

Syracuse Hearing

STATE OF NEW YORK

In the Matter of the Fact Finding
Hearing conducted by the New York State
Defenders Association and
New York League of Women Voters.

Onondaga County Legislative
Chambers
Syracuse, New York 13202
Tuesday, November 10, 1998
10:00 a.m.

Before:

MARION H. HATHAWAY, JONATHAN E. GRADESS
Chairperson Executive Director
NYSDA Advisory Board
NORMAN P. EFFMAN DAVID LEWIS
Board of Directors Board of Directors
HON. MINNA BUCK HEIDI SIEGFRIED
League of Women Voters League of Women Voters

REPORTED BY: PAMELA PALOMEQUE, RPR

EXAMINATIONS

Table with 3 columns: Witness, Page, and Witness details. Includes Ed Nowak, Bill Cuddy, David Hayes, Marsha Weissman, Bonnie Gail Levy, Barrie Gewanter, Alan Rosenthal, James Ryan, John Rowley, and Christina Pezzulo.

19	11. Kate Rosenthal, 18-B Attorney	217
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23	Onondaga County Assigned Counsel	
	* * *	

1 3  
2 MR. GRADESS: Good morning, we're  
3 going to convene the Syracuse hearing with --  
4 begin with Ed Nowak.

5 MR. NOWAK: My name is Ed Nowak  
6 and I'm the Public Defender in Monroe County  
7 and also president of the New York State  
8 Defenders Association. And this morning I  
9 would like to try to talk about both, two  
10 different roles I play, one is Public  
11 Defender in Monroe County and also is  
12 president of the association, talk about the  
13 needs I see across the state. I guess  
14 probably more specifically focus on the facts  
15 I see which I think will lead to the needs we  
16 need to address in the future.

17 The first and probably most  
18 critical is caseload problems. Currently in  
19 Monroe County I have watched, during my term  
20 as Public Defender, the caseload of our  
21 assistants increase dramatically. In the  
22 misdemeanor area right now, the staff of the  
23 Monroe County Public Defenders Office is  
24 called upon to represent clients in about an  
25 average of 1,000 cases per attorney. I

1 4  
2 believe that is grossly excessive and  
3 unfortunately, despite efforts to get  
4 increased funding for our staff, those  
5 efforts meet without success.

6 In fact those efforts meet with  
7 response from funding sources, well, we will  
8 look at other neighboring counties and we  
9 think they're doing it cheaper so maybe we  
10 ought to think about a different system, so  
11 the threat is who can do it cheaper and  
12 that's the system we will go with. There's  
13 no discussion ever of quality. There is only  
14 a discussion of cheapness, how cheap can you  
15 do it. I think that is clearly a very  
16 dangerous path on which our funding sources  
17 are currently going down and I think it is  
18 something that we need to address in a  
19 variety of different ways.

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I think that I can also state from my role in the Defenders Association that I think the caseloads are a problem throughout the state. I understand that in the Erie County area, in the Legal Aid Society in Buffalo, that caseloads there for

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misdemeanor violation combination caseloads are approaching 2,000 cases per lawyer. I'm also aware from a Chief Defender convention that I've heard other Chief Defenders say that they have caseloads in excess of 1,000 cases per lawyer in the misdemeanor area and their lawyers are part-time.

So at least to my way of thinking, one of the very serious problems that we face, not only in Monroe County but throughout this state are various -- very serious caseload problems. What can we do about it? One suggestion that I would make is that the state could certainly accept its responsibility of being an overseer of defense services. I think it's a mandate they have under the Gideon decision and they could implement standards and propose standards for Public Defender and Legal Aid offices that cases shall not exceed so many per lawyer, and the teeth they put behind it would be to say if you, the county, don't maintain those standards, then state funding will not come your way.

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The counties need pressure on them to keep caseloads within a reasonable limit and currently there are no such pressures, and so it's a race to the lowest cost, who can do it for the lowest cost, who can do it the cheapest, who can provide the least amount of services to clients and that's the service plan we will go with.

Second issue I would like to talk about is Appellate delay. Appellate delay from my perspective is something that results in a client who has been convicted of usually a felony charge not having their appeal heard by an Appellate Division, their first appeal as a right, for about three years. That is a serious problem in the Fourth Department. About 8 years ago the Division of Criminal Justice Services sponsored a number of statewide initiatives throughout the Fourth Department, Syracuse, Buffalo and Rochester, to help us get those Appellate caseloads

23 reduced. One of the problems that occurred  
24 is, for example, in Monroe County, our office  
25 received two additional attorneys but when

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1  
2 that grant expired, we had our caseload down  
3 from the delay of almost 3 years to a delay  
4 of 14 months.

5 I would submit that somewhere  
6 between a year and a year and a half would be  
7 a reasonable time period. So we had gotten  
8 to that point, but the state funding elapsed,  
9 and our county would not pick up the cost of  
10 the attorneys hired under the grant and  
11 instead reverted back to our old staffing  
12 level.

13 Each year now we have added  
14 because we cannot keep up with the number of  
15 assignments that we are getting. We keep  
16 adding to our pending caseload, such as of  
17 today we have an Appellate delay of two years  
18 and 8 months. We are again approaching this  
19 three year delay, and I believe that by this  
20 time next year we will probably exceed three  
21 years unless we can take some action to  
22 address this problem.

23 I believe that in Erie County,  
24 their Legal Aid Society, they were able to  
25 maintain the staffing levels that they

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1  
2 acquired under that state grant. As a result  
3 they have a significantly larger Appellate  
4 staff than we do. They have 9 and a half  
5 attorneys. We have 6. The irony is in  
6 Monroe County we are assigned to more appeals  
7 than they are in Erie County, even though it  
8 is a larger community. So I think we have a  
9 serious problem with Appellate backlog.

10 I've met with my County Executive  
11 again to address this issue, and as of the  
12 budget decision that's being made as we  
13 speak, our Ways and Means Committee met  
14 Saturday. The legislature is finalizing the  
15 budget tonight. There is no new staffing for  
16 Appellate attorneys in our office for the  
17 1999 budget, so once again, I will try to  
18 find out if DCJS will be willing to fund some  
19 similar initiative as it did a number of  
20 years ago. I don't hold out much hope on  
21 that front, however.

22 Another issue that I would like  
23 to talk about is the merit selection of the  
24 Public Defender. I believe I'm very

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fortunate in Monroe County to have been

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selected through a process recommended by the National Legal Aid and Defender Association in 1974. A study was done of the Monroe County Public Defenders Office in 1973 and a report which I have read on a number of occasions indicates that the Monroe Public Defenders Office was one of the worst that that organization had ever evaluated. It was woefully inadequate in its staffing and its addressing the needs of the clients we serve, and the selection of the Public Defender and Public Defender staff was based on pure political consideration and without regard to merit.

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As a result of that study, Monroe County undertook to make a commitment to the County of Monroe and citizens and to the Monroe County Bar Association that it would provide a Public Defenders Office free of political interference and to hire the Public Defender based on merit, and that process has been in place now since 1974, and in 1977 I was fortunate enough to have been selected as Public Defender.

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I have been to many other offices, in the state. I can tell you that in meeting with the Chief Defenders of those offices there are many political considerations that go into the running of the office and the hiring of staff, and each of those chief defenders will tell you that it is not a comfortable position to be in. I personally believe that it is absolutely critical to hire people who have a commitment to public defense work. People need to be committed to representing the clients that we are assigned to represent, and when they have that commitment, despite the difference in personalities that everyone brings to an office, and we have a staff of 75 people, I find that inevitably it comes down to the fact that everyone in that office has a common bond. The bond is that they care about the work that they are doing and they care a great deal about their clients and they make a tremendous commitment to the work that they do.

I have attorneys on my staff who

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in a 40 hour workweek, it's a salaried position, will work 65 and 70 hours in carrying out their duties to make sure their clients are represented. I see time cards which I sign on a two-week basis with 130, 126 hours worked in that particular pay period. That to me is reflective of how our office is able to do the job that I think we do in serving our clients and to meet their needs.

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I also think that what's critical to that is that I have the flexibility as the chief defender to hire people based on their merit. Calls from County Executive or Personnel Director in the county or ward leaders, however it's broken out, don't come to me. While it may be a factor in other governmental agencies, it isn't a factor in the Monroe County Defenders Office. I think it's something our county can be very proud of, and I also think it's critical to providing quality defense services to the clients we are assigned to represent.

The next issue I wanted to raise

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has to do with the new requirement for admitted attorneys of mandatory CLE, and I think that the new requirement of the Office of Court Administration in our court system to require attorneys to undergo 12 hours of CLE while it will benefit the attorneys professionally, is going to create a hardship on Defender offices. The question becomes where is the money coming from? When you honestly have people who are working the hours that we are working in the Public Defenders Office to try to help our clients, Saturdays are regular almost workdays for our local court and felony sections. Their people are in the office. When and where are they going to train and more importantly, where is the money for the training coming from?

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There needs to be training, I believe specific for defenders, people who do criminal defense work. That is our full-time job and to expect that people will go to some generic Bar Association CLE in order to get the credits, that CLE might be on the CPLR or

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the state practice or whatever, because they

3 need the hours, that is going to be totally  
4 counterproductive to what the goal of  
5 mandatory CLE should be.

6 I personally believe  
7 New York State Defenders Association is one  
8 of the organizations in this state that's in  
9 a unique position to be able to deliver high  
10 quality training in this area. A critical  
11 issue for the defenders will be the funding  
12 that is needed to put this training on  
13 throughout the State of New York.

14 The final issue that I wanted to  
15 bring to your attention is the issue of  
16 access to client criminal records, known as  
17 rap sheets. It's a problem that I think has  
18 persisted in the state for many, many years  
19 and currently a prosecutor's office have  
20 access to the client's rap sheet and by law  
21 they're supposed to be providing that  
22 information to defense counsel. Well, the  
23 rap sheet information comes to defense  
24 counsel in most jurisdictions here in Upstate  
25 New York late. It is not available at

1 14  
2 arraignment. It gets to us a day later or  
3 two days later or even beyond that.

4 Monroe County participated in a  
5 pilot grant for rap sheet access directly to  
6 the Monroe County Public Defenders Office.  
7 Computerization and cabling and modems were  
8 put in place to allow us that access, and  
9 when we had the access, it was a very  
10 important thing for us to have. It could  
11 expedite plea bargaining. We would know  
12 firsthand what our client's pending charges  
13 and warrants are. We would know or have a  
14 better idea of the status of our client's  
15 current situation.

16 The problem has arisen though  
17 that the funding that we got from DCJS has  
18 elapsed so we are not getting any funding.  
19 More importantly, when the funding elapsed,  
20 so did the access to the DCJS terminal. So  
21 now we cannot call DCJS and get the  
22 information we used to get because we are no  
23 longer an authorized agency. I also believe  
24 that Onondaga County, I know -- I believe in  
25 New York City at the Legal Aid Society, those

1 15  
2 were the other jurisdictions that had this  
3 access. Even if we don't get the funding to  
4 help with the record correction issue that

5 DCJS was interested in, we at least should be  
6 given access. That not only applies to  
7 Monroe County but to all Defender offices.  
8 There are states that have this access in  
9 their defense systems. There is absolutely  
10 no valid reason to my way of thinking why  
11 Defender offices should not be entitled to  
12 access to DCJS rap sheet information. It's a  
13 need I think we have, it needs to be  
14 addressed by the New York State Legislature.

15 That concludes my remarks. I'd  
16 be happy to answer any questions.

17 MR. LEWIS: On the last point,  
18 isn't it required by statute that there be a  
19 free report? The question was: Isn't there  
20 a statute that requires that the defendant be  
21 fingerprinted and that there be returned  
22 before they can be arraigned?

23 MR. NOWAK: There's a state law  
24 that requires that rap sheets be available at  
25 the arraignment process. When the DAs have

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2 it, that's fine.

3 MR. LEWIS: Does the judge have  
4 it as well?

5 MR. NOWAK: I'm not certain if  
6 the judges have them. I believe that they  
7 do.

8 MR. LEWIS: Because I think if  
9 the judge has it for arraignment, that a copy  
10 be made available.

11 MR. NOWAK: The problem is the  
12 paperwork that's going on in the courts that  
13 morning. The volume in the city courts,  
14 while I know many people don't believe it or  
15 understand it, but the volumes I believe in  
16 many jurisdictions in Upstate New York, the  
17 attorneys are expected to handle, are higher  
18 than what is occurring in New York City.

19 I've heard many people say, well,  
20 come up to Upstate New York, it won't be as  
21 busy as it has been down in New York City.  
22 Well, that's absolutely not true. I've hired  
23 folks in my office who have worked for the  
24 New York City Legal Aid and they are  
25 absolutely astounded by the caseload and

1 17  
2 workload we have.

3 MR. LEWIS: In the five counties  
4 in New York, you cannot get your case called  
5 at arraignment, you cannot be dealt with at  
6 all until the prints are back and two copies

7 are attached the file. One is the judge's  
8 copy and they tear away the carbonized  
9 version and give it to the defense. It can't  
10 get on the docket. You can jump and dance  
11 and scream but nothing you can do until those  
12 prints come back, and it is just a computer  
13 terminal that prints it out for the court  
14 with a sheet.

15 MR. NOWAK: Part of my concern  
16 there is that's delaying the client's  
17 arraignment and potential release on bail.

18 MR. LEWIS: I don't disagree with  
19 you but for those that are going to get out,  
20 they're going to get out; and for those that  
21 have a chance to get out, the question is  
22 whether the wait is worth it. In New York  
23 the police department will not even produce a  
24 defendant in the courtroom until all the paper  
25 is out and that's why we have a 24, 36 hour

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2 delay in arraignments and the biggest delay  
3 is those computerized responses from  
4 fingerprints. That's what takes the longest  
5 amount of time but it might be worth trying  
6 to figure out at least on arraignments for  
7 felonies or things that look like they're not  
8 going to be bailed to do that. This is  
9 really in New York, it's automatic. No one  
10 actually sat down and thought about how to do  
11 this right. It makes all those copies so  
12 everybody gets one.

13 MR. EFFMAN: Mr. Nowak, you  
14 indicated you have 75 attorneys.

15 MR. NOWAK: 75 staff.

16 MR. EFFMAN: 75 staff? How many  
17 attorneys?

18 MR. NOWAK: 50 attorneys, 25  
19 support staff.

20 MR. EFFMAN: And the attorneys  
21 are all full-time?

22 MR. NOWAK: Yes.

23 MR. EFFMAN: Can you give us some  
24 idea as to how their compensation compares to  
25 the Monroe County District Attorney's Office

1 19  
2 salaries?

3 MR. NOWAK: The compensation for  
4 the local court staff entry level attorneys  
5 are on the same pay grade as Assistant  
6 District Attorneys. Each office has certain  
7 grade levels. Grade Two is our entry level,  
8 Grade One would be a felony level. Then we

9 have Special Assistant Public Defenders; they  
10 have Special Assistant District Attorneys.  
11 Those three pay grades are on the same level.

12 Part of the issue is the number  
13 of Grade Two and Grade Ones each office has.  
14 When an Assistant DA leaves City Court, they  
15 can go to Felony Court and get promoted to  
16 the Grand Jury Bureau. They're eligible for  
17 a Grade One. That doesn't occur in our  
18 office, so there are people with less  
19 seniority than the DA's office who get to  
20 move up the ranks to higher levels before  
21 counterparts would in the Public Defenders  
22 office.

23 Beyond that, at that level of  
24 Special Assistant, then the parity breaks  
25 down. The District Attorney's Office has

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2 special titles called Bureau Chiefs. Despite  
3 my request we do not have any Bureau Chiefs  
4 at the Public Defenders Office. Those are  
5 higher pay grades and despite the fact that I  
6 have Bureau Chiefs, they are called Special  
7 Assistant Public Defenders. The Second  
8 Assistant, First Assistant, DA and Public  
9 Defender are all paid on different rates.  
10 There is no parity at those levels.

11 MR. EFFMAN: Okay. Just to  
12 follow up on that, I'm presuming that because  
13 they're all county employees, you have  
14 similar fringe benefits as the prosecutor's  
15 office?

16 MR. NOWAK: Yes.

17 MS. HATHAWAY: I would just like  
18 to know, are the clients made aware when  
19 maybe their rap sheets are there, the records  
20 are delayed? Is this explained to them, that  
21 they might have to be arraigned without the  
22 paperwork being completed or just how is that  
23 treated as far as they're concerned?

24 MR. NOWAK: Well, we generally  
25 proceed with the arraignment as quickly as we

1 21  
2 can, and that's one of the things I think is  
3 very critical. If there is missing  
4 information and there's a dispute about a  
5 prior record or whatever, then the case will  
6 be marked as called later and the judge,  
7 instead of doing it in general arraignment  
8 hours, will fall somewhere between 9:30 or  
9 11:00 or 11:30. The court has also a second  
10 call docket that begins at 11:30 and goes to

11 about 1:00. That case will be put on the  
12 second half and the staff at the DA's office  
13 will generally will try to find out the  
14 information that is lacking or missing or  
15 disputed. We generally will get to the  
16 arraignment that same morning.

17 MS. HATHAWAY: My question is:  
18 Is this explained to the client? Do they  
19 really know what's going on?

20 MR. NOWAK: They're present when  
21 the discussions are being had. The client  
22 can talk to -- usually does talk to the  
23 Assistant Public Defender and says no, I  
24 didn't have that charge. No, that John Smith  
25 is not me. It's a wrong person. I didn't do

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2 that and then we will raise that with the  
3 court to dispute an allegation by the  
4 prosecution that our client, for example,  
5 might have a prior felony conviction and  
6 that's what puts the case into dispute. So  
7 the client does understand what's going on,  
8 it's explained to him and communicates with  
9 his Assistant Public Defender who's present  
10 at the court proceeding.

11 MS. HATHAWAY: Okay.

12 MS. BUCK: Perhaps you could  
13 explain to me what the issue of no longer  
14 being an authorized agency. You mentioned  
15 that you had had this access to the rap  
16 sheets. Is it a question of dollars or  
17 question of some legislative action?

18 MR. NOWAK: Legislative action.  
19 There's a statute in the state that allows  
20 certain agencies access to the information  
21 that DCJS has. That statute was amended when  
22 we were given a grant to allow us to be one  
23 of the authorized agencies listed in the  
24 statute. So the enabling legislation was to  
25 add, I believe, the Onondaga County Assigned

1 23  
2 Counsel Program, the Monroe County Public  
3 Defender, the Legal Aid Society of New York  
4 City and maybe one other agency in New York  
5 City, and then we were added to the  
6 legislation, but when the money stopped  
7 flowing, we were not continued as an  
8 authorized agency in the legislation. We  
9 were deleted.

10 MS. BUCK: Explain the connection  
11 to me between -- I know you have to see the  
12 money but what is the connection?

13 MR. NOWAK: The connection was we  
14 were given the money to assist the Division  
15 of Criminal Justice Services in correcting  
16 the data contained on a rap sheet. There was  
17 a study done by the federal government of the  
18 Division of Criminal Justice Services rap  
19 sheet system. I don't remember the exact  
20 numbers but something like 40 percent,  
21 between 35 and 40 percent had errors in them,  
22 and the Division of Criminal Justice was  
23 concerned about it.

24 The federal government said we  
25 are not going to keep giving you these

1 24  
2 federal dollars unless you devote a portion  
3 of them to correcting the errors that exist  
4 in your rap sheet database. Most of the  
5 money that the Division of Criminal Justice  
6 Services had in this regard was given to  
7 prosecutor's offices, probation departments  
8 and other courts to assist them in correcting  
9 this database.

10 On behalf of the Defenders  
11 Association, we argued to DCJS there's only  
12 one person who really wants to make sure they  
13 have a correct rap sheet and that's the  
14 defendant, the client whose record is being  
15 maintained by DCJS, and it ought to be  
16 Defenders who should be correcting this  
17 information and not the prosecution because  
18 the prosecution has a vested interest.  
19 Inaccurate records or open dispositions mean  
20 people stay in jail longer. So we were given  
21 money to do that.

22 Now, the problem was, well, we  
23 got the money to do it but how do we access  
24 the information, so they had to give us  
25 access. But as soon as the money stopped so

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2 that we were not helping them to correct  
3 their records, then we were no longer given  
4 access, just to do our job, without helping  
5 them to correct records. There is no need to  
6 tie the two together of money and  
7 authorization.

8 MS. BUCK: That's what I'm trying  
9 to get at.

10 MR. NOWAK: They made that  
11 correlation as part of their funding  
12 mechanism.

13 MS. BUCK: So if the legislation

14 were put back to where it were before so you  
15 had the access without any issue of DCJS  
16 money, would that --  
17 MR. NOWAK: That would help a  
18 great deal. That would help a great deal.  
19 MR. GRADESS: Thank you.  
20 MR. NOWAK: Thank you.  
21 MR. GRADESS: Bill Cuddy.  
22 MR. CUDDY: Good morning.  
23 MR. GRADESS: Please begin.  
24 MR. CUDDY: Do you have copies of  
25 the testimony that we're going to give this

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1 morning?  
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3 MR. LEWIS: Not yet.  
4 MR. CUDDY: This is the jail  
5 ministry folks; Mimi Olech, I'm Bill Cuddy,  
6 Bob Belge and Janice Rosbrook, and there will  
7 be different people would be able to respond  
8 better to different questions. First is just  
9 an idea of how we're organized in jail  
10 ministry. So we're a volunteer, mostly  
11 volunteer group that works out of a ministry  
12 relationship with the jail. So that over the  
13 years we have gained access to being in  
14 relationships with inmates.  
15 Presently we would have screeners  
16 that go into the jail every day to respond to  
17 the written referral system that someone  
18 would like to talk to someone from jail  
19 ministry.  
20 Secondly, we have a free phone  
21 line that goes from each of the pods to our  
22 office and we have five phones that respond  
23 to these calls in the course of the day  
24 Monday through Friday. So we have an  
25 extensive access system. Out of that we get

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1 a lot of calls requesting us to do something  
2 about their defense counsel, the relationship  
3 with their defense counsel. They get a lot  
4 of questions, so I put these in two different  
5 categories. One is kind of a general, these  
6 are kinds of the cases we get a lot of calls  
7 on. So maybe Bob could start that.  
8 MR. BELGE: One of the problems  
9 that we incur -- these things occur when we  
10 talk with inmates, that they don't have any  
11 contact with their lawyer prior to the  
12 preliminary hearing and in some cases there's  
13 a tremendous confusion exists for inmates as  
14 they're not transported to this hearing and  
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16 they don't know why. Many call to ask what  
17 happened and in some cases it seems that the  
18 counsel has postponed or even waived the  
19 hearing without conversation with the inmate.

20 There's usually -- oftentimes we  
21 hear a complaint that there's no contact with  
22 a lawyer before the scheduled court  
23 appearances. The only time they see the  
24 attorney is -- for a couple seconds as they  
25 appear before the judge. There's

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2 postponement of scheduled court appearances  
3 without informing the inmate.

4 I think that -- those are the  
5 problems that I have personally encountered  
6 many different times. I think Mimi was going  
7 to say something about the --

8 MS. HANCOCK-OLECH: Many times an  
9 inmate upon arraignment in a town court is  
10 not Assigned Counsel, will not be Assigned  
11 Counsel until they go to the next court date.  
12 That would leave them sort of in limbo while  
13 they're in jail or out if they've been bailed  
14 and we have tried to get them and we have  
15 gotten them counsel ourselves through the  
16 town judges.

17 Also there will be inmates upon  
18 arraignment that may have a job. They'll be  
19 employed; thereupon they're not eligible for  
20 Assigned Counsel. They've gotten into jail.  
21 They've missed several days of work, they no  
22 longer have a job and they're now  
23 incarcerated without counsel. Those are the  
24 two I'm working on.

25 MR. CUDDY: Frequently we've got

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2 calls saying that the counsel, the lawyer,  
3 assigned counsels are not receiving phone  
4 calls out of the Justice Center. They make  
5 collect phone calls to the lawyers' offices.  
6 We understand that the lawyer can't accept  
7 those phone calls unless their money is  
8 reimbursed but there's a lot of confusion.  
9 We get lots and lots of calls saying my  
10 lawyer refuses the call. Just doesn't  
11 understand that communication. We don't  
12 understand it quite frequently how -- it's  
13 constant.

14 It's constant phone calls so that  
15 the access to talking with the lawyer is  
16 problematic in our view. Again, we hear no  
17 visits from the lawyer for long periods of

18 time, and we might inquire about the length  
19 of time. It could be several months and they  
20 might say they have not talked to a lawyer.  
21 On occasion we hear lawyers asking for extra  
22 money to do extra work. In our staff of  
23 volunteers, sometimes we hear that a lawyer  
24 will be talking to some deputies in the jail  
25 and we feel it's a demeaning kind of

30

1 conversation, that the lawyer might be  
2 offering in terms of their client.  
3

4 One further note that I would  
5 like to go into that's not here in the  
6 written testimony is that the remand orders.  
7 I'm not sure where the responsibility falls  
8 on this but in a span of a couple weeks -- we  
9 just came across because we're set up to take  
10 these phone calls all the time, and we do  
11 have a bail office. We're able to do bails.  
12 We might access some of this where an inmate  
13 was ROR, he thinks that they have a bail,  
14 really didn't hear that in court and in fact  
15 they ROR but the remand order doesn't get  
16 over to the Justice Center, doesn't get from  
17 the court to the Justice Center. In a period  
18 of two weeks we had 4 cases like that. One  
19 client spent 9 days in jail only to find,  
20 when we went to do the bail 9 days later they  
21 were ROR 9 days earlier; another was 8 days.  
22 Most often it's a day or two so when we  
23 try -- we talk to Chief Calisto. We talked  
24 to Chief -- Judge DeJoseph to see where that  
25 responsibility falls, and I imagine it falls

31

1 between the two jurisdictions and someone  
2 just forgot to do it and -- but then  
3 sometimes mentioning this to a lawyer, I  
4 don't know if lawyers can do anything for us,  
5 the Assigned Counsel -- what the Assigned  
6 Counsel does with that? Do they register  
7 something on behalf of their client when that  
8 happens? I'm not sure what happens to that  
9 kind of circumstance when in our view it's  
10 happening frequently. It's a breakdown and  
11 so I'd like to register that.  
12

13 MR. BELGE: That was most often  
14 with the clients down in Cortland. If the  
15 client is not in court, the case is dismissed  
16 and they're ROR'd and if the client is in  
17 court, then usually things will follow.

18 MR. CUDDY: Then we have a couple  
19 specific cases, we'll go into detail on those

20 cases. Assigned Counsel informed his client  
21 he was not eligible for pro bono counsel  
22 because he owned a mobile home valued at  
23 \$13,000. Subsequently the client was turned  
24 down in his attempt to obtain a loan on the  
25 mobile home. The client was out of jail at

32

1  
2 this particular time, tried to get a loan,  
3 the bank wouldn't give him a loan on his  
4 \$13,000 trailer. He was on a fixed income  
5 with disability of less than \$600 a month and  
6 he had the responsibility for two children.  
7 He did have a companion who worked and she  
8 made less than \$100 a week.

9 Without representation, he failed  
10 to go to court, was picked up on a warrant,  
11 spent 18 days in jail before his next court  
12 appearance, was in the County Court level at  
13 this point, and the judge was willing --  
14 because we factored into the case at this  
15 point, the judge was willing to order  
16 Assigned Counsel, if there's any question of  
17 whether this person was eligible or not, and  
18 consequently the person plead guilty in that  
19 court appearance because he would get  
20 probation but also would get out of jail.  
21 All those factors, not sure what was  
22 significant in the person pleading guilty  
23 after 18 days, but felt that this eligibility  
24 issue was confusing and therefore the  
25 consequences flowed from that that I think

33

1  
2 were injurious to the client.  
3 MS. HANCOCK-OLECH: I have a case  
4 in 1994, a mother with children, had been  
5 Assigned Counsel for a DWI charge. She  
6 attended all the court dates and she  
7 completely -- she successfully completed  
8 counseling and all other conditions required  
9 by the court. Without her knowledge, the  
10 counsel -- her counsel moved from the  
11 Syracuse area. Not hearing anything from the  
12 courts or her counsel she presumed her case  
13 was over. A few years later she was arrested  
14 on a warrant and held in the Justice Center  
15 for a weekend that proved to be extremely  
16 disruptive to her children's life. Indeed  
17 she was picked up October 31st as her  
18 children were getting ready to go out  
19 trick-or-treating.

20 This person has never been in  
21 trouble with the law since or before that.

22 When her counsel left, he did not turn over  
23 this case to another counsel nor did he make  
24 it known to her. She did keep -- try to keep  
25 in touch with him and also the same sort of

34

1  
2 example, I ran into just yesterday with  
3 another counsel, Assigned Counsel who also  
4 left town.

5 MR. CUDDY: And finally, this is  
6 a case in which I was personally involved  
7 with. Assigned Counsel asked for money as a  
8 payment for his services when he learned his  
9 client had \$1,200 in his bank account.  
10 Client was incarcerated, was maintained on  
11 SSI income and would be homeless if released  
12 to the street. I said that was impossible.  
13 That couldn't be true. It couldn't be true  
14 that if he's got \$1,200 that he isn't  
15 eligible, he has to pay for services, so we  
16 called -- together we called the Assigned  
17 Counsel Office where the receptionist stated  
18 that we did -- we did it through a phone call  
19 so all of us -- the receptionist stated the  
20 \$1,200 bank account puts the eligibility of  
21 the client in question and so I felt that  
22 again is that area where there's confusion  
23 around eligibility. That's our testimony.

24 MS. ROSBROOK: I'd just like to  
25 comment on a couple things. The Assigned

35

1 Counsel system I think is a wonderful program  
2 but I really think that it needs to be looked  
3 at, and I guess that's why I would look to  
4 you to see if some of these things -- Bill  
5 just brought up the eligibility requirements,  
6 just the caseloads and we get the innumerable  
7 phone calls from people who aren't seeing  
8 their attorneys and sometimes it's a matter  
9 of communication. That's what a lot of these  
10 problems are. It's just communication and so  
11 that would be my main concern, main issue.

12 MR. BELGE: That's a concern we  
13 hear all the time; that I don't know what's  
14 happening. One of the things most people in  
15 jail ministry are doing is calling an  
16 attorney and finding out what's happening in  
17 the case and then referring it back to the  
18 client?

19 MR. GRADESS: How do the  
20 attorneys react when you call them?

21 MR. BELGE: Sometimes very  
22 positively, sometimes negatively or angrily  
23

24 but usually it's -- we get positive  
25 information and bring it back to the client.

36

1  
2 MS. BUCK: I wanted to ask about  
3 the failure to assign lawyers if the  
4 arraignment is in a town court. I don't  
5 know, is this a frequent occurrence?

6 MS. HANCOCK-OLECH: (Nodding.).

7 MS. BUCK: Have you been able to  
8 discern any pattern in particular courts or  
9 is it all over?

10 MS. HANCOCK-OLECH: It is a  
11 frequent occurrence. I've not really sat  
12 down to figure out exactly which courts it  
13 is. As far as I know it's practically all  
14 town courts. I've spoken to different courts  
15 to try to set up counsel, four different ones  
16 all over.

17 MS. BUCK: When you follow up on  
18 this, what kind of responses have you gotten?  
19 Is there a reason why counsel wasn't  
20 assigned?

21 MS. HANCOCK-OLECH: No, we don't  
22 assign counsel when they're first arraigned  
23 here.

24 MS. BUCK: Just as a matter of  
25 policy?

37

1 MS. HANCOCK-OLECH: As a matter  
2 of policy.

3 MS. BUCK: I guess I have a  
4 question for all of you with respect to  
5

6 complaints that you get from inmates, and I'm  
7 sure there're two sides to every coin but I'm  
8 curious about what kind of communication you  
9 maintain with the Assigned Counsel Office.  
10 The things that you're pointing out as issues  
11 of omissions, what kind of communication do  
12 you have where you come across something like  
13 that with the Assigned Counsel Office?

14 MS. ROSBROOK: I can respond to  
15 that. What I personally do is have the  
16 inmate call the Assigned Counsel Office and  
17 see if he can -- he or she can clarify what's  
18 happened.

19 MS. BUCK: Do they accept collect  
20 calls?

21 MS. ROSBROOK: They will speak  
22 with -- they are given a piece of paper that  
23 they do call. If they do not find a  
24 solution, then I have called and it's

25 often -- as I said before, it's

1  
2 communication, it's a glitch that -- a  
3 breakdown in the system from the time the  
4 person is assigned and sometimes paperwork  
5 gets lost, so that's where, you know, we  
6 would come in, to find out what happened.

7 In terms of the Assigned Counsel,  
8 I find that, as was commented before, there  
9 are attorneys that I think sometimes get  
10 overloaded and sometimes we can help  
11 facilitate the communication between the  
12 attorney and the client but I'm not sure that  
13 I understand your -- what we do. If there's  
14 a problem, we call the Assigned Counsel and  
15 if the Assigned Counsel, if there's still a  
16 problem, then we keep -- we're persistent  
17 until it's taken care of.

18 MS. BUCK: Thank you.

19 MR. CUDDY: I would find the  
20 Assigned Counsel receptive. They try to be  
21 helpful, get information that we're seeking.

22 MR. LEWIS: Can you comment for  
23 us on the eligibility requirements, whether  
24 they're economically realistic given this day  
25 and age and the cost of lawyers in the

1  
2 community?

3 MR. CUDDY: I really don't know  
4 what the line is that -- when I sit in the  
5 City Court I hear the judges ask questions  
6 about what is the take-home pay. I know  
7 there's a line at which the judge says, you  
8 have a job, you have income, you're not  
9 eligible. So I'm not sure. I haven't gotten  
10 that sheet of eligibility, that information.  
11 My guess is that it's very low. I mean, it's  
12 not realistic.

13 MS. HANCOCK-OLECH: I have spoken  
14 to inmates that have just had menial jobs  
15 such as working at McDonalds and if they'd  
16 been off work for a couple of days, which  
17 usually is the case when they're  
18 incarcerated, they're no longer -- they do  
19 not have any Assigned Counsel because just a  
20 job at McDonalds qualifies them to find their  
21 own.

22 MR. LEWIS: One of the things --  
23 I'm sorry.

24 MR. CUDDY: I would think it  
25 would be a helpful policy if judges would

1  
2 assign counsel and then let the counsel find  
3 out. These are decisions made at the bench  
4 where it's kind of confusing, yes, they have  
5 a job and can retain their counsel, kind of  
6 yes, but when they get in jail, they really  
7 don't have a job and it's a lot of  
8 communication problems obtained trying to  
9 rectify the situation.

10 MR. LEWIS: This might sound a  
11 little strange but I will try it any way.  
12 Can you give us an average amount of time  
13 that your people spend on a single inmate's  
14 problem? The reason I'm asking that is I'm  
15 trying to figure out what an 18-b lawyer  
16 would have to spend in time to solve some of  
17 the things you've suggested because even if  
18 it's a small amount and it's not on the list  
19 of things one is compensated for, it may  
20 be -- more determinative than we might like,  
21 but it still might be determinative, so the  
22 question is the average time per case, if you  
23 want to call it, or per inmate, if you can.  
24 If anybody has even thought about this  
25 before.

1  
2 MR. BELGE: It's a difficult  
3 question to answer because we deal with all  
4 kinds of things. Some of it has to do with,  
5 you know, with the problems with attorneys  
6 but often, you know, we're trying to  
7 communicate with a loved one someplace or  
8 trying to find a secure place for his  
9 belongings or that kind of thing, so it's  
10 very -- we've never done a study like that.

11 MR. LEWIS: One of the things you  
12 do is relieve Assigned Counsel doing, so I'm  
13 trying to figure out what we save in effect  
14 by having someone go to you rather than  
15 depend on us -- I'm looking not to test your  
16 efficiency so much as to see what else should  
17 be being done out there and what kind of time  
18 issues we're talking about.

19 MR. BELGE: I have even gone out  
20 on several different cases and contacted  
21 people that the inmate says is a witness and  
22 an attorney hasn't talked to them. We've  
23 done that kind of thing, so I'm sure that's  
24 something that Assigned Counsel could do but  
25 I don't know if anybody has ever thought

1  
2 about what an average amount of time, some of



5 two areas where ministry is -- significant  
6 work is done.

7 MR. BELGE: Jail ministry is  
8 somewhat of a misnomer in a way because we do  
9 a lot of advocacy work rather than just  
10 representing them in some kind of a religious  
11 way. As a matter of fact, most of what we do  
12 is advocacy.

13 MS. ROSBROOK: I just like to add  
14 a comment that one of our big parts is our  
15 advocate program and that's where we match  
16 someone who is trained with a person in jail  
17 who would take on legal advocacy.

18 MR. EFFMAN: A couple of  
19 questions about communication which I sense  
20 is the primary problem, communications  
21 between lawyers and clients, and I guess that  
22 includes some retained counsel as well from  
23 what you say.

24 Number 1, do you have a sense  
25 that the 18-b lawyers in Onondaga County are

45

1 aware of your existence and their ability to  
2 use you to communicate with their clients and  
3 if they are aware, are they for some reason  
4 reluctant on routine matters to utilize your  
5 good services? Do we need to communicate  
6 more and often to the 18-b panel to let them  
7 know you exist and what you can do for them.

8 MS. ROSBROOK: There are several  
9 attorneys that welcome our input and we work  
10 together with them. It's -- I have found  
11 that to be true.  
12

13 MR. CUDDY: We've been here 22  
14 years doing this so a lot -- we have a lot of  
15 personal contact with lawyers but we've never  
16 done anything formally with the bar.

17 MR. BELGE: We have formally sent  
18 them letters of appeal for money.

19 MR. EFFMAN: The other area of  
20 communication -- again, I'm from an area, we  
21 do have a jail ministry and use then as an  
22 ombudsman type of operation and it's very  
23 successful, but in any event, is there  
24 something in your opinion that can be done  
25 with the telephone communication aspects in

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1 Onondaga County, either permitting inmates to  
2 make direct calls where the jail picks up the  
3 bill or in Onondaga County, is it possible,  
4 for example, for a lawyer to contact a client  
5

6 by phone if he knows what number to call.  
7 Will they bring a client to a telephone?  
8 MS. HANCOCK-OLECH: Well, lawyers  
9 can contact inmates by calling the -- this is  
10 how we do it anyways, to call the pod, find  
11 out where that inmate is located, call the  
12 pod that had deputies in the pod, will  
13 transfer that information to the inmate and  
14 an inmate will then call them, the lawyer.  
15 However, sometimes there's a bit of a problem  
16 getting through the lawyer's secretary and --  
17 MR. LEWIS: That's planned.  
18 MS. HANCOCK-OLECH: Yeah. I  
19 mean, the best way is for a lawyer to come up  
20 and see the inmate in person because really  
21 there is no way that an inmate can contact  
22 their lawyer. It's very rare the lawyer that  
23 will accept an inmate's call.  
24 MR. CUDDY: I don't think the  
25 jail is set up to do that. The numbers on

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1 the different pods, I think that the jail  
2 administration would like to keep that a  
3 little bit selective as to who gets those  
4 numbers. I know they're published, so how do  
5 you call the pod. You can call the  
6 administration and try to get through. I  
7 think the telephone gets you from the lawyer  
8 to the jail is not set up to access in that  
9 fashion. We seem to be allowed to do that,  
10 call the pods and have the inmate call us, so  
11 the telephone communication will be effective  
12 from us to them.

14 MS. ROSBROOK: I'd like to have  
15 the Assigned Counsel have something set up  
16 that they have to accept a call from their  
17 client on -- I don't know if it's a weekly  
18 basis, a twice a month or something. There  
19 are attorneys who do accept collect phone  
20 calls if they are in the office. There are  
21 attorneys who are never there so, again, I  
22 don't know but it's like with everything,  
23 there are -- it's just some things that are  
24 falling through the cracks. There are very  
25 good attorneys out there who are, you know,

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1 accepting the calls when they're there and  
2 there's others that aren't. So that's where  
3 the problem is, somehow if that could be  
4 addressed, when the person is accepted into  
5 the Assigned Counsel, however that is --  
6 MR. GRADESS: Let me just -- I'd  
7

8 like to tie down a couple of things you've  
9 talked about. Your references to the  
10 eligibility determination is a reference to  
11 what court specifically where you've heard  
12 judges do this? Syracuse City Court are we  
13 referring to?

14 MR. CUDDY: The two cases were  
15 more Assigned Counsel and the client talking  
16 about the eligibility.

17 MR. GRADESS: Yes.

18 MR. CUDDY: I did make reference  
19 to how the different judges handle the  
20 eligibility.

21 MR. GRADESS: Is that reference a  
22 reference essentially to Syracuse City Court?

23 MR. CUDDY: Yes.

24 MR. GRADESS: Let's try and focus  
25 for a second on the number of complaints

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1 because I think I'm hearing you do two  
2 different kinds of work. One is complaints  
3 about lawyers that fall in the category of  
4 communication, fall into the category of  
5 haven't come to visit me, fall into the  
6 category I can't get them on the telephone,  
7 et cetera, and you suggested that if you went  
8 today to pick up 15 to 20 referrals, and  
9 maybe 7 to 10 of them would be related to the  
10 attorney-client relationship. So how many  
11 people visit during the week? Is somebody in  
12 the jail each day?

13 MS. ROSBROOK: Yes.

14 MR. GRADESS: So is it fair to  
15 say on a routine basis there would be 70  
16 complaints during the week about these  
17 issues? Is it less; is it more?

18 MS. HANCOCK-OLECH: I would say  
19 it's more because we have open lines from the  
20 jail to both jail ministry and to the bail  
21 expediter program of jail ministry and that  
22 would make 5 lines all together, and all 5  
23 lines are usually ringing all at the same  
24 time.  
25

50

1 MR. GRADESS: Again, I'm trying  
2 to distinguish here between the kinds of  
3 thing that I got to put my stuff into storage  
4 because I can't pay the rent, I'm  
5 incarcerated versus I've got to talk to my  
6 lawyer because we're going to go to court  
7 next week. We're talking about 70 or more of  
8 those latter kinds of calls?  
9

10 MS. HANCOCK-OLECH: I would say  
11 more.  
12 MR. GRADESS: Do you want to, for  
13 the record, estimate a number without --  
14 MS. HANCOCK-OLECH: I couldn't  
15 estimate it.  
16 MR. GRADESS: You don't have to.  
17 Let me ask you, has there ever been a time  
18 where you have sat down with the Assigned  
19 Counsel administrator or the head of the  
20 Legal Aid Society in this community to  
21 discuss those issues, where you call for a  
22 formal meeting to sit down with those people?  
23 MR. CUDDY: No.  
24 MR. GRADESS: Is that something  
25 that would be untoward to do? Is that --

1 51  
2 does that make some sense?  
3 MS. ROSBROOK: It makes sense.  
4 It would be very good.  
5 MR. GRADESS: I'd like to get a  
6 little clearer on the -- you gave an example  
7 of an Assigned Counsel practitioner who tried  
8 to solicit extra money to do extra work.  
9 Could you be a little more clear about the  
10 nature of that, if you know more about that?  
11 MR. CUDDY: Clearer than the  
12 three of us talked -- not the inmate and the  
13 lawyer and myself, but Assigned Counsel  
14 Program, the lawyer and myself, and it was my  
15 disbelief with this kind of bank account  
16 that -- and the kind of circumstances that  
17 was involved with this client that was  
18 homeless, needed a place to stay, that indeed  
19 there was an eligibility question.  
20 MR. GRADESS: This is the issue  
21 now of the \$1,200 in the bank?  
22 MR. CUDDY: Yes.  
23 MR. GRADESS: Did I take it also  
24 from your testimony that there were occasions  
25 where you had complaints from clients that

1 52  
2 their Assigned Counsel lawyer was hitting  
3 them up for money? That's what I thought you  
4 were saying earlier.  
5 MR. CUDDY: We hear that from  
6 time to time, sure.  
7 MR. GRADESS: How frequently do  
8 you hear that?  
9 MR. CUDDY: 15 times a year, I  
10 don't know. 15 times a year. That's not a  
11 frequent thing but we do hear it. We're

12 never sure how that works. If somebody did  
13 call Assigned Counsel and found out that on  
14 rare occasions that could take place, a money  
15 request, but has to go through Assigned  
16 Counsel. It has to go through Assigned  
17 Counsel, not through the lawyer but Assigned  
18 Counsel.

19 MS. HANCOCK-OLECH: You also have  
20 to understand that these are just people in  
21 contact with jail ministry and we are not in  
22 contact with every inmate in the jail. So  
23 there may be quite a few others that we don't  
24 know about.

25 MR. GRADESS: So some of these 15

53

1 are references where an attorney actually  
2 thinks there should be some sort of  
3 reimbursement to the county because of the  
4 income of the client?

6 MR. CUDDY: (Nodding.).

7 MR. GRADESS: Anything else?

8 MR. EFFMAN: Just to complete the  
9 record, can you give me some idea as to the  
10 number on a daily basis of unsentenced  
11 inmates with your ministry in the jail?

12 MR. CUDDY: Unsented inmates?

13 MR. EFFMAN: What kind of  
14 population are you dealing with when you go  
15 in on a daily basis, how many inmates?

16 MR. CUDDY: How many contact our  
17 office?

18 MR. EFFMAN: How many inmates are  
19 in the jail?

20 MR. CUDDY: Are there in the  
21 jail? The average is running 570 at this  
22 point. 300 are on -- over 300 are on no-bail  
23 status, so I would say of the 570, probably  
24 550, 500, usually runs about 20  
25 Jamesville-sentenced inmates, some

54

1 State-ready inmates, so there's 520 on an  
2 average basis right now of unsentenced  
3 inmates.  
4

5 MS. HATHAWAY: Yes. I have two  
6 questions that any of you can answer and then  
7 I have a question for the lady over here.

8 My first question is: How  
9 effective do you feel that your services are  
10 to the clients dealing with these issues that  
11 you've cited and what the results are usually  
12 and, secondly, who is your ministry actually  
13 responsible to when the issues seem to need

14 further discussions and seem not to be able  
15 to be solved by you, such as Assigned  
16 Counsel, the schedules, the appointment,  
17 court appointment schedules without the  
18 knowledge of your counsel and to the young  
19 lady there, I'd like to know how do you  
20 handle the situations that you mentioned of  
21 the -- of your clients when the attorneys  
22 disappear or don't leave any forwarding --  
23 how do you handle that?

24 MR. BELGE: Effectiveness, I'm  
25 not sure what you mean in terms of Assigned

55

1  
2 Counsel or in terms of our response to  
3 inmates.

4 MS. HATHAWAY: The services that  
5 you render, period, how do you feel how  
6 effective that you are in rendering these  
7 services to the clients in all the categories  
8 you mentioned, the telephoning, the --  
9 whatever it is that you do. Your client  
10 advocacy mixed with your jail ministry is  
11 throwing me off quite a bit because jail  
12 ministry, I've been acquainted with it, has  
13 not had the interaction, so you seem to be  
14 doing several things, and how effective do  
15 you feel that you are in doing these things?  
16 Do you feel that anything is lacking and if  
17 it is -- if you're stumped about something,  
18 who are you responsible to to carry this  
19 further, to try to get some results?

20 MR. BELGE: I think just judging  
21 from the fact that as soon as you walk into  
22 one of the pods, 4 or 5 people want to see us  
23 who haven't put in a slip testifies to some  
24 of the effectiveness because of the other  
25 inmates have needs also and they're

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1  
2 recognized and some other people's needs have  
3 been satisfied or helped at any rate.  
4 Sometimes you feel terribly frustrated  
5 because we haven't been able to do something  
6 more positive but I think by and large it's a  
7 pretty effective program and -- I mean, I  
8 can't imagine anything worse than sitting in  
9 jail for 10 days and not even knowing what's  
10 happening to your case and that happens  
11 often, so in that sense we're able to contact  
12 counsel, find out what's going on and report  
13 back, so I think that's an extremely --

14 MR. CUDDY: I would tend to  
15 answer that in terms of we try to be faithful

16 to our visits, to our follow-up work and do  
17 what we say we're going to do and, again, in  
18 the sense we're effective -- that helps  
19 people's spirits, then that's our goal. If  
20 we can put up a communication -- I'm not sure  
21 we judge ourselves on the effectiveness of  
22 that. We just try to do it so our barometer  
23 is not -- we don't keep track of our  
24 effectiveness, measure ourselves by  
25 effectiveness as much as following up and

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1  
2 doing what we say we're going to do.

3 MS. HATHAWAY: If you came upon  
4 an issue where you thought you ran into a  
5 stone wall, who do you -- who do you go to  
6 try to help you resolve that or is it --

7 MS. ROSBROOK: I think I know  
8 what you're saying and it's we've just begun  
9 in the last couple of months, we formed a  
10 committee, that we're bringing to this  
11 committee things that we hear that don't seem  
12 to go away, persistent complaints, if you  
13 will, so I think that that's going to be a  
14 vehicle for us to study this stuff that we're  
15 hearing and to -- a few heads to decide where  
16 we're going to go and if need be, we would do  
17 whatever, if that would be our consensus.

18 MR. BELGE: We don't have -- I  
19 think one of the -- I think one of the  
20 underlying things we've requested is who do  
21 we report to, who does the jail ministry  
22 report to and we're a grassroots  
23 organization, and all of our money comes from  
24 donations for the most part, except for the  
25 bail program, and that's somewhat different.

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2 MS. HATHAWAY: Just briefly, if  
3 you can, just -- I'd like to know how you  
4 handle the situation where they're -- the  
5 attorney --

6 MS. HANCOCK-OLECH: When the  
7 attorney left town and left no forwarding  
8 address, it just seems obvious to me any way  
9 that an attorney on the Assigned Counsel list  
10 would inform the Assigned Counsel that he was  
11 indeed leaving. This is the list of his  
12 clients and in turn, re-assign that client.  
13 In both of these cases, because I just got  
14 one yesterday, too, there was nobody assigned  
15 and they showed up in court and there was no  
16 lawyer there with them.

17 MS. HATHAWAY: So you take on

18 responsibility to try to help -- to try to  
19 get another Assigned Counsel?  
20 MS. HANCOCK-OLECH: Yeah. In  
21 that case I would call both judges, the judge  
22 they would report to.  
23 MR. GRADESS: Thank you.  
24 David Hayes.  
25 MR. HAYES: Good morning, I'm

1 59  
2 here as President of the Onondaga County Bar  
3 Association in Syracuse, New York and thank  
4 you for this opportunity to make this  
5 statement. I will address the subject this  
6 morning of Assigned Counsel fees. Equal  
7 justice under law is the inscription over the  
8 main entrance to the United States Supreme  
9 Court building in Washington, D.C. Who was  
10 the author of that promise of equal justice  
11 under law which our nation's highest court  
12 admits to those that seek justice.  
13 Was it Chief Justice John  
14 Marshall or Justice Oliver Wendall Holmes,  
15 Jr.? The answer is Cass Gilbert, the  
16 architect that designed the building. It is  
17 so basic that justice must be equally  
18 available to all people that it did not take  
19 a brilliant judge or a legal philosopher to  
20 express this simple truth, Cass Gilbert, the  
21 architect was able to capture the essence of  
22 a fair system of justice. It must be equally  
23 available to all people.  
24 The Onondaga County Bar  
25 Association has rededicated itself to

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2 promoting equal access to the legal system  
3 for all individuals. The attorneys who  
4 organized our Bar Association almost 125  
5 years ago in 1875 stated in our original  
6 certificate of incorporation that one of the  
7 particular objects of the association would  
8 be to, "increase its usefulness in promoting  
9 the due administration of justice." The Bar  
10 Association is part of a long range plan  
11 which we adopted in 1997, adopted a mission  
12 of inspiring excellence in the legal  
13 profession, fostering the fair administration  
14 of justice and promoting equal access to the  
15 legal system. Our legal system must be  
16 available to all people, rich and poor alike,  
17 or we cannot describe our system as a fair  
18 system.  
19 The Bar Association urges that

20 the rates paid to criminal defense attorneys  
21 assigned by the courts to represent indigent  
22 persons in felony criminal cases be increased  
23 \$75 per hour and the Bar Association  
24 recommends that the rates in misdemeanor  
25 cases be increased to \$50 per hour. As part

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1 of that recommendation, we are recommending  
2 that the current system of making a  
3 distinction between out-of-court and in-court  
4 time be dropped and that the \$50 per hour in  
5 misdemeanor cases and \$75 per hour in felony  
6 cases would apply regardless of whether the  
7 attorney spent his time in court or out of  
8 court.  
9

10 Assigned Counsel fees need to be  
11 increased. The current rates were set in  
12 1986. The majority of other states and the  
13 federal government pay higher Assigned  
14 Counsel fees than New York State. The Bar  
15 Association does suggest New York State  
16 reimburse localities like Onondaga County for  
17 some portion of local criminal defense costs  
18 without regard to whether the locality has an  
19 Assigned Counsel Program or a Public Defender  
20 system.

21 As you know, in Onondaga County  
22 we do have an Assigned Counsel system, so we  
23 are recommending that this increase which we  
24 are calling for the state to make not be  
25 passed on as a burden to the local

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1 municipalities, like our county, but rather  
2 be recognized as a state obligation, at least  
3 in part. The Onondaga County Bar Association  
4 recommends that the Assigned Counsel fees  
5 paid to lawyers representing indigent  
6 criminal defendants be increased as part of  
7 our nation's commitment and responsibility to  
8 provide equal justice under law to all  
9 individuals charged with a crime.  
10

11 Thank you for the opportunity to  
12 make this statement and I'll be glad to  
13 address your questions and comments, thank  
14 you.

15 MS. BUCK: I have to ask you this  
16 question, David. I'm assuming that your  
17 recommendation for raising the rates would  
18 also apply to 18-b attorneys who appear in  
19 Family Court?

20 MR. HAYES: Yes, they would, your  
21 Honor.

22 MS. BUCK: You're talking \$50 an  
23 hour comparable to misdemeanor cases?  
24 MR. HAYES: We have not made that  
25 distinction, your Honor, but a minimum of \$50

1 63  
2 an hour would be increased from the current  
3 \$25 or 40 to a minimum \$50 an hour for Family  
4 Court matters and our Bar Association -- as a  
5 matter of record, our Bar Association Board  
6 of Directors has made that recommendation and  
7 I did not include it in my comments this  
8 morning. It was an oversight on our part, so  
9 our Board of Directors of the Bar Association  
10 does mean to urge this increase not only for  
11 attorneys representing the indigent criminal  
12 defendants but also for Family Court matters.  
13 Thank you for raising that.  
14 MS. BUCK: I knew that's what you  
15 meant.  
16 MR. HAYES: Thank you.  
17 MR. LEWIS: Mr. Hayes, do you

18 have -- the Bar Association have an opinion  
19 about the possibility of cost of living  
20 increases due to some sort of manner in which  
21 the Bar Association would be relieved of once  
22 again enacting a resolution in a few years,  
23 as cost and expenses go up; is there any  
24 thought to that?  
25 MR. HAYES: We have not addressed

1 64  
2 that, Mr. Lewis. That sounds like a good  
3 suggestion to me. I don't know whether or  
4 not it would be realistic as far as getting  
5 the New York Legislators and Assembly and  
6 Senate to agree to such a cost of living  
7 adjustment or increase to Assigned Counsel  
8 fees based on some kind of a benchmark or  
9 based on consumer price index or some sort of  
10 inflation factor. Is that what you're --  
11 MR. LEWIS: No, I was thinking  
12 legislative pay raises, any indication or  
13 index?  
14 MR. HAYES: That would --  
15 possibly that would be a good index but I  
16 don't know whether that would be realistic.  
17 We have not addressed that. If that was a  
18 possibility, we certainly would support that  
19 effort. We wouldn't oppose it; we would  
20 support that effort. I don't know whether  
21 that's doable or not.  
22 MR. LEWIS: Thank you.

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MR. EFFMAN: Mr. Hayes, do you have any sense of what might occur in this county if the rates you suggest were adopted

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but there were no state reimbursement and left as a county unfunded mandate?

MR. HAYES: I would guess -- I would think that our county legislature and county government would look at other alternatives, such as possibly a Public Defender system such as there is in Monroe County. That may be one of the possibilities. When our Board of Directors considered this, Mr. Effman, we took that into consideration and despite that risk possibly of the Assigned Counsel Program, which we think is an excellent Assigned Counsel Program in our community and operated really as -- under a separate Board of Directors and under separate administration in the Bar Association, although we have a close affiliation with that Assigned Counsel Program, despite the fact we think that's an excellent program and doing a fine service for our community, we understand that one of the risks could be that the Public Defender system could possibly replace our current system if those rates were increased.

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Despite that, our Board of Directors unanimously approved this recommendation, the rates be increased. That's a potential risk, we might go to a Public Defender system.

Quite frankly, listening to your first person and his statement this morning, I'm not sure that our county government would be prepared for or be cognizant of the fact we're talking about a staff of 75 people in a Public Defender system in Monroe County, which I understand it, the testimony was 50 attorneys and 25 staff. I don't know that the -- whether the county government here would embrace the idea there would be a Public Defender system and staff upwards of that 50 or 75 people.

So that is a risk, possibly we would end up with Public Defender system in our county, and despite that, we think in fairness to the attorneys, panel attorneys who are doing this work, the current rates are a disgrace of \$25 and \$40 and an increase

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is long overdue.

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MR. GRADESS: I'd just like to ask you a couple of questions. One is when you referred to there being a risk of a Public Defender system, I wonder if you to amplify what you think what that risk might be.

MR. HAYES: Risk of we won't know if the Public Defender system will continue to supply the excellent representation and the excellent system we have here in Onondaga County. We think under our Assigned Counsel Program here today we do have a fine program where defendants are getting good representation, and if we go to a Public Defender system, we're taking the risk it's a change and will that change be a change for the better or change for the worse. That's the risk we're taking.

It could be a change for the better. I -- we don't necessarily think so because we think we have an excellent program today but the risk would be that the -- we would have a Public Defender system and a large increase of governmental unit, with 50

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or 75 people on the payroll of the government, increasing our -- the cost and could be more expensive. Not only -- the quality of representation I think is the number 1 item that we should be concerned about, of course, but then the cost. Is really a Public Defender system going to be less costly or more costly to the taxpayers than the current system that we have?

MR. GRADESS: I wonder if we could ask you to pass on a copy of the resolution you're referring to for the record, of your bar association on this position. Have you done it by way of resolution?

MR. HAYES: We did it back in the spring. We made a public statement. I can give you my copy of the public statement today and I'll give you a copy of what our Board of Directors approved early in the spring when we made a legislative effort in Albany with our local legislators to attempt to get them to approve not only an increase in Assigned Counsel rates, but also to

1  
2 increase the Civil Legal Services funding.

3 MR. GRADESS: Okay.

4 MR. HAYES: I'll do that, thank  
5 you.

6 MR. GRADESS: Thank you very  
7 much.

8 Marsha Weissman.

9 MS. WEISSMAN: Good morning. My  
10 name is Marsha Weissman. I am the Executive  
11 Director of the Center for Community  
12 Alternatives, an agency that is known as CCA,  
13 and we provide alternatives to incarceration  
14 services through our offices here in Syracuse  
15 and in New York City.

16 Among our chief programs and  
17 actually the foundation of almost all the  
18 work that we do is client specific planning  
19 and that is a defense-based advocacy  
20 sentencing program that is actually the  
21 state's oldest alternative to incarceration  
22 program. It was started in 1981. Since that  
23 time we've developed a number of other  
24 programs including a program that provides  
25 court advocacy and community support and

1 supervision for juvenile offenders and a  
2 women's treatment program. We also work in  
3 prisons providing HIV and AIDS services.

4 My comments this morning will be  
5 from the perspective of someone who runs an  
6 ATI agency, alternative to incarceration  
7 agency, that relies very heavily on defense  
8 attorneys and specifically Public Defenders,  
9 public defense attorneys to work with us in  
10 forwarding alternative sentencing proposals.

11 I want to start by thanking the  
12 League of Women Voters for participating in  
13 these hearings with the State Defenders  
14 Association. I think the league is well  
15 suited to be a partner in these fact finding  
16 hearings because, as you know, several years  
17 ago the league did also undertake a study of  
18 alternatives to incarceration. Public  
19 Defender services and alternatives to  
20 incarceration are intimately connected.  
21 Without a strong public defense system,  
22 alternatives to incarceration often wind up  
23 expanding the net of social control rather  
24 than inducing reliance on incarceration.  
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2 Sentencing advocacy, including

3 the support for use of alternative to  
4 incarceration programs is a vitally important  
5 part of a defense attorney's job. The  
6 sentencing phase is critical given that about  
7 two-thirds of New York felony arrests end in  
8 conviction and of those, 85 percent come as a  
9 plea bargain. So despite the Perry Mason  
10 focus of public defense, much of the work  
11 that actually gets done is focused on  
12 resolving the in and out question, the  
13 sentencing question, the length of  
14 incarceration.

15 It is indeed a challenge to  
16 propose alternatives to incarceration in a  
17 political climate that makes it very  
18 difficult to have a rational discussion about  
19 how to best achieve public safety and that  
20 ultimately is what the sentencing question is  
21 about. Despite a body of research that  
22 strongly endorses the greater use of  
23 alternatives to incarceration, we only see  
24 legislation that mandates incarceration in  
25 more categories of offenders and the types of

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1 crime. Legislation has not only increased  
2 the number of crimes subject to mandatory  
3 sentencing but has also increased the length  
4 of those sentences. Yet contrary to what the  
5 public may perceive, these mandatory  
6 sentencing requirements do not only target  
7 serious repeat violent offenders. Rather,  
8 the use of incarceration results in the  
9 imprisonment of many low level first  
10 offenders and the only effective means  
11 between those kinds of consequences and  
12 outcomes is in fact a vigorous public defense  
13 system that can advocate at sentencing.  
14

15 But let me give you some  
16 information that underscores the point I just  
17 made. In a General Accounting Office, the  
18 GAO report found out 54 percent of federal  
19 offenders sentenced in 1991 were first time  
20 offenders and 65 percent of those received  
21 prison sentences, and that was actually  
22 before the federal guidelines, you know, had  
23 its impact, and this situation is even worse  
24 today. In New York 40 percent of state  
25 prisoners were first felony offenders and

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1 over 60 percent were committed for  
2 non-violent crimes.  
3

4 In New York State drug offenders

5 make up the preponderance of crimes for which  
6 people are incarcerated and despite the  
7 rhetoric that talks about reserving prison  
8 space for violent offenders, there has been  
9 no legislative reforms that have induced  
10 reliance on incarceration. We see laws that  
11 enhance sentencing requirements for violent  
12 offenders but despite widespread public  
13 support and years of effort, we have not seen  
14 reform of the Rockefeller drug laws. We seem  
15 only to be able to add to incarceration and  
16 not take another look about sentences and  
17 sentence instructions for non-violent  
18 offenders.

19 The use of incarceration appears  
20 to have little to do in improving public  
21 safety but rather has more to do with, I  
22 think, politics, the way we've learned to win  
23 elections and a hidden agenda that's very  
24 important in Upstate New York is the economic  
25 agenda. In 1993 Dan Feldmann, who was then

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2 the chair of the New York State Assembly  
3 Corrections Commission -- Committee, rather,  
4 found that 91 percent of New York State  
5 prisons are found in the 52 rural counties in  
6 Upstate New York, while 80 percent of the  
7 state's prison population comes from urban  
8 areas, predominantly New York City. Prisons  
9 represent secure jobs with fringe benefits  
10 and retirement options rarely available in  
11 Upstate communities where unemployment rates  
12 can run as high as 17 percent.

13 This is not an evenly distributed  
14 system and as the Sentencing Project  
15 revealed, the boom in prisons has clearly  
16 come at the expense of poor African American

17 men with 1 in 4 young African men under  
18 criminal justice system control. This  
19 practice of criminal justice lies in the face  
20 of judicial and Bar Association  
21 recommendations and I think that it's no  
22 surprise and no accident that we've seen an  
23 increased use of incarceration simultaneous  
24 with decreased support, both philosophic and  
25 financial for the public defense system.

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2 Despite many Bar Association  
3 reports, an ABA report, the bar of the City  
4 of New York report that endorsed wider use of  
5 alternatives to incarceration, we've seen

6 little expansion and little ability for  
7 defense attorneys to know how to use them and  
8 to make more access of these services.

9 I think that very important to  
10 consider was the recent report, the December  
11 1996 report of the Unified Court System's  
12 Committee on Alternative Sentencing, on  
13 alternative criminal sanctions that was  
14 appointed by Chief Judge Judith Kaye that  
15 found judges would welcome more alternatives  
16 to incarceration, and the judges said what  
17 they needed is more information.

18 Defense attorneys are essential  
19 to communicating information about  
20 alternatives to incarceration to judges.  
21 Defense attorneys are the only players in the  
22 criminal justice system and have that as an  
23 obligation, they must make this case for  
24 alternatives on behalf of their individual  
25 clients. Defense attorneys must play a role

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1 in making sure that a client who is really at  
2 risk of jail or prison can gain access to  
3 scarce alternatives to incarceration. This  
4 is not only the right thing to do, it is a  
5 professional responsibility.  
6

7 A key question then becomes how  
8 well equipped is the public defense system in  
9 New York State to take up sentencing advocacy  
10 in a climate that equates anything short of a  
11 long prison sentence as undue leniency.  
12 There are currently several barriers that  
13 stand in the way of Public Defender  
14 effectiveness in promoting and using  
15 alternatives to incarceration programs for  
16 appropriate clients.

17 First, law school education and  
18 even continuing legal education gets short  
19 tripped training attorneys or future  
20 attorneys about sentencing. Also sentencing  
21 advocacy moves beyond the bounds of legal  
22 expertise and into the realm of social work  
23 and, therefore, requires not only training  
24 but access to resources as well. In general,  
25 there are inadequate ATI resources throughout

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1 the state and more specifically, the public  
2 defense system in New York State is very  
3 uneven.  
4

5 There is some jurisdictions like  
6 Monroe County through the Public Defenders  
7 Office that has inhouse sentencing advocacy  
8 resources. There are some counties like

9 Onondaga County that has some limited access  
10 to sentencing advocacy services through our  
11 client specific planning service but there  
12 are many jurisdictions that have access to  
13 neither kind of service. Training and  
14 resources are necessary but not sufficient to  
15 insure the ability of Public Defenders to  
16 effectively advocate for their clients at  
17 sentencing. Public Defenders who face ever  
18 increasing caseloads in an environment makes  
19 that -- that makes sentencing advocacy a  
20 luxury for which Public Defenders have little  
21 time to pursue.

22 In conclusion, despite this  
23 rather dismal environment that demonizes not  
24 only those who commit crimes but those who  
25 would defend them against the vagaries of the

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1 state, the public defense system, the local  
2 and state Bar Association should be vocal in  
3 demanding better resources for defense and  
4 ATI services and better opportunities for  
5 these services to work together.  
6

7 There is an ABA recommendation in  
8 its report on the use of incarceration that I  
9 think is very timely for this hearing and  
10 that is the collaboration among organizations

11 that have a shared interest in sentencing  
12 policy to actively promote greater use of  
13 alternatives to incarceration and changes in  
14 state law that would place alternatives at  
15 the center rather than at the fringe of  
16 criminal justice policy. I want to commend  
17 the Defenders Association for playing a  
18 leadership role in this effort.

19 Finally, the challenge before us  
20 goes beyond a technocratic effort to improve  
21 public defense services, as important as that  
22 may be. The fundamental challenge that faces  
23 all of us is to break through the ideological  
24 barriers that equates a vigorous defense with  
25 immoral behavior and believes that only harsh

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1 punishment through prison and jail can  
2 achieve public safety and justice.  
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4 Fox Butterfield in his wonderful  
5 book "All God's Children" reminds us of the  
6 choices we would make if the young men and  
7 women who fill our jails and prisons were  
8 truly considered our children. We would  
9 choose teachers, not prison guards, job  
10 training and good schools, not idle time.

11 Defense attorneys as professionals, as  
12 members of Bar and Defender associations and  
13 most importantly as citizens have much to  
14 contribute to this larger debate, to create a  
15 rationale and human criminal justice system.  
16 Thank you.

17 MR. EFFMAN: Ms. Weissman, I  
18 don't know where I should start, coming from  
19 a county which specializes in cows and  
20 inmates, but we do have two correctional  
21 facilities and 10 percent of our population  
22 are inmates.

23 Let me talk to you more about the  
24 specific problems of, again, communication  
25 and education, especially with 18-b panels

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2 rather than Public Defender agencies. Can  
3 you tell me what kind of efforts you have  
4 made or think would be appropriate in  
5 educating a panel of 18-b lawyers with  
6 respect to sentencing advocacy? What happens  
7 in Onondaga County, how do you get through to  
8 the individual practitioner who accepts  
9 assigned cases?

10 MS. WEISSMAN: We do a number of  
11 things to inform attorneys about our  
12 services. Frankly, some of it is simply a  
13 marketing effort. Part of it is simply  
14 reminding attorneys that there is a service  
15 out there for them to use and I think that's  
16 a reflection in part of the lack of time and  
17 resources that attorneys have to think about  
18 sentencing.

19 To use our service an Assigned  
20 Counsel attorney only has to pick up the  
21 phone. If the defendant is indigent, it's a  
22 free service. A lot of times attorneys don't  
23 even have the time to do that. They forget  
24 to do that, so we simply send out information  
25 to remind them that the service is available.

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2 I think more importantly, we have  
3 over the years participated in training  
4 sessions, educational sessions held by the  
5 Assigned Counsel Program. John Parker has  
6 been very supportive of making whatever  
7 services are available to the Assigned  
8 Counsel panel, and we work closely with him  
9 to disseminate information at trainings,  
10 either directly or simply by being there with  
11 sort of a table of information.

12 I think though that the defense

13 community in general has to take the subject  
14 of sentencing more seriously. Sometimes I  
15 feel we only get in on the agenda because we  
16 badger people to get it on the agenda. It's  
17 not something that comes to mind. I think,  
18 frankly, you're more interested in training  
19 on questions of evidence and cross to kill  
20 and those kinds of things, when very often  
21 you don't have an opportunity to  
22 cross-examine anyone because you're going to  
23 take a plea bargain, so I think those  
24 institutions that sponsor training have to be  
25 pro-active in pulling in resources to do

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1 training on sentencing advocacy and related  
2 questions.  
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4 There are specific subject  
5 matters. For example, training on -- I know  
6 that the association did training here in the  
7 Assigned Counsel Program a few years ago on  
8 issues related to substance abuse, substance  
9 abuse treatment. So it's not just  
10 sentencing. It's also knowing what you need  
11 to know in order to make your case for the  
12 client and that kind of information has to be  
13 moved more to the forefront of attorney  
14 training, both in law schools and through  
15 continuing legal education programs.

16 MR. LEWIS: Do you feel there's a  
17 role for ATIs even at the level in which the  
18 defendant's being arraigned?

19 MS. WEISSMAN: Absolutely. I  
20 think the earlier involvement of ATIs, the  
21 better. First of all, ATIs can play a role  
22 working with defense attorneys in bail  
23 applications. I know in New York very often  
24 defendants are released to our programs as  
25 part of a release from detention and they

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1 have that opportunity to then build a decent  
2 track record about rehabilitation and even  
3 sanctioning that, then can be presented to  
4 the judge and the district attorney in  
5 negotiating a plea, and also in -- at the  
6 time of sentence. I think that in  
7 jurisdictions, particularly like New York  
8 City where plea bargaining and sentencing are  
9 rarely bifurcated, here we see more of that,  
10 that it's absolutely essential to have  
11 sentencing advocacy begin at the earliest  
12 stage possible.  
13

14 MR. LEWIS: Have you seen

15 anything in regard to capital work in terms  
16 of working on the sentencing in the  
17 beginning, the changes by the way the case is  
18 handled by both the lawyer and the ATI?

19 MS. WEISSMAN: We do, as you  
20 know, capital mitigation work and it's been a  
21 challenging but rewarding experience for us  
22 as sentencing advocates. We're brought into  
23 the case very early, you know, oftentimes  
24 before arraignment but certainly immediately  
25 after arraignment and we are made part of the

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1 defense team from day one. As sentencing  
2 advocates, we do suffer from, I think, a bit  
3 of a lack of respect on the part of we --  
4 with all due respect to you attorneys on the  
5 panel, that if you're not an attorney, we  
6 can't really talk to you; you're not worthy  
7 of having a conversation, and that really  
8 goes away in capital work. We haven't  
9 experienced that at all and I think that says  
10 a lot to how capital defense work has really  
11 integrated sentencing advocacy into how it is  
12 to conduct its work.

13 Again, as you well know, training  
14 through the CDO's office and other venues  
15 puts the question of mitigation right up  
16 front and it shouldn't take the -- obviously  
17 death is different, as the saying goes, but  
18 when you think about the long time people  
19 spent in prison and how that affects their  
20 life, it shouldn't only be that this work  
21 becomes part of death penalty work and in  
22 fact, there is -- there's more rewards if you  
23 do it, certainly, for less serious offenses.

24 The victory, quote, unquote in

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1 death penalty work is life without parole.  
2 If you're talking about a drug offender, some  
3 23 year old kid who dropped out of school,  
4 reads at the twelfth grade -- twelfth grade  
5 level would be a blessing, reads at a tenth  
6 grade, eighth grade level, to get that person  
7 into drug treatment to support them while  
8 they go through drug treatment, to hook them  
9 up with an education program and to see the  
10 prospect of life with hope and life with job  
11 is a whole lot more rewarding than simply  
12 securing a life without parole sentence.

13 MR. LEWIS: From one extreme to  
14 the other, the defendant who takes a plea  
15

16 bargain on an agreed-upon sentence, is there  
17 a role for sentencing advocacy more for the  
18 lawyer in that situation?

19 MS. WEISSMAN: There's a role for  
20 sentencing advocacy both for the lawyer and  
21 for the judge because in New York State there  
22 are correctional options available depending  
23 on what you plead to in a sentencing  
24 structure. So, for example, better  
25 sentencing advocacy for second non-violent

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1 drug offender might have that defendant not  
2 wind up in an ATI sentence but wind up in the  
3 Willard program where they serve, I think,  
4 three months and then they get out into a  
5 drug treatment program, so even in those case  
6 where there's a mandatory sentencing still in  
7 effect, there is some relief that you can get  
8 even when you're going to plead to a crime  
9 that requires a prison sentence.

10 The other, I think, important  
11 point -- the reality is that a lot of people  
12 serve prison sentences in New York State. We  
13 don't only recommend alternatives to  
14 incarceration. Some of our work is  
15 mitigating the length of incarceration. Even  
16 a year is a long time in the life of a young  
17 person and if they get a two year sentence  
18 rather than a three year sentence, that's one  
19 year less in prison, and the other role that  
20 a sentencing report can play, even where  
21 someone is going to go in, you can have the  
22 defense attorney -- the defense attorney can  
23 ask the judge to attach it to the sentencing  
24 minutes. It then will be placed in the  
25

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1 offender's file and it can be reviewed.

2 There's an opportunity to call up  
3 the Department of Corrections and try to  
4 advocate for this person to be put in certain  
5 programs, if that's merited. We've seen  
6 people with mental health issues that go in.  
7 We need to alert the Department of  
8 Corrections. They're more than happy to get  
9 this information. We see people with  
10 life-threatening illnesses. You have the  
11 opportunity to perhaps cushion the kind of  
12 sentence that you serve.

13 MR. LEWIS: Thank you.

14 MR. GRADESS: I wonder if you  
15 could, for the record, you used at the outset  
16 of your testimony the phrase "expanding the  
17

18 net" when you referred to a system without  
19 public defense involvement. I wonder if you  
20 can explain for the record, define what you  
21 mean by that.

22 MS. WEISSMAN: The term expanding  
23 the net of social control means using  
24 alternatives to incarceration for persons who  
25 would not be likely to be incarcerated in a

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1 given jurisdiction. There's actually been  
2 some statistical studies, particularly in New  
3 York City, that have identified factors  
4 related to incarceration in that  
5 jurisdiction, what might predict an  
6 incarcerative sentence. The use of  
7 incarceration which -- alternatives to  
8 incarcerations should, if they're being true  
9 alternatives to incarceration, in other  
10 words, if there's really a sentencing option  
11 that someone is considering putting in for a  
12 year or two years or something like that,  
13 should be rigorous, should have controls,  
14 should have a sanction, but if you're going  
15 to impose that on someone who would otherwise  
16 have gotten a conditional discharge or a  
17 regular sentence of probation, you're  
18 misusing that limited resource. You're using  
19 it for people who would not otherwise be  
20 incarcerated.  
21

22 There's ways that you can  
23 identify, and they vary jurisdiction by  
24 jurisdiction, what characteristics or factors  
25 are consistent with incarceration but the

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1 defense attorney is in the best position to  
2 know that because it's the defense attorney  
3 that day in and day out negotiates these  
4 pleas, knows what the recurrency is, knows  
5 whether or not he or she is likely through  
6 the merits of the case to get a conditional  
7 discharge or a probation sentence and what we  
8 have seen, for example, in New York City  
9 where ATI programs used to do their own court  
10 advocacy in conjunction with the public  
11 defense bar, and the system has now moved to  
12 having sort of a middleman through the  
13 centralized court screening service, is that  
14 there is the tendency of seeing more people  
15 come into these programs who look like they  
16 never would be incarcerated in the first  
17 place.  
18

19 For example, our program in New

20 York City for juvenile offenders, previously  
21 only worked with kids who had been in  
22 detention for 30 days or more because an  
23 analysis by the Department of Juvenile  
24 Justice showed that those kids stayed the  
25 longest and got the DFY sentence. We're now

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1 getting kids who have never been in detention  
2 for just one day. I'm not saying those kids  
3 don't need services but they don't need ATI  
4 services when we only have 130 slots for the  
5 whole jail population in New York City.  
6

7 And it's really the defense  
8 attorney that can stand there -- we  
9 haven't -- attorneys that are friends of mine  
10 and I know they're representing someone on  
11 the case, I might call them and say, do you  
12 need our help and they'll say no, I don't and  
13 they're not just bluffing or puffing. They  
14 actually know that they're going to get a  
15 decent sentence absent our involvement. They  
16 also use their wisdom and they know when  
17 nothing might work or certainly no ATI would  
18 work and that's why I think the public  
19 defense system are -- is critical to an  
20 effective gate keeping function with regard  
21 to ATI services.

22 MR. GRADESS: I wonder if you  
23 could do something else for the record.  
24 You're talking about your work but not  
25 describing it concretely. Could you for the

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1 record pretend at the other end there is a  
2 martian and describe what you might do in  
3 terms of the creation of a client-specific  
4 plan, concretely.  
5

6 MS. WEISSMAN: We speak with the  
7 defense attorney first. We ask that we  
8 receive, for this particular program, a  
9 letter authorizing our involvement under  
10 attorney-client privilege. We ask for any of  
11 the information that the attorney may have in  
12 the file, like the police report, any prior  
13 reports, just any information in general, and  
14 then we will start by interviewing the  
15 defendant in detention or not. From that  
16 initial interview, developing a list of  
17 collateral contacts: Family members, service  
18 providers, teachers, ministers, anyone that  
19 we then also interview. We get releases so  
20 that we can get any prior records that we  
21 need to review relative to developing the

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plan.

And then we begin to -- I'm going to speak now for somebody who's eligible for an alternative to incarceration program. We

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then begin to make referrals and actually have to do a fair amount of advocacy, particularly in Upstate communities that don't have an array of ATI programs. New York City, for example, has a number of programs that solely serve people in the criminal justice system.

In smaller jurisdictions, you don't have a specialized ATI drug treatment program. You have drug treatment programs. I'm pleased to say that we rarely have difficulty getting these agencies and organizations to accept people even though they know they're coming with, you know -- through a criminal justice referral, and I think that speaks to public support for alternatives, particularly if you do it on a

case-by-case basis. You're not asking

someone to take 50 drug addicts as a

community service placement but you're asking someone to take one, and they have the opportunity to interview them.

We ask all the people, agencies that play a role in the plan to write us a

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letter verifying their commitment and their willingness to report to, either directly to the judge or more typically to probation, if it's a sentence of probation.

It is not uncommon for us to contact the victim to find out their position in the matter. We indicate to the victim that we're working on behalf of the defendants and there's no miscommunication. Clearly they don't have to meet with us. We don't start out by trying to, in any way -- that's not our role in general to defend the crime that's committed but we find that victims often are really thirsty for information and much to my surprise, more often than not, we do get victim support for the sentence recommendations that we're making, and we ask the victim if they'd be willing to either speak in court or write a

21 letter or indicate to the Probation  
22 Department that they have reviewed our  
23 recommendations and support them.  
24 This is written up, reviewed by  
25 the defense attorney and we really value and

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1  
2 require vigorous review on the part of  
3 defense attorney. It doesn't make us  
4 comfortable when the lawyer says to us, I  
5 know your work, just send it in. And then  
6 we -- either we directly or through the  
7 attorney, it is submitted to the court and  
8 the district attorney.

9 MR. LEWIS: You also verify  
10 information from the lawyer and the  
11 defendants so that your own reputation  
12 doesn't suffer from what might be inaccuracy?

13 MS. WEISSMAN: Yes, and we are --  
14 about a year ago New York State authorized  
15 designated ATI agencies to have direct access  
16 to rap sheets, so we're going to have that --  
17 I mean, it's in the office. We're learning  
18 how to push the buttons.

19 MS. HATHAWAY: I just have one  
20 question right now. How well-known is your  
21 service actually known in the client  
22 community and is there availability -- is it  
23 prior to a client going to or after they get  
24 in?

25 MS. WEISSMAN: Your question is

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1  
2 how well-known is this service?

3 MS. HATHAWAY: This service and  
4 its availability to clients?

5 MS. WEISSMAN: That actually --  
6 that varies and it's almost a marketing  
7 question. If we send things out, we remind  
8 attorneys we're around. Also through word of  
9 mouth in the inmate community and in  
10 detention, it gets around. We have, since  
11 the first year that we've started doing  
12 client specific planning, never had -- never  
13 been unable to meet all our contract numbers,  
14 so to speak, to the state. So there are many  
15 times we remain a bit quiet because we don't  
16 have the resources to accommodate the demand  
17 that comes in when we do, for example, even a  
18 simple mailing. So I think that how well  
19 we're known is really a function of how much  
20 we take on promoting ourselves at a given  
21 point in time.

22 MR. EFFMAN: You mention a state

23 contracts and funding. Just for the record,  
24 could you give us some idea as to what  
25 percentage of your funding is state, local,

1 federal? 96

2  
3 MS. WEISSMAN: Probably 90  
4 percent, but not -- we have 22 programs so  
5 there's a million contracts.

6 MR. EFFMAN: 90 percent being  
7 state funded?

8 MS. WEISSMAN: In terms of the  
9 breakdown, state and local? Probably more  
10 than 50 percent state.

11 MR. EFFMAN: Okay. Thank you.

12 MR. GRADESS: The final question  
13 I'd like to ask you, if you know, what would  
14 you say is the percentage of either the  
15 Assigned Counsel panel, for example, in this  
16 jurisdiction that routinely uses your  
17 services?

18 MS. WEISSMAN: I -- I really  
19 don't have the answer to that question.

20 MR. GRADESS: Thank you very  
21 much. We're going to take a short break,  
22 about 8 minutes, and we'll be right back for  
23 our next witness.

24 (A recess was then taken.)

25 MR. GRADESS: Bonnie Levy.

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2 MS. LEVY: Good morning.

3 MR. GRADESS: Good afternoon.

4 MS. LEVY: Good afternoon by a  
5 couple minutes. I'm Bonnie Levy and I've  
6 asked to speak here today as a mere panel  
7 attorney in Onondaga County. I don't have  
8 any high level title. I can't tell you I'm  
9 an important person but I will try to bring  
10 to this panel the concerns I feel as an  
11 attorney face my clients when I represent  
12 them.

13 I would start by saying maybe,  
14 just to prove it to myself, I am a real  
15 attorney. Something that in this county is  
16 disregarded at times by both our clients,  
17 other attorneys, including our Bar  
18 Association, and the judiciary. But I will  
19 talk about that later.

20 I'd like to start by one of the  
21 major concerns I have in this county in the  
22 representation of the poor and one of the  
23 major concerns is our holding cell, which is  
24 located right out that back window, known as

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the Justice Center. Our clients now refer to

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that as the Just Us Center, as well they may.

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I have made numerous complaints to the

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administration there, to no avail, so I will

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put forth before this committee some of the

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problems in the hope that maybe they can be

7

solved and other counties facing the same

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problems may deal with them.

9

Number 1, when the jail was

10

built, only a few years ago, attorneys were

11

promised an area where we could consult with

12

clients called core, and our jail is divided

13

into various floors and parts. There are

14

three living quarters called the pods on each

15

floor and a central area where a guard sits

16

that has rooms in which you might interview

17

your clients. When the new jail was being

18

built, we were informed that we would always

19

be able to see our clients on core or away

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from the rest of the inmate population in

21

privacy.

22

Shortly after the new jail was

23

built there was a determination that there

24

was not enough deputies and, therefore, the

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core would never be staffed, although

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administration will tell you otherwise. I

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would tell you I haven't had a core visit in

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over two years now. My requests to get a

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core visit are met with at best laughter if I

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can get through on the jail telephone. What

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that brings forth is I now have to meet my

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clients on the pod, which is the living

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quarter.

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Now in and of myself, I do not

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fear my clients or most of them but you are

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at that point forced to mingle with 50 other

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inmates, many of whom haven't seen their

14

outside for a while and many of whom want to

15

speak to the live body who entered the pod.

16

The attorney consult rooms are totally glass

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so anybody can watch your interview which

18

makes it very difficult to confidentially

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discuss with the client, potentially in a

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murder or self-defense case, show me how he

21

came to you or show me what you did back.

22

You can't do it or you give away your case.

23

The attorney consult room faces

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the inmate showers so we can watch the

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inmates shower as we talk to the client. As

1  
2 one might laugh at it, I think it's a lack of  
3 privacy and lack of respect for our clients  
4 to have them subjected to that.

5 Additionally during the entire  
6 time that these interviews take place, you  
7 will hear announcements from the floor, now,  
8 we are showing Escape from New York or  
9 whatever. Lunch is now being served. So in  
10 between these legal attempts to have legal  
11 visits there's an announcement every 5  
12 minutes. Cell number 5, close your door this  
13 instant. It is a real problem. It's a lack  
14 of the ability to intelligently discuss the  
15 case with our client on the pods.

16 As I said, unfortunately any  
17 attempt to get jail administration to react  
18 with this is met with we don't have enough  
19 deputies or just call us, if you can get  
20 through on the number, and we'll arrange a  
21 different setting. It doesn't happen.

22 On one of the floors, which is 5,  
23 I have been told that I must speak with  
24 clients in a room which is off to the side.  
25 You are locked into this room, the buzzer

1  
2 inside the room does not work so you can't  
3 get out. The room is about maybe 9 by 6 and  
4 you bang on the door for 15 minutes to be let  
5 out. I thankfully have had clients just as  
6 claustrophobic as myself locked in with me  
7 for 15, 20 minutes before we can get out.  
8 Personally I feared for my safety at some  
9 point.

10 The fifth floor is the floor  
11 where we have the problem clients, quote,  
12 unquote, the ones that can't behave on the  
13 regular floors. It's a danger to lawyers.  
14 Everybody scoffs at it. Additionally, we  
15 cannot enter and exit the jail as we need to  
16 see our clients.

17 I have taken to going on Sunday  
18 nights where I hope to see the least amount  
19 of problems. In the past two months one  
20 Sunday night the jail was closed because,  
21 quote, there is an incident on 4, therefore  
22 we've closed the whole jail. One Sunday  
23 night the computer system broke so, "we don't  
24 know where anybody is in the jail. God  
25 forbid you get stuck on a pod when an

1  
2 incident erupts. You are stuck in the jail

3 and cannot get out.

4 Even when you're allowed to go  
5 into the jail, attorneys are the only people  
6 that I can see that don't have passes to go  
7 easily from floor to floor. The nurse does,  
8 the medical people do, the librarian did.  
9 One night on a Sunday night I was stuck with  
10 the guy who fills the candy machines on the  
11 floor. He had a pass. He let me in and out.  
12 I said, did they ever do a security check on  
13 you? No. He has a pass to get in and out;  
14 the attorneys don't. I've been told we're a  
15 security risk, a lack of respect for us.

16 One of our main concerns with  
17 respect to the jail is lack of providing our  
18 clients with medical care, proper medical  
19 care. I have gone from sentencing with the  
20 judge ordering the jail to fill a  
21 prescription of a doctor that I have brought  
22 for sentencing or if they're going to be in  
23 jail for a while, they can't make bail. The  
24 jail has routinely failed to provide medical  
25 prescriptions to the inmates even with

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1 legitimate doctor's prescriptions determining  
2 the inmate in fact does need such medication.

3 I had a client about two months  
4 ago who was diagnosed with diabetes and they  
5 failed to treat. The answer of the nurse was  
6 we don't think she has diabetes, period. Two  
7 weeks ago I asked -- I did not ask, a judge  
8 ordered a client of mine to have a mental  
9 exam. The doctors apparently did not show up  
10 for the mental exam, which takes about 20  
11 minutes and which they basically ask what day  
12 is it, do you know what a lawyer is, what's a  
13 judge; you're sane. They did not get this  
14 done for two weeks. Why? When I called  
15 Mental Health, "when the doctors don't show  
16 up, there's nothing we can do. That's the  
17 way life is."

18 On approaching the judges with  
19 this, this was the judges in City Court, I  
20 was basically told the same thing. Oh, well,  
21 if they don't show up, there's no mental  
22 exam. Now, I'd love to tell you I went  
23 immediately for a habeas corpus and whatnot.  
24 I didn't have the time to do that and my  
25

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1 client sat, being found sane I might add.

2 Often on the pods there is a lack  
3 of facilities. If two lawyers, one is using  
4

5 the library, one is using the interview room,  
6 you have nowhere to speak to a client; the  
7 core will not be opened up. When asking the  
8 deputies what should I do, the answer is talk  
9 with them on the floor, who cares, and that  
10 is the attitude.

11 Two months ago a client of mine,  
12 how should I put it, smelled a little ripe.  
13 I suggested that they might like a shower.  
14 She also suggested she would like a shower  
15 but she had been told that she would not be  
16 allowed to change clothes or get new clothes  
17 or even have a towel for three days due to  
18 security reasons. When I called up  
19 administration, oh, they said this can't  
20 possibly be true.

21 This goes on in our county every  
22 single day and we get no relief from this.  
23 It causes our clients to be very disagreeable  
24 and quite frankly, I think if we looked at  
25 this type of behavior in another country, we

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1 would be appalled. That's basically the  
2 issues that I have to raise about the jail.

3 I'd like to raise issues about  
4 the bail situation in Onondaga County. We  
5 have a pretrial release program.  
6 Unfortunately in the last several years our  
7 pretrial release program has decided the only  
8 persons they want to accept for pretrial  
9 release are people who would just as easily  
10 supervise themselves; in other words, people  
11 that steal, people that commit only  
12 non-violent crimes. Anything that smacks of  
13 violence in any form, pretrial refuses to  
14 take. Therefore, many people are left in the  
15 jail to be released, quite frankly, without  
16 any supervision when their preliminary date  
17 comes, which is five days later.

18 However, even when one speaks  
19 about trying to get juveniles released, and  
20 I'm not talking about people that kill  
21 people. I'm talking about altercations that  
22 may only involve fists, common street fights,  
23 probation says we don't deal with violent  
24 people. The judges who can order pretrial to  
25

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1 take a person will not do that.  
2

3 In the alternatives, people,  
4 defendants who are wealthy can make bail  
5 easily. Our clients cannot since \$1,500  
6 requires property and they don't have it.

7 Thus we are left with a great deal of clients  
8 who spend their time in jail because they  
9 cannot make bail and are of no flight risk  
10 since they've been living their entire days  
11 in Onondaga County.

12 Finally, we have a proposal, as I  
13 understand, being considered by our  
14 legislature about videotaped arraignments.  
15 The procedure -- the proposal is not only for  
16 arraignments but other court proceedings to  
17 be done. I was invited to a meeting, got a  
18 lot of objections; was told it's going to  
19 happen whether you like it or not. The  
20 interesting proposal, the defense attorney  
21 and the client will be I guess arraigned  
22 together while the real lawyers and the DA  
23 and the judge of course will be in the real  
24 courtroom.

25 I find this offensive. If we

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1 don't allow people to be in the courtroom  
2 when the proceedings take place, we're  
3 really -- we really have a disrespect for the  
4 legal system and the people who may judge us  
5 one way or the other. Nonetheless I've been  
6 told this is going to happen.

7 Those are the major concerns I  
8 have right now with respect to clients. I  
9 would like to talk just for a few minutes  
10 about the lack of respect this county has  
11 shown to its panel attorneys. For years we  
12 were never paid on time in spite of the low  
13 rates. We fought this. Our Bar Association  
14 does not support us. Our Assigned Counsel  
15 committee of which I was a member at times  
16 did not support us.

17 I have outlined in great detail  
18 in my testimony some of the things that have  
19 gone on. It was so bad that in January of  
20 this year I had to write each one of these  
21 people that sit in this chambers, the county  
22 legislators, to consider -- they consider  
23 paying me because I got no response as to  
24 when I would be paid. That didn't come

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1 through.

2 The system has now been changed  
3 and we are more or less being paid on time;  
4 however, it's taken years to do that. In  
5 speaking with various legislators about the  
6 pay as well as our Bar Association, the  
7 attitude tends to be, well, we don't earn the  
8

9 money. After all, you're not doing real  
10 work. It's a continual attitude in this  
11 county that doing work for indigent people is  
12 not to be respected. It starts with the  
13 clients who don't believe they're going to  
14 get a fair shake when you come to see them  
15 and say they may hire a real attorney, and  
16 that's why I started this discussion by  
17 saying I am a real attorney. It starts with  
18 the District Attorney's Office and I have  
19 attached their walk-in sheet when you go to  
20 deal misdemeanors and which you have to check  
21 off, are you assigned or retained.

22 There may be stats that I put in  
23 my report that justify this sheet but more  
24 than once I have been told, asked by the  
25 district attorney, are you assigned or

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1 retained because the deal will get better,  
2 because if you're retained -- I know this  
3 kind of thing goes on over the state. Maybe  
4 I think I'm Polly Annish to think it won't  
5 happen or should not happen or will be  
6 stopped. Unfortunately that's what our  
7 indigent clients face and they know it. So  
8 their efforts are to hire a real attorney in  
9 part because they know we're being paid on it  
10 and they feel we won't care.

11 Unfortunately, some colleagues  
12 think that Assigned Counsel defense and a  
13 real defense, if you pay you get a real  
14 defense. Our judges subtly don't help the  
15 situation. We have to beg them for experts.  
16 As many of you know, you can't fight a case  
17 without experts. These people are not guilty  
18 by their profession to work for free. Many  
19 of them will not work for Assigned Counsel  
20 clients because they're poor, because the  
21 cases are ugly, because the judges won't pay  
22 them what they think they're worth because  
23 judges have cut their fees, and because more  
24 importantly our own Assigned Counsel system  
25

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1 has not paid them on time. We've had two  
2 investigators that I know of refuse to do  
3 Assigned Counsel work in this county because  
4 they were not paid on time. We have numerous  
5 experts who've told me privately they will  
6 not work for assigned clients in this county  
7 because they have not been paid in time  
8 and/or because judges have cut their rates.  
9 I can't do magic in a courtroom. I'm not a  
10

11 magician. I need those experts. I need  
12 those investigators to help me. And if there  
13 are none available or they're too busy, the  
14 representation of my clients becomes  
15 defective.

16 Our Bar Association several years  
17 ago pieced off our Assigned Counsel system  
18 and set it up as a separate board. As I said  
19 we had to write -- there has been tremendous  
20 delays in payment. It's always been blamed  
21 on the legislature. Hopefully that program  
22 is now gone; however, due to lack of response  
23 to our members, our bar board this year  
24 apparently passed a civility resolution  
25 ordering our Assigned Counsel committee,

1 111  
2 who's, I would think, supposed to help  
3 Assigned Counsel lawyers, to be civil to us  
4 when we call the office. That's the lack of  
5 respect that we get in this county.

6 Until rates are raised for  
7 assigned lawyers, until our clients are  
8 respected in various ways, until the  
9 judiciary in some fashion, if ever, respects  
10 what we do in defending our clients, I don't  
11 see much of a change. I'll continue to do  
12 the work I have to do but the system is  
13 fraught with inequality at this point. And I  
14 don't see what changes will be made unless  
15 people realize that the defense of the  
16 indigent really is the defense of all of us.  
17 Thank you.

18 MS. HATHAWAY: Yes, Ms. Levy, I  
19 just want to compliment you and thank you for  
20 a very frank and straightforward presentation  
21 on all your issues. So I have no questions  
22 because you have answered them for me. Thank  
23 you.

24 MS. LEVY: Thank you for the  
25 opportunity.

1 112  
2 MS. BUCK: One question.

3 MR. EFFMAN: Obviously what you  
4 say is very disturbing, I think, to all of  
5 us. It's almost unexplainable because I've  
6 practiced in communities not unlike this one,  
7 in Erie County, which has an 18-b panel that  
8 handles all felony cases in all town justice  
9 courts and at least when I was there, my  
10 experience was that the full spectrum of  
11 defense bar were taking assigned cases and,  
12 therefore, there was very little difference

13 that I could see on how individual attorneys  
14 were treated by courts, DAs, et cetera,  
15 because would meet them the next day has  
16 retained counsel and had to deal with them as  
17 such and, again, the most powerful of the  
18 defense bar attorneys who were influential in  
19 the community were part of the 18-b panel.  
20 I guess all politics is local.  
21 I'm just wondering if you have any response  
22 politically to gain more power as an indigent  
23 defense bar in order to address the problems  
24 with both the Sheriffs Department and the  
25 court system.

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1  
2 MS. LEVY: I think it should be  
3 the concern of our Assigned Counsel Committee  
4 to address some of these issues with the  
5 jail. Bluntly, I don't have the time to do  
6 everything and I've addressed it as an  
7 individual. That committee should be taking  
8 on this agenda for our clients at large. It  
9 hasn't, to my knowledge. It has on occasion  
10 talked about it. The complaints continue.

11 In my opinion, there's a lack of  
12 interest to bother. And I know that will be  
13 disputed later on at some point with  
14 testimony but it's a real problem and we  
15 don't seem to get any resolved.

16 I think that part of the problem  
17 in this particular county and possibly in  
18 small counties all over is that to allow  
19 local bodies to fund the Assigned Counsel  
20 Program or the 18-b panel is problematic at  
21 best because all people that fund are the  
22 county legislators. They're looking to cut  
23 costs to be responsive to their constituents  
24 and the way to cut costs -- you know,  
25 criminals don't vote and so when you say we

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1 cut Assigned Counsel costs, we did this, it  
2 looks good to the constituents.

3 I think it should be taken over  
4 and funded by the state. Again, that's an  
5 opinion on the hope that maybe the state  
6 funding is less political. Each one of the  
7 little -- of the individuals or legislators  
8 that sit in this chamber has to deal with a  
9 small constituency who say, hey, my taxes  
10 went up because you gave those lawyers for  
11 the criminals more money and I think they  
12 respond to that pressure.

13  
14 When I went to the meeting on the

15 videotaping of the jail, the only issue  
16 raised was money and when I said it looked  
17 inappropriate, I thought it looked  
18 inappropriate to have the defense attorney  
19 and the client in jail and the prosecutor and  
20 judges out. Not only did one of the judges  
21 say I have no intention of ever going into  
22 that jail as long as I'm judge, but the  
23 response by the County Executive and the  
24 legislators is, well, it's money saved so  
25 what's the problem. So there's no

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1 philosophical idea of what looks right and in  
2 fact there's a worry that any push to pay us  
3 more or pay us on time or whatever is going  
4 to be seen as counterproductive to their  
5 constituents.  
6

7 MR. LEWIS: You should know  
8 there's New York State OCA regulation that  
9 requires the judges of the different levels  
10 visit prisons, at least one, as part of their  
11 duty. It may be enough to recuse one to get  
12 their attention.

13 MS. LEVY: What can I tell you.  
14 There's lots of rules.

15 MR. LEWIS: One of those great  
16 motions. You use the phrase "paid on time,"  
17 and what I'm concerned about as it sits in  
18 the record, it's in the nature of a temper  
19 tantrum rather than a real problem. I'd like  
20 you to explain the issue of being paid on  
21 time, first for lawyers and then for  
22 investigators and experts.

23 MS. LEVY: Sure. I have spoken  
24 to investigators who have been delayed pay  
25 for over a year. I have spoken to a lawyer

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1 where there have been holdups on bills from  
2 anywhere from a few months to over a year, to  
3 years. Excuses being given from anything to  
4 the bill was submitted late, which this Bar  
5 Association takes the position you don't have  
6 to pay the person or you have to pay them a  
7 cut rate of what they earned. I have had  
8 payment delays of anywhere from up to a year  
9 several years ago to 10 weeks, which may not  
10 sound very long but, you know, when you ask  
11 where the voucher is, no one can tell you.  
12 When am I going to be paid? Don't know.

13 My office or somebody in my  
14 office for the last three years has called --  
15 has had to call, because nobody else would,  
16

17 the controller's office to find out where the  
18 Bar Association contract was to find out it  
19 was not signed, okay, so there was no money,  
20 because the contract wasn't signed.  
21 Everybody blames everybody else. Blames the  
22 legislature, the legislature blames the  
23 Assigned Counsel committee but there's a lot  
24 of delay politics and the result of it is  
25 that nobody takes the rate seriously. The

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1 attitude of the Bar Association has basically  
2 been it's only \$25 or \$40 an hour, find some  
3 other way to make a living.  
4

5 MR. LEWIS: What I'm asking you  
6 is -- you cannot answer this, but what's the  
7 impact on your practice and your life to wait  
8 10 weeks to get paid?

9 MS. LEVY: It's huge.

10 MR. LEWIS: Tell us about that.

11 MS. LEVY: I have a secretary and  
12 the rates are going to sound paltry here to  
13 those of you who practice in New York City  
14 but I have expenses probably in the  
15 neighborhood of, overhead of \$2,500 a month.  
16 Now, when -- like I said, to people in New  
17 York City, that sounds paltry. Up here, it's  
18 not policy up here. I'm a sole practitioner.  
19 Probably assigned counsels fees at this point  
20 are probably a third of my income. They do  
21 barely but they do pay overhead. If I don't  
22 get a check and in December of this year I  
23 was owed approximately \$4,500. That's a huge  
24 chunk of change to me. When I am told we  
25 don't know when we're going to pay you, when

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1 we get to it, that is not something my  
2 secretary is going to wait for.  
3

4 I would say a lot of the small  
5 attorneys up here depend on Assigned Counsel  
6 fees to pay the bills. Less and less as time  
7 goes on but it is money and it is money that  
8 is earned. When I don't get paid on time,  
9 and I'm talking right now we're being paid at  
10 the average rate of, within the month of  
11 submission, which I consider more than fair.  
12 I can make arrangements to generate fees and  
13 have enough money to pay my bills. When the  
14 system is left to be we'll get to you when we  
15 feel like it, then you have no ability to  
16 generate fees and you begin to say, should I  
17 do this type of work.

18 My biggest concern with this has

19 been not the ability of the Bar Association  
20 or lawyers in this town, judges to say, hey,  
21 we have a fee shortage or whatever, bear with  
22 us a little bit, but it's more an attitude  
23 of, you know, the hell with you, if we want  
24 to pay you, we will. If we don't, we don't.  
25 We'll do it in our own sweet time and there's

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1 nothing you can do with it. That's what's  
2 gone on for several years here.

3 MR. LEWIS: Is it your belief  
4 that the Assigned Counsel Program and the  
5 administrator, whatever the entity is, should  
6 be an advocate for the lawyers on the panel?  
7

8 MS. LEVY: I think the Assigned  
9 Counsel Program should be an advocate both  
10 for the clients and the lawyers, yes. I  
11 think that there is a certain amount needed  
12 to pay lawyers and I'll give you an example  
13 which is in my testimony which I didn't  
14 testify to. I sat on that board -- again,  
15 I've heard this denied. I heard it with my  
16 own ears, other people have heard it with  
17 their own ears. When it comes to budgets,  
18 submission of budgets to the county  
19 legislature, the position is we'll ask for  
20 what we need rather than more and then we'll  
21 be on the good side of the legislators, and  
22 quote, "that's politics." I've never heard  
23 of politics like that. My understanding of  
24 the way the politics works is you ask for  
25 twice as much as you need and hope you get

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1 half of it.  
2

3 MR. LEWIS: They are two  
4 competing schools.

5 MS. LEVY: I understand. The  
6 problem is when the head of the system gets  
7 paid no matter what and the rest of us don't  
8 because we've asked for half of what we need,  
9 it's a problem and the answer is yes, I think  
10 there's no reason why the head of the system  
11 shouldn't advocate for us to get paid,  
12 especially at the rates we're getting.

13 MR. LEWIS: I want to turn to the  
14 area of experts. Do you find the practice --  
15 you've been in the practice for a period of  
16 time you can measure. Do you find that the  
17 criminal law has gotten more complex in the  
18 time you've been practicing?

19 MS. LEVY: I think criminal law  
20 has gotten more complex and I think in order

21 to defend experts that the district attorney  
22 hires and virtually without limit as to  
23 price, it's incumbent upon us to hire  
24 experts. I think those experts charge, I  
25 know they charge a great deal of money and

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1 they're unaffordable, and then the question  
2 becomes if they're unaffordable, what do we  
3 do.  
4

5 The other problem we face in this  
6 county, and I'll give you an example  
7 specifically in the area of defending a  
8 person charged with sexual abuse, is a lot of  
9 the psychologists and psychiatrists work in  
10 one way or another for the Department of  
11 Social Services and thus do not want to ever  
12 be hired by the defense or do so at a great  
13 price, so, therefore, we have to go outside  
14 to the area to look for people, and that's  
15 where the cost comes in.

16 MR. LEWIS: Do you think judges  
17 should be approving experts?

18 MS. LEVY: Yes, I do. Do I think  
19 in general should they be approving experts?

20 MR. LEWIS: Should the  
21 application by 18-b to a judge for a  
22 particular expert go to the judge for  
23 approval or should it go somewhere else?

24 MS. LEVY: I think it should go  
25 somewhere else. It truly concerns me -- and

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1 what truly concerns me is there tends to be  
2 an atmosphere around asking a judge for  
3 approval that is, why do you really need  
4 this? Justify this to me. I don't know any  
5 other lawyer that has to justify what they're  
6 doing, you know, in the practice of law, and,  
7 therefore if the judge disagrees with you and  
8 says, well, I've decided you don't need an  
9 expert, you don't get one, and a typical  
10 example I can give you from several years  
11 back, I felt I needed an identification  
12 expert in the nature of someone who could say  
13 to the jury, just because the person says  
14 I'll never forget that face, I needed someone  
15 to say, in fact, the study showed otherwise.  
16 The judge's decision on that was, no, you  
17 don't need the expert. The jury can decide  
18 it, I don't care what the study showed,  
19 you're not getting an expert, period. I  
20 think with somebody different, we would have  
21 had a different result. Not only the case  
22

23 ended up pleading out but not only that, but  
24 the ability to go to trial and prove,  
25 hopefully prove to the jury there was another

1 123  
2 way to look at identification testing but  
3 experts are expensive.

4 MR. LEWIS: Thank you.

5 MR. GRADESS: Let me try and  
6 just -- let me ask you to give the example.  
7 Let's take the example you've given of, say,  
8 a sexual abuse case and you conclude fairly  
9 quickly that the complaining witness or  
10 witnesses you need to see are in Nevada and  
11 your client has a learning disability and  
12 epilepsy and he has made a statement that you  
13 think is questionable.

14 So you essentially conclude that  
15 you would like to get a CAT scan, you would  
16 like to send an investigator to Nevada. You  
17 would like to have a learning disability  
18 expert and you'd like to find someone to  
19 challenge the validity of the statement.  
20 What would happen here? What would you do?

21 MS. LEVY: Well, I would approach  
22 the judge with all of those requests. Now,  
23 I've got to tell you, I'm not going to go  
24 judge by judge, but depending on the judge I  
25 pull for the felony case or if it's on the

1 124  
2 lower level, misdemeanor, I might or might  
3 not get permission to hire one or several of  
4 those people but I doubt not all. I would  
5 truly doubt that I could get an investigator  
6 in Nevada, to go to Nevada. I truly doubt I  
7 would get permission to do that. I might be  
8 able to get a learning disability person.  
9 They would tell me to look locally first. If  
10 I said I had someone out of the state or from  
11 a different part of the state, cost would be  
12 examined, carefully. Often I would  
13 present -- I would present my proposal, some  
14 judges would sign off depending on what the  
15 price. Others will say look around first for  
16 someone more local before you hire that  
17 person and often, you know, you find these  
18 people because they're listed in various  
19 professional journals you have or someone  
20 else has used them or you've read a write-up  
21 about them.

22 I guess what I'm telling you,  
23 it's very determinative of who the judge is  
24 as to whether you'll get some or part of your

25 request and then it depends on how much that

1 125  
2 person wants to charge. More often than not  
3 you're asked to see if there's anybody more  
4 local that can do the job for you and  
5 sometimes that is problematic because of many  
6 reasons, including past history in this  
7 county of testimony that's available or  
8 politics they've gotten into that are subject  
9 to cross-examination but it's not easy to get  
10 experts.

11 MR. GRADESS: If you decided that  
12 you needed to go to Nevada to develop the  
13 witnesses on your own, would you be  
14 reimbursed for that trip?

15 MS. LEVY: Not likely. I mean, I  
16 would ask. It wouldn't stop me from asking.  
17 I think -- I think it would be unlikely at  
18 best.

19 MR. GRADESS: That would be a  
20 judicial act rejecting that?

21 MS. LEVY: Yes.

22 MR. GRADESS: You made reference  
23 earlier to voucher cutting. Can you describe  
24 the practice? We've had a lot of testimony  
25 about voucher cutting. Can you describe how

1 126  
2 it's experienced here.

3 MS. LEVY: I would -- with  
4 respect to my own bills, I have very rarely  
5 been cut on a voucher. I can't personally  
6 complain about that, although I'm very  
7 careful and try to make sure I limit what I  
8 put, so there is attorney voucher cutting,  
9 too.

10 With respect to experts, there  
11 oftentimes, after the expert has done their  
12 work, they decide \$1,500 is too much money.  
13 They'll authorize up to \$5,000 and the expert  
14 comes in at about 2 but they never testified  
15 but they say I spent all this time reviewing  
16 records and doing what I had to do. The  
17 judge might cut that voucher to a certain  
18 level and the problem and the aftershock it  
19 has on us is once that expert is cut by a  
20 judge, that expert doesn't want to put forth  
21 again for Assigned Counsel because they  
22 haven't been paid what they felt their  
23 legitimate bill was.

24 And so that becomes a problem  
25 especially in your soft sciences,

1  
2 psychological, psychiatrists, and I can't --  
3 you know, the judges say why couldn't they  
4 review the records in three hours, not five?  
5 I don't know. You know, it's the questioning  
6 of what other professionals do in their right  
7 to cutting.

8 Now it's endemic in the whole  
9 history of the state paying things and I  
10 suppose -- I know I've dealt with it in a  
11 private practice when you hire somebody, for  
12 example, in a personal injury case, the bill  
13 looks a little high, is there any possibility  
14 of working with this, but see, it's a real  
15 slap in the face to the expert that comes  
16 forth to you and they just won't do it again.

17 MR. GRADESS: Let me ask you one  
18 last question. You made reference to some of  
19 your colleagues distinguishing between a  
20 quote, Assigned Counsel defense and a real  
21 defense. Could you go into that deeper,  
22 please?

23 MS. LEVY: Sure. There is a  
24 perception, both by some of my colleagues and  
25 clients, that there are two different type of

1  
2 defenses in Onondaga County. We're put in an  
3 untenable position in this county in part  
4 because we fill out our client's own  
5 financial sheets which I think is a problem  
6 so, for example, if I see a client that's  
7 maybe \$10 over eligibility, I virtually have  
8 two choices. I can go to the judge and say  
9 this person is \$10 over eligibility, what do  
10 you want me to do, or I can mail it into our  
11 Assigned Counsel Program that rejects them  
12 and I got to say to the judge can I take this  
13 person private or not and they can be told  
14 no, I want you to continue in spite of  
15 eligibility or not.

16 Now, what's been going on the  
17 last couple years, which to me is worrisome,  
18 is a great deal of colleagues or clients  
19 suggesting that won't I get a better deal if  
20 you're retained and not assigned. The  
21 theoretical answer should be no. Practical  
22 answer, it's really dependent. I think  
23 attorneys, most attorneys will work as hard  
24 no matter whether someone is assigned or not.  
25 I think there's a predominance in some

1  
2 attorneys to say, hey, privately I have more

3 time to spend on your case so I'm going to  
4 give you more time and you'll get a better  
5 result. Whether it's true or not, I don't  
6 know.

7 My big concern is the theory of  
8 the clients is true and also the theory of  
9 other bodies it's true and this goes from the  
10 time that bail is pronounced all the way  
11 through the whole process. For example, I  
12 watched a person the other day on a violation  
13 of probation, retained client on a DWI,  
14 violate probation for the third time for  
15 drinking, on a DWI, and the judge -- the  
16 attorney was retained and the judge turned to  
17 that particular defendant and said, well, I'm  
18 going to let you out one more time because  
19 your attorney has vouchered for you. My  
20 clients get locked up. At least when they're  
21 not retained.

22 I've got to tell you when you  
23 approach a judge on bail and say I've been  
24 retained, the likelihood of you getting an  
25 ROR release is much higher than when your

1 130  
2 client is sitting in the jail and poor and  
3 minority to boot.

4 MR. GRADESS: Thank you.

5 MS. LEVY: Thank you.

6 MR. GRADESS: Barrie Gewanter.

7 MS. GEWANTER: Hello. My name is  
8 Barrie Gewanter and I'm the executive  
9 director of the Central New York Chapter of  
10 New York Civil Liberties Union. I'm not an  
11 attorney but I am a layperson that does  
12 represent the ACLU in 7 counties in Central  
13 New York including Onondaga, Cortland,  
14 Chenango, Cayuga, Seneca, Oswego and Oneida  
15 County. Most of my contact is with people in  
16 the cities of Syracuse, Utica, Auburn and  
17 Oswego.

18 Most of you probably already know  
19 what the ACLU does. We protect and defend  
20 the rights that are guaranteed under federal  
21 and state constitutions and their bill of  
22 rights. We do this through education and  
23 advocacy and litigation of selected cases.  
24 We are nonpartisan, nonprofit and when we  
25 take selected cases and engage in litigation,

1 131  
2 we do so pro bono.

3 Locally our chapter speaks on  
4 civil liberties issues and educational in

5 public forums. We have a membership of over  
6 800 members represented by a local Board of  
7 Directors, and I am active part of a network  
8 of organizations in Syracuse, particularly,  
9 that work for social justice. I run an  
10 office that's a resource for information  
11 about civil liberties and referrals. I also  
12 receive and screen requests for legal  
13 assistance that come into the office and I  
14 work with a panel of volunteer and  
15 cooperating attorneys that respond to the  
16 requests for aid and initiate litigation on  
17 selected cases.

18 That last role of my office is  
19 one that's the most relevant to the issues of  
20 is our public defense system adequate. I  
21 receive numerous requests for legal aid and  
22 advice by mail, phone, fax, a portion related  
23 to civil concerns, a portion related to  
24 criminal proceedings and interactions with  
25 the justice system. I really can't give you

1 132  
2 an accurate statistical breakdown, but I'll  
3 tell you, I receive by mail and fax, about 10  
4 to 15 requests per week, by phone 10 to 20 a  
5 week. We're incredibly understaffed but  
6 we're talking at least 500 to 600 requests  
7 for aid a year.

8 I can't give you the nitty-gritty  
9 details about the jail or the court system  
10 today, partially because we usually do not  
11 represent individuals charged with a crime  
12 unless it's a clear issue of civil liberties  
13 involved or a clear issue of civil liberties  
14 that needs to be addressed. However, we have  
15 received enough requests for aid for persons  
16 who are unable to afford a public -- sorry,  
17 afford to hire a private attorney and persons  
18 who are represented by Public Defenders and  
19 Assigned Counsel to be able to offer you  
20 insights today.

21 My Board of Directors has  
22 directed me to bring you the following  
23 issues: I'll describe four issues and offer  
24 some suggestions as to how to address them.  
25 First of all, there's a scarcity of attorneys

1 133  
2 available to represent low income persons  
3 generally. This goes for criminal concerns  
4 as well as civil concerns and while the  
5 concerns of low income people are often  
6 legitimate and valid, they often go

7 unaddressed because they cannot afford to  
8 secure competent and vigorous quality legal  
9 representation. In our position this creates  
10 a two-tier society where only the middle and  
11 upper classes really have access to vigorous  
12 legal representation and our supposed right  
13 to legal redress.

14 Second issue: There is question  
15 about the level of experience and  
16 follow-through that Public Defenders are able  
17 to engage in, and I'm going to suggest that  
18 this is institutionally limited. When I get  
19 complaints in the office about the way a  
20 criminal proceeding has proceeded, sometimes  
21 the complaint is about the conduct of a judge  
22 but most often it is about the conduct of a  
23 lawyer who represented him. I rarely get  
24 complaints about attorneys that are hired  
25 privately, retained attorneys. Most

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1 frequently the complaints are about Public  
2 Defenders or Assigned Counsel.

3 I don't want to indict any  
4 individual attorney. That's not why I'm  
5 here. I'm talking about a system that puts  
6 the burden on the attorneys that are working  
7 diligently to try to defend their clients.  
8 But let me give you some ideas of the common  
9 complaints that I get through the office.  
10 The lawyer didn't talk to the accused until  
11 trial. The first contact I had with my  
12 attorney was in the courtroom. The lawyer  
13 didn't fight. The lawyer didn't seem to know  
14 what they were doing. The lawyer tried to  
15 get him to plead guilty even though I was  
16 innocent or even though there were other  
17 circumstances. The lawyer didn't know  
18 anything about the specifics of the case.  
19 The lawyer didn't present evidence they  
20 should have had. The lawyer didn't call  
21 witnesses they should have. The lawyer did  
22 something the client expressly didn't want  
23 them to do or the client felt coerced to go  
24 along with something when they really didn't  
25

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1 understand the full range of consequences it  
2 involved.

3 So what is going on when I  
4 receive these kind of complaints in the  
5 office? Are the lawyers incompetent? No, I  
6 wouldn't say that. Did the lawyers not care?  
7 No, I wouldn't say that. As Bonnie Levy  
8

9 said, they are real attorneys and they do  
10 care, otherwise they wouldn't be practicing  
11 law, particularly for the low rates of  
12 compensation that Public Defenders receive.

13 What's the problem? I think  
14 there are many, many Public Defenders who are  
15 committed to their role in the adversary  
16 system but I think that many Public Defenders  
17 are inexperienced. They are new lawyers just  
18 learning their way. I also think that Public  
19 Defenders end up having too many cases so  
20 they can't give each case the proper effort.  
21 They have to spread out their effort to each  
22 case and no case really gets the complete  
23 effort or the potential for complete  
24 follow-through. It's just not humanly  
25 possible.

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1 I also think that the Public  
2 Defenders don't have the time in the day to  
3 meet with their clients, interview potential  
4 witnesses, start the evidence to identify key  
5 factors or properly prepare a defense. When  
6 you have too many cases, there's just not  
7 enough time. It's not humanly possible.

9 I think that knowing all of this  
10 reality, some Public Defenders will take the  
11 path of least resistance and encourage a  
12 client to plea bargain rather than take  
13 something to trial.

14 I suggested some ways that some  
15 public defenders and Assigned Counsel become  
16 more skilled at haggling with lawyers from  
17 the DA's office rather than developing the  
18 skills at trial. I do not think this serves  
19 individual low income clients and I do not  
20 think this serves low income clients in  
21 general. Again, I'm not trying to indict  
22 individual lawyers in any way. I think this  
23 is a system problem, a situation that is  
24 institutionally created, not individually  
25 created.

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1 Third problem: The reputation of  
2 Public Defenders in the community,  
3 particularly in the low income community is  
4 so bad that the clients end up feeling  
5 institutionally coerced into capitulating for  
6 a guilty plea. Low income persons know the  
7 problems with Public Defenders. Bonnie  
8 talked about wouldn't it be better if I got a  
9 real attorney. The accused persons have to  
10

11 end up deciding what they want to do with  
12 their case based on their evaluation of their  
13 odds, and I think that low income clients end  
14 up downgrading their odds regardless of the  
15 level of guilt, regardless of the mitigating  
16 circumstances. Often the people who contact  
17 my office say that they felt they had no  
18 choice; that they felt compelled to plea.

19 What I'm suggesting is that the  
20 deficits of the system end up resulting in a  
21 kind of coercion that is produced by an  
22 inadequate institution rather than any real  
23 notion of justice.

24 I think that the fourth problem  
25 is an additional problem related to

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1 eligibility guidelines. Attorneys are  
2 expensive and the cost of experienced  
3 attorneys is very high. Criminal defense is  
4 a specialty with specialized skills. Not  
5 every lawyer can mount a criminal defense  
6 effectively. My understanding of the system  
7 is that you get a Public Defender if you meet  
8 eligibility guidelines based on income and in  
9 Syracuse representation for criminal cases is  
10 based on income for the Assigned Counsel  
11 Program and for -- so one of the questions I  
12 have is that if you make too much to be  
13 eligible but not enough to afford an  
14 experienced criminal defense attorney, where  
15 are you?  
16

17 I think there's a group of people  
18 out there, and I can't give you a measurable  
19 estimate of them, but there is a group of  
20 people not entitled to Public Defenders, per  
21 se, but they really can't afford a private  
22 attorney with the experience to be effective  
23 in criminal defense. I'm suggesting this  
24 creates kind of a no man's land where justice  
25 is still not served.

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1 So how do we address these  
2 problems? First of all, raise the income  
3 thresholds so that people who do not meet the  
4 eligibility guidelines don't have to mortgage  
5 their home or withhold food in order to pay  
6 for a private attorney. Secondly, preserve,  
7 expand and improve the Assigned Counsel  
8 system so that it may provide more  
9 experienced attorneys for public defense.  
10 Third, provide funds to hire more attorneys  
11 to represent indigent clients in order to  
12

13 decrease the caseload of each attorney so  
14 that each client can really receive a  
15 vigorous defense.

16 Finally, raise the compensation  
17 for Assigned Counsel attorneys/public  
18 defenders. I've been told that compensation  
19 rate was set in 1984 and has not really  
20 appreciably increased, don't know that for  
21 certain because I'm not an assigned attorney.  
22 I'm not an attorney. I've heard the figure  
23 of \$25 an hour. What lawyer practicing since  
24 1990 do you know that would work for that  
25 rate? Certainly none with any significant

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1 level of experience unless they happen to be  
2 independently wealthy or particularly  
3 committed but it's not a good way to live.

4 A lot of attorneys I work with at  
5 the ACLU, do Assigned Counsel work, and  
6 they're not making it for their families.  
7 They're having to choose to go away from the  
8 work that they love in order to make a salary  
9 that will allow them to do the basics of  
10 owning a home and raising a child. How can  
11 we encourage attorneys to do work for  
12 indigent clients if we cannot even provide a  
13 living wage?  
14

15 I believe that raising the  
16 salaries, the compensation will increase the  
17 number of lawyers who are willing to go into  
18 public defense work and willing to stay in it  
19 over time. Any attorney that's been in a  
20 courtroom knows that you learn the job by  
21 doing it. The only way to get attorneys who  
22 are experienced in courtroom proceedings is  
23 to get attorneys that can stay in the work  
24 over time and at the compensation rate, what  
25 you end up with is a revolving door.

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1 In conclusion, I think that we  
2 need to make our adversary system work. Our  
3 legal system is based on an adversary model.  
4 The idea that each party, whether it be  
5 parties in a civil case or the state and the  
6 individual in a criminal case, the idea is  
7 that both parties be represented by lawyers  
8 that will fight vigorously for each party.  
9 Through this ideal of equal adversaries and  
10 vigorous representation, this is what's  
11 supposed to ensure that justice is served for  
12 all, but because of the deficits in the  
13 public defense services, justice is not  
14

15 served because the system of equal  
16 adversaries in reality can become a sham.

17 Without improvements in the  
18 public defense system, what we have is a  
19 veneer of justice for anyone who cannot  
20 afford to hire a private, competent,  
21 experienced, committed criminal defense  
22 attorney. It's a veneer of justice laid over  
23 a very bitter reality of coercion, unbalanced  
24 odds, inadequate choices, and in some case  
25 back door deal making. We must improve the

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1 public defense services in New York to  
2 eliminate this two-tier system of justice and  
3 make the criminal justice system work for all  
4 citizens. Thank you.

5 MR. LEWIS: The New York Civil  
6 Liberties Union often gets lawyers to serve  
7 on its board to bring cases either pro bono  
8 or some reduced rate. One of the issues that  
9 Bonnie Levy brought up and is common is the  
10 participation of the senior or the more  
11 affluent or the whatever you want to call  
12 them members of the bar. The Civil Liberties  
13 Union seems to have a track record to be able  
14 to bring those people in either as helpers or  
15 advisors.  
16

17 Can you help us understand how  
18 perhaps an administrator in the county might  
19 be able to do that?

20 MS. GEWANTER: First let me say  
21 there's a difference in dynamics of getting  
22 pro bono attorneys downstate than Upstate.  
23 This is one of the difficulties I'm dealing  
24 with as an executive director Upstate. My  
25 contemporaries and my boss, the director for

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1 the whole state, is able to attract  
2 experienced, prominent, successful attorneys  
3 downstate to do the pro bono work. Upstate  
4 you have fewer attorneys in each specialty  
5 and what I find in the 7 counties that I work  
6 with is that the only attorneys that we're  
7 able to attract to do pro bono work with us  
8 are the young ones. We are not able to get  
9 the more experienced attorneys doing that  
10 kind of work, partially because there are so  
11 few of them in each specialty Upstate.  
12

13 So I think in answer to your  
14 question, the strategies have to be different  
15 based on the amount and distribution of  
16 attorneys in different specialties within

17 that specific locale. I don't think you can  
18 apply the same strategy in Westchester or New  
19 York City that you can in Albany, Buffalo,  
20 Rochester, Syracuse.

21 I think that part of the problem  
22 has to do -- I'm doing this off the cuff to  
23 some extent -- with why people get into law  
24 now. My dad's a barrister in New York City  
25 and he has a maxim that he follows. He's

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1 quite successful. He's a partner in his own  
2 firm, and he said what he followed ever since  
3 he was a young lawyer, help people and the  
4 money will come, and that's what he does but  
5 when he encounters younger attorneys, their  
6 answer to him is and then you found out  
7 that's wrong.

8  
9 I think that we need to change  
10 the system so that my father's maxim still  
11 works, that helping people can end up  
12 bringing people a living wage. Perhaps not  
13 the kind of income that a corporate attorney  
14 might receive, but we need to do something in  
15 the system so that helping people still will  
16 bring a reasonable income, a reasonable  
17 lifestyle, so that acting on your convictions  
18 does not also equate a permanent life in  
19 poverty.

20 MR. LEWIS: Thank you.

21 MR. GRADESS: Thank you.

22 Alan Rosenthal.

23 MR. ROSENTHAL: My name is Alan  
24 Rosenthal. I'm an attorney on the Assigned  
25 Counsel Program and have represented criminal

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1 defendants pro bono, retained, am currently  
2 on the Board of Directors for the Assigned  
3 Counsel Program and have been Appellate  
4 counsel in a number of criminal cases and  
5 have been able to look at an overview of  
6 counsel, defense counsel performance from  
7 that perspective.

8  
9 I'm going to keep my remarks  
10 relatively short and simply to make a  
11 suggestion and express a concern. There  
12 seems to be, looking back on 24 years of  
13 practice, seems to be a substantial flaw in  
14 our criminal justice system, which have lots  
15 of flaws but -- which has to do with the  
16 adversary nature of that system and the  
17 problem is that as new lawyers come in and as  
18 practicing attorneys, particularly in the

19 Assigned Counsel system, they come in with a  
20 substantial lack of skill, training and  
21 obviously experience, and sometimes it leads  
22 to their own embarrassment but more times  
23 than not it leads to the detriment of their  
24 clients.

25 As a consequence of these

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1 shortcomings, not necessarily of their own  
2 making, what a criminal defendant finds  
3 himself with is an advocate who lacks the  
4 knowledge, the confidence, the  
5 aggressiveness, the imagination and as a  
6 result, the courage to put on a substantial  
7 defense.  
8

9 There are two factors that I  
10 think contribute to this: One is a  
11 self-criticism, a criticism of profession and  
12 that is that it does not seem to me that the  
13 legal profession has done enough to develop  
14 young lawyers, so that when they step forward  
15 to undertake representation, they're doing so  
16 as effective trial lawyers. Criticism has  
17 been leveled, now for a number of years, that  
18 we simply are not training trial lawyers.  
19 That's what a criminal defense lawyer must  
20 do.

21 The second factor is that as  
22 attorneys gain skill, expertise, experience,  
23 they no longer are attracted to the Assigned  
24 Counsel system, no longer stay there and then  
25 they leave for financial reasons, many leave

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1 simply because they have developed other  
2 areas of expertise.  
3

4 As a consequence of all of this  
5 and as a result of reviewing any number of  
6 trial transcripts with an eye towards appeal,  
7 it seems to me that we have a substantial  
8 number of people serving time in state prison  
9 that with able counsel would not be there.  
10 What can we do to raise the bar, to raise the  
11 level of criminal defense counsel practice  
12 and my suggestion is that we move to a  
13 mentoring system, one in which the mentors  
14 are compensated and which they are assigned  
15 to young, incoming attorneys in their first  
16 and second year of practice. I'm not talking  
17 about a co-counsel. I'm talking about more  
18 than co-counsel. I know that some -- some of  
19 the counties around the state do have a  
20 co-counsel system to help bring young

21 attorneys in but I'm talking about something  
22 more than that because I think that mentoring  
23 is more than that.  
24 I'm talking about somebody who  
25 will help the other attorneys in developing

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1 the skills and the wherewithal for case  
2 preparation, second, and a special skill that  
3 I think is needed to work with young  
4 attorneys with regard to getting the rapport  
5 that needs to be developed between attorneys  
6 and clients with regard to trust, respect and  
7 issues having to do with class and race.

8 These are very, very serious  
9 impediments to adequate representation. When  
10 one breaks down the skills that go into a  
11 trial, when you think about it, voir dire,  
12 opening statement, cross and direct,  
13 summation, jury instructions, nobody knows  
14 how to gloss over these skills. These are  
15 very specialized and one might say fairly,  
16 after 10 or 15 years of practice, you begin  
17 to master these skills.

18 Another point of issue I throw in  
19 here, only because I'm not sure when we  
20 finally reached this level of competence  
21 having to do with the preservation of error  
22 for Appellate review, I have reviewed trial  
23 transcripts of the most skilled and  
24 experienced of trial attorneys and at times  
25

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1 you shake your head, because the reflection  
2 of your office is decency, how errors should  
3 have been preserved, but the problem is that  
4 when you get to the Appellate Division, you  
5 get to the Court of Appeals, a person who has  
6 every right to a new trial and the error was  
7 one that may have made the difference, a  
8 mistake by counsel, certainly it happens  
9 every day for inexperienced counsel, is the  
10 difference between getting a new trial or  
11 not.  
12

13 A mentoring system can help raise  
14 the bar for new incoming attorneys but I  
15 think that it provides us with another  
16 opportunity, and that's an opportunity to  
17 keep experienced attorneys involved in the  
18 Assigned Counsel system and I think that it  
19 provides that opportunity in two ways under  
20 the -- in the name of community and  
21 professional service but I think that it  
22 provides a challenge to those who would be

23 mentors to stay in that system, to pass on  
24 the skills and experience and the wisdom that  
25 they have attained and at the same time

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1 compensate them to do that.

2  
3 On an entirely different subject,  
4 but I think with the same thread running  
5 through it on how to do a client  
6 representation, I would like to express my  
7 concern about the developing trend in  
8 New York State we have seen recently with the  
9 change in legislation in Onondaga County, and  
10 it's the threat and the challenge that I see  
11 of videotaped court appearances or waiver of  
12 personal appearance by criminal defenders.  
13 Not only does it open up a whole pandora's  
14 box of problems, but I think that it takes us  
15 back several steps in terms of good and  
16 proper representation.

17 The waiver of appearance by  
18 criminal defendants is now provided for in  
19 our Criminal Procedure Law. It's not  
20 provided by the rules of the chief  
21 administrator and recently the change is now  
22 allowed in Onondaga County. Other states  
23 have moved to the system as long ago as five  
24 and six years ago. It was done on an  
25 experimental basis in the name of cost

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1 savings and efficiency. Nobody has even  
2 pretended that it brings about better  
3 representation and I think that at this point  
4 it's beyond argument that videotaped  
5 appearances can only undermine adequate  
6 representation, full and complete.

7  
8 The two quick examples that I  
9 would throw out in that regard are that  
10 defense counsel is posed with the choice of  
11 being either in court with his client  
12 elsewhere or standing with the client, most  
13 likely at the jail and out of the courtroom.  
14 In either case, it poses the problem of  
15 communication and how that's done, and lots  
16 of issues that come up in the course of trial  
17 and as early as bail come up and there's a  
18 necessity to communicate with that client,  
19 ask a quick question about issues that need  
20 to be addressed, whether it's ties to the  
21 community, ability to make certain bail,  
22 community contacts.

23 At every stage that communication  
24 is absolutely necessary and I think that for

25

us to allow the criminal justice system to

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2

move in this direction poses a terrible  
3 danger, most importantly, not to understate  
4 the need for that communication, but I think  
5 more importantly because anyone who has  
6 served as a criminal defense attorney has had  
7 the experience of trying to communicate with  
8 a client about important issues and knowing  
9 that the level of trust is not there.

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Every Public Defender or Assigned  
Counsel has had a client say I would do  
better with retained counsel. You are simply  
part of the system. The psychological damage  
that will be done by videotaped appearances  
enhances exactly that dynamic, with the  
defendant outside of the courtroom, not  
feeling any part of what's going on. Defense  
counsel in the courtroom, defense counsel  
looks part of the system. The alienation  
is -- I don't need to really talk about it a  
whole lot other than to say if you're not  
there, if you're not in person, if you're in  
the jail, the system becomes another world.  
It's like you're viewing it on television and  
you're not treated as -- you view it as

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you're not treated as a human being.

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We have begun to address this in  
Onondaga County and discussed it in a number  
of different ways as to how to deal with this  
and perhaps the simplest way is that as the  
system exists now, it requires waiver of  
appearance and it seems to me, and the  
feedback I've gotten from other counsel is  
that no right-minded defense counsel would  
waive that appearance, and I think that needs  
to be -- that thinking needs to be encouraged  
and enforced. There is -- but I don't think  
it's as simple as that and it's not as simple  
as that because you then need to be concerned  
about judicial attitudes, among other things,  
and that is if this is being enacted -- if  
waiver of appearance is enacted to save money  
and for expedience, the defendant who doesn't  
waive, the defense counsel who doesn't waive  
may run the risk of judicial wrath and we see  
that in so many other contexts that I don't  
think that it's simply a paranoid idea to  
think that it would develop in this case. So  
not all of the judiciary but a potential for

1  
2 abuse there, and so I raise that and thank  
3 you.

4 MS. BUCK: You heard the earlier  
5 speaker from the Public Defenders Office of  
6 Monroe County who is also, I guess, he was  
7 president of the association, of the state  
8 association concerned about the impact of  
9 mandatory CLE for lawyers if it's not  
10 appropriately focused on the specific needs  
11 of criminal defense lawyers, and I wonder if  
12 you see any connection between CLE and your  
13 proposal for drawing more experienced lawyers  
14 as mentors for young attorneys. Do you have  
15 any thoughts about that?

16 MR. ROSENTHAL: I do, and I gave  
17 it in the context of CLE and I think to the  
18 extent that CLE was an attempt to raise the  
19 bar for the entire -- and a commendable  
20 effort, in my opinion, but there's -- I think  
21 there's only so much that can be accomplished  
22 in the course of CLEs as we've come to know  
23 them, in terms of lecture series, materials  
24 provided and so on, and some of them are  
25 outstanding. However, and as I juxtapose

1 that to a mentoring system, I think that so  
2 much more can be done on a one-on-one basis,  
3 and I suppose that some thought ought to be  
4 given to those situations where we create it,  
5 if we create a mentoring system, that some  
6 CLE credit actually be given for that  
7 because, as I would envision it, the young  
8 attorney would spend many, many more hours  
9 with a mentor than in their -- than in their  
10 usual preparation of a case. And I think  
11 that needs to be taken into consideration,  
12 acknowledged properly credited.

13 At the same time it's unrealistic  
14 to expect a mentor to go and to do it on a  
15 pro bono basis, on a volunteer basis, and I  
16 think if we were going -- we need to treat  
17 them in the same way as we would anybody else  
18 conducting a higher level of education.  
19 Again, I know that a lot of CLE programs,  
20 there is no compensation for that or there's  
21 some nominal gratuity thrown in, but I think  
22 as we make that mandatory, we need to look at  
23 ways to compensate the people within the  
24 profession who are returning what they've  
25

1 gotten out of the profession both in terms of  
2

3 skill and experience and compensating them.

4 I know there's been a lot of talk  
5 about raising the compensation of those  
6 assigned attorneys who are certainly  
7 underpaid but if we're going to require  
8 continuing education, if we can move toward  
9 the mentoring system, we have to figure out  
10 ways to compensate and keep more experienced  
11 attorneys within the Assigned Counsel system.

12 MS. BUCK: I wouldn't dismiss the  
13 pro bono dimension of more experienced  
14 attorneys acting as mentors which would also  
15 require some rethinking on their part, state  
16 bar level, about what constitutes pro bono  
17 work since there's also a push consistently  
18 to increase pro bono activities. But I would  
19 also suggest that pushing both the Office of  
20 Court Administration and the Bar Association  
21 to rethink this relationship between  
22 continuing education and mentoring, after all  
23 we're not that far from a time when you could  
24 be admitted to practice not just by putting  
25 in so many hours in school but by studying

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1 under the tutelage of an experienced lawyer.

2 MS. SIEGFRIED: This is  
3 interesting. I practice in a rural area  
4 where I don't think we, it's my perception  
5 anyway, that the whole bar takes 18-b cases,  
6 so this problem of, you know, just having  
7 young attorneys doing the 18-b work, this --  
8 this idea of mentoring is a good one. I  
9 think that in terms of compensation though we  
10 should explore the pro bono aspect of it and  
11 I just wanted to mention that the women's bar  
12 here now, we have this thing where we've  
13 trained a bunch of attorneys who don't  
14 normally ever do divorces, have agreed to  
15 take one pro bono divorce and you do get a  
16 mentor along with agreeing to this one  
17 divorce, because we have these women who  
18 normally practice municipal law or something  
19 so they don't have a clue.

20 I mean, that's one model that's  
21 already happening and they've agreed to do it  
22 out of, you know, maybe a duty to the  
23 profession but also probably the women's bar  
24 feels the duty to women or something. So I  
25

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1 think that's a good suggestion that we should  
2 explore further.

3 MR. EFFMAN: Counselor, I'd like  
4

5 to add to that as well. Dealing with a  
6 mentoring suggestion, I'm thinking about why  
7 it's necessary now and not before and, of  
8 course, if you're involved in any  
9 institutionalized practice such as a Public  
10 Defender or Legal Aid Society, you're  
11 naturally in a mentoring system to begin  
12 with, a training program for young lawyers  
13 coming in. I think that's true when you  
14 started and when I started, as a young  
15 practitioner who accepted 18-b assignments  
16 was normally in an office-sharing situation.  
17 This is precomputer stuff, where could not  
18 solo out of your house without -- it just was  
19 unusual, so you would more often share space  
20 if you were a solo practitioner, and that  
21 naturally evolved into a mentoring situation.  
22 You were never alone in your home trying to  
23 figure out what you're doing, using the  
24 Internet.  
25 Maybe it's the technological

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1 enhancement that has enabled individual  
2 practitioners to practice in the home  
3 environment that mandates a mentoring system  
4 if those people are going to be representing  
5 individuals on liberty issue situations, so I  
6 think, again, it's a part of a technological  
7 problem we encountered when we isolate people  
8 from other lawyers and expect them to  
9 represent defendants.  
10  
11 MR. LEWIS: On the mentoring  
12 thing, are you concerned that the use of --  
13 possibility of pro bono creates the class of  
14 lawyers, again, in the form that you heard  
15 Bonnie Levy talk about? I'm saying pro bono  
16 versus the person who's the mentor who  
17 commands a fee from the system that puts the  
18 young lawyer in the position to require the  
19 mentor.

20 MR. ROSENTHAL: I am concerned  
21 about that and on the one hand as an attorney  
22 and -- we know that many of the panel members  
23 have found themselves in pro bono situations  
24 as well, so I don't want to diminish the  
25 importance of that but at the same time I

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1 think that, at least as I visualize this  
2 mentoring, to me it is so important and then  
3 to be cultivated, that I really would prefer  
4 to see it as a compensated system rather than  
5 a pro bono system.  
6

7 MR. LEWIS: Is it fair to say  
8 that one of the issues about pro bono for  
9 lawyers like us is that we get to pick and  
10 choose rather than be ordered to do it?

11 MR. ROSENTHAL: Yes, that is  
12 true, and as one gains more experience and  
13 maybe is even a little more careful about the  
14 use of their time, I know that I pick and  
15 choose the cases that I will do pro bono,  
16 have not made myself available to certain  
17 lists either the judges have or other  
18 organizations, simply because of my view that  
19 I can best budget my own time. On the other  
20 hand, when asked, I'm always reluctant to  
21 turn down the interesting and important case,  
22 so I think that it would be not impossible  
23 but very difficult to find experienced  
24 attorneys willing to give as much time and,  
25 again, as I would visualize it in a mentoring

1 161  
2 system.

3 I mean, in the course of a trial,  
4 at a trial that might go a week, and given  
5 the preparation and all that would go into  
6 it, I guess I would see the mentor spending  
7 close to the amount of time that the  
8 Assigned -- the primary Assigned Counsel  
9 would spend, so to my way of thinking, I  
10 think that it -- you're easily asking them to  
11 spend 100 to 200 hours of time. That's a lot  
12 of pro bono time.

13 MR. LEWIS: Do you think the  
14 system's expenses for criminal defense, I  
15 don't mean at the trial level but in the  
16 collateral attacks and habeas corpus and all  
17 that, do you think the system would spend  
18 more money or less money for paying its  
19 mentors as you've talked about?

20 MR. ROSENTHAL: Well, if my  
21 initial premise is correct, there's a  
22 substantial number of people serving time in  
23 prison that wouldn't be there with able  
24 counsel. One could make the argument that we  
25 would spend less money housing those people;

1 162  
2 however, the prison system has an unusual  
3 capacity to fill itself up no matter how many  
4 people are -- I wonder about that.

5 MS. BUCK: Let me just follow up  
6 though. You've been talking about the amount  
7 of time that would be involved or the  
8 commitment that would be necessary from this

9 more experienced mentor that we know that in  
10 most cases or the majority of criminal cases  
11 do not go to trial, and we've heard this  
12 morning about the importance of some of the  
13 early stages and lawyers having appropriate  
14 assistance in early stages. Do you think  
15 that in that respect there's an opportunity  
16 for pro bono mentoring?

17 MR. ROSENTHAL: It's certainly a  
18 much more self-defined period of time. The  
19 problem with that is that -- is the danger of  
20 trying to identify at too early a stage those  
21 cases that are only going to be plea  
22 bargained or dismissed on motion as opposed  
23 to those that will go to trial. That's  
24 difficult.

25 Now, the way I might address that

1 163  
2 is that to try and devise some system whereby  
3 a young attorney will be given a mentor for a  
4 certain number of cases that don't go to  
5 trial, a certain number that may go through  
6 the motion stage, a certain number that will  
7 certainly be pled at an early stage but also  
8 have the opportunity to be mentored through a  
9 trial attorney.

10 MS. BUCK: Of course you don't  
11 always know that in the beginning so you  
12 might need different categories of mentors.

13 MR. ROSENTHAL: Correct.

14 MR. GRADESS: I wonder if you,  
15 for the record, would you sort of envisioning  
16 what that mentoring is in concrete terms?  
17 We're using that as a label. Why don't you  
18 for the record, describe for the record what  
19 it might feel like if you were a young  
20 attorney, what you might be doing if you were  
21 a mentor.

22 MR. ROSENTHAL: I think that at  
23 the moment of your -- first moment of your  
24 assignment -- I'm not quite sure what the  
25 criteria would be. You have the opportunity

1 164  
2 if not the requirement that you -- the  
3 ability to contact a mentor and bring a  
4 mentor in immediately upon arraignment. I  
5 see that person as co-counsel so that you  
6 wouldn't want to -- you wouldn't want to  
7 bring him in at some later stage and begin to  
8 discuss all of the aspects of your case. You  
9 might even, as I would visualize it, have  
10 this person sit through an initial client

11 interview, and I say that because I do think  
12 that that's a -- a very significant stage and  
13 one in which it's hard to develop the skills  
14 in doing that and to do it in a way that  
15 promotes a good relationship with the client  
16 and the attorney.

17 I guess as I see it, I see every  
18 step of the way being synchronized between  
19 the mentor and the Assigned Counsel, primary  
20 Assigned Counsel. I guess I wouldn't  
21 visualize anything being done in the case  
22 without being discussed, without the  
23 ramifications of a particular motion being  
24 discussed, without the best -- without -- I  
25 guess I could mention not discussing the

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1 motions with the client, so many clients  
2 don't have the slightest idea what motions  
3 have been made in their case and for a new  
4 attorney, it might not occur to them.

5 Through our education, legal  
6 educational system, we're so in tune with the  
7 profession but not so in tune with what  
8 obligations we owe to our clients in terms of  
9 expressing them, so I think a mentor would  
10 certainly play an important role in  
11 encouraging that communication in every step  
12 so that it's reinforced.

13 Just to digress for a minute, I  
14 think the ability is, as we break in new  
15 attorneys, we're setting the bar much higher  
16 than it is now and so that the time that they  
17 can participate in the Assigned Counsel  
18 system, it's kept high and my guess would be  
19 that out of a sense of how much they benefit  
20 from a mentoring system, they would be more  
21 willing to participate in it as they develop  
22 the skills.

23 MR. GRADESS: Thank you. We're  
24 going to break now and we will reconvene at  
25

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1 2:15.  
2

3 (Whereupon, a luncheon recess was  
4 then taken.)

5 MR. GRADESS: James Ryan. Thank  
6 you for putting up with us. Please begin.

7 MR. RYAN: I don't want to bore  
8 you but I'm going to read from a prepared  
9 statement, copies of which have been left  
10 with this panel and the subject is my  
11 perspective of the Public Defender system in  
12 my capacity as a Probation Director in

13 Madison County, which is a predominantly  
14 rural county.

15 Overall, I think that the major  
16 issue I see to assist him is that the Public  
17 Defenders Offices need to be provided with  
18 sufficient funding so that the defendant can  
19 be provided with adequate defense. It would  
20 be consistent with other individuals in the  
21 system who may be represented by retained  
22 attorneys and with that is an overall  
23 thought, I'll expand it a little further.

24 One issue that I've seen in our  
25 local department has been staff turnover.

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1 There's a need to provide the Public  
2 Defenders Office with the ability to retain  
3 attorneys who will stay at the job and become  
4 proficient at the work that they do. This  
5 turnover affects the overall operation and  
6 efficiency of the local justice system, when  
7 people's day in court is delayed because of  
8 not enough staff to represent them.

9 Another area is the public  
10 perception. It's my contention that there  
11 are two myths about the Public Defender  
12 system: One, that the individuals being  
13 represented by a Public Defender are probably  
14 guilty any way and that justifies not  
15 spending much taxpayer money on them. The  
16 other myth I see is that the individuals  
17 represented by the Public Defender do not  
18 think that they're getting a "good lawyer".  
19 If they had the money, they could afford a  
20 better lawyer and either beat the charge or  
21 get a better deal. There needs to be some  
22 mechanism to address and dispel these myths.

23 Something that is particularly  
24 sensitive to me is this access to services  
25

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1 for the defendant at the presentencing level.  
2 Crimes are committed by individuals whose  
3 behavior is influenced by different factors  
4 determining the person's decision making in  
5 addition to personal choice, character and  
6 moral values. Depending on the crime,  
7 defendant should have an alcohol/drug  
8 evaluation, perhaps a sex offender evaluation  
9 or a psychological evaluation completed, and  
10 those results should be made available to the  
11 court, the district attorney and the Public  
12 Defender, depending on the defendant's  
13 location; in other words, whether he's  
14

15 incarcerated or released into the community  
16 and the defendant's assets or the ability to  
17 pay for these evaluations there -- oftentimes  
18 the Public Defender does not have this  
19 critical information to include in the  
20 defense of the client. There should be a  
21 means to have these resources available for  
22 the Public Defender to use.

23 Another matter I've observed is  
24 the issue of equal standing before the court.  
25 At times in rural counties and local justice

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1 courts, particularly where the justice is not  
2 an attorney, the presiding justice has  
3 developed a dependence to rely on the  
4 District Attorney's Office for procedural and  
5 judicial advice, and the Public Defender is  
6 not seen as an equivalent resource. This  
7 actual or perhaps perceived disparity needs  
8 to be eliminated.

9  
10 Another general statement, the  
11 Public Defenders should be independent from  
12 political interference, influence and  
13 obligation. Public Defender should be  
14 compensated commensurate to the difficulty of  
15 the tasks they perform, representing the  
16 indigent who often possess a multitude of  
17 issues that need to be addressed but are not.  
18 This is complicated by the client's negative  
19 perception of representation that they  
20 receive, the public's perception that the  
21 Public Defender is not due the recognition  
22 and respect that the district attorney or the  
23 "legitimate" lawyer might receive. That's my  
24 formal testimony.

25 MR. GRADESS: Great. Thank you.

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1 Let me -- let me start with one thing that  
2 emerges from your testimony, maybe because  
3 I've developed this keenness of listening for  
4 it, but we have had a lot of testimony at  
5 these hearings concerning the state takeover  
6 of defense services and the implication being  
7 that the deeper pocket would provide a  
8 resource to better establish defense  
9 services.

10  
11 From your vantage point as a  
12 probation administrator, you've probably  
13 experienced some sensitivity to state  
14 takeover as an issue. I wonder if you could  
15 talk about your sense of either the  
16 difficulties at the probation level or the

17 value or nonvalue of state takeover for  
18 defense services as a means of improving it.  
19 MR. RYAN: State takeover may  
20 potentially provide a better financial base  
21 for the Public Defenders. It may provide on  
22 paper more equal and adequate services but  
23 it's my observation that the concept of state  
24 takeover of the Public Defender is in  
25 opposition to everything else the state is

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1 attempting to do, which is to return power,  
2 return control to the local governments.  
3

4 In the past there's been  
5 consideration that the state take over  
6 probation services not only financially but  
7 converting state -- converting county and  
8 local employees to state employees. The  
9 actual practice has been that the state has  
10 been reducing the amount of money that they  
11 reimburse each county for probation services,  
12 so my experience has been although there may  
13 be some consideration for state takeover, the  
14 practice that I've experienced has been it's  
15 the opposite.

16 I'm also not sure that having the  
17 state in complete oversight of Public  
18 Defender services is going to enhance the  
19 local department's or local office's  
20 familiarity with unique needs of the county  
21 that they're located in.

22 MR. GRADESS: Let's go in, if we  
23 could, a little bit more into this -- the  
24 idea of pre-sentence resources for the  
25 defense or pre-sentence evaluations to be

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1 available to the defense. I take it the  
2 implication of your remarks, that's simply  
3 not happening now in your jurisdiction or  
4 could you tell us what is happening?  
5

6 MR. RYAN: It's very difficult  
7 for an indigent person to get access to  
8 mental health services, alcohol services, and  
9 other resources where there might be problems  
10 they have that could be diagnosed from formal  
11 treatment recommendations or determination.  
12 The reason for this are real simple: They  
13 don't have the money. The institutions and  
14 agencies and individuals that provide these  
15 services are in it to make a living, whether  
16 they're a public entity or private  
17 individual, and although there's some  
18 provision for sliding scale fees for people,

19 they're met by waiting lists. They're met by  
20 applications from Medicaid to be processed.

21 There's a 30 day time period for  
22 a person in the community to apply for  
23 Medicaid to see if they can get medical  
24 coverage that an agent or agency would accept  
25 to do the work. If somebody is incarcerated,

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1 then it's very difficult to find a  
2 practitioner who will go to the jail to  
3 interview or to evaluate, so those are some  
4 of the issues I've seen.

6 MR. GRADESS: Can you tell us a  
7 little bit about Madison Public Defense  
8 system as far as this issue?

9 MR. RYAN: Madison County Public  
10 Defenders is a private agency that contracts  
11 with the county. They have, I feel, gone to  
12 great extremes to accommodate people  
13 particularly who are incarcerated or, for  
14 example, the sexual offender evaluations have  
15 been critical in determining whether or not  
16 that person is safe to be released into the  
17 community, is amenable to some sort of  
18 treatment or if that person is a risk and  
19 needs to be incarcerated for a longer period  
20 of time. They have somehow found in the  
21 budget some funds to pay the evaluators for  
22 the work that they do.

23 MR. GRADESS: Lastly, your  
24 comment about the justice courts in equal  
25 standing, how many justice courts do you have

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1 in Madison County?

3 MR. RYAN: Around 30, between  
4 towns and villages.

5 MR. GRADESS: The phenomenon of  
6 justice court judges relying on DAs for  
7 advice to the exclusion of the defense, would  
8 you say that phenomenon is in each of those  
9 courts?

10 MR. RYAN: Not all courts but a  
11 significant number.

12 MR. GRADESS: So can you describe  
13 for the record how that might manifest itself  
14 in a case?

15 MR. RYAN: It probably occurs  
16 most often where the judge, the justice is  
17 unsure procedurally what direction to take or  
18 what decision to make as far as accepting a  
19 plea, as far as rescheduling the hearing. It  
20 can even get into the areas of what types of

21 evidence is admissible, a wide variety of  
22 questions that, for the layman to act as a  
23 judge come up.

24 MR. GRADESS: The assistant  
25 district attorney then or the district

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1 attorney of the county is essentially on  
2 issues?  
3

4 MR. RYAN: They can on an  
5 informal basis. I want to make it clear that  
6 it's not a procedure, it's not a concrete  
7 practice but if the judge has somebody before  
8 them on a Complaint in an arrest that the  
9 police have brought in, they're going to call  
10 the district attorney to see what to do, how  
11 do I fill out this form, where does this  
12 warrant go, where does this commitment order  
13 where does it need to be completed. It's  
14 those kinds of situations that I think  
15 there's been a deliberate, at least not an  
16 indetermined dependence at times on the  
17 district attorney for advice.

18 MR. GRADESS: Does this have  
19 implications for the initial decision to hold  
20 or release or the bail to be set, that type  
21 of thing?

22 MR. RYAN: It's conceivable it  
23 could have a carryover, yes. If the district  
24 attorney is making the -- taking the position  
25 that a high bail in this case needs to be

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1 set, the Public Defender is taking the  
2 position that this person has ties to the  
3 community and is not a risk to run and will  
4 in fact be returning to court, it's  
5 conceivable that the judge who has a more  
6 familiar relationship with the district  
7 attorney could listen to that argument more  
8 strongly.  
9

10 MR. GRADESS: The likelihood --  
11 the circumstances under which you describing  
12 is a case where neither the Public Defender  
13 nor the district attorney are present in  
14 court but a defendant is before the court,  
15 perhaps brought there by a police officer?

16 MR. RYAN: It could be either  
17 case.

18 MR. GRADESS: One last question.  
19 We had testimony earlier today concerning the  
20 availability, at least in this jurisdiction,  
21 of an agency that prepares client specific  
22 plans that are available directly to the

23 defense that can be used in addition to the  
24 PSI. I wonder, first of all, if you -- if  
25 that ever occurs in Madison County and the

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1  
2 extent to which, the frequency of there being  
3 anything other than a PSI before sentencing  
4 in court.

5 MR. RYAN: We have had defense  
6 memoranda, I think is another term for those,  
7 that have appeared in some courts. They've  
8 usually been prepared by agencies in Onondaga  
9 County, usually through a retained attorney.  
10 They have been supplemental to the  
11 pre-sentence report, and 99 percent of the  
12 cases in Madison County, if there's a  
13 supplemental report to the court, it's  
14 usually done through the Probation  
15 Department.

16 MR. GRADESS: Great. Thank you.  
17 Does anyone have any other questions? Thank  
18 you very much.

19 John Rowley.

20 MR. ROWLEY: Good afternoon.

21 MR. GRADESS: Good afternoon.

22 MR. ROWLEY: I appreciate the  
23 opportunity to address you this afternoon. I  
24 am currently finishing my third year as a  
25 City Judge in the City of Ithaca, which is a

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1  
2 part-time position, so I continue to maintain  
3 a private practice so that I can feed my  
4 family.

5 Prior to that I had been a  
6 criminal defense attorney, primarily, for 7  
7 years before my appointment as City Judge.  
8 And actually from the very first day I  
9 started as an attorney, my first assignment  
10 for the attorney I was hired by was to begin  
11 reviewing an Appellate record, and from that  
12 day forward much of my interest in the  
13 practice of law has been in Appellate work.

14 I'm here today to address that  
15 issue specifically in my continuing  
16 experience doing side Appellate work in  
17 particular. I have a real love for appeal  
18 work, for whatever reason. It's a sickness  
19 perhaps, and I just was trying to count up  
20 roughly as I came up here today -- I know  
21 I've done at least 15 assigned criminal  
22 appeals over the last 10 years and probably  
23 about 25 retained appeals. I currently --  
24 actually, I was in Albany yesterday arguing

25 an appeal; I'll be there next Tuesday arguing

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2 an appeal and I have four more retained  
3 appeals on my desk, so it's a major focus of  
4 mine in my private practice.

5 The problem that I've encountered  
6 and that which I want to call to your  
7 attention has to do with my representation of  
8 indigent defendants and my assignment as  
9 their attorney. As I believe you are aware,  
10 in the Third Department, I assume throughout  
11 the state, that reimbursement rate for  
12 defense counsel, Appellate counsel is \$40 per  
13 hour, and the problem I want to address is  
14 that of having vouchers cut when I submit  
15 them for payment after doing work. Rather  
16 than talking about testimony any further, let  
17 me read a letter that kind of summarizes  
18 what's become of the situation.

19 I wrote this on July 10th of this  
20 year to Michael Novak, Chief Clerk for the  
21 Appellate Division, Third Department. Dear  
22 Mr. Novak -- this is regarding a particular  
23 appeal, People versus Jefferson, which I had  
24 just received my order for payment on.

25 Dear Mr. Novak, I recently

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2 received the order of the Appellate Division  
3 approving my attorney's fee and disbursements  
4 in connection with the above-captioned  
5 appeal; however, the amount allowed was \$800  
6 less than the fee I requested and documented  
7 in my four-page itemized bill.

8 Unfortunately, this cutting of my  
9 voucher appears to represent a recent trend  
10 that the Appellate Division, at least with  
11 respect to appeals I have perfected, has  
12 developed over the last year. For example,  
13 in People versus Shikur, I was underpaid by  
14 over \$1,100. In People versus Fish, I was  
15 underpaid by over \$900.

16 I'm reluctant to speculate on a  
17 reason why these vouchers are being cut;  
18 however, the only two possibilities that come  
19 to mind is that the court does not believe  
20 that I am in fact putting in the hours that I  
21 am claiming or if I am putting in those  
22 hours, that I am spending more time than is  
23 justifiable on these appeals. Frankly,  
24 neither of these alternatives are acceptable  
25 to me.

1  
2 For virtually the entire time I  
3 have been an attorney, now over 10 years,  
4 I've handled assigned criminal appeals.  
5 While this work initially was a welcome  
6 source of income, I have continued to handle  
7 these matters more as a service to indigent  
8 defendants than anything else. Although I  
9 still devote a fair amount of my practice to  
10 Appellate work, most of it is retained.

11 After much thought I have  
12 concluded that I am no longer willing to be  
13 underpaid for assigned appeals for which I am  
14 realistically losing money in the first place  
15 at a \$40 per hour reimbursement rate.  
16 Therefore, I reluctantly request that my name  
17 be removed from the list of those attorneys  
18 willing to handle to appeals of indigent  
19 defendants. If you have any questions,  
20 please contact me.

21 I received a prompt telephone  
22 call in response to my letter from a Deputy  
23 Clerk from the Appellate Division, who I must  
24 say has always been extremely helpful over  
25 the years, answering my procedural requests.

1 He told me that he'd been asked by Mr. Novak  
2 to respond to my letter and to assure me  
3 there was no question; that the time I  
4 claimed was in fact valid but that what I was  
5 experiencing was a process by which all  
6 appeals, presumably above a certain limit,  
7 were being cut. He told me that it was the  
8 practice of the Appellate Division to cut  
9 Assigned appeal vouchers and that, frankly,  
10 they had hoped that the reimbursement rate  
11 would be increased.

12 I wasn't quite sure what the  
13 connection was there, but I guess thinking at  
14 least more money going to these attorneys who  
15 are doing this work but that had not yet  
16 happened. I responded that I thought that  
17 was a most inappropriate a policy to  
18 intentionally cut vouchers and that I was not  
19 willing to be treated in that way.

20 Obviously I don't have any  
21 leverage in this particular situation but I  
22 hoped that I would get something in response  
23 to my threat to stop taking appeals and I  
24 frankly said that I would hope other  
25

1 attorneys would decline this work as well,  
2

3 given the treatment we were experiencing,  
4 and the response was they expected to have an  
5 adequate pool to represent indigent  
6 defendants.

7 I found this most disturbing for  
8 a number of reasons and I wanted to briefly  
9 comment on those and then I'd be happy to  
10 respond to any questions you might have.

11 First of all, the kind of cases I  
12 was taking are, I would say are increasingly  
13 serious over time. The three I referenced  
14 here, the one person was -- is doing 62 and a  
15 half to 125 years in state prison; one was a  
16 13 count indictment of which he was convicted  
17 of all counts; the last one, 12 and a half to  
18 25. These are all indigent defendants who  
19 are in state prison and many of them in state  
20 prison for a long time and, frankly, I don't  
21 know how to do an appeal other than to go  
22 through a record, to do the legal research  
23 and to raise the issues that appear to me to  
24 be significant to raise. There's no way I  
25 can cut the work I do on an appeal. I do

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1 what I think is appropriate, that's my  
2 obligation. I raise the issues that I think  
3 are important and we go from there.

4 I'm also, of course, now as a  
5 judge, in the position to review vouchers  
6 from assigned attorneys and I do that  
7 routinely, so I have sworn affidavits that  
8 come across my desk from attorneys that  
9 appeared in front of me representing indigent  
10 defendants. We have an 18-b system in  
11 Tompkins County; there's no Public Defender,  
12 so this happens all the time, and I feel my  
13 obligation -- I don't think it's a  
14 complicated obligation. I review the voucher  
15 that I get. If I have a question about  
16 whether or not the time claimed is  
17 legitimate, I think it's my obligation to  
18 inquire of the attorney with regard to that,  
19 and I've done that a couple of times.

20 Beyond that, if I credit that the  
21 attorney did the work that they asked, my  
22 obligation, I think, is to sign it and  
23 forward it to the appropriate body that's  
24 responsible for payment. I don't feel I have  
25

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1 any responsibility to the public or to the  
2 county with regard to the amount of those  
3 bills.  
4



7 MS. HATHAWAY: May I just ask,  
8 before you made your request to be removed  
9 from the assigned cases, at that point had  
10 you completed your caseload, your caseload  
11 or -- did you have anything pending?

12 MR. ROWLEY: Yes, that's the  
13 thing I wanted to write this letter for a  
14 long time, and I waited until all my cases  
15 had been resolved and it was only after I  
16 finally got the last payment and once again  
17 the cut, that I took this action.

18 MR. GRADESS: Let me -- I did  
19 some quick math of -- it looks like in the  
20 cases you've just mentioned in your  
21 testimony, you did 70 hours of appellate work  
22 that was not compensated.

23 MR. ROWLEY: That's about right.

24 MR. GRADESS: If you could, for  
25 the record, give some sense of -- let me ask

1 188  
2 you a preliminary question: Is the Appellate  
3 Division in any way holding itself to a  
4 \$1,200 cap or could you give us a sense of  
5 what they actually paid in these cases?

6 MR. ROWLEY: I haven't seen any  
7 evidence of that and, frankly, the cap is a  
8 joke. I mean, I feel -- I couldn't get a  
9 case in under the cap. I couldn't do an  
10 appeal with any legitimate issues for under  
11 that amount of money. By the time I review  
12 the record, analyze the record and do the  
13 work and, frankly, I go to Albany to argue  
14 these appeals. I feel it's my obligation to  
15 go to Albany, so I've got a three hour travel  
16 each way to argue them.

17 I don't see any evidence that  
18 they're capping them. These are all appeals  
19 that were in the \$2,500 to \$3,500 range,  
20 whatever the time comes out for those. So I  
21 was cut back to somewhere between \$2,000 and  
22 \$3,000 from more than that.

23 MR. GRADESS: Would you give us a  
24 sense, for the record, in light of that, of  
25 what the amount of time you would think

1 189  
2 appropriate to do an Appellate brief for the  
3 Appellate Division, Third Department, on  
4 average?

5 MR. ROWLEY: What I'm finding --  
6 I try to get a sense of that, and as I'm  
7 sometimes asked to give a quote, how much I  
8 would like to charge for an appeal. It's a

9 very hard thing to know. My appeals average  
10 probably 20 to 30 pages on average, 50 is our  
11 maximum. One of these documented here was 45  
12 pages. It depends on the issues. It seems  
13 somehow to work out that -- let me do -- if I  
14 could do my math here. I didn't do my math  
15 ahead of time here. So I think these are in  
16 the 40 hour range, 40, 50 hours and up,  
17 depending on the complexity of the issue,  
18 depending on whether or not I visit my client  
19 in the correctional facility and depending on  
20 what's required, so it's a little hard to  
21 just estimate that. My Family Court work I  
22 think those briefs tend to be shorter.

23 MR. EFFMAN: Just wondering if  
24 you're being fully reimbursed on  
25 disbursements? Are you doing copying inhouse

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1 or sending it out?  
2

3 MR. ROWLEY: They're very careful  
4 to pay all the disbursements that are  
5 claimed. I do copying at a local copy  
6 center. They always pay that. Always all  
7 the disbursements are paid. It's the --

8 MR. GRADESS: Can I just -- you  
9 were doing a calculation. Just roughly  
10 looking at this, these are sort of between 60  
11 and 88 hours, I'm calculating.

12 MR. ROWLEY: That's right.

13 MR. GRADESS: That's a normal  
14 kind of --

15 MR. ROWLEY: For a, you know --  
16 for a 3 or 4 or 5 day trial that had a  
17 suppression hearing, where there's maybe 3 or  
18 4 significant issues, that's my experience.

19 MR. GRADESS: That's great, thank  
20 you.

21 MR. ROWLEY: It's the only way I  
22 can do them is the way I do them.

23 MS. BUCK: The cases that you  
24 refer to which your voucher was cut, I'm  
25 curious as to two things: Over what time

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1 period that was, and also whether prior to  
2 the conversations with the deputy clerk, any  
3 explanation had been given to you when the  
4 reduced payment order came through?  
5

6 MR. ROWLEY: Yeah, no  
7 explanation. The first two I received in the  
8 spring of 1997 for cases I actually completed  
9 in '96. It's a whole separate issue, the  
10 fact that the incredible time lag of payment

11 for appeals, which happens long after the  
12 work has been done, and so it was started in  
13 the spring of '98, and I was watching out for  
14 it for the next substantial appeal I did and  
15 the next one was June of '98 I received the  
16 payment.

17 MS. BUCK: So would it be the  
18 last three?

19 MR. ROWLEY: That's right, the  
20 last three I did.

21 MS. BUCK: Thank you.

22 MR. ROWLEY: I'm not aware of  
23 ever having a voucher cut prior to that.

24 MR. GRADESS: Just two quick  
25 final questions.

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1 MR. ROWLEY: Sure.  
2

3 MR. GRADESS: You mentioned  
4 visiting your clients in prison. I wonder if  
5 you could amplify, first of all, how that is  
6 important to you as an appellate lawyer and  
7 what you do on them and, secondly, whether  
8 you've ever had any difficulty getting paid?

9 MR. ROWLEY: On the latter point,  
10 no, no one has ever raised an objection,  
11 although I haven't ever traveled beyond the  
12 Elmira, Auburn Prison. Those are the two  
13 places I've visited to meet with my clients.  
14 Again, it's not something that I feel like I  
15 have a lot of discretion in. If the issues  
16 are such that I feel like I've got to have a  
17 face-to-face meeting with my client, if  
18 there's a possibility of a 440 motion, if we  
19 have to prepare an affidavit, if he requests  
20 it because of -- and has some specific reason  
21 for it, I feel likes it's my obligation to  
22 go, I mean, as I would any client and meet  
23 with my client within reason, and I have done  
24 that when I thought it was appropriate and I  
25 have -- I don't do it as a matter of

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1 practice. I don't go meet all my clients  
2 that I represent in prisons. I go when I  
3 think it's appropriate but I certainly  
4 wouldn't want anybody to look over my  
5 shoulder second guessing that judgment.  
6

7 MR. GRADESS: Secondly, and  
8 finally, could you just amplify what you were  
9 referring to in terms of the delay in  
10 payment?

11 MR. ROWLEY: Yeah, if -- so if I  
12 finish work on a case, let's say I submit by

13 April 1st, so I've done -- now done all of my  
14 work. I submit by April 1st. That case is  
15 likely to be on the September calendar  
16 currently, approximately. So I finish  
17 April 1st and my work, that I've been  
18 assigned perhaps October or November of the  
19 year before, maybe earlier than that, maybe  
20 the previous summer, depending how long the  
21 transcripts take. So I've already been  
22 working on it 6 or 8 months or had it  
23 assigned to me for that long. April 1st I  
24 submit. September I argue. It's 6 weeks  
25 before I get a decision at a minimum, so now

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1 I'm into October or November.  
2  
3 At that point if I've lost,  
4 there's going to be an application for leave  
5 to appeal to the Court of Appeals. It's my  
6 obligation to complete that as well, so I'll  
7 do the work necessary for that, so I have  
8 another 30 days to have that done. So when  
9 I've done all that -- that's the first time,  
10 of course, that I'm even eligible to submit  
11 my time to the Appellate Division. I'll  
12 submit it at that point and then wait two to  
13 three months for a response to that, to that  
14 voucher and of course what I get back from  
15 them is an order directing our county to pay  
16 it, and I submit that to the county to pay it  
17 and I'm facing about a 2 to 4 week delay for  
18 payment. Almost a year passes from the time  
19 I finish a case and by the time I get paid on  
20 it.

21 MR. LEWIS: I'm sorry, I missed  
22 part of the beginning of your presentation  
23 but I'm fascinated about the idea that  
24 there's a judge looking at vouchers, you  
25 don't see it as your responsibility. Can you

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1 talk to us a little more, I guess it's really  
2 about the philosophy of where you are on  
3 that.  
4

5 MR. ROWLEY: You know, I don't  
6 know how to explain it. I just don't see it  
7 as my role. I mean if they told me the  
8 Assigned Counsel Program was over budget this  
9 particular year and notify me in November,  
10 that's happening, does that mean I scrutinize  
11 in more detail the vouchers that come across  
12 my desk? I feel like my function is entirely  
13 separate from that -- the county  
14 administration and the county government in

15 that regard. It doesn't mean that I have no  
16 sense of it. Doesn't mean I'm not in tune to  
17 frivolous lawsuits or wastes of time, and  
18 that I don't go ordering the Sheriff's  
19 Department to deliver people all over the  
20 state. I'm aware of those costs, but I don't  
21 keep track of budgets. I don't believe I  
22 have any obligation and in fact, I think it  
23 would be inappropriate for me to be including  
24 such considerations.

25 MR. LEWIS: Why? Why would that

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1  
2 be inappropriate?

3 MR. ROWLEY: Again, I guess it's  
4 the reverse. I feel it's interference in the  
5 independence of the judiciary and my role as  
6 a judge. My role in that particular regard  
7 is simply to review whether or not the --  
8 whether or not I credit this attorney's  
9 affidavit, that he's done the time, he or she  
10 has done the time he or she claimed and  
11 unless there's a question about that and if  
12 there is, it's my obligation to follow that  
13 up. I guess that's the public trust that I  
14 do have to follow, and I do. If I think  
15 something is out of line, have the attorney  
16 come in and we'll talk about it. Aside from  
17 that, this person has represented this to me,  
18 my only obligation is to sign off on it. The  
19 reimbursement rate and the budget are of no  
20 concern to me.

21 MR. LEWIS: What about the  
22 across-the-board percentage cut approach to  
23 vouchers? Do you have any opinion on that?

24 MR. ROWLEY: I frankly found  
25 it -- I don't know if unethical is the right

197

1 word. It's dishonest, it's offensive and has  
2 real impact on the people the system is  
3 designed to serve, the indigent defendants,  
4 no question about that.

5 MR. LEWIS: It may be early, but  
6 have you gotten any feedback from whatever  
7 prospective powers may be about your approach  
8 to the vouchers?  
9

10 MR. ROWLEY: As far as? You mean  
11 as a judge?

12 MR. LEWIS: As a judge, yeah. I  
13 can tell as a lawyer you get the feedback the  
14 rest of us got.

15 MR. ROWLEY: I mean, we've had an  
16 article in the paper about the assignment --

17 assignment of attorneys, how it happens in  
18 City Court. Certainly there are some  
19 questions raised about that, about how many  
20 hoops we make people jump through when we  
21 know they are receiving public assistance, so  
22 I automatically assign a public attorney.  
23 Aside from that, I haven't had any -- I can't  
24 imagine a different response regardless of  
25 who's asking the questions.

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1  
2 MR. LEWIS: Do you have any sense  
3 that it makes the process more efficient or  
4 more reliable by assigning the attorneys and  
5 making sure that folks have counsel?

6 MR. ROWLEY: I'm a real believer  
7 in that system and that way. It works well  
8 for us, provided that the attorneys are being  
9 compensated and attorneys will continue in  
10 the pool after they've gained more experience  
11 and aren't basically priced out of it by the  
12 low reimbursement rate.

13 MR. LEWIS: Thank you.

14 MR. GRADESS: Thank you very  
15 much.

16 MR. ROWLEY: Thank you.

17 MR. GRADESS: Christina Pezzulo.

18 MS. PEZZULO: Good afternoon.

19 I'm Deputy County Attorney with the Onondaga  
20 County Department of Law. Our relationship  
21 to the Assigned Counsel system is that we  
22 negotiate the contract annually with the  
23 Onondaga County Bar Association for Assigned  
24 Counsel services and in addition, we have a  
25 unit in our office that handles the

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1 prosecution of Family Court matters: Neglect  
2 and abuse, PINS and juvenile delinquency  
3 matters.  
4

5 We look at it from two  
6 perspectives: One is the financial aspect  
7 and one is the quality of service delivery.  
8 From the financial aspect, the program as  
9 it's administered includes experience in the  
10 criminal level, includes experienced  
11 attorneys. Experienced attorneys are  
12 important to service delivery. State  
13 assistance would also be important in terms  
14 of providing adequate services and  
15 reimbursement to the Assigned Counsel  
16 Program.

17 One suggestion would be to  
18 conduct pilot programs perhaps paid for by

19 the state directly that explore different  
20 financial arrangements or different service  
21 delivery systems. One idea that's been  
22 tossed around in our office is the idea of  
23 having a flat fee for misdemeanor, maybe  
24 justice court type of services, and that way  
25 there's a lot of reduction from the Assigned

200

1 Counsel's point of view of the paperwork, the  
2 overhead, the double checks, and there may be  
3 circumstances where that ceiling on his or  
4 her fee would benefit him and her and on the  
5 other hand the same would happen with us.  
6

7 That's one idea that has been  
8 tossed around but I think the whole idea of  
9 examining different methods of service  
10 delivery and financial management to the  
11 program that's supported by the state so that  
12 we can examine it, we can see if it's cost  
13 effective, if it provides experience of  
14 counsel without being a further drain on  
15 local resources.

16 From a second -- the second  
17 perspective that I spoke about was the Family  
18 Court perspective which I'm a little bit more  
19 familiar with. I'm told by attorneys who  
20 handle Family Court practice that oftentimes  
21 they see, especially in Family Court,  
22 inexperienced attorneys, and since the  
23 attorneys in our office are so experienced  
24 prosecuting cases, they often mentor or tutor  
25 their adversaries, and they're happy to do

201

1 it. They want to see if their process --  
2 they want to see the best interest of the  
3 children, but on the other hand, it seems to  
4 me it would be appropriate to have more  
5 extensive training available.  
6

7 There is some training available.  
8 I know the law guardian system has a very  
9 extensive training program available. From  
10 the point of view of respondent's attorneys,  
11 and I did serve as a respondent's attorney at  
12 one point in my career, I know there isn't  
13 alot of support in terms of training.

14 Again, I see that as a state  
15 responsibility, that the state should be  
16 providing uniform training throughout the  
17 state and should be supporting our local Bar  
18 Association and local counties in that  
19 regard.

20 That's it. Do you have any

21 questions?  
22 MR. LEWIS: Does the county  
23 contract out any of its legal work to private  
24 firms?  
25 MS. PEZZULO: There is some -- in

1 202  
2 the area of, say, conflicts of interest  
3 where, you know, there's multiple parties  
4 that may have a conflict and the County  
5 Attorney can't be representing one or all of  
6 the parties in that area. In the area where  
7 there are specialty areas of law, for  
8 example, Super Fund, environmental areas of  
9 law, we've done that as well.

10 MR. LEWIS: With bonding?  
11 MS. PEZZULO: Bonding is another  
12 example.

13 MR. LEWIS: Do you know if the  
14 county has sought to move to, in effect, fee  
15 for services for those particular  
16 specialities as opposed to the one --

17 MS. PEZZULO: I'm not sure I  
18 understand your question.

19 MR. LEWIS: How do the lawyers  
20 get paid in the Super Fund cases?

21 MS. PEZZULO: On a case-by-case  
22 basis we examine the amount of services that  
23 are needed, the level of skill that is  
24 offered, how much support -- one model that  
25 was used in our office is a partnering model

1 203  
2 where the attorneys in our office will  
3 provide a lot of the leg work and support and  
4 then be mentored or assisted by more  
5 experienced counsel in the area of their  
6 specialty.

7 MR. LEWIS: I guess what I'm  
8 trying to ask you is can you distinguish  
9 between the way certain specialties like  
10 bonding and Super Fund are handled as opposed  
11 to the way criminal defense is handled?

12 MS. PEZZULO: I don't understand  
13 your question. How do I distinguish it?  
14 It's a different model. We contract with the  
15 Bar Association and they choose the model  
16 that they use for service delivery. With  
17 respect to say a particular case where there  
18 is a conflict of interest, we may, you know,  
19 do a request for a proposal and make a  
20 decision which attorney has the appropriate  
21 expertise to handle the case and then make an  
22 arrangement with that individual attorney

23           whereas in the Assigned Counsel Program, the  
24           contract is with an agency and they choose  
25           the service delivery.  It's a little bit

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2           different.

3                     MR. LEWIS:  But the amount of  
4           payment is different in the request for  
5           proposals?

6                     MS. PEZZULO:  The state goes  
7           ahead and sets the Assigned Counsel rate and  
8           with respect to the rates that we choose for  
9           private counsel to perform services directly  
10          for the county really depends on the type of  
11          case, the level of expertise and other  
12          competitive rates as they come back in the  
13          request for proposal.

14                    MR. LEWIS:  With the exception of  
15          Assigned Counsel, the rest of the areas of  
16          the bar that you contract out apparently is a  
17          competitive bid, in fact?

18                    MS. PEZZULO:  Well, Assigned  
19          Counsel, you know, as you know the system is  
20          set by a state statute so we follow that, and  
21          there is a contract that we have with the  
22          agency and they provide us -- John Parker  
23          who's here to talk in a little bit, will  
24          provide us with an estimate of what it is  
25          that he feels he needs to deliver the

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1                    services for the subsequent year, and that's  
2           the nature of the negotiation.  Then it is  
3           the -- you know, Assigned Counsel system  
4           under the auspices of state law.

5                    MR. LEWIS:  I'm more interested  
6           in the way you handle private lawyers because  
7           if -- if we came to you and said -- if you  
8           were sent into a bonding company -- bonding  
9           law firm and said here's what we've got,  
10          we've got \$40 an hour in court, \$25 an hour  
11          out of court, how much do you want, what do  
12          you think the response would be?

13                    MS. PEZZULO:  I suppose if there  
14          was a state law that took away that  
15          competitive edge and mandated that amount,  
16          then they'd have to take what they were  
17          getting.  If there isn't a state law  
18          then, for example, private counsel charge  
19          more than \$40 an hour and those individuals  
20          who choose to be on the Assigned Counsel list  
21          know what the State law is, know what the  
22          reimbursement rate is and that's not  
23          something, I don't think, that we negotiate

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individually. what We negotiate is the

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contract with the Assigned Counsel system to  
make sure the services are delivered.

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MR. LEWIS: See, my suggestion  
was that if it was uniform state law that  
were adopted from an Assigned Counsel  
Program, that I suggest that the County would  
get very little services from private lawyers  
because it would be more lucrative to do  
almost anything else.

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MS. PEZZULO: I suppose in any  
realm, you know, private representation in  
any realm, if there was a state law that  
mandated what your reimbursement rate would  
be, we'd have a whole different world of  
lawyers. I suppose in that respect you're  
right but with respect to that --

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MR. LEWIS: Or none at all.

19

20

MS. PEZZULO: Or none at all.

21

MR. LEWIS: Thank you.

22

MS. BUCK: I must say it's new to  
me, the Department's of Law's negotiation of  
a contract other than their general  
responsibility to pass on the form of all  
county contracts. My understanding always

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was that since the state mandates the service  
and sets the fee for private attorneys; that  
the only area of discretion for the county  
and presumably the area for negotiation is  
how you're going to deliver the service.

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7

You're saying that in your  
dealings with the Assigned Counsel system,  
you consider it their responsibility to work  
out the details of the particular service  
delivery model? What are you negotiating  
with?

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MS. PEZZULO: Judge, you're  
absolutely right. The contract, there's a  
state obligation for the county to provide  
these services.

14

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17

MS. BUCK: What area is the  
negotiation on there?

18

19

MS. PEZZULO: You're absolutely  
right. The contract is, from our  
perspective, is reviewed as to form. John  
appears before the legislature. The  
legislature decides what terms are going to  
be included in the contract in terms of when  
the money is going to be disbursed. I don't

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1  
2 think there's even a whole lot of discussion  
3 with respect to the actual amount.

4 MS. BUCK: We go back a long time  
5 and I know there has been a perennial problem  
6 of the legislature being shocked at what it  
7 indigent defense costs and trying to cut down  
8 on the numbers here. And part of that, part  
9 of that gets played out in the statement of  
10 eligibility for service, and how those get  
11 applied, how they get interpreted and  
12 applied. Obviously if they have fewer  
13 indigents entitled to representation, it  
14 costs less.

15 I'm curious whether your office  
16 has any role or thinks it has any role in  
17 setting the eligibility standard and how that  
18 eligibility is applied, since it is the  
19 county's obligation.

20 MS. PEZZULO: To my knowledge  
21 it's not part of the contract, is it, John?  
22 John reviews, John Parker meaning, reviews  
23 the eligibility of individuals and the  
24 statutes --

25 MS. BUCK: The statutes don't say

1  
2 who's eligible other than if you're indigent,  
3 you're entitled to counsel. You contract  
4 doesn't say who's eligible; is that accurate?

5 MS. PEZZULO: I don't know.  
6 John, is that accurate?

7 MR. PARKER: Does the contract  
8 say who's eligible? No, the contract does  
9 not say who's eligible.

10 MS. BUCK: Not which individuals.  
11 I guess what I'm trying to get at: Does your  
12 office have any role in establishing what the  
13 standard of eligibility is or how it should  
14 be determined?

15 MS. PEZZULO: Not to my  
16 knowledge, no.

17 MS. BUCK: So if the question is  
18 whether somebody has no outside source of  
19 income other than maybe SSI, has \$1,200 in  
20 the bank, whether that would make that person  
21 eligible or not, your office doesn't have  
22 anything to do with that?

23 MS. PEZZULO: In the area of poor  
24 person relief, when there's appellate  
25 practice or practice with regard to waiver of

1  
2 fees, which is not part of the Assigned

3 Counsel system, except for in the appellate  
4 stage, our office is on notice of each of  
5 those poor person applications and has a  
6 right to be heard with respect to it. So in  
7 that respect there's a contact with that  
8 decision-making process.

9 MS. BUCK: But you don't have a  
10 standard, a family of four with this net  
11 income or anything like that?

12 MS. PEZZULO: No.

13 MS. BUCK: That is not an issue  
14 of negotiation between the county and  
15 Assigned Counsel?

16 MS. PEZZULO: Not to my  
17 knowledge, although I don't negotiate the  
18 contracts.

19 MR. EFFMAN: Is the actual budget  
20 itself subject to negotiation between the  
21 County Attorney's Office and Bar Association  
22 or Assigned Counsel?

23 MS. PEZZULO: Not to my  
24 knowledge. I think that that John Parker can  
25 speak more directly to and how he presents

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1 his budget to the legislature and how it that  
2 process takes place.

3 MR. EFFMAN: I ask that because  
4 if you were actually involved in negotiating  
5 dollars, you're actually determining how much  
6 money your opposition would have available in  
7 Family Court assignments, right.

8 MS. PEZZULO: In kind of an  
9 attenuated way, I suppose. No, that's more a  
10 matter of negotiation with the legislature.

11 MR. EFFMAN: Just an opinion  
12 now. If Assigned Counsel rates were  
13 increased but there were no state input into  
14 giving county additional monies, what do you  
15 think would happen with respect to delivery  
16 of services?

17 MS. PEZZULO: I can only give you  
18 an opinion from me, Christina Pezzulo.

19 MR. EFFMAN: Okay.

20 MS. PEZZULO: And you know, if  
21 there was a state mandate, there's a state  
22 mandate. It's not right. It's not fair but  
23 we would deliver the services as, you know,  
24 the state mandates it.  
25

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1 MR. EFFMAN: What I'm focusing  
2 on, you discussed in your testimony the  
3 question of how the service would be  
4

5 delivered. Has that come up in your  
6 experience in discussing what would occur at  
7 the county level if rates were increased but  
8 no state monies were given to the counties to  
9 alter the delivery system itself?

10 MS. PEZZULO: I don't know if  
11 there's any plans to change the current  
12 contract system. I have no knowledge of that  
13 one way or the other.

14 MS. HATHAWAY: Maybe you could  
15 clarify something for me and then I won't  
16 have to research it when I go back to the  
17 city. Is it my understanding that if a  
18 person has \$1,200 or more dollars in the  
19 bank, it deems then that they're not eligible  
20 to be considered an indigent client for the  
21 delivery of services?

22 MS. PEZZULO: I personally don't  
23 know what the standards of indigency are.  
24 John Parker could probably speak to that  
25 better.

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1 MS. SIEGFRIED: You said that you  
2 do have experienced attorneys. We're  
3 speaking of the Assigned Counsel Program,  
4 that it does include experienced attorneys?

5 MS. PEZZULO: In my office  
6 handling Family Court?

7 MS. SIEGFRIED: Oh, your office.  
8 You weren't speaking of the Assigned Counsel  
9 Program?

10 MS. PEZZULO: I'm sure there are  
11 experienced attorneys representing people.  
12 I'm sure that John Parker oversees that  
13 process.

14 MS. SIEGFRIED: I was going to  
15 ask you how you know that but -- you're  
16 saying you don't really know that about the  
17 18-b program? You know that about your  
18 program?

19 MS. PEZZULO: I know that with  
20 respect to Family Court, I've talked to  
21 people regarding the level of representation  
22 of respondents in Family Court, and as I said  
23 before, one of the concerns that they have is  
24 the level of inexperience that they've seen  
25

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1 there.

2 MS. SIEGFRIED: Okay.

3 MS. PEZZULO: We don't handle any  
4 criminal matters in my office. That's  
5 handled by the District Attorney's Office.  
6

7 MS. SIEGFRIED: Before you got to  
8 the part about the Family Court and finding  
9 that they were inexperienced, you had said  
10 something about the program includes  
11 experienced attorneys. I just -- I thought  
12 you were speaking of the 18-b program.

13 MR. LEWIS: She said in her  
14 office.

15 MR. GRADESS: Let me ask you:  
16 Does the County Attorney's Office handle  
17 special contracts when special prosecutors  
18 are appointed in criminal cases?

19 MS. PEZZULO: As with any  
20 contract, as Judge Buck pointed out, we  
21 review the contracts as to form. Some are  
22 more involved in the issue of negotiation  
23 than others and with respect to special  
24 counsel, when that's determined to be  
25 appropriate, our office handles the

1 215  
2 contracts.

3 MR. GRADESS: Does your office  
4 have a -- is there a standard fee which is  
5 paid to special prosecutors when they are  
6 appointed as an alternative to your district  
7 attorney?

8 MS. PEZZULO: I don't know the  
9 answer to your question.

10 MR. GRADESS: Is that something  
11 we could ask you to pursue and share with us?

12 MS. PEZZULO: Yes.

13 MR. GRADESS: I'd like to do  
14 that. The question I want to go back to is  
15 at the outset of your testimony you made  
16 reference to a flat fee proposal or an idea  
17 that you might work with the state or some  
18 kind of state funded pilot program. Is there  
19 anything affirmative that you guys are doing  
20 at the moment in the County Attorney's Office  
21 to develop such programs?

22 MS. PEZZULO: No.

23 MR. GRADESS: This was an idea of  
24 yours specifically as a suggestion or is it  
25 the County Attorney's idea?

1 216  
2 MS. PEZZULO: I think that the  
3 idea is one just for the -- an example that  
4 maybe there are other methods of service  
5 delivery, financing the program, that should  
6 be explored, can be explored, just one  
7 example that might be considered.

8 MR. GRADESS: The reason I ask

9 you that is because you tied the idea of such  
10 experiments to the improvement of the quality  
11 in keeping experienced and qualified counsel.  
12 Is that a -- is that a goal? Judge Buck I  
13 heard asked the question, aren't we trying to  
14 reduce the costs and sometimes the costs --  
15 reducing the costs and keeping the quality  
16 and retention, and I wonder which issue  
17 predominated in those experimental programs?

18 MS. PEZZULO: I would hope there  
19 would be experienced attorneys willing to  
20 provide services and would see, you know,  
21 experimental programs as perhaps being a way  
22 to continue the Assigned Counsel Program in a  
23 more cost beneficial way.

24 MR. GRADESS: Thank you very  
25 much.

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2 We shall take a short break. We  
3 will take fivish minutes.

4 (A recess was then taken.).

5 MR. GRADESS: Kate Rosenthal.

6 MS. ROSENTHAL: Hello. My name  
7 is Kate Rosenthal. I'm not only a private  
8 attorney but, as we say, a founding mother of  
9 the Syracuse Association of Defense Lawyers.  
10 I have been a practicing lawyer here in  
11 Onondaga County for 17 years; 15 of those  
12 I've been a 18-b panel attorney. I've  
13 represented people both in Family Court and  
14 in the criminal courts. I've always wanted  
15 to be a defense lawyer, that's all I've been,  
16 that's all I ever want to be; however, the  
17 rates that we are paid make it very difficult  
18 to continue to do that work and to do it  
19 well.

20 I have represented people, as I  
21 said, not only in Family Court but in  
22 criminal court in cases that range from  
23 shoplifting to capital murder so I've seen  
24 the gamut of cases and I've needed experts  
25 and I've felt and experienced most of the

1 218

2 problems that you all have heard about.

3 The issue came home to me about  
4 two years ago when Bonnie Levy, who you heard  
5 this morning, she and I were working on a  
6 murder case. Our client was charged with two  
7 separate homicides. Now, under law and under  
8 the system we're not entitled to both be paid  
9 individually. We worked out a deal where we  
10 would not double bill.

11                   We were standing in the DA's  
12 office looking at the property of this murder  
13 and we had plastic gloves on and we were  
14 going through plastic bags filled with  
15 clothing that was bloody, and the DA was  
16 telling us, in an effort to distract us from  
17 the evidence, about his sister or  
18 brother-in-law, I don't remember which, who  
19 happened to have a franchise in the mall and  
20 the franchise makes pretzels and he told us  
21 about the \$300,000 to \$500,000 a year that  
22 this individual grossed and Bonnie -- or  
23 netted actually -- Bonnie and I just looked  
24 at each other with our hands in this guy's  
25 bloody underwear and thinking what the hell

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1  
2 are we doing. For \$25 an hour we could be  
3 making pretzels. We could have paid off  
4 loans and debts by now but no, we have this  
5 incredible urge to do this work for \$25 an  
6 hour.

7                   And when I prepared my testimony  
8 for today, I decided it would be really  
9 useful, because I've been complaining for  
10 years about the rates, to figure out exactly  
11 what it does cost me per hour in my office,  
12 so I added up my rent, my secretary, my  
13 publications that I need, my malpractice that  
14 I must pay and all of that, and if I could  
15 bill 32 hours a week, it would cost me --  
16 closer -- it would cost me \$22 an hour to  
17 open my doors.

18                   There's a guy that stands out  
19 here at the cathedral and all he does all day  
20 is yell "spare change, spare change, spare  
21 change." He makes more per hour than I do,  
22 so I've decided maybe I'll just go buy him  
23 and go spare change, spare change and see  
24 what I can get from him. But for \$3 an hour  
25 I had my hands in plastic gloves looking

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1  
2 through someone else's dirty underwear.

3                   In this county the problems of  
4 Assigned Counsel, because we have no Public  
5 Defender, really rally around the issues of  
6 compensation. In an effort to keep I believe  
7 the legislature happy, what has happened is  
8 we've pieced off the system. In an effort to  
9 keep costs down we have effectively  
10 emasculated the system.

11                   We now have what we call a core  
12 system. The core system was supposed to be

13 this great effort to efficiently represent  
14 people in misdemeanor cases in all the courts  
15 and what it did was everybody now that wanted  
16 to represent people on misdemeanors in the  
17 town courts and in city courts signed up for  
18 a core. Then the judges got to decide who  
19 got to be on the core and who didn't and for  
20 6 months you would have a caseload.

21 Well, the interesting thing about  
22 this is it's like the Public Defenders Office  
23 basically. You're getting people, 3 or 4  
24 people to represent clients in front of one  
25 judge on a weekly, monthly, half a year

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1 basis. So what it did was it took a lot of  
2 cases, gave them to a core of people and it  
3 saved, in theory and I'm sure in reality, a  
4 lot of money.

5  
6 I have never been on the core so  
7 I can't speak from personal experience but  
8 having talked to those that have been, what I  
9 found from one guy is -- I said, I can't do  
10 this anymore; I can't keep people straight.  
11 The caseload was so much. They're out in  
12 justice court, maybe you have 15 cases on a  
13 night. Now you're only able to bill 3 hours  
14 of court time for that or for whatever the  
15 amount of time is you're spending in court  
16 even though you have 15 cases. Sure, they're  
17 saving a bundle of money.

18 Now, for those of us that go out  
19 to justice court on a felony, in Onondaga  
20 County, for those of you who aren't in with  
21 it, it's a huge place. To get from east to  
22 west easily takes 45 minutes. To start from  
23 downtown to go out to Skaneateles takes about  
24 a half an hour, so for an hour round trip we  
25 cannot bill for that. We are not paid for

222

1 that. We don't get paid for the time. We  
2 cannot bill for mileage.

3  
4 The court time billing issue is  
5 one which I actually reviewed a whole bunch  
6 of memos in an effort to try to figure out,  
7 to be accurate here, and honestly I'm going  
8 to quote to you from the memo because I'm not  
9 sure what this means. "you can only bill for  
10 the time you actually spend on a case. Only  
11 exception is for court appearances where you  
12 can bill a minimum of half an hour per  
13 appearance up to a maximum of one and a half  
14 hours at one time or one court session. Any

15 billing of over an hour and a half at court  
16 must be for no more than the actual time  
17 spent in court, not traveling to and from, no  
18 matter how many cases you are appearing on.  
19 So in my estimation, that really limits how  
20 much time you can actually bill for, even  
21 though you've taken care of probably 4 or 5  
22 cases.

23 Phone calls, you've heard a  
24 lot -- I sat through the jail ministry folks  
25 and I can appreciate their frustration. Bear

1 223  
2 in mind my frustration. I'm in an 11 person  
3 office. There are at least five of us in  
4 that office that take Assigned Counsel cases.  
5 At any given hour there are at least three  
6 people calling from a correctional facility  
7 collect. If we're not there, the  
8 receptionist is told not to take the case.  
9 Quite honestly, I don't have anything to tell  
10 the client, we don't accept the call, because  
11 I got no way in my office of tracking which  
12 client I'm going to be able to bill that  
13 collect call to.

14 So what do you do? So the  
15 Assigned Counsel lawyer very often, (a), you  
16 either accept the call and eat the cost  
17 because there's no way of literally tracking  
18 it and putting a phone bill to that voucher,  
19 or you simply refuse to take the call. There  
20 are some offices in this town where nobody  
21 will accept a collect phone call. I believe  
22 that jail ministry speaks the truth when they  
23 say that. There are those like me where I  
24 make a decision. I either have something to  
25 tell the client and it's the worth the \$1.50

1 224  
2 it's going to cost to tell them, or more, and  
3 I'm willing to spend the time. I don't want  
4 to talk about confidential matters over the  
5 phone but something procedural I'll be glad  
6 to or you just say, I don't have anything to  
7 say and don't accept the call.

8 This brings us to the no frills  
9 defense which I think Bonnie alluded to.  
10 There are lawyers who will say, I'm not  
11 getting paid to hold hands on an Assigned  
12 Counsel case. Now we all know if you do, for  
13 example, capital work that death is different  
14 and so is every case. Some people need that  
15 personal touch. They need to know their  
16 lawyer really cares about them as a human

17 being. That takes time.  
18 Can we bill for that? I've heard  
19 at least one instance where somebody, quote,  
20 spent too much time talking to family and so  
21 their voucher got cut. I believe it  
22 necessarily didn't get cut by the system but  
23 by the judge. So that that phone call issue  
24 and access to the client is a very real one  
25 because it's impossible for almost everybody

225

1 to figure out how to bill it and I've eaten  
2 that cost for years.  
3  
4 They won't pay for a DMV refusal  
5 hearing. On every DWI case if the person  
6 refused and they got hit with a DWI  
7 misdemeanor, there's going to be a refusal  
8 hearing and while we never, ever expect to  
9 win them, there's great discovery there.  
10 Assigned Counsel won't pay for it. So you  
11 decide, well, do you send your client off by  
12 themselves, which is just malpractice. Do  
13 you say, oh, let's just blow off the hearing,  
14 which is malpractice, and we'll just say to  
15 the system we won't go or do you go and eat  
16 the costs.  
17 If you've been to a DMV hearing,  
18 there's no such thing as getting in and out.  
19 You're there for the half day, just to hear  
20 that you lost or to hear the police officer;  
21 I guess now it's hearsay testimony. It's  
22 great discovery. If you don't take advantage  
23 of it, it's malpractice but you can't get  
24 paid for it.  
25 Same thing with aggravated

226

1 unlicensed operation in the third degree,  
2 misdemeanor. May not be a big crime down in  
3 the city but up here they can't wait to hit  
4 you with that. Generally the DA's office  
5 here will dispose of that case but before  
6 they do, you have to take care of the  
7 underlying traffic tickets. It's not such a  
8 big deal if they're in Onondaga County but,  
9 again, we don't pay for that because that's,  
10 quote, traffic. If it's in Onondaga County,  
11 at least I can say to the DA, okay, tell me  
12 where it is; tell me what they owe and we'll  
13 take care of it.  
14 Suppose it's in Monroe County or  
15 Cayuga County or you go to these little town  
16 courts. First of all, you got to get ahold  
17 of the judge. Secondly you got to get  
18

19 someone to understand. Blah, blah, blah.  
20 It's hours of time. You cannot resolve it  
21 but if you don't resolve it and you tell your  
22 client to pay, you're probably, again,  
23 committing malpractice.  
24 We don't pay for preparing the  
25 voucher. Okay. Well, maybe private

1 227  
2 practitioners don't pay for or don't bill  
3 their client for coming up with the bill but  
4 I suspect that the big firms do. We are not  
5 allowed to do that and unfortunately  
6 sometimes putting a bill together for  
7 Assigned Counsel where you've represented the  
8 client on 3 or 4 different matters over the  
9 space of 18 months takes a while. Can't bill  
10 for that.  
11 Can't bill for opening the file.  
12 Well, okay, I probably shouldn't be allowed  
13 to bill for taking a manila folder, opening  
14 it and putting my client's name on it. I  
15 give you that but, you know, you represent a  
16 juvenile, you can't find their parents, you  
17 can't get the pay stubs and now you're in the  
18 process of becoming the person that has to  
19 change -- chase down the financial  
20 information. Can't bill for that.  
21 I will say this: I do a lot of  
22 Federal Court CJA work. At least in Federal  
23 Court I don't have to deal with that stuff.  
24 Somebody else does it. When I get the  
25 client, it's because somebody already made

1 228  
2 the determination that they qualify. Not so  
3 in our system.  
4 There was a proposal a year or  
5 two ago whereby Assigned Counsel would at  
6 least have the forms available in the  
7 courtroom to start that process. I don't  
8 believe it's ever occurred.  
9 After the case is closed, what  
10 can -- we can't bill for anything. I've  
11 never yet to figure out, inevitably, you  
12 know, your client goes away to state prison  
13 and all of a sudden they become the genius  
14 they weren't 6 months earlier when you said  
15 you really should take the deal. No, no, no,  
16 the witnesses will never show up. Yeah,  
17 right. They did show up, you went to trial  
18 and of course the four eyewitnesses buried  
19 your client and he's now in jail. Now  
20 they've got a million and one questions. they

21 want everything in the file. They want all  
22 this stuff. It takes time, it's takes money  
23 to reproduce, and I think there is a way of  
24 recouping that but I've never seen an  
25 official policy on it but more importantly,

229

1  
2 you're answering questions from family  
3 members. I got a call from somebody two  
4 years after their loved one went to jail  
5 wanting to know what's going on with the  
6 case. It's a little late. If you do your  
7 job, you don't tell them, I'm not going to  
8 get paid for this so I'm not going to answer  
9 the question. Of course you do. Maybe it's  
10 10 minutes added up over the years and you're  
11 using a lot of time and a lot of money.

12 Sometimes you end up where they  
13 want you to be a social worker. This is  
14 where jail ministry comes in and takes care  
15 of a lot of stuff, but oftentimes they can't,  
16 and they look at you and at times nobody is  
17 going to pay you for taking care of all their  
18 personal problems. I finally once said to  
19 someone, I'm not a social worker. You've got  
20 to take care of some of this stuff and if it  
21 doesn't really affect their defense and  
22 doesn't require them to make some admission  
23 that's going to be used against them down the  
24 road I -- I just don't have that kind of  
25 time.

230

1  
2 Bonnie touched on the issue of  
3 experts and let me just say this: I once had  
4 a judge say to me when I sought out an  
5 expert, can't you get somebody to do that for  
6 free? And I suggested to the judge, when the  
7 prosecution got their witnesses and their  
8 experts for free, I would be glad to do the  
9 same. It is humiliating and embarrassing in  
10 this community to have to go to a doctor or  
11 psychiatrist to see if they'll do Assigned  
12 Counsel work. On more than one occasion I've  
13 heard, I really, Kate; I don't get paid. I  
14 don't get paid on time.

15 My own experience, I had a double  
16 homicide a few years ago and somebody had  
17 already -- we had an expert pathologist who  
18 was retired. I submitted the bill three  
19 times and it wasn't even for an exorbitant  
20 amount of money. I was humiliated. This man  
21 was a very prominent member of the medical  
22 community and he just didn't get paid on

23 time, and that doesn't bode well for us as  
24 attorneys and certainly doesn't bode well for  
25 the clients.

1 231  
2 It is hard to find people in the  
3 community that will do the work for the  
4 paltry sum. I mean, I love the fact that  
5 you're supposed to get a private investigator  
6 for 20 bucks an hour. I can probably hire  
7 the guy on the street corner who wants spare  
8 change for 20 bucks an hour but the private  
9 investigators, why would they work for 20  
10 bucks an hour when they can work a PI case in  
11 a private firm and make a whole lot more, so  
12 we have difficulty with that and getting the  
13 quality of work that needs to be done.

14 In one instance I talked to an  
15 expert late on the eve of trial because an  
16 issue came up. I ended up eating up the  
17 costs. I think the expert was a jerk and he  
18 talked to me for 45 minutes, and he was  
19 well-known and he certainly could have done  
20 it pro bono when he knew it was an Assigned  
21 Counsel case and he tried to send me a bill  
22 for \$150. I ate it because it certainly  
23 wasn't worth my time to try to figure out how  
24 to get paid.

25 The jail: Bonnie talked to you

1 232  
2 an awful lot about the problems. Let me talk  
3 about the problem with the core. The old  
4 jail was despicable. It smelled bad. You  
5 had no privacy with your client. You were  
6 locked in a booth with bars and that's how  
7 you communicated with your client. The new  
8 jail, while it doesn't smell so bad, it's a  
9 pain in the neck.

10 The core, we've given up on  
11 trying to have a core visit because there's a  
12 political fight, I think, going on, between  
13 the administration and those that work the  
14 jail and there isn't enough staff, so you  
15 could barely find somebody to let you into  
16 the pod much less let you into the core for a  
17 visit. I would say in the last year and a  
18 half I've probably been in the core once or  
19 twice and that's with great insistence, and I  
20 was not met with a lot of enthusiasm because  
21 it was like I was putting them all out.

22 When you need to go see your  
23 client on the pod, what happens is you become  
24 the attorney for the pod, and if you have

25

three clients and only have information for

1

233

2

one, it's very hard to avoid the other two.

3

This becomes a real problem. The architect

4

should be shot. I don't know whose bright

5

light it was to put the attorney's room

6

opposite the showers. My life is dull but it

7

ain't that dull. I just really don't need to

8

see guys taking showers or women taking

9

showers but that's where it is. It's really

10

kind of ridiculous.

11

Getting locked in: Individual

12

got locked in for two hours, was told he

13

couldn't get out because after all, they were

14

understaffed and there wasn't anybody to

15

escort him out. I don't think any of us

16

volunteered to get that close to our clients

17

and the whole population for that period of

18

time and it shouldn't happen.

19

I had the situation happen where

20

somebody at the front desk decided to decide

21

how long I spend with my clients. I checked

22

out one day and I noticed I'd already been

23

checked out. I thought this was interesting

24

and I said, how did that happen? He said,

25

well, we just decided you probably spent -- I

1

234

2

had three clients so they decided to give me

3

20 minutes with each client. I was there for

4

almost 2 hours. I wrote a letter to jail

5

administration and I don't think this is

6

appropriate for a variety of reasons: (a),

7

I'm not getting paid and if anybody checks

8

the records, they're going to think I'm

9

lying.

10

(b), More importantly it's

11

happened to experts where they've been in

12

court and have been confronted with jail

13

records after they said they spent two hours

14

with the defendant. The DA comes up and says

15

I don't think so. Look at this jail record,

16

it says, you were there for an hour. It's

17

not the case. Somebody had decided on their

18

own to do this and more importantly, for

19

security reasons, they think you're out of

20

the jail and in fact you're in. If there's a

21

problem, they're not going to know where to

22

look for you.

23

There is a problem among the very

24

small group of lawyers, I think, in this town

25

that do not give their all to the Assigned

1  
2 Counsel client and it does mean that some  
3 people actually think that you don't get any  
4 justice with a free lawyer. I think the bulk  
5 and majority of the lawyers in this town do  
6 an excellent job for nothing, basically when  
7 you figure out at \$25 you really aren't  
8 making anything. I've heard lawyers say,  
9 hey, this is a no frills defense. You don't  
10 really -- it's an Assigned Counsel client,  
11 how much time am I going to spend preparing  
12 when I have a big PI case to work on. This  
13 is not a good sign and it's gotten worse over  
14 the years because we haven't got an increase  
15 in 13 years.

16 You asked about the special  
17 prosecutor. I really don't know if I really  
18 want to admit this but I was a special  
19 prosecutor once. Guy didn't do any jail. I  
20 felt very good about that. I got \$60 an  
21 hour. No, it's an interesting phenomenon  
22 that in this community we value the special  
23 prosecutor for \$60 an hour. I think I'm kind  
24 of a special defense lawyer and I should be  
25 entitled to the same rate but obviously I'm

1  
2 not.

3 The other thing is there are  
4 judges in this town that if you're assigned  
5 and you want to get relieved for a variety of  
6 reasons, they won't relieve you. Now, as we  
7 all know, and Judge Buck probably does, too,  
8 there's a variety of lawyer out there, the  
9 first sign of trouble, they want off the  
10 case. Those people probably shouldn't be  
11 doing this work, but when you've got a client  
12 that's physically threatening you or verbally  
13 threatening you or wanting you to suborn  
14 perjury and you can't get off the case,  
15 there's something rotten and there's  
16 something wrong, and not that paying people  
17 more money is going to cure all of these  
18 problems but clearly the lack of respect that  
19 is shown for attorneys by paying them such a  
20 paltry sum adds to the lack of respect in the  
21 system and, you know, the problems if you're  
22 a minority or not of this community and  
23 language is not English and culture is not  
24 American are even more legend. It's very,  
25 very difficult and those folks, you want to

1  
2 say to them, hey, location, location,

3 location. If you want to commit a crime, you  
4 probably should have done it someplace where  
5 they speak your tongue because justice for  
6 them is terribly skewed.

7 MS. BUCK: I want to refer to the  
8 problems you've talked about in the logistics  
9 and the procedures in the jail when you  
10 interview clients. Since you do both 18-b  
11 work and have retained cases in the criminal  
12 law, do you find any difference in the  
13 treatment?

14 MS. ROSENTHAL: In the jail, no.  
15 No, nobody -- for the most part, I don't  
16 think in the jail they ask the same questions  
17 if you're retained or assigned. But they  
18 certainly do in court. That's the first  
19 question in arraignment on a felony  
20 indictment, are you assigned or retained?  
21 I've yet to figure why that's important.

22 MS. BUCK: Is that uniform among  
23 the judges?

24 MS. ROSENTHAL: Pretty much, yes.  
25 Except if I'm retained, obviously I don't

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1 have to ask permission to hire an expert.  
2 There's a belief here that why would you need  
3 an expert to challenge an ID? Why would you  
4 need an expert to say that the confession was  
5 involuntarily given? Come on, that's just  
6 ridiculous, and so I don't believe that  
7 anybody has ever been successful in getting  
8 an ID expert.  
9

10 MS. BUCK: Thank you.

11 MR. LEWIS: One of the other  
12 problems is that the Appellate Divisions that  
13 have ruled on it have said that you can't  
14 have the expert in part because the court  
15 appointed lawyer has been unable to have the  
16 expert to make a showing. There's only been  
17 one in which Bob Buck, has since passed away,  
18 showed up for a hearing, to have a hearing  
19 about whether, in effect, they can have an  
20 expert.

21 Do you see the judges in the area  
22 of dealing with the experts as the  
23 gatekeepers or gatekeepers for the public  
24 fisc or as agents for the system?

25 MS. ROSENTHAL: I think the

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1 judges that have been on the bench for a very  
2 long time see themselves as gatekeepers of  
3 the public budget, you know, as if it's  
4

5 coming out of their pocket. I'm not going to  
6 spend money for this. You don't have to  
7 spend a dime out of your pocket, sir. It's  
8 for my client's benefit.

9 I would say that the judges who  
10 have -- are younger don't see it quite that  
11 way and that you have a better opportunity to  
12 convince them that you need an expert.

13 MR. LEWIS: Do you think part of  
14 the problem is defense lawyers making what  
15 are often called insufficient applications?

16 MS. ROSENTHAL: Yes. I think  
17 they make insufficient applications because  
18 they're so -- they're overwhelmed by the  
19 work. They're underpaid so they tend to try  
20 to get the best possible deal for the least  
21 amount of work. I mean, there's a real  
22 theory here of let's just move the cases  
23 along. It's particularly true, I think, in  
24 City Court where the idea is just don't make  
25 waves and so, you know, if you're going to

240

1 ask for experts, that's going to make waves.  
2 If you're the kind of lawyer that asks for an  
3 expert on every case, you're the kind of  
4 lawyer that eventually will not be assigned.

5 MR. LEWIS: Is that just a  
6 coincidence or is that --

7 MS. ROSENTHAL: I think for some  
8 judges that's not a coincidence. Years and  
9 years and years ago, probably 14 or 15 years  
10 ago there was a terrible sex abuse case where  
11 I believe that the court assigned attorneys,  
12 who they really didn't think were competent,  
13 thought -- for obvious reasons because they  
14 thought the defendants were guilty as sin.  
15 Ultimately the defendants were found guilty.  
16 But counsel in that case was totally  
17 incompetent and I believe it was a set-up but  
18 that was 15 years ago and I don't think that  
19 goes on like that. I haven't seen evidence  
20 of it.

21 MR. LEWIS: The Federal rate is  
22 what up here?

23 MS. ROSENTHAL: The Federal rate  
24 up here is a whopping 45 out of court, 65 in  
25

241

1 court unlike the 75 downstate.

2 MR. LEWIS: Do those numbers that  
3 seem to be not that much more than 18-b  
4 numbers make that much difference in the  
5 practice?  
6

7 MS. ROSENTHAL: I don't know that  
8 they make that much difference but it's -- I  
9 think you -- people don't complain about it  
10 for sure, but the practice in Federal Court  
11 is so different that I would be -- it would  
12 not be smart for me to say that paying people  
13 more, you get a different sort of  
14 representation. Federal Court is just a very  
15 different animal where the emphasis is on the  
16 ultimate issues of sentencing more so than  
17 anything else.

18 MR. LEWIS: Does the additional  
19 Federal monies provide a better margin in  
20 terms of what you make an hour?

21 MS. ROSENTHAL: Absolutely. If  
22 it's costing me \$23 or \$22 to open my doors,  
23 I'm going to make \$45, I'm certainly in much  
24 better shape.

25 MR. LEWIS: But the last part of

1 242  
2 this, if you have a Federal appointed docket  
3 and a State appointed docket, do you do  
4 triage?

5 MS. ROSENTHAL: Yes, but triage  
6 isn't always based upon the money. That  
7 would be unfair.

8 MR. LEWIS: But two competing  
9 tracks, the same with cases?

10 MS. ROSENTHAL: Exactly. I mean,  
11 where am I going to put my effort, where I  
12 can make \$3 an hour or where I'm going to  
13 make \$22 an hour? There's no question that  
14 I'm going to spend the time, assuming they're  
15 both in the same track, in terms of what  
16 needs to be done. I'm going to spend my time  
17 on the one that's going to pay me the most.

18 Now, also in Federal Court you  
19 can get interim payments. We don't have a  
20 system that is set up for interim payments  
21 and the worst case scenario is when your  
22 client -- I love jail ministry. I truly do.  
23 They do a great service but you know, this,  
24 well, my client -- my lawyer never calls me,  
25 well, the flip side is I can never find my

1 243  
2 client and let me tell you, they disappear.  
3 You get a bench warrant. You cannot build  
4 the case unless you get everybody's  
5 permission until, quote, it's over, but the  
6 bench warrant doesn't mean it's over, but a  
7 year and a half later when they get picked up  
8 on it, you still have an open file. So what

9 are you supposed to do with those cases? We  
10 have no procedure for that. So you can have  
11 a file open for quite some time because the  
12 client split, but I agree that if all things  
13 are equal, we'll go to a Federal case.

14 MR. LEWIS: Thanks.

15 MR. EFFMAN: Can you tell me the  
16 assignment system in Superior Court in  
17 Onondaga County? The judges select from a  
18 list or is it done through the Assigned  
19 Counsel plan?

20 MS. ROSENTHAL: If you get to  
21 superior court, by that point generally  
22 someone has the lawyer from the lower court.  
23 The bulk of assignments come out of City  
24 Court and/or the justice courts. If somebody  
25 is arraigned on a sealed indictment, they

1 need a lawyer. 244

2  
3 Quite honestly, generally what  
4 happens is if you're in a courtroom and the  
5 judge sees you, you're the one. It happens  
6 on extraditions. Now, obviously in homicide  
7 cases, it's not done that way. Homicides  
8 will be done differently but you're rarely  
9 going to have a homicide on a sealed  
10 indictment any way. But the percentage  
11 assigned by the Superior Court judges is  
12 infantismal.

13 MS. HATHAWAY: I just want to  
14 make a comment on a couple of things, as a  
15 client advocate, not anything personal but  
16 just something that I feel I need to say.

17 First of all, like the person on  
18 the corner with the cup, I, myself, sometimes  
19 feel that way; however, once I look and begin  
20 to assess, I feel that they're actually  
21 working harder than I am because regardless  
22 of the weather, the time, the hours they have  
23 to put in, they really work harder because  
24 they have to depend on whether or not we  
25 deserve their attention in the first place.

1 So I feel that's pretty hard work. 245

2  
3 And secondly, about the clients  
4 who know nothing about -- a lot of things  
5 before they go to jail and then when they do  
6 appear 6 months later or more, that they have  
7 gained some knowledge is really because they  
8 have found themselves with nothing on their  
9 hands to do and they began to go to the law  
10 library and they began to learn about things

11 that they were not aware of in the first  
12 place and they are referred to as jailhouse  
13 lawyers.

14 However, it does at least give  
15 these persons some insight as to what has  
16 happened to them, whether it's by their  
17 choice or not, so that in the interim,  
18 whether they know it or not, perhaps the  
19 system has done them a service; that they can  
20 begin to ask questions, maybe that they  
21 didn't know that they should have been able  
22 to ask in the first place.

23 MS. ROSENTHAL: Please don't  
24 misunderstand what I said. My point with  
25 respect to that is that I don't have a

246

1 problem with somebody writing to me and  
2 wanting all this stuff. My problem is, quite  
3 honestly, it's my time and my reproduction  
4 costs, whatever, and I'm not getting  
5 compensated for it. So that I don't mind,  
6 and I have and I've done a lot of it,  
7 addressed those issues but I don't have --  
8 there's nothing in our system by way of  
9 compensation, and it's impossible for me to  
10 continue. I mean, I'm not Legal Aid. I am  
11 not in this business to do pro bono totally.  
12 If that were the case, I couldn't open my  
13 doors. I couldn't pay for the research that  
14 does the motions that may suppress the  
15 confession.

16 That's the dilemma that the  
17 Assigned Counsel lawyer is in, is that we  
18 want to do the work, and I think most of us  
19 do do the work but we don't get paid to do a  
20 lot of what we do. I've never let a client  
21 go to a DMV hearing without an attorney.  
22 I've never not taken care of an underlying  
23 traffic charge in order to get rid of an AUO,  
24 but I can't get paid for it.

247

1 MR. GRADESS: When you submitted  
2 the three bills to the forensic pathologist  
3 you mentioned, whose fault was it that they  
4 weren't paid? Where were you submitting  
5 them?  
6

7 MS. ROSENTHAL: I submitted it to  
8 the Assigned Counsel Program. In one  
9 instance, all paperwork -- it may have been  
10 our office's fault or mine that we didn't get  
11 it all in together, but once it was all in  
12 together, I believe I submitted that bill

13 three times.  
14 What I had found, and I cannot  
15 tell you whether it's true now, under the  
16 system before the county was giving us money  
17 on a monthly basis, my belief was that those  
18 huge bills kept getting pushed off, so that  
19 if you had a homicide case, you didn't get  
20 paid right away. It took months, like over  
21 10 weeks, sometimes 12 weeks to get paid. I  
22 haven't had one of those recently so I can't  
23 say whether that's still the same.  
24 MR. GRADESS: One other thing  
25 that's come up from the jail and see if -- I

1 248  
2 want to see if I'm correct in understanding  
3 this. In the pod system in the new jail here  
4 in Onondaga County, because you are not  
5 routinely able to use the core system, the  
6 core portion to visit your clients, you find  
7 yourself in the pod with prisoners and there  
8 is one single attorney visitation room?  
9 MS. ROSENTHAL: There's a library  
10 and there's a visitation room. Sometimes the  
11 library is being used by inmates for  
12 religious services, that sort of thing, so  
13 it's -- you know, sometimes they'll kick the  
14 inmates out of their library room, so to  
15 speak, so two people can use it.  
16 MR. GRADESS: As far as what's  
17 provided there's one attorney-client visiting  
18 room?  
19 MS. ROSENTHAL: That's correct.  
20 MR. GRADESS: What happens to  
21 attorney number 2 if the two attorneys should  
22 happen upon the jail at the same time?  
23 MS. ROSENTHAL: I have had that  
24 happen and I have talked to my client in the  
25 open pod at a table desk, you know, that's

1 249  
2 separated a little bit. Clearly I'm not  
3 talking about anything that's truly crucial  
4 because I honestly -- obviously there's no  
5 confidentiality. You know, the theory that  
6 you can call ahead and make reservations for  
7 the core is ridiculous. They just don't have  
8 the people and they don't have the  
9 inclination. If you want to wait for the  
10 core, sure, you can wait 45 minutes at the  
11 front desk for the supervising deputy to show  
12 up but then that's 45 minutes you don't have  
13 with your client. If I'm going to spend my  
14 time, I'd rather spend it with the client

15 than not.  
16 It makes it very, very difficult  
17 to have a meaningful discussion of somebody's  
18 case, particularly if they're going to trial  
19 or you're trying to explain to them a deal  
20 but yes, I've seen -- the 5th floor of the  
21 jail is reserved not only for the problem  
22 people but for those with mental problems,  
23 and my favorite consultation was where they  
24 told me that my client, who is on the mental  
25 pod, could not be brought out of the pod

1 250  
2 because that was not secure but I could go  
3 in. So I went in.

4 Now, again, architecture is  
5 everything. They had a double tier. There  
6 was -- I'm literally sitting in my client's  
7 cell talking to her about her problems when  
8 another inmate is threatening to throw  
9 herself off the railing. Now, I mean it just  
10 doesn't make for very good client  
11 communication and certainly doesn't encourage  
12 a lawyer to go talk to their client if they  
13 have to be with a bunch of other people who  
14 have mental problems. I mean, they need to  
15 take care of them but I'm not the person who  
16 should be taking care of them.

17 MR. GRADESS: One final question.  
18 Do you have -- there has been testimony today  
19 about this no frills defense and cadre --  
20 apparent cadre of lawyers doing perhaps less  
21 than that they should in the Assigned Counsel  
22 Program. I wonder if you could tell us a  
23 little bit more about that and describe for  
24 the record what specifically you mean.

25 MS. ROSENTHAL: Well, I remember

1 251  
2 one lawyer telling me that they were going to  
3 trial, and they really -- I think they were  
4 angry the client hadn't taken the deal that  
5 was offered and they thought it was a good  
6 deal so their heart was really into going to  
7 trial, and I got the impression that they  
8 probably didn't prepare as much as they  
9 should have. It's the client's choice  
10 ultimately, and if they make the wrong  
11 choice, that's unfortunate, but you got to  
12 put your best foot forward and do the best  
13 you can, and I got that impression that they  
14 hadn't put as much work into it as perhaps  
15 they might have had they been (a) getting  
16 paid or getting paid more.

17                   It's really hard to convince some  
18 lawyers on Sunday night, if they have to go  
19 to trial on Monday, they should probably be  
20 working on the file as opposed to watching  
21 the ballgame or whatever. I would hate  
22 anybody on this panel, however, to go away  
23 with the belief that this happens a lot. I'm  
24 talking of anecdotes of 2 or 3 lawyers that I  
25 can think of. I'm -- I would feel awful if I

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1  
2 thought it happened a lot. I don't think it  
3 does.

4                   One last comment. I noticed  
5 somebody this morning, I think it was David  
6 Hayes, President of the bar, talked about the  
7 risk of a Public Defender system. You know,  
8 as a private lawyer it's no longer a threat.  
9 I think a Public Defender system is not a bad  
10 idea for the county at all. I think it would  
11 provide a voice for not only the clients but  
12 resource for the attorneys.

13                   We have no voice now. Syracuse  
14 Association of Defense Lawyers was started  
15 because we didn't have anybody caring about  
16 what we were doing. When I go to a seminar  
17 on dealing with undercover cops and how to  
18 deal with drug cases with undercover cops,  
19 and I find an undercover cop in my seminar,  
20 I'm angry, and I'm even more angry when I  
21 find out that somebody just couldn't say no  
22 to the guy. You know what, when the NYSPD  
23 holds their seminars, I'm not invited. When  
24 the DA's office goes off and holds a seminar,  
25 I'm not invited. So what the heck is the guy

253

1  
2 doing there who shouldn't have been invited,  
3 and that's why Syracuse Association of  
4 Defense Lawyers started. We're a group of  
5 about hundred lawyers. We charge people 20  
6 bucks once and our whole idea here is to  
7 share information and become better lawyers.  
8 It's -- one of the things that we certainly  
9 have all been complaining about is the rates.

10                   MR. GRADESS: Thank you.

11                   MS. ROSENTHAL: Thank you.

12                   Mary Moule.

13                   MS. MOULE: Good afternoon. I  
14 kind of surmised by this hour of the day  
15 you've heard many, many, many litanies. I  
16 have a slightly different approach. I was  
17 the Public Defender in Family Law for  
18 Franklin County. We have somewhat of a

19 different set-up there. You might be aware  
20 of it. We have three autonomous part-time  
21 Public Defenders. One is responsible for  
22 Family -- all Family Court matters where  
23 indigent parents are entitled to  
24 representation and when I was that PD, I was  
25 also responsible for writing all parole

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1 appeals. We have two correctional facilities  
2 there. So that's one job.

3 I was paid \$21,000 a year for  
4 what was supposed to be 21 hours a week. We  
5 have -- I don't hold the position anymore.  
6 We also have two criminal Public Defenders,  
7 one who's to handle the cases which emanate  
8 in the northern part of the county and the  
9 other to handle the cases which originate in  
10 the southern part of the county, and I've  
11 come today also on behalf of Virginia  
12 Killbary, who is Franklin County's Criminal  
13 Public Defender South. She's paid for 24 and  
14 a half hours a week regardless of what her  
15 caseload is and that is the case with all  
16 of -- is the case with all P.D.s there.  
17 Whatever the caseload is, you carry it. And  
18 I have held the position, as I said, for 18  
19 months.  
20

21 I wanted to address today  
22 caseload crisis for you and give you an  
23 example, and I certainly don't by any means  
24 presume that you haven't heard of the kinds  
25 of things that create a caseload crisis but

255

1 it's an area where we as Public Defenders  
2 just simply haven't been able to solve the  
3 problem. I put a little background about my  
4 county in the copies that I had to submit and  
5 I'm not going to touch those.

6 I left the position after 18  
7 months when I found and knew I was working 45  
8 to 60 hours a week strictly on my Public  
9 Defender files. I literally did log my time.  
10 The county would not increase my compensation  
11 and when I had a caseload crisis, very  
12 regrettably I had to leave.

13 Now, Miss Killbary happens to be  
14 facing a caseload crisis and very ironically  
15 it centers around the same client, almost the  
16 same set of facts. In 1993 there was a  
17 family, three little boys and parents, and  
18 the youngest boy had been born with a  
19 collapsed lung and his second lung collapsed  
20

21 shortly after birth. He was seen, he was  
22 treated. During his early years he had many  
23 apnea attacks. He would stop breathing; he  
24 would have to be rushed in. Ultimately he  
25 was stabilized, and I don't want to misquote

256

1 but I believe he was found to have a  
2 congenital problem as does a first cousin of  
3 the same blood line.

4 In December of that year the  
5 mother gave birth early to a little girl, was  
6 not a term pregnancy. While in labor the  
7 mother -- in long labor the baby was  
8 experiencing fetal heart distress and so that  
9 they did a cesarian section. Baby made it,  
10 went home and within two weeks the baby began  
11 to experience apnea attacks. She was put on  
12 medication, she was tested, and she was  
13 treated. She was put on apnea monitor. The  
14 tapes were analyzed by physicians to see what  
15 was happening and no one could ascertain what  
16 was wrong with this child. She was seen by  
17 doctors not only in our town but in  
18 Burlington, Vermont and ultimately Boston,  
19 and on this little baby's first birthday and  
20 we can call her Emily, she had a pacemaker  
21 implanted.  
22

23 The apnea attacks, however,  
24 continued and she was taken in by a rescue  
25 squad, by her parents, and the medication was

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1 increased. This happens to be medication  
2 which the literature at the time said was not  
3 approved for children under 6.

4 Two years and one month after  
5 Emily's birth she had her last attack and in  
6 mid-January she was rushed to the emergency  
7 room, air lifted to Burlington, virtually  
8 brain dead where she died. Within hours of  
9 her death, the three older children were  
10 taken from relatives -- the three older boys  
11 by the Department of Social Services and the  
12 mother was approached when she returned to  
13 Malone and was immediately questioned by the  
14 New York State Police wanting to know why she  
15 had, quote, killed her baby.  
16

17 That's when I met Emily's mother  
18 and father and that began my caseload crisis  
19 because I was already going 45 to 60 hours a  
20 week, as I said. No extra compensation, no  
21 matter what the caseload was. I was  
22 responsible for all Family Law cases in the

23 county and the person who now holds the  
24 position is, too, except at least that they  
25 took the parole appeals away from him.

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1  
2 The mother was taken to Family  
3 Court with charges of abuse and neglect and  
4 you probably know that if you establish abuse  
5 and neglect by a parent as to one child, all  
6 the children may be removed. The parent is  
7 derivatively assumed to have abused or  
8 neglected the other children.

9 As this matter was proceeding  
10 through Family Court, in a private conference  
11 the district attorney, who's always included  
12 in conferences on family offenses and abuse  
13 and neglect, the district attorney offered  
14 the opinion that the mother had killed the  
15 baby but that they just couldn't prove it, so  
16 I was pretty upset with this improper  
17 statement and this unconstitutional  
18 allegation in front of the judge who would be  
19 trier of fact, and I demanded proof, and  
20 within a few days, the New York State Police  
21 made available to me some 2,000 to 3,000  
22 pages of medical records and lab reports and  
23 then I -- there was about 4,000 pages and I  
24 subsequently obtained another 2,000 to 3,000  
25 pages from other sources and I began to read.

259

1 I do not have a medical background and I  
2 can't say I do now but I certainly can tell  
3 you about Munchausen's syndrome by proxy.

4 The autopsy wasn't completed  
5 until four months after little Emily dies and  
6 it states the cause of death as hypoxic  
7 ischemic, lack of oxygen to the brain. The  
8 manner of death was classified as  
9 undetermined. The physician who did the  
10 autopsy in Vermont, of course, knew that the  
11 mother had the other children removed. The  
12 Social Services attorney and the law guardian  
13 for the surviving children met me on my  
14 arrival in court one day and said that they  
15 would offer a deal if the mother would just  
16 admit that she tried to suffocate little  
17 Emily. We refused the deal and I continued  
18 to look at medical records.

19 Emily's body wasn't released  
20 until four months after she died and we had  
21 to beg and plead and demand and confront just  
22 to get permission to let the surviving  
23 children attend the burial service because  
24

25 after all, the accused mother was going to be

1 260

2 there.

3 My caseload continued to increase  
4 and in the summer of 1996, I knew I could not  
5 do justice to any client and I had to submit  
6 my resignation. A fact finding was -- would  
7 you like to stop?

8 MR. GRADESS: Go ahead.

9 MS. MOULE: The fact finding was  
10 in this particular place. I conveyed  
11 everything I read to all the attorneys in the  
12 case, including my successor, and I was  
13 relieved to learn in October of that year the  
14 case in Family Court against the mother had  
15 been adjourned in contemplation of dismissal  
16 with the one-year period; in other words, if  
17 no event occurred, the case would  
18 automatically go away by operation of law.  
19 So I'd seen the family occasionally in the  
20 village. The mother had to take some  
21 classes, never any admission, never any  
22 finding.

23 In October of '97, the one just  
24 past a year ago, the case automatically was  
25 dismissed. There was no incident so here's a

1 261

2 family of five, three surviving sons, mother  
3 and father. Also in October of 1997 that a  
4 book was published and the name of that book  
5 is the "Death of Innocents," and it's very  
6 ironic that this book focuses on a case that  
7 occurred in this county, the Juanita Hoyt  
8 case.

9 Juanita Hoyt, who I believe lost  
10 five children, that they all died, and I  
11 don't want to misquote because I haven't  
12 finished the book, but after many, many, many  
13 years Juanita Hoyt, as I recall it, was  
14 convicted of murdering her children. Tucked  
15 in the back of this "Death of Innocents" are  
16 bits and pieces of Emily's story, some  
17 erroneous; that they don't match the medical  
18 record facts. I'm not giving you opinion.  
19 I'm speaking of records, and these authors  
20 gave their opinion that Emily ultimately died  
21 in the face of blatant implications of child  
22 abuse by her mother and persistent efforts to  
23 save her by a doctor and others. In a  
24 footnote that they claim that they got their  
25 information about Emily independently and

1  
2 that they verified the various aspects of  
3 this case with the central participants.

4 Well, I tell you, that they never  
5 spoke to the mother or father or any of the  
6 grandparents and that they never attempted to  
7 reach me nor my successor. One month after  
8 this book was published, my county elected a  
9 new DA. He assigned a new assistant who  
10 admits that much of his early knowledge of  
11 the case came from this book and in August of  
12 this year, 1998, Emily's mother was indicted  
13 on 32 felony counts, charges involving 29  
14 separate dates on which she's accused of  
15 reckless endangerment first as to the little  
16 boy Joe on 8 occasions, reckless endangerment  
17 first as to the little Emily on 21 occasions,  
18 and attempted murder second as to Emily. And  
19 the local headlines screamed "Mom Jailed for  
20 Murder in 1996 Death of Infant," and the  
21 judge set bail at \$200,000, which even if a  
22 fairly well off uncle would front the  
23 necessary funds, we have found no bail  
24 bondsman in New York State who will touch it.

25 My colleague whom I said I

1 represent -- I'm here for, she's now mom's  
2 Public Defender and now she has her caseload  
3 crisis and the mother has hers. She's locked  
4 up in the county jail. She has to see the  
5 children one at a time for maximum half-hour  
6 visit and not daily. When little Joe, the  
7 first child who had this apnea attacks, saw  
8 his mother on Plattsburgh TV and heard the  
9 announcer say she was in jail for allegedly  
10 killing Emily and harming him, he screamed,  
11 no, no, my mommy didn't do it, and he's  
12 having problems in school and do we wonder  
13 why.  
14

15 Now, Virginia Killbary has some 7  
16 or 8,000 pages of medical records, the  
17 same -- the very same medical records I had.  
18 We got them back from the successor PD and  
19 they're from doctors and hospitals and labs  
20 and rescue squads and apnea tapes and they're  
21 from Burlington and Boston and Malone, and  
22 she has substantial materials that I had  
23 gained from the laboratory which prescribes  
24 the drug that was given to this baby from  
25 about the time she was 6 months old until she

1  
2 died.

3 Now, Virginia Killbary has this  
4 caseload crisis and who is it to read this  
5 material, to catalog it, to identify it, to  
6 find witnesses, to identify them, to study  
7 the drugs. She's paid for 24 and a half  
8 hours a week, works far in excess of that,  
9 gets no extra money. She's applied for an  
10 expert witness. We don't have any answer on  
11 that motion, so we have this mother accused  
12 in Family Court of abuse and neglect,  
13 represented by a PD, charges ultimately  
14 dropped because they couldn't establish by a  
15 preponderance of evidence that she had harmed  
16 any of her children, now facing 32 felony  
17 counts.

18 I think the injustice to this  
19 family, the potential injustice is huge. I  
20 don't think the injustice is unique to this  
21 family. As the Family Law Public Defender, I  
22 could go on for hours with stories but this  
23 one seemed the most egregious and this one  
24 seemed the one most significant and not  
25 certainly the easiest to tell, but I wanted

1 265

2 to tell you these are the kinds of things  
3 that are happening with Public Defenders.

4 I took some Assigned Counsel  
5 cases from Clinton County after I stepped out  
6 of my role. I can't necessarily complain  
7 about that. I don't know how the Assigned  
8 Counsel Program works. I just know that when  
9 you have three autonomous fixed pay P.D.s, it  
10 doesn't work. I don't know who's going to be  
11 able to help Emily's mom. Thank you.

12 MR. LEWIS: Has there been any  
13 thought to either a court application to  
14 modify the contract or a statement of refusal  
15 under the Sixth Amendment and the State  
16 Constitution that this woman will never get a  
17 fair trial under the system?

18 MS. MOULE: Ms. Killbary hasn't  
19 tried that. In terms of modifying -- you're  
20 talking about the contract between her and  
21 the county?

22 MR. LEWIS: Based on this  
23 extraordinary circumstance.

24 MS. MOULE: I attempted some of  
25 that when I was representing the mother in

1 266

2 Family Court and I struck out all along the  
3 way. The court did give me \$300 for an  
4 investigator, that was max. In terms of

5 applying for extra funding, the budgets in my  
6 county are just being adopted. The third --  
7 the PD of the longest duration who did  
8 criminal law there for 8 years, he has just  
9 resigned because he got his own caseload  
10 crisis, a murder case with all the other  
11 cases he had. The legislature is trying to  
12 get him to change his mind and it was rumored  
13 that his budget might be up at least 50  
14 percent but we've heard nothing, and I will  
15 tell you that I know my legislature. I  
16 didn't come here to throw stones on them. I  
17 know all about elected office and you run  
18 again and the people look at the budget but I  
19 can tell you, Miss Killbary would be  
20 fortunate if that legislature gave her \$5,000  
21 at best. Sixth Amendment, that's an idea.

22 MR. LEWIS: The DA whose case it  
23 is now, is he full-time or part-time?

24 MS. MOULE: He's full-time and  
25 there was just a notice in the paper, the

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1 newspaper sits in my briefcase, within the  
2 last few weeks, after this case broke, the DA  
3 has now been given part-time -- a new  
4 part-time assistant and I will tell you -- I  
5 have no bone to pick with Onondaga County.  
6 I've only been in Syracuse once, to the  
7 airport, and the mall, but I will tell you  
8 the -- it is in the newspaper that the  
9 Onondaga County DA's office is assisting  
10 Franklin County's DA. Now, they've got a new  
11 part-time assistant because they have two  
12 murder cases, one's my friend Virginia's and  
13 one's the other PD who resigned.

14 What do the P.D.s have? See, for  
15 us it's an unsolvable problem. I will tell  
16 you that the association did tip us, gave  
17 Miss Killbary information on grants that the  
18 Department of Justice has, competitive  
19 grants, and I assisted her in filling out an  
20 application for her practice overall because  
21 I will tell you, too, she's in the southern  
22 part of the county. The court is in the  
23 northern part. When there is a conflict with  
24 any of these other two P.D.s, it shifts. In  
25

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1 other words, she gets north and criminal  
2 because that PD was there 8 years and he's  
3 got a conflict or they're co-defendants. Her  
4 clients don't have transportation and the  
5 ability even to get to see her in Saranac  
6

7 Lake, so we applied to the DOJ for a grant  
8 hopefully to set up a satellite office in  
9 Malone and to give assistance. We described  
10 this case a little bit but it would be  
11 overall.

12 MR. LEWIS: Is there an 18-b  
13 panel, Assigned Counsel panel in the county?

14 MS. MOULE: No -- in the county?  
15 I think we do have the 18-b. When the  
16 criminal PD resigned recently, I did get a  
17 memorandum from the presiding judge who said  
18 he's going to do Assigned Counsel on an  
19 alphabetical basis until a new PD is found.  
20 I don't know who's going to take that. That  
21 PD closed 700 files last year.

22 MR. LEWIS: Last thing is how do  
23 they do that, do anything to ensure quality  
24 representation? The case you're talking  
25 about is not something that you can sort of

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1 roll out of the boat and just do. Is there  
2 any way that they assure that in these  
3 complex and difficult cases counsel is at  
4 least able?  
5

6 MS. MOULE: With all due respect  
7 to my county, and I didn't grow up there, we  
8 are an island unto ourselves. There's no  
9 sense of accountability. We have a judge who  
10 I believe considers himself ethical but, you  
11 know, he's got a lot of cases and he wants  
12 cases settled, too, especially custody cases,  
13 those kinds of cases.

14 There is -- there is no real  
15 accountability. I'm not saying every case is  
16 handled badly. Please don't get that  
17 impression, and I feel that the Public  
18 Defenders work very, very, very hard. And  
19 I've known everyone who's held that office  
20 since I've been there for 10 years. You  
21 can't make more hours in a week. You just  
22 can't, even if you're willing. You have to  
23 leave your office at some point and go home  
24 and shower and shop. You can't do it if  
25 you're willing, and we're a poor county. I

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1 believe our last census, our median income  
2 was under \$10,000. We have about 40 some  
3 thousand people in the county. We have 2,000  
4 who have higher education and don't say that  
5 in any kind of degrading manner but to tell  
6 you we have a lot of people without  
7 education, without work, there's very little  
8

9 work there. That's why the area welcomes the  
10 prisons, that they think it will bring jobs.  
11 Very little work, many, many, many people  
12 eligible, many.

13 MR. LEWIS: Thank you.

14 MR. EFFMAN: Just a quick  
15 question. When you're doing parole appeals,  
16 do you know if your county ever sought or  
17 received any reimbursement for the parole  
18 appeals you've been doing?

19 MS. MOULE: I had spoken with the  
20 county manager at the time I was doing them  
21 because my predecessor had been asked to keep  
22 time slips on the time. The County manager  
23 in the office at the time told me not to  
24 bother because it was -- there's a pot of  
25 money that goes back out for reimbursement to

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1 all the counties and that by the time it  
2 filtered down to us, the pot would be so low,  
3 she said it wouldn't be worth my time or hers  
4 to keep track -- to keep track so we -- to my  
5 knowledge we didn't and do not.

6 MR. EFFMAN: What about the  
7 situations where inmates -- you have what,  
8 two prisons?  
9

10 MS. MOULE: We have two  
11 correctional facilities and we're building  
12 our third.

13 MR. EFFMAN: What about 606  
14 reimbursement; that is, if an inmate is  
15 charged in Franklin County with a new crime  
16 involving the prison, who gets -- the Public  
17 Defender, I presume, gets assigned?

18 MS. MOULE: Well, it's very  
19 interesting you should ask, sir. Basically  
20 it would be assigned in Franklin County. One  
21 of the things that increased my caseload in  
22 that summer of '96 was there came a stack of  
23 parole revocation appeals. I went into the  
24 law, I researched it and put it on -- the  
25 judge assigned them to me. He says it's part

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1 of my job. I sent a memorandum to him and  
2 finally a motion citing the law that said  
3 that the representation should come from the  
4 county in which the violation occurred, and  
5 after about 8 months of my pressuring him, he  
6 finally made a ruling, he said, sorry,  
7 they're your job, and quite honestly, that's  
8 when I said goodbye. I gave notice but that  
9 was it.  
10

11 MR. EFFMAN: I'm just refocusing  
12 not on parole, but on let's say an inmate is  
13 charged with assault on another inmate or a  
14 CO and a Public Defender gets assigned. Do  
15 you know if the county seeks any  
16 reimbursement?

17 MS. MOULE: I don't know because  
18 my work primarily was in Family Law, although  
19 I had to take some criminal conflicts  
20 occasionally. I don't know if the county  
21 gets reimbursed for that. Can't answer that.

22 MR. GRADESS: Let me ask you a  
23 couple questions.

24 MS. MOULE: Sure.

25 MR. GRADESS: You talked about

1 273  
2 the hours but I wonder -- first of all, let  
3 me clarify. At the current moment the Family  
4 Law Public Defender is who?

5 MS. MOULE: David LaPlant.

6 MR. GRADESS: He has been in that  
7 job since --

8 MS. MOULE: 6, 8 months.

9 MR. GRADESS: The southern is  
10 Ms. Killbary?

11 MS. MOULE: Virginia Killbary,  
12 her name appears on my statement.

13 MR. GRADESS: The northern  
14 defender is in equipoise, possibly quitting  
15 and possibly being solicited to stay?

16 MS. MOULE: Alexander Lesyk, yes.

17 MR. GRADESS: In addition to  
18 hours you're talking about, can you talk a  
19 little bit about the concrete numbers of  
20 cases you were handling?

21 MS. MOULE: When the Family Court  
22 files were turned over to me, I believe I had  
23 about 50 to 60 open files. It's been some  
24 time now. When I turned them over, I believe  
25 I turned over about 50 active Family Court

1 274  
2 files. I did 75 parole appeals per year. In  
3 fact, the judge became alarmed about it and  
4 wrote the legislature but they didn't up the  
5 ante.

6 I would point out to you in  
7 Family Court, there's always -- in a standard  
8 custody battle there's preliminary appearance  
9 so you go and you stand in a hall and you  
10 wait for 3 or 4 hours until it's your time to  
11 say no, there's no agreement, if there's not,  
12 and then you go back in about a month when

13 there's been a probation department report  
14 that the judge mandates and you go in early  
15 and you read the probation report and you see  
16 if you can get the parents to agree, and you  
17 still stand around in the corridors for about  
18 2 or 3 hours, and then you say if you have no  
19 agreement, and I certainly tried to settle  
20 many and I did. Your Honor, there's still no  
21 agreement. Then he says, okay, we'll have a  
22 trial in four months, and then you prepare  
23 for trial and he sets discovery and all.

24 So Ms. Killbary and I have often  
25 spoken about this. She handles misdemeanors

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1 in the local courts and she does felonies in  
2 County Court. Some of the criminal matters,  
3 and I don't mean to minimize the work that  
4 PDs do in the criminal, but basically it's  
5 one or two appearances and you're do -- you  
6 enter a plea and you communicate with the DA  
7 and you go back and you enter your plea  
8 bargaining.

10 Family Court goes on and on and  
11 on and I do have to -- I do concur with the  
12 woman who -- the Public Defender who was here  
13 ahead of me in the sense that people in  
14 Family Court call their PD all the time  
15 because the baby came home with a dirty  
16 diaper or the baby came home 30 minutes late  
17 and they don't understand. I used to get  
18 them to understand we're not social workers  
19 but the burden in Family Court, Family Law is  
20 different. I don't mean it's any greater  
21 than in criminal, but it's constant. He  
22 didn't pay me the support. You can see why I  
23 left.

24 MR. GRADESS: Did you have  
25 available -- I want to see and want to put on

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1 the record and want to ask you a few more  
2 questions. In addition to the \$21,000 a year  
3 contract, did you have -- what other  
4 resources did you have available to you? Did  
5 you have secretarial assistance?

7 MS. MOULE: I was given \$10,000 a  
8 year which was paid to me monthly and that  
9 was to cover the county's idea of a share of,  
10 you know, the office, the secretary, copy --  
11 everything else, postage and everything else.  
12 Mr. Lesyk, as I recall his budget, his total  
13 budget, last I looked -- but I want to  
14 explain it -- his total budget was near

15 \$100,000 but in that he was getting \$41,000,  
16 his secretary was paid directly by the  
17 county. He had an investigator, Rod Hart,  
18 who's paid directly by the county, so when  
19 you add all that up, it came to about -- and  
20 you know, some stipend for his office and his  
21 phones.

22 As far as other resources, no,  
23 no, I mean -- if I went into the court and  
24 used the copy machine on a PD case, I was  
25 billed 25 cents a copy just like I was for a

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1 private client. I tell you I didn't have  
2 many private clients working those kind of  
3 hours.  
4

5 MR. GRADESS: Essentially you had  
6 a private law office and they subsidized it  
7 with \$10,000 for all purposes, and once you  
8 were out of -- once you ran out of the  
9 \$10,000 --

10 MS. MOULE: Which was exactly  
11 what I put in my resignation letter, I can't  
12 subsidize the county through my expenses or  
13 for legal services any longer.

14 MR. GRADESS: I don't have your  
15 statement. Have we got a copy of your  
16 resignation letter attached to this?

17 MS. MOULE: Well, you've got a  
18 copy -- five pages of my statement.

19 MR. GRADESS: Did you include  
20 your letter, resignation letter with that  
21 statement?

22 MS. MOULE: No, I didn't.

23 MR. GRADESS: I wonder if you  
24 could make a copy of that available for us.

25 MS. MOULE: Do you have a pen?

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1 MS. GRADESS: We'll make a note  
2 of it for you.

3 MS. MOULE: Do I just send it  
4 to -- I just want to know where to send it.

5 MR. GRADESS: We'll give you that  
6 address. Let me have one other question.  
7 Did you have an investigator of any kind  
8 available to you?  
9

10 MS. MOULE: Mr. Hart was situated  
11 with Alex's office was, I was told, to be  
12 available to me, and I hope I did cover -- I  
13 was told when I was hired, my job would take  
14 2 or 3 days a week. Anyway, Rod Hart was to  
15 be available to me.

16 Once I was appointed and I called

17 him and he's a fine, fine, gentleman. He  
18 already had his routine with Alex. What Rod  
19 would do is he would come to my office every  
20 Tuesday morning for two hours and he would  
21 screen my applicants to see if they were  
22 indeed eligible for Public Defender services.  
23 My secretary would give them the application  
24 and or we would have mailed it. They come in  
25 on Tuesdays. Sometimes Rod missed it because

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1 he was tied up on Alex's cases and that's all  
2 he did.

3  
4 And I must be very candid, too.  
5 When it came to this particular case that I  
6 used as an illustration today, it just so  
7 happened that Rod Hart's wife is a nurse at  
8 the hospital where little Emily was taken  
9 time and time and time again, and I believe  
10 was there the last time Emily had an attack.  
11 There was no way Rod would touch it and there  
12 was no way we could let him.

13 MR. GRADESS: Was Mr. Hart as an  
14 investigator available also to the southern  
15 office?

16 MS. MOULE: Very limitedly. What  
17 he would do. He lives up at the northern  
18 end. He would go to the jail and there's a  
19 sign-up sheet there. If you've been  
20 arrested, especially over the weekend, you  
21 signed up to see him and he'll preliminarily  
22 qualify the, you know, defendant, the accused  
23 and sometimes get in touch with Ms. Killbary.  
24 In terms of chasing facts and all, no, and I  
25 don't mean that negatively toward Rod. I

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1 think Alex's practice, quite frankly, kept  
2 him very, very busy and he worked a set  
3 number of hours for I believe \$17,000 a year  
4 and trust me, that's what Rod worked and I  
5 don't fault him at all. See, he's not the  
6 lawyer. He didn't have his name in the court  
7 file where he had to keep going.

8  
9 MR. GRADESS: I think I missed  
10 what you said about chasing facts. Could you  
11 Go over that again.

12 MS. MOULE: Rod did not do --

13 MR. GRADESS: Factual field  
14 investigation?

15 MS. MOULE: Fact field  
16 investigation. To my knowledge he has  
17 rarely, if ever, done it for Ms. Killbary and  
18 he does it primarily for Alex.

19 MR. GRADESS: So his work in the  
20 other two offices was merely a screen for  
21 eligibility.

22 MS. MOULE: He doesn't even  
23 screen for Ms. Killbary. He will at the  
24 jail. He'll screen at the jail for  
25 Ms. Killbary if he shows up there.

1 281  
2 MR. GRADESS: The southern office  
3 and the Family Court office essentially had  
4 no field investigation services?

5 MS. MOULE: Absolutely not.

6 MR. GRADESS: Did you have a  
7 budget line to perform investigations, any  
8 funds available to you?

9 MS. MOULE: No. If you wanted an  
10 investigator, you had to submit a motion and  
11 an affidavit to the court and as I said, I  
12 did get approval for an investigator. I  
13 missed a portion of the law. His bill was  
14 over \$300 when I sent it for approval and the  
15 judge approved it for \$300 and that was on  
16 this case.

17 MR. GRADESS: They would cap your  
18 request for assistance at \$300?

19 MS. MOULE: Well, they did in  
20 this one case.

21 MR. GRADESS: Did you ever have  
22 any other applications you made during your  
23 tenure?

24 MS. MOULE: I frankly, sir,  
25 didn't have the time to waste. You know, I

1 282  
2 want to be careful but I just -- I knew where  
3 the money was and it wasn't going to come  
4 from. And I will point out there was an  
5 election recently in my county where the  
6 presiding judge did run again, so, you know,  
7 the previous speaker talked about, you know,  
8 sometimes judges put caps on budgets and I  
9 think that our judge, well meaning, probably  
10 did that.

11 MR. GRADESS: Thank you very  
12 much.

13 John Parker.

14 MR. PARKER: You ready? I've  
15 been here most of the day and you've covered  
16 a lot today and I'm going to try not to go  
17 over it again. I'm going to resist the  
18 temptation to comment on everything about our  
19 program that's been commented on earlier  
20 today and I'd like to answer any questions

21 that any of you have, and please interrupt me  
22 when you come to something that you need to  
23 go into a little more detail.

24 I'll describe the program because  
25 there may be some people here that are not

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1 familiar with how our Assigned Counsel  
2 Program is set up, although you've gotten  
3 parts of it throughout the day. This is one  
4 of the larger counties which has principally  
5 an Assigned Counsel Program, and I think it  
6 may be the largest county outside of New York  
7 City in terms of an Assigned Counsel Program.  
8 We subcontract with the Legal Aid Society  
9 here to do misdemeanors and appeals to the  
10 Appellate Division and the Court of Appeals,  
11 misdemeanors in City Court. The rest of the  
12 representation is done by approximately 200  
13 Assigned Counsel attorneys.

14  
15 The cases are principally  
16 assigned by the judges in the various courts,  
17 whether that be Family Court, City Court,  
18 County Court or more than 50 Justice Court  
19 judges in the outlying villages and towns.  
20 We have about 12,000 assignments per year  
21 with an additional 4,000 going to the Legal  
22 Aid Society. Our budget is approximately \$4  
23 million including money for the Legal Aid  
24 Society.

25 You've heard of many problems and

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1 circumstances with the program, with the  
2 providing of defense services in this county,  
3 most of which I'm intimately involved in on a  
4 day-to-day basis. To me we provide a --  
5 somewhat of a balancing act between various  
6 competing interests. We have, so to speak,  
7 several different constituencies or clients  
8 that we serve. The county has some interests  
9 that they would like us to serve and that's  
10 principally providing service at the least  
11 cost or doing it in the most efficient  
12 manner. The clients obviously are interested  
13 in the best representation. If they're  
14 charged criminally, they want to get off, they  
15 want to stay out of jail. The lawyers have  
16 an interest. Their interest is being paid,  
17 being paid as quickly as possible and having  
18 as much assistance and as less hassle in  
19 doing it, their job as possible.

20  
21 Very often those interests are  
22 competing; county wanting us to pay as little

23 money as possible, lawyers wanting us to pay  
24 as much as possible and the clients wanting  
25 to get quality representation. You can see

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1 that it may be impossible to maximize any of  
2 those interests at one time without  
3 minimizing one of the other interests. If we  
4 could pay more money to lawyers, we could get  
5 better quality representation and we can make  
6 the clients happier. State law doesn't allow  
7 it and the county wouldn't like it.

8 We've tried, however, to meet the  
9 interests of all three of those parties. We  
10 may have been more successful with some at  
11 various times than others. I don't know how  
12 we do in comparison with other programs  
13 around the state. One of the things that  
14 I've asked the Defenders Association to do,  
15 and I'm a board member of the New York State  
16 Defenders Association, have been for I think  
17 15 or 16 years now, is I'd like the Defenders  
18 Association or some other organization to  
19 spend more time doing what they're doing now  
20 with this series of hearings and some reviews  
21 of the programs in other counties, to do a  
22 survey or an audit around the state as to  
23 what the quality of representation is.

24 Frankly, I think that -- I  
25

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1 believe that the quality of representation in  
2 our Assigned Counsel Program here would stack  
3 up fairly well throughout most of the state  
4 but I don't know that for sure because I  
5 don't know what's going on in other counties.  
6 I hear parts of, snippets of information as  
7 to the caseload in some county, as to a  
8 horror story in another county and we don't  
9 have some of those but we have some other  
10 problems.  
11

12 I think there's a need to focus  
13 on the quality issue and as Ed Nowak said,  
14 who was the first speaker this morning, I  
15 think there's a need for standards. I think  
16 there's a need for standards as to what  
17 quality representation is. We can usually  
18 tell when we hear about bad representation.  
19 We can usually see it because most of us here  
20 are lawyers but, frankly, I don't think most  
21 of the people in county government, most of  
22 the people in county legislatures, most of  
23 the nonlawyers in the state realize what  
24 we're talking about when we're talking about

25

quality of representation or whether we're

1

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2

talking about bad representation. They don't

3

realize what the ramifications are of one or

4

the other. They don't realize that it

5

affects not just the person charged with

6

grand larceny, who I'm representing at the

7

moment, but it affects everyone throughout

8

the state and it affects the quality of life

9

in the state, the quality of justice and may

10

affect the quality of representation even by

11

private counsel that is given a member of

12

their family or someone they know.

13

I think the quality of

14

representation given to indigent defendants,

15

because those defendants represent such a

16

large part of the criminal justice system,

17

affects intimately the quality of

18

representation given to private clients, even

19

though certainly you can buy a little better

20

quality of justice, but once the judges get

21

used to be able to do something a certain

22

way, once the police get used to it, that

23

continues from case to case regardless of

24

whether it's an Assigned Counsel case or a

25

privately retained case.

1

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2

Let me mention a little bit,

3

because it's been mentioned today, some of

4

the issues back and forth between an Assigned

5

Counsel Program and a Public Defender

6

program. I have never taken the position

7

that an Assigned Counsel Program is better

8

nor have I taken the position that a Public

9

Defender program is better. I think that

10

they both have advantages and disadvantages.

11

A lot of it depends upon the particular

12

situation in the county and the locality that

13

you're in.

14

One of the advantages of Assigned

15

Counsel programs is that we normally don't

16

have the forced -- problems of caseload that

17

are forced on many Public Defender programs.

18

You've heard today talking about situations

19

where attorneys are forced to take a caseload

20

of 1,000 cases per year, 1,200 cases per

21

year. I think there was a mention 2,000

22

cases per year, and where the pay rate is the

23

same no matter how many cases they are forced

24

to handle.

25

One saving grace, if any, of the

1  
2 statewide pay raise that we have for Assigned  
3 Counsel is that attorneys are paid for the  
4 hours that they do put in. They're not  
5 forced to overload themselves with cases even  
6 though that pay rate is low. Computing it  
7 out, however, very often I find, however,  
8 that it is higher for an attorney doing a  
9 full load of Assigned Counsel cases as many  
10 people make it as Public Defenders in many of  
11 the counties.

12 It's been mentioned the  
13 experience level of Assigned Counsel  
14 attorneys, and I don't know what the  
15 experience level is generally throughout the  
16 state. The level of experience of our  
17 Assigned Counsel attorneys has generally been  
18 an average of five years experience. We have  
19 about 200 attorneys on the panel and we have  
20 about 20 to 30 new attorneys join the panel  
21 each year. We have many experienced  
22 attorneys on the panel, persons have been on  
23 the panel 15, 20 years, 30 years, some people  
24 who have been on the panel since Assigned  
25 Counsel first became a paid program back in

1  
2 the '60s.

3 With the failure of the state to  
4 increase Assigned Counsel rates, and I think  
5 in any reasonable manner over the last  
6 thirteen years or so since it was last  
7 increased by legislation in 1985, I think the  
8 rate of leaving the program has increased. I  
9 don't have a particular statistic on it. I  
10 suppose I could go back and spend some time  
11 and come up with those statistics as to  
12 whether the rate of experienced attorneys  
13 leaving was greater in 1988 or in 1998.

14 But what is obvious is that the  
15 type of office maintained by attorneys has  
16 changed. I'm not ascribing this to the rates  
17 and the failure to increase the rates. I  
18 can't definitely tell you there's a cause and  
19 effect relationship but I can tell you that  
20 back in -- I think it was 1974 when I first  
21 did Assigned Counsel cases, almost everyone  
22 who did Assigned Counsel cases had an office.  
23 Everyone I knew of had an office that they  
24 shared with a number of other attorneys; two  
25 attorneys, three attorneys, they had a

1  
2 secretary, they had two secretaries. They

3 had facilities, like most of us consider  
4 would be required in a normal office. Some  
5 were in larger office, some were in offices  
6 of 20 to 30 attorneys; they did some Assigned  
7 Counsel work; that they were the attorney in  
8 that office that did criminal work so that  
9 they did Assigned Counsel work.

10 I now find, especially with some  
11 of the newer attorneys who come on the panel  
12 every year, that many of the attorneys no  
13 longer have secretaries. Many of the  
14 attorneys no longer have what we would  
15 consider a typical office. They're attorneys  
16 who are working out of their homes. There  
17 are -- we did have evidence of an attorney  
18 working out of his car as a matter of fact.  
19 Actually, he also worked for the Albany DA's  
20 Office for a time and lived in his car at the  
21 time he was working for the Albany DA's  
22 Office and he was fired from that. It's not  
23 only Assigned Counsel who runs into those  
24 problems.

25 But some of the problems we

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1 talked about earlier in terms of  
2 communication with clients, some of the  
3 problems, I think, in terms of quality of  
4 representation, some of the problems in terms  
5 of a lack of mentoring or the need for  
6 mentoring are based upon this change in the  
7 way that some people practice law, which  
8 again, I think is due to economic factors.

9 The computer makes it easier for  
10 people to do away with a secretary. I know I  
11 type a lot of things myself on the computer  
12 that I used to dictate to a secretary, but  
13 the communication problem I think is one  
14 thing that may be approaching crisis  
15 proportions in terms of communication between  
16 clients, especially clients who are  
17 incarcerated and they're not free to show up  
18 at a lawyer's office when they need  
19 information. Because of the lack of a  
20 secretary, lack of associates in an office  
21 means that there're going to be problems. An  
22 attorney who is ill, an attorney who's away  
23 on vacation, an attorney who's tied up in  
24 trial is not able to communicate with their  
25

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1 clients during that period of time.

2 We have in this county, in the  
3 jail, as there are in many or most of the  
4

5 jails in the state and in the country now, a  
6 system of collect telephone calls from the  
7 jail. In the old days an inmate in jail  
8 across the street, which used to be the  
9 Public Safety Building, in order to make a  
10 call to anyone, to a family member, to an  
11 attorney, would have to get a guard who would  
12 take them from their cell to a booth, would  
13 then dial the phone, would then get the other  
14 person on the other end of the phone and  
15 would say, I have Joe Smith here. He says  
16 you're his attorney, would you talk to him?  
17 I'd say yes, we'd have a conversation then.  
18 There would be some questions as to the  
19 confidentiality of that conversation, if any,  
20 because you have a guard somewhat near the  
21 inmate.

22 At some point 4 or 5 years ago a  
23 new system was proposed and essentially put  
24 in before, I think, most defense counsel knew  
25 what was happening, which involved collect

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1 telephone calls. This system had what was  
2 thought to be many advantages. Inmates in  
3 the jail would be able to make telephone  
4 calls to their attorneys, to family members  
5 any time that they were not locked in the  
6 cell. There would be a phone on the wall in  
7 a general area for the prisoners and that  
8 phone number would allow collect calls to  
9 anyone who would accept them.  
10

11 Many problems, unfortunately,  
12 have developed from that, some of which  
13 you've heard today. I think you heard from  
14 people in the jail ministry about some of  
15 those calls. You've also heard from some  
16 attorneys in terms of the problems associated  
17 with that. Our program pays attorneys for  
18 collect telephone calls. We are asking all  
19 attorneys to accept collect telephone calls.  
20 We are -- have tried to encourage other  
21 alternate systems.

22 The problems that have come up is  
23 that an answering machine essentially can't  
24 discriminate, can't decide whether to accept  
25 a collect call or not. An answering service

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1 is the same thing. When an attorney is not  
2 there, they don't take the phone calls. So a  
3 person without a secretary essentially is  
4 having no communication when they're not in  
5 the office. This is certainly a problem. I  
6

7 don't know whether it's as big a problem  
8 around the state as it is here locally or  
9 not.

10 In order to help with this  
11 problem and others in the Assigned Counsel  
12 Office, we do accept all calls from persons  
13 in the jail. They do not have to be collect  
14 calls. Ours is one of the few numbers that  
15 there's no lockout on from the jail where  
16 collect calls can be accepted. Unfortunately  
17 most county and state agencies don't accept  
18 collect telephone calls. The parole office  
19 here does not accept collect telephone calls.  
20 The Probation Department does not accept  
21 collect telephone calls. The Department of  
22 Social Services does not accept collect  
23 telephone calls.

24 If you're arrested and you're on  
25 probation, you're supposed to inform your

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1 probation officer but you can't do that by  
2 calling their office because they don't  
3 accept collect telephone calls. There are a  
4 few agencies: The Legal Aid Society accepts  
5 telephone calls, the Assigned Counsel Office  
6 does. I believe the NAACP does and there may  
7 be a few organizations that do.

8 Through 9/16 of this year we  
9 received 2,584 telephone calls from the jail  
10 with -- from 1,027 clients who were  
11 represented by 139 different attorneys. Some  
12 of those can be classified as complaints.  
13 Some of those can be classified as requests  
14 for information. Typically the calls we  
15 received are, I was assigned an attorney, I  
16 haven't heard from the attorney yet.  
17 Sometimes the question that I ask was when  
18 were you assigned and sometimes the answer is  
19 today and my answer will be, can you wait  
20 until tomorrow, he may not yet gotten  
21 notified of the assignment yet.

22 Other times you'll find the  
23 assignment was made a week ago, two weeks  
24 ago, and there may be some kind of problem.  
25

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1 Sometimes the attorney still hasn't been  
2 informed. We've had some problems with  
3 courts. It used to be courts would notify  
4 the attorneys promptly after morning;  
5 arraignments that they'd been -- the attorney  
6 had been assigned to a new client. We found,  
7 unfortunately, that due to some staffing  
8

9 problems or otherwise in City Court,  
10 sometimes calls aren't being made until the  
11 next day and sometimes that goes from a  
12 Friday until a Monday, and that engenders  
13 additional calls we get from clients.  
14 We're attempting to work out a  
15 change in the system so that we will not have  
16 this communication problem. We've proposed  
17 with various other telephone companies some  
18 other ways of doing this so that the calls do  
19 not have to be made on a collect basis, which  
20 is creating some of the problem.  
21 It sounds like a simple problem  
22 to solve. Unfortunately it doesn't seem to  
23 be that way when we try to work it out with  
24 the attorneys. There seems to be problems in  
25 their being able to bill for those calls. We

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1 need some detail and some attorneys have  
2 proposed, gee, why can't we bill you \$100 a  
3 month or \$50 a month for our collect calls.  
4 Unfortunately, the county, the county's  
5 auditors, et cetera, wouldn't accept that  
6 kind of billing with no assurance that that  
7 was the actual amount of calls; that those  
8 calls were for Assigned Counsel clients as  
9 opposed to private clients.  
10

11 I don't know whether you have any  
12 further questions on that issue of those  
13 calls. I know they were brought up at length  
14 earlier today which is why I spent some time  
15 on it.

16 MR. GRADESS: Are you ready for  
17 questions?

18 MR. PARKER: I have some other  
19 things to say but I'm ready at any time for  
20 questions. I get tired of the sound of my  
21 own voice and I need a break.

22 MS. BUCK: When does your  
23 office -- when and how is your office  
24 informed of an assignment by a court? In  
25 other words, if --

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1 MR. PARKER: I'm glad you  
2 mentioned that. The answer is other than  
3 City Court -- other than Family Court, we're  
4 not. This creates a problem. I should say  
5 there is an exception. Dewitt does inform  
6 us; there may be one other Justice Court that  
7 informs us. We do get written notices from  
8 Family Court of the assignments but in  
9 general, with the majority of the criminal  
10

11 courts, being some 60 different criminal  
12 court judges who would be making assignments,  
13 we get notification from the attorneys and  
14 that's part of the eligibility process in  
15 terms of their submitting to us a dual  
16 purpose notification; one, that they've been  
17 assigned the case and, two, here's the  
18 financial information about this particular  
19 client. It creates a problem.

20 MS. BUCK: Have you ever  
21 requested that City Court --

22 MR. PARKER: Yes.

23 MS. BUCK: -- have the clerk  
24 inform you on a daily basis of the attorneys  
25 assigned and the docket and the case numbers?

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1  
2 MR. PARKER: Many times. I've  
3 discussed this with Judge DeJoseph of City  
4 Court this year, within the last 6 weeks any  
5 way. We've discussed it and -- this will  
6 probably seem incredible. I see Dave Lewis  
7 reaching for the microphone here, but it is a  
8 problem. It's a problem for us in a number  
9 of areas in terms of keeping track of these  
10 cases. Many of the calls that we get,  
11 probably most calls we get from clients,  
12 questions I need to see my attorney; I  
13 haven't seen my attorney, we don't have any  
14 record of the case yet.

15 MS. BUCK: Can I assume from that  
16 that it is the court that is considered to  
17 have the responsibility to notify the  
18 attorney of the assignment?

19 MR. PARKER: Yes.

20 MS. BUCK: Is there a uniform  
21 procedure for doing that? What is the  
22 procedure?

23 MR. PARKER: Well, it is normally  
24 a telephone call but it can also be followed  
25 up with a notice, with a written notice or a

301

1 fax. Again, one of the things that is  
2 uniform is the lack of uniformity among all  
3 of the different courts where judges seem to  
4 be very individualistic in terms of wanting  
5 to do things their own way, and it's been  
6 very difficult to try to get any group of  
7 judges to follow certain standards in terms  
8 of doing something on a unified manner.

9 MS. BUCK: If the judge who is  
10 assigned is notified by phone call then the  
11 attorney has to get down to where to pick up  
12

13 the file? He has to go to court; does he get  
14 something in writing?  
15 MR. PARKER: Well, the -- if it's  
16 City Court?  
17 MS. BUCK: Yes.  
18 MR. PARKER: They normally would  
19 pick up the papers in City Court. If it's a  
20 Justice Court, they're normally mailed copies  
21 of the papers.  
22 MR. LEWIS: When someone is  
23 appointed, isn't there a 722C ordered? The  
24 actual appointment of counsel is by the  
25 judge?

302

1  
2 MR. PARKER: Yes.  
3 MR. LEWIS: And it's court  
4 ordered, doesn't that exist somewhere on  
5 paper?  
6 MR. PARKER: Not in -- as a  
7 formal order. The only way -- the only place  
8 I know of that's being done as a formal order  
9 is parole violation cases in this county.  
10 MR. LEWIS: How do you know to  
11 cut a voucher, in effect, for that order?  
12 MR. PARKER: Well, we'll get a  
13 voucher from the lawyer. The process, to go  
14 over it a little bit, is once the assignment  
15 is made, that here we have the attorney go  
16 over the financial information with the  
17 client. If there is no problem with the  
18 financial information, the next thing that's  
19 occurred with the Assigned Counsel, for  
20 instance, unless there's a problem with the  
21 case, is receiving a voucher. We have gotten  
22 a Notice of Assignment we get from the  
23 attorney saying I was assigned by Judge Smith  
24 on such and such a date, a financial  
25 statement that shows the person was on

303

1 welfare, what their assets are, that that  
2 looks reasonable in terms of eligibility. We  
3 get a voucher from the attorney, whether it's  
4 a month later or 6 months later, which  
5 indicates the disposition on the case, the  
6 statistics, whether the person was released  
7 on bail, whether there was hearings,  
8 et cetera, and that voucher is sent to the  
9 judge for that judge's approval and we cut a  
10 check.  
11  
12 MR. LEWIS: In other counties, if  
13 you know, when there is assignment -- the  
14 judge signs a blank form 722C order, puts the

15 defendant's name, the date, their signature  
16 and that then triggers Assigned Counsel to  
17 issue a voucher based on that order.

18 MR. PARKER: You mean a form  
19 that's numbered for that particular --  
20 numbered for that particular case?

21 MR. LEWIS: Yeah, but without the  
22 judge's order, you can't get a voucher. You  
23 can't, in fact, prove you've been assigned.

24 MR. PARKER: I've heard of that  
25 procedure. We actually issue numbers in our

304

1 own office, which is what we track, track a  
2 case by.

3  
4 MR. LEWIS: Those are for  
5 vouchers --

6 MR. PARKER: A number for each  
7 case. Each case has a number, 10,374,  
8 whatever it is.

9 MR. LEWIS: I'm talking about a  
10 document in the case file docketed, that is  
11 the court order appointing counsel and what  
12 it is, it's multiply carbonized so everybody  
13 gets one. Just may be a quicker way for your  
14 office to be able to know who the lawyer is  
15 on the docket that is on the caseload so that  
16 there's an answer literally by the, maybe by  
17 noon recess or by the end of the day.

18 The reason it's done Downstate is  
19 because of the tremendous volume. From what  
20 we're hearing today, the idea of Downstate  
21 having a tremendous volume and Upstate having  
22 a trickle is false. In some cases your  
23 justice courts and other places like that,  
24 the volume is even greater than our criminal  
25 court Downstate. I recommend it as an idea

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1 to solve the level of problems.

2  
3 I want to ask you one thing about  
4 the phone business. When I did 18-b cases  
5 down in the city, we made a decision that (A)  
6 we would take every collect call and (B) we  
7 decided we wouldn't try to figure out which  
8 ones were which or bill for them because the  
9 cost of tracing it down became so prohibitive  
10 that to justify the billing would take more  
11 lawyer's time in some cases than just the  
12 case itself.

13 So my question to you, as the  
14 head of the Assigned Counsel panel, given  
15 that kind of immutable, unchangeable fact,  
16 would it not be better for there be flat

17 rates, would it not be better if someone went  
18 in and advocated that with this flat rate or  
19 something like that, we're done, because  
20 otherwise --

21 MR. PARKER: A flat rate for  
22 expenses such as telephone calls?

23 MR. LEWIS: For collect calls,  
24 yeah. if your client's inside, there's a  
25 good chance you're going to get a couple. If

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1 I've got to chase them down -- in Federal  
2 Court we've got to produce the phone bill for  
3 your client if it's an out-of-state call,  
4 because it's going to be a principal record,  
5 and you spend a certain amount of time  
6 recapturing those, but our instructions are  
7 only if you know who it is, and we know where  
8 our people are state by state but within the  
9 unit you're not going to get that.  
10

11 So the question is: Might it not  
12 be the advocate's position and I guess it  
13 kind of goes to the next question, do you  
14 consider yourself as an advocate for the  
15 lawyers? Do you consider yourself as  
16 administrator of the program? I know that  
17 comes with it.

18 MR. PARKER: Let's go to the  
19 first one. I never thought of the expenses  
20 in terms of a flat rate. That's not  
21 something I've considered and sort of  
22 off-the-cuff response to that suggestion, I  
23 would say any flat rate tends to discourage  
24 additional work; in terms of your flat rate  
25 covers five phone calls, then there will be

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1 people who won't take any more than five  
2 phone calls because you're only getting paid  
3 for five.  
4

5 MR. LEWIS: It's ahead of  
6 everybody not taking any.

7 MR. PARKER: I wouldn't say  
8 everybody is not taking any. There are a lot  
9 of attorneys who do take -- let's be straight  
10 on this, in terms of there's a lot attorneys  
11 who do take phone calls, take every phone  
12 call. We simply have an office policy we  
13 take phone calls from the jail. Someone take  
14 the phone calls and they bill it to us, some  
15 take the phone calls and don't bill it to us.  
16 Some take the phone calls and bill us 2 or 3  
17 phone calls a case and, you know, we let it  
18 go. What we have a problem is with billing

19 \$87 in collect phone calls without any  
20 details because the county has a problem with  
21 that when they do their audits, and I wish we  
22 didn't have to meet the requirements of  
23 auditors and accountants for those kinds of  
24 things, but our money ends up being hinged  
25 upon accountability for those kind of

308

1  
2 details.

3 I know attorneys in the middle of  
4 trying to represent somebody in a serious  
5 case, the last thing that they need to be  
6 concerned about is the pennies and the dimes  
7 and the quarters and those things, but some  
8 of us, myself included, never went into this  
9 business because I like paperwork or like to  
10 be an accountant or keep track of those  
11 details. And I know a lot of attorneys share  
12 those problems and really think about doing a  
13 good job representing a defendant, that I  
14 shouldn't have to worry about these other  
15 things.

16 Some of that goes back to the  
17 differences in the types of law offices that  
18 they used to be and the types that there are  
19 now because when an attorney is working solo  
20 without a secretary, then those paperwork  
21 issues, I think, sometimes become  
22 insurmountable; whereas, if you had office  
23 staff that was able to do them, if you had  
24 enough money to pay overhead to have those  
25 and those things could be handled by

309

1  
2 administrative personnel in your office.

3 MR. LEWIS: Even to have your  
4 administrative personnel handling it is not  
5 cost effective. I asked you about the  
6 concept between being the administrator and  
7 being the advocate. I'm interested in that  
8 for a lot of reasons, including understanding  
9 how different administrators around the state  
10 perceive their job.

11 MR. PARKER: Did you say advocate  
12 for the client or the attorney?

13 MR. LEWIS: For the attorneys on  
14 the panel, by and through them for the  
15 clients?

16 MR. PARKER: I play a lot of  
17 roles. They're -- you know, there's a role  
18 with the county in which the county wants us  
19 to run the program efficiently, in which the  
20 county wants us to save as much money as

21 possible, in which we're essentially  
22 competing with other forms of representation.  
23 I don't know how many times in  
24 the years I've been head of the Assigned  
25 Counsel Program where we've had some sort of

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1 review, some questioning very often in this  
2 room by the legislature as to how we compare  
3 with other programs, frequently it's with the  
4 Public Defenders program in Rochester. Are  
5 we cheaper? Are we as efficient? Should we  
6 consider changing the form of the program?  
7 You know, should they think about bidding  
8 this out or something of that sort? Clearly  
9 we respond to the county with we are  
10 efficient, we've cut down the cost; we've  
11 done this program, which saves money. These  
12 are our statistics on the cost of  
13 representation. They've gone down, they've  
14 gone down every year.

15  
16 On the other hand, we're  
17 advocating for the attorneys and the clients  
18 to the county. I mean, one of the things  
19 that was said earlier today that I have to  
20 disagree with is it was said we don't ask for  
21 enough money or the program has been  
22 underfunded for years because we've asked for  
23 less than we need and that's never been the  
24 case. There have been a couple of years  
25 where we underestimated the amount and I can

311

1 remember a couple of years where there was a  
2 tremendous increase in the number of cases  
3 which was beyond what we estimated. There  
4 were also years when some unusual things  
5 happened in terms of vouchers that were  
6 submitted or types of cases we had to have  
7 where there was an underestimation of what  
8 the cost was but in general we've always  
9 followed what we normally do with government.

10  
11 You anticipate that you're going  
12 to be cut and more than you're going to need  
13 and frankly, probably for the majority of the  
14 years I've been an administrator of the  
15 program, actually had a surplus. Now that  
16 surplus it's not an accrual accounting basis,  
17 doesn't mean you always have enough money to  
18 pay the attorneys because the county and the  
19 state have been notoriously late in making  
20 our payments. So on an accrual basis you  
21 have a surplus; on the other hand, you didn't  
22 have any cash to pay anybody and that

23 inability to pay people quickly has certainly  
24 been a problem with the attorneys, although I  
25 know from doing surveys around the state

1 312  
2 we've usually paid as quickly as most other  
3 Assigned Counsel programs and over the years  
4 we normally paid within 6 to 8 weeks of  
5 getting a billing except at the beginning of  
6 the year when the county has always delayed  
7 in cutting us our contract for the new year  
8 so there's more of a delay until the contract  
9 is finalized the end of February or so, or  
10 maybe early March.

11 So we've now entered into a new  
12 program with the County whereby they're  
13 paying us in a different manner which allows  
14 us to make much more -- pay the attorneys  
15 much more quickly, which I think had solved  
16 the problem, at least of dissatisfaction of  
17 delay in payments, and attorneys are getting  
18 paid within two or three weeks of submitting  
19 most routine vouchers at this time.

20 And that -- you know, it's  
21 unfortunate that making that change in the  
22 method of payment has took us so long to  
23 accomplish because it did mean a lot to the  
24 attorneys. It's something we've been  
25 advocating for years, that if they just paid

1 313  
2 us the same money sooner, we can pay the  
3 attorneys sooner and have a much more  
4 contented crew which would probably result in  
5 more efficient service.

6 I don't know whether that answers  
7 your question. The other part of that --

8 MR. LEWIS: I don't know if it  
9 does either.

10 MR. PARKER: The other part of  
11 that is advocating for the clients and I  
12 certainly think -- I mean I probably put more  
13 emphasize in advocating for the clients than  
14 sometimes the county or the attorneys want.  
15 I mean, I consider ultimately that really  
16 we're here to represent clients and do a  
17 quality job for representing those clients,  
18 and that is really the ultimate goal, and we  
19 hold that goal above efficiency for the  
20 county or quick payment for the attorneys,  
21 et cetera.

22 I mean, it depends on which one  
23 of these competing interests we're looking  
24 at, but I think the most important is those

25 people whose liberty's at stake. Let me

314

1  
2 mention some of the things we do do in the  
3 program that relate to some of the things  
4 that have been said before but relate to  
5 quality. We require -- there's been a  
6 discussion of experience levels of training,  
7 of mentoring earlier. We've always required  
8 that the attorneys that do not have any  
9 experience join our panel go through the  
10 introductory program first. The introductory  
11 program takes a number of weeks. We do it  
12 only once a year. That leads to some  
13 dissatisfaction from some attorneys who have  
14 to wait 6 months or 8 months to get on the  
15 panel. But if they don't have experience, we  
16 require it, and it's a basic program, sort of  
17 a practice program, a local practice, how to  
18 represent clients, teaching you what you  
19 didn't get taught in law school about the  
20 practical aspects of representation.

21 We have had a requirement of  
22 continuing legal education. Frankly some  
23 people have complained about mandatory  
24 continuing legal education and putting this  
25 burden on the attorneys. Well, the

315

1  
2 requirement that our program has had for 16,  
3 17 years requires at least as many hours per  
4 year as the mandatory continuing legal  
5 education requires, and in some years when  
6 we've had additional training available  
7 through Federal grants, through cooperation  
8 of the New York State Defenders Association,  
9 our requirement for training, because it was  
10 available was much higher than that.

11 We've also had requirements  
12 limiting what kinds of cases attorneys can  
13 take based upon their experience. In other  
14 words, you don't come on our panel and  
15 suddenly take felony cases if you haven't  
16 done felony cases before; that you can't get  
17 on our felony panel until you've had some  
18 felony trial experience, whether that's  
19 privately or whether it's by assisting more  
20 experienced attorneys in felony trials. Once  
21 you're on the felony panel, you can't do a  
22 felony trial by yourself unless you're -- you  
23 have to be assisted by a more experienced  
24 attorney, which we pay for.

25 In other words, we pay for that

1  
2 mentor to go through that first trial process  
3 with you as a fairly inexperienced attorney.  
4 And that's not done by a voucher; essentially  
5 that's done by my arranging for that  
6 attorney. If you were in our program, Dave,  
7 I would call you up and say, you know, would  
8 you supervise Jonathan for his first felony  
9 trial, you know, and we'll pay you for the  
10 time and just give me a letter at the end of  
11 the trial how much it is and we'll pay it. I  
12 don't know how many programs provide that  
13 kind of supervision. I think we ought to do  
14 more and I think some of the things that Alan  
15 Rosenthal mentioned in terms of mentoring are  
16 things we're going to look into.

17 We tried a mentor program a  
18 number of years ago that failed essentially  
19 because we had too few people volunteer to be  
20 the mentors. We had a number of attorneys  
21 who wanted mentors but we didn't have enough  
22 people to do it. I see not reason why not  
23 try it again. I would say the quality of  
24 representation is one of the things our board  
25 has wanted us to emphasize.

1  
2 We got off track earlier this  
3 year in terms of some problems that came up  
4 which prevented us from going as far in that  
5 direction as we wanted to this year but it's  
6 one of the things still on the table.

7 In terms of communication with  
8 clients that you've talked about, there's a  
9 proposal before our board which details  
10 requirements as to attorneys being available  
11 to talk to their clients, the length of time  
12 in which an attorney should -- setting a  
13 standard as to the length of time an attorney  
14 can take before he or she has a conference  
15 with a client after assignment, the length of  
16 time in which somebody has to return  
17 telephone calls; a statement that attorneys  
18 who, you know, who may become ill or go on  
19 vacation or tied up in trial on how they must  
20 make arrangements to have some one else cover  
21 for them during that time for their other  
22 clients; that that would be a requirement of  
23 proper representation; that people would have  
24 some whether, system it was accepting collect  
25 telephone calls or not, but every attorney

1  
2 must have some system of being able to get a

3 message from a client, whether they're  
4 incarcerated or not incarcerated and return  
5 that in a short period of time but we have a  
6 committee that is composed of not only  
7 attorneys but of representatives of the  
8 community; the head of our local NAACP, the  
9 head of the Spanish Action League are on this  
10 committee as well as Judge Hancock formerly  
11 of the Court of Appeals, which is our  
12 committee on attorney competence and  
13 discipline, which looks into these  
14 complaints, complaints we do have from  
15 clients about attorneys who may not have  
16 responded or may not have kept up with the  
17 case, may have done something else which is  
18 being alleged to be improper in terms of the  
19 case, and we feel very strongly about  
20 following up on those and trying to assure  
21 that our clients get the best quality of  
22 representation.

23 MR. GRADESS: Let me get a few  
24 more questions on the record. I want to give  
25 the panel time to answer these questions

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1 before they go to the airport.

2 MR. PARKER: If I could mention  
3 one other thing. I think one of the key  
4 problems that Assigned Counsel Programs do  
5 have in terms of quality is the issue of  
6 people getting on the panel. I think that in  
7 New York City it's probably one of the few  
8 Assigned Counsel Programs that I know of  
9 where you really have to go through a process  
10 to get on the panel.

11 Now actually whether it works the  
12 way it should on paper, I'm not sure of.  
13 I've been told that it doesn't but at least  
14 on paper it's a process whereby you get  
15 recommendations from counsel that you've been  
16 involved in other cases with, from judges  
17 you've appeared before, actually have to put  
18 in an application to be put on the panel  
19 which at least in theory may be turned down.

20 I think one of our chief problems  
21 here and in most jurisdictions, Assigned  
22 Counsel programs I know, is essentially a  
23 person who has a license to practice law in  
24 the state and can show some minimum level,  
25

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1 very minimal level of experience just  
2 objectively can get on the panel, and we're  
3 not in a situation where we take an  
4

5 application and decide whether to hire  
6 somebody or not, as you might be in a Public  
7 Defender office.

8 I think Assigned Counsel programs  
9 in general ought to look more at the quality  
10 of attorneys up front where you do have the  
11 luxury of having, let's say, more people who  
12 want to take cases than are necessary so that  
13 you can weed out some people who are obvious  
14 problems. We have had that in the past.

15 I know people applied to the  
16 program that I happen to know who weren't  
17 necessarily the type of person that I'd love  
18 to have on the panel but didn't have the  
19 authority to keep off the panel to begin  
20 with, had to wait until they made some  
21 mistakes before we could remove them.

22 MS. SIEGFRIED: Well, I obviously  
23 missed some of this but I was -- the Assigned  
24 Counsel attorneys make the determination of  
25 eligibility apparently; they have guidelines,

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1 right, but they get the financial information  
2 and do that. We heard earlier today about  
3 this -- if somebody already asked about this,  
4 then, you know, let me know but that people  
5 at jail ministry seemed to think there was an  
6 idea that an attorney would ask for an extra  
7 payment for extra work. When we got that  
8 clarified it seemed more like it might be an  
9 issue where maybe the person was on the  
10 borderline of being eligible for Assigned  
11 Counsel and the client somehow got the idea  
12 that -- I don't know how that could have  
13 happened but I mean, do you have any clue how  
14 something like this -- they might get this  
15 idea?  
16

17 MR. PARKER: I can tell you  
18 exactly. There are a couple of different  
19 scenarios that we're talking about here.  
20 First of all, let me say the attorneys don't  
21 really determine eligibility. The attorneys  
22 get the financial information from the client  
23 and then they submit that financial  
24 information to the Assigned Counsel Office.

25 If there is no question about the

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1 eligibility, it's okay, the person's  
2 eligible, there's no problem. If we have a  
3 question from the point of view  
4 administratively of our program about the  
5 eligibility, we'll then either work that out  
6

7 with the attorney or the client.

8 In some cases we do what you  
9 might call part-payment program or sliding  
10 scale where we would say, you have some  
11 assets. They're not sufficient to hire a  
12 private attorney in this case but they're  
13 sufficient to raise a question here. If you  
14 would pay \$10 a week or pay a certain lump  
15 sum to our office, then we would provide you  
16 with an Assigned Counsel attorney.

17 Now, again, that's done through  
18 our office. We do not want attorneys and we  
19 don't allow attorneys to say, well, pay me a  
20 hundred dollars and you'll be eligible for  
21 Assigned Counsel. That's not how it works.  
22 We have to have that separation. It would be  
23 too much of a conflict there.

24 Unfortunately I'm sure there have  
25 been instances when an attorneys have tried

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1 to get money from someone who is otherwise  
2 eligible. It is not accepted in our program.  
3 It's not accepted in state law. In other  
4 words, if you're -- under state law if you're  
5 assigned, you can't accept money from a  
6 client you're assigned to unless you get the  
7 permission of the assigning judge.  
8

9 Certainly there's sometimes are  
10 discussion between clients -- clients ask --  
11 frankly, I know because I've talked enough to  
12 them about it. They will ask attorneys like  
13 if you represent me on an assigned basis,  
14 will I get just as good a representation as  
15 if I paid you? And that really opens the  
16 door because to most attorneys that means,  
17 hey, we have a person who's got a choice  
18 here. This is a person who could pay me.  
19 Now, recognize, it's one thing if that  
20 question comes to you from someone who is on  
21 welfare, is charged with petit larceny. It's  
22 an entirely different circumstance, if that  
23 person drove up to your office in a Mercedes,  
24 is charged with possession and sale of drugs  
25 and, you know, looks to you like this person

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1 may have assets and resources, so I think you  
2 get a number of different answers to those  
3 questions.  
4

5 Sometimes it unfortunately  
6 results in some, you know, confusion. An  
7 attorney trying to give an honest answer may  
8 give an answer that is misinterpreted. I

9 listened to a tape one day. I had a client  
10 call me and tell me, one of your attorneys  
11 did something wrong. I want this attorney  
12 thrown off the panel. I think this was  
13 terrible. The attorney told me that he could  
14 get me off if I paid him but if I didn't pay  
15 him, I'd probably go to jail, and said he'd  
16 give me a much better representation if I  
17 paid him, and I want to make a complaint  
18 against that attorney. I told the person to  
19 come in.

20 The person came into my office.  
21 The person told me the story and then the  
22 person said, by the way, I taped it. I taped  
23 my conversations with that attorney and I  
24 want you to hear the tape, and I put the tape  
25 in my machine and I played the tape and the

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1 tape said exactly the opposite of what the  
2 client told me and the client was sitting  
3 right there and I said, I just listened to  
4 the tape. You asked the attorney three times  
5 if you could get better representation if you  
6 paid him and the attorney three times said  
7 no, and you're telling me that the attorney  
8 said that he would give you better  
9 representation.  
10

11 Well, frankly I don't know how  
12 these words got misinterpreted, but after  
13 listening to the client tell me that, after  
14 hearing the tape of the conversation, I now  
15 know that anything -- any interpretation in  
16 this area seems to be possible because that  
17 tape was as clear to me as an answer could  
18 be, but it was still misinterpreted by the  
19 client and I think some clients have a  
20 preconceived notion of what the answer to  
21 that question is going to be.

22 MS. BUCK: I just want to ask on  
23 the issue of advocacy for the lawyers on the  
24 panel, from your perspective, having the  
25 Assigned Counsel administration stand alone

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1 as contrasted to being under the supervision  
2 of a Bar Association, do you -- what is  
3 your -- what is your feeling about what  
4 that -- whether the Bar Association itself  
5 which has its own stature and credibility,  
6 what their involvement in advocating for the  
7 attorneys on the panel is, and do you think  
8 that it is a good idea, the separation.  
9

10 MR. PARKER: I think definitely

11 it's a good idea to have a separate  
12 corporation and all of the large Assigned  
13 Counsel Programs that I know of have done  
14 something of that sort, and I know Nassau  
15 County has done the same thing. I know Erie  
16 County has done the same thing.

17 We're still associated with the  
18 bar association. Our Board of Directors is  
19 selected, approved by the Bar Association.  
20 The board of the Bar Association is the  
21 members of our corporation. We essentially  
22 have to report to the Bar Association, but on  
23 the other hand, we have a Board of Directors,  
24 when we come to monthly meetings, the only  
25 issue on the table at those meetings are

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1 issues of Assigned Counsel.  
2

3 The problem with the Bar  
4 Association board overseeing this would be  
5 that we would have important issue and it  
6 would be one of maybe 20 issues before the  
7 board of the Bar Association, and many of the  
8 persons on the board of the Bar were not  
9 criminal attorneys, were not interested in  
10 this area; they were interested in something  
11 else, so it was difficult, much more  
12 difficult then to get issues heard and policy  
13 issues, making rules, doing things of that  
14 sort, even responses to issues that came up  
15 with the county. We can be more active, more  
16 reactive, more pro-active.

17 MS. BUCK: The question is  
18 whether the Bar Association is still actively  
19 involved in advocating for the Assigned  
20 Counsel Program as it was before?

21 MR. PARKER: Well, I think so.  
22 You heard David Hayes here this morning. You  
23 heard him talking about Assigned Counsel  
24 rates as president. I mean, we hear from  
25 them when we get any complaints from

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1 attorneys. Some of the attorneys, if they  
2 have something to say about something, we'll  
3 still bring it to the Bar board and we've had  
4 some issues this year in regards to that, so  
5 there's still communication back and forth  
6 and a sharing of information.  
7

8 I'm hoping that the Bar  
9 Association will take a more active role in  
10 terms of such things as the proposal for  
11 video appearances that's been proposed in the  
12 county, because I think that's an issue for

13 the Bar as a whole and not just the Assigned  
14 Counsel Program.

15 Sometimes we're too close to some  
16 of these issues that involve money with the  
17 county because we're going to the county for  
18 our funds.

19 MR. GRADESS: Two quick  
20 questions, if I might. What's the authority  
21 for the payment -- these are related  
22 questions. Let me ask you -- earlier today  
23 we had a series of questions about  
24 eligibility standards in this county. Where  
25 are they set? Who sets them? Where were

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1 they created, the standards for eligibility?  
2

3 MR. PARKER: John, as you know,  
4 there are no concrete standards for  
5 eligibility. We have a State statute and we  
6 have a Federal right to counsel and those  
7 control any eligibility issues. You're  
8 well-aware of many cases which have ruled  
9 that you can't have a set standard for  
10 eligibility. Can't be the welfare standard,  
11 can't be a set dollar amount. Most of the  
12 cases I've read, and especially those Federal  
13 cases, say that it has to be an individual  
14 determination based upon specific  
15 circumstances of the case, the assets and  
16 liabilities of a particular client, what  
17 they're charged with, et cetera.

18 So we can't -- we can't have a  
19 set standard; however, in order to administer  
20 a program where essentially we're opening 50  
21 cases a day looking at eligibility in those  
22 cases, if a clerical person in my office is  
23 going to be looking at those cases, I've got  
24 to give those people some kind of guidelines.  
25 What we use as guidelines is the same

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1 guidelines that are used for Legal Services  
2 Corporation. That would be the poverty  
3 guidelines of the Federal Division of  
4 Management and Budget; actually it's 125  
5 percent of the poverty guideline, and that's  
6 probably the guideline that's used by more  
7 programs in the country and in the state than  
8 any other in terms of legal aid, Assigned  
9 Counsel, et cetera.  
10

11 We use those to be inclusive  
12 rather than to exclude. In other words, that  
13 we find that about 90, 95 percent of the  
14 people that are Assigned Counsel come within

15 those guidelines and we can say, you're under  
16 those guidelines, your income is under those,  
17 no question. We don't have to go and ask you  
18 a whole lot of other questions, we don't have  
19 to go back to the judge, et cetera.

20 For people who are above those  
21 guidelines, that's where we look at those  
22 cases more closely. We very often sent those  
23 cases essentially back to the judge, for the  
24 judge's determination. Under State law it's  
25 the judge that makes the final decision. I'm

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1 not sure that's the best way to do it but  
2 that's the law we're stuck with in New York  
3 and have been.

4 So where there is a question, is  
5 \$1,200, for instance, as was mentioned  
6 earlier that somebody has in a bank account,  
7 going to disqualify somebody, depending on  
8 what the charge is. That situation may very  
9 well go back to the judge for the judge's  
10 determination.

11 MR. GRADESS: Is the judge then  
12 would determine that a weekly payment order  
13 would be made to your program or lump sum  
14 paid to your program or is that something for  
15 you to decide?

16 MR. PARKER: Could be either way.  
17 I may frequently tell someone if it's in  
18 question, look, what can you afford to pay or  
19 somebody says \$10 a week, we might accept \$10  
20 a week. In other words, if we can agree on  
21 that, then I don't think it has to go back to  
22 the judge. In some cases the judge will  
23 make, as part of an order of continued  
24 representation, a certain amount of payment.  
25

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1 It may be a weekly payment; it may be a lump  
2 sum payment. In some cases it's simply an  
3 order to the person to come to our office to  
4 work out a payment schedule. It's not done  
5 in a large percentage of cases. It's  
6 really -- and most, again, 90 to 95 percent  
7 of the cases there isn't an issue.

8 MS. HATHAWAY: I just have one,  
9 maybe you can clarify this for me, maybe not.  
10 I understand now there is a surcharge that is  
11 given to every inmate for what, especially  
12 felonies. I think it's felonies, and that  
13 they are charged a surcharge and they are --  
14 money is taken out -- whatever money is put  
15 into their account and/or -- whatever is left  
16

17 once they get out; they have to finish paying  
18 that. So what is -- how does that work in  
19 with the --

20 MR. PARKER: I'm not familiar  
21 with the details of that.

22 MS. HATHAWAY: I understand that  
23 is a state law now or mandated state law?

24 MR. EFFMAN: Let me fill in.  
25 It's a nonwaivable surcharge. It's \$155 on a

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1  
2 felony, I think it's \$95 on your average  
3 misdemeanor. If you get sent to state  
4 prison, they take it out of your inmate  
5 wages.

6 MR. PARKER: The problem we have  
7 with surcharges, which maybe is something  
8 that this commission should be aware of in  
9 terms of we have had cases where a surcharge  
10 has resulted in a warrant, a failure to pay a  
11 surcharge results in a warrant for someone's  
12 arrest; whereas, someone pleads to a  
13 misdemeanor, is given a conditional  
14 discharge, there's still a surcharge.  
15 They're told to pay the surcharge by the  
16 first of the next month. They don't pay the  
17 surcharge and the court feels they have no  
18 other charge but to then issue a warrant for  
19 the person and they arrest the person for  
20 failure to pay the surcharge and, you know,  
21 some of them -- obviously it's a no-win  
22 situation for everybody because it costs them  
23 more to arrest -- to look for the person,  
24 arrest the person and keep them overnight  
25 than the amount of the surcharge.

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1  
2 Jonathan, I wanted to answer --  
3 hold on, you asked me on Friday about some  
4 further information that you wanted and this  
5 was with regards to appeals cases and I know  
6 that's been discussed today and it's been in  
7 terms of the cutting of appeals, appeals to  
8 the Appellate Division and that used to be a  
9 significant problem.

10 When I've run our statistics,  
11 however, I find that it was a problem from  
12 '82 to '94 when approximately -- there was a  
13 33 percent reduction in the amounts that were  
14 requested by attorneys to be paid by the  
15 Appellate Division. For 1995, '96, '97 and  
16 '98, the total reductions for those four  
17 years is less than \$1,000 out of \$70,000 of  
18 bills submitted.



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It's been annoying to have an Appellate Court essentially clearly not follow, at least to me, what seems to be the state law on eligibility and continuously refer to a person being indigent or not

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instead of a person being able to afford counsel and I don't think their definition of indigent is the inability to afford private counsel.

MR. GRADESS: Thank you. We're going to call this hearing to a close. Thank you very much.

(6:00 p.m.)

\* \* \*