

1 mind the need to stop appearances that really
2 matter so long as it doesn't cost so much, that
3 it matters more -- the cost matters more than
4 what it is you're stopping.

5 I hope I haven't taken too much of your
6 time.

7 CHAIR HARRISON: Did you get any
8 responses to your e-mail?

9 MR. SCHOTLAND: Oh, yeah. None of them
10 knew anything. Sam Dash and -- I'm sorry, I
11 should have said that.

12 CHAIR HARRISON: Questions? Bob.

13 MR. TEMBECKJIAN: I have a question.

14 Yes, sir --

15 MR. SCHOTLAND: Roy, please.

16 MR. TEMBECKJIAN: Roy. Bob, please.

17 On the issue of -- and it's probably a
18 lot easier than Tembeckjian.

19 On the Canon 2 appearance of impropriety
20 questions, to follow up on the discussion that
21 John and I were having at lunch, in your view can

1 we isolate the problem to the title of the Canon,
2 as opposed to the substantive subdivisions of the
3 Canon? And to further the discussion on that
4 point, I would note that I'm unaware of any
5 judicial conduct commission that in enforcing
6 Canon 2, even though it might use the phrase
7 "appearance of impropriety", ever disciplined the
8 judge without reciting a subdivision by number or
9 the language of that subdivision in its decision.

10 As the example, if you're going to
11 discipline somebody for a Canon 2 provision you
12 might say for violating 2A, and then use the
13 language, "appearance of impropriety", because
14 that's what it's called.

15 Does the problem go beyond the title and
16 the, rather, lose application of the phrase, or
17 is there something within the Canon itself that
18 you think ought to be addressed to do away with
19 the potential of charging a judge with something
20 that is unclear?

21 MR. SCHOTLAND: I wish I could give you

1 an answer that is worthy of the question and that
2 is going to advance where you are already,
3 because I think you may be ahead of -- Jan will
4 know how remarkable it is if I say that some of
5 what he was saying earlier, at the end, this
6 morning, I agree with.

7 MR. TEMBECKJIAN: And after lunch I was
8 beginning to agree, too. So I think we're moving
9 in a way -- in a common direction.

10 MR. BARAN: I'll take the credit to my
11 own persuasiveness.

12 MR. SCHOTLAND: You had a softball case
13 there.

14 You're blessed. I don't know how much
15 you all have looked at George Cooney and this
16 memo from Ruth Woodrift of about a week ago, ten
17 days ago, on Canon 1 and 2 and code revisions. I
18 think this is a terrific memo. And I would not
19 presume to have the command of it that she and he
20 and probably all of you have.

21 I would make one comment, which is, I

1 didn't see White mentioned anywhere in the memo.
2 And what everyone says about all these cases, and
3 while I think Jan and a lot of other people in
4 misreading White -- and I'll come back to that in
5 a moment -- you can't look at these things
6 without putting the White filter on it. And that
7 certainly makes it even more important that there
8 be clarity.

9 MR. TEMBECKJIAN: Do you suppose that --

10 MR. SCHOTLAND: Is that responsive?

11 MR. TEMBECKJIAN: Yes. Thank you.

12 Do you suppose that commentary, as
13 opposed to dealing with the language as it's
14 existed since '72 would be an appropriate way of
15 addressing the issues, and, perhaps, a change in
16 the title, if not the substantive subdivisions?

17 MR. SCHOTLAND: My honest answer would
18 be, I would want to hear what Peter Moser wants
19 to put in black letter and what he wants to put
20 in commentary, because he's just so good on this,
21 the feel for that. He's really so soaked.

1 I'm not saying one -- everybody would
2 agree with him all the time, but that's where I
3 would start. And I think you're right to say,
4 you know, can't we take care of a lot of this
5 problem by commentary. And that's, of course,
6 exactly what I was trying to say in the first
7 part of my comments, which is, we are not doing
8 remotely enough with commentary.

9 When you explain -- when you bar
10 personal explanation of campaign contributions
11 and statements of support, you explain the one
12 and not the other. The job hasn't been done.

13 CHAIR HARRISON: Judge Wynn.

14 THE HONORABLE JUDGE WYNN: Roy, you
15 mentioned that in New York City, to some extent,
16 in how to provide some avenue of advice for
17 candidates. Are you suggesting that we look at
18 some provision that would create a safe harbor
19 for candidates, sort of ask this individual, this
20 person, then if it was later determined that it
21 was valiative of the code, they would be

1 exonerated because they followed that?

2 MR. SCHOTLAND: That would certainly be
3 a piece of it. I believe New York does have
4 explicit language. New York has an advisory
5 committee, I believe it's all judges, who advise
6 on ethics. And they have, I think, about 3,000
7 rulings, and they have just brought out -- in
8 fact, you may want to get it if you don't already
9 have, a -- about six weeks ago, they brought out
10 a handbook of advice to judges and candidates
11 about campaign conduct.

12 And they do, I believe, I think it is
13 mentioned even in the Feerick report, the
14 language, about if you have sought advice and how
15 much of a safe harbor that gives you. And maybe
16 some other states have better language and better
17 treatment. I haven't studied that. But, yes, I
18 think you're putting forward a very valuable and
19 important point.

20 THE HONORABLE JUDGE WYNN: Would that
21 also create another opportunity for discipline

1 for a candidate who has not followed that advice?

2 That's a question.

3 MR. SCHOTLAND: I understand that, but I
4 think it's more than a question.

5 CHAIR HARRISON: Okay. As a purely
6 projectional matter, in a case which I prosecuted
7 for the Commission, the judge in question
8 acknowledged that he knew that there was a
9 judicial advisory committee and not bothered to
10 call them, and I'm sure that exacerbated the
11 discipline.

12 Marv.

13 MR. KARP: In Illinois we do have the
14 sort of thing that's contemplated by the New York
15 recommendation. One of the additional things
16 that has been involved in that process is that
17 the judges, the candidates, are asked to sign a
18 pledge that they agree with the precepts of this
19 fair and honest election approach.

20 What do you think about that?

21 MR. SCHOTLAND: That's a voluntary

1 unofficial group, isn't it?

2 MR. KARP: Yes, sir.

3 MR. SCHOTLAND: Well, first of all, I
4 think having groups like that is absolutely
5 fabulous, and I think the one in Cook County is
6 just terrific.

7 Second of all, I find very savvy people
8 going both ways on the pledges. In Dade County
9 they use it, and it's been quite successful.
10 Some other counties in Florida have tried it and
11 it's been a bust. In Ohio, last year, there was
12 an absolutely major role played by a brand new
13 State Bar Committee in Supreme Court races, and
14 they tried a pledge, and I said that it was
15 overreaching in its language, and they couldn't
16 get any candidates to sign it. And they're
17 revising it and trying again, for the '04s.

18 Some of the pledges get overambitious.
19 Some of them, for example, Dade County, I think,
20 is an acknowledgment that you know the relevant
21 laws and have studied it. But I think much

1 better than that is what Ohio does, they're the
2 only one in the Country. They mandate an
3 education program. You have to, if you're a
4 candidate, judge, or seeking to be a judge, come
5 to a -- I think it's an afternoon or morning
6 course.

7 Florida doesn't require it, but they
8 have a fantastically good program, which opens
9 with a video by the Chief, and then it's presided
10 over by -- and around the state, different
11 groups, difference places, by the presiding judge
12 of the district and the local bar president. And
13 they have a Power Point that they use in all
14 these sessions, which ends up with some slides
15 about the cases in which judges were removed.
16 Maybe I should say a judge removed, and another
17 severely disciplined. And that latter is since
18 White.

19 So they really get it across. They have
20 wonderful -- they have the best material. Ohio
21 has the best program, but they don't have good

1 material. Florida may be -- is the best program,
2 except it isn't mandatory, but I think they get
3 everybody. And you need to get, not only the
4 candidates there, you need to get the -- somebody
5 on their committee.

6 And this was -- the first one was in
7 Alabama, in -- I mean the first one recently,
8 statewide, was Alabama in '98. And what they
9 found was that when they had a session with all
10 the candidates, it was the first time many of the
11 people running against one another were meeting
12 one another. That can't be a bad thing.

13 CHAIR HARRISON: Questions?

14 THE HONORABLE JUDGE WYNN: I have a
15 follow-up question, if you don't mind me keeping
16 you on the hot spot for a second longer.

17 On your cost analysis. It sounds
18 reasonable, but it seems to me what you probably
19 are is on some threshold level, where it is not
20 elimination of it either --

21 MR. SCHOTLAND: Yeah, right.

1 THE HONORABLE JUDGE WYNN: -- because
2 I'm sure, Richard Rosner and the others would
3 love to hear your analysis on it. But you are
4 looking at a cost/benefit analysis that is
5 something that is more than some standard of
6 conduct, we don't normally do that. I mean in a
7 drug world we kind of have this level and you're
8 just stuck with it, either you did or you didn't
9 do it. But is that what you are talking about --

10 MR. SCHOTLAND: You put it better than I
11 have, yes, unsurprisingly. No, seriously, that's
12 exactly what I'm -- I didn't even use the phrase
13 cost/benefit, but that's exactly what I'm trying
14 to say. We treat it as if we've got to protect
15 it again improper appearance, period.

16 THE HONORABLE JUDGE WYNN: What do you
17 suggest, in terms of now instead of just saying
18 appearance of impropriety, what language do we
19 use that would help import --

20 MR. SCHOTLAND: Because the language
21 might be the same. But, for example, what Mike

1 Gratz was writing about in the federal employees
2 getting gifts. He would push the threshold
3 above, I think, \$20 or something, because he put
4 all these resources into everything under the
5 sun. It doesn't make any sense.

6 Or take the recusal. I guess the exact
7 same language, but, I think, myself, \$500 in New
8 York State is much too low, on the one hand. On
9 the other hand they did do it in light of
10 experience. And they found -- so I'm going to
11 have to eat my words that I've just said -- they
12 found, I think, it was a \$341 average
13 contribution. So, although it's legal to give, I
14 think, several thousand, in fact, \$341 is the
15 average, than \$500 means you're already above.

16 Now, I'd go still higher, to at least
17 \$1,000. But they did come in below the legal
18 cap. And so long as you do it in the light of
19 experience. Usually people want to do this --

20 I remember in California somebody wanted
21 to say campaign contributions to be limited to

1 \$1,000. And in came -- this is a California
2 limited consultant. In came somebody who said,
3 you do this and you will not have a minority
4 member on the bench in California, because they
5 all depend on relatively small number of deeper
6 pockets. They don't have the big fund-raisers --
7 this is 12 years ago -- they don't have help. In
8 OJ Simpson's courthouse, there was no Black
9 judge. I say OJ Simpson, you know what I mean,
10 Lance Ito.

11 They don't have -- they said women and
12 minorities don't have the same network that the
13 white males have, especially in large firms. So
14 where do you put these thresholds.

15 But then you get to the New Yorkers
16 haven't addressed the problem of -- how about the
17 law firms. Lawyer Wynn didn't give over \$500,
18 but every other person in his firm gave \$500.
19 Indeed, that's part of the reason Lawyer Wynn's
20 on the case, because he didn't give -- they've
21 got somebody who didn't give to every judge. So

1 you've got to treat the firms. The only state
2 that is aggregated that way is Texas.

3 CHAIR HARRISON: Loretta.

4 MS. ARGRETT: I have a question and I'm
5 having some difficulty understanding why you view
6 this as a problem, and you have the example of
7 Mike Gratz who was in the Treasury Department,
8 and the example was this box of cookies, I
9 gather.

10 I guess I don't understand why it's a
11 problem. If you think it's over the threshold,
12 it's a box of cookies, you just don't eat the box
13 of cookies.

14 I mean, there are going to be gray areas
15 in every circumstance, even if you decide that
16 you're not going to accept the gray areas. Or if
17 it matters that much to you, it seems to me you
18 take the appropriate route to try to figure out
19 what it is.

20 I don't -- I guess I don't understand
21 why that is a problem as you view it.

1 MR. SCHOTLAND: What I'm trying to say
2 is what I think Judge Wynn has put in exactly the
3 right rubric of cost/benefit, and that is, I
4 don't think any judge is going to decide a case
5 for somebody because they got a \$50 contribution
6 or a \$100 contribution from a lawyer or a
7 litigant. I don't think any federal official is
8 going to go out of his or her way improperly
9 because of a \$25 gift or lunch.

10 MR. ARGRETT: Right. But -- I agree
11 with you on that.

12 MR. SCHOTLAND: So I'm talking about the
13 thresholds --

14 MS. ARGRETT: Oh, okay. Because -- all
15 right. Because if that's the only reason for
16 giving the analogy, then the question that you
17 raised is a question of the threshold and not --

18 MR. SCHOTLAND: Well, look at that
19 federal statute on federal judge's
20 disqualifications, however small.

21 MR. GEYH: Just to be clear on that, I'm

1 following up on Loretta. It seems that what
2 you're ultimately -- it seems to me that you're
3 really talking about a true cost/benefit
4 analysis, because what you're essentially arguing
5 is that having minimis appearance problems aren't
6 really appearance problems, aren't legitimate
7 appearance problems.

8 MR. SCHOTLAND: Well, I don't think that
9 is --

10 MR. GEYH: You have a legitimate
11 appearance problem, one that you regard as
12 legitimate.

13 MR. SCHOTLAND: When 87 percent of the
14 public say that they think a judge shouldn't sit
15 if anybody gave -- if a litigant or counsel gave
16 anything, I think we do have an appearance
17 problem.

18 MR. GEYH: But you used, I think, what's
19 totally ridiculous, and I think that that
20 implies, that in your judgment, it's not a bona
21 fide appearance problem.

1 MR. SCHOTLAND: Yes. And I wouldn't use
2 the word "ridiculous" if I was trying to persuade
3 and educate. But I do think we need to stand up
4 and say, look, what some people think are bad --
5 is bad conduct, isn't.

6 I mean, what if it's the costs of making
7 it proscribed are too high. Does that make --
8 Charlie, does that make --

9 MR. GEYH: No, I -- it just seems to me
10 that you weren't arguing the case for saying that
11 in some cases in which you would regard an
12 appearance problem as a serious one, that you
13 would still see situations in which that not --
14 ought not be something which you worry about,
15 that the costs are too high, and I think that --

16 MR. SCHOTLAND: Well, I'm not sure I --
17 if it's a serious one I'm not sure -- I'd have to
18 have a concrete example --

19 MR. GEYH: Right.

20 MR. SCHOTLAND: -- to make me think that
21 the costs are so high, I would swallow that one.

1 The minute you said it's a serious one, I expect
2 I'm going to say that's one which we can't
3 tolerate.

4 CHAIR HARRISON: Bob.

5 MR. CUMMINS: Roy, those who were
6 involved in Graylord have suggested that the
7 amount is not necessarily --

8 MR. SCHOTLAND: \$300?

9 MR. CUMMINS: -- the benchmark.

10 Right. So I'm not sure how one
11 defines --

12 MR. SCHOTLAND: But, sir, that wasn't an
13 appearance.

14 MR. CUMMINS: No, I know. Those were --
15 but those were -- there were a lot of
16 complicating factors, including the fact that all
17 of the judges, save for one, were impaired, and
18 no one dealt with that.

19 But I wondered if there is a way to
20 define it without putting a number on it, if
21 you're going to talk about thresholds?

1 And the other point that you made and I
2 wonder about, if, in reality it's a serious
3 concern, is the notion that, well, if a judge is
4 into a case so far, maybe even though there is a
5 disqualifying circumstance -- if I heard you
6 correctly -- that you might endorse the notion
7 that he stays in the case?

8 MR. SCHOTLAND: That is where the
9 federal code -- if he divests.

10 MR. CUMMINS: Right.

11 MR. SCHOTLAND: That's now the federal
12 code.

13 MR. CUMMINS: Right. And they amended
14 that. Whereas, one share of General Motors,
15 otherwise you were out.

16 But I wonder if that's really in reality
17 a serious problem, because, for example, every
18 time a new judicial officer is appointed in a
19 court that has any size docket, cases are
20 randomly assigned, it doesn't make any difference
21 if you were, the day before trial, you may now

1 try your case 18 months later with a new judge.
2 So those are real things. But I just wondered
3 how often we find circumstances where you'd have
4 to say, let's forget the disqualification because
5 the judge is so invested in the case. I'm just
6 not sure that there are going to be that many.
7 But I raise the question.

8 CHAIR HARRISON: Seth.

9 MR. ROSNER: One question for you. I
10 just want to be clear. Am I correct in
11 concluding that your issue with the appearance of
12 impropriety concept is limited to contributions,
13 gifts, contributions?

14 MR. SCHOTLAND: Well, I was using it as
15 an example in the recusal problem and what --
16 because of gifts and contributions --

17 MR. ROSNER: Well, I understand.

18 MR. SCHOTLAND: But what I was trying to
19 -- what I'm trying to submit is a broader
20 proposition, which, I think, Jim Wynn captured
21 perfectly when he said -- I think the federal

1 statute which says a federal judge can't sit if
2 he has a financial interest, however small,
3 that's done no cost/benefit analysis at all.

4 MR. ROSNER: Okay. I meant to say
5 broadly if we're talking only about money,
6 financial interest. We're not talking about
7 other appearance of impropriety problems, or are
8 we, or are you? That's my question.

9 MR. SCHOTLAND: Well, as I understand it
10 there's a case about a judge who was drunk and
11 refused to leave the bar and got arrested.

12 MR. ROSNER: Okay. Now we're getting to
13 another -- my question with respect to your
14 position, because I, at least, I'm tentatively
15 leaning to the notion of we really do need to
16 keep that.

17 MR. SCHOTLAND: And I didn't mean it
18 differently.

19 MR. ROSNER: Well, that's why I'm asking
20 you. Because you're not taking about appearance
21 of impropriety, trying to define that, as you

1 pointed out, means an encyclopedia.

2 MR. SCHOTLAND: Mr. Rosner, not one bit
3 means differently. As I tried to bring out that
4 I'm not saying when you're a hawk for protecting
5 against variances or a hawk against what's called
6 jury hot lash. Put that aside, don't -- there's
7 no free lunch. Saying we're going to take care
8 of appearance is not a freebie. That's all I'm
9 saying.

10 CHAIR HARRISON: Bob, and then we'll
11 move on.

12 MR. TEMBECKJIAN: Just to follow up on
13 the point that Bob Cummins has made. Is there a
14 point in which there -- a disqualification or
15 recusal ought not to result?

16 Hypothetically, if you have a case which
17 has been going on for two years, and the judge is
18 running for re-election in the midst of cases
19 pending, and one of the parties is unhappy with
20 the way the litigation is going, and makes a
21 contribution to that judge's campaign of \$1,000,

1 what happens under the Feerick proposal or those
2 situations where states are requiring a judge to
3 get off because the contribution has been made?
4 Do we need to worry about form shopping, and can
5 the code prevent that?

6 MR. SCHOTLAND: Nobody requires the
7 simple fact of a contribution. If the Feerick
8 \$500 were adopted and it was \$1,000 contribution,
9 that would trigger withdrawal if the other side
10 moved for it.

11 MR. CUMMINS: But you don't have to keep
12 the money. I mean it's not --

13 MR. SCHOTLAND: But, you know, one of
14 the things you ought to thinking about --

15 MR. CUMMINS: I mean you have a
16 committee. What do you do when the judge doesn't
17 know and he should not know, theoretically,
18 what's going on. If I were chairing your
19 committee, Roy, and I saw that -- I ought to have
20 my eyes open and my head on my shoulders about
21 what's before you, and you've got a hot case and

1 I say, hey, wait a minute, you guys are trying,
2 you know, oust you in a case, that's really going
3 to your detriment. You're not going to take the
4 \$1,000.

5 MR. SCHOTLAND: I regret to say that an
6 Eleventh Circuit panel, which drew out the limit
7 on personal soliciting, although it had not been
8 argued, it had not been attacked in the
9 complaint, it was not argued during the trial or
10 appeal or anything else. They just reached out
11 and threw it out. And to give you some idea as
12 to how much that may matter, Florida, where trial
13 judges run in contestable races, the total race
14 by trial judges in 2002 was 17 million dollars,
15 and they're running at more than that at this
16 time. Now, that is a lot of money. And there
17 are only 43 contested races.

18 MR. CUMMINS: Mark, just one quick
19 response that I want to follow up.

20 CHAIR HARRISON: Is that Weaver you're
21 talking about?

1 MR. SCHOTLAND: Weaver is the Eleventh
2 Circuit disaster, which -- it's just --

3 MR. CUMMINS: Because John Hilliker
4 makes a point that, theoretically, for example,
5 in Illinois, judges are not supposed to know how
6 much.

7 But I always wondered how really
8 credible that whole business was when that judge
9 has a reception for all his contributors who
10 don't hand the dough at that time, but he does
11 look around the room and he does remember who
12 shakes his hand.

13 MR. SCHOTLAND: And sometimes you even
14 have different hats for how much you gave or
15 different tag names -- or different name tags.

16 MR. CUMMINS: I mean, are we kidding
17 ourselves in terms of some of these so-called
18 proscriptions?

19 MR. SCHOTLAND: Look, it's better than
20 just saying, personally it's okay. I was talking
21 with Lee Cooper, the former president of the ABA,

1 and I said, do you ask for the contribution
2 before the oral argument or after? And he said
3 why not during.

4 I mean, you know, start thinking about
5 it. You have the jury back and you say, folks,
6 I'm running.

7 May I just go to one other thing and
8 then exit? I mean I know you need my exit.

9 I understand that there's been some
10 understandable talk about the White case and how
11 much that means to existing Canons. And it was
12 suggested I might address that and I said I
13 didn't think I could address that as usefully as
14 I might by just sending you a copy of a letter
15 that I sent to the Feerick Commission.

16 They had had Floyd Abrams tell them that
17 White means you can tear up things like pledge
18 and promises and everything else. And he said,
19 the New York court in Watson and Radd has not
20 heard the music. So I wrote a letter saying that
21 he's marching to a drum that's completely

1 cockeyed, and if I could I would like to send you
2 a copy of that.

3 CHAIR HARRISON: We would like to have
4 it.

5 MR. SCHOTLAND: Thank you. And thank
6 you very much for your time.

7 CHAIR HARRISON: Thank you very much.

8 And send us the Floyd Abrams --

9 MR. SCHOTLAND: Well, I don't have a
10 copy of his testimony.

11 CHAIR HARRISON: But you can send the
12 letter?

13 MR. SCHOTLAND: He didn't send a letter,
14 he testified.

15 CHAIR HARRISON: Oh, he testified.

16 MR. SCHOTLAND: I was then asked to
17 testify sort of in rebuttal, and I was teaching
18 at the time they wanted me to come, so I said
19 could I send a letter instead.

20 CHAIR HARRISON: Well, we'd rather have
21 yours.

1 MR. SCHOTLAND: Very well. I will send
2 you that without additional charge.

3 (Break taken.)

4 MR. FEERICK: How are you doing?

5 CHAIR HARRISON: I'm doing fine. How
6 are you doing?

7 MR. FEERICK: Fine, thank you. Nice to
8 see you again. It's been a while.

9 CHAIR HARRISON: We really appreciate
10 you shlepping down here in this weather.

11 MR. FEERICK: Well, I'm happy to. I
12 mean, this is important, what you're doing, and
13 we use a lot of your recommendations, in terms of
14 the judicial code. I don't know if you've had a
15 change to look at our document.

16 CHAIR HARRISON: I haven't.

17 MR. FEERICK: So what you're doing is
18 very important.

19 CHAIR HARRISON: Since we're making a
20 record of this, would you identify yourself and
21 tell us who you are and why you're here.

1 MR. FEERICK: Sure. Be very happy to.

2 My name is John Feerick. I'm a
3 professor at Durham Law School. I'm a former
4 dean of law school, and before that I was a
5 practicing lawyer for 20-plus years. And during
6 the 20 years that I was a practicing lawyer I
7 worked very closely with the Washington office of
8 the American Bar Association in connection with a
9 number of reform efforts with the Congress of the
10 United States. And I've chaired committees and
11 did different things in those years.

12 And, more specifically, last November or
13 December I received a call from the Chief Judge
14 of New York, Judith Kaye, and she wanted to meet
15 with me, and we sat around and she was telling me
16 that she was serving, then -- and perhaps she's
17 still serving, I don't know -- as President of
18 the Conference of Chief Judges. And that she was
19 quite upset about some of the -- some of the
20 information that she was receiving about judicial
21 elections in the United States, and was very much

1 concerned that kinds of coll -- that some of her
2 colleagues were sharing with her, could be
3 problems in New York, and it was important to get
4 ahead, so to speak, of the curve. And would I,
5 you know, chair a commission she'd like to put
6 together to promote confidence in judicial
7 elections. And I'll come back to that in a
8 second. And so for the next two or three months
9 we worked together on the membership of the
10 Commission.

11 But in that time period it seemed like
12 the world changed in New York in a sense. Not
13 that we haven't had corruption before, but they
14 had a lot of scandals in Brooklyn; there was an
15 attack on the Judicial Code by Judge Spargo.

16 And so our thought for the commission
17 was something that's long-term, set out a
18 long-term agenda became very important at this
19 time to lay out some ideas to enhance confidence
20 in judicial elections in New York State.

21 And so the Commission, itself, that was

1 formed is a rather unusual commission. It's a
2 large commission, but that's not why it's
3 unusual. It has 29 commissioners from every
4 judicial district in New York State. We have
5 something like nine or ten sitting judges,
6 including a former member of the Court of
7 Appeals, and a former presiding Justice of one of
8 appellate divisions; we have two former
9 counselors to Governors, Cuomo and Patacki; we
10 have former members of the legislature, albeit, a
11 former political leader in the Bronx, George
12 Freedman, who's in the legislature also; and a
13 State Supreme Court judge; then we have former
14 bar presidents; we have citizen participation.

15 And in creating the commission it was
16 very important to the Chief Judge that we not be
17 seen just as a bunch of do-gooders. That we be
18 seen as a real group in terms of understanding
19 the political processes, and maybe we could
20 develop a consensus that could become an engine
21 for improvements in the confidence in judicial

1 elections.

2 Now, why judicial elections instead of
3 the appointive system. And some of the people
4 who have commented, even before our recent
5 recommendations, have said, you know, we're
6 spinning our wheels. We're not really going at
7 the heart of the problem, which is to go from
8 elective to appointive. And I'll come back to
9 that in a second.

10 In New York State we have about
11 1,000-plus full-time judges; seven of whom are on
12 the Court of Appeals through an appointive
13 process that was adopted in 1977 against the
14 background of a lot of -- a very lot of jarring
15 kind of events. But 75 to 80 percent of the
16 judges are elected in the State; Supreme Court
17 Justices, that's our trial court; County Court
18 judges and so forth throughout the state.

19 If you look back, historically, we had
20 an appointive system until about 1846, and all
21 kinds of problems and scandals with the

1 appointive system. And so they changed the
2 Constitution to end up with an elective system.

3 And from 1846 until about 1977, when the
4 change was made in the Court of Appeals, there
5 were many occasions when the voters, through
6 constitutional conventions and other efforts, had
7 a chance to scrap the elective system, and upon
8 all of those occasions, there were -- the outcome
9 was to stay with the elective system. And there
10 were two major commissions that did the points in
11 the 20th Century about -- looked at it and
12 recommended reforms, but not changing the
13 elective system.

14 In the height of the corruption scandals
15 in the 1980s in New York, I was asked to chair a
16 very difficult commission, called the New York
17 State Commission on Government Integrity. We
18 were given an annual appropriation which lasted
19 for a few years of 5 million dollars; we created
20 the staff of 100 lawyers and investigators. I
21 served with six outstanding commissioners, Cy

1 Vance and Judge Brendanmeyer, came out of the
2 Court of Appeals, and other people that really
3 would have represented -- a Tiffany-kind of
4 standard of people that I learned from and relied
5 on.

6 And we spent three or four years having
7 public hearings. Some, very dramatic. We did a
8 lot of studies, and we conducted something like
9 23 investigations in the State and laid out a lot
10 of recommendations.

11 And all of the work of the Commission is
12 in this volume called Government Ethics Reform
13 for the 1990s. I remember when I came up with
14 the title that should be on the front of the
15 volume, I said this would probably be outdated by
16 this century; and how wrong I was.

17 In our report on judicial elections we
18 said, scrap the elective system. The first time
19 a major commission -- I'm not talking about bar
20 associations and other groups, but, you know, a
21 government-funded commission -- laid out the case

1 for an appointive system.

2 The reason I brought the book is because
3 it remains on the shelf. The leaders of our
4 State Government -- and it's probably going to be
5 on the shelf for a long time. So when the Chief
6 Judge appointed this Commission she said, I know
7 how you feel about the elective system, because
8 you and your commission said so in this volume.
9 She said, I don't want another volume. She said
10 we've got problems right now in terms of the
11 confidence in the judiciary. I'm not going to
12 rule out if you want to say something down the
13 line about some other system, but that's not what
14 I want you to do. What I want you to do is to
15 take a look at the elective system. It's not
16 about to change. We're not about to get a
17 constitutional amendment. We're not about to
18 change all the attitudes of the party leaders in
19 the State. Give me a -- give me the best we can
20 do in promoting confidence in the elective
21 system.

1 So we have not been looking at the
2 appointive system as such.

3 I invested four years of volunteered
4 time heading this commission, and I understand
5 the challenges and difficulties in changing the
6 system in New York. And in the Chief Judge's
7 view, it's just not doable. And it's easy to
8 come with another volume like that if you haven't
9 done a darn thing.

10 So for the last six months our
11 commission has looked at the elective system very
12 carefully. And we issued an interim report. We
13 have another six months, seven months, where
14 we'll look at other things we haven't commented
15 on in the interim report. And we've laid out a
16 lot of recommendations.

17 The most positive thing, from the
18 standpoint of those of us who are serving as a --
19 in the volunteer capacity, is that, maybe 90
20 percent that's in the report can be pushed by the
21 Chief Judge under her administrative and

1 regulatory authority along with the
2 administrative arm of the judiciary. And she has
3 said publicly the other day in a press
4 conference, she said to our commission, she says,
5 whatever you give me that I can make happen, I
6 make a commitment to you I'll make happen. I
7 just want your best thinking, collectivity. And
8 you have the best thinking, to date, that we
9 have.

10 There's a lot of detail that has to be
11 filled in terms of -- our central recommendation
12 is that, we have four judicial departments in New
13 York State that we should create, what we call
14 independent elective qualification commissions in
15 each department. And those commissions should
16 have an active mandate to develop the widest part
17 -- the widest possible pool of candidates for the
18 judiciary.

19 And the concept is, as it stands right
20 down, and we haven't put a lot of detail on the
21 commission -- and I'll explain that in a second

1 -- that no one should go on the ballot who isn't
2 found or viewed as well qualified. It's not
3 designed to replace bar processes or political
4 processes. It's designed to be a series of -- a
5 commission in each department, at least one, that
6 would be fairly reflective of the community of
7 that department that would have a mandate to have
8 outreach when a vacancy is created; to be mindful
9 of diversity, and that should be reflected on the
10 commissions; and, perhaps, persuade local party
11 leaders and others that they should not be moving
12 anyone through the system that hasn't been found
13 well qualified by this commission.

14 So that the idea was sort of a very
15 bare-boned thing. And what we're about to launch
16 for the next three or four months is two major
17 initiatives. We have four of our commissioners
18 who are very astute about the political process
19 of the State, who are formulating a strategy for
20 conversations with the political and party
21 leaders of the State.

1 And we have another group, that I'm
2 going to be particularly active with, developing
3 citizen focus group meetings throughout the
4 State. So at the end of that process, April,
5 March, we will have given everyone an opportunity
6 to participate, and we'll have our final
7 recommendations.

8 Now, what's not said in the document is,
9 how do you establish these commissions? What can
10 the Chief Judge do? She'll let us know. What
11 the party leaders aren't interested in is
12 changing their rules to include the concept that
13 you have -- if you have to be debted by these
14 commissions. Maybe a lot of people are well
15 qualified, and it's okay, particularly if you
16 want to capture more young, traditional, people
17 who have an interest in being considered for
18 judgeships.

19 So we're going to be mining, so to
20 speak, details of this concept over the next
21 three or four months. And some of the press, you

1 know, wanted to go right away. They wanted to
2 know, how do you make this happen? And we're not
3 ready to -- because we're not ready to speak to
4 that because we really want a partic -- we want
5 buy-in. And there are those who say you're
6 wasting your time, you're trying to get political
7 and party leaders to buy in.

8 On the other hand, there are others who
9 say, that even political party leaders are
10 sensitive to the fact that there's been a lot of
11 damage done to our judiciary in New York State,
12 and there's a need for the system to take some
13 steps to elevate confidence in the judiciary.

14 I've already met with about eight or
15 nine political party chairs in different parts of
16 the State, and to my pleasant surprise, a number
17 are not lawyers, a number are new, they're eager
18 to get behind something. Whether they work, only
19 time will tell.

20 The second part of our recommendations,
21 we have a number of changes to the judicial code

1 in New York, which is -- in terms of judges and
2 candidates for the judiciary enduring rules that
3 the administrative courts have adopted. So you
4 have rules that have teeth. And we've taken a
5 lot of the proposed amendments, took them out;
6 the outstanding work of this Commission, and
7 offered those changes. But it's not much
8 different from the 2003 amendments and things
9 that you will find in our proposed changes.

10 We did separate out the commit and
11 promise and pledges clauses into two provisions,
12 so that if one gets -- if one gets invalidated,
13 the other one is still there, rather than have a
14 hold-up. But that's just sort of at the edges.
15 You won't find, as I say, a lot of change from
16 ones you've proposed.

17 We do spell out, in the rules
18 themselves, the enforceable rules. What we see
19 is the compelling government interest and
20 independence, integrity and impartiality, and we
21 have -- we offered some definitions of those

1 terms. Not in the commentary of writing the
2 rules.

3 And we've taken your commentary, which
4 was not part of our rules in New York, and we've
5 made -- we've added commentary to all the rules
6 so that there will be even greater clarity to
7 judicial candidates of what's required by the
8 rules. So the commentary that you've developed,
9 it's been very helpful to our work.

10 We also have a number of provisions on
11 disqualifications, and it's going to hurt.
12 They're going to hurt. They're going to hurt
13 people who might think it's desirable to make
14 campaign contributions to judicial elections
15 because maybe that makes me more of a player in
16 the courts.

17 We have in there a provision that took a
18 -- it was a lot of debate in our commission about
19 it -- a provision that says, if a judge has
20 received \$500 or more from a party or a lawyer,
21 in that case, he's out or she's out. Automatic

1 disqualification.

2 We also require parties to share with
3 their adversaries contributions they've made to
4 the judge they're going to have the case before.

5 So there a lot of recommendations that
6 the Chief Judge and the Chief Administrative
7 Judge think have a chance of changing the whole
8 climate in the State. And it's not glitzy. If
9 you're looking for glitz, read the volume. But
10 there's -- you'll find that throughout the
11 report.

12 We also have been concerned about
13 candidates for the judiciary, including sitting
14 judges who are also candidates, attending
15 political functions where the ticket price is
16 quite substantial. So there's really no
17 relationship between value received, the dinner
18 or the lunch and what you've gone to, and the
19 amount that you're paying.

20 And it's been a long history in New
21 York -- and some of that's in this volume -- that

1 perceives that area as a channel for corruption.
2 And so we have some pretty hard recommendations
3 in there that make it clear that, you know, if
4 the price is \$500, there has got to be some
5 evidence that that's the cost of the function.
6 That can't be a vehicle for a political
7 contribution, which you're not allowed to have,
8 in any event, you know, under the provisions of
9 the code. So we've got -- we're going at that.

10 If a judge's committee is purchasing
11 some goods and services from different vendors,
12 right now that's being investigated by the
13 District Attorney of King's County who thinks
14 there's been a lot of corruption in that area.
15 He's trying to make that case right now.

16 We would require a certification from
17 anybody that provides a service to the political
18 committee of the judge, to the effect that the
19 cost, you know, represents fair market value.

20 So it's a little -- so it's -- you know,
21 it's not -- some members of our commission

1 thought it should be an affidavit, but we didn't
2 go that far. Again, we're just -- we're moving
3 into an area where we're trying to change
4 culture.

5 You will also find in the report all
6 kinds of recommendations that would make it more
7 apparent who's giving to judicial campaigns. We
8 have state-wide disclosure at a central place in
9 terms of who's giving to Supreme Court Justices.
10 We don't have any state-wide system, with
11 reference to the other judges in the State. The
12 press has a terrible time figuring out, even
13 though the party committees of the judges have a
14 requirement to file reports, who's giving to
15 those campaigns. The filings are in paper.
16 There's almost no electronic access to that
17 information in the State.

18 And even with respect to the Supreme
19 Court that has a central filing with the Board of
20 Elections, it's very difficult -- and I'm not a
21 computer buff, but I'm told by people associated

1 with our Commission, that's it very hard to
2 download. You can't -- even with the electronic
3 system, it's not quite as strong as it might
4 otherwise appear. So we have a lot of
5 recommendations in there that wants to put more
6 sunlight on who contributes to the campaigns of
7 judges.

8 We are also recommending the
9 establishment of a judicial ethics center. There
10 are a lot of recommendations in that. The Chief
11 Judge is very, very excited about that, and she
12 and the Chief Administrative Judge have told me
13 they're going to get to work to move that
14 recommendation sooner than later.

15 And we have recommendations in there as
16 to voter guides and the like.

17 In the aggregate, I would say, depending
18 on what happens with these recommendations, we
19 have a chance of, at least incrementally,
20 changing the climate and giving a little -- and
21 promoting some greater confidence in the

1 judiciary in the State. So that's what you'll
2 find in this. And I anticipate that, over the
3 next several months, and even in all of the areas
4 I mentioned, we'll have some refinements. People
5 will probably raise questions that we have to
6 respond to. But that's essentially where we are.

7 I hope I haven't gone on unduly long,
8 but it's -- for me it's a different kind of
9 public service. I've spent a lot of my life with
10 reforms that went nowhere. I've spent 15 years
11 sort of in the forefront of the ABA's effort to
12 change the electorate college system, and as I
13 say, spent a lot of years on this. And this is
14 the first time the head of an arm of government
15 says, wherever I can implement, I'm going to
16 ensure, you know, after a certain amount of
17 bedding, I'm going to make it happen.

18 So we've got a great chief judge who is
19 really committed to changing the system.

20 So I'm happy to receive questions.

21 CHAIR HARRISON: Thank you very much,

1 Dean.

2 Bob.

3 MR. CUMMINS: I think it's a great,
4 great report. Really terrific.

5 Who's going to fund the Campaign Ethics
6 and Conduct Center?

7 MR. FEERICK: That would be -- I mean I
8 thought it would be -- that would be -- it's one
9 of the questions that the Chief Administrator
10 will have to work out in terms of the judiciary
11 budget. But I think they're looking, right now,
12 certainly, at what can they do within their
13 present limited resources.

14 And that might be the kind of question
15 that, depending on what reactions we get from the
16 leaders of the legislature, that has to get some
17 attention.

18 We were, both -- the Chief Judge was
19 pleasantly surprised to read in the newspaper the
20 head of the assembly, Shelly Silver, if
21 accurately quoted, said she applauded the

1 recommendations of the Commission, and he said,
2 this is something that his body and the
3 legislature could work with.

4 CHAIR HARRISON: It's going to be funded
5 by judicial candidates committee, so I take it.

6 MR. FEERICK: No, I don't think so.

7 MR. HILLIKER: Yeah, I just wondered,
8 but about the -- is there any discussion about
9 giving to someone that takes a contribution by
10 law firms, and having that as a disqualification?
11 Is that an issue that --

12 MR. FEERICK: Yeah. We debated that.
13 We don't -- we have a statement in the commentary
14 that makes it clear that the mandatory recusal is
15 -- doesn't involve attribution of your partners.

16 But, on the other hand, there is another
17 provision, which you have in your model code,
18 that if, I, in a case, felt that there was reason
19 to believe impartiality of a judge was affected
20 by the contributions coming from my adversary's
21 firm, I can make a motion, but that's up to the

1 judge.

2 If there really is a reasonable belief
3 in his or her impartiality, they need to take
4 themselves out.

5 CHAIR HARRISON: Bob.

6 MR. TEMBECKJIAN: And I'd like to just
7 note that this is a sublime moment for me because
8 my former law school dean is in a position where
9 I can ask him questions.

10 And, in fact, the last time I saw Dean
11 Feerick I was with the chairman of my judicial
12 comment commission and testified before his
13 commission. So I'm happy to reverse the roles
14 for a moment.

15 I was wondering about the recommendation
16 of your commission on changing the pledges and
17 promises clause, which follows, to some extent,
18 the ABA model, as to whether you gave any thought
19 to not adding the limitation in that proposal to
20 adjudicative responsibilities? And is there some
21 concern or some guidance you might give us as to

1 an area of pledges or promises dealing with, say,
2 with administrative campaign promises if elected,
3 you can count on my putting democrats into staff
4 positions, that the adjudicative limitation might
5 leave us open to?

6 MR. FEERICK: I'd really need to be
7 frank with you and think about that. A lot of
8 the work in our commission, in that area, was led
9 by three members of the judiciary.

10 We have a Judge George Marlow, who is
11 the -- as you know is the co-chair of the
12 Judicial Ethics Advisory Committee that's been
13 dealing with this for many years, and Jim
14 Fariacoza of the Appellate Division, our second
15 department, and also Judge Paulezeno from West
16 Chester, sort of been -- have been working the
17 commentary within all these words. And I must
18 say I really am not into the fine point, and a
19 good point. But I'd be happy to go back and to
20 come back to you with maybe a communication, to
21 your Chair, with any additional thinking that

1 went on within the subcommittee.

2 That the work of the Commission, as you
3 may be aware of, we had a lot of commission
4 meetings. We had four or five commission
5 meetings, but the subcommittees did so much of
6 the work. There are three subcommittees. And
7 that particular subcommittee is chaired by Elaine
8 Barnett, whom some of you probably know from her
9 work at the ABA.

10 And I didn't attend every subcommittee
11 meeting. So there may be some legislative
12 history there that I could get from them and
13 share with you, which I'd be happy to do.

14 CHAIR HARRISON: I realize it's
15 impertinent to our work, but I can't help but ask
16 you, because there's a Times article about your
17 Commission report, suggested there was some
18 discussion about public financing of elections in
19 New York, but you're not --

20 MR. FEERICK: No. What we said in the
21 report -- there were a whole lot of subjects that

1 we have to comment on, I think, for our
2 credibility as a commission. One, of course, is
3 public financing.

4 And also there's a construct in New York
5 of -- or Supreme Court Justices of what they call
6 judicial nominating conventions. So there's no
7 sunlight on what goes on in the nominating
8 conventions, but that's where the political party
9 leader says to the delegates, this is the person
10 I -- not in all cases, and not -- you know, there
11 is a little -- sometimes it's not easy.

12 But we're sort of -- you know, we're
13 probably going to -- for certain we're going to
14 comment on it, because I think we're expected to
15 comment on it.

16 But in terms of public financing, we'll
17 comment on it. I wouldn't say we're running at
18 it, you know, at this point. But the interesting
19 think is that, that our recommendations that are
20 addressed to political contributions and
21 disqualification and disclosure and certifying

1 expenditures, might give more momentum to an
2 interest in public financing. And in the survey
3 we had conducted by the Masters, was just --
4 you're probably aware, a very fine group in New
5 York. Because, you know, I recognize you can't
6 build policy just based on a poll or a survey.

7 They indicated a lot of support for ways
8 to break the relationship between a political
9 contribution and the judge, because 80 percent of
10 the people surveyed believe that one's decision,
11 dealing with political contributors, is
12 influenced by the gift. So there may be some
13 kind of movement that way.

14 But, for myself, you know, having all
15 kinds of recommendations, not only for the
16 judiciary, for actually other officers of the
17 State, given the times we live in, I don't sense
18 a lot of political support, but, yeah, we -- I
19 don't know. I don't know where we're going to
20 come out of that.

21 CHAIR HARRISON: And, of course, the

1 contributors don't think it's doing them much
2 good, there may be a lot more public financing.

3 MR. FEERICK: Yeah. I think it may --
4 there may be a little more opportunity, and I
5 would think -- certainly, my mind is open.

6 THE HONORABLE JUDGE McKOWEN: I have a
7 question on whether commuters might think it's
8 good. The \$500 bright line has a lot of
9 attractiveness, but what about those firms or
10 lawyers that had a judge who they didn't want to
11 have a case at the time and contributed \$552. So
12 I'm just curious about that phenomenon, because
13 it would seem to me that that would be an obvious
14 approach.

15 MR. FEERICK: Yeah. We're going to have
16 at a lot of these kinds of questions over the
17 next few months. I mean you've got the whole
18 issue of, is there something we want to say about
19 attribution.

20 We had proposals around, within our
21 commission on that, but we didn't feel

1 comfortable with where we were in our own work.
2 And we're going to have -- as we indicated in the
3 report, we're really not finished with this area,
4 because there are a lot more subtleties and
5 refinements that will sort of come out of the
6 recommendation in the discussion period, which
7 will help us, maybe, in some additional views on
8 that basically.

9 Seth, I think I saw your hand up.

10 MR. ROSNER: No. Actually that was the
11 question that I had. I was interested in the
12 attribution issue, whether you had thought about
13 that?

14 MR. BARAN: I want my colleagues to know
15 that, notwithstanding, when you said you'd worked
16 on projects that didn't come to fruition, I'm
17 aware of the fact you and Sandy Calanbare, with
18 the help of Tom Schwartz, and if the group felt
19 they are responsible for the ABA's policy
20 position on campaign finance, which you created
21 in 1975 and which is still in effect to this day.

1 MR. FEERICK: Absolutely.

2 MR. BARAN: And that predated, with
3 great petulance, the outcome in the Buckholdt
4 decision. And it's a real tribute to your effort
5 back there that you came up with a solution that
6 not only was followed legislatively, but was
7 upheld by the Supreme Court of the United States.

8 MR. FEERICK: Thank you for -- I
9 wouldn't have remember that. I mean I remembered
10 it, but --

11 MR. BARAN: I think it's regrettable you
12 remember your failures but you don't remember
13 your successes.

14 MR. FEERICK: Just as a footnote to
15 that, I was a -- it was a young associate at
16 Staton Ops by the name of Tom Schwartz, who was
17 yearning to do something, and I had said to him,
18 how about helping us understand -- you know, I
19 was serving with Sandy and I succeeded him as
20 chair at that effort, and Tom came up with this
21 document that, as you've pointed out, you know,

1 that was used by the Supreme Court.

2 MR. BARAN: It's terrific. I became
3 chairman of that committee and then asked Tom to
4 join the committee as some member. So we're
5 doing the continuity of all that great work you
6 did in 1970.

7 MR. FEERICK: Thank you.

8 MR. BARAN: And my question is related
9 to this contribution issue in the context of
10 judicial races.

11 Is there a limit in New York on how much
12 a lawyer can give to a judicial candidate's race,
13 and is it more than \$500?

14 MR. FEERICK: Oh, yeah. You can give --

15 MR. BARAN: How much can you give?

16 MR. FEERICK: You know, I -- do you
17 know, Seth? I don't know --

18 MR. ROSNER: No.

19 MR. FEERICK: No, you -- there's no
20 limit. I mean there's a limit.

21 MR. BARAN: Of the overall -- was there

1 a reason why your commission didn't recommend a
2 lower contribution limit, instead of just
3 recusal?

4 MR. FEERICK: Well, we were going -- in
5 a sense that there's a -- there practically is no
6 limit, and it was a difficult recommendation
7 within the Commission, because you're saying to
8 the judge, you're out. And a lot of commissions
9 had a hard time with the recommendation.

10 But there was a substantial group within
11 the commission said we've really got to try to
12 change the world a little bit.

13 CHAIR HARRISON: Well, was there a
14 concern that that would create significant
15 administrative problems?

16 MR. FEERICK: No. I think the concern
17 was that there is an elective system, and the
18 only people that really support judges are
19 lawyers. And it shouldn't be making it difficult
20 for judges to compete by -- and then there were
21 some areas of the State where there's only one

1 judge, so lawyers in the area have made
2 contributions. And what do you do? A judge
3 can't sit.

4 So if you said, if you got any gift,
5 which was a recommendation within the Commission,
6 it would have been very difficult.

7 On the other hand, if you look at the
8 State, the number of gifts that are over \$500
9 aren't that many. And it's not putting --
10 obviously if you -- if you aggregated the
11 partners of the law firm you'd have a lot more
12 than \$500, as we know.

13 But there are gifts over \$500, but you
14 can go to different districts in the State. So
15 it has more of a change of working as a practical
16 matter. But I may be wrong. We would have to
17 wait and see.

18 But there was really no -- it was just
19 -- it was a hard -- and then saying for five
20 years. So if the judge, you know, in a five-year
21 period, you know, can't sit if you gave the

1 judge, in that five-year period, \$500, to the
2 judge's campaign or committee.

3 CHAIR HARRISON: Judge Neville.

4 THE HONORABLE JUDGE NEVILLE: Having,
5 too, come from the committee that actually
6 brought the revisions to the code that dealt with
7 the pay to play issue, we took the core version
8 after they indicated how much the -- would be the
9 number before the judge would have to be
10 disqualified. The core version, under 5C,
11 stated that the judge should instruct their
12 campaign committee, at the start of a campaign,
13 not to accept a campaign contribution for any
14 election that exceeded in the aggregate an amount
15 from "blank" for an individual or from an entity,
16 and that the -- recommended that it be correlated
17 to the earlier amount that we had.

18 And then, also, as to the -- some of the
19 things that you're talking about comes back to
20 me, just bits and pieces of the discussion that
21 we had when I wrote this. Is that -- you

1 recommended that there should be a central
2 location for depositing the information.

3 MR. FEERICK: Right now it does exist on
4 the State Supreme Court.

5 THE HONORABLE JUDGE NEVILLE: Not just
6 for appellate judges, but for all judges.

7 MR. FEERICK: Right. We've had -- that
8 recommendation is what -- and there's a lot --
9 there's a lot of specific recommendations not
10 intact. The people who worked in that part of
11 our report are very strong.

12 The Executive Director of the New York
13 City Campaign Finance Board, Nicole Gordon, which
14 has been most successful, I understand, in terms
15 of local government, the public financing system
16 in the country, in terms of local government,
17 she's chaired that subcommittee and knows what
18 she's had to deal with to try to get their system
19 to a sunlight system. And everybody who deals
20 with that agency knows it's a sunlight system.
21 So we're trying to mirror that with reference to

1 disclosure, in terms of the judiciary.

2 THE HONORABLE JUDGE NEVILLE: Okay. But
3 that's like putting in a part of the -- the idea
4 was trying to keep the campaigns from having
5 that.

6 MR. FEERICK: Some of this may be a
7 little more difficult. Some of this, I know,
8 will require legislation. This is not avoidable
9 to the judge.

10 CHAIR HARRISON: Okay. We're about to
11 wrap this up. Bob, you get to ask one last
12 question.

13 MR. TEMBECKJIAN: Okay. Dean Feerick,
14 on the question of mandating recusal if the
15 judge, in the course of a campaign, has made some
16 statement that would indicate a predisposition,
17 what would be an improper statement.

18 If the judge makes the statement or the
19 judicial candidate makes the statement and then
20 recuses, would you think that that would obviate
21 the discipline of the judge for having made the

1 statement?

2 In other words, in recommending the
3 recusal, would you suggest that the act of
4 recusal mitigates the initial statement, versus
5 if the judge makes the statement and doesn't get
6 off?

7 MR. FEERICK: I haven't thought about
8 the question and obviously I would not want to
9 give an opinion on it, but I'll give you a
10 reaction. There is a difference in my
11 terminology, get a reaction instead of opinion.

12 I would not want to punish somebody who
13 was doing -- who felt that it really could be a
14 question about a statement by saying that's
15 somehow evidence to be used against a judge. It
16 bothers me as a public policy. That's not to say
17 that it might not be a case where, maybe, that
18 means something, but I would come at it that way.
19 I really would need to be persuaded that -- you
20 really want people to go with their conscience,
21 and you really shouldn't be making that more

1 difficult than it is.

2 CHAIR HARRISON: Well, the context of
3 the question, I assume, was an earlier discussion
4 where there was a concern expressed that some
5 people might, with impunity, make statements in
6 the context of a campaign to get elected knowing
7 that they can arguably solve the problem or the
8 personal point of view by subsequently recusing
9 themselves. And, you know, can you -- is that --

10 MR. TEMBECKJIAN: Yes. More or less,
11 yes. We're at kind of a Watson -- matter of
12 Watson issue where --

13 MR. FEERICK: Interesting question.

14 MR. TEMBECKJIAN: -- the statements are
15 made, he gets elected and then recuses by getting
16 off the cases, the damage has been done.

17 MR. FEERICK: Well, the one area that we
18 haven't -- I mean we haven't finished on is -- as
19 you know, in New York State the bar has these --
20 that they ask for buy-ins, in terms of good
21 practices, and they comment. You know, the State

1 Bar in New York has done a really good job in
2 that area, and some of the local Bars. And we
3 have a lot of recommendation around in our
4 commission about the subject of oversight.

5 I don't know where we're going to come
6 out in that. You know, whether you take the
7 present system, which is largely voluntary by the
8 Bar, trying to get people to buy in to a certain
9 framework of the good practices. And Michael
10 Klein and others at the State Bar in New York
11 have really done a good job. He's a member of
12 our commission.

13 We had that area of -- we're looking at
14 that area from that standpoint. I'm not sure
15 where we're going to come out of that.

16 MR. TEMBECKJIAN: In that regard, the
17 interim report is an ingenious vehicle, because
18 it gives you several months to kind of vest these
19 ideas without presenting them as a fait accompli,
20 and as you say, the buy-in period takes place --
21 well, I think it's a very intelligent concept --

1 MR. FEERICK: Well, I think, if we are
2 successful, it's because of the Chief Judge. You
3 know, she -- her moral authority is enormous, and
4 her regulatory authority, collectively, with the
5 Administrative Board, is enormous. And she might
6 test the limits of some of that, in terms of what
7 she does with these recommendations. I don't
8 know.

9 MR. TEMBECKJIAN: By giving the
10 opportunity for people to participate in buy-ins
11 with -- it's really very, very clever.

12 MR. FEERICK: But it's a real effort.
13 You know, we're not that -- you know, we're not
14 going -- you know, it's a real effort. And I've
15 spoken to a number of the political party leaders
16 the other day when we were issuing the report. I
17 called them up and I let them know what was in
18 there, and I said I really wanted to come up and
19 -- only time will tell. Really, there's a whole
20 lot who don't -- nobody wants to give up power.
21 Right?

1 CHAIR HARRISON: Dean, thanks a million
2 for visiting with us, for coming down.

3 MR. FEERICK: Happy to. Thank you very
4 much.

5 CHAIR HARRISON: Maybe we'll be calling
6 on you again.

7 MR. FEERICK: And I'll try to respond to
8 the question, I really didn't -- this former
9 graduate had a real answer to it.

10 CHAIR HARRISON: A two-minute break.

11 (Break taken.)

12 CHAIR HARRISON: David, thank you for
13 your patience. And, now, if you'll tell us who
14 you are and why you're here and who you
15 represent.

16 MR. TEVELIN: Well, I just want to make
17 this clear. I'm the last witness on a lousy
18 Friday afternoon. I know my job. I'll try to be
19 the Mariano Rivera of closers here and get this
20 done quickly.

21 My name is Dave Tevelin. I'm the

1 Executive Director of the State Justice
2 Institute, and I will be talking about several of
3 the issues that I don't think, at least, the
4 previous two witnesses have talked about. But,
5 before I do that, why don't I give you maybe 30
6 seconds on what the State Justice Institute is
7 and what it does.

8 SJI was created by federal law in 1984,
9 for the purpose of awarding grants to improve the
10 quality of justice in state courts nationwide.
11 We have a board of directors that's appointed by
12 the President, confirmed by the Senate. There
13 are 11 members in all; six of them by statute are
14 state court judges; one is a state court
15 administrator; and four are members of the
16 public.

17 Now, despite that federal pedigree and
18 the fact that all our money comes from Congress,
19 in one way or the other, we're not technically a
20 federal agency, but really a nonprofit
21 organization. And if it makes it any easier for

1 you to put it in your frame of reference, we
2 really act and our statute is modeled after the
3 Legal Services Corporation. So we're kind of the
4 quasi federal kind of thing.

5 We've been operational since 1987. Over
6 that period of time, we have awarded over \$125
7 million to support well over 1,000 projects in
8 contemplation of that mission that I've described
9 to you. And because our mandate is as broad as
10 the responsibilities of state courts, we really
11 have had an opportunity to support projects in
12 every phase of the state courts, or including a
13 number of the issues that are directly within the
14 province of this Commission.

15 And as you might expect from the
16 composition of our board of directors, the issue
17 of judicial ethics is something they're very
18 interested in. I went back and counted and tried
19 pulling up the ones I felt were directly on
20 point.

21 We've supported 14 different projects,

1 aimed squarely at judicial ethics. One of those
2 grants, in fact, supported the ABA's revision of
3 this code in 1990. And we also awarded a grant
4 to the National Judicial College that same year
5 to train judges on the new code provisions.

6 I think the ones I just want to point to
7 you -- and I will be quick here -- are grants
8 that we've given to the American Judicature
9 Society, which, of course, has the Center for
10 Judicial Ethics. We've supported a manual on the
11 ethics of judicial election campaigns; a training
12 program on ethical standards for judicial
13 settlements; an ethics curriculum on judicial
14 relationships with the media; an ethics guide for
15 part-time judges; an ethics guide for judges and
16 their families; a think piece on ethics and
17 judges involving their roles off the bench; and
18 the most recent project was one that will give
19 some judicial education for judges about the
20 ethical concerns facing judges in pro se
21 litigation. And it's really those last two

1 issues that I would like to talk to you about.

2 The ethics of judges' participation in
3 off-the-bench activities and their role in --
4 just sort of the unique questions that arise in
5 the course of pro se litigation. And I'd like to
6 put them in the context of what I see as the
7 broader changes that are afoot in the way state
8 judges go about their duties, and may well be
9 performing their duties in the years to come.

10 Succinctly put, I think the
11 responsibilities of a state court judge in the
12 early 21st century do differ from the traditional
13 responsibilities of state court judges. Fairly
14 or unfairly, wisely or unwisely, judges today are
15 being called upon to participate in a variety of
16 off-the-bench collaborative activities to improve
17 the way the justice system serves the public.

18 Sometimes these initiatives are routed
19 in the state legislation, some may arise because
20 there was some local, political or judicial
21 controversy, or they may arise simply out of a

1 judge's frustration with the confines of their
2 traditional roles when they try to do justice in
3 a particular case.

4 But regardless of how they started, I
5 think that all of them are dedicated to make the
6 courts more responsive, more user friendly or, if
7 you will, more accountable to the public they
8 serve.

9 Since I've been at SJI, which is now 16
10 years, the scope -- even in that time -- the
11 scope of judges' off-the-bench activities has
12 really broadened. In the past a judge may have
13 been a member of a coordinating council that was
14 created to improve the way the criminal justice
15 system in a particular jurisdiction worked. But
16 now many judges are being called to participate,
17 and, in many cases, chair a much broader
18 collaborative effort that involves not only
19 government figures, but social service agencies,
20 private providers, even advocacy groups, in
21 projects that are aimed to improve the system's

1 response to issues that go well beyond the
2 confines of what may be before a court in areas
3 like family violence, child abuse and neglect,
4 drug abuse.

5 Now, I want to just step aside here and
6 give you what I would think SJI -- maybe SJI's
7 view, but I'm not here to give you SJI's view at
8 the moment. I'll give my view on what I think is
9 likely to happen here, and the context of this.

10 I do not believe that all of these
11 extrajudicial activities that draw courts into a
12 greater role in the community are bad. I see it
13 as part of a trend that hasn't, yet, culminated
14 or even leveled off, and it's not likely to do
15 either in the foreseeable future. It's a trend
16 that will also likely be accelerated by state
17 legislatures and even Congress, which continue to
18 pass laws that give judges broader
19 responsibilities in more areas.

20 Some of the impetus for these new
21 collaborative public service approaches come from

1 the judiciary itself, as I mentioned. More and
2 more judges feel that their traditional roles
3 aren't allowing them to really do what a judge
4 should do in a particular case. And that's led
5 to the creation of what the New York judges might
6 call problem-solving courts, drug courts,
7 community courts, other kinds of courts
8 specifically directed at a particular issue where
9 a judge finds himself or herself more and more
10 getting to what the roots are of the problem that
11 brought this person to court.

12 And it's not only growing geographically
13 as these courts spread across the country, but
14 substantively as well. For instance, in New York
15 again, in the Red Hook section of Brooklyn, there
16 is now a Red Hook Community Justice Center. That
17 it opens its doors to the entire public to obtain
18 the services that are available at the center.
19 In essence, you don't have to be a party to any
20 litigation going to -- in that court to avail
21 yourself of the services there. It's really

1 become the social service agency, if you will,
2 for that community of Brooklyn.

3 I think that many of these
4 collaborations succeed only because there's a
5 judge involved, and often only because there's
6 judicial leadership. The judge is often the only
7 figure in the room who has the neutrality, the
8 authority and the respect of the others to make
9 things happen. Without the judge's presence, the
10 collaboration would likely fail, or if it
11 succeeds, it will succeed at a real cost to the
12 judiciary. Because, once again, as I've heard
13 from judges over the years, it will be somebody
14 else directing how the court does its work. And
15 the court could be either playing an unwilling
16 role in an enterprise or the enterprise is going
17 to be doomed to fail.

18 So, again, looking at the Canons with
19 respect to this, it's my own view, again,
20 personally, that Canon 4 should be modified or
21 interpreted in a way that it would permit judges

1 to do what their duties now call upon them to do
2 in more and more jurisdictions, and will likely
3 call upon them to do in more and more
4 circumstances over the years ahead.

5 Canon 4C(2), by implication, says that a
6 judge may serve on a government committee or
7 commission that is concerned with "the
8 improvement of the law or the legal system or the
9 administration of justice."

10 I would encourage this Commission to
11 interpret those terms literally, in order to both
12 permit judges to take an active hand in shaping
13 the future of their own courts and to maximize
14 the prospects of a collaboration of success and
15 improving the justice system more largely.

16 Similarly, more and more people are
17 going to be coming to court without lawyers, and
18 not just because they can't afford them. They'll
19 be coming by themselves because they live in a
20 culture that has made self-reliance a virtue that
21 is easier to achieve than ever before. I want to

1 paraphrase Willard Hornsby, who several of you
2 may know, who articulated these sentiments first.
3 But, in so many words, what he said was, "without
4 anyone's help, Americans now pump their own gas;
5 they run businesses out of their home; thanks to
6 the Internet they do everything from diagnose
7 their own medical symptoms to record their own
8 albums; they sell anything imaginable out of
9 their houses; why shouldn't they think they can
10 represent themselves in court.

11 Now, these cases, of course, present
12 special challenges to judges. In the words of
13 Cindy Gray, the director of the Judicature
14 Society Center for Judicial Ethics, the role of a
15 judge in a pro se case remains "mirky and
16 contentious".

17 I recognize there is a serious policy
18 choice before you in deciding the need to
19 preserve judicial impartiality on the one hand
20 and assure meaningful access to the courts on the
21 other. And I, again, personally would encourage

1 you to err on the side of promoting greater
2 access. And here's why:

3 The state courts of this country hear
4 more than 95 percent of the litigation that is
5 convened -- conducted in this country. Their
6 civil jurisdiction runs the gamut from conflicts,
7 mass tort litigation, all the way down to parking
8 tickets. That means it's the forum where most
9 Americans really experience justice. More and
10 more of those Americans will be appearing without
11 counsel in the years ahead. And if they feel
12 that the judge has not given them a fair
13 opportunity to present their case, I believe the
14 system will suffer from what many critics of
15 greater judicial intervention in these cases
16 fear, a perceived lack of impartiality.

17 In my view it would be far better for a
18 judge to bear the perception by trying to
19 actively promote the understanding and use of
20 courts, than by restricting meaningful access to
21 them.

1 Or as one judge put it me in a recent
2 letter, "pro se litigants don't want detached,
3 decorous, disinterested propriety. Win or lose
4 they feel that they need -- they need to feel
5 that the judge cared about their case."

6 At SJI we've always tried to be
7 responsive to what the state courts of this
8 country tell us is important to them, and I've
9 tried to use my time to share that with you. I
10 know this is only -- these are only two of the
11 most important issues you have to deal with, but
12 I thought I'd give you my perspective on them.
13 And I'd be happy to take any questions. And I
14 thank you for the opportunity.

15 CHAIR HARRISON: Thank you, David.

16 Before I get to questions, do we have
17 copies of the two studies to which you referred,
18 the off-the-bench activities, and pro se
19 litigation, and if not, can we get them?

20 MR. TEVELIN: I can get you those. I
21 don't know if you're going to be hearing from

1 anybody at AJS, by I know Cindy Gray regularly
2 carries them around with her, but we'll get them
3 for you.

4 CHAIR HARRISON: There was a hand up
5 over here.

6 MR. ROSNER: We've lightly been over
7 this ground earlier today, and I wondered whether
8 caring about my case, from the viewpoints of the
9 pro se litigant, extends or equates to a judge
10 intervening to protect that pro se litigant from
11 a fatal error?

12 The example was given this morning, a
13 failure -- at the conclusion of a case to move --
14 to renew a motion to dismiss, which is lost if
15 it's not made at the close of the case.

16 MR. TEVELIN: In my mind, that should be
17 ethically permitted. I think there are costs to
18 the system, never mind the individual case. And
19 I can -- while it's true, the other side may feel
20 that the pro se litigant is just getting an
21 unfair advantage, in fact, he shouldn't be -- or

1 she shouldn't be punished for not knowing what
2 would be, I would say, more a technicality than a
3 rule of due process.

4 There are plenty of rules -- I'm sure
5 you could say any number of examples -- any
6 particular jurisdiction that, if invoked, would
7 result in the case being nonsuited if it was
8 brought by a lawyer.

9 But I think this may be an area where
10 you're going to need some judicial ethics
11 opinions and some guidance for judges. But to
12 me --

13 MR. ROSNER: Well, I'm asking for your
14 opinion.

15 MR. TEVELIN: Well, my opinion is that,
16 that in a circumstance like that, the judge
17 should be permitted to give that kind of
18 assistance.

19 MR. ROSNER: Is there a distinction
20 between that circumstance and the similar
21 scenario, but where one of the parties, the party

1 who fails -- who is failing to make that
2 necessary -- or renew the motion to dismiss, is
3 represented by an incompetent lawyer who just
4 blows it?

5 MR. TEVELIN: Well -- and I was thinking
6 of that as I heard your question, and I think
7 that some judges would bail out the lawyer, too,
8 and -- because they don't want the party to
9 suffer from the incompetence of the lawyer. I
10 think that's what my gut would tell me, we should
11 go also.

12 MR. BARAN: That happens all the time.

13 CHAIR HARRISON: Judge Wynn.

14 THE HONORABLE JUDGE WYNN: David, I was
15 listening very attentively to your proposal, I
16 guess, to modify Canon 4C to some extent, at
17 least to interpret broader the judge's desire to
18 participate in extrajudicial-type activities.
19 And I was thinking, you know, because of the
20 issue of it, it's much more representative than
21 it's probably ever been involving

1 African-Americans and minorities and women in the
2 process.

3 There are many more community-based type
4 judges who not only feel that it is something
5 they should do, I mean, they feel obligated to do
6 it. I mean you can live in the community where
7 you have problems you see continuously and not
8 address them to some sense, and I think that's
9 why you have it there.

10 But my question goes to maybe the
11 Arkansas case, where you've got Judge Griffin.
12 Judge Griffin used comments in there that, when
13 you read it, it looks like he's contextually out
14 of an area that he ought to be dealing with. I
15 mean he's talking to the coach of the Arkansas
16 basketball team. And that would be up to the
17 American, and he's addressing that to a
18 constituent group and saying that this is a
19 problem and you need to do something.

20 Within the context of community
21 activities and within his community, that is an

1 extrajudicial activity. It doesn't appear to be,
2 to many, appropriate to them, and the court went
3 the other way on different grounds. But how do
4 we address or, at least, identify those issues or
5 should we in a way --

6 MR. TEVELIN: Yeah. I'm not sure.

7 THE HONORABLE JUDGE WYNN: -- that would
8 be appropriate for extrajudicial activities?
9 Because within different groups it can be
10 interpreted very broadly.

11 MR. TEVELIN: Right. I think that
12 everyone would agree that the judge should not do
13 anything that would demonstrate a predisposition
14 to rule in a certain way on behalf of a certain
15 group.

16 Now, having said that, I appreciate that
17 there is not a bright line but a fuzzy line
18 separating those types of cases from the other
19 ones. And I think the other -- to me what we're
20 -- and I guess I'm looking at this more from the
21 judicial system perspective rather than the

1 litigant's -- but I, again, would err on the side
2 of saying, what would cause the public to gain or
3 lose confidence in the system, in looking at
4 those facts. And so I think it depends on a
5 factual -- fact -- specific fact-by-fact
6 consideration.

7 There I would say that the judge -- it
8 may be interpreted -- I'm not familiar with the
9 specifics of this case -- but the judge is trying
10 to curry favor with one side of this litigation
11 and, therefore, it may be a little -- it may be
12 worthy of censure or some kind of ethical
13 guidance to him.

14 But I think from the system's viewpoint,
15 if the judge can avoid creating the perception
16 that he or she is biased, one way or the other,
17 about the nature of the litigation or the
18 parties, the Canons ought to take a broad liberal
19 look at what judges can do.

20 CHAIR HARRISON: Jan.

21 MR. BARAN: Well, it seems to me that

1 all these issues keep bringing us back to this
2 question of whether the provisions of the code
3 should prohibit certain conduct or whether or not
4 certain conduct should result in recusal. And
5 this seems to be another one of those examples.

6 If the judges are increasingly involved
7 in these types of activities in their
8 communities, it seems that the code should be
9 viewed as no longer requiring a prohibition on
10 them -- or opposing a prohibition on them,
11 because it just seems that the role of the judge
12 is changing. But, if we do that, then there are
13 going to be certain potential recusal
14 consequences. Maybe that's the risk here for a
15 judge, is that, by taking on these additional
16 roles, they compromise their ability to sit on
17 cases when they come before them.

18 Do you have any thoughts on that?

19 MR. TEVELIN: Yeah. I mean the example
20 I'm thinking of, that would not be an appropriate
21 solution, which I think is the typical kind of

1 thing.

2 For instance, in many jurisdictions,
3 now, are set up coordinating councils to deal
4 with family violence in the community. And
5 judges are very often asked to be the head of
6 them, because what I said before, the sort of the
7 respect and neutrality that they bring to the
8 role.

9 Then, if a judge gets a family violence
10 case who happens to be sitting in that role, I
11 don't see that as grounds for recusal. Even if
12 the Commission came up with recommendations about
13 the broad societal response and that courts hire
14 staff to deal with family violence cases and
15 there should be new courts created where a judge
16 may be able to put his arms around an entire
17 family situation that happens to be in different
18 parts of the court and deal with family violence
19 as -- in the context of that, I don't see where
20 that causes the judge to be so impartial, or even
21 the appearance of impartiality, that he or she

1 should be recused of.

2 MR. BARAN: Well, is the risk not so
3 much that they're taking a generalized interest
4 in a particular subject matter, rather the risk
5 seems to be that in the course of their
6 participation in that activity they come across
7 cases of individuals that, then, later on wind up
8 being in front of them in court. Does that
9 happen? Is that where --

10 MR. TEVELIN: No. Maybe that's just
11 part of judicial education. There's more to know
12 about being a judge than what you learn in a law
13 book. And particularly -- and this all feeds
14 back to the other issue, where you have judges
15 who are elected and the community has certain
16 expectations of a judge, and the judge, for his
17 own or her own political survival, needs to be
18 responsive and aware of what's going on in the
19 community, serving on those kinds of coordinating
20 groups or coalitions is part of what informs the
21 judge about his duties.

1 MR. BARAN: Well, if I could just pursue
2 this. I'm trying to understand the issues that
3 are confronting judges these days.

4 I assume in the course of a judge being
5 active in this type of group on domestic
6 violence, will come across individuals who say,
7 you know, I've been the subject of domestic
8 violence.

9 CHAIR HARRISON: Or I've been the
10 abuser.

11 MR. BARAN: Or I've been the abuser.
12 Now, what happens if that same individual later
13 winds up in a case before that judge?

14 MR. TEVELIN: If what they've testified
15 before had nothing to do with the case that is
16 ultimately brought before them, I don't see a
17 problem. If the judge is involved in a case
18 where the judge is a preceding judge of a court
19 that is hearing that case, then that judge -- and
20 it is pending at the time that person testifies
21 -- then I could say the judge should probably

1 recuse, just for appearances sake. But I don't
2 think that's typically the case.

3 CHAIR HARRISON: Other questions?

4 MR. TEMBECKJIAN: Yes.

5 CHAIR HARRISON: Bob.

6 MR. TEMBECKJIAN: In some of the -- this
7 growing breed of specialty courts that you were
8 referring to, such as the New York Drug Treatment
9 Court, the modus operandi of the court is
10 different than what we would ordinarily expect in
11 a traditional courtroom. For example, in the
12 drug treatment court, the judge's approach is
13 typically to read the riot act, to be extremely
14 stern, to act in a way that might otherwise be in
15 conflict with the obligations to be courteous, be
16 patient with the people who are appearing before
17 the judge. Because that's the whole point of
18 this kind of diversionary program.

19 How, if at all, can the code address
20 that issue without separating itself, in terms of
21 its applicability to, this is the code as it

1 applies to the traditional court, but when you
2 get to some of these others, the obligation to be
3 courteous and patient no longer applies?

4 MR. TEVELIN: With all deference, and
5 you would happen to have asked a lawyer a
6 question, I'm going to differ with your question.
7 I don't think the premise of your question's
8 correct, actually, in two respects.

9 One is, that a lot of judges who now
10 engage in these specialty courts, they're doing a
11 justice the traditional way courts did operate
12 before it became an assembly line operation and
13 you just had to take the papers and keep moving.
14 But the judges did have a chance to communicate,
15 to educate the public, educate the parties to
16 spend time.

17 And the second thing is, I don't
18 think -- well, although your -- I've been in New
19 York drug treatment courts and I've seen drug
20 courts around the country, and there are times
21 when the judge is stern and scolding. There are

1 times when the judge comes off the bench and hugs
2 the client. There are times where, you know,
3 it's a graduation ceremony and there's kisses
4 blown. Which is not too much different than what
5 maybe does happen at a normal sentencing.

6 If the judge feels like he's got to be
7 stern with a defendant, he's going to point his
8 finger and throw away the key, blah, blah, blah.
9 Other times he might say, I'm going to give you a
10 break and here's why, you know.

11 I mean I just don't see that as so much
12 difference than what happens in a traditional
13 courtroom.

14 So did I answer your question by dodging
15 it entirely?

16 MR. TEMBECKJIAN: No, no. I mean as a
17 matter of fact, it's an argument I've heard in
18 New York, is that some of these courts are a
19 different breed. And so in disciplinary work we
20 have to treat them differently, and the standard
21 that we try to impose, or reach, is in context

1 was the judge patient, dignified and courteous.
2 And the fact, we've never disciplined anybody in
3 one of those courts.

4 But we are conscious of being careful
5 not to assume that it's going to be the same way
6 there as we might expect it to be elsewhere.

7 MR. TEVELIN: Yeah. And I would
8 understand the need to have one rule for all
9 judges.

10 MR. TEMBECKJIAN: Because even by the
11 hugging example, if I were to walk into a
12 standard courtroom and see the judge come off the
13 bence and hug the defendant, I would think, this
14 guy got a break because the judge and he are
15 neighbors or there's some relationship there
16 beyond judge and the defendant.

17 CHAIR HARRISON: Margaret.

18 THE HONORABLE JUDGE McKOWEN: One of the
19 things I've heard from lawyers about looking into
20 the access of justice, speaking of that, there's
21 certain kinds of ex parte contact that might be

1 more appropriate in the sort of a standard
2 community role. But nobody's really defined what
3 kind of things they might be, and I'm wondering
4 if we should be alert to anything in particular
5 that you think actually would fall under the
6 rubric of what might be an ex parte contact, but
7 that would be more acceptable because it's been
8 more of a community contact?

9 MR. TEVELIN: No, I don't have a good
10 example. I'm not sure I'd be able to give you
11 too much help about that. I mean the typical
12 thing I think that happens is, the judge will
13 call the one party up to the bench and say, you
14 might want to, you know, do this instead of that,
15 protect yourself, and then announce from the
16 bench to the courtroom, this is what he said.

17 But I really -- I guess that hasn't
18 presented itself in any projects we've funded.

19 CHAIR HARRISON: Any other questions for
20 David?

21 THE HONORABLE JUDGE NEVILLE: Just in

1 quick response. I'm trying to think of where it
2 would come up in domestic violence prog --
3 systems and they're talking to victims and they
4 want to come up and tell you something, they
5 control them, but they don't want to say it in
6 front of the defendant, in the presence of the
7 staff and the attorney, so they want to come up
8 there and tell you. And I mean you want to be
9 able to know and be fair and not do anything that
10 would, you know, create any more violence.

11 I'd have to tell them, you know, we're
12 going to invite the prosecutor and the lawyer,
13 you know, I would want to be able to do it in the
14 court, but it's not appropriate for me to hear
15 testimony without their presence.

16 MR TEVELIN: Yeah. And what that brings
17 to my mind, quickly, is that, in a lot these
18 problem-solving courts, a lot of what goes on in
19 the case happens at the bench, not in open court,
20 which they might just ask the lawyer or the pro
21 se person to come up and say, you know, off the

1 record, this is what's going to happen if I do
2 this; do you want me to do this, do you want to
3 do that, but the other side is present.

4 THE HONORABLE JUDGE NEVILLE: Correct.
5 It's just not public.

6 MR. TEVELIN: It's just not public.
7 It's not the usual decorum.

8 THE HONORABLE JUDGE NEVILLE: Yeah. But
9 some judges are sort of like alluding to this.
10 So that's what I'm trying to get my hands around
11 as to how it might happen.

12 CHAIR HARRISON: Anything else?
13 David, thank you very much.

14 MR. TEVELIN: I tried to get you out of
15 here at 3:30.

16 CHAIR HARRISON: Well, actually, we're
17 not getting out of here, we're just -- now we're
18 going to start to assimilate some of what we've
19 heard today.

20 MR. TEVELIN: Well, good luck.

21 CHAIR HARRISON: But we really

1 appreciate you taking the time to come and visit
2 us.

3 MR. TEVELIN: Okay. Thank you for the
4 opportunity.

5 CHAIR HARRISON: Eileen just asked if we
6 think we'll need the court reporter. I think in
7 fairness we ought to send the court reporter
8 home. It's been a long day, thank you very much.

9 (Whereupon, the public hearing
10 portion and roundtable discussion was concluded
11 at 4:00 p.m.)

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1 STATE OF MARYLAND

2 SS:

3 I, ETHEL M. COATES, a Notary Public of the
4 State of Maryland, do hereby certify that these
5 proceedings took place before me at the time and
6 place herein set out, and the proceedings were
7 recorded stenographically by me and this
8 transcript is a true record of the proceedings.

9

10 I further certify that I am not of counsel to
11 any of the parties nor an employee of counsel nor
12 related to any of the parties nor in any way
13 interested in the outcome of this action.

14

15

16 As witness my hand and notarial seal this 30th
17 day of December, 2003.

18

19

20 My commission expires

21 December 1, 2004

Notary Public

