wondering why they are made to pay the price of their
19 freedom for their wrong doing, while guards appear to
20 act with impunity.

21 While it's very difficult to prove physical
22 abuse in court, PLS has handled many cases for
23 inmates who have suffered needlessly as a result of
24 this abuse. Through Federal civil rights actions
25 prisoners are given their day in court, and allegedly

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1 abusive guards are required to justify their actions
2 to federal judges and juries. PLS has been
3 successful on behalf of many inmates in securing
4 damages for their injuries and more importantly
5 providing some accountability in public for the
6 events which occurred.

7 Prisoners cannot handle these cases by
8 themselves and unfortunately have not been able to
9 get private counsel to handle these matters, either.

10 Pro bono counsel are in short supply for
11 prisoners as they are for poor people across the
12 State. As the most recent study of the legal needs
13 of poor in New York is concluded, meaningful access
14 to the court for all citizens will only be realized
15 through a combination of publicly-funded staff
16 attorney programs and a more active participation by
17 the private bar. This is true for the 70,000 men and
18 women incarcerated in New York State prisons.

19 PLS until the Governor's veto this past April
20 was responding to 12,000 requests for assistance a
21 year. With that volume of need no pro bono effort
22 will be enough. Many private attorneys who have
23 represented prisoners in the past as well as the
24 staff of state courts around the State have felt the
25 loss of PLS by being deluge with prisoners' requests

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1 for help, to which those individuals in groups cannot
2 respond.

3 Most private attorneys are not located where
4 the need exists. In rural areas upstate where

5 prisons are located, they are not able to respond to
6 emergencies nor conduct even routine investigations.
7 Most private attorneys cannot handle the volume of
8 requests and could not develop the detail for Miranda
9 that we have done to advise prisoners and to educate
10 prisoners regarding their rights and
11 responsibilities.

12 Most private attorneys would have difficulty
13 with the subject matter of prison law where in
14 addition to state statutes there are layers and
15 layers of administrative directives not readily
16 available to the public which impact on prison
17 operations. Just to research the law to determine if
18 there was a claim would require an inordinate amount
19 of time unless you are a regular practitioner in the
20 area. Attorneys who have taken cases in the past for
21 prisoners or who have been assigned by the court
22 often consult with PLS attorneys in order to
23 adequately represent their clients.

24 Without PLS, without backup resources that we
25 provide to the private bar, the relatively small

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1 number of attorneys willing to represent prisoners
2 pro bono will be even less effective in meeting their
3 needs.

4 For several years Native Americans in the
5 system complained about discrimination they
6 experienced in the prison system because of their
7 ethnic background and religion. In 66 of the 69
8 prisons in New York Native Americans were effectively
9 barred from coming together to conduct religious
10 services. Many grievances and complaints were filed
11 over the years and appealed up to the central office
12 of the Department, but did not result in change.

13 In 1995 a group of Native American inmates
14 contacted PLS for assistance. We conducted an
15 investigation and then contacted prison officials
16 through a series of letters and communications over
17 an 18-month period in an effort to engage them in a
18 dialogue over religious discrimination. Prison
19 officials gave us no meaningful response even when we
20 finally told them that their silence would result in
21 the only avenue left to resolve the impasse,
22 litigation.

23 Finally in September of 1997 we filed a class
24 action on behalf of all the Native Americans in DOCS
25 custody, and the Department to their credit

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1 immediately saw that they had no choice and finally
2 acknowledged the problems and took steps to change

3 their discriminatory policies. While this matter is
4 still pending and not finally resolved, positive
5 change has already happened; but it did not happen by
6 the Native American inmates writing complaint letters
7 and filing grievances over the years. It didn't
8 happen when members of the Native American community
9 on the outside contacted the Corrections Department
10 and asked for change. It didn't even happen when we
11 wrote letters to the commissioner directly and to
12 others in the Department requesting change. It
13 unfortunately only happened after the class action
14 complaint was filed.

15 PLS is the only organization with statewide
16 presence which could conduct an investigation and
17 conduct the research necessary to organize an effort
18 such as this.

19 These are only a few examples of the need
20 that will go unmet if Prisoner's Legal Services goes
21 completely out of business. There is no other option
22 in this State for addressing the need. PLS has
23 become an integral part of the criminal justice
24 system in this State since 1976, making our prisons
25 more humane and safe for prisoners and staff who work

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1 there. If the program is not funded publicly this
2 next year serious problems will result.

3 The history of prison riots in the United
4 States this century is very instructive to look at.
5 Every 20 to 30 years there are a series of riots
6 around the country resulting in loss of life, major
7 damage to property, and general mayhem. Following
8 those uprisings, there's a period of modest reform
9 which recognizes that you cannot imprison someone for
10 even short periods of time and give them no hope,
11 poor living conditions and no way to address their
12 problems without violence. The modest reforms
13 continue until there is a slow-down, often for
14 political purposes, when correction systems begin
15 abandoning the programs which have been functioning
16 well and have been shown to reduce recidivism. As a
17 result conditions deteriorate creating fertile ground
18 for more violence. When the violence erupts as it
19 did at Attica 27 years ago, the lessons are learned
20 once again. We should not ignore those lessons
21 again. Thank you.

22 MS. HATHAWAY: Just one question. What if
23 anything is PLS doing in face of this right now with
24 the threat of being completely put out of business
25 because of the lack of funding that you might not get

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1 in '99? What is PLS doing to try to circumvent that
2 in the meantime?

3 MR. TERRIZZI: Well, in April we had a staff
4 of around 60, 62 people, and when the Governor vetoed
5 our budget, we immediately -- and even before that --
6 started to do some private fund raising in attempts
7 to get foundation support and private bar support and
8 support from any avenue that we could find it; and we
9 were somewhat successful initially in raising some
10 money, but not enough to keep the entire staff on and
11 we just hung on as long as we could. Those 60 people
12 have been laid off now, and we've closed the offices
13 around the State, so that now there are only three
14 people who remain and we're working part time. I'm
15 the only one who is still doing legal work, and we're
16 handling some of the class action work, including
17 this Native American case that I talked about, but
18 most of our efforts at this point are trying to raise
19 the public consciousness about what happened and the
20 need for the services in an attempt to get back into
21 the State budget this next year. There's absolutely
22 no substitute for public financing of this kind of
23 service. The resources just will not be there
24 through private foundations and the bar, and as I
25 mentioned before there's just no likelihood that

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1 there would be enough pro bono services to even begin
2 to meet the need. So we are concentrating our
3 efforts on trying to get back into the State budget.

4 MR. GRADESS: Let me ask you for the record,
5 there have been two criticisms of PLS that have been
6 made in recent years while your agency has been under
7 attack. One of those criticisms is that you file a
8 lot of frivolous lawsuits or you permit it. Could
9 you address that for the record?

10 MR. TERRIZZI: Sure. First of all, like most
11 law offices we're not -- the largest percentage
12 of our time is spent not on litigation, but on
13 administrative advocacy and counseling our clients;
14 So our litigation load, although at the time we
15 closed down was maybe around 200 cases was not the
16 major part of our work. But over our 25-year history
17 no court had ever dismissed any one of our lawsuits
18 as being frivolous; and in fact, it just makes no
19 sense for us to file a frivolous lawsuit. We spend a
20 lot of time investigating claims and making sure,
21 because it's a very difficult area of law to practice
22 in, that our claims are solid before we file the
23 lawsuit. I don't have an exact percentage of our
24 winning percentage of cases, but in this type of area
25 it's very difficult, and we win way far beyond the

1 majority of our lawsuits. But again, no court has
2 ever thrown out one of lawsuits as being frivolous,
3 and we do spend a fair amount of our time counseling
4 inmates about what their rights and responsibilities
5 are; and a lot of that involves examining the claim
6 both on the facts but on the law and then telling
7 certain individuals, "You don't have a claim, that's
8 it, and you shouldn't file it pro se as well." So
9 I'd say a good percentage of our work has just been
10 counseling people, advising them what their rights
11 are and trying to ensure that frivolous cases in fact
12 don't get filed.

13 Each year the Attorney General issues a list
14 of the top 10 frivolous prisoner lawsuits around the
15 State. A couple years ago when he issued that list
16 the Chief Judge of the 2nd Circuit asked for the
17 papers on the cases that the Attorney General had
18 highlighted and in an address the Chief Judge pointed
19 out that in fact the facts weren't exactly as the
20 Attorney General had portrayed them in his press
21 release, and in fact there were legitimate claims
22 involved in some of the lawsuits that he had
23 mentioned.

24 I think prisoner lawsuits are pretty easy
25 pickings for exaggeration by the press and to be used

1 in certain political ways; but in fact, there are
2 going to be a certain number of lawsuits which could
3 be described as frivolous or certainly without merit.
4 Most prison inmates have an educational level of less
5 than an 8th grade, and for them to actually be able
6 to read the law, understand the law, and to
7 articulate that in a way in a set of pleadings to a
8 court is very difficult. So even though there may be
9 claims behind what they're filing a lawsuit about it
10 may not be apparent on the face of the pleadings.

11 It's sort of the long answer to say that we
12 don't involve ourselves in frivolous litigation, and
13 we have been for some time working to reduce the
14 amount of it.

15 MR. GRADESS: And then finally the second
16 question that has been raised is that law libraries
17 are sufficient and PLS is not needed. Could you
18 address that?

19 MR. TERRIZZI: Well, it sort of goes back to
20 the general education level of inmates. And that is
21 if you -- if the general educational level is
22 somebody reading at a 6th or 7th grade level, you're
23 not going to be able to adequately use a law library.
24 I think there are obvious reasons that people go to

25 law school and study the law and learn how to proceed

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1 in court both procedural-wise and the substance of
2 the law, and someone who is not trained in the law is
3 not going to be able to do that.

4 We spend a lot of our time developing
5 information for inmates to explain to them what their
6 rights and responsibilities are, but I certainly
7 don't expect inmates to understand all of the
8 intricacies of procedure or even state procedure in
9 court to be able to represent themselves.

10 A couple years ago when we had to stop
11 practicing for a while because of a cash flow problem
12 because the budget was so late, we had an experience
13 where a lot of cases were ready to go into litigation
14 and we had prepared the papers for the clients and
15 gave them to them and said they had to proceed pro se
16 at that point along with detailed instructions on how
17 to get into court and proceed with the case; and two
18 months later when we came back we found that the
19 majority of those inmates had screwed up the process
20 somehow, even though we had given them exact
21 instructions on how to proceed and actually prepared
22 the papers for them. The majority of those lawsuits
23 got thrown out because they just weren't even walked
24 through the initial steps properly. So I just think
25 that while law libraries are important for people for

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1 study purposes they're just simply not going to be a
2 meaningful substitute for an advocate and an
3 attorney.

4 MR. GRADESS: Thank you very much.
5 Donald Thompson?

6 MR. THOMPSON: Thank you. Good afternoon.
7 I'd like to speak to you about the assigned counsel
8 rates and speak to you, first of all, on my own
9 behalf as a private practitioner for these past 12
10 years or so accepting assigned cases and also on
11 behalf of the Monroe County Bar Association who has
12 regularly and consistently passed resolutions
13 indicating that the assigned counsel rates in this
14 State are inappropriate and fail to adequately
15 compensate assigned counsel even in the face of the
16 pro bono acknowledged obligation on the part of such
17 counsel. Also, as you know by now, the rates are
18 capped at \$1,200 for felony cases, \$800 for
19 misdemeanor cases. I think that we should be clear
20 that those caps are routinely at this point ignored,
21 and it's a good thing that they are. I would submit
22 to you that were those caps regularly enforced there

23 would be very few attorneys in private practice
24 willing to accept a serious felony matter for \$1,200.
25 Simply not realistic.

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1 The other thing that should be mentioned is
2 that there's a \$300 cap on investigative services or
3 services for other experts, which again is, thank
4 God, routinely ignored; and were it not, we would
5 likely be without effective assistance of other staff
6 that are necessary in these cases.

7 The trial rates, as I'm sure you know, for
8 assigned counsel has not been changed since 1985. In
9 that time every other participant in the criminal
10 justice system -- judges, court personnel, deputies,
11 jail deputies, prosecutors -- have received an
12 increase in their compensation. We have not.

13 I did some calculations this year as to what
14 my office overhead is, what it cost me to open the
15 door when paying secretarial staff, paying for
16 equipment, supplies, rent, and so on; and I
17 calculated it to be approximately \$22 dollars an
18 hour. So when I'm taking an assigned case I'm, in
19 effect, after paying my overhead, making \$3 an hour
20 on the out-of-court time portion of this.

21 I had the experience today before I came down
22 here of being alone in my office with the copy repair
23 man, and we were both working at the same time, he on
24 my copy machine and me on an assigned case; and I
25 went in and asked him, "How much are you making?"

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1 And he was making between three and four times what I
2 was making working on that assigned case, to fix my
3 copy machine.

4 I think it's destructive, as well, that the
5 rates for attorneys who are assigned or retained to
6 represent members of the State government on civil
7 issues are compensated substantially more than
8 assigned counsel are. For example, bond counsel in
9 this state receive a minimum of 150 and up to \$250
10 per hour for representation of government employees
11 and civil matters.

12 I recently had the opportunity to represent a
13 county court judge on an appellate matter because of
14 a conflict with the Attorney General's office.
15 Assigned counsel -- or private counsel was necessary,
16 and for that I was compensated at the rate of \$150 an
17 hour for this, a case where nobody was going to go to
18 jail. This was a civil matter.

19 Mr. Gradess, you asked earlier about some
20 special difficulties relating to representation in

21 assigned contexts. I recently had a case where a
22 defendant of mine went through a second double
23 homicide trial, and there was a mistrial declared
24 because of a juror problem at the very end of the
25 trial; and there was a real, viable active issue as

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1 to whether or not a third trial should be allowed.
2 So an Article 78 proceeding was necessary. Well, in
3 this state when you bring an Article 78 proceeding it
4 doesn't matter if you're indigent or not; you have to
5 come up with \$250 for a filing fee, and if you don't
6 come up with it you don't have access to the court.
7 So I paid that out of my own pocket because it was
8 necessary, and that's not reimbursable. The court in
9 this jurisdiction has recently decided that.

10 I have some other special difficulties as it
11 relates to assigned counsel work. I have a son who,
12 God willing, will want to go to college someday, and
13 I'm faced with the difficulty of explaining to him
14 why he gets to go to a state school when his friends,
15 the friends that he has of other professionals, get
16 to go to private colleges or any college of their
17 choice. I have the difficulty of explaining to my
18 wife when a voucher gets cut why it is that we're not
19 even making \$25 dollars an hour for out-of-court time
20 or \$40 dollars an hour for in-court time on this
21 particular case and why it is maybe we should put off
22 that vacation that she had planned.

23 So yes, I have some difficulties. I have
24 some difficulties when a judge who as far as I'm
25 aware hasn't had their pay docked for any

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1 circumstance whatsoever cuts my voucher back to --
2 it's the rare case, but it happens -- to the assigned
3 counsel limit of \$1,200 on a serious felony case
4 where I billed two or three or four times that. I
5 have some difficulties with that, and it's difficult
6 to keep a practice going on that basis.

7 That is a circumstance that the Monroe County
8 Bar Association has regularly recognized. They
9 passed another resolution this year, as they do every
10 year, indicating that these assigned counsel rates
11 should be raised, that they're inappropriately low,
12 that the -- the bill that was previously introduced
13 was an appropriate one except insofar as it shifted
14 the obligation from the County to the State to pay
15 for these increased rates.

16 I don't think that there's any question that
17 members of the practicing bar and those who are in
18 touch with members of the practicing bar, the judges

19 before whom these cases are presented, are uniformly
20 of the feeling that in order to ensure -- to continue
21 to ensure a competent, effective counsel, that these
22 rates need to be increased.

23 MR. LEWIS: You talk a little bit about the
24 tension between providing quality representation and
25 the awareness of the overhead issue?

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1 MR. THOMPSON: Yes. I've heard a number of
2 people say, "You know, it doesn't matter to me
3 whether I'm assigned counsel or whether I'm retained
4 counsel. It doesn't make any difference as to the
5 quality of representation that I can provide." I say
6 that's hogwash. I think you'd like that to be the
7 case. I would hope that's the case in my cases; but
8 as a practical matter, as a real line bottom line
9 matter, you've got to keep the door open or you're
10 not going to be representing anybody. Is it possible
11 to expend more time on a case where you're receiving
12 \$150 an hour than on a case where you're receiving
13 \$25 an hour? Of course it is, and anybody who tells
14 you otherwise is not being honest with you. That's
15 simply the bottom line financial realities of it,
16 because in large part the counsel that accept these
17 assignments are either solo or small firm
18 practitioners, and they're close to the bottom line.
19 They know what the bottom line is. It's them. You
20 know, they're the franchise, and they've got to keep
21 the door open in large part, and if you're not
22 recognizing that I submit to you you're not in
23 business for a long time. So there has to be some
24 recognition of that.

25 Certainly there is a continual tension, I

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1 would characterize it as, with respect to the taking
2 of assigned cases and the paying of the bills when
3 assigned cases are taken. I have either the blessing
4 or the drawback of having my wife be my office
5 manager; so she handles the bills, and she lets me
6 know when we're getting close and when maybe we
7 hadn't ought to be taking an assigned case and we
8 ought to make room for some retained cases here.
9 I've made a conscious effort in my practice; although
10 I don't have to take assigned cases at this point, I
11 turn away retained cases to take assigned cases
12 because I think it's important, and that causes some
13 tension, sure it does, and it causes some concern
14 about the ability to remain financially viable. But
15 it's a tightrope that we all walk, those of us that

16 are committed to taking assigned cases.
17 MS. HATHAWAY: Well, yes, in part you
18 answered the question I was going to ask, is knowing
19 beforehand just what the rates are and that they
20 aren't adequate, why do you accept these cases, and
21 you answered that somewhat just now.
22 Do these assigned cases that you accept
23 actually keep your door open, and does your assigned
24 cases outweigh your private cases?
25 MR. THOMPSON: The first one is easy. The

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1 assigned cases that I take do not keep my door open.
2 But for the private cases I would not be in a
3 position to accept the number of assigned cases that
4 I do accept. The number of assigned cases I accept
5 is probably between -- it's at least a third of my
6 practice, and probably half of my practice.
7 Actually, if you consider the appellate work I'm sure
8 it's more than half of my practice. And that's a
9 conscious decision on my part to do that.
10 And knowing what the rates are beforehand why
11 do I take these cases? Because somebody has got to.
12 You know, if we're going to have a reasonable, civil
13 system of justice someone has got to do it. Why not
14 me? I mean, I'm qualified to do it. I've received
15 the training that's necessary to do it. Who better
16 than me to do it? And sure there are some sacrifices
17 involved in doing it, but I see other people ready,
18 willing, and able to make those sacrifices, and
19 because they're in it I'll do it, too. We have to
20 stand up for the system of justice that was the
21 reason that all of us got involved in the law in the
22 first place. You know, I'm not willing to
23 participate in a system of justice that doesn't
24 provide effective representation for folks who don't
25 have the money to retain a private attorney, and this

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1 is my way of doing something about it.
2 MS. HATHAWAY: Well, we certainly know
3 attorneys who are committed who come into public
4 interests always have been, and I guess you just have
5 to keep up the fight to try to reach a level. So I
6 didn't ask that question to be critical.
7 MR. THOMPSON: I understand. I don't have a
8 problem keeping up the fight myself; but I mean, I
9 should be clear that I'm not the only one that pays
10 the price. It's my family that pays the price. It's
11 others in my situation that pay the price.
12 MS. HATHAWAY: Thank you.
13 MR. GRADESS: I want to clarify for the

14 record something you said earlier. When you made
15 reference to the routine ignoring of caps both for
16 attorneys fees and for 722(c) of the County Law, what
17 jurisdiction were you specifically referring to?

18 MR. THOMPSON: That would be here in Monroe
19 County.

20 MR. GRADESS: Thank you.

21 Secondly, earlier this morning Justice Denman
22 testified to a period sometime back where the
23 Appellate Division, 4th Department, apparently made
24 it a practice to routinely cut appellate vouchers of
25 the lawyers who were assigned to cases. I wonder if

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1 you were doing appellate work during that period of
2 time?

3 MR. THOMPSON: I'm familiar with that period
4 of time, and I had that experience.

5 MR. GRADESS: I wonder if you could tell us a
6 little bit about it.

7 MR. THOMPSON: The experience I had was that
8 there was not a rational basis for the cutting of
9 vouchers, but rather that the vouchers were cut on a
10 percentage basis. I specifically remember a case I
11 had. I remember it because it happened to be the
12 most complex appeal case that I've ever done to this
13 point, and I do probably 50 percent of my work at the
14 appellate level. I remember that that voucher was
15 cut exactly by 20 percent of the voucher that I
16 submitted, and I remember a letter that I sent to
17 Justice Denman, knowing that I am only one of a
18 handful of private counsel who are willing to accept
19 these difficult appellate cases, in the case of a
20 conflict with the Public Defender's Office, saying in
21 essence, if this is going to be the practice of this
22 Court then take me off your list. I'm no longer
23 willing to accept assignments where the vouchers are
24 cut without any apparent scrutiny for the basis of
25 the bill that's submitted and simply on a percentage

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1 basis; and I specifically asked in that letter, as a
2 matter of fact, whether this was a reflection of the
3 Court's opinion of my advocacy in this particular
4 case, if maybe I had slipped a little bit and I could
5 justify it in that manner, or if there was any other
6 apparent basis that would result in a cut in this
7 particular case of exactly 20 percent.

8 The bottom line and the end result of that is
9 that the voucher was restored, and I'm still on the
10 appellate assignment list. I think very quickly what
11 happened in that case was a number of other attorneys

12 took the position that I took. They're simply not
13 going to be accepting random and arbitrary cuts of
14 the vouchers because of State budgetary concerns or
15 anything else, and that practice was quickly
16 eliminated. I haven't seen that taking place
17 recently.

18 MR. GRADESS: Thank you. On the Article 78
19 that you mentioned that cost you \$250 out of your own
20 pocket, did you submit the cost of that on your
21 assigned counsel voucher?

22 MR. THOMPSON: Actually, what we did is we
23 litigated whether or not that \$250 was reimbursable
24 in the course of the Article 78 proceeding, and we
25 litigated the fact that if you're an indigent person

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1 in this State you have to pay \$250 before you could
2 even file papers with the court. We litigated the
3 fact that, that denies indigent persons access to
4 Article 78 proceedings, and the 4th Department here
5 in this area of the State held, A, that that is
6 sustainable, that even though you are indigent you
7 must file the \$250 filing fee; and, B, if you're able
8 to file the \$250 filing fee then you're no longer
9 indigent. Therefore, you're not entitled to have the
10 \$250 reimbursed to you. The name of that case, for
11 the record, happens to be Mikel v. Relin & Connell.
12 That was my case, and I litigated it up to the Court
13 of Appeals, and we lost on those specific grounds.

14 MR. GRADESS: Thank you. Does your practice
15 take you on assigned cases to the Court of Appeals?

16 MR. THOMPSON: It does. I went to the Court
17 of Appeals -- it seems like a year ago, but it was
18 last week; and I've been to the Court of Appeals, I
19 would estimate, eight times for argument. That might
20 be a little high. Maybe seven times. I'm not
21 exactly sure because I don't keep count.

22 You know, the funny thing for me was -- I can
23 relate this to you. I went to the Court of Appeals
24 this last time for the County Court Judge on the case
25 I mentioned earlier where I was making \$150 an hour

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1 for representation, and my wife/office manager put
2 that bill into our computer system and calculated it
3 up at the court-assigned rate. So I had an
4 opportunity to notice the different between the
5 court-assigned rate for an appeal where,
6 overwhelmingly speaking, my clients are in prison and
7 have been there for some time and will be there for
8 some time longer if I'm not successful, and an appeal
9 where we're talking about a civil legal issue that

10 has no relation to incarceration.

11 MR. GRADESS: We would appreciate you sharing
12 those figures with us if you would care to do that.

13 MR. THOMPSON: Let's see, right off the top
14 of my head I can tell you that for -- at the rate
15 that I was assigned for the Judge, I made -- and this
16 isn't down to the penny, but I made \$2,250 for a day
17 of work; going to the Court of Appeals, arguing at
18 the Court of Appeals, coming back. And I'll have --
19 forgive me, I'll have to do the math. I don't recall
20 the -- but let me do it just quickly because I don't
21 recall looking at the voucher -- the lower voucher.
22 Let me just do that.

23 (There was a pause in the proceeding.)

24 MR. THOMPSON: The rate at the regular
25 assigned rate would have been \$600.

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1 MR. GRADESS: We heard testimony in New York
2 last week from lawyers who were held to the cap in
3 the Court of Appeals on indigent assignments. I
4 wonder if that has been your experience?

5 MR. THOMPSON: I have had that happen, and I
6 believe that from my experience to be the rule. In
7 my particular case, I have to tell you, it hasn't
8 been a particular hardship because I've normally done
9 the Appellate Division work already which largely
10 covers the Court of Appeals work. However, I have
11 spoken to other attorneys who, for example, recently
12 have been assigned by the Court of Appeals to a case
13 that they had not done the Appellate Division work
14 on; and in that case the cap is a substantial
15 hardship, and that's clear. I talked to an attorney
16 from the Syracuse area recently, for example, who was
17 assigned by the Court of Appeals on an interesting
18 capital issue, and his -- the voucher that he was
19 compensated for was roughly one-third of the voucher
20 that he had submitted because of the cap. And it
21 seems to be the experience that the Court of Appeals
22 does hold stringently to the cap that's imposed.

23 MR. GRADESS: Thank you. And finally one
24 last question. I wasn't clear on what you were
25 saying about the shift to the State of the increased

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1 cost of assigned counsel if the fees were raised.
2 Did you make a point about that?

3 MR. THOMPSON: The proposal as I understood
4 it was that rather than having the County solely
5 responsible for the assigned counsel rates, that
6 under the increase that was proposed the State would
7 be responsible for a portion of that increase. And

8 the County would be responsible for only a -- and I
9 don't recall exactly what the percentages of those
10 were. But I think the danger in that type of a
11 system is that it potentially encourages the
12 elimination of cost-effective and otherwise legally
13 effective public defender's offices simply because of

14 the funding issues, which here in Monroe County we're
15 blessed with, I think, one of the finest public
16 defenders offices in the State. They do a wonderful
17 job, and anything that would impact either directly
18 or indirectly, such as by budgetary means on the
19 elimination of that office, I think should be
20 scrutinized very carefully, and I think is a very
21 dangerous proposition.

22 MR. GRADESS: I see. Thank you very much,
23 Mr. Thompson.

24 MR. THOMPSON: Thank you.

25 MR. GRADESS: Gary Horton?

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1 MR. HORTON: Thank you. My name is Gary
2 Horton. I'm from Genesee County. I have been
3 involved in public defense in one form or another
4 throughout all of the 22 years I've been practicing
5 law. I've been a member of assigned counsel panels,
6 I have administrated assigned counsel panels in
7 Genesee County. I have been a part-time attorney in
8 the Public Defender's Office in Genesee County. I am
9 currently public defender for Genesee County, a
10 position I've held since 1991, and for about a year
11 have held that position full time. So I think I have
12 a perspective of public defense in smaller counties
13 that I would like to talk to you about this
14 afternoon.

15 I've enjoyed a good working relationship with
16 County legislators and County managers during my
17 tenure, and I feel that Genesee County government has
18 made a real commitment to providing public defense,
19 but despite that commitment, all county government is
20 faced with providing more mandated services with
21 limited resources; and at the same time public
22 defender's offices, both large and small, are
23 experiencing increasing case loads without sufficient
24 staff to keep pace.

25 The staff of the Public Defender's Office in

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1 Genesee County currently consists of five attorneys,
2 including myself, two of whom are full time and three
3 part time. We have a full-time person who serves
4 both as an investigator and social worker and two

5 full-time secretaries. One attorney is assigned
6 exclusively to Family Court matters, and the criminal
7 case load is handled by two full-time and two
8 part-time attorneys. What that staff handles, I
9 think, represents between 65 and 75 percent of the
10 criminal cases brought in Genesee County. By
11 comparison, the District Attorney's office is staffed
12 by four full-time attorneys and two part-time
13 attorneys and a larger support staff.

14 During calendar year 1997, we had 1,800
15 people referred to our office for representation,
16 both from the criminal courts and the Family Court.
17 The office represented 1,268 clients in criminal
18 cases and 295 clients in Family Court, an average of
19 approximately 30 -- I'm sorry, 300 clients per
20 attorney. Felony offenses represent approximately 25
21 percent of the criminal case load. This case load
22 exceeds standards set for public defense programs and
23 greatly exceeds the case load of the average attorney
24 in private practice.

25 It is necessary for public defense attorneys

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1 to be efficient and knowledgeable and to have the
2 tools to adequately represent our clients. This
3 includes the access to experts, training, the ability
4 to adequately investigate and prepare cases, the
5 ability to accurately report to the courts the risk
6 level of our clients for purposes of bail and
7 sentencing issues.

8 It has been my experience that successful
9 public defense involves much more than courtroom
10 representation of the client. Although zealous
11 advocacy is the keystone of quality representation,
12 our clients come to us with a myriad of problems in
13 addition to the criminal charges they face. Alcohol
14 and substance abuse, mental health issues, family
15 relationships, employment, educational and housing
16 needs are all issues that either are contributing to
17 our clients being before the criminal courts or
18 complicate the disposition of their cases.

19 Public defenders must have the means to be
20 able to recognize and address these problems for
21 their clients. In turn, if these problems are
22 successfully addressed by our clients their risk of
23 re-offending can be reduced dramatically and as a
24 result the overall crime rate can be reduced.

25 There should not be a public defender's

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1 office in this State without a social worker on staff
2 to assess client needs and refer clients to

3 appropriate agencies or treatment, but it is my
4 feeling that there are many such offices. In this
5 sense the most compelling problem we face is alcohol
6 and substance abuse. For a number of years we have
7 been waging in this country what has been styled as a
8 war on drugs. That war has been singularly
9 unsuccessful. Substance abuse is a problem that
10 reaches into every city and town and village across
11 our state. Substance abuse strikes at all levels of
12 our society respecting neither gender, race, nor
13 economic status. The cost of substance abuse are
14 phenomenal both in terms of shattered lives,
15 shattered families, and the economic costs.

16 Based on my experience I have come to know
17 that a large percentage of property crimes are
18 committed by substance abusers and are driven by
19 their addiction. That incarcerating a substance
20 abuser does not deter future abuse and therefore does
21 not deter the substance abuser from re-offending; but
22 on the other hand, treatment programs are effective
23 and can lead to abstinence, which in turn can prevent
24 future offenses.

25 From studies we know that by direct

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1 comparison treatment is less costly than
2 incarceration. When translated into reduced
3 recidivism and economic loss not sustained from
4 future crimes not committed, treatment is much less
5 costly than incarceration.

6 If we can successfully treat addicted
7 individuals who commit nonviolent crimes to support
8 their addiction, we can put a stop to at least a
9 portion of the revolving door that engenders so much
10 criticism for the criminal justice system. We can
11 get people out of the system and back to a productive
12 lifestyle. We can mend families and then lives.

13 The public defense community needs tools for
14 this to happen. We need drug courts in every county
15 across the State. Drug court diversion programs have
16 proved enormously successful wherever they've been
17 implemented. A drug court model which provides
18 immediate sanctions for offenders who violate
19 treatment agreements and immediate positive
20 reinforcement for those in compliance has experienced
21 a much higher successful completion of treatment rate
22 than other forms of court ordered treatment, and much
23 lower recidivism rates.

24 We need legislation requiring the courts to
25 make finding on the record in every case at the time

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1 of sentencing as to whether the defendant has
2 treatment needs. By regular this type of finding
3 treatment needs can be identified and addressed in
4 every sentencing. We need viable treatment programs
5 at all treatment levels; outpatient, inpatient, and
6 long-term residential placements, which are readily
7 available; readily available in the sense of existing
8 programs, in the sense of good working relationship
9 between the public defense and treatment agencies and
10 in the sense of open avenues to secure the cost of
11 treatment for indigent clients. We need public
12 awareness of the true nature of the problem and the
13 viability of treatment for nonviolent offenders.

14 We need objective risk and level of service
15 assessments of established reliability which will be
16 accepted by the courts. Jail space, probation
17 officer case loads treatment facilities and other
18 alternatives for incarceration are all limited
19 resources. If we are truly committed to changing
20 people's lives rather than merely processing cases
21 through the system, these are the tools the public
22 defense programs small as well as large need to have
23 at their disposal.

24 In light of limited resources it is extremely
25 important that those resources are utilized for

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1 appropriate clients. In order to maintain the
2 credibility of public defense programs it is
3 necessary that we identify the level of service
4 needed by the individual client and the individual's
5 risk of failure in a particular level of service. In
6 order to assess an individual client's need for
7 services, risk of recidivism, and amenability to
8 supervision in a community-based sentence is
9 necessary to have a reliable, nonsubjective means of
10 measuring those factors.

11 Reliability is important both in the
12 appropriate use of limited resources and the
13 appropriate levels of supervision to provide safety
14 for the community. A nonsubjective method of
15 measuring these factors is important to the
16 credibility of recommendations to the court, both
17 with regard to sentencing and pretrial release
18 programs.

19 I recently represented a young man who was
20 facing his fourth DWI charge, his second felony DWI.
21 This client by all expectations would be sentenced to
22 a state prison sentence if convicted. My judge
23 basically told me that up front. My problem in
24 representing him was my knowledge that for the first
25 time in his life he had made a commitment to

1 treatment and sobriety, that he had successfully
2 completed an inpatient and halfway house treatment
3 regimen and had been sober for nine months and had
4 turned his life around. I needed the means to
5 convince the sentencing judge that his risk of
6 re-offending was much lower than prior to treatment
7 and that he was a good risk for community-based
8 probation sentence. To accomplish this, I had to
9 have a forensic psychologist perform a risk
10 assessment evaluation at a cost of \$750.

11 It is tragic that this type of presentation
12 to the court should be an extraordinary measure.
13 This is information which should be available to the
14 courts whenever the court faces a difficult
15 sentencing issue so that extensive resources are not
16 misused and the incarceration are reserved for those
17 who truly represent a risk to the community and that
18 the client's true situation is objectively presented
19 to the court.

20 My entire budget, however, covering all the
21 aspects of my program, personnel, office expense,
22 contractual and training, averages to a cost of
23 slightly more than \$200 per client. So I can't do
24 this for every client. With that type of budgetary
25 restriction, the extras which are really necessities

1 cannot be accomplished.

2 The District Attorney's office in my county
3 is better staffed than funded in my office because
4 part of their budget comes from grants for various
5 criminal initiatives paid for by the State, such as
6 domestic violence programs. Prosecution initiatives
7 which are funded -- which fund expanded prosecution
8 without funding an appropriate defense ability to
9 respond operate to unbalance our system. When
10 unbalance is built into the system, the ability of
11 public defense programs to adequately represent our
12 clients suffers, and as a result our society as a
13 whole suffers from a criminal justice system that has
14 to decide the fate of individuals without the benefit
15 of sufficient representation.

16 All public defender programs ask is for a
17 level playing field, the means to represent our
18 clients adequately. We ask for the tools to try to
19 effectuate change in our clients' lives and
20 consequently in society as a whole. Thank you.

21 MS. BANKS: When I discuss with legislators
22 the whole question of community sanctions, drug
23 treatment, and so on, one of the frequent replies
24 is -- and I'm talking in terms of the nonviolent

25 felony offenders -- the frequent reply is, the

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1 designation nonviolent felony offenders is bogus
2 because most cases are pled down to nonviolent felony

3 offenses. How would you answer that?

4 MR. HORTON: I have been -- and it may be
5 obvious from my remarks -- I have been studying the
6 possibility of a drug court in my county very closely
7 and have been trying to implement that. And I think
8 that's a false perception because in negotiating the
9 parameters of a program, what is looked at is
10 excluding people who are arrested for violent felony
11 offenses. Not complete --

12 MS. BANKS: Would we know that they're -- I'm
13 a layperson. Would I know that they haven't pled it
14 down? Would I know their original arrest?

15 MR. HORTON: What I'm trying to indicate is
16 that a person who was originally arrested for a
17 violent felony offense would not be eligible for a
18 drug court program.

19 MR. LEWIS: Also, the concept of a nonviolent
20 offense is a legal term that imposes -- or a violent
21 offense imposes restrictions on a DA's capability
22 even to plead it down. So on two levels it may be
23 specious.

24 MR. HORTON: That's correct.

25 MS. BANKS: Thank you.

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1 MR. GRADESS: Let me try to ask you to put
2 into context, what was your -- you don't have a drug
3 court at the moment; is that correct?

4 MR. HORTON: We do not.

5 MR. GRADESS: Could you for the record tell
6 us what you anticipate that would look like or what
7 you would like to see in it?

8 MR. HORTON: What I would like see is a --
9 programmatically, we need a full time drug court
10 coordinator, a person to stand as, if you will, a
11 conduit between the courts and the treatment
12 agencies. Obviously, that requires funding. It
13 requires some secretarial staff and some
14 recordkeeping. But as far as the outlines of the
15 court itself, I would anticipate that eligible
16 offenders, if they entered into the treatment
17 contract, would be in a regimen of treatment that
18 could last probably no less than six months, more
19 commonly a year, and to graduate, if you will, from
20 the drug court program they would have to complete
21 all their treatment requirements, would have to be

22 employed, and there would also be an educational
23 component -- GED program if they did not have a high
24 school diploma. Obviously what they're looking at
25 there is putting a person in the position to enter

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1 back into the community and not back into the
2 revolving door of committing more -- most commonly
3 property crimes.

4 The procedural aspect is normally a person
5 will, if charged with a property misdemeanor, would
6 expect at the other end through this diversion
7 process, perhaps -- certainly not have a criminal
8 conviction out of their arrest; either having a
9 violation conviction or perhaps a dismissal of the
10 charges. Felony-level persons who enter into the
11 program could expect to have their charge quite
12 possibly reduced to a misdemeanor with no further
13 supervision, presuming they go through this year
14 successfully and complete the drug court program.

15 I don't know if that answers your question.

16 MR. GRADESS: No, it does.

17 I wonder if you could amplify something else
18 you said. When you made the statement that there
19 should not be a public defender office without a
20 social worker, I wonder if you could amplify your
21 thinking on that?

22 MR. HORTON: My thinking is that our clients
23 come to us as whole people, and they do have a number
24 of needs that need to be addressed that do impact on
25 their situation in court. Attorneys in public

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1 defense are busy enough handling the issues that
2 arise in court and unable to adequately address some
3 of these other issues, and I speak from experience.
4 I speak from experience both as prior to becoming
5 public defender and after becoming public defender in
6 a county where I have to carry a full case load, I do
7 not have the time to do for my clients with treatment
8 referrals and assistance with Medicaid applications
9 and housing referrals what my social worker can do
10 for them; and I speak from a period where we did not
11 have a social worker.

12 MR. GRADESS: Lastly, this use of a forensic
13 psychologist that you referred to as extraordinary in
14 your office, how many times a year would you say
15 you're in a position to have that kind of examination
16 made of a client?

17 MR. HORTON: What I was trying to indicate
18 was extraordinary. We often use psychologists, and

19 we have a budget for psychologists and other experts
20 for purposes of competency determinations, other
21 psychological issues. To have to use a
22 psychologist -- a Ph.D. psychologist to obtain a risk
23 assessment or level service assessment I think is
24 extraordinary, but that's where I had to go to get it
25 done because I don't have anybody trained in my

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1 county, or even better within my office to do that;
2 and it doesn't require a Ph.D. or a psychologist. It
3 could be done on a bachelor's or master's level.

4 MR. LEWIS: As things -- is it your
5 experience that things are becoming more specialized
6 and complex in the area of experts?

7 MR. HORTON: Somewhat. I think there are
8 more levels of expertise that are being recognized by
9 the courts.

10 MR. LEWIS: Does that reflect in what's
11 charged by those experts as needed in cases?

12 MR. HORTON: It's -- yes, it's certainly
13 reflected in -- and certainly I feel sympathy when I
14 think of assigned counsel who are laboring at 25 and
15 \$40 per hour, and an expert is being paid if not
16 twice, three times that to appear and testify.

17 MR. LEWIS: Last, do you have an opinion
18 about the judge in effect controlling whether or not
19 the expert is available to the assigned counsel as
20 opposed to you in your position?

21 MR. HORTON: My general experience has been
22 if there is a need for an expert, a panel attorney
23 can get an expert; and when I say "get an expert,"
24 get an order from the judge saying yes, you can go
25 out and buy him -- or retain an expert. The question

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1 becomes whether or not the judge will approve a fee
2 over the limit and whether you can get an expert for
3 that fee, and that becomes a more difficult question.

4 MR. LEWIS: Thank you.

5 MS. HATHAWAY: If you were to be able to
6 realize your dream of getting a program set up for
7 the substance abuse and alcohol abuse, I just have
8 one suggestion. This is from 23 years of experience
9 in that area. Six months would not be enough no
10 matter who the individual is; and then maybe from 12
11 months, 18 to 24 months, depending on the individual
12 and their problem and the other aspects that your
13 program would be able to assist on that. But six to
14 eight -- 30 days to six months would definitely not
15 be enough.

16 MR. HORTON: I certainly understand that, and

17 that's why I indicated at least a year, and with the
18 positive reinforcement from regular appearances in
19 front of the court.

20 MS. HATHAWAY: Thank you.

21 MR. GRADESS: I think we need to take a
22 five-minute break if we could.

23 (The proceeding was recessed at 1:05 p.m.)

24 (The proceeding was resumed at 1:10 p.m.)

25 MR. GRADESS: Mr. Phillip Hurwitz.

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1 MR. HURWITZ: Good afternoon. My name is
2 Phil Hurwitz. I'm a sole practicing attorney here in
3 Rochester, and I accept assigned counsel cases. The
4 cases I accept include criminal and Family Court
5 matters, and I also accept assigned appeals.

6 As a sole practitioner I must constantly
7 watch my bottom line. The assigned clientele I
8 represent are of modest means or impoverished. As a
9 consequence I cannot afford to invest the money
10 required to access on-line legal resources such as
11 WestLaw.

12 While an appellate law library is available
13 here in Rochester, it takes time and money to leave
14 my desk, park my car, and do my legal research away
15 from the office. Time is a precious commodity that
16 cannot always be found if I have to go to the court
17 library whenever I need to look something up.
18 Researching issues important to my client cannot
19 always be limited to library hours.

20 The mechanic I go to, to fix my car charges
21 50 bucks an hour, a plumber even more. While these
22 are honorable professions and fulfill a need, being a
23 lawyer representing a child who is the subject of a
24 custody dispute or a lady accused of a felony is of a
25 greater magnitude given the stakes involved. Don't

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1 misunderstand my position. I understand that by
2 agreeing to accept assigned counsel cases I am
3 agreeing to work for less than I would if the client
4 had been privately retained. Yet given the increased
5 financial demands required of all attorneys, an
6 increase in the hourly rate paid assigned counsel has
7 become a necessity.

8 As you are well aware, I am now required to
9 take 24 credit hours of continuing legal education
10 every two years in order to maintain my license to
11 practice law. This is now in addition to the \$300 I
12 must pay the State every two years to also remain
13 licensed.

14 Continued failure of the legislature to pass

15 legislation increasing assigned counsel compensation
16 may wind up costing the tax payers more than
17 anticipated. Refusing to increase assigned counsel
18 rates acts as a disincentive to private attorneys to
19 accept assignments. This in turn restricts the pool
20 of attorneys willing to accept such assignments.
21 This restriction is amplified if neither legal aid
22 nor the public defender can represent an individual
23 due to a conflict of interest.
24 Shadowing this concern is a requirement of
25 the State to provide legal representation to those

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1 unable to afford an attorney when life, liberty or
2 property or a property right is at stake. The day
3 may come when the State may yet need to create a
4 bureaucracy to ensure it fulfills its obligations.
5 The willingness of private practitioners such as
6 myself prevents that possibility from becoming a
7 reality.
8 MR. GRADESS: Let me just -- two quick
9 questions for you if I might. You mentioned that you
10 do assigned counsel appeals.
11 MR. HURWITZ: Yes.
12 MR. GRADESS: I wonder -- Justice Denman
13 earlier today testified to a period of time when the
14 Appellate Division cut assigned counsel vouchers. I
15 wonder if that is in your experience still the case
16 in the 4th Department, or whether you were part of
17 it, experienced it earlier or --
18 MR. HURWITZ: That's not been my experience.
19 MR. GRADESS: Has not been.
20 The second question I have, earlier a witness
21 testified in series of civil cases in the State and
22 bond counsel cases and agency payments and under the
23 Public Officers Law there are lawyers making between
24 150 and \$250 an hour routinely for the representation
25 of public officials. There was a witness here who

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1 represented a judge at \$150 an hour. So I'm curious,
2 where does it come from in your own mind that you
3 made an agreement to take less than you would if
4 privately retained representing poor people? Where
5 does it come from?
6 MR. HURWITZ: To gain experience as a
7 criminal defense attorney is the reason why I accept
8 these cases. The middle class, as a general rule,
9 doesn't commit many of the street crimes in our
10 community. It's the poor and impoverished; and as a
11 result that tests the limits of the law, and it
12 affords me an opportunity to hone my craft as a

13 defense attorney, and as a result that's why I take
14 assigned counsel. It's really a pragmatic --
15 practical reason for doing that.

16 MR. GRADESS: I see.
17 Question?

18 MS. HATHAWAY: No.

19 MR. GRADESS: Thank you very much.

20 So we'll adjourn now until 1:45.

21 (The proceeding was recessed at 1:18 p.m.)

22 (The proceeding was resumed at 1:50 p.m.)

23 MR. GRADESS: Richard Rich?

24 MR. RICH: Yes.

25 MR. GRADESS: Good afternoon.

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1 MR. RICH: Good afternoon. My name is
2 Richard Rich, and I am the Chemung County Public
3 Defender. Chemung County is in the southern tier of
4 New York approximately two hours south of here.
5 Elmira is the county seat.

6 The Chemung County Public Defender's Office
7 is essentially part of the executive branch of county
8 government. We provide legal representation to
9 criminal defendants who cannot afford their own
10 counsel. Our office represents 75 and 80 percent of
11 all criminal defendants in Chemung County, and the
12 office consists of the chief defender, which is
13 myself; I'm classified as part time, although for
14 budget year 1999 that should become full time. I
15 have one full-time assistant and four part-time
16 assistant public defenders. We additionally have one
17 full time investigator and two secretaries. That is
18 essentially what our office is comprised of.

19 The busiest court in Chemung County is Elmira
20 City Court. We handle over -- just over a thousand
21 cases a year in that court, and we only have one
22 attorney that we can devote to it who handles all
23 those cases, which is well above any reasonable
24 standards. That attorney that handles all the cases
25 in Elmira City Court additionally handles three

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1 justice courts at night, which probably amounts to
2 another 200 cases a year that he will be handling.
3 Our part-time staff is divided into persons handling
4 misdemeanor level cases and persons handling
5 felonies. Our two misdemeanor level attorneys handle
6 justice courts at night. They work approximately 20
7 hours per week, but only paid for approximately 10.

8 At the felony level we have two part-time
9 assistant public defenders. They each handle about
10 65 felony level cases per year. In addition, they're

11 responsible for appellate level work, probably each
12 handling six to seven appeals per year.

13 Lastly, there is me. As the chief defender I
14 handle approximately 75 indictments per year, two
15 justice courts at night, and I'm also responsible for
16 the day-to-day operation of the office. That is
17 still considered a part-time job within our county.

18 Our office is faced with many problems, most
19 of which are the direct result of or are compounded
20 by our -- the inadequate funding that we receive,
21 limited staff, low salaries, inadequate training and
22 resources all kind of work together to impair the
23 quality of service that we're able to offer to our
24 clients who are desperately seeking to improve that.

25 In terms of staffing, there's a gross

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1 disparity between the staffing levels of our County
2 District Attorney's office and the staffing at our
3 office. As I indicated, our office consists of one,
4 perhaps two full-time attorneys and four part-time
5 attorneys. In contrast the County District
6 Attorney's office consists of a full-time district
7 attorney, a full-time chief assistant district
8 attorney, four full-time assistant district
9 attorneys, and five part-time attorneys. They also
10 have a much larger secretarial staff and two
11 full-time investigators compared to ours.

12 Over the past two years the DA's Office has
13 added two full-time lawyers and part-time lawyers.
14 Our office has not kept pace, and our budget
15 represents less than a quarter of the District
16 Attorney's budget. That's just what's paid by the
17 County. The District Attorney also receives grants
18 that we're not eligible for, making that disparity
19 even wider.

20 The salaries for our attorneys are very, very
21 low. My salary is less than 40 percent of the
22 District Attorney's salaries. The salaries for our
23 assistant public defenders range from \$10,000 a year
24 to \$19,000 at the high end. Only one of our
25 assistant -- only one of the part-time assistant

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1 public defenders receives health insurance benefits.
2 The other four do not. The person who does receive
3 health insurance benefits has been with the office
4 for 28 years.

5 In terms of resources, until very, very
6 recently our office has not been equipped with
7 computers, although when I became chief defender in
8 March, the County allowed me to bring two new

9 personal computers that immediately went on the desks
10 of our secretaries. They have budgeted for next year
11 two computers for the full-time attorneys within the
12 office, but the other attorneys are not provided with
13 computers or have access to them. This is extremely
14 detrimental in terms of our ability to do on-the-spot
15 research, to research issues quickly, or make use of
16 technology that's available to us.

17 Our training budget up until this past year
18 has been approximately \$1,000. This for an office of
19 six attorneys. A typical seminar that we would go to
20 would cost anywhere from 150 to several thousand
21 dollars. That becomes virtually impossible with our
22 limited training budget. Again, this year the County
23 as allocated quite a bit more money, and assuming our
24 budget is approved, we're looking at an increase to
25 approximately \$7,000, which would be very welcome for

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1 us.

2 This in contrast with the District Attorney's
3 Office. Each year each of their attorneys is allowed
4 substantially more training than ours. They
5 routinely send their attorneys away to week-long
6 seminars. Our County District Attorney chairs the
7 State District Attorney's Commission on DNA evidence,
8 and there's patent gross disparity in the amount of
9 resources and training available on scientific and
10 forensic issues. We're having a very difficult time
11 competing; and again, hopefully our increased
12 training budget will help with that.

13 Our case loads are growing every year.
14 Despite the national trend towards lowering crime
15 rates, the crime rate in Chemung County has increased
16 steadily over the past few years. This is due to a
17 number of factors. The war on drugs has given us
18 many, many, more clients. There's been a tremendous
19 increase in the amount of persons in state prison.
20 In Chemung County the largest employer in the County
21 is the Department of Corrections. We house two
22 maximum security jails, and the number of crimes
23 involving inmates has risen dramatically over the
24 past several years. This makes our office very, very
25 busy.

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1 Morale is a very significant problem for our
2 attorneys. As a result of extraordinarily high case
3 loads, no health insurance benefits, and low
4 salaries, we have a difficult time keeping attorneys
5 on staff. The attorneys that we do have are
6 frequently disgruntled; and again, this is something

7 we need to improve.
8 In my opinion the only thing that's going to
9 improve this is increased funding. We need to
10 increase our attorney's salaries. We need to provide
11 health insurance benefits to our part-timers or hire
12 full-timers only, which would be another option; but
13 again, that would involve quite a bit more money. So
14 without more money we're in rough shape.

15 As bleak as that picture is, we're probably
16 in significantly better shape than the other counties
17 that adjoin ours. Counties such as Steuben, Schuyler
18 and Tioga probably have smaller offices than we do
19 with less administration than we're able to offer.

20 My experience in speaking with other public
21 defenders around the country and going to convenings
22 such as this, it seems like statewide standards must
23 be imposed. As I believe somebody testified here
24 earlier, here in Rochester you benefit from an
25 excellent Public Defender's Office. They've been

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1 well organized for years. Funding is much more
2 appropriate in this county, and you're able to
3 provide indigent poor with a much better service than
4 I'm able to in Chemung County. But unless the State
5 takes an active role in providing standards or
6 possibly administering indigent defense services on a
7 statewide level, this problem probably will not go
8 away, and you'll see a gross disparity in the level
9 of quality representation in smaller rural counties
10 such as mine when contrasted with counties such as
11 Monroe. Thank you.

12 MS. HATHAWAY: Yes, a couple of questions.
13 How does your office -- how is your office able to
14 obtain the data to compare for use for the
15 comparisons with the District Attorney's Office?

16 MR. RICH: Most of that information is public
17 record. All I really need to do is call the county
18 budget officer, and I can be provided that kind of
19 information quite easily. I also frequently contact
20 the State Defenders Association which has a pretty
21 good data bank on that type information, as well.

22 MS. HATHAWAY: I can understand that the
23 attorneys would be low spirited in morale and be
24 disgruntled; but are they able to handle this
25 disgruntledness so that it doesn't spill over into

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1 their work where the clients are concerned?

2 MR. RICH: I think it doesn't. We have
3 excellent attorneys in our office, and they're very,
4 very dedicated. I don't think the level of

5 dissatisfaction shows in court; but privately or in
6 office conferences, et cetera, it's very, very
7 apparent, and as the administrator for the office I'm
8 constantly looking for potential new attorneys
9 because my existing lawyers are constantly telling
10 me, you know, "If I ever make enough money I'm
11 leaving."

12 MS. HATHAWAY: At least they're willing to
13 leave. And one other I thing. What issues would you
14 like for this panel to consider for your office and
15 for the County? What is it that you would look for
16 to come out of this panel?

17 MR. RICH: I would hope that more public
18 money is devoted to indigent defense. I would also
19 like to see the State as opposed to the counties bear
20 some responsibility for indigent defense. As long as
21 we leave the cost and the responsibility to the
22 counties to provide representation for the poor in
23 places such as Chemung County or the southern tier in
24 general, the quality of our representation just will
25 not be as good as it should be. There's not enough

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1 local money to fund necessary things such as a proper
2 public defender program.

3 MS. JONES: You said there was an attorney --
4 one of your attorneys has had to handle a thousand
5 cases in a year?

6 MR. RICH: That's basically correct. All
7 misdemeanor level offenses, but yes.

8 MS. JONES: That's a lot of cases. How many
9 hours could he possibly give?

10 MR. RICH: He's working about 60 hours per
11 week and paid for 37. I try to back up him as much
12 as possible, but I'm in court myself. I'm handling a
13 much higher than average felony level load. So it's
14 a huge problem.

15 MS. JONES: I would think it might impact the
16 quality of the service a lot.

17 MR. RICH: Unfortunately it does. To bring
18 back Mr. Horton's point from, I guess, a couple
19 speakers earlier, he indicated he didn't feel any
20 public defender's office could function without a
21 social worker. Again, that's something we're in
22 terrible need of. I recently wrote a grant
23 application hoping we could get some Federal funding
24 to hire a social worker ourselves. I don't know what
25 the status of my application is or if it will be

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1 approved; but yes, we certainly need more than what
2 we have.

3 MS. JONES: Thank you.
4 MR. GRADESS: I wonder, Mr. Rich, if you
5 could do one thing, if you could sort of use a stream
6 of consciousness to answer this question that's okay,
7 or any other way you want to answer it. Sort of run
8 through the litany of what it is you'd like to be
9 doing in cases that you simply can't. Are there
10 routine things you have to forego because of this
11 case load? Are there things you can't accomplish
12 because of the finances? You characterize that very
13 well, but I wonder if you could sort of give us the
14 effect.
15 MR. RICH: Sure. The single thing that we
16 would like to do most is spend more time with our
17 clients. Because each attorney is assigned to so
18 many and because the hours in the day are limited, we
19 don't get enough time to make our clients
20 comfortable, to fully understand the background that
21 they come from, to fully understand their version of
22 the facts in certain cases.
23 I believe we have enough time to adequately
24 research the law. I think all of our attorneys
25 are -- have recently submitted excellent memoranda in

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1 legal research product, but we don't have enough time
2 to return every phone call that comes into the
3 office. That's a tremendous problem. We don't have
4 enough time just making our clients comfortable. And
5 part of the end result is that even in clients who do
6 get a good result, they don't realize it because
7 their attorney did not have enough time to establish
8 a positive relationship with them. That leads to
9 many, many of our clients feeling that they were
10 treated unfairly, when in certain circumstances they
11 weren't, just because their attorney didn't have
12 enough time to spend with them, make them comfortable
13 with the process and let them understand what
14 actually did happen.

15 MR. GRADESS: We had testimony earlier today
16 from an administrator from Livingston County who
17 indicated, if I understand correctly his testimony,
18 that he is not fully reimbursed for the cases arising
19 in the prisons in his county. Could you address --
20 you have in your jurisdiction Southport Correctional
21 Facility and Elmira?

22 MR. RICH: Correct. Our County vigorously
23 prosecutes crimes that were allegedly committed in
24 our two state prisons. Under 606 of the County Law
25 we're allowed to apply to the State for

1 reimbursement. Part of my earlier remarks were
2 saying that public defender services are a county
3 expense as opposed to a State expense. The one
4 exception -- or one of the exceptions to that rule is
5 in crimes that occur in the State facilities. In
6 those cases we do apply to the State for
7 reimbursement.

8 Now, I personally submit vouchers to our
9 County budget director who submits them again to the
10 State. My understanding is that we're only
11 reimbursed about 45 to \$50 per \$100 submitted, so
12 that we're not getting a dollar-for-dollar return on
13 what's spent there. That, again, is a cost to our
14 office.

15 MR. GRADESS: Now, if you could -- if we
16 don't have that in our office I wonder if you would
17 make a point of supplying that to Wendy, the
18 information concerning that reimbursement?

19 MR. RICH: Sure. I could get to that quite
20 easily.

21 MR. LEWIS: I'm curious about whether given
22 the staffing issues you're able to pursue
23 investigative leads and things like that, because
24 when you talk about understanding the client's
25 version of the facts, we know that the version of

1 facts is sometimes due to investigation. And I
2 wonder without taking a position on any particular
3 case whether your lawyers and yourself feel that you
4 are pursuing all the leads with the diligence that
5 you could given the situation?

6 MR. RICH: We absolutely try our best, and we
7 do luckily have a full-time investigator. I
8 certainly can only speak for my own case load, but I
9 investigate any lead that I see, and I'm pretty sure
10 our assistant public defenders do the same. If we
11 had more time to spend with our clients we probably
12 would uncover things that we're not uncovering now;
13 but, you know, again, we certainly do our best in
14 that respect.

15 MS. BANKS: Since you are one of the few who
16 mentioned state administration of the program, could

17 you elaborate on that a little bit?

18 MR. RICH: Sure. Under the County Law, I
19 believe it's section 18(a) or (b) of the County Law,
20 the cost of providing legal representation to the
21 poor rests on the counties, not on the states. New
22 York has, I believe, 62 counties, and this is one of,
23 if not the most diverse states in the nation; so
24 you've got wide disparity between those counties in

25 terms of the resources that are allocated to indigent

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1 defense. Counties such as mine that are relatively
2 poor and rural are unable to put together a public
3 defender's office as good as what you have here in
4 Rochester; and there are smaller counties near where
5 I come from that are significantly worse than we are.
6 If there was -- if the program was administered
7 statewide as opposed to countywide, if there were
8 statewide standards, perhaps we would have regional
9 offices instead of county offices, but everybody
10 would receive largely the same quality of
11 representation. There wouldn't be a wide disparity
12 between County A and County B.

13 MS. BANKS: Thank you.

14 MR. RICH: Sure.

15 MR. GRADESS: Thank you very much, Mr. Rich.
16 Gary Muldoon?

17 MR. MULDOON: Good afternoon. I came here to
18 attack, but after the last person speaking I think I
19 should mute my criticisms and concerns. I practice
20 law largely in Monroe County, though not exclusively.
21 I handle matters in other state courts outside of
22 Monroe County, mostly the adjoining counties; and the
23 state of the law in Monroe County in some ways is
24 pretty good. I worked for five and-a-half years --
25 about a dozen years ago I worked for five and-a-half

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1 years with the Public Defender's Office in Monroe
2 County, and the Monroe County Public Defender's
3 Office, I think, has been the leader in quality
4 representation; that is not to say that it offers
5 superb representation at all times. I mean there is
6 always variances in the quality of attorneys in the
7 amount of work they can devote to one case. Even
8 back then when I was at the Public Defender's Office,
9 you know, it was 1980 to 1986, there was a heavy case
10 load, and no doubt, I'm quite certain that it has
11 increased significantly. But Monroe County Public
12 Defender's does offer high quality representation. I
13 think part of the reason is that the Public
14 Defender's Office here has full time public
15 defenders; and I think when you get into the
16 situation having part time public defenders you can
17 have serious problems, particular where you have part
18 time public defenders who are paid at the amounts
19 that the last speaker previously noted.

20 I have been practicing law now for 21 years,
21 17 of those years have been doing criminal law. I
22 think if we said fairly that I have a fair record of

23 representing indigents -- my first job was as a VISTA
24 volunteer. I've worked as a legal services attorney
25 on Long Island. I was an instructor and staff

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1 attorney at Cornell Legal Aid Clinic, again doing
2 civil work, Public Defender's Office in Monroe
3 County. I've held elective office in Rochester.
4 I've written a book that's used statewide on the
5 criminal process, published by West Publishing
6 Company. I've done assigned counsel work, and I'm
7 also for the past 12 years been in private practice
8 doing both assigned and retained. When I first got
9 out and was doing work on my own, probably 80 to 90
10 percent of that was assigned counsel. At present
11 it's probably 5 or 10 percent.

12 There is a lot of anomalies in the criminal
13 justice system, and if you want a subject from me to
14 talk about it must be potpourri, because there's a
15 few areas where I couldn't give very critical
16 testimony on how things are done in Monroe County and
17 in New York State. We have a situation where the
18 payment rate for attorneys is \$25 an hour out of
19 court, \$40 an hour in court. Well, to my mind when I
20 go into court I'm wasting my time. It's sit around
21 and wait. Sure, I just got done with a trial -- I
22 just got done with two trials where I was very
23 active; but often what you're doing in court is
24 waiting around. When I am out of court that's when I
25 am accomplishing something. I'm meeting with

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1 clients, I'm going to the scene of the incident. I
2 am doing research. I am doing a much better job for
3 my client out of court than in court. And that is
4 regardless of whether I do it as assigned counsel or
5 as retained counsel.

6 As a retained attorney I do not have a
7 separate rate for going into court, because I don't
8 think my litigation skills are that much better?
9 It's not really that. It's because I'm not doing a
10 better job for my client when I go into court. The
11 smart attorney is the attorney who avoids going into
12 court, whether on civil cases or criminal cases.
13 It's a smart attorney who can settle cases when they
14 can; and it's the smart attorney who gets things done
15 out of court. I think the difference between
16 retained -- between in court and out of court is a
17 foolish one, and when it comes to the death penalty
18 cases where they are suggesting now that you should
19 be paid less at the initial stages of the case and
20 more later on, that is foolishness magnified, because

21 you're dealing with the death case, and you need to
22 have quality representation right at the beginning.
23 You need better quality representation at the
24 beginning than at the end, and it's almost a feature
25 of our society that we start at the end of cases, at

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1 the end of a person's life we start paying more
2 attention to that than when the initial problem
3 exists. We need to be paying attention. As the
4 attorney who has been in the trenches -- and I do not
5 do to death penalty cases; I'm not going to touch
6 those. You know, as Mark Mahoney once said, "It's a
7 personal issue for me. It's whether we want to help
8 build a better bridge over the River Qwai." And

9 thank you, but I don't which to do so.

10 We should have quality representation at the
11 beginning. If I get on a case a month or two months
12 after the case is started, I'm doing a poor job for
13 my client. I want to be there at the time of
14 arraignment. I want to be there at the time of
15 incident, if possible, in order to give quality
16 representation to that client.

17 One of things we have in statewide is what's
18 called a 722(c) order. One of the problems is that
19 there are a lot of defense attorneys who are not very
20 familiar with 722(c) orders. I went into a local
21 court not long ago and handed to the judge a 722(c)
22 order on an assigned case, and the judge looked at me
23 like this order I had provided him was written in
24 Sanskrit. He had never had -- and this judge had
25 been on the bench perhaps a half-dozen years -- in a

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1 local court, a town court, an attorney give to him a
2 722(c) order. These are orders for investigative
3 services.

4 Attorneys need to be using these more and
5 more. You don't need a 722(c) order on every petit
6 larceny from K-Mart or something, but you do need to
7 have them in order case -- in many other cases. One
8 of the things -- it's not really a problem, but I
9 would just note, is that there is a \$300 cap for
10 722(c) orders. Now, my experience is that judges
11 will grant a greater amount than \$300. I've never
12 had a judge refuse me on that. That \$300 is an
13 anachronism.

14 When it comes to anachronisms, of course, one
15 of the big problems you have is the 25 and \$40 an
16 hour rate. When it comes to paying social workers
17 the New York Court of Appeals in the matter of

18 assigned counsel, the director of the Assigned
19 Counsel Plan at 87 NY 2nd, approved \$100 an hour for
20 social workers. Now, if a social worker can be paid
21 that -- and I am not quibbling with the amount of
22 money that they are paid, \$100 an hour for the
23 quality of work that they are doing; that's a Court
24 of Appeals decision -- then the disparity of paying
25 an attorney who has gone through one more year of law

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1 school, who passed the bar exam is very unsettling.

2 I do a fair amount of appeals work. I've
3 argued both at the New York Court of Appeals and at
4 the Appellate Division. I would like to say to you
5 that every time I've argued there every judge has
6 granted me the full amount of compensation that I
7 have requested. The fact of the matter is that when
8 I did argue at the Court of Appeals my rate was
9 reduced about 6 or \$700. This was on a case that had
10 statewide significance. It was a very important
11 4th Amendment issue called People versus West. It
12 was decided, I believe, in 1989.

13 The 4th Department has also cut my vouchers
14 on occasion. I understand that they perceive this --
15 some judges may perceive handling assigned counsel as
16 having a pro bono aspect to it, but when you are in
17 private practice getting paid 25 or \$40 an hour,
18 there's pro bono there out the Wazoo at the
19 beginning. I mean -- let me tell you this. My wife
20 has as good an education as I have, and she's
21 actually a little bit smarter; but she works as a
22 contract worker outside the legal field, and she --
23 she is paid \$25 an hour without any overhead, without
24 touching overhead for -- and I have all the kinds of
25 costs that are associated from malpractice insurance

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1 to a secretary, to computers, and we do have
2 computers in Monroe County.

3 The idea that there would be any kind of a
4 law office functioning without computers nowadays is a
5 travesty. I've had a computer on my desk even when I
6 was the most indigent of assigned attorneys. I've
7 had it on my desk for the past 12 years.

8 One of the benefits that I have as an
9 attorney in private practice is, number one, the fact
10 that I have been practicing criminal law for 17
11 years, and also while I'm a solo practitioner I have
12 the benefit of having -- of working in a suite of
13 offices where there are other extremely experienced
14 attorneys. Not every attorney has that benefit, and
15 sometimes you need to be able to talk to another

16 attorney; and not just find out what is in the
17 written law, but how is law practiced. You need to
18 be able to have some kinds of backup support, and
19 that's why organizations such as the New York State
20 Defenders Association perform a vital role. I
21 regularly attend meetings of the New York State
22 Defenders Association during the summer, as well as
23 the New York State Criminal Defense Lawyers. I'm a
24 member of both; and it's important to be able to
25 attend to those. The idea that people do not attend

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1 and regularly keep up on the law to me is a scary
2 idea. You need to be able to do that. If I
3 graduated first in my class -- I didn't, but if I
4 graduated first in my class 10 or 12 years ago and
5 was an absolute expert in the law back then, that
6 means nothing now. I need to be an expert in what
7 the law is now, because the New York Court of Appeals
8 and the State Legislature are changing the law all
9 the time. We need to keep up on the law. Attorneys
10 need to have -- to be able to attend seminars, to do
11 research in order to do quality representation;
12 quality representation, whether that is a disorderly
13 conduct charge or whether it is murder second degree,
14 the case I just finished, or murder first degree,
15 which I really do not handle.

16 I would say all in all that the state of the
17 law in Monroe County is much better than it is
18 outside the county line. At times you get out there
19 and you just have a feeling that it's kind of like
20 the law west of the Pecos.

21 I've covered a number of topics and I kind of
22 feel like what Woody Allen said, he said, "I read
23 War and Peace in 30 minutes. It's about Russia." So
24 forgive me if I've covered too many topics too
25 quickly.

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1 MR. LEWIS: I'd be interested in your opinion
2 on the question of the delivery of quality services.
3 Certainly the book you've written for West for this
4 State appears to be -- at present at least, anyway --
5 the leading text on the providing of criminal
6 defense. So maybe by default or design I'm asking
7 you an expert's question. Do you have an opinion
8 about what's required to provide quality criminal
9 defense in the context of 18-b fees? You talked
10 about computers; you talked about all these overhead
11 items. If you were asked the impact of these rates
12 on the provision of quality defense, what would you
13 tell us?

14 MR. MULDOON: If I was an indigent person in
15 most counties in New York State and I was asked to be
16 represented by a public defender or an 18-b attorney,
17 I would beg, borrow, and perhaps steal in order to
18 get a retained attorney. That is not to say that the
19 quality of representation that I have given to many
20 of my clients is not high. I think it's been very
21 high, but there is a tremendous variation in the
22 quality of representation. You can have one person
23 who just does everything, does a terrific job, and
24 the next speaker, Mr. Tallon, who finished a murder
25 trial a few years ago, he substituted himself for

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1 another attorney who was doing a significantly less
2 than stellar job. It's almost the luck of the draw.
3 You can get great defense attorneys even at 18-b
4 rates. People who do it selflessly; but you also can
5 get some fairly terrible ones.

6 And let me mention one other thing. If I'm
7 going to pay you \$150 an hour -- which is quite
8 honestly my standard rate for handling any kind of
9 criminal case -- or if I'm going to pay you \$25 an
10 hour to handle a case, which is the one that you or I
11 or any rational person is going to put work in on? I
12 have a mortgage. I have to pay the grocery bills.
13 My bank is a nice bank, but it does nothing pro bono.
14 And my grocery store is Wegmans. It's wonderful, but
15 it does not take pro bono. You have to pay the
16 bills, and as a result now I do maybe five percent of
17 my work doing assigned counsel.

18 And I think that's typical of many attorneys
19 who are quality attorneys. I'm not holding myself
20 out as being the best attorney in Monroe County, and
21 certainly not the best attorney, frankly, in this
22 room. There are many good attorneys, many good
23 attorneys who are handling assigned counsel cases,
24 but as time goes by you don't want to take as many
25 cases as that, as I do a fair amount of civil cases

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1 where you can charge the same amount, you can charge
2 \$120 to 150 or \$175 an hour, which is Monroe County
3 rates, or you do retained criminal cases.

4 Now, let me just follow that up with one
5 other thing, Mr. Lewis. I just got done with a D
6 felony. It was a three-day trial. Actually, it was
7 fairly fast. On this case, for which I was retained,
8 I went to the scene of the incident about two miles
9 north of here five times; one time with my client,
10 four times to walk it myself. There was a missing
11 child who was the most important child -- witness in

12 the case. The child had moved to Schenectady. Twice
13 I drove to Schenectady in order to find this child,
14 served two subpoenas on the city school district, and
15 prepared a material witness order, and did a lot of
16 other things. I think three separate motions;
17 Omnibus Motion, Motion to Dismiss in the Interest of
18 Justice, and some other motion, on a retained case.
19 If I was doing that on an assigned counsel case
20 getting paid 25 or \$40 an hour, I don't know if I
21 would have done it.

22 MR. LEWIS: Why not? When you say you
23 wouldn't know -- I'm really asking you to talk about
24 the tensions between the -- this problem we're
25 dealing with assigned counsel rates and the quality

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1 and how we each of us reconcile that tension.
2 MR. MULDOON: Because when you have other
3 cases pending -- and I can work right now probably 75
4 or 80 hours a week and keep busy for the next year,
5 at some point those extra hours that you put in
6 become marginal. You do want to spend time with your
7 wife. You do want to spend time with your daughter.
8 And if all you're going to get paid is \$25 an hour,
9 with a cap -- with a cap that judges will enforce,
10 then you realize that at some point do I need to do
11 this extra work? I can deliver People versus Baldi
12 level of representation in almost any case.
13 People versus Baldi is the leading case in New York
14 State on effective assistance of counsel, and what it
15 says is meaningful representation. Well, meaningful
16 representation as the Appellate Courts have viewed it
17 is kind of a joke, really, quite honestly. It's what
18 I call fog the mirror level of representation. If
19 you have an attorney who shows up and says,
20 "Objection," and can give some kind of representation
21 and cross-examine one or two witnesses, then that is
22 going to be meaningful representation as the Court of
23 Appeals has defined in People versus Baldi, and your
24 conviction -- and you surely will be convicted --
25 that conviction will be affirmed, including on

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1 grounds of effective assistance of counsel.
2 When you are doing a criminal case, whether
3 in -- I'm doing mostly felonies now -- you want to be
4 able to deliver high quality representation. I
5 represented a man recently, and his son said to me,
6 "Remember, this is my father." He was an older man
7 who really wanted to have the best for his -- it was
8 a younger man who wanted the best for his 61-year-old
9 father who was being tried in the case; and that's

10 what I try to do when I represent the client, of
11 doing the best, figure that could be my father, that
12 could be my daughter, that could be my son, and I
13 could -- and believe me, I've had a few relatives
14 that have been arrested once or twice in their life.
15 But you try to deliver that quality of
16 representation. And if all you want to have is
17 People versus Baldy representation, leave the system
18 as it is. It's kind of a mess, but leave the system
19 as it is. But if you ever get arrested you don't
20 want to be represented by somebody who is handling a
21 case for 25 or \$40 an hour. You really don't.

22 Did I answer your question, Mr. Lewis?

23 MR. LEWIS: Yes.

24 MS. HATHAWAY: I think you have answered it,
25 but I have to asking for my edification. I'm a

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1 layperson, a client advocate. Approximately how many
2 indigent clients do you represent out of court, and
3 of those that you represent do you feel that you can
4 offer them this qualified representation that you're
5 talking about? And my last would be from what I
6 picked up in your testimony, even now why do you even
7 do the five percent that you do?

8 MR. MULDOON: Well, the easiest question is
9 the last one, why do we do it. Robert Penn Warren,
10 who wrote All The Kings Men and who is a great poet,
11 was once giving a reading of his poetry to a group of
12 college students, and one of the students raised his
13 hand and said, "Why do you write?" And he said, "Why
14 do you scratch where it itches?" That's the answer,
15 and however oblique it may be, of why I practice
16 criminal law and why I handle indigent defense. I
17 don't know the number of cases that I've handled.

18 MS. HATHAWAY: Just say approximately off the
19 top of your head.

20 MR. MULDOON: In any one year, now I'm
21 probably handling maybe 20. I'm just not handling
22 that many. In previous years I did both Family Court
23 as well as criminal courts, and I may have handled
24 100, 150 over the course of a year.

25 MS. HATHAWAY: Right at this -- today, this

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1 point, what you're doing now, do you feel that you
2 are really giving them the qualified representation
3 that you would give your client that you're getting
4 \$150 per hour for?

5 MR. MULDOON: I would have to think long and
6 hard about that. I can tell you one thing. When it
7 comes to assigned counsel cases that I have now, ones

8 that are doing on appeal, if I have a client come in
9 to me giving me \$10,000, or whatever, to do a
10 retained appeal and I have an assigned an appeal,
11 quite honestly those assigned appeals are going to
12 get pushed back, and I'll say, "Look,
13 Mr. So-and-so" -- on this retained case -- "I'm going
14 to handle your case first." So in terms of speed of
15 cases --

16 MS. HATHAWAY: So where does that leave the
17 other client?

18 MR. MULDOON: They will get quality
19 representation, but they may not get it as speedy.

20 MS. HATHAWAY: But you stated that you
21 yourself would not want to come in on a case two or
22 three months later because you couldn't be there
23 right from the beginning. This client that you are
24 now saying this to, how do you know what -- what
25 extra effort would you put to maybe even see that

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1 that client may get a person, may get an attorney
2 that would be willing to step in where you left off
3 because you want to deal with the other client first.

4 MR. MULDOON: When I was talking about speed
5 of delivery of services, previously I was speaking of
6 at trial level, at the arraignment level. What I was
7 addressing just now, I was talking about assigned
8 cases on appeal. Appeals cases take a lot longer ,
9 and it may not be as absolutely crucial that you
10 handle a case --

11 MS. HATHAWAY: Do you explain that to the
12 client?

13 MR. MULDOON: No, I don't.

14 MS. HATHAWAY: Why not? How are they
15 supposed to know what you -- what you're thinking?
16 You're leaving me here and you told me why you're
17 leaving me here, but why aren't you telling me in
18 plain English why you're leaving me here and what am
19 I supposed to do? What is my family supposed to do?
20 In the meantime what happens to my appeal now? I
21 just have to let it sit there and wait until you can
22 get back to it?

23 MR. MULDOON: Frankly, that is what happens.
24 I will deliver, I think, on both assigned as well as
25 retained cases a quality level of appellate advocacy,

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1 but the assigned cases will take longer than the
2 retained cases.

3 MS. HATHAWAY: But you know that -- you know
4 that from the beginning. You know that from the
5 get-go, so if you have an assigned case why would you

6 take on a retained case, and if you know this is
7 going on happen to you somewhere down the road, then
8 why not just leave that assigned case in the first
9 place?
10 MR. MULDOON: Number one, I take the assigned
11 cases because they're practically begging people to
12 take them. There's not that many people who want to
13 take assigned appeals. There are people to take
14 assigned trial cases, but they don't want to take
15 assigned appeals; and the reason why I take on
16 retained cases is -- basically I take retained cases
17 so that in a sense --
18 MS. HATHAWAY: I know. I'm just saying that
19 my problem is one is left hanging so that another one
20 can be taken care of, and then if I have the time
21 I'll come back. That person is in limbo.
22 MR. MULDOON: Any appeal is going to take
23 a -- several months, if not more than a year in order
24 to get done.
25 MS. HATHAWAY: I know that. But in the

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1 meantime -- well, let's not belabor the point.
2 MR. LEWIS: Well, lawyers do that all the
3 time whether they're public defenders or private
4 lawyers. There's a certain element of triage both at
5 the business end and also in the scheduling end.
6 MR. MULDOON: And part of what you're doing
7 with retained cases, that you're taking some retained
8 cases in order that you can subsidize the assigned
9 counsel cases.
10 MS. JONES: Would you recommend that the
11 State run the public defense system? Would you think
12 it would operate better?
13 MR. MULDOON: Well, I'm not sure that -- if
14 you had a state, in a sense, subsidy of the funding,
15 that might be better; but I'm not sure you
16 necessarily want to have --
17 MS. JONES: But you think it still could be
18 run county by county?
19 MR. MULDOON: I think it could be run county
20 by county and I think there are benefits to having
21 things run county by county. Monroe County is in a
22 beneficial position because it has good quality
23 private bar as well as public defender bar.
24 MS. JONES: What we're hearing from some of
25 the poorer counties is that they admire the Monroe

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1 County system, and they wish they could afford it and
2 they can't.
3 MR. MULDOON: Right.

4 MS. JONES: They might if the State absorbed
5 the cost.

6 MR. MULDOON: If the State absorbed the cost
7 but was not necessarily handling all the other
8 portions of the administrative ends of it, that might
9 be a good way of doing it. I don't know. I've never
10 really approached that. I'm not sure that always
11 setting it off to a larger and larger governmental
12 entity is necessarily a good idea. Monroe County on
13 its own handles things fairly well; but I still have,
14 you know, significant reservations about how things
15 occur in Monroe County, in part because of the
16 assigned counsel rates; but the idea that a person is
17 going to be a part time public defender for 10,000 or
18 \$19,000, that's risible; I mean, that's beyond the
19 appeal.

20 MR. GRADESS: I just have three questions,
21 and two of them are to clarify the record. In your
22 experience with the town judge where you filed the
23 722(c) order and it was his first experience with it,
24 was that motion grand?

25 MR. MULDOON: Oh, yes, absolutely.

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1 MR. GRADESS: Secondly, in the course of your
2 testimony on this issue you made reference to judges
3 going over the cap in the 722(c) cases. Could you
4 define what jurisdiction you're speaking about when
5 you talk about judges' willingness to go over the cap
6 in 722(c) cases?

7 MR. MULDOON: Typically, that's Monroe
8 County, and typically that's the felony level cases.
9 If I have a 722(c) order for investigative services
10 at the town court level, I usually do not have
11 significant need for services over \$300; but if --
12 the murder case that I just handled and other kinds
13 of felony cases when it's County Court or Supreme
14 Court, that's where you need to have judges go beyond
15 that cap. And my own experience is that in Monroe
16 County judges are willing to go beyond that arbitrary
17 figure of \$300.

18 MR. GRADESS: What is your experience in the
19 surrounding jurisdictions with a 722(c) order in
20 felony cases?

21 MR. MULDOON: I don't do assigned counsel
22 work out there, so I couldn't comment on that.

23 MR. GRADESS: And lastly, would you mind
24 stating for the record the name of your book?

25 MR. MULDOON: Oh, sure. The name of the book

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1 is Handling a Criminal Case in New York. It's

2 published by West, and it's in its fourth edition
3 now.

4 MR. GRADESS: Thank you very much, Mr.
5 Muldoon.

6 MR. MULDOON: Sure.

7 MR. GRADESS: Michael Tallon.

8 MR. TALLON: Good afternoon. I'm Michael
9 Tallon, and I'm pleased to be able to speak to you as
10 a member of the Criminal Defense Bar in Monroe
11 County, private practice, and as a member of the
12 Board of Directors of the New York State Association
13 of Criminal Defense Lawyers, and last and probably
14 most importantly, as somebody speaking on behalf of
15 effective counsel as we would like to think of it,
16 being guaranteed by our Constitution, both United
17 States and New York.

18 I must say that I feel like I'm in the wrong
19 chambers, speaking to the wrong people about these
20 things; but if you're willing to listen I'm certainly
21 willing to talk.

22 First and foremost, the system -- this
23 criminal justice system with respect to 18-b rates,
24 which is what I will focus on, is simply inequitable.
25 And it's inequitable in part because it operates

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1 within a political system that, I think, is largely
2 indifferent to anything that might be construed as
3 providing someone who is accused of a crime with
4 effective counsel.

5 Probably the first -- well, I should give you
6 a little background. I have been practicing law for
7 20 years, and I practiced as a state prosecutor and
8 as a Federal prosecutor and somebody in private
9 practice, somebody who has done retained work and has
10 done civil work, somebody who has been on the
11 Assigned Counsel Panel since probably 1990 in this
12 county, has been on the CJA panel in the Western
13 District since 1986.

14 Probably the point that I realized how
15 inequitable the system could be was perhaps seven or
16 eight years ago when I was approached and asked if I
17 would be available in a conflict with the District
18 Attorney to become a special prosecutor; and among
19 the questions that I had answered or the information
20 that I was provided was -- I think it was seven or
21 eight years ago, that the rate for the special
22 prosecutor, because there was a conflict with the
23 Monroe County District Attorney, was, like, I think,
24 100 or \$105; and there's something wrong with a
25 system that allows that, and I think that it's

1 shameful. I think we're indifferent, and I really,
2 realistically, don't expect much to come of these
3 fact findings until the crisis gains in degree and
4 magnitude by the thinning of the panels in terms of
5 experienced attorneys, and when there are enough
6 screw-ups that somebody has to take notice that the
7 system is not doing what it wants to do.

8 Ms. Hathaway, you were asking some very good
9 questions of Mr. Muldoon about, gee, what's the
10 difference between representing somebody if you're
11 retained and representing somebody if you're
12 assigned. I guess there are different approaches to
13 that, but the point is well taken. And my answer is
14 right now I don't accept assigned counsel
15 assignments. As I think Mr. Youngman will tell you,
16 I got off the wheel and have been off the wheel
17 probably since the beginning of the year, and that is
18 a real pressure on attorneys who are performing a
19 defense for indigent clients under the system right
20 now. There is a clear economic disincentive. And
21 when you couple that with people who I think are
22 coming into this panel who are not experienced and do
23 not have professional judgment, they will take things
24 that they can't handle properly.

25 And I think that isn't always apparent from

1 the record because I agree with what I heard Mr.
2 Muldoon say, and that is so much of this work,
3 effective counseling, does not take place in the
4 courtroom. It takes place at the very beginning. It
5 takes place for hours in a Monroe County jail. It
6 takes place in the worse parts of the city. It is
7 thankless work. It's very difficult work to do the
8 job properly.

9 So my response to that has been that I cease
10 taking things looking at it from a monetary point of
11 view, because if you do you don't have any business
12 taking cases. It does not cover your overhead. It's
13 not fair to me professionally or anybody else who
14 does it and tries to do it well, and it's certainly
15 not fair to my family, and I have children, as maybe
16 all you do, I don't know.

17 So, you know, I don't know if anybody can
18 rationally fashion a solution to the problem that I
19 see. I think it's a crisis that will do it. I think
20 there isn't any lobbying for this, and I think some
21 of the problems that NYSDA has experienced as a
22 statewide, state-funded organization is probably a
23 good indication of, you know, where such overtures
24 will go as where they have gone in terms of the
25 attempting to increase the 18-b panel rates. I don't

1 see it happening, and I think that's unfortunate
2 because I think we'll lose experienced attorneys on
3 these panels. We're going to have fewer people to
4 deal with it. We may have efforts to fund training
5 and education, and I don't know if I'm speaking out
6 of turn, Mr. Youngman, but I know that you mentioned
7 to me about trying to have the Monroe County Academy
8 of Law conduct a training seminar for ACP attorneys
9 at a substantial cost in order to sort of beef up the
10 trial experience that the protocols of the panels
11 require in order to elevate some people who don't
12 have any trial experience beyond misdemeanors that
13 need -- are needed somehow to fill felony panels,
14 which I think are probably, you know, reduced in
15 number and probably reduced in availability, if I
16 speak for myself.

17 I have here -- there are some horror stories
18 that I'm sure you have heard. Some of them I have
19 experienced. I think the point that Mr. Muldoon
20 made, and forgive me if I repeat things that may have
21 made by speakers before I arrived approximately a
22 half hour ago, but the investigators I use probably
23 have a standard rate anywhere from 30 to \$40 for
24 their private work, and they will routinely submit
25 vouchers for court ordered investigative 722(d)s for

1 30, \$35.

2 There was a survey conducted by Corporation
3 Counsel for the City of Rochester approximately seven
4 years ago when there was a dispute about what the
5 reasonable attorney fees should be that the City was
6 going to be responsible for in a Federal civil rights
7 trial, and at that time I think the range for the
8 reasonable value of services, as we understand that
9 from at least United States Supreme Court cases,
10 Missouri versus something -- and I can get you that
11 cite if you would like -- we're talking 150 to \$200.

12 And while I can appreciate that there's a
13 certain uniqueness about death penalty cases, the
14 bottom line is that that rate is 175 for a lead
15 attorney and 150 for associate attorney, I think, but
16 that happened because people wanted, Lord knows why,
17 people wanted the death penalty in the State and
18 they're willing to pay for that element of it. And I
19 think people don't want good defense, effective
20 defense in the run of the mill felony cases or in
21 homicides that don't have the death penalty. They
22 don't want that. They don't want to pay for that.
23 They don't want to pay attorneys more money. They

24 don't want to pay people to defend people accused of
25 crimes. It's really that simple. I think that's

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1 unfortunate for us as a society.
2 So there shouldn't be any disparity between
3 in-court and out-of-court rates because I think the
4 best work is done in terms of preparation to make the
5 determination as to whether you should be going to
6 trial in a given case. And I think a lot of the
7 time, I think the ratio of time that people put into
8 an assigned counsel case, if you're doing it right,
9 may work out to be for every two or three hours out
10 of court, then they have one hour in court to do it
11 well; and there have been a number of long cases that
12 I sort of tracked that I handled of substance that
13 would bear that out. So there shouldn't be any
14 disparity between rates.
15 So putting aside for the moment the inequity,
16 I think that, that exists and will continue to exist,
17 and maybe, you know, you may have money flowing into
18 the Monroe County Bar Association Academy of Law
19 because that may be a little more politically
20 acceptable to spend \$10,000 doing that; or you may
21 have better hourly rates on death penalty cases
22 because that's more politically acceptable to the
23 people who vote on these things. But trying to
24 coordinate and provide commensurate services to
25 indigent accused is not even, I think, on the agenda,

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1 and that's shameful, really a shame.
2 I can tell you that in a case that I handled
3 as assigned counsel, a homicide case, I actually
4 retained a Michigan law firm under order of the
5 court, and paid that Michigan law firm \$175 an hour
6 to do something with a witness that I needed brought
7 back here, and I had to fight for the principle of
8 getting that witness ordered back here because he was
9 an essential witness, and somebody was paid \$175 an
10 hour on my watch to do that, which is not
11 unreasonable, I think, from the point of view of
12 Michigan counsel, but it illuminates the disparity, I
13 think, that we as people accepting -- attorneys
14 accepting assigned counsel cases operate. You're
15 constantly seeing the inequity, okay, in terms of
16 compensation.
17 I can tell you that in order to obtain crime
18 scene photographs from the Rochester Police
19 Department as assigned counsel, you must pay them \$5
20 per photo, and there was a case that given how
21 extensive it was, without going into details, it was

22 a homicide and attempted homicides, there was about
23 700 or \$800 worth of \$5 photos, and either I was
24 expected to pay for that up front or go without them.
25 So I contacted somebody who had a little bit more

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1 presence of mind from the Corporation Counsel's
2 office and had a letter sent over there. But that
3 expense is routinely vouchered to Monroe County
4 Assigned Counsel Program, and I have those
5 photographs so that the City Police Department gets
6 paid its \$750 for photographs in that case, and it's
7 billed to the Assigned Counsel Program.

8 There needs to be a little better
9 coordination on things like that, because I think
10 it's not really good, and you may not have somebody
11 who is experienced enough or persistent enough or,
12 Ms. Hathaway, thinks that it's worth pursuing at \$25
13 an hour. And I think that sometimes in this area
14 self-reflection and self-criticism about what
15 motivates you to take the course of action or not is
16 often difficult to acknowledge to yourself, let alone
17 respond directly to a question about it. But it's
18 there. It's there, and we're going to pay for it one
19 way or another.

20 So how do you change this? Well, my simple
21 thought is I don't think we should necessarily lay
22 over another bureaucratic mechanism here. I think
23 you need to pay what you pay the special prosecutor
24 essentially performing the same function as you would
25 pay somebody who is assigned from the Panel because

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1 of a conflict with the Monroe County Public
2 Defender's Office, which is in my opinion one of the
3 finer offices that I have ever come in contact with,
4 with respect to providing high quality effective
5 representation. But I think you need to peg it on
6 something like that, because I think when you do the
7 comparison can be readily seen, which is prosecutor
8 has a conflict, you hire somebody; public defender
9 has a conflict, you hire somebody. They're doing the

10 same kind of work; they should get the same kind of
11 money, period. And that will put into some sort of
12 coordination these rates. You have to keep it
13 simple. But unless you tie it to something that has
14 a counterpoint in the system, such as the special
15 prosecutor's rate, it will not be principally
16 addressed; it will not be fairly addressed by the
17 political system given its agenda.

18 There's probably a lot of things that I

19 missed in my notes here. There's more horror stories
20 I could tell you, but you're probably aware of them
21 in one manner, shape, or form; and if you have any
22 questions, I would be happy to attempt an answer.

23 MR. GRADESS: I just have one question for
24 you, Mr. Tallon, if you would. At the outset of your
25 testimony you talked about the necessity of spending

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1 hours in the Monroe County Jail.

2 MR. TALLON: Yes.

3 MR. GRADESS: Why don't you just amplify for
4 the record what specifically you're talking about in
5 terms of attorney/client relations.

6 MR. TALLON: Things have improved there
7 because they have enlarged the jail, but you will
8 have a problem if you have somebody who has been
9 convicted and incarcerated in a State institution.
10 Unless you have a DA who is going to be
11 accommodating, you may not have your client where you
12 need him. You may not be able to have him come back,
13 and you may have to do some traveling. That's one
14 aspect of that, Mr. Gradess, that I didn't address.

15 In the jail itself, I think they have taken
16 some steps -- for example, there's PD night. There's
17 one night a week where you don't have -- the public
18 defenders can come in and they use the visitor's area
19 simply because there isn't sufficient access to your
20 client without, for example, as I have done and other
21 people have done, because I've seen it, waited 45
22 minutes, waited an hour, waited an hour and 15
23 minutes in order to find a room or find a deputy who
24 can transport your client there; and there have been
25 many occasions over the years that I have been in

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1 that jail where because of previous commitments,
2 appointments -- court appointments, I've had to
3 leave. So the practice I developed, which -- you,
4 know, out of necessity is I would go to the Monroe
5 County Jail on a sunny Sunday afternoon during --
6 when people are watching football or when my kids
7 were outside, or I would be there on a Saturday night
8 and catch up with somebody at a bar later on. So to
9 get access can be difficult under any circumstances.
10 To have privacy can be difficult. To conduct, for
11 example, pol -- there's no privacy whatsoever. To
12 get a judge to let somebody out under the custody of
13 a deputy or two to investigate a crime scene, that's
14 very, very, very difficult.

15 So having an incarcerated defendant poses
16 many problems in terms of effective communication. I

17 think that the Monroe County Jail has been pretty
18 good about that. Major Lipari, who is in charge of
19 that jail, I have always found accessible, and when
20 there's been a particular problem presented to him, I
21 think he's done whatever he could to do that. But
22 institutionally, this system isn't equipped for
23 effective communication at the level I would find
24 comfortable with my clients.

25 Does that answer your question or not?

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1 MR. GRADESS: That answers the question.

2 MR. TALLON: Does it? Okay. Sometimes I get
3 off to the side.

4 MR. GRADESS: Thank you very much.
5 David Saleh?

6 MR SALEH: Good afternoon. My name is David
7 Saleh. I'm a private practicing attorney in Batavia,
8 New York, and I -- my primary practice is
9 representing clients in Genesee County and then in
10 the neighboring counties -- the counties that
11 surround Genesee, although I do get into the urban
12 counties, Erie and Monroe both, I do a very
13 substantial practice in the rural courts, and I know
14 there's been some questions about some of the
15 adjoining counties as I've been listening here.

16 I've been in practice for 19 and-a-half
17 years, and it's been solely in private practice.
18 I've never had a position as either a prosecutor or a
19 public defender or assisted in any of those offices.
20 I presently chair the Criminal Defendant Committee
21 for the Genesee County Bar Association, and I would
22 like to speak to you today about some special
23 problems which need to be addressed with respect to
24 legal services as they're provided to the indigent in
25 rural counties.

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1 You know, I've over the years spoken with
2 experienced practitioners who told me stories about
3 how things used to be done in terms of attorneys
4 being assigned to cases and having to go to trial
5 very quickly on the defense side. Years and years
6 ago, I'm talking practitioners who have been
7 practicing 40 years -- even 50 years -- and at times
8 there would be -- they would be assigned to prosecute
9 cases similarly, because you had very limited
10 involvement, you know, by attorneys in the system.
11 You had -- in Genesee County originally, a part-time
12 prosecutor -- part-time District Attorney and maybe
13 one part-time assistant, and over the years on the
14 prosecution side the commitment to investigation and

15 prosecution has skyrocketed. The police forces and
16 police agencies are much larger. The amount of money
17 expended through all the various programs, whether
18 they're Federal, state, or locally funded are

19 extensively increased, and today I see a Genesee
20 County District Attorney's office with four full-time
21 attorneys and two part-time attorneys; and it's a
22 totally different world than it used to be. And the
23 perception I have from the private bar, having,
24 again, practiced nearly 20 years, is that the
25 provision of defense services really hasn't improved

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1 at all in that period of time; it hasn't kept up with
2 the times. We have had an increase in the commitment
3 to the Genesee County Public Defender's Office very
4 recently, but at the same time when you get two cases
5 that are -- that are being handled where the
6 attorneys -- the Public Defender's Office has a
7 conflict or other special circumstance that they
8 can't handle the case, you revert to the 18-b program
9 in the county.

10 What you need to understand is in the rural
11 counties there isn't the same volume of criminal
12 cases on the private level that defense attorneys are
13 handling, so what happens is that many of us that are
14 doing defense work have active practices outside of
15 criminal defense. We don't specialize in those
16 areas. So getting attorneys who have the experience
17 level and the interest in taking assigned cases is
18 challenging.

19 I've worked very intensely over the past
20 several years with the administrator of the 18-b
21 program in Genesee County and have accepted cases on
22 assigned basis at varying levels of involvement over
23 my entire career. But what you have -- and it's been
24 a growing problem as we've gotten into more modern
25 times -- by "modern times" I mean present times --

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1 because of inadequate funding to the program,
2 attorneys that are experienced and capable of
3 providing quality services to defend -- to defend the
4 indigent, especially in the more serious cases, are
5 expected to take a very serious financial hit.

6 And Ms. Hathaway and Mr. Lewis, I was here
7 when you were speaking to Mr. Muldoon about this
8 problem, and I come in at a little different angle
9 than he does. I mean, I would not say to you when
10 I -- and I think he felt the same way, too. When I
11 get a case that's assigned to me, a serious case --

12 and I've had some very serious matters that I've
13 handled over the years; whether they were high
14 profile or low profile, they involved very difficult
15 defenses. And in fact the primary assigned work I
16 take now, I specifically stated that, I won't take a
17 case unless there's a problem finding an attorney,
18 and then come talk to me and I'll see what it is. So
19 I've taken cases where there's been prior assigned
20 counsel that has either gotten out of the case or the
21 defense asked for a different attorney for various
22 reasons or there was a reluctance on the part of the
23 local bar to handle the cases. And what the -- the
24 financial penalty that we have to accept in order to
25 handle these cases is severe; and I will give that

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1 person the best defense that I can. I've always been
2 committed that way, and I think any defense attorney
3 that you're going to see is going to say that. It
4 may very well be that those services when you're
5 talking about appeals or whatever, aren't always
6 provided in the quickest fashion; but when I've got a
7 case and -- if Judge Noonan in Genesee County sets a
8 trial schedule at the trial level, I'm on his
9 schedule, and I know that if I'm going to be ready
10 and handle that case as I in good faith feel that I
11 have to, I've got to be ready and I've got to make
12 the commitment to do that, and I will do that.

13 But I have a very serious reluctance to take
14 any volume of those cases, and all of the experienced
15 attorneys in Genesee County and the ones I know in
16 Wyoming and Erie and Orleans that are handling these
17 cases will tell you the same thing. We are very
18 reluctant to continue to do this. We take a
19 substantial penalty. At \$25 an hour, and even \$40 an
20 hour, I am not -- no attorney that's got an office
21 where they're providing the services they need to,
22 having computer skills -- I'm sorry, computer skills
23 and computer devices available for research or
24 whatever, having qualified secretarial and paralegal
25 help to the extent they need it, we're operating at

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1 substantially more than \$25 an hour to just keep the
2 doors open. So what I'm basically being asked to do
3 in my mind when I take one of these cases is not only
4 accept it effectively without compensation, but in
5 fact to pay money out of my pocket to handle the
6 case; and the results of this is it's very difficult
7 to get attorneys with good skills and proper
8 experience to handle the serious cases in the rural
9 counties.

10 We've attempted in Genesee County to
11 establish standards through the Bar Association
12 through my Committee for representation, and -- of
13 defendants and to handle -- they're not serious --
14 they're not -- I wouldn't say serious, but they're
15 not extensive qualifications. You have to have
16 handled two felony trials in order to handle an A, B,
17 or C felony, noncapital. We have trouble -- and the
18 administrator continually comes back to me with the
19 problem that she has trouble finding attorneys with
20 that experience level that are willing to accept the
21 cases on an 18-b cases; and I personally know four or
22 five attorneys who are well qualified to handle those
23 cases. They would represent a proper rotation of the
24 cases among the attorneys to be able to handle these
25 and do it effectively, and they simply cannot afford

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1 to take the cases. And what that forces in the rural
2 counties the administrators to do is basically have
3 the -- look for attorneys, anyone that will fill that
4 position; and as been said to you before, there is a
5 tremendous, tremendous variance in quality that you
6 receive as a result of that.

7 I want to talk a little bit, also, to repeat
8 the issues on the 722(c) orders. Now, I have applied
9 on several occasions for 722(c) assistance for
10 investigators and experts at different times, and the
11 judges in Genesee County have been willing to -- and
12 in Wyoming County, also, have been willing to
13 accommodate those requests; but the difficulty I have
14 in doing that is I'm not -- I'm not confident when I
15 begin to make that application that I'm going to get
16 it -- get it granted, and it's a very cumbersome
17 process because a lot of times when you're getting
18 into an extensive investigation you don't really know
19 where it's going to end up dollar-wise, and a lot of
20 times you have to make multiple applications to the
21 judge and you're disclosing, you know, a good deal of
22 your case to the court, and even though it's ex
23 parte, there are areas of concern that I have with
24 that.

25 I have always been concerned, and in the

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1 experience I've had with my vouchers and getting
2 these -- getting these requests approved, that if
3 they were coming in -- if they were coming in on a
4 regular basis, the county judges would have
5 difficulty because financially they're -- they know
6 that there are very limited budgets that the local
7 administrators are working with and the local plan

8 has available to it, and I think that this will be a
9 problem if the applications are coming in as they
10 should be from counsel, which is on a regular basis.

11 Conceptually, I always thought of this as a
12 method of saving money for the county, because if I'm
13 running around doing the work instead of an
14 investigator, it would be more expensive. However
15 the reality is -- which points out the unfairness of
16 the system, is that the investigators are basically
17 getting paid more than the attorney is with less
18 overhead and less responsibility in the case, and
19 I've always found that troubling to go to an expert,
20 and they're saying I want \$100, \$125 an hour, and
21 that's less than my out-of-court rate, which I also
22 in my own individual practice have a straight rate
23 in-court and out-of-court time. I think the
24 discrepancy is ludicrous between in-court and
25 out-of-court time. But to be basically talking to

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1 someone who is going to do expert work for me at 125
2 or \$100 an hour and thinking to myself, well, that's
3 still less than my hourly rate, except in this case
4 I'm getting paid, you know, at 25 and I'm just
5 getting hammered for it financially and just have to
6 basically be told to accept that.

7 But that is the basic problem between all of
8 these different issues. I know if I take a serious
9 assigned case that is going to be very difficult to
10 handle between the financial penalty and then the
11 imbalance in resources that are available between the
12 prosecution and my representing an indigent client,
13 and it is very challenging and very difficult to give
14 people competent representation even though I am very
15 confident that I am able to do that, I always find it
16 very difficult to do so because of all these
17 different problems and difficulties that come from
18 this system.

19 I would ask, and I think it reasonable, for
20 the State to take the obligation of paying for a
21 proper Assigned Counsel Program.
22 Administration-wise, I don't have any difficulty
23 dealing with local administration if the bill were
24 paid by the State so you wouldn't have the pressure
25 of the County Legislature looking at this and setting

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1 the budget, especially in the rural counties.
2 They're only going to pay what they absolutely feel
3 they have to pay for this kind of service, and it's
4 not going to be enough to handle it properly.

5 I think, also, that there should be standards

6 for attorneys that are handling these kinds of cases.
7 The system that's in place for qualifying attorneys
8 for the capital cases should be utilized, obviously,
9 with different standards, but there should be
10 specific experience requirements, and we have
11 attempted in Genesee County, and I know in areas of
12 Monroe County they talked about this, a monitoring
13 program giving less experienced attorneys an
14 opportunity to develop the experience necessary to

15 qualify is not unreasonable, and that's what I
16 believe; and, you know, I also see that a flat hourly
17 rate of \$75 per hour on felony defense should be a
18 minimum standard, and it troubles me that we're --
19 the present proposals in the capital cases aren't
20 much higher than that. I think that's the only way
21 you're going to see competent representation in these
22 cases.

23 There's one more thing I want to mention very
24 briefly, and then I'll let this go. You know, I had
25 experience with a -- with Mark Mahoney talking to him

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1 about a case that I had been contacted to handle a
2 representation of a defendant in a -- that had
3 previously been a capital case and pled out, and the
4 individual took a sentence of life without parole,
5 was contacted by the Appellate Division to ask to
6 represent the individual, and as I explored and
7 investigated it I found that this problem stared me
8 straight in the face; and when I investigated the
9 issues I found that there were some very monumental
10 issues concerning the utilization of life without
11 parole as a sentence and what standards the court was
12 going to establish in terms of considering whether or
13 not to give a person life without parole or something
14 less on a plea, and as I dug into it a little bit and
15 found not only was it a case of first resort in New
16 York State, but it had very serious ramifications
17 nationwide and it needed a very serious commitment to
18 computer-aided research and an assistance for the
19 attorney that was going to handle that case, and a
20 \$25 an hour rate was very unrealistic.

21 I advised the court of that situation, and I
22 don't think they took the position they weren't going
23 to pay any further and disapprove those services, but
24 it's the same problem with all those services like
25 that. For an attorney to take these cases and take

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1 the risk they're going to get, they're going to get
2 hit very seriously in a situation like this, it has a

3 chilling effect on what you're going to do in those
4 cases, and I think that there has to be a system put
5 in place where we can sometimes get pre-approval for
6 some of these services where we know going in we're
7 going to have some things that are out of the
8 ordinary.

9 MR. GRADESS: Thank you.

10 I wonder if I can, Mr. Saleh, ask you one
11 question concerning this last thing you testified to.
12 Did I take your testimony to be that the Appellate
13 Division approached you to handle -- is this the
14 Granell matter that you're talking about.

15 MR. SALEH: Yes, it is, and I was contacted
16 by the Clerk of the Court and asked to handle that.

17 MR. GRADESS: Do you happen to know, can you
18 pinpoint for us when that might have occurred?

19 MR. SALEH: My recollection is weak, but I
20 would say it was probably back in August of this
21 year.

22 MR. GRADESS: August of 1998?

23 MR. SALEH: Yes, yes.

24 MR. GRADESS: Thank you very much, sir.

25 We need to take a five-minute break. I'm

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1 sorry for the next witness, but we need to do it.

2 (The proceeding was recessed at 3:18 p.m.)

3 (The proceeding was resumed at 3:25 p.m.)

4 MR. GRADESS: One apology for the afternoon
5 to all the witnesses. We're running late, and we'll
6 try to catch up, and I'm sorry.

7 Mr. Hinman?

8 MR. HINMAN: Thank you. My name is James
9 Hinman. I'm an attorney in private practice in
10 Monroe County. I've been in private practice since I
11 was admitted in 1981, and I've sat through some of
12 the testimony this afternoon and I'll try not to
13 repeat things I've already heard.

14 I was mentioning to Mr. Youngman during the
15 break, I think the -- this process of holding public
16 hearings is nice, but I think it's frankly a waste of
17 time because I don't think there's going to really be
18 any change; and I think there's one word that sums up
19 the assigned counsel rate system, and that is
20 disgraceful. And if you need me to sit here or other
21 lawyers to sit here and tell you why it's
22 disgraceful, I would suggest that the best way to do
23 it would be to propose a rule that any lawyer who is
24 employed by the State of New York to perform legal
25 services will be compensated at the rate of the \$40

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1 an hour for in-court time and \$25 an hour for
2 out-of-court time, and let the lawyers who are
3 representing Dennis Vacco in the political firing
4 lawsuit explain to you why that rate is inadequate.
5 I read in the paper about a year ago that they're
6 being paid \$175 an hour to represent the Attorney
7 General in a political firing lawsuit; and the
8 Governor turns around in the same issue in the
9 newspaper complaining that \$175 an hour for death
10 penalty counsel is too high. Will Dennis Vacco's
11 life hang in the balance if his lawyer makes a
12 mistake? Absolutely not.

13 When Ms. Hathaway asked the question of
14 Mr. Muldoon when I came in, and it's one I've been
15 thinking about for a long time, and that is why do
16 you do it, I think the answer is we care, and we pay
17 a price for caring. My family pays a price. I pay a
18 price. My assigned clients pay a price, and my
19 retained clients pay a price because there's only so
20 much of me to go around.

21 The rates were raised in January 1st of 1986.
22 It's been almost 13 years. I defy anyone to find any
23 person in any capacity who works for the State of New
24 York who has not received an increase in compensation
25 in those 13 years.

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1 I do a lot of work in Family Court in
2 addition to assigned criminal cases. One of the
3 things that I always do in a Family Court case when
4 I'm representing a respondent is ask for the
5 Department of Social Services file so I can read
6 through the progress notes, the reports, and the
7 information that's contained in that file.

8 Several years ago the county executive at the
9 time, Bob King, was conducting an efficiency study of
10 the County and was soliciting suggestions as to what
11 might make the County more efficient, so I offered
12 the suggestion that when I'm representing a
13 respondent in a Family Court case, perhaps I could
14 specify the documents I would like to receive from
15 the County file and they could be copied by a copy
16 clerk employed by the County Department of Social
17 Services; and you know, it's funny, because the
18 answer I got back was it was cheaper to have me copy
19 the file than to have the copy clerk do it. And
20 they're right, it is. So I go to the Department of
21 Social Services attorney's office and get the file
22 and stand at their copier and make the copies myself
23 because it's cheaper to pay the lawyer to make the
24 copies than it is for a copy clerk. I went through
25 four years of college, three years of law school. I

1 work hard, to make copies, because it's cheaper for
2 me to do it.

3 And why do we keep doing it? You know, any
4 rational person would say I don't know; but I'm not
5 rational because I care about the clients I
6 represent. Rick Youngman can tell you I have a very
7 difficult time forming the word no. So when I get a
8 call, "Will you represent a client," the answer is
9 yes, of course I'll do it. And it gets overwhelming
10 sometimes, but we get through it.

11 But there comes a point in time, though, and
12 I don't know when I will reach it, but I feel myself
13 getting closer and closer to it, when I'm going to
14 have to start saying no. My retained clients
15 frequently suffer because I get held up in court on
16 assigned cases and I can't get their wills drawn as
17 promptly as I would like, can't get their complaints
18 drawn as promptly as I would like. I'm late for a
19 closing because I've been delayed in court, or I'm
20 late for an appointment with a client because I've
21 been at the jail visiting an assigned client. Is it
22 fair to an assigned client? No. Is it fair to a
23 retained client? No, it's not. Does assigned
24 counsel work sometimes get put aside in favor of
25 retained client work? Absolutely. Am I proud of

1 that? No. Why does it happen? Because my mortgage
2 company won't wait for their payment. They won't
3 wait until the end of my case to be settled when I'll
4 get the check to say we'll pick it up from you at
5 that time.

6 Several years ago I had an interesting
7 experience, because Judge Boomer of the Appellate
8 Division had always said that the assigned counsel
9 provisions of the statute were not a floor and that
10 time alone was not the deciding factor in determining
11 whether or not -- what level of compensation should
12 be paid. So I had a situation where I represented a
13 co-defendant on an appeal, and the transcript was
14 pretty much the same for both defendants. My appeal
15 got submitted a little later than the co-defendant's
16 appeal, and I ran into the co-defendant's appellate
17 counsel one day and asked him if he had any problem
18 with his voucher, and he told me no, that it had been
19 paid. He had put in a voucher for \$9,000 for the
20 appeal. I went back and had my secretary run all my
21 time for me off the computer that I put into the
22 case, and the record in that case sat literally this
23 high off the floor, the transcripts alone of the
24 trial proceeding. It was a quintuple homicide arson

25 case with co-defendants and a double jury trial.

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1 There were a number of issues that were raised, and
2 when I pulled my time out of the computer, my time
3 came out to about \$3,600 worth of time. So I
4 submitted -- went through an academic exercise for
5 Justice Boomer to come out with the conclusion that I
6 knew was coming, and that is that time alone is not
7 the deciding factor, but it is a ceiling on
8 compensation, because I asked the Judge to compensate
9 me at \$4,500, half of what had been paid to the
10 co-counsel, for reviewing the same case and doing the
11 same work.

12 In the course of doing that I learned a lot
13 of things about how these things work. I realized
14 that the case had been in my office for over a year.
15 I realized that the review of the transcript had
16 frequently occurred in the evening hours, usually at
17 home, time that I wasn't spending with my family and
18 my kids, or on weekends, again, time that I could
19 have been spending doing other things, when most
20 people aren't doing their work. I had waited for a
21 year to be compensated, and around the time I put in
22 the voucher I had just received my taxes from my
23 accountant for my practice from the year before, and
24 I made this -- what I would think is probably a
25 deadly mistake. I actually calculated what my

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1 overhead worked out to at the time -- and this was, I
2 believe -- I'm going to say about seven or eight
3 years ago -- and it worked out to \$38 and some change
4 and hour, and that's without a single penny in my
5 pocket. I just took -- I figured 35 hours of
6 billable hours a week. Anybody who's been in private
7 practice knows there's a big difference between a
8 billable hour and an hour on the clock. 35 billable
9 hours a week at 50 weeks a year, and I divided my
10 expenses without anything in there for me, and it
11 came out to \$38 and some change. So on that appeal I
12 made less than I would have made working at
13 McDonald's. I made \$1.60, I think, an hour for
14 handling that appeal.

15 So why do I do it? Why does anybody do it?
16 And why do I think this process is futile?
17 Mr. Gradess knows, he's heard me say this before. I
18 think the only way these rates are going to be
19 changed is when somebody gets around to suing the
20 State of New York because these rates are
21 unconstitutional. They deprive people of their basic
22 rights, and not just the clients -- and there's a --

23 this is interesting. I've referred to this. This is
24 the Indigent Defense Crisis that was published by the
25 American Bar Association in 1993. It's now five-plus

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1 years old, and they talk in here of cases where
2 litigation has been brought, and one court actually
3 recognized that attorney's services are property that
4 are subject to Fifth Amendment protection. And
5 that's important to me to understand that somebody
6 else at least understands that the time and the
7 knowledge and the training that I have is subject to
8 some protection, and it's not recognized in the
9 current level of compensation to say that \$40 and \$25
10 an hour -- why do we need to hold a hearing to
11 understand that that's incompetent, ineffective, and
12 inadequate?

13 I notice it's all being taken down, and I'm
14 sure that the transcript of all this is going to be
15 circulated to people who are in a position to make a
16 change, but I have absolutely no confidence

17 whatsoever that they'll read it, and I have no
18 confidence whatsoever that if they read it they'll do
19 anything about it. I have become extremely
20 disillusioned by writing letters and hearing about
21 lobbying efforts that are undertaken by the Defenders
22 Association, the Association of Criminal Defense
23 Lawyers, and I talk with senators and I talk with
24 assembly people about these rates, and I talk about
25 how inadequate it is, and they all tell me, "Oh, yes,

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1 no question about that. No question about at all.
2 We agree," and nothing changes; but I come here today
3 because if I don't come here today and complain we'll
4 hear that they held hearings and nobody came and
5 complained, and that will be used as an argument
6 against changing.

7 We hear, "We don't need to raise the rates.
8 Look at the number of lawyers who are taking these
9 cases." So maybe we ought to stop taking the cases,
10 and then they'd find out what they're up against.
11 And most of this time it gets focused on what -- the
12 criminal cases, but several years ago I spoke in this
13 chamber to a subcommittee of the Monroe County
14 Legislature that was investigating the possibility of
15 eliminating the Public Defender's Office. You know,
16 if you got something that works that does a real good
17 job you throw it out. But that's what they were
18 looking into doing. They wanted to eliminating the
19 Public Defender's Office; and I told them they may be

20 able to find enough attorneys to handle the criminal
21 cases because criminal cases get you into court, you
22 deal with interesting fact patterns, you meet some
23 people you wouldn't meet anywhere else, and you have
24 great stories to tell people at parties about cases.
25 Everybody wants to know about criminal law. But

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1 who's going to pick up the accused sex abuser in
2 Family Court? Who is going to represent the father
3 and mother who is involved in a custody case in
4 Family Court? Who are you going to get to take on
5 those cases? The lawyers now avoid Family Court like
6 the plague. They don't want to get involved in that
7 kind of thing, and the Public Defender's Office here
8 picks up cases in Family Court regularly,
9 representing people who are not charged criminally,
10 but who are involved in some of the worse kind of
11 cases that you can deal with, and there's a small --
12 it's a very small group in Monroe County of lawyers
13 who take those cases when the Public Defender's
14 Office cannot.

15 There's a real problem. I don't need to tell
16 you. You're all familiar with this problem. I'm
17 preaching to the choir here today, but I need to
18 preach because if I stop preaching the message isn't
19 going to get out. So I preach every opportunity I
20 get. Mr. Gradess knows that, Mr. Lewis knows that
21 because I've bent their ear many a time at meetings
22 of the Defenders Association on this very subject.
23 I've written them letters and I've offered to be the
24 plaintiff in a lawsuit, and I'd bring a lawsuit
25 myself if I only had time to do the research. But I

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1 don't have that time. The little time I have left I
2 spend in other ways, and that's a practical problem
3 that those of us in private practice face.

4 And I can also point out when we talk about
5 lowering taxes -- and I hear this every year at this
6 time about how taxes have been lowered. Yes, maybe
7 the tax rate has been lowered, but I know that the
8 clients that retain me at \$175 an hour are paying a
9 higher rate than they would have to pay if the
10 assigned counsel rates were higher, because they are
11 the ones who are subsidizing my ability to take on
12 assigned cases at 40 and \$25 an hour. They are the
13 ones who are subsidizing. And if you add that to
14 what they're paying in taxes, it's skyrocketed. But
15 nobody looks at it that way. And they pay it because
16 they understand -- at least I think they do -- that
17 it's worth it. That's the price they're paying, \$175

18 an hour, for what the State will pay 40 and 25.
19 And I agree with Mr. Muldoon's comments, I
20 don't know of a single lawyer in this town anymore
21 who charges a different out-of-court rate than an
22 in-court rate, and frequently the work that you do
23 out of court is far more valuable and far more
24 important than what you do in court, and to have a
25 discrepancy between those rates to me makes no sense

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1 at all.

2 And I've probably talked long enough today; I
3 see it says zero time over there. I wonder how long
4 it's been up; and I apologize, and I'd be glad to
5 answer any questions that anyone might have.

6 MR. LEWIS: Can you talk for the record,
7 given what you said, for the record about the
8 contours of a lawsuit, because not everybody is so
9 height bound to the Legislature.

10 MR. HINMAN: Well, in this "Indigent Defense
11 Monograph" from the ABA it talks about, "Increasing
12 litigation has been a method by which both public
13 defenders and court-appointed counsel have attempted
14 to deal with problems of overwhelming case loads and
15 inadequate compensation." They refer to a case in
16 Arizona where the Arizona court did something about
17 it. There's a California case that's cited; a
18 Florida case that's cited. The case that recognized
19 that attorney services are property and subject to
20 5th Amendment protection was a Kansas case. There's
21 also citations in here in the section of the
22 Monograph to a case in Arkansas, cases in
23 Mississippi, Nebraska, and Oklahoma.

24 MR. LEWIS: There are also about seven states
25 that ruled the other way.

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1 MR. HINMAN: I'm sure there are.

2 MR. LEWIS: No, but I'm curious about your
3 view of the lawsuit in State of New York. The reason
4 I'm prompting you is for the very reason you said to
5 us, there really is a record.

6 MR. HINMAN: Yes. I'm serious. If I had the
7 time to do the research and frame the complaint, it
8 would be filed.

9 MR. LEWIS: And the idea is that it's the
10 taking of attorney's time --

11 MR. HINMAN: It's the taking of my right to
12 practice my profession; not just my right to practice
13 my profession, but they're now telling us, a few
14 years ago, that we're obligated to take cases without
15 compensation. They wanted to impose a rule that said

16 you've got to perform so many free hours of legal
17 services a year; and when I went to that hearing and
18 asked, "How do you factor in assigned counsel cases?"
19 I was told, "Well, you get paid for those, so that's
20 not pro bono." Well, I mean, what do they want? Now
21 they want us to take on additional hours of
22 continuing legal education every year. We're going
23 to be required to do that. We're required now in
24 matrimonial cases to advise our clients, protect
25 yourself against your lawyer, you know, and

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1 everything is written. They're increasingly coming
2 down on the lawyers with more and more requirements
3 for us, and yet they don't think that we're entitled
4 to any additional compensation?
5 There is a case in New York City that
6 recognized that children have a right to
7 constitutional -- constitutionally guaranteed right
8 to effective representation by a law guardian, and
9 the law guardians are paid the same rate, \$40 an hour
10 in court, \$25 an hour out of court. So now everybody
11 who is covered by this rate is recognized to have a
12 constitutionally protected right to effective
13 counsel. So I think that's another aspect on which a
14 lawsuit could be brought.
15 I think there's maybe an equal protection
16 issue in terms of the different rates of compensation
17 that are paid by the State of New York to different
18 lawyers who perform legal services for or on behalf
19 of the State. Now, that would probably only need a
20 rational basis, but I'd almost defy anyone to find a
21 rational basis.
22 MR. LEWIS: Thank you.
23 MR. HINMAN: My pleasure.
24 MS. HATHAWAY: You might have a point. You
25 know, if the attorneys, all of you, band together and

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1 stop taking the cases. It certainly couldn't get
2 much worse or any worse than it is for the client
3 right now at this moment, and maybe then, just maybe,
4 it might serve as a wake-up call to those who are --
5 you know, making these asinine rules; and I do agree
6 it's asinine.
7 MR. HINMAN: Now try to get the lawyers
8 together to do it.
9 MS. HATHAWAY: Although it may sound a little
10 frivolous, you know, sometimes it takes something
11 that is extreme; and as I said, the client is there
12 anyway. It can't get much worse.
13 MR. HINMAN: That's right. I believe that

14 happened in Canada several years ago.
15 MR. GRADESS: Thank you very much.
16 Norm Effman?
17 MR. EFFMAN: Good afternoon. I realize it's
18 late in the day, and I notice that there's a break
19 after me, so that's what you have to look forward to.
20 I'm the Wyoming County Public Defender and
21 the executive director of the Wyoming County Attica
22 Legal Aid Bureau. For those of you not from this
23 part of the State, just a little geography, because I
24 remember when the Bills first started their Super
25 Bowl run most people in New York thought that Buffalo

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1 was just north of Albany. So to give you some idea
2 of where Wyoming County is, we are half way between
3 Rochester and Buffalo and south of both, equidistant,
4 in fact, about 50 miles from Buffalo and 50 miles
5 from Rochester, if you start from our county seat,
6 which is Warsaw, New York.
7 We're famous for a couple of things, just to
8 give you, again, where I'm coming from. Wyoming
9 County -- and I start all of my testimony with
10 this -- is the largest dairy producing county in New
11 York State, which is third in the Nation, so we have
12 approximately the same number of cows as people,
13 about 40,000 of each. Of our human population,
14 approximately 10 percent are inmates at the two
15 correctional facilities in the County, Attica and
16 Wyoming. Dairy is the number one industry;
17 corrections is probably number two; and number three
18 is probably tourism, not to see the prison but
19 because of hunting, fishing and Letchworth State
20 Park, which about 80 percent of that park is in
21 Wyoming, the rest of it is in Livingston County.
22 I'm here to give you a little different view
23 of public defense in this State because I really
24 believe that I'm in a unique situation when it comes
25 to representing indigent defendants; and that's not

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1 necessarily because of my public defender role, but
2 because of my other role as executive director of a
3 not-for-profit legal aid society, not unlike in
4 structure something like New York Legal Aid, and that
5 is a stand-alone not-for-profit without any
6 government help other than contractual.
7 I became public defender in 1990. Prior to
8 that, from about '65 to '90, Wyoming County had a
9 traditional delivery of defense services, and that is
10 two part-timers, a public defender and an assistant,
11 in dollar amounts earning somewhere between 20 and

12 \$15,000 per year, depending on which year we're
13 talking about, both of whom were private
14 practitioners and both of whom were given the
15 assistance of a part-time secretary to aid them in
16 their public defender endeavors.

17 Wyoming County Legal Aid has been in
18 existence since 1991 and started out primarily doing
19 prison litigation, parole work, as well as
20 representation, not unlike what you've heard, I
21 presume, from Tom Terrizzi at PLS this morning,
22 representing inmates involved in disciplinary
23 matters, et cetera, at that time Attica and then
24 later Wyoming Correctional Facility.

25 Right now we have a staff of myself and three

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1 other attorneys. We have two and-a-half secretaries,
2 and right now we have an investigator/paralegal,
3 although whether that continues is part of the budget
4 process I'm going through in Wyoming County.

5 All of our employees are also -- have two
6 hats at least, and that is they work for the County
7 as part-time public defenders -- we're still
8 considered part time -- and work for Attica Legal
9 Aid, a not-for-profit corporation, and receive pay
10 checks from both entities. It is this combined
11 function that has enabled my organization not only to
12 exist in hard times, based on all the testimony I'm
13 sure you've heard with respect to criminal defense of
14 the indigent, but actually to flourish and to
15 improve, and in my mind to be able to deliver quality
16 defense services with realistically no problems in
17 financing those services even in the most serious of
18 cases, including capital cases, because we're one of
19 the few public defender offices that I'm aware of
20 that has a contract to be assignable in capital
21 cases; and we have in fact been assigned on a capital
22 case which has recently concluded.

23 The way this glimmer of hope I hope to spread
24 over the room during the late afternoon has occurred
25 is really by happenstance, by luck, by perhaps good

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1 planning; but the reality is that of my entire
2 combined budget of, let's say, \$350,000, Wyoming
3 County's share is approximately \$125,000; and that is
4 because as Attica Legal Aid we have contracts to
5 provide various services to the State of New York,
6 which includes alternatives to incarceration, day
7 reporting type of services. We're working on a drug
8 court component as well. We provide services again
9 to state inmates and the two correctional facilities,

10 and it is the ability to combine all of these funding
11 sources which enable us to put together a defense
12 component that is truly full time and well-financed
13 and able to meet the challenges of what is now a
14 full-time District Attorney's office with a full-time
15 DA and two full-time assistants. That is also recent
16 in Wyoming County.

17 It is totally beyond my imagination that we
18 would be able to come close to competing with the
19 prosecution if we relied solely on County funds. Now
20 the County not only provides funding to us in the
21 traditional legislative budget process for the Public
22 Defender's Office, but in most of the State funds we
23 receive, there is, of course, the necessity for some
24 local match. So when I say that the County is
25 spending \$125,000, that includes the local matches

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1 for our Legal Aid Society programs.

2 I don't know how else to express what I
3 believe might be perhaps an answer to the problems at
4 the institutionalized level rather than the 18-b
5 level of providing defense services, but the answer
6 clearly in my mind is we need State support at the
7 local county levels.

8 My county is extremely fiscally conservative,
9 about as extreme as you can get. However, they are
10 so extreme in their view of the Constitution and of
11 individual's rights and of the almighty dollar, that
12 in some senses they're liberal; and that is if you
13 are a true believer in the Constitution, you know,
14 that part of conservativeness, you believe in the
15 rights of the defendant. And that's where the circle
16 kind of completes itself. And therefore, I find not
17 only, for example, with our jurors in rural areas,
18 but with our County Legislature, I can truly make be
19 an argument with the flag wrapped tightly around me
20 on the due process requirements necessary to provide
21 an adequate defense, and while no one is there
22 running a campaign saying we're defending the Public
23 Defender's Office so that they can represent the
24 worse of us, the reality is in chambers that argument
25 does catch fire, and we do have the ability for them

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1 to recognize our needs, especially if I add the
2 component of State funds coming in, because
3 unfortunately, again, no matter how much you believe
4 in the Bill of Rights and the right to an effective,
5 adequate defense system in place, every budget
6 hearing I have deals with one primary object, and
7 that is the tax levy. That's all that is talked

8 about in the budget process, at least in my neck of
9 the woods, rural New York. And I'll give you an
10 example of how dealing with the State on one hand and
11 approaching the viewpoint of the legislature on the
12 other can somehow deal with our problem.

13 I was able last year to convince our County
14 Legislature to provide me with our first investigator
15 that we've ever had. The attorneys were doing their
16 own investigations. We do our own jail interviews,
17 et cetera. I was able to get that done because we
18 were involved in a capital case where by contract the
19 County was being reimbursed at the rate of \$80 per
20 hour on any work we did on this capital case. The
21 CDO and I arrived at that figure based upon our
22 budget and the fact it was costing the County \$80 an
23 hour to run our office. So we did the work without
24 any additional staff. We vouchered quarterly to the
25 Capital Defender's Office, and those monies went to

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1 the County, not to the Public Defender's Office.
2 That revenue was utilized to pay for a
3 paralegal/investigator. The County, however, not
4 wanting to add to county employees because of the
5 ripple effect -- fringe benefits, insurance,
6 especially health insurance, et cetera -- utilized
7 not by consent but by decree the fact that I do have
8 two hats and we do have a not-for-profit sitting
9 there. So they came up with the idea of contracting
10 with our Legal Aid Society -- the same people,
11 different hats -- to provide paralegal/investigation
12 resources to the Public Defender on a contractual
13 basis for \$25,000 a year. We would have to pick up
14 any fringes if we were going to give them any. And,
15 of course, those monies would come from the monies
16 generated by our capital case.

17 So with that we add an employee, who is not a
18 County employee, but a Legal Aid employee, and there
19 is no change in the tax levy, the magic words. You
20 don't have to increase taxes to the local property.
21 There is income on one side to balance the employee
22 on the other.

23 The same phenomenon is working now. The
24 capital case is over. That source of income is gone.
25 I'm looking to renew the contract. We have another

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1 revenue source in Wyoming County. Under the
2 Corrections Law if a state inmate is charged with a
3 crime and prosecuted in a locality, that locality is
4 entitled to total reimbursement on all ends,
5 prosecution and defense, by the State, 606 of the

6 Corrections Law.

7 The Department of Correctional Services for
8 whatever reason has put a lot of pressure on our
9 local DA to prosecute inmates. For whatever reason
10 we now have 17 inmate cases pending in our office.
11 Those cases generate on average about \$2,000 worth of
12 reimbursement money based on 18-b rates. We use 18-b
13 rates when we're charging the State for
14 representation of inmates. It turns out, at \$2,000
15 per inmate plus our normally anticipated revenue from
16 this, that it actually covers the additional \$25,000
17 necessary to continue this program.

18 So that's my pitch to the County, whether it
19 makes it or not, is that, again, I could have an
20 employee who's not a county employee based on revenue
21 producing sources, and that is prosecution of
22 inmates, defense of inmates, reimbursable to the
23 County, no impact on the tax levy. Those are the
24 golden, magic words in dealing with local legislators
25 and budgets: No tax levy increase. And the only way

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1 I can do that is by revenue being produced by our
2 resources at the State level; and I have certainly
3 honed those resources over those almost eight, nine
4 years that I'm Public Defender. Our senator is
5 Senator Volker, and therefore we have some clout at
6 the Senate level. Upstate republicans and the
7 Assembly have little to no clout at all, but Tom
8 Reynolds was our assemblyman, so we had whatever
9 clout there was in that house to push legislation
10 through.

11 We did not suffer the losses that PLS
12 suffered. We've been cut out of the budget on some
13 of our programs year after year, but we did not
14 suffer the veto this year. I don't know who to thank
15 or blame, but the reality is it's State monies that
16 keep us afloat, and it's the combination of doing
17 standard public defender work and involving yourself
18 in programs with State reimbursement that enable us
19 to operate at a competitive level so that I do not
20 add to the gloom and doom testimony that I'm sure you
21 have heard and will be hearing throughout the State.

22 Just as a personal note, I've been lawyering
23 for about 30 years. I've handled primarily criminal
24 cases, but I've done everything from patent law to
25 zoning, and therefore have a wide knowledge of

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1 individuals in the Western New York area that I can
2 count on for support and aid in making these programs
3 work.

4 Rather than taking more time I think that
5 gives you the scope of where I think public defender
6 can go, but it is clearly based on the necessity of
7 state aid. We are not one of the 30 some-odd
8 counties that receive aid to defense; so that's not
9 in our pocket. I don't think there's been any change
10 in that particular program since it was commenced I
11 presume in the early '70s, with the Rockefeller drug
12 law; but I think those 30 counties are still the same
13 30 counties that get aid to defense. We have not
14 been able to break that cycle of monies, but we keep
15 our eye on what is available at both the Federal and
16 State sources. I'm my only grantsman, and when
17 there's money available we apply for it.

18 Any questions?

19 MR. GRADESS: We had testimony earlier today
20 from two witnesses that their 606 expenditures do not
21 completely reimburse them under the Corrections Law.
22 Instead, one of them testified that they were limited
23 to the amount of the appropriation. Has that been
24 your experience, or are you fully reimbursed?

25 MR. EFFMAN: I don't get all of the feedback

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1 because we simply submit our vouchers to the County
2 treasurer who submits them to the State. When I
3 checked last, all of our vouchers were honored at the
4 hundred percent, and that's as recently as two or
5 three months ago.

6 MR. GRADESS: Tell us if you would for the
7 record the impact of these budget cuts that you made
8 reference to over the last couple of years, the
9 budget process, the issue, its effect on your office,
10 how much time you have to spend, this sort of thing.
11 Could you give us a little flavor of what that meant
12 to you, particularly since you've come out at least
13 seemingly successful?

14 MR. EFFMAN: Well, I'm trying to remember how
15 many years we had to go through the fight, but I
16 think it's at least two of the Cuomo years and all of
17 the Pataki years where our primary funding source,
18 that is the indigent parolee budget fund, the State
19 funding source, was left out of the State budget and
20 we had to go in and campaign at both county,
21 intercounty and state levels for re-establishing
22 those programs.

23 Basically, from -- I would say four months a
24 year we're involved in budget fights to maintain
25 these things. And as Jonathan knows, because I'm

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1 involved in the lobbying efforts in Albany, we

2 probably spend five -- I spend personally probably
3 three to five days per year plus days in the office
4 reviewing proposals, submitting requests, going to my
5 County Legislature, getting them to adopt resolutions
6 requesting re-establishment of funds necessary to
7 continue these programs.

8 I don't view myself as an administrator. I
9 think I'm a trial lawyer. That's what I like to do.
10 I like to be in court. I handle most of the felony
11 trials in my office, and the reality is when the
12 budget process begins in Albany, at least half of me
13 is involved in that process; so clearly, it's not
14 only a struggle to get it done every year, it is a
15 discouraging process to go -- to go through the
16 deja vu that is part of the yearly problems of trying
17 to get funding.

18 In talking about that problem, the drudgery
19 of doing the same thing every year, going to the same
20 people, realizing that if you leave one out they
21 might feel that they are slighted, so you can't
22 forget to see someone who you believe is even on your
23 side, because if they don't show up in their office,
24 you don't know what kind of waves that will bring
25 about. It is difficult. I like getting away from

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1 Wyoming County once in a while, but Albany in March
2 isn't great, either.

3 What I thought about and mentioned to Senator
4 Volker at a -- at some event is the necessity for a
5 dedicated defense source of funding that will take it
6 out of the political process, because as some of the
7 speakers have indicated to you, in spite of our
8 efforts here the view from the defense bar is it's
9 going nowhere because of the political aspects of
10 funding unpopular causes. The only way around that,
11 as I see it at this point, is to come up with some
12 source of dedicated funding that will not be
13 subjected to the same political problems that each of
14 the defense programs come to face each budget year;
15 whether it's PLS or the defense programs out of New
16 York City or Aid to Defense. Those are -- it is
17 difficult for elected officials to back those
18 programs and go out to their voters. There's got to
19 be a way to cut money loose in this State with a
20 proper oversight committee to distribute those funds
21 so that they are not part of the political football
22 and obviously must be played as part of our budget
23 process and is played as part of our budget process
24 yearly.

25 MR. GRADESS: You've heard some of the

1 testimony here. I know you've been sitting and
2 listening to some of it. I just wonder if you can
3 address these. We've heard testimony all day
4 regarding the failure to take into account cost of
5 living, the failure to look at market wages; and
6 throughout there has been this kind of discussion of
7 the State takeover of defense services. Are you
8 distinguishing in your testimony between State
9 takeover and State financing; and if so, could you
10 talk about those issues in context?

11 MR. EFFMAN: It's an interesting concept. I
12 guess there are states with statewide public
13 defender's offices; I'm aware of them. I think this
14 State is so diversified that even if we were to go to
15 a CEO type of operation, clearly it would have to be
16 regionalized because of the vast differences between
17 the west and northern and southern parts of this
18 State.

19 I happen to think very much of local impact
20 on defense services, and I can give you again one
21 more story that may or may not hold true as this
22 process is developed. We had a very high profile, as
23 I indicated, capital case in our County. It was a
24 case where the judge saw fit to assign not only the
25 Capital Defenders Office, but to assign my office as

1 co-lead counsel and then a 35(b) attorney as second
2 chair who had already been involved in the case. It
3 was the ideal working team to make that case resolve
4 itself. The expertise available from the CDO, their
5 ability to do research, to come up with the
6 pleadings, to come up with the talent necessary to
7 represent someone on a capital case was something I
8 don't think I could have gone without. It was a
9 necessary part of the defense component. The 35(b)
10 lawyer who was involved earlier had a personal
11 rapport with the client that was absolutely mandatory
12 in resolving this case; and my input, and I get this
13 from both sides and the court, was invaluable simply
14 because I knew the players, that I knew the judge, I
15 knew the District Attorney, I knew which arguments
16 would be viewed kindly and which would not. I knew
17 how to approach them rather than having an outside
18 expert come in where everyone gets their territorial
19 nails out to keep home rule in place. The local
20 component is absolutely essential in defense work, I
21 believe, for the most part, even if it's teamed with
22 expertise from outside, in order to deal with egos,
23 local rules, local protocol, and local personalities.

24 So yes, I think right now just based on my
25 experience, I think State aid and local control is

1 where I would go; but I would not be opposed to
2 getting more structure at the State level to oversee
3 that type of delivery of defense services. I think
4 you need some statewide -- I hate to use the word
5 "committee" because they're frightening, but it's the

6 only way we operate in this Democracy, but you need
7 some statewide oversight to ensure quality services
8 when you're dealing with the breadth and width of the
9 62 counties in this State, and the diversity. I
10 mean, I don't know how many of you are from New York,
11 but I have the blessing of growing up in the urban
12 part and suburban part of this state and now living
13 in the most rural part of this state, so I can see
14 the differences; and we are as diversified as this
15 country is, and I think that's why regional input is
16 absolutely necessary in dealing with local judges,
17 county judges, and even at the urban levels, because
18 Buffalo and Rochester, both in the same neck of the
19 woods if you look at the map, are totally different
20 when it comes to criminal defense and dealing with
21 the individuals; that is the DA's Office, the judges,
22 and the systems in place. The CPL is the same, but
23 everything else is different.

24 MR. GRADESS: Thank you.
25 Clare Regan?

1 MS REGAN: I'm Clare Regan. I am not a
2 lawyer, and I have been involved in criminal justice
3 work since 1972 after the Attica riot. I'm a member
4 of the Judicial Process Commission, which is a
5 criminal justice advocacy group which was formed
6 after the Attica riot to see that there was equal
7 prosecution of the guards, State Police, as well as
8 the inmates; and for the last 21 years I've edited a
9 criminal justice newsletter. I was a member of the
10 New York State Coalition for Criminal Justice, and
11 I'm also a member of the Monroe County Criminal
12 Justice Council and a member of the local Public
13 Defender's Advisory Board.

14 Now, there are several areas that I am very
15 interested in because we sit and meet with these
16 people that are affected by it. When you go over to
17 the Public Defender's Office all you have to do is
18 stand there for a while, and there will be people,
19 clients saying, "But I called five times and I've
20 never gotten an answer back," or people complaining
21 that they've gone to court and have hardly gotten to
22 see their attorneys at all.

23 Last year City Court, which handles all
24 felonies, misdemeanors, and violations as they're
25 taken in, in the City of Rochester, handled 11,500

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1 cases. They had one supervising attorney and 10
2 attorneys to handle all that. Now, when you break
3 that down, because they have to determine the
4 eligibility for the representation, the bail
5 applications, go to the arraignments, the pretrial
6 conferencing, do motions, pretrial hearings, trials,
7 Social Services referrals, and sentencing, all of
8 that they have about five hours per case for each one
9 of them, and that's in a 40-hour work week, which
10 obviously they can't do. They have to work a lot
11 more than that. They are about a hundred percent
12 over the standards -- national standards per
13 attorney, and they had 67 trials, and they actually
14 did pretty well. On 50 percent of them they had
15 trial orders of dismissal or acquittals in that
16 number, but they did a lot of plea bargaining.

17 Now, what we hear from people in the criminal
18 justice system, of the clients, that they are totally
19 alienated. Many of the people in the City are
20 African-American or Latino, many of their lawyers are
21 caucasian, and they just feel very frankly that
22 they're being put upon. Once given, they're cast
23 aside; and I think this is one of the reasons why we
24 can't get them out to vote. They just feel that the
25 system is so corrupt and against them, what's the

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1 point. So it has other implications than we think
2 of.

3 In the town and village courts they have
4 about 4,800 cases, and these are the people that come
5 in that are just essentially being trained, and
6 there's one special assistant public defender, and
7 then six assistants. They handle about 800 cases
8 apiece a year. Now, the City once had about 1,200,
9 but since many of the town courts only meet a couple
10 nights a week, they may have 50 cases in one night;
11 and this is also pretty difficult for a new attorney
12 coming in.

13 Family Court, each public defender has about
14 300 clients. It's almost two and-a-half times what
15 they had in 1987, and that's a hundred percent over
16 the standards. In spite of this they have had fairly
17 good results. And in Superior Court with the felony
18 cases, there's been about 3,000, which is 165 per
19 attorney; and it's only about 35 percent over, but
20 that's still the serious cases.

21 With violent felony offenders here, last year
22 there were 1,167. Now, it will be interesting to see
23 what happens to those cases now that Jenna's Law is
24 in effect, because I don't know if you understand
25 what happened with Jenna's law, but that says any

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1 violent felony offense and a burglary of any house,
2 any public house, private house, whether there's
3 anybody home or not, is considered a violent felony
4 offense, and they serve six-sevenths of their
5 sentence, 85 percent, and then they're put on special
6 supervision for anywhere from one and-a-half to five
7 years, which starts after that. They can also be put
8 in immediately, after that six-sevenths of their
9 sentence, into a drug rehab place for six months. If
10 they have a low-level felony, that may even be longer
11 than their sentence would have been with a total
12 sentence.

13 So these are things -- will there be as many
14 plea bargains? One wonders. When the clients really
15 understand the impact on this, and what you have --
16 the sort of sentence you would get in New York City
17 for the same crime and in Monroe County -- let's say
18 you get seven years in New York City, you could get
19 10 years here, and in some of the rural counties for
20 the same crime you could get 15; and for the extra
21 supervised time after release it can be one
22 and-a-half to five years. So you would think that
23 they would give the maximum to the people that had
24 the longer sentences. That's almost like parole.
25 And if they violate during that time, they can serve

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1 that extra time plus the rest of their sentence, and
2 they have to serve at least six months of time if
3 they had been violated during that supervised
4 release, and that doesn't count the time that they
5 spend in jail waiting for the decision on that.

6 I think this is really going to have some
7 impact -- it's certainly going to have an impact on
8 the prison system, and I think once it becomes known
9 it will have an impact on the defenders because I
10 can't see a person not being willing to fight and
11 take a chance on going to trial unless the evidence
12 against them is so air tight that they don't feel
13 they have any kind of chance at all.

14 The other thing, I wanted to talk about this
15 for a minute. I have made myself sort of a
16 specialist in just knowledge about the death penalty.
17 I don't -- and I have found we're now up to 484
18 cases, executions since Gary Gilmore, and I can give

19 you good reasons why at least 20 of those people were
20 totally innocent and another 20 were maybe involved
21 in the crime in a minor way but were not the person
22 who did the murder.

23 As we have more and more murder trials in New
24 York, the Capital Defender's Office is going to have
25 to rely on other people to help out, and we now have

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1 four trials where the person has been convicted. We
2 have two dispositions now; one person is on death
3 row, one got life without possibility of parole. The
4 other two are waiting their sentences.

5 I think that unless lawyers are adequately
6 compensated you're going to have a hard time getting
7 good lawyers. As was said here before, when
8 Governor Pataki was suing to have Robert Johnson
9 removed in the Angel Diaz case, his lawyer was paid
10 \$175 an hour. If you can pay it to go after somebody
11 to kill them you ought to be able to pay that same
12 amount to keep somebody from being killed.

13 And these are my thoughts, and especially
14 with the local Public Defenders's Office, I know how
15 seriously they are overburdened because of lack of
16 attorneys.

17 MR. GRADESS: Thank you.

18 Clare, if you might, just for the record,
19 you've made reference in your testimony to standards
20 and the office being 100 percent over standards.
21 Could you tell us what standards you're making
22 reference to?

23 MS REGAN: These are the national standards.

24 MR. GRADESS: National Legal Aid and
25 Defenders Association?

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1 MS. REGAN: Yes.

2 MR. GRADESS: Thank you very much.

3 We'll take a little break, five minutes, and
4 we will keep going, okay?

5 (The proceeding was recessed at 4:20 p.m.)

6 (The proceeding was resumed at 4:25 p.m.)

7 MR. GRADESS: Gloria Lopez?

8 MS. LOPEZ: Good afternoon to all of you.

9 My name is Gloria Lopez. I'm with the Urban
10 League of Rochester. I happen to be an attorney, but
11 I also happen to be their director of human resources
12 and civil rights officer, so I investigate a lot of
13 civil rights claims, and I have an opportunity to go
14 to the Monroe County Jail quite often.

15 First let me tell you about the Urban League.
16 We're a nonprofit organization. Our organization

17 helps people of color to realize their full human
18 potential and their rights. Additionally, we
19 advocate for all people in our community to improve
20 their living conditions and all the necessary
21 elements. Our programs and services which we
22 provided, we have served over 10,000 clients in the
23 past year, and probably will be serving more people
24 in the coming year.

25 I would like to take this opportunity to

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1 thank you for letting us share our concerns and some
2 of our overview of what we see at the Public
3 Defender's Office.

4 To give you a little history, Monroe County,
5 as I understand it, is one of the few locations that
6 has a merit selection process for the Public
7 Defender's Office, and the Urban League of Rochester
8 has been involved since 1977 when we first selected
9 Public Defender Ed Nowak to be our current Public
10 Defender, and we have continued our relationship with
11 the Public Defender's Office. In fact, we're on the
12 Advisory Committee.

13 Two concerns we have is, one, that the Public
14 Defender's Office does not reflect the community; and
15 second, we would like to make a request if we could
16 possibly increase the staffing level at the Public
17 Defender's Office, particularly the attorneys, and if
18 we could get more minority attorneys we would be
19 very, very happy.

20 To discuss the Public Defender's Office, to
21 have it be more reflective of the population, over
22 the years, the population in Monroe County has -- the
23 minority population has decrease. In fact the 1990
24 census indicates that there are 11.9 percent
25 African-Americans in Monroe County, 3.7 percent

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1 Latinos, 1.8 percent Asian, and 4 percent of other
2 nationalities. However, our Public Defender's Office
3 only has two people of color attorneys. It has
4 several people of color investigators, but only two
5 people of color attorneys; one African-American, one
6 Latino, and these two were recently hired, and this
7 is just two people of color attorney in a Public
8 Defender's Office consisting of 50 attorneys.

9 That imbalance is not acceptable to us.
10 Diversity is key in order to make a Public Defender's
11 Office more effective. Additionally, if you have
12 more attorneys who are bilingual it will help in the
13 representation of people. When I used to do a lot of
14 representation of people I can't tell you how

15 wonderful people felt when I would be able to speak
16 with them in Spanish to understand them better rather
17 than going through an interpreter. I did a lot of
18 landlord/tenants, and many of them Latinos and people
19 of color are people that I represented.

20 What we would suggest is that if the Public
21 Defender's Office, but also the Monroe County legal
22 departments, the Corporate Counsel's Department, the
23 District Attorney's Office, as well as the County Law
24 Departments would make an intensive effort to
25 increase the people of color attorneys in their

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1 offices. We recognize that it's difficult to recruit
2 minority attorneys, but they need to make an effort
3 by working with some of the local community
4 organizations, contacting them, distributing their
5 job description, letting them know when positions
6 become available in various legal departments.
7 Contacting the Monroe County Bar Association, we have
8 a Bar Association consisting of minorities, and we
9 would be willing to work with the legal departments
10 to try to fill more people of color positions and
11 their attorney positions.

12 Also, if they could go to the local law
13 schools and try to recruit people from there.

14 I remember -- I was talking with some of my
15 other minority attorneys, and we were saying when we
16 were going to law school, we were basically solicited
17 from places like New York City, other large cities,
18 we didn't see our Public Defender or -- actually our
19 County law departments at the law schools that we
20 attended. They were local law schools. So we would
21 request that they send and make an effort by sending
22 their job descriptions to the New York State Faculty
23 of Law Jurisprudence in Buffalo, Albany, or Syracuse;
24 but we need them to work with us.

25 Possibly, they should share -- the Public

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1 Defender's as well as the other legal departments
2 should share their job descriptions with the Advisory
3 Committee. The Public Defender gets numerous local
4 organizations on its Advisory Committee. Ibarro,
5 which is an in Latino organization, The Urban League,
6 which is an organization that helps all people of
7 color, and other organizations as well.

8 The second point that we're concerned about
9 is that the Public Defender's Office -- at least from
10 what we perceive -- they need to have an increase in
11 their staffing level. What we've noticed is that the
12 City of Rochester Police Department in its annual

13 report indicated that there are approximately 21,000
14 Part One offenses committed in the City of Rochester
15 alone; 25,649 Part Two offenses committed in the City
16 of Rochester, which comes out to be more than 46,600
17 offenses. The Public Defender's Office with its 50
18 attorneys handle 32,823 cases in Monroe County. They
19 could have done more, provided more legal
20 representation to the people had there been more of
21 them, more attorneys there.

22 Also, the increase in staffing level would
23 also allow the Public Defender's Office, the
24 attorneys, to represent the clients from beginning
25 all the way through the other levels that are

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1 necessary, and it would also increase the efficiency,
2 the effectiveness of handling the cases by the Public
3 Defender's Offices. They have a high case load of
4 approximately maybe 660 cases per attorney. That is
5 a lot for someone to handle; and if we had an
6 increased staffing level in our -- and more minority
7 attorneys, it would also prevent the possible
8 attorney burnout that many of the Public Defender's
9 attorneys are feeling now.

10 So our two points are that, one, we would
11 like to see the Public Defender's Office to be a
12 little bit more reflective of the community; and,
13 second, to increase the staffing levels.

14 I was sitting there and listening to Clare
15 speak about what she heard about the clients. As I
16 said, what I do is I do the civil rights cases in the
17 Urban League. I investigate them. I have received
18 phone calls from people from jail in which they're
19 telling me, "I don't have an opportunity to see my
20 public defender until moments before we go in court.
21 I call them. I don't have the opportunity to speak
22 with them."

23 Many of us attorneys, when we call the Public
24 Defender's Office, we're really lucky and we consider
25 ourself fortunate when they call us back. It's not

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1 because they don't do good work, but it's because
2 they're overburdened and they just don't have the
3 time to reach everyone. If we had more public
4 defenders we would be able to increase accessibility
5 to clients as well as to the legal community.

6 Also, I also believe this would increase the
7 morale in the Public Defender's Office by making
8 people a little bit more energetic, because some of
9 us who are attorneys and we've done trial work, after
10 you've done it for a long time, if you've done a lot

11 of cases you get a little burned out; but it's vital
12 that we have attorneys and support staff at the
13 Public Defender's Office who are available, are
14 accessible to the clients and are energetic, so that
15 they can continue to carry on the battle of
16 injustices, correct some wrongs, and protect the
17 liberty of people.

18 So those are our statements, those twofold
19 statements.

20 MR. GRADESS: Thank you.

21 MS. HATHAWAY: I just have a statement.

22 Ms. Lopez, I really agree with all that
23 you've saying about having more participants, people
24 of color -- you know, attorneys of color; and I guess
25 if we could just find maybe another handful like you

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1 it might start the ball rolling. But realistically
2 when I think -- when our attorneys listen to their
3 counterparts who can't seem to exist on the funds as
4 they are now and other reasons that they give, then
5 certainly the attorney of color -- the attorneys of
6 color take this into consideration also, because it
7 will not also pay their bills, it won't be a
8 financial boon for them. Certainly public interest
9 law takes commitment, and there are many out there
10 that are committed, but they too simply cannot afford
11 even less than their counterparts can.

12 So I believe in miracles. Hopefully maybe
13 something -- maybe we might be able to come up with
14 something out of these hearings. I don't consider
15 them a waste of time, or I would not be sitting here,
16 because I don't have time to waste and neither does
17 any of us. So hopefully something will come out.
18 Maybe one small step, no matter how small, if it's
19 one small step it can be enlarged.

20 MS. LOPEZ: That's what my mother always told
21 me. If I could start with a little bit, you never
22 know where you can go then. I believe that. And I
23 understand the finances because when I came out of
24 law school I had several places down in New York City
25 that would pay me a lot more money than I was making

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1 here; but I wanted to come back to the city that
2 adopted me, because I wasn't born here; but I wanted
3 to come back here to do some work for the people here
4 because I have the skills as I'm bilingual to
5 represent some of our bilingual people. I even took
6 a pay cut. But what was important to me is that I
7 firmly believe in the rights of people to be
8 protected, and that's what we as attorneys -- and we

9 as even community organizers need to be there for.
10 It's hard, but you never know unless you try. You
11 can find some people, and so I appreciate and
12 whatever you can do to help us to get more people of
13 color as attorneys or even staffs, we would greatly
14 appreciate it, and I know the Public Defender's
15 Office would greatly appreciate having more people on
16 board, more than 50, to handle 32,823 cases. That's
17 a lot. Thank you.

18 MR. GRADESS: Could I just ask you one
19 question, please.

20 MS. LOPEZ: Yes.

21 MR. GRADESS: About what you do in the
22 ordinary course of your work, if you might share it a
23 little bit and tell us about the jail visits and what
24 the nature of the kinds of complaints that you hear?

25 MS. LOPEZ: Okay. The normal course of my

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1 work is -- it's just like everything. But
2 particularly with the jail visits, what I do is I
3 investigate internal -- kind of civil rights
4 violations. If a person feels they're being treated
5 unfairly based upon the race, religious, color of
6 skin, national origin, or something; so I investigate
7 into it and see what the Urban League can do to
8 intervene. We negotiate settlements; we talk with
9 people; talk with corporations. Sometimes, like in
10 the Public Defender's Office, when I get a phone call
11 from the jail person, they tell me, "The public
12 defender hasn't spoken to me. I call them. I ask to
13 speak with them. They haven't spoken with me."
14 Because I know Mr. Nowak, I call him up and say, "Ed,
15 what's this? What can we do to get this person --
16 the attorney to speak with this person?" And I
17 understand time is essential in this instance, but
18 our people in jail are complaining that they're not
19 getting the attention that they should receive, and I
20 understand the Public Defender's Office is kind of
21 overwhelmed, but sometimes people, all they need is
22 communication so they can understand the legal
23 process.

24 So I play like a little intermediary, and
25 then I follow up with the attorney and say, "Hey, you

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1 know, your client is asking you to speak to him.
2 What are you going to do? He needs to strategize
3 with you with your case. Let's go down and speak
4 with him." So generally, our intervention gets the
5 two of them to talk more than what they do, and they
6 have told me -- the people that we have intervened on

7 behalf of at the jail over here, they appreciate our
8 invention. Sometimes we can't do very much, but at
9 least they know there's an organization out there,
10 someone who will really try to connect the two of
11 them together.

12 Sometimes I go to jail -- over to the
13 courthouse to make sure that the people -- the public
14 defender will be there a little early to talk with
15 the person, just to get them talking; because
16 sometimes they may not talk with each other because
17 they may not feel comfortable because of the
18 people -- as I was saying, they're reflective of the
19 community. Sometimes it's a majority of the
20 people -- at least the ones we see are people of
21 color, and then if their public defender is not a
22 person of color they may not understand each other.

23 Once I did intervene with a Latino person who
24 had a little difficult time speaking in English, but
25 when they could speak in Spanish it's real easy to

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1 just talk away and express your concerns; and then
2 when they talk with me I can talk to the Public
3 Defender's Office because I also have the legal
4 ability and the legal knowledge to express his
5 concerns and this is they want to tell you. Can that
6 help you.

7 I found that the Public Defender's Office is
8 generally receptive, and they are on the right track
9 and they are doing a lot of background work, but it's
10 communication that is needed for the people so that
11 they don't feel like they're out there hanging by
12 themselves, because I don't know if any of you have
13 ever been to jail, but gosh that's a horrible place
14 to go. On my first visit when the door slammed on me
15 I was saying, "Dear Lord, don't let them have a riot
16 while I'm here." So they need the communication.
17 That's basically what I do, is I talk to the them ,
18 talk with the PD, talk with the attorneys, follow up
19 just to make sure they're talking with each other,
20 and that's just with the criminal part. The other
21 part, the civil rights part, it's more of the
22 negotiation, mediation, and seeing what we can do to
23 settle the matter; otherwise, we send it to the
24 Division of Human Rights.

25 MR. LEWIS: Do you find yourself doing that

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1 no matter whether the client is represented by a
2 public defender or court-appointed or private lawyer?

3 MS. LOPEZ: The only incidents in which I've
4 been involved has been with the Public Defender's

5 Office. It has not been assigned counsel or private
6 attorneys, just the public defenders were the ones
7 that I have been involved in. I think they may have
8 been about -- maybe four or five of them. Not very
9 many, but those people who do call, they are hurting.

10 MR. LEWIS: And forgive me, this may just
11 display ignorance rather than anything else, but is
12 it a matter of lawyers without interpreters or is it
13 a cultural gap? What is it that you observe that --
14 I mean, if the Urban League didn't do this who could
15 do it within the system so that it ensures no one
16 falls between the cracks even if they can't get to
17 you?

18 MS. LOPEZ: Who could do it? Possibly
19 probably other community organizations, or even -- I
20 think the Public Defender's Office would be able to
21 do it if they had more people who can communicate in
22 the same kind of language that these people can
23 communicate in and relate to. I can't understand why
24 if there was -- if there were not more Latino
25 bilingual attorneys in the Public Defender's Office

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1 they would be able to speak with them as well,
2 because I found that people really just want to talk.
3 Sometimes the people who look like them, talk with
4 them, they feel come from the same environment.

5 Who else? I'm not so sure what the
6 interpreter's role is except for in the court when
7 they go there and just interpret. I know that I
8 always have an edge on everyone when it's a Latino
9 person is interpreting, because I know if the
10 interpreter is doing it correctly or not.

11 I just would think if they had more bilingual
12 people in the Public Defender's Office, even some of
13 their staffing -- I know that paralegals would also
14 go in and interview people, so they would be able to
15 do some of that. If we had more African-Americans
16 there. Sometimes the perception and the feeling of
17 people being -- that they sort of look like each
18 other, it helps them, even though there are many -- I
19 have a lot of friends who are not people of color,
20 and they're just as good and they can relate; but
21 sometimes when you're hurting and you're in there you
22 need someone who sort of looks like you, and it
23 helps. We would just ask them to be a little more
24 reflective and do a little bit more intense
25 recruiting of people of color and bilingual people.

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1 I don't know if that helps --

2 MR. LEWIS: Thank you. That really is more

3 of an answer than -- what I was concerned with was,
4 was this interpretation merely the language, or was
5 there more -- a wider cultural context; and I think
6 your answer, really, tells us from your opinion that
7 it's a wider cultural context.

8 MS. LOPEZ: Yes. I think it's both. I hope
9 that the Urban League will always be there to help
10 people.

11 MR. LEWIS: I wasn't taking a hit at the
12 Urban League. I was trying to understand the role.

13 MS. LOPEZ: No, no, I understand.

14 MR. GRADESS: Thank you very much.

15 Daan Zwick?

16 MR. ZWICK: Having a last name beginning with
17 Z, I'm used to being last.

18 My name is Daan Zwick, and I am representing
19 the Genesee Valley Chapter of the New York Civil
20 Liberties Union. My boss Paula Clark, who is the
21 executive director, was scheduled to talk here, but
22 because of the delay she has a 5 o'clock meeting she
23 had to go to; so I said what I'll say will be for
24 both of us.

25 Twelve years ago I retired as a research

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1 scientist after 42 years at Eastman Kodak Company,
2 and I have occupied much of these retirement years in
3 community volunteer work. Part of this effort
4 involves working as a client intake volunteer with
5 the Genesee Valley Chapter of the New York Civil
6 Liberties Union in Rochester. The Chapter deals with
7 civil liberty problems in a nine-county area from
8 Lake Ontario to Pennsylvania; so we have a lot of
9 experience trying to deal outside of the Rochester
10 area with its great public defender system.

11 My duties have included receiving hundreds of
12 telephone calls and letters from a wide variety of
13 people in the nine counties who believe that their
14 liberties have been violated in one manner or
15 another. Since we are one of the few organizations
16 that accept collect telephone calls from prisoners,
17 many of our requests for help are from inmates at
18 county jails and state correctional facilities. In
19 addition, migrant or other nonwhite minorities in
20 small rural communities often find themselves to be
21 targets for arrest on charges that are not applied to
22 other members of the community.

23 I was interested in Ms. Lopez because she
24 obtained a translator for me for a man in Wayne
25 County who was being really railroaded because he did

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1 not understand English.

2 As a result of this volunteer experience I
3 have become familiar with the many problems faced by
4 the indigent people who are involved with the
5 criminal justice system. The Civil Liberties Union
6 does not represent the defendants in fighting
7 criminal charges. Our activity is restricted to
8 defending constitutionally derived civil liberties;
9 however, we try to assist these people to find the
10 help they are seeking by suggesting referrals to
11 other organizations.

12 We get many calls from people who don't
13 understand what we are, and some will ask what do you
14 do; and one of the main things we do is try to help
15 everybody that call us. We've had policemen call us
16 for help, and we've had people in trouble as
17 defendants in criminal cases call us for help.

18 There has -- with the disappearance of the
19 Prisoner's Legal Services, it is now almost
20 impossible to find referral agency for inmates of the
21 State prison system. And we get a lot of calls from
22 them. There never has been adequate referral for the
23 inmates of any county jails. Most of the public
24 service agencies do not handle criminal matters, and
25 their case loads have increased faster than their

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1 funding.

2 As this need grows greater, I find it
3 personally increasingly frustrating and depressing
4 that we have to tell so many people that there's no
5 help for them anywhere. Close to burnout.

6 There's a serious need for a low-cost or pro
7 bono service just to provide answers to the simple
8 law -- criminal law questions that inmates sometimes
9 can get from jailhouse lawyers or which affluent
10 people can get by a phone call to their attorney.
11 This may be a paralegal service group, but something
12 that gives access to the many, many people who do not
13 have any legal training but need some sort of legal
14 information.

15 In the rural counties I mentioned assigned
16 counsel and even part-time public defenders may often
17 be inexperienced in criminal law. Little or no
18 motivation exists to provide an active defense for an
19 indigent client, since compensation for such service
20 is far below what the assigned attorney might be
21 getting in private practice, \$20 out of court, \$40 an
22 hour in court. You know what lawyers get in private
23 practice.

24 There have been cases, and I think as
25 Ms. Lopez mentioned this, where the first significant

1 contact and consultation between such an attorney and
2 an indigent client does not occur until the court
3 date when the attorney presses the client to agree to
4 a plea bargain, which, of course, frees the assigned
5 counsel from the unwanted time of investigation and
6 defense.

7 Ms. Lopez mentioned this happens with the
8 Public Defender here in Monroe County, but it happens
9 even more frequently -- a long time with no contact
10 with an attorney -- in some of the rural counties.

11 Plea bargaining is used in over 97 percent of
12 criminal cases, and the courts would be hopelessly
13 clogged if all cases went to trial. Therefore, plea
14 bargaining may appear as an advantage to attorneys,
15 judges, and to many guilty criminal defendants;
16 however, we all know that some of the persons who are
17 charged with crimes are not guilty. We also know
18 that the indigent are more apt to be charged with
19 crimes than the affluent.

20 What happens to a defendant who may not be
21 guilty? Our present system forces such an individual
22 into pleading guilty. The alternative means a trial
23 in which he will be defended by an attorney who will
24 not be motivated to pursue a vigorous defense. He
25 will face a judge with an overcrowded calendar who

1 very likely will impose the maximum sentence on the
2 defendant who would not accept the plea bargain and
3 who cannot show remorse for a crime he did not
4 commit.

5 I have met innocent defendants who have faced
6 this dilemma. Those who stuck with their principles
7 and chose the trial usually did end up with the
8 maximum sentence. The cost to the County or the
9 State for one year of their incarceration would have
10 been more than enough to train and motivate an
11 attorney to provide the defense needed to avoid this
12 miscarriage of justice. I'm very concerned about
13 this problem, because it is a very definite
14 miscarriage of justice. People serve sentences for
15 crimes they did not exit, and many times because they
16 did not have the right kind of representation that
17 would have set them free.

18 With liberty and justice for all should be
19 sufficient moral and legal grounds for an adequate,
20 state-supported criminal justice defense system for
21 those many people who cannot afford to retain a
22 trained, diligent attorney. For those people who
23 oppose such coddling of criminals, I believe the
24 economic argument of decreased cost, of shortening

25 the long periods of pretrial detention, and

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1 especially the elimination of wrongful incarceration
2 of innocent defendants should be convincing. Thank
3 you.

4 MR. GRADESS: Mr. Zwick?

5 MR. ZWICK: Yes.

6 MR. GRADESS: I wonder if you could -- could
7 you characterize some of what you were talking about
8 by county?

9 MR. ZWICK: Yes. We get an awful lot of
10 calls from Steuben County. Although I'm not an
11 attorney our conversations with clients are
12 privileged, so I won't give individual's --

13 MR. GRADESS: That's fine.

14 MR. ZWICK: But we get a great many
15 complaints about the criminal justice system and from
16 people who feel they have been not treated properly
17 from Steuben County and from people who are in the
18 Steuben County Jail or now or eventually on to the
19 State system. I would put them probably near the
20 top.

21 Orleans County is another one where there has
22 been a problem. For a while back the public defender
23 there was not really capable of handling his job.
24 He's since been replaced. I'm talking about the last
25 12 years.

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1 Wayne county, with the migrant labor problem
2 in there, there's a lot of discrimination where
3 people are arrested on charges. We don't want them
4 in our backyard and they're unpopular, and it's easy
5 to get convictions in Wayne County.

6 In Livingston, I would call it more a problem
7 with the old boys network where the attorneys and the
8 judges are close enough together so if someone has a
9 complaint about the system they can't get it in that
10 county. That's just my impression. I am not -- I
11 won't cite any particular examples, but we've had
12 examples of this.

13 MR. LEWIS: I'm sorry, what county was that?

14 MR. ZWICK: Livingston, south of Monroe.

15 Ontario County, interesting, Ontario County
16 used to be a troublesome one in that situation, and
17 as I understand it quite a few years ago the
18 public -- the New York State Defenders Association
19 had an investigation done from a complaint in that
20 county, and they since pulled up their socks a bit
21 and do a better job in providing assigned counsel.

22 One of the problems with assigned counsel, of

23 course, is the people who get assigned may be someone
24 who happens to be in the courtroom at that time, may
25 be a real estate lawyer, and they can't present an

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1 adequate defense, but yet it satisfies a
2 constitutional ping that this person has an attorney
3 representing him.

4 We do get a lot of calls from people who ask
5 how can I complain about my attorney, and we do get
6 good referrals to the Grievance Committees of both
7 the Bar Association in the county staff and the
8 Seventh and Eighth Judicial Districts that have good
9 referral investigation for attorneys.

10 MR. GRADESS: Well, thank you very much.

11 MR. ZWICK: Is this the end of the alphabet?

12 MR. GRADESS: I think we're there. Thank you
13 very much.

14 MR. ZWICK: Thank you for listening.

15 MR. GRADESS: If there's no comments, I think
16 we will declare this hearing closed.

17 (TIME: 5:00 p.m.)

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C E R T I F I C A T E

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I, Francis J. LeoGrande, Notary Public in and for
the County of Wayne, State of New York, hereby
certify that on the date subscribed herein the
aforementioned proceeding was stenographically
reported by me and later reduced to print by means of
computer-aided transcription under my direction, with
the foregoing being a full and true record of the
testimony given in this proceeding.

I further certify that I am a disinterested
person in the event or outcome of the above-named
cause of action.

IN WITNESS THEREOF, I subscribe my name this
day of , 1998.

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FRANCIS J. LEOGRANDE
Notary Public
Wayne County, New York