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INTERBRANCH COMMISSION ON JUVENILE JUSTICE
PUBLIC HEARING

BEFORE: HONORABLE JOHN M. CLELAND, CHAIRMAN
TOD C. ALLEN, MEMBER
VALERIE BENDER, MEMBER
HONORABLE JAMES A. GIBBONS, MEMBER
KENNETH J. HOROHO, ESQUIRE, MEMBER
JASON J. LEGG, ESQUIRE, MEMBER
ROBERT L. LISTENBEE, ESQUIRE, MEMBER
GEORGE D. MOSEE, JR., ESQUIRE, MEMBER
HONORABLE JOHN C. UHLER, MEMBER
RONALD P. WILLIAMS, MEMBER
HONORABLE DWAYNE D. WOODRUFF, MEMBER

DATE: FEBRUARY 1, 2010, 9:54 A.M.

PLACE: PENNSYLVANIA JUDICIAL CENTER
601 COMMONWEALTH AVENUE
HARRISBURG, PENNSYLVANIA

APPEARANCES:

BY: DARREN BRESLIN, ESQUIRE
FOR - COMMISSION

DONNA E. GLADWIN, REPORTER
NOTARY PUBLIC

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1 CHAIRMAN CLELAND: Good morning. I am John
2 Cleland, a senior judge of the Superior Court of
3 Pennsylvania and chairman of the Interbranch Commission on
4 Juvenile Justice.

5 Today we begin the second day of hearings held this
6 week in Harrisburg to address the suggestions and
7 recommendations of various groups and organizations to deal
8 with the Luzerne County juvenile justice scandal and its
9 fallout in numerous ways.

10 Yesterday we heard testimony regarding the juvenile
11 defense and ethical and victim issues. And today our list
12 of distinguished witnesses includes representatives of the
13 Pennsylvania Bar Association, Pennsylvania For Modern
14 Courts, and the Judicial Conduct Board.

15 Our current plan is to hold a final day of hearings
16 in Wilkes-Barre on February 25th, although that could change
17 as events develop.

18 The other members of the Commission joining us here
19 today are Tod Allen, Director of Court Advocacy of the Crime
20 Victim Center in Erie; Valerie Bender, Senior Research
21 Associate at the National Center for Juvenile Justice in
22 Pittsburgh; Kenneth Horoho, a Pittsburgh attorney and former
23 president of the Pennsylvania Bar Association; Magisterial
24 District Judge James A. Gibbons of Lackawanna County; Jason
25 J. Legg, District Attorney of Susquehanna County; Robert

1 Listenbee, Chief of the Juvenile Unit of the Defender
2 Association of Philadelphia; George D. Mosee, Jr., Chief of
3 the Juvenile Division and Deputy District Attorney of
4 Philadelphia; Senior Judge John C. Uhler of the Court of
5 Common Pleas of York County and former president of that
6 court; Ronald P. Williams, Regional Director of the
7 Pennsylvania Department of Agriculture and former county
8 commissioner in Wyoming County; Judge Dwayne D. Woodruff,
9 Juvenile Court Judge from Allegheny County; and Darren
10 Breslin, counsel to the Commission.

11 Our first witness this morning is Clifford Haines.
12 Mr. Haines is president of the Philadelphia law firm of
13 Haines & Associates and currently serves as the 115th
14 president of the Pennsylvania Bar Association.

15 He's also a former chancellor of the Philadelphia
16 Bar Association. He's active in a variety of professional
17 and civic organizations in the Philadelphia area.

18 Mr. Haines, welcome. If you'd please stand to take
19 the oath.

20
21 CLIFFORD E. HAINES, called as a witness, being duly
22 sworn, testified as follows:

23

24 MR. HAINES: I do.

25 CHAIRMAN CLELAND: Thank you. Mr. Haines, welcome,

1 and you may proceed.

2 MR. HAINES: Thank you. Good morning, Chairman
3 Cleland and members of the Interbranch Commission. I want
4 to thank the Commission for allowing the Pennsylvania Bar
5 Association to share some thoughts with you today as you
6 continue your work of investigating the events that have
7 been reported about the justice system in Luzerne County.

8 I want to particularly thank Ken Horoho, our past
9 president, who arranged for this appearance. It is normal
10 for me to speak extemporaneously, and so I'm a little out of
11 my element this morning because I do have prepared remarks.

12 And for the benefit of those who have already had a
13 chance to see those remarks, I'm going to stick to the
14 script. If for some reason you feel compelled to interrupt
15 me and ask questions, I welcome that. Obviously I will be,
16 at the conclusion of the remarks, prepared to answer any
17 questions that you may have.

18 For the benefit of those of you who may not be
19 familiar with our organization, the Pennsylvania Bar
20 Association is comprised of 29,000 lawyers from across the
21 state. It is a voluntary organization. In 1997 the Supreme
22 Court of Pennsylvania, by authority of a Pennsylvania
23 statute, designated the association as the organization most
24 representatives -- representative of the legal profession in
25 Pennsylvania.

1 We regularly offer testimony before and give
2 guidance to the legislature and speak out on issues
3 important to the judiciary and the justice system. Despite
4 that position we have struggled with what to do or say about
5 the drama that has unfolded in Luzerne County.

6 In truth, we have no power to do anything, and we
7 have been hard pressed to know what to say. There has been
8 a paucity of what I call the true facts. What we know
9 started with the conditional guilty pleas of Judges
10 Ciavarella and Conahan, pleas that were subsequently
11 rejected by the Federal Court.

12 From when the pleas were conditional and until now
13 both judges are cloaked with the presumption of innocence
14 despite what appears to be overwhelming evidence against
15 them. As much as we want to condemn their conduct, it is
16 hard to do that in the context of the presumption they
17 enjoy.

18 As lawyers we are the bulwark of that rule of law
19 which we are compelled to follow, but does not always
20 constrain others. While the media has reported admissions
21 and other information about this situation, we have been
22 hard pressed to find concrete answers to precisely what
23 happened in Luzerne County.

24 What we know is what we read in the papers. And
25 while I don't doubt most of what has been printed is

1 accurate, we cannot, as the organized bar, let what is
2 printed take on the mantra of the true facts.

3 The United States Department of Justice has been
4 notorious for its reticence to comment on criminal
5 investigations that are ongoing. In this instance that
6 policy has, in my personal view, caused more harm than good
7 to the people of Pennsylvania and to the justice system.

8 At a time when society demands more openness from
9 its government and open records laws proliferate, we have
10 heard no word from the Department of Justice about what is
11 going on in Luzerne County. Rumors of more to come, rumors
12 of target letters sent to lawyers last summer, and rumors of
13 FBI agents buying homes in Luzerne County only prolong the
14 belief that corruption is ongoing. And they make it very
15 difficult to remove the dark cloud of suspicion and distrust
16 hanging over those good lawyers and honest judges who have
17 adhered to the law in Luzerne County.

18 The situation reminds me of Franz Kafka's *The Trial*
19 in which the protagonist, Joseph K., is arrested by
20 unidentified agents for unspecified crimes and over the
21 course of a year mentally deteriorates awaiting the outcome
22 of unknown charges.

23 I believe the Department of Justice owes the people
24 of Pennsylvania more than its utter silence. Although
25 formal charges against Judge Conahan and Ciavarella became

1 public over a year ago, there is not, to date, a trial
2 scheduled.

3 I would call on this Commission to seek out greater
4 transparency and explanations from the Department of
5 Justice. The Pennsylvania Bar Association has been a long
6 time supporter of the concept of judicial independence.
7 Since 1998 we have had an active Judicial Independence
8 committee which seeks to promote increased public
9 understanding of the justice system and judicial decisions.

10 As recently as 2007 the Pennsylvania Bar
11 Association led the defense of retention judges from
12 baseless attacks because these attacks threatened the
13 independence of the judiciary. We adhere to the principle
14 that judges must be free to perform their duties without
15 unfair criticism and attack.

16 We have taken that principle to the point where we
17 believe it is our duty as officers of the court to actively
18 defend the judiciary, and we will continue to do so where
19 warranted. The situation in Luzerne County, however, did
20 not, of course, allow us to do that. Principally because we
21 are not talking about the concepts relevant to independence,
22 for independence never incorporates criminality.

23 To say that lawyers were disheartened would be a
24 polite understatement. Revulsion is probably closer to the
25 reaction. Revulsion because any failing of the justice

1 system, particularly one involving abuse of power and
2 independence, inflicts a scar on the integrity of the system
3 and is another stake in the heart of proud lawyers who
4 believe they follow the concept of equal justice and are in
5 a constant battle for their own reputations which are so
6 often the subject of groundless attack and criticism.

7 Unfortunately, as an organization the Pennsylvania
8 Bar Association is not in a position to either determine the
9 root cause of what went wrong in Luzerne County or to do
10 something directly about it. Despite my earlier comments
11 about the presumption of innocence, the apparent admissions
12 by one of the judges, the conditional plea, and resignations
13 is evidence that something did go seriously wrong. But it
14 is in the hands of this Commission and those charged under
15 statute and our state constitution to take action.

16 This, of course, does not mean that we can't and
17 won't make suggestions of safeguards to help ensure that the
18 situation and events in Luzerne County are not repeated.

19 Judicial accountability is a term that has received
20 increasing attention in the legal community. Accountability
21 of our courts to the rule of law and the constitution is, of
22 course, essential to an effective system of judicial
23 administration.

24 A major research study of public opinion conducted
25 in 2005 found that although 94 percent of persons strongly

1 agree their courts should be strong and free from political
2 influence, 62 percent of those surveyed believe the courts
3 should be held accountable to the rule of law and the
4 constitution.

5 The Pennsylvania Bar Association's support of
6 judicial independence has always been tempered by the
7 dependence of that concept on judicial responsibility. No
8 one is entitled to independence who cannot fulfill the
9 responsibility of that principle.

10 The election of judges in the political realm is
11 not a test of responsibility, a subject that is at the
12 moment more properly addressed by Pennsylvanians For Modern
13 Courts and Lynn Marks who will be speaking to you after me.

14 But we are rapidly moving in the direction of just
15 such a test. In 17 states we find differing forms of
16 judicial performance evaluation. New Hampshire's Supreme
17 Court has adopted a judicial evaluation rule that involved a
18 broadbased commission to evaluate judicial performance every
19 three years. It ensures secrecy of those evaluations to a
20 point and has been widely heralded as a fair and helpful
21 process to foster judicial integrity and respect.

22 Judicial performance evaluations allow a judge to
23 get feedback on the quality of his or her work and provide
24 some important oversight of what judges do between the time
25 of election, or even appointment, until a retention

1 election.

2 In 2007 the Pennsylvania Bar Association's House of
3 Delegates accepted a special report from the PBA Task Force
4 on the judicial system that included a recommendation that a
5 judicial evaluation process be considered. We have formed
6 another task force to study this issue, and this group is in
7 the process of crafting a recommendation to our governing
8 body that will call for the Supreme Court's consideration of
9 an evaluation process.

10 The idea of such a recommendation recently was
11 supported by a resolution of our Board of Governors, and I
12 expect that our House of Delegates will take an official
13 position on this issue at our annual meeting in May.

14 In the interim we are setting up a less formal
15 process of a confidential ombudsperson to act as a resource
16 for lawyers who perceive unfair treatment by a judge --
17 judges.

18 Often this perception is fueled by disappointment
19 about an outcome, but sometimes it is based on legitimate
20 concerns. And often lawyers are reticent to report those
21 concerns out of fear of retaliation. One can't help but
22 speculate that if such a mechanism had been available in
23 Luzerne County, some of the problems could have been dealt
24 with more expeditiously.

25 The Pennsylvania Bar Association appreciates that

1 your Commission is casting a broad net that includes other
2 public officials who may have fallen down on this
3 responsibility and whose conduct is outside the realm of our
4 expertise.

5 We also appreciate the focus you have placed on the
6 plight of the victims from what is apparent misconduct and
7 abuse of public office. We hope our focus will add to the
8 recommendations made by the Commission, and I would be happy
9 to entertain any questions you may have.

10 BY CHAIRMAN CLELAND:

11 Q Mr. Haines, thank you, very much for your thoughts
12 on behalf of the Bar Association. Let me just start with a
13 question, if that's all right.

14 I understand your concern about the presumption of
15 innocence and not wanting to comment on any criminal charges
16 is perfectly appropriate, but we've also heard testimony of
17 conduct that falls far short of criminality, disregard of
18 rules, abuse of processes of courtrooms, and so forth,
19 involving thousands of cases day after day, year after year.
20 But apparently no complaints filed by the -- any members of
21 the bar in Luzerne County.

22 Can you offer us some incite about what caused that
23 reticence? I mean, I understand the pressures that are
24 placed on attorneys, but what can we do to make the process
25 of doing the right thing easier?

1 I notice on page 8 here you say that one can't help
2 but speculate that if such a mechanism had been available in
3 Luzerne County, some of the problems could have been dealt
4 with. But the JCB was available, the Judicial Conduct
5 Board, and no attorneys filed complaints. Can you offer
6 some incite and suggestions on that question?

7 A Well, I'll try. First I think there is frequently
8 a quantum leap between what is perceived as a misstep one or
9 two times and reporting a judge to the Judicial Conduct
10 Board.

11 Second, I think that there is a -- an element of a
12 culturation that apparently occurred in Luzerne County. And
13 by that I mean it -- it's kind of like the dog that gets
14 beaten. It's only when you stop that it recognizes
15 something was wrong.

16 You know, behavior starts to be the norm to
17 everybody, and nobody thinks things are that far off the
18 mark; or they do, but they are uncertain and unsure about
19 what they can do.

20 And, finally, I believe that the concern about
21 retaliation is an enormous concern among lawyers. Certainly
22 if a judge receives notice from the Judicial Conduct Board
23 that he or she is being investigated or evaluated in
24 connection with something that they did, particularly in a
25 smaller county, it is relatively easy for the judge to

1 figure out who it is that he's got a problem with. And thus
2 the concern about retaliation.

3 In addition to which, because our judicial system
4 is politicized by virtue of the fact that judges are elected
5 and elected on a partisan ballot, the retaliation may not
6 necessarily be limited to what a judge does, but may pervade
7 the political process in all kinds of ways right down to how
8 you get your client's application through a zoning board.

9 So that aspect of -- of the consequences of
10 reporting, I think, is material to why lawyers don't come
11 forward more regularly. What I think the judicial
12 evaluation process offers that the Judicial Conduct Board
13 can't offer is the Judicial Conduct Board is really a
14 punitive body, or perceived as a punitive body. You take a
15 judge to the Judicial Conduct Board because he or she did
16 something wrong.

17 A judicial evaluation process on the other hand may
18 well be one that rewards judges who are doing a good job and
19 the right thing because they get positive feedback. They
20 hear that they are doing well at their job, and they are
21 encouraged to continue to do a good job.

22 Those who don't, particularly under a system like
23 the one in New Hampshire, are given an opportunity to
24 correct their mistakes. When you have an evaluation
25 process, again, like the one in New Hampshire that is every

1 three years a judge is reviewed, and it's a little harder to
2 stray off the reservation if every three years you know that
3 a whole bunch of people are going to be questioned about
4 what you're doing and how you're doing it.

5 So I think that not only does the evaluation
6 process provide a positive opportunity for judges to grow,
7 it is a deterrent to judges who want to stray. Every report
8 that I have heard is that one of the judges in Luzerne
9 County who is involved had a tyrannical approach to the
10 legal profession. It's a little hard to take on a tyrant.
11 It falls into the adage, if you're going after the king, you
12 better kill the king.

13 And as some of you may know, in many counties the
14 President Judge isn't just the President Judge. The
15 President Judge is the president of the Board of
16 Commissioners of the county. He holds a high -- or she
17 holds the highest political office in the county. He or she
18 is the most influential person in the county.

19 So that while Your Honor is right, there is a
20 fundamental obligation on the part of lawyers to report that
21 which they perceive to be misconduct, the line is not always
22 clear, and the practicalities are that lawyers don't want to
23 lose their ability to make a living.

24 CHAIRMAN CLELAND: Thank you. Mr. Horoho.

25 BY MR. HOROHO:

1 Q Mr. Haines, first of all, thank you for appearing
2 in front of us. I know how busy your schedule is. But as a
3 follow-up to Judge Cleland's question, and I was intrigued
4 by your discussion about this ombudsman group. How far
5 along are you with that concept?

6 Let me tell you, our -- our mandate is to come up
7 with recommendations, and our deadline is the end of May.
8 We're looking for recommendations and resources, and then
9 also potential oversight groups.

10 So the -- the issue that you just talked about,
11 small county, maybe a judge straying off the reservation,
12 what is your concept of what this group would do when
13 investigating the powers it would have? What sanction
14 powers would it have? Can you talk a little bit more about
15 that?

16 A Yeah, I'll try to. And we are trying to move this
17 quickly, but at the same time it's in a developmental stage.
18 I have already identified a former judge of the Court of
19 Common Pleas in Montgomery County who has agreed to serve as
20 an ombudsperson for the eastern half of the state. Frankly
21 I'm looking for a counterpart on the western part of the
22 state.

23 We have put together a brief outline of that -- the
24 responsibilities that that ombudsperson would have. We are
25 trying to put together some guidelines that adhere to Judge

1 Cleland's concerns about the responsibility to report versus
2 remonstrating and counseling.

3 The idea -- the idea is to give to a lawyer in our
4 association a place to go where at least at the first level
5 there isn't the fear that this unknown entity has suddenly
6 taken on a complaint, to discuss with that ombudsperson what
7 that lawyer perceives is wrong, what that lawyer can or
8 can't do to address the problem, and even to go so far as to
9 allow that ombudsperson to pick up the phone and get -- get
10 on the judge -- get on the phone with the judge and say, you
11 know, what's the story here? What's the problem?

12 I think that it's appropriate to tell you that the
13 State Conference of Trial Judges has been with us and
14 supportive of informal processes. They are as aware as we
15 are there are rogues on the bench. And I don't mean, when I
16 say rogue, somebody who's engaged in criminal conduct. But
17 sometimes judges, with all due respect to Your Honors, lose
18 perspective on how they are received on the other side of
19 the bench.

20 They're not aware of a costic comment, you know, a
21 real shot at a lawyer, and it can wound deeply. And
22 sometimes it's just a matter of saying, judge, when you said
23 A, B, and C, did you think about how that would be received
24 by the lawyer? And the judge says, well, no, in truth I
25 didn't. And it's sometimes helpful to a judge to hear that

1 feedback. We think a lot of the problems can be addressed
2 in that way. Not all of them.

3 And as the level of seriousness goes up, the role
4 of that ombudsperson becomes more critical. One of our
5 presidents-to-be is an ethics expert, and we're struggling
6 through now what does an ombudsperson do who's a
7 Pennsylvania Bar person if he or she receives information of
8 criminal conduct?

9 And obviously that if he or she received that kind
10 of information, I think we all agree that they would be
11 duty-bound to report that information. And then it starts
12 to take on the mantra of this process that is so fearful to
13 lawyers.

14 But we think we can work our way through that in a
15 way that will be helpful.

16 Q And I know the other Commissioners have questions
17 for you, Mr. Haines, but this is separate from the task
18 force that you just talked about that has recently also been
19 formed with the PBA?

20 A It is.

21 Q Okay.

22 A And I have to caution the Commission that I -- I
23 can't -- I can't give you official PBA policy at the moment
24 because unfortunately the power rests with the House of
25 Delegates and not with the president to make official

1 policy. But I can tell you that there is a task force that
2 is working on a recommendation, the substance of which has
3 already been approved by our Board of Governors, and I sense
4 will be accepted by our House of Delegates to recommend a
5 formal evaluation process.

6 I've mentioned New Hampshire a couple of times
7 because I like New Hampshire's model. I think New
8 Hampshire's model makes a lot of sense. It's very well
9 received there. It allows for an evaluation process that is
10 secret to a point.

11 If Your Honor were evaluated by that process and
12 you were criticized for some aspect of your performance,
13 that's simply an evaluation like it would be in the place of
14 employment, not -- not everybody gets it.

15 And you're given an opportunity and some guidelines
16 to meet the standard expected. If at the second evaluation
17 the evidence is you made no effort, or the evidence is that
18 you haven't improved, then it's subject to publication. So
19 that it has a blend of public and private scrutiny to it.
20 No judge -- and it belies independence.

21 No judge wants every evaluation ever made a matter
22 of public record because then they're under potentially
23 unfair scrutiny by the public, and it does intrude their
24 independence. But I don't think good judges resist fair
25 evaluations. Good judges know that they're going to do fine

1 in a fair evaluation.

2 MR. HOROHO: That's all the questions I have, Mr.
3 Chairman.

4 CHAIRMAN CLELAND: Anyone else? Judge Gibbons.

5 BY JUDGE GIBBONS:

6 Q Thanks for coming today, Mr. Haines. The
7 evaluation process, you wouldn't propose that that would
8 subplant any disciplinary process?

9 A No, no. I think they're separate things. An
10 evaluation process is simply that. You get a performance
11 review like anybody in any -- in the workplace does.

12 Q Okay.

13 A Separate and apart from whether or not if you cross
14 the line you are subject to discipline.

15 Q And just a question on your -- you made an
16 observation about concerns of retaliation by a judge on
17 behalf of lawyers in terms of evaluating whether they should
18 report that judge.

19 In a situation similar to what we have learned
20 about here in these processes in Luzerne County where
21 seemingly at least in the public there hasn't been any
22 action taken by the disciplinary body, does that enhance
23 that fear of retaliation, do you think, or does it do
24 anything to assuage that fear?

25 A Well, I think fear of retaliation is like a lot of

1 fear, frequently not ground in fact. But it is nonetheless
2 real. I'm tempted to launch into my own appraisal of
3 Luzerne County and the whys, but I suggested in my testimony
4 I don't want to do that because it is a level of
5 speculation.

6 While I have property in Luzerne County, I don't
7 live there. And as I suggested to the chairman, I think
8 there are multiple layers of issues that are unique to
9 Luzerne County, not the least of which is the apparent
10 underlying criminal element that exists in Northeastern
11 Pennsylvania uniquely in the United States, which I believe
12 has some impact on all of this, frankly.

13 So there you go. I just did wage into my
14 speculation. I don't know whether that answers your
15 question.

16 Q I'm not sure that it does, but I --

17 A Okay. Well, let me try again, because I'd like to
18 be as clear as I can.

19 Q Well, I mean, you have this system of judicial
20 discipline that's there and set up, and you say lawyers are
21 oftentimes apprehensive about going there about fear of
22 retaliation of reporting the judge?

23 A Right.

24 Q Does the apparent absence of any actions by that
25 disciplinary body, does that kind of underscore that fear of

1 retaliation? Does it enhance it?

2 A Well, I'm not in a position to know what that
3 investigative body knew and when they knew it.

4 Q That's why I used the word apparent.

5 A Other than, you know, what I've read in the
6 newspapers. I do think that if you ask 100 lawyers, 90 of
7 them would be surprised to know that the Judicial Conduct
8 Board is not an arm of the Supreme Court, that it's an
9 independent entity not under the court's control.

10 So that because of that perception, that is that
11 they are one in the same, the sense of retaliation is not
12 necessarily limited to the magisterial district, the Court
13 of Common Pleas. There is a perception among the legal
14 community that retaliation can be widespread.

15 And it is, as I suggested, an inherent problem of a
16 politicized and political judicial branch of government.
17 Because retaliation doesn't necessarily have to come from
18 how a judge treats you in a courtroom. Lawyers are engaged
19 with governmental entities and governmental officials all
20 the time. Retaliation can come in all kinds of forms.

21 JUDGE GIBBONS: Okay. Thank you.

22 CHAIRMAN CLELAND: Judge Uhler.

23 BY JUDGE UHLER:

24 Q Your comments and evident concern surrounding the
25 reticence, the failure of the US Attorney's Office, the

1 Department of Justice to be more active in their description
2 of ongoing activity from their investigative standpoint,
3 you're not suggesting, are you, that they exceed the rules
4 of professional responsibility of 36 and 38 of our Rules of
5 Professional Responsibility, are you?

6 A No. But I believe -- based on everything I know,
7 they are done with judges in Luzerne County. Can't they say
8 that? Based on everything I know they have issued target
9 letters to anywhere -- and it depends on who you ask -- 17,
10 25, 27 lawyers. Those target letters were issued last
11 summer.

12 Q So it's your --

13 A Is that -- is there such an investigation? Is that
14 a fact? I think the Department of Justice -- and I've never
15 liked that term, because it's not the Department of Justice,
16 it's the Department of Prosecution. But putting that aside,
17 I think they have a responsibility to at least talk at some
18 level about what's going on, particularly because it
19 involves the judicial system.

20 Q And particularly surrounding closure of
21 investigations?

22 A Exactly.

23 Q As I understand --

24 A Exactly.

25 Q -- your point.

1 A Yes.

2 Q Okay.

3 A If they're done with the judiciary, there's not
4 much left for them to do, I don't think. It would be, in my
5 view, prudent and appropriate to say we've completed our
6 investigation of the judiciary in Luzerne County at this
7 point. You know, the Department of Justice never wants to
8 say a thing like that because in their view everybody's
9 under investigation all the time and subject to be
10 reinvestigated at any moment. And I don't -- I don't want
11 to, you know, get too far afield on that.

12 Q But thank you for that clarification. That's what
13 I was shooting for. Thank you.

14 A Okay. Fine.

15 CHAIRMAN CLELAND: Mr. Listenbee.

16 BY MR. LISTENBEE:

17 Q Thank you. Mr. Haines, we've taken considerable
18 testimony about the role of prosecutors, public defenders,
19 and court-appointed counsel in the juvenile courts of
20 Luzerne County. We've heard them testify that they were not
21 familiar with the Juvenile Act, Rules of Procedure, and
22 other practices that are common across the Commonwealth.

23 We've heard them testify that they were not
24 involved for the most part with training programs outside of
25 Luzerne County or with any training programs that educated

1 them about the kinds of practices that were supposed to be
2 going on in juvenile court.

3 What role do you see for your organization in the
4 future in terms of helping the development of public
5 defenders, court-appointed counsel, and prosecutors so that
6 they can be fully familiar with the rules and practices in
7 Luzerne County and throughout the Commonwealth?

8 A Well, obviously it is disturbing that any lawyer
9 who is in a position of public trust would say they don't
10 know the rules. And I share your and the rest of the
11 Commissions concern about that.

12 We are a voluntary organization. We have no
13 authority to do much other than provide an opportunity to
14 lawyers to join our organization and become active members.
15 As you were speaking I thought to myself, well, the response
16 is simple. They all ought to be encouraged to join the bar
17 association because we do have a criminal justice section,
18 because it does comprise -- is made up of lawyers who
19 practice exclusively in that area, and it's a place where
20 you can go and interact and learn.

21 And the Pennsylvania Bar Institute provides
22 educational opportunities all the time. I think the place
23 where we can better serve Luzerne County is by reaching out
24 to that county and to all rural counties and encourage their
25 members or their -- the lawyers there to be active in our

1 organization.

2 And I think that we can look at our educational
3 programs and make sure that we are addressing the kind of
4 fundamental issues that you've raised here. Sometimes legal
5 education programs get criticized because they're so
6 simplistic, that they don't -- that they provide things with
7 -- that people already know.

8 But that's not everybody, and maybe we need to be
9 more mindful that every once in a while it's not a bad idea
10 to go back and be reminded what the rules are, what you're
11 supposed to know. And that doesn't mean that you're
12 supposed to know when you're the District Attorney that a
13 child is entitled to a lawyer. That's so fundamental that I
14 don't even -- I don't think anybody would consider an
15 educational program along those lines.

16 Q Also, Mr. Haines, you've indicated that you are in
17 the process of developing the ombudsperson role within the
18 bar?

19 A Yes.

20 Q Do you foresee that reaching out to children who
21 are part of the delinquency system in Pennsylvania or their
22 families so that they may report problems that they have with
23 judges? Because in Luzerne that was also a problem that
24 there were not a lot of families who actually reached the
25 level of the Judicial Conduct Board so that they could

1 report their problems and issues.

2 A We have -- I have not thought about that. We have
3 not considered that. In part, I think it's a resource
4 question. Do we have the resources to provide that to the
5 public at large? But it's certainly worth our considering
6 and perhaps a valuable additional tool that we could -- and
7 service that we could provide to the public.

8 MR. LISTENBEE: Thank you.

9 CHAIRMAN CLELAND: Other questions? Mr. Haines,
10 thank you, very much for your thoughts and incites on behalf
11 of the organized bar. We appreciate that. They're
12 obviously key players in the system of justice, and we
13 appreciate your active involvement, not only yours
14 personally, but the Pennsylvania Bar Association, helping to
15 develop solutions to what is obviously a common problem. So
16 thank you, very much.

17 MR. HAINES: Thank you for the opportunity to be
18 here. And if there is anything more that we can do or offer
19 to the Commission, please don't hesitate to ask. We are in
20 large part a public service organization.

21 CHAIRMAN CLELAND: Thank you, very much. We'll
22 take a ten minute recess and reconvene about ten minutes
23 after.

24 (Recess.)

25 CHAIRMAN CLELAND: Good morning. We're about to

1 resume our hearings. The recess didn't quite start or end
2 when I thought it was going to, and I take the blame for
3 that. My watch was wrong.

4 So if there's any confusion, I think I now have my
5 watch set at least according to the PCN time, so we'll be
6 back on schedule.

7 We welcome now the testimony of the Pennsylvanians
8 For Modern Courts. We'll be hearing from Lynn Marks,
9 Executive Director; Shira Goodman, the Deputy Director; and
10 also from Judge Beck. I'm not sure who's going to go first.

11 JUDGE BECK: I am.

12 CHAIRMAN CLELAND: Judge Beck, welcome.

13 JUDGE BECK: No, no, excuse me. Lynn Marks.

14 CHAIRMAN CLELAND: Ms. Marks is going to go first?

15 MS. MARKS: Yes. I'm going to provide an
16 introduction.

17 CHAIRMAN CLELAND: Ms. Marks, go ahead.

18 MS. MARKS: Good morning.

19 CHAIRMAN CLELAND: Oh, I'm sorry. I should swear
20 you in. I'll do all three at once. If you would all stand,
21 please, and raise your right hand.

22
23 LYNN MARKS, called as a witness, being duly sworn,
24 testified as follows:

25

1 PHYLLIS BECK, called as a witness, being duly
2 sworn, testified as follows:

3

4 SHIRA GOODMAN, called as a witness, being duly
5 sworn, testified as follows:

6

7 CHAIRMAN CLELAND: Ms. Marks, go ahead.

8 MS. MARKS: Good morning. I'm Lynn Marks. I'm the
9 Executive Director of Pennsylvanians For Modern Courts, and
10 we thank the Interbranch Commission for holding this hearing
11 and for the opportunity to submit testimony.

12 Pennsylvanians For Modern Courts is a statewide
13 non-partisan, non-profit organization founded to improve and
14 strengthen the court system in Pennsylvania by reforming the
15 way that we choose our appellate court judges, by ensuring a
16 strong discipline system for judges accused of misconduct,
17 for improving the jury system and court financing, serving
18 as a watch dog, increasing fairness in the courts, and
19 helping citizens navigate the courts when they have problems
20 or questions, whether they're litigants, jurors, or
21 witnesses.

22 We understand that the Commission's main focus is
23 on the juvenile justice system, but we did see in the
24 statute authorizing this Commission that you will also be
25 looking into procedures for handling complaints against

1 judges and attorneys and making recommendations.

2 So our testimony today is really going to focus on
3 the judicial discipline system. Before we get into our
4 testimony we do want to commend the three branches of
5 government for forming this Interbranch Commission. It's
6 very important that the branches work together, and
7 particularly here in Pennsylvania where we've had such a --
8 such tragic things going on in Luzerne County, which
9 unfortunately have gotten national and international
10 attention.

11 And it's important to have an Interbranch
12 Commission because they really are distinct things that -- a
13 distinct role for the judiciary, the legislature, and the
14 Governor. So we look forward to whatever recommendations
15 you come up with.

16 We also commend the appointments to this
17 Commission. I know some of you personally. I know the rest
18 of you by reputation. I know you're up to the task.
19 Unfortunately, Pennsylvania is experiencing a crisis of
20 confidence in our courts and our judges.

21 When judges face criminal charges, as they do in
22 Luzerne County, or judges are disciplined for misconduct,
23 for unethical or improper behavior on the bench or the
24 campaign trail, it weakens public trust in the -- in the
25 entire judicial system.

1 And the last few years, as we know, has just
2 brought too many stories of Pennsylvania judges violating
3 the judicial code and even criminal laws. But what helps
4 maintain public confidence in the face of what's going on in
5 the courts is the knowledge that we have a strong,
6 independent judicial discipline system, an independent
7 system that will investigate allegations of misconduct,
8 prosecute credible, substantiated allegations, and impose
9 meaningful sanctions when appropriate.

10 A strong judicial discipline system should have two
11 functions. First, to protect the public by ensuring that
12 unethical and illegal conduct by judges will be halted and
13 punished. And second, to protect judges, protect judges
14 from unfounded allegations by disappointed litigants.

15 At the moment the public's faith in that discipline
16 system has been severely shaken. We still believe that a
17 two-tiered judicial discipline system is the best way to go,
18 and you will hear that from Judge Beck.

19 However, we think that two things should happen
20 here in Pennsylvania to increase public confidence in that
21 system. And, first, there must be an accounting of actions
22 or inactions by the Judicial Conduct Board concerning
23 allegations made in Luzerne County.

24 And, secondly, we believe that some changes should
25 be considered to the constitutional structure and the

1 internal operating procedures of the judicial discipline
2 bodies. And we think that that will improve the system's
3 effectiveness and potency.

4 I'd like to point out that for years we at
5 Pennsylvanians For Modern Courts has worked closely with the
6 Judicial Conduct Board, particularly its chief counsel, Mr.
7 Joseph Massa, who I know has been here. We have spoken at
8 public programs together to educate the public about the
9 judicial discipline system.

10 And often when the Judicial Conduct Board gets
11 inquiries from people who might -- might file a complaint
12 against judges, they often refer those calls to us. We at
13 Pennsylvanians For Modern Courts do provide a resource on
14 the judicial discipline process.

15 You all should have a copy of our general operating
16 -- or our general brochures and educational brochure for
17 citizens in easily, understandable language. For those who
18 are tuning in on PCN, you can get it on our website. Just
19 Google Pennsylvanians For Modern Courts. It's
20 www.pcmonline.org. And this really provides important
21 background to the discipline system.

22 Too often we find that when people don't like the
23 ruling or they're upset by it, that sometimes they'll think
24 that there has been misconduct by the judge when the
25 appropriate forum really is to bring an appeal. So we -- we

1 don't take a position on whether or not somebody should file
2 a claim for misconduct, but what we do do is explain to them
3 what it is and what it isn't.

4 Okay. Our line up for speakers. Next you're going
5 to hear from Judge Phyllis W. Beck, who probably many of you
6 know was on the Superior Court of Pennsylvania and has been
7 a long time advocate for judicial reform here in
8 Pennsylvania and is also on our Board.

9 And she's going to present the history of the
10 judicial discipline system, and she should know it. She
11 lived it firsthand the change from the old system.

12 And then we're going to hear from the Deputy
13 Director of Pennsylvanians For Modern Courts, Shira Goodman.
14 And she's going to talk about three suggestions that we have
15 for you about the judicial discipline process.

16 One suggestion is in investigating how the
17 discipline system -- judicial discipline system's handling
18 of the Luzerne allegations of corruption and what
19 suggestions we think for you of what you could do, and
20 suggested changes to the structure and operations of the
21 Judicial Conduct Board.

22 And, third, some suggestions that we had for the
23 operation of the judicial -- of the whole judicial system.
24 And I'm going to turn it over now to Judge Phyllis Beck.
25 Thank you.

1 CHAIRMAN CLELAND: Before Judge Beck starts, I just
2 want to acknowledge Judge Beck and her background, both
3 academic and professional. She was a associate professor at
4 Temple, and then Vice Dean until going on to the Superior
5 Court in 1981 until 2005.

6 She was the first woman judge on the Superior Court
7 of Pennsylvania, and now in January of 2010 that court is a
8 majority of women. So Judge Beck was one of the first calls
9 that I received when I was appointed chairman offering her
10 help and assistance, and we certainly appreciate, Judge
11 Beck, that you're here today to do just that. So thank you.

12 JUDGE BECK: Thank you for that introduction. I'm
13 delighted to be here. I look around this room. This is my
14 first time in the Judicial Center, and I look around the
15 room, and I realize how solidly it is built and how -- what
16 a handsome edifice it is. And a little voice in my head
17 said, well, it's time that the judiciary mirrored what this
18 building is. And that's what we hope.

19 That's why Pennsylvanians For Modern Courts is
20 involved with the judiciary, and we hope that some day that
21 will come true. But I'm going to talk about history a
22 little bit.

23 Prior to the present system of judicial discipline
24 in Pennsylvania, discipline was in the hands of the
25 Judiciary Inquiry and Review Board. In 1987 Governor Robert

1 Casey created the Statewide Judicial Reform Commission,
2 commonly referred to as the Beck Commission, to examine the
3 entire judiciary.

4 One aspect of the Beck Commission examined the
5 disciplinary procedure. One of the major problems with the
6 disciplinary system under the Judicial Inquiry and Review
7 Board was its unitary nature. The same body, the Judicial
8 Inquiry and Review Board, investigated the claims of
9 malfeasance or misfeasance and passed judgement on those who
10 were accused.

11 The conclusions of the Board were only recommend --
12 were only recommendations to Pennsylvania Supreme Court,
13 which frequently ignored the recommendations and started at
14 square one, and the Commission thought that was wrong.

15 The major recommendation of the Beck Commission was
16 that two separate bodies be created. One to investigate,
17 called the Board; and the second body, called the court, to
18 determine liability of the judge, if any, and to impose a
19 penalty where warranted.

20 The Supreme Court wasn't too happy. Their review
21 jurisdiction was limited. The Beck Commission said their
22 review jurisdiction should be as an appellate court. In
23 other words, they could not reach down and find facts, that
24 the court had already done that, and they had to accept the
25 facts. And that did pretty much clean up what had been a

1 mess.

2 The Beck Commission recommendations were the result
3 of several public hearings at which judges testified,
4 members of the judiciary -- Judicial and Inquiry Board
5 testified, lawyers who had defended judges before the Board
6 testified, lay people interested in the subject testified.

7 In addition, we had academics both from the US and
8 Canada who had studied judicial discipline systems in other
9 states, in other countries, and they also testified. And
10 that was the bulk of the information we had to make our
11 recommendations.

12 As to discipline, the major goals recommended by
13 the Beck Commission were, one, that impeachment should stay
14 in place, and that the disciplinary system should be
15 co-existing with the -- with the disciplinary system; that
16 the state should establish a two-tiered disciplinary system
17 to remove judges or otherwise discipline judges who were
18 unfaithful to their trust.

19 Three, that the Supreme Court review jurisdiction,
20 as I said, that their review jurisdiction should be limited.
21 And, four, special provisions should be made to deal with
22 judges who became mentally or physically unable to perform
23 their duties.

24 I must say the kind of situation that we have read
25 about in Luzerne County never crossed the minds of the Beck

1 Commission. It just -- we were dealing with situations that
2 -- I mean, what we had before us were situations that were
3 really ordinary in the normal course of events, and I
4 certainly did not consider, if what I read is correct, that
5 the Luzerne situation falls within that category.

6 We did spend a lot of time on judges who were
7 mentally and physically unable to perform their duties, and
8 that was really brand new, that the judiciary itself
9 recognized that some of our colleagues needed help rather
10 than -- rather than discipline.

11 The recommendations of the Beck Commission would
12 have gathered dust and no action would have been taken if
13 not for an organization formed in 1988 called Pennsylvanians
14 For Modern Courts.

15 In the early 80s Pennsylvanians For Modern Courts
16 crafted and proposed a constitutional amendment based on a
17 proposal in the Beck Commission report. The General
18 Assembly modified our work, and the bill they eventually
19 passed by both houses twice and by the electorate became, in
20 1993, our current disciplinary system.

21 One of the questions before you today is the
22 inaction of the Board as to the Luzerne County matter. Of
23 course I cannot answer that, but I can note that there is
24 language in the Beck report, as well as in the constitution
25 itself, which permits the Board to initiate a complaint on

1 its own. That's Section 18(a)(7).

2 Therefore, the Board, upon its own recommendation
3 -- upon the staff's recommendation to the Board had
4 authority to issue a complaint, whether that -- whether the
5 complaint emanated from an anonymous source or an incomplete
6 complaint. If the -- if the staff felt there was something
7 wrong, it was within the power of the staff to bring it to
8 the Board, and it was in the power of the Board to act on
9 its -- on its own, which it did not.

10 Complaints submitted anonymously in my view should
11 not, without further consideration, be tossed into the
12 wastebasket. Consider the reasons why complaints may be
13 anonymous. Lawyers, court personnel, litigants may fear
14 retaliation if they send in a formal complaint to the Board.

15 One immediate problem, which I guess has been
16 solved last week by the Supreme Court, is confidentiality,
17 whether the Board is -- has to turn over to this Commission
18 information relating to the Board's knowledge of the matters
19 under investigation.

20 When the -- this is like legislative history. When
21 the Board talked about confidentiality it never, never was
22 confidentiality of the Board itself. The confidentiality
23 was for the judge and maybe the witness.

24 The constitution, I know, is written more broadly
25 than that, but we thought the Board deserved protection, and

1 that protection would come in the form of immunity, not
2 confidentiality.

3 That just was not discussed as a protection for the
4 Board. Although the constitution amendment makes clear that
5 pre-probable cause information is confidential, as I have
6 noted, the Beck Commission did not feel that confidentiality
7 was a privilege of the Board.

8 That's basically the background for the formation
9 of the Judicial Inquiry -- of the Board and the court. And
10 I guess like anything in life, you take the norm. You try
11 to set out rules for the norm, and then the extremes come
12 and hit you in the face. And I think this is what happened
13 here.

14 So many of the issues -- not many of the issues,
15 but certainly the confidentiality issue that you and the
16 Supreme Court have grappled with was not in the mind of the
17 Beck Commission. Thank you.

18 CHAIRMAN CLELAND: Thank you, Judge Beck. Ms.
19 Goodman.

20 MS. GOODMAN: Thank you.

21 CHAIRMAN CLELAND: I think we'll hold the questions
22 to the end. Is that okay? Go ahead.

23 MS. GOODMAN: Thank you. As Lynn noted in her
24 introductory remarks, I will focus the remainder of the
25 PMC's testimony on three items. First, is the need for a

1 full understanding of the role the judicial discipline
2 system played in relation to the unfolding of Luzerne County
3 scandal.

4 Second, PMC will offer several proposals for how to
5 improve the judicial discipline system so to ensure that it
6 is capable of protecting Pennsylvanians from corrupt judges.

7 Third, we will offer additional proposals to
8 improve our judicial system and strengthen public confidence
9 in our courts and judges. We believe that Pennsylvania will
10 be unable to move forward and restore public confidence in
11 our courts and judicial discipline system until there is a
12 full and fair investigation into the system's handling of
13 the allegations of corruption in Luzerne County.

14 The public wants to know what the Judicial Conduct
15 Board knew, when it knew it, and why it acted as it did.
16 The public needs a fair, full, independent investigation.
17 Without it we cannot be confident that Pennsylvania has in
18 place a strong, independent, judicial discipline system that
19 will prevent and redress judicial misconduct in the future
20 and protect the public.

21 It would seem that this Commission is the proper
22 body to investigate and assess the judicial discipline
23 system's handling of the allegations about Luzerne County.
24 We hope your investigation will continue as many questions
25 remain unanswered.

1 We are aware, however, of the Supreme Court's
2 decision last week regarding the dispute between the
3 Commission and the Judicial Conduct Board over the provision
4 of documents and testimony.

5 Given this ruling, the potential for further
6 litigation, and the limited duration of this Commission's
7 charge, we recognize that you may determine that the
8 Commission cannot conclude a full investigation.

9 Should this occur we urge you to recommend in your
10 final report to the General Assembly, the Supreme Court, and
11 the Governor that a new investigation be authorized into the
12 judicial discipline system specifically.

13 This proposal, focused as it is on the past,
14 recognizes that to move forward and improve our system
15 requires an understanding of what happened so that positive
16 change can be implemented. It is important to have this
17 understanding, but it is also critical to look to the
18 future.

19 The remainder of our testimony does just that. PMC
20 suggests that this Commission consider proposing amendments
21 to the structure and operation of the judicial discipline
22 system. This will entail an examination of both the
23 constitutional provisions governing the judicial discipline
24 system and the internal operating procedures of the Board of
25 Judicial Conduct.

1 We first recommend that the Commission consider an
2 examination of the constitutional provisions governing
3 service on the Judicial Conduct Board and the Court of
4 Judicial Discipline.

5 A key question is whether there should be limits on
6 an individual's ability to serve on the Judicial Conduct
7 Board, and then following that service to serve on the Court
8 of Judicial Discipline, or vice versa. There currently are
9 no such restrictions.

10 For the independence of both bodies and public
11 confidence in the system it seems that at the very least
12 there should be some period of time during which a former
13 member of the Judicial Conduct Board should not be permitted
14 to be appointed to the Court of Judicial Discipline. And,
15 again, the opposite holds true.

16 In addition, there are currently no limits on how
17 many terms an individual may serve on either the Judicial
18 Conduct Board or the Court of Judicial Discipline. The only
19 restriction is that a member of either body must wait a year
20 following the conclusion of his or her term before being
21 reappointed to that body.

22 We recommend that longer periods off the Board of
23 Judicial Conduct and/or the Court of Judicial Discipline be
24 considered, and that a maximum number of years of service
25 also be considered.

1 Institutional memory and a fuller understanding of
2 the work of either body may well be informed by continued
3 service and by having members who have served on each body.

4 However, without some time limits and
5 restrictions, the frequent rotation of the members of the
6 Judicial Conduct Board and the Court of Judicial Discipline
7 weakens, at least in appearance, the independence of the
8 bodies and the purpose of having a two-tiered system of
9 judicial discipline.

10 PMC was pleased to see the Judicial Conduct Board's
11 public release of its newly compiled internal operating
12 procedures. It is important that these procedures are in
13 written form and available to the public.

14 We believe, however, that amendments to the Board's
15 procedures are necessary. We wish to focus specifically on
16 the internal operating procedures governing recusal,
17 confidentiality, and deferral of Board investigations
18 because of pending criminal investigations.

19 New Internal Operating Procedure 2.15, as well as
20 Judicial Conduct Board Member Conduct Rule No. 8, addressed
21 recusal or disqualification of members of the Judicial
22 Conduct Board.

23 In our view these provisions are underinclusive.
24 There is no direction given as to how a member of the
25 Conduct Board should identify or define actual or potential

1 conflicts of interest.

2 There is no direction on the process of making a
3 recusal determination, nor is there any discussion of
4 whether the member makes that decision alone or whether the
5 member should consult with the other members of the Judicial
6 Conduct Board.

7 There is also no discussion of how a member should
8 proceed in the event of a potential conflict of interest.
9 Instead only actual conflicts, which are not defined in the
10 rules, trigger immediate disqualification.

11 We urge this Commission to recommend that the
12 Judicial Conduct Board consider revising this internal
13 operating procedure and the applicable conduct rules to
14 provide more guidance to the Board members in the event that
15 conflicts, potential or actual, arise.

16 The constitutional confidentiality provision that
17 Judge Beck spoke about exists to protect complainants from
18 reprisal and to protect judges from spurious allegations by
19 disgruntled litigants. These are very important elements of
20 a well-functioning judicial discipline system.

21 They ensure that complainants are not afraid to
22 file complaints against judges who engage in misconduct, and
23 they protect judges when erroneous or malicious complaints
24 are filed.

25 Based on our reading of the relevant provisions of

1 the Pennsylvania Constitution we believe that new Internal
2 Operating Procedure 5.01 is an inappropriate expansion of
3 the constitutional confidentiality provisions.

4 We urge the Commission to recommend that the
5 Conduct Board amend this internal operating procedure to
6 ensure that it comports with the constitutional provisions
7 and does not expand them to create a special privilege for
8 the work of the Board.

9 We are also concerned that the deferral procedures
10 outlined in the new internal operating procedures do not
11 adequately serve the Board's mission to protect the public
12 from judges who engage in serious misconduct.

13 We are specifically concerned about allegations of
14 judicial misconduct in office. That is, allegations
15 relating to the judge's courtroom decision making,
16 disposition of litigation matters, and treatment of
17 litigants.

18 The allegations against the former Luzerne County
19 judges related to the judge's conduct on the bench. The
20 result of the Board's deferring its investigation may very
21 well have been to permit former Judges Conahan and
22 Ciavarella to continue for many more months or even years
23 activities that caused horrendous injury to innocent
24 children.

25 We believe that the Judicial Conduct Board should

1 never defer an investigation into allegations of judicial
2 misconduct in office, allegations related to the judicial
3 role or function itself to wait for criminal prosecution.

4 If another case were to arise alleging serious
5 misconduct on the bench or in the courtroom, including
6 corruption, case fixing, or some other subversion of the
7 judicial function, it is uncertain how new Internal
8 Operating Procedure 4.07 would be applied.

9 That -- that rule provides that the Board may, in
10 some cases, pursue an investigation into judicial misconduct
11 even while the criminal investigation is ongoing, but the
12 Board is not required to do so.

13 The people of Pennsylvania need and deserve
14 certainty. Certainty that the Board will investigate
15 judicial misconduct in office regardless of pending criminal
16 investigations. New Internal Operating Procedure 4.07 does
17 not provide this certainty.

18 PMC understands that the Judicial Conduct Board,
19 like the entire Unified Judicial System, is grossly
20 underfunded. We understand that there are limited resources
21 dedicated to the Judicial Conduct Board's critical work.
22 But this should not result in a deferral of the duty to
23 protect the public from judges engaging in what may be the
24 very worst cases of misconduct.

25 We are pleased that the new internal operating

1 procedures make clear that the Conduct Board has the power
2 to initiate special proceedings when immediate action is
3 necessary to protect the public.

4 For example, in Internal Operating Procedure 4.13
5 refers to the emergency removal when administration of
6 justice is significantly impaired. PMC recommends that the
7 Commission question how this procedure works and why it
8 apparently was not utilized with regard to the Luzerne
9 County judges.

10 We also recommend that the IOP -- the internal
11 operating procedures be amended to make clear in the
12 deferral/referral provisions that this option for immediate
13 action remains available to the Judicial Conduct Board even
14 when an outside criminal investigation is pending.

15 We urge this Commission to recommend that the
16 Judicial Conduct Board adopt and implement a policy to
17 ensure that the Board will never again cede its jurisdiction
18 and abandon or delay exercising its duty to protect the
19 people of Pennsylvania.

20 We have focused the majority of our testimony on
21 the judicial discipline system. Because this Commission has
22 broad jurisdiction and will be reporting to the Supreme
23 Court, the Governor, and the General Assembly, we'd also
24 like to take a few moments to offer some proposals for
25 broader change within the judicial system.

1 Unlike lawyers, most judges are not required to
2 attend mandatory, ongoing education. We suggest that the
3 Commission recommend that the Supreme Court of Pennsylvania
4 enact a new requirement for ongoing, annual judicial ethics
5 training. This training should include education about the
6 Rules of Conduct, as well as broader discussion of ethical
7 challenges that arise during one's work as a judge.

8 We believe this will be a value to the judges
9 themselves and will also help restore public confidence in
10 the judiciary. Other states, the American Bar Association,
11 and the Conference of Chief Justices are re-examining their
12 rules of judicial conduct to ensure they provide strong,
13 reasonable guidance to judges.

14 Pennsylvania should undertake a similar evaluation,
15 especially with an eye toward recusal issues. That is, when
16 must a judge remove him or herself from a case because of
17 actual or perceived conflicts of interest?

18 Finally, there should be centralized control of the
19 60 judicial districts under the auspices of the Supreme
20 Court and the Administrative Office of Pennsylvania Courts
21 to ensure that clear procedures and policies govern the
22 operation of the courthouse and the duties and powers of
23 president and administrative judges and other judges.

24 Each county courthouse should be run like the
25 others in the Commonwealth despite the vast disparities that

1 characterize our state. The judicial discipline system
2 provides a forum for some types of problems to be addressed,
3 but uniform procedures must also be available for court
4 employees, lawyers, courthouse personnel to report concerns
5 that do not rise to the level of a judicial misconduct
6 complaint.

7 There should be uniform policies that govern
8 general complaints, and these policies and procedures should
9 be advertised to court employees, judges, and court users.

10 Mr. Haines spoke about such a system for lawyers to
11 report, but we do need something broader that applies across
12 the system similar to the Uniform Judicial System's policy
13 on reporting bias.

14 Funding is also part of the equation. Despite a
15 longstanding order of the Pennsylvania Supreme Court the
16 state does not even fully or even mostly fund the Unified
17 Judicial System.

18 The state budget covers certain judicial and
19 administrative salaries, but the bulk of the cost of running
20 the county courthouses fall upon the individual counties.
21 This creates serious budget pressures on the counties and
22 also on the judges and courthouse staff.

23 Litigation is currently pending before the
24 Pennsylvania Supreme Court to resolve this issue. Whether
25 it is resolved through the litigation, negotiation, or some

1 more innovative cooperation among the three branches of
2 government, the people of Pennsylvania deserve to know how
3 our courthouse doors would be kept open. And we hope this
4 Commission will make that clear when it makes its report to
5 the three branches.

6 Thank you again for the opportunity to present this
7 testimony. Pennsylvanians For Modern Courts believes the
8 Commission's hard work and dedication will be instrumental
9 in restoring public confidence in our court system and in
10 ensuring that we have structures and procedures in place to
11 prevent any future Luzerne county type scandal.

12 CHAIRMAN CLELAND: Thank you.

13 MS. MARKS: Thank you. That concludes the
14 testimony for Pennsylvanians For Modern Courts. We'd be
15 delighted to take questions.

16 CHAIRMAN CLELAND: Mr. Mosee.

17 MR. MOSEE: Several of the state level
18 organizations that have testified before this Commission
19 have advocated for the creation of a kind of fast track
20 appellate procedure for juvenile cases.

21 Have you had the occasion to ever look at that
22 issue?

23 JUDGE BECK: I think the Superior Court now does
24 have a fast track for juvenile placement cases. I think
25 there's a difference between the money cases, how much

1 support does one person owe to the other, or the disposition
2 of where a child will live.

3 And I don't know the details of it, but I'm pretty
4 sure the court does have a fast track.

5 MR. MOSEE: The current fast track program only
6 relates to dependency matters. I'm talking about
7 delinquency cases. I was wondering if Pennsylvanians For
8 Modern Courts have taken a look at that issue.

9 JUDGE BECK: No, but it's a good issue.

10 MS. MARKS: We did comment on the fast track for
11 dependency cases and thought that was crucial in terms of
12 maintenance of families. We have not taken a position yet,
13 but we will look into it. Thank you.

14 MR. MOSEE: It seems to me that one of the ways
15 that that might be accomplished, if it turns out to be a
16 manpower issue, is to increase the number of Superior Court
17 judges.

18 Has the -- has your organization ever advocated for
19 an increase in the number of judges or looked at the number
20 of judges from a manpower perspective with regard to any
21 issues?

22 MS. MARKS: It's been -- I know it's been a real
23 touchy situation, as you all know, for the legislature
24 expanding the number of trial judges in particular counties,
25 and yet the counties end up having to footing the bill.

1 I know that that's been a real issue, particularly
2 in some counties that haven't thought they really needed
3 them. I know the use of senior judges is absolutely crucial
4 in Pennsylvania courts to deal with the -- to deal with the
5 overload. But we have not -- we have not encouraged -- we
6 have not encouraged increasing the numbers of judges.

7 MR. MOSEE: I raise that issue -- I'm certainly
8 inviting you to take a look at that and to help us to make a
9 determination as to whether or not that might be a way to
10 increase the speed with which juvenile appeals are actually
11 handled.

12 Certainly in juvenile court time is of the essence
13 if for no other reason than the jurisdiction of the court
14 expires when the person reaches the age of 21. Thank you.

15 JUDGE BECK: Well, let me add to that. The
16 Superior Court, as well as the Commonwealth Court, has
17 started a mediation program. That program only relates to
18 civil matters and does not relate to any juvenile criminal
19 matters.

20 So there's a lot of -- would be a lot of problems,
21 but it certainly is an excellent suggestion and worth
22 looking into.

23 MR. MOSEE: Thank you.

24 CHAIRMAN CLELAND: Mr. Listenbee.

25 MR. LISTENBEE: Yes. Good morning, and thank you

1 for appearing before us. The Juvenile Defenders were here
2 yesterday. One of their strong recommendations was for the
3 creation of a Pennsylvania Center for Juvenile Defense
4 Excellence.

5 One of the components of that center would be an
6 appellate division that would have statewide -- provide
7 statewide access for juvenile defenders court-appointed
8 counsel and anyone -- any families to be able to appeal
9 cases.

10 One of the challenges is that out in the -- many of
11 the rural areas and also some of our urban areas in the
12 Commonwealth we do not have appellate lawyers who can
13 actually access the appellate courts.

14 My question to you is have you taken a look at the
15 issue of access to counsel, quality representation, when it
16 comes to appellate counsel for juveniles in the
17 Commonwealth?

18 MS. MARKS: I think that that's actually an
19 excellent idea that the Defenders Office suggested, although
20 Pennsylvanians For Modern Courts has not taken a position on
21 it yet.

22 I'm sure you all know that Pennsylvania is one of
23 only, what is it, two states, Mr. Listenbee, that doesn't
24 pay for -- doesn't pay for our statewide public defender
25 services.

1 MR. LISTENBEE: I think we're down to one.

2 MS. MARKS: Maybe you are one now. That's what I
3 thought. So I know it's a crucial need. I think that we
4 will probably take a position on that, and we will get back
5 to the Commission.

6 JUDGE BECK: Mr. Listenbee, let me ask you a
7 question.

8 MR. LISTENBEE: Yes.

9 JUDGE BECK: Is this recommendation to set up a
10 parallel system of justice for juveniles?

11 MR. LISTENBEE: It would be for a statewide
12 appellate office for -- to represent juveniles who are in
13 the delinquency system.

14 JUDGE BECK: Statewide?

15 MR. LISTENBEE: Yes, ma'am.

16 JUDGE BECK: Statewide court that would do nothing
17 but --

18 MR. LISTENBEE: No. A statewide defense office
19 that would provide representation with the exception of --

20 JUDGE BECK: I understand.

21 MR. LISTENBEE: -- the defender offices for
22 counties of the first class, I think.

23 JUDGE BECK: Okay.

24 CHAIRMAN CLELAND: Judge Gibbons.

25 JUDGE GIBBONS: Thank you. And thank you all for

1 coming. Ms. Marks, did I hear you say that you got
2 referrals from the Judicial Conduct Board?

3 MS. MARKS: It's referrals for information. When
4 they get calls from people, from citizens, who have
5 concerns, they -- they often refer them to us for
6 information. Often when they also get questions from
7 representatives of the media, they often refer them to us.
8 Kind of a citizen's voice.

9 JUDGE GIBBONS: Okay. Does that include referrals
10 of complaints or identifying information?

11 MS. MARKS: No, no, we don't have anything. In
12 fact, I don't know whether the people that have called have
13 gotten any information other than talking to the
14 receptionist is what I'm assuming. And so we don't get --
15 we don't have any of that information.

16 JUDGE GIBBONS: Okay. Thank you.

17 CHAIRMAN CLELAND: Judge Uhler.

18 JUDGE UHLER: Has your organization taken a stand
19 on transparency in dependency and delinquency hearings? And
20 if so, what is that stand, openness or closed addressing
21 issues of whether or not the public should participate --
22 permitted to participate?

23 MS. MARKS: We have worked in coalitions with other
24 organizations who think there should be -- who think there
25 should be transparency, particularly in coalitions in

1 Philadelphia in terms of -- because, I mean, I'm sure you've
2 all gotten the -- you all know that transparency versus, you
3 know, keeping the press out so that people can feel like
4 they just have a room to themselves.

5 But on balance we have geared towards transparency
6 and the importance of it. And certainly what happened in
7 Luzerne is an example of when transparency would have been
8 very important.

9 CHAIRMAN CLELAND: Mr. Legg.

10 MR. LEGG: Thank you. I have some general
11 questions. The first of which is kind of a -- I guess a
12 theoretical question. There's been some advocacy that we
13 need to open up the juvenile proceedings so that the public
14 knows what's going on.

15 And I guess I direct this to Judge Beck, you know,
16 having this perspective in looking across, I guess, the
17 years that we've seen the new judicial system. Do you think
18 that that call for openness could apply to some degree to
19 the Conduct Board as well in terms of this -- this
20 confidentiality and the need to protect judges against the
21 public's right to know what's going on?

22 I mean, if we're advocating about opening up
23 proceedings about ten year old children, do you think maybe
24 we should be advocating for more openness in the discipline
25 process for judges as well?

1 JUDGE BECK: Well, many years ago I -- I would have
2 answered that question no. I've given that question a great
3 deal of thought, and I think it's a yes or no. And now I
4 might opt for transparency. I think the public would soon
5 realize that a lot of the complaints about a lot of judges
6 is because the complainant was a loser. And I think the
7 system might be better served with openness on the -- on the
8 Board.

9 The -- the recommendation for closure was strictly
10 for the protection of unjustly accused judges. And while
11 that protection is still needed, I think on balance I would
12 opt for transparency. I don't think Pennsylvanians For
13 Modern Courts has taken a position, so that's just my
14 personal.

15 MR. LEGG: I know I surprised you with that
16 question. Do you think that the change in technology in
17 terms of the internet, let's say, and the ability of just an
18 individual complainant to target a judge or publish this
19 information changes your view at all?

20 In other words, would it be better to be open
21 instead of having these allegations out there against the
22 judges and the courts to have a body that says, yes, we've
23 seen these allegations. We've investigated them. We've
24 dismissed them. In other words, isn't there a value to
25 that?

1 JUDGE BECK: I -- you're echoing my final
2 conclusion where I -- I have come full circle around and now
3 think that transparency, and certainly because of the speed
4 of communication, would be important.

5 Let me say one more thing, and this goes especially
6 to the judges on the panel. Judges have a really privileged
7 position in society because they are the ones that decide
8 the fate of people, property, other things.

9 When you put the robe on there are things you have
10 to give up. You give up certain First Amendment rights.
11 You have to behave yourself. You shouldn't park -- I mean,
12 I might park in a place before I was a judge that says don't
13 park, but once I was a judge I would never park in a place
14 that said don't park.

15 So that's a silly example, I know, but you give up
16 certain First Amendment rights. You give up other rights.
17 And in return for giving up those rights maybe you give up
18 some privacy rights before a board such as the Board we're
19 discussing today.

20 MR. LEGG: And I think Mr. Massa testified judges
21 are 24/7. It's not just when you're wearing a robe. And I
22 think that's what you're referring to?

23 JUDGE BECK: Yes.

24 MR. LEGG: It's such a privilege, and it's such a
25 high honor. There's a high standard that goes with it?

1 JUDGE BECK: You got to behave yourself.

2 MR. LEGG: And I think what this Commission is
3 struggling with to some degree, and what your recommendation
4 challenges us to find, is accountability, I guess, for who
5 holds the JCB accountable? Who reviews what they do, and
6 how do we know as citizens that it's doing its
7 constitutional function?

8 And I guess my question for that is obviously we'd
9 have to amend the constitution if we're going to provide for
10 openness, but does openness, in fact, accomplish that goal
11 to some degree? Not only so the public knows what's going
12 on, but provides some assurance to the public that the
13 Conduct Board itself is doing what the constitution requires
14 it to do?

15 JUDGE BECK: I think it's not an easy answer, but I
16 have come down on the side of transparency because there's
17 certainly a lot of countervailing sentiment for
18 confidentiality.

19 MS. GOODMAN: Could I respond as well?

20 MR. LEGG: Absolutely.

21 MS. GOODMAN: Thank you. I think Judge Beck makes
22 a very persuasive case. PMC has not yet taken a full
23 position on changing the rules of confidentiality that are
24 in the constitution, but we would agree that there needs to
25 be a better public understanding of the work of the judicial

1 discipline system so it's not seen as just an arm of the
2 court and a body that protects judges, but that it is an
3 independent body that fulfills its mission in protecting the
4 public.

5 I think there would need to be some constitutional
6 amendments. And I think that the problem in this particular --
7 case that constitutionality provisions about confidential --
8 confidentiality rules have created is that as far as I can
9 tell from what I've read in the media and the testimony
10 presented to this Commission and the briefs and the
11 different legal proceedings is the anonymous complaint got
12 stuck in some kind of limbo where the Court of Judicial
13 Discipline never -- I'm sorry, the Judicial Conduct Board
14 never filed charges so nothing could become public, but
15 never dismissed the complaint so nothing could become
16 public.

17 It's just sitting there. And how often does that
18 happen? I have no idea. I mean, I hope that you can get
19 some answers to that. But I don't know that changing the
20 entire structure of confidentiality solves that problem. I
21 think there could be better rules in place.

22 I think that some have suggested an inspector
23 general for the court system that maybe does do monitoring
24 and auditing and more than self reporting of annual reports
25 that the -- that the Board does.

1 I think knowing from firsthand and talking to
2 people who are contemplating filing complaints against
3 judges, I don't think that it would serve the public well to
4 have every complaint that's filed against a judge be made
5 public and have every time that somebody files a complaint
6 against a judge be made public.

7 There would have to be some kind of screening
8 first. Because so many people are angry or upset or
9 confused about what happened. And they sound very logical
10 when you talk to them. They can give you all the
11 information about their case. And if you talk to them for a
12 while, and we do, and we're a small organization, it takes a
13 a lot of time, you realize that what they're saying does not
14 make sense.

15 The conspiracy that they are -- have created in
16 their mind doesn't make sense, and really they need to
17 either file a motion or file an appeal, or sometimes they
18 really just need to talk to somebody for a few minutes and
19 be angry.

20 But if every one of those complaints from a
21 disgruntled litigant against a judge gets filed, nobody's
22 going to want to serve as judge. I mean, judges are people.
23 They have feelings. It's the big complaints.

24 And the question would be, is there a score card or
25 at least is the Supreme Court hearing every year about how

1 many complaints are filed? I think there might be interim
2 steps before just opening the entire process.

3 But I think it's something that should be looked
4 at. And whether this Commission makes recommendations or it
5 ends up going to the legislature for hearings, I think it's
6 a step that would be very important.

7 MR. LEGG: Let me go back to your suggestion that
8 this Commission is unique -- in a unique position to get the
9 answers, or that we should recommend the creation of a
10 special master or something to that affect to try to figure
11 out what it was that happened with respect to what the
12 Judicial Conduct Board knew in relation to Luzerne County
13 and why there was inaction, I guess.

14 But you've seen the Supreme Court's decision. Do
15 you think that a special master would get any further than
16 we would get? In other words, we've come as far as anyone
17 has ever come in getting information from the Board itself.
18 And do you think at this point in time making that type of
19 recommendation would just be a waste of resources?

20 In other words, what would someone other than us do
21 that we haven't done?

22 MS. GOODMAN: First of all, I think the Commission
23 has taken every step that it could take. So I don't think
24 that it is, you know, due to lack of trying or effort or
25 diligence. I think in reading the various opinions that

1 came down from the Supreme Court last week it's not clear to
2 me that it's over, a litigation. Certainly Chief Justice
3 Castille rested on this narrow rule and didn't go to the
4 confidentiality provisions and say whether this rule would
5 be violative of them or not.

6 Justice Eakin says it should be on a case by case
7 basis. I mean, they're certainly divided in the court. I
8 think -- I'm not certain, but I believe that the Supreme
9 Court could, on its own, appoint a special master with the
10 powers and direct that the Conduct Board and Court of
11 Judicial Discipline answer questions.

12 I'm not -- I would have thought reading the
13 legislative charter that this body would have -- because it
14 was, you know, created by three branches and given that
15 specific charge, would have been the body to do that.
16 I don't know if further litigation would make it that way,
17 and I'm not sure that that's worth your time given your
18 scope.

19 MR. LEGG: And let me make it concrete for you.
20 Let's assume that we try to solidify the record, and we get
21 objections that are based upon deliberative process.
22 There's absolutely no way for us to create a record as to
23 what occurred, or if any deliberations even occurred. And
24 if a court is going to determine that the processes or
25 whatever the court -- or the Board of Judicial Discipline

1 does or the JCB does, all they have to do is raise an
2 objection, and it never goes further than that.

3 Where do we go? In other words, we're going to
4 bang our head against the wall and engage in an exercise
5 that is difficult and arduous, but are we really getting
6 anywhere with it?

7 And is it really the bottom line that the
8 constitution itself either has to be amended to provide for
9 openness, or we as citizens are going to accept this level
10 of confidentiality?

11 MS. GOODMAN: Well, I don't know if even amending
12 the constitution would retroactively get you, this
13 Commission, what it would need.

14 MR. LEGG: I think it would.

15 MS. GOODMAN: No, I don't think it would because
16 they would go by -- I mean, if you look at last week's
17 decision, they went by the rules that were in affect before,
18 not the new rules.

19 So, I mean, I certainly understand and share your
20 frustration. I think that this body has the unique standing
21 among the public and among the three branches of government
22 to be that voice, at a minimum, of the public calling for
23 that.

24 And I think that, you know, to their credit, our
25 Supreme Court justices have taken steps that many people

1 maybe didn't think they would take when the scandal began to
2 unfold to make sure that problems were addressed and people
3 got new hearings and things were examined.

4 And I think with continued public pressure and with
5 the weight of this Commission talking to the Governor and
6 the General Assembly and the Supreme Court, if the
7 litigation, or continued litigation, doesn't get what you
8 need, I think there might be more of a public outcry.

9 I think that's a big story coming out. And I hope
10 that you all have success, or that there will be success.
11 Because I really do worry that we have a system that most of
12 the country -- you know, the two-tiered system is what the
13 country's -- the rest of the states look to and hold up as
14 an example when you talk to people from the National Center
15 For State Courts.

16 And they talk about confidentiality and deferral
17 procedures as normal. You know, PMC, in sharing our
18 thoughts and talking to other experts before we've committed
19 our testimony to paper, have heard, well, of course there
20 are rules of confidentiality.

21 So that's not unusual. Those rules aren't unusual.
22 We have an unusual situation that seems to be thwarting
23 getting information. But we also have an unusual situation
24 that seems to be demanding unusual results and remedies.

25 MR. LEGG: I had some questions for Judge Beck just

1 because the legislative history, I guess, or the history of
2 the Commission really fascinated me, especially when you
3 look at the new operating procedures that the Board is
4 implementing.

5 MR. HOROHO: And let me maybe -- I'm not reading
6 Mr. Legg's mind, but going back to Judge Beck. And I
7 appreciate the thoughtfulness you had regarding this
8 transparency.

9 But as we struggle with this issue, and the JCB now
10 has responded, in part because of what happened in Luzerne
11 County, with internal operating procedures, which was
12 laudable on their part.

13 But now there is three levels of hierarchy for the
14 JCB to follow. The constitution supersedes their rules.
15 Their rules supersedes the IOPs. So how do we solve this
16 problem without essentially going back and amending the
17 constitution?

18 So I know you have some legislative -- or you might
19 have some thoughts on how that -- how the constitution --
20 why it was amended and why that was passed then. And do you
21 think that's the only way we can solve this problem? And if
22 so, what would be our arguments to make that happen?

23 JUDGE BECK: I think a constitutional amendment is
24 the cleanest way to go about this. And I think the public
25 now is much more -- or they desire to a much greater degree

1 transparency. And I would doubt that you would have a very
2 hard time passing that constitutional amendment. I would do
3 it cleanly and try for constitutional amendment.

4 MS. MARKS: Before the constitutional amendment
5 creating the current discipline system was enacted in 1993,
6 and you probably remember around that time there was a lot
7 of coverage of the impeachment of former Justice Rolf
8 Larson. And that kind of put that -- you know, the issue on
9 the front page, just as what we're seeing with what happened
10 in Luzerne has put judicial discipline and judicial issues
11 on the front page.

12 I mean, too often courts only get covered when
13 there's a mess up. And so I think that, you know, this -- I
14 actually had a -- a conversation with a legislator about the
15 possibility at some point of holding hearings on the
16 constitutional amendment and see if it should be changed.

17 But I suggested to him to at least wait to see what
18 comes out of your Commission in case you do make
19 recommendations for the -- for change in the judicial
20 discipline system.

21 MR. LEGG: Judge Beck, I just wanted to try to make
22 this confidentiality issue concrete for the record. The
23 constitution itself has a provision, and it's a stand-alone
24 sentence, that says all proceedings of the Board shall be
25 confidential except when the subject of the investigation

1 waives confidentiality. That's the sentence.

2 JUDGE BECK: Right.

3 MR. LEGG: There's nothing in there indicating that
4 the confidentiality itself applies to the Board.

5 JUDGE BECK: That's my interpretation.

6 MR. LEGG: And is it fair to say that was the --
7 what the Commission intended as well --

8 JUDGE BECK: Yes.

9 MR. LEGG: -- when it drafted this?

10 JUDGE BECK: It was -- it was protective of the
11 judge and the witness. It was not protective of the Board.

12 MR. LEGG: And --

13 JUDGE BECK: I mean, it was protective of the
14 Board in terms of immunity, but not confidentiality.

15 MR. LEGG: And that's a separate provision of the
16 constitution itself?

17 JUDGE BECK: That's totally separate, yeah.

18 MR. LEGG: What I'm trying to verify is, let's say,
19 a judicial officer waives confidentiality. And let's say in
20 this scenario one of the judges waived confidentiality.
21 Would it have been the Commission's intent at that point
22 that a Commission such as this would be entitled to the
23 documents? In other words, that confidentiality would no
24 longer exist.

25 JUDGE BECK: That would -- the Supreme Court

1 doesn't agree with me, but that would be -- whether they
2 waived it voluntarily or they waived it because the
3 information got out through some other procedure, in my view
4 it's been waived. But my view means nothing. The Supreme
5 Court says it's not waived.

6 MR. LEGG: Well, and I'm not sure the Supreme Court
7 had the benefit of the history of the Commission, what the
8 Commission's intent was. And that's what I'm trying to
9 verify.

10 JUDGE BECK: Well, the intent was that it would not
11 -- the confidentiality was not a privilege of the Board.

12 MR. LEGG: Okay.

13 JUDGE BECK: The Board was expected to act as a
14 lawyer acts. And if a lawyer knows something he should not
15 be talking about, that's what one expected of the Board.

16 MR. LEGG: So if a judicial officer waives
17 confidentiality, at that point confidentiality is no longer
18 an issue?

19 JUDGE BECK: Right.

20 MR. LEGG: And their new operating procedure, I
21 want to read a portion of it, it's 5.01, indicates in part,
22 the respondent judicial officer may waive confidentiality
23 with respect to the complaint, but the Board shall reserve
24 judgement in its discretion whether or not to make the
25 complaint public.

1 It then goes on to say, a public response, if any
2 is made by the JCB, should be limited to, A, a complaint was
3 filed against the named respondent; B, the judicial officer
4 has a right to an attorney; C, the JCB has the sole burden
5 of proof by clear and convincing evidence; and D, it is
6 presumed that the respondent judicial officer has not
7 committed any violation of the code.

8 Their operating procedures are saying even if a
9 judicial officer waives confidentiality, at most the only
10 thing we'll release is the complaint?

11 JUDGE BECK: I think Shira answered that question
12 directly when she talked about 5.01. She -- she viewed that
13 as an unconstitutional extension.

14 MR. LEGG: Well, and I want your interpretation as
15 a member of the Commission in terms of --

16 JUDGE BECK: That would certainly be --

17 MR. LEGG: -- was there ever an intent to allow the
18 JCB to say, even if there's a waiver, we're only going to
19 release the complaint?

20 JUDGE BECK: No, never.

21 MR. LEGG: And, in fact, if there's a waiver,
22 they're essentially still maintaining the discretion
23 apparently to say we're not going to release anything?
24 That's what this rule says, right?

25 JUDGE BECK: Yeah. I think that may have driven me

1 to my transparency view.

2 MR. LEGG: Okay. And, in fact, the things they're
3 saying to release, at least three of the four, are things
4 that are public anyway. A, you have a right to an attorney.
5 B is what the burden of proof is, and C is there's a
6 presumption of innocence. None of that would be
7 confidential to be begin with; is that correct?

8 JUDGE BECK: Correct.

9 MR. LEGG: And, in fact, is it fair to say that the
10 constitution itself envisions situations where this type of
11 statement could be requested by the judicial officer? A,
12 we've received a complaint. B is we're going to investigate
13 it, and it's our burden, and there's a presumption of
14 innocence.

15 In other words, their rules have a dichotomy there
16 as well. In other words, there's the blanket waiver versus
17 the request to make a public statement, I guess I'll put it
18 that way. Do you see those as two different things as well?
19 In other words, a judicial officer saying I waive
20 confidentiality, or a judicial officer saying, hey, this
21 stuff's out there. You guys have to issue a statement to
22 explain what you do?

23 JUDGE BECK: Yeah.

24 MR. LEGG: Do you see this operating procedure as
25 really combining the two and then creating a shield for the

1 JCB to say we're not giving anybody anything regardless of
2 circumstances?

3 JUDGE BECK: Clearly. And when the original intent
4 was that the judicial officer was not entitled to any
5 confidentiality at all on his own, the confidentiality went
6 to the judge and to a witness or complainant.

7 MR. LEGG: One final question, if I may, Judge.
8 I'm sorry.

9 CHAIRMAN CLELAND: No. Sure. Fine.

10 MR. LEGG: Again, I want to go to legislative
11 intent, because I think it's interesting. The constitution
12 appears to have mandatory language that the JCB must
13 investigate complaints. And I would argue that upon finding
14 probable cause that they will file charges. Was it the
15 Commission's intent that the JCB would, first of all,
16 investigate every complaint? B, if they found probable
17 cause, proceed to some type of disciplinary action?

18 JUDGE BECK: No. 1, I think the Commission did not
19 think they would necessarily investigate every complaint,
20 that the -- the staff of the Board would weed out those
21 complaints, let's say from the crazies, you know, that they
22 would use their judgement.

23 MR. LEGG: But there'd be some type of screening?

24 JUDGE BECK: There would be a screening. But as to
25 any complaint that had the tinge of authenticity, they would

1 -- they would investigate that. If they found probable
2 cause, it would then go to the court.

3 MR. LEGG: Well, and that's my question. What --
4 do they have a constitutional obligation, in your view, upon
5 finding probable cause to proceed with a complaint for
6 judicial discipline?

7 JUDGE BECK: They did. But the thing you have to
8 remember is the Commission's language was not totally
9 adopted by the legislature.

10 MR. LEGG: Is there anything as you read in the
11 constitution that would support the deferral policy?

12 JUDGE BECK: No.

13 MR. LEGG: Do you believe that they do, in fact,
14 still have that constitutional duty to investigate
15 complaints that have some type of value and to move forth
16 with the discipline process in the current state of the
17 constitution?

18 JUDGE BECK: It seems to me that their function is
19 to determine if there's probable cause, and if there is
20 probable cause, to take the next step and make that
21 referral.

22 MR. LEGG: Do you believe that the deferral policy
23 itself is a constitution -- is constitutional under the
24 current language?

25 JUDGE BECK: No.

1 MR. LEGG: That's all I have.

2 CHAIRMAN CLELAND: I want to thank you all very
3 much for being here today and offering your incites and
4 guidance and judgement on these very complicated matters.
5 Thank you, very much.

6 MS. MARKS: Thank you, very much to the Commission.

7 JUDGE BECK: We thank you, the Commission, for
8 undertaking this really horrendous situation and working so
9 hard to find a solution to the situation.

10 MS. MARKS: And if we can help in any way as you --
11 as you go into your next steps after the hearings end, we
12 stand ready and willing to do that. Thank you again.

13 CHAIRMAN CLELAND: Thank you. We're going to be in
14 recess until 20 after 11. Thank you.

15 (Recess taken from 11:00 to 11:20.)

16 CHAIRMAN CLELAND: Good morning. We're ready to
17 resume this morning's hearing with testimony from
18 representatives of the Judicial Conduct Board. As is well
19 known by now, late Friday afternoon last week the Supreme
20 Court issued a complex collection of rulings involving the
21 relationships and legal issues affecting the questions
22 before the -- this Commission insofar as it affects the
23 Constitutional provisions governing the work of the Judicial
24 Conduct Board.

25 The Board yesterday afternoon, through its counsel,

1 Mr. Titus, delivered to me the information directed by the
2 Court to be supplied; and that has been received and is
3 under seal.

4 As part of that collection of opinions, Justice
5 Baer invited the possibility that negotiations might be
6 conducted, and those continue to be ongoing. In the
7 meantime, the Justice also suggested the possibility that
8 the issues might be more fully presented to the Court in a
9 contempt proceeding based on a full record.

10 Bearing in mind Justice Baer's writing on that
11 point, we feel that it is important that we create a record
12 in some detail that could support, if necessary, a contempt
13 petition if this Commission decides to pursue that.

14 As a result, in an effort to create that record it
15 is certainly not the intention of the -- of this Commission
16 either to be or appear to be contentious. However, there is
17 a need to delve in some detail into this matter, and the
18 examinations of the Board could possibly be extended.

19 However, Mr. Puskas, we hope to get you done by
20 lunch.

21 MR. PUSKAS: Thank you.

22 CHAIRMAN CLELAND: Counsel, I'm not sure who's
23 doing the questioning here.

24 MR. LEGG: I will be, Mr. Chairman.

25 CHAIRMAN CLELAND: Mr. Legg.

1 MR. LEGG: Do you want to swear Mr. Puskas in?

2 CHAIRMAN CLELAND: Yes. Would you please stand to
3 be sworn in?

4

5 FRANCIS J. PUSKAS, II, called as a witness, being
6 duly sworn, testified as follows:

7

8 MR. PUSKAS: I do.

9 BY MR. LEGG:

10 Q Good morning, Mr. Puskas.

11 A Good morning.

12 Q Could you just describe briefly how you're
13 employed?

14 A I'm employed as Deputy Chief Counsel to the
15 Pennsylvania Judicial Conduct Board.

16 Q And how long have you been Deputy Chief Counsel?

17 A I've been Deputy Chief Counsel since 2005.

18 Q And can you just describe for us what a Deputy
19 Chief Counsel does?

20 A I serve in a supportive capacity to Chief Counsel.
21 I handle certain administrative matters, in addition to a
22 third of the case load.

23 Q Now, when you say one third of the case load, would
24 that be just disciplinary proceedings or preliminary
25 reviews, or how does that work?

1 A We're talking about all complaints. So all
2 complaints received by the Board are basically divided up
3 between the three counsel.

4 Q Would you see every complaint or just a third of
5 the complaints?

6 A Just a third of the complaints.

7 Q And how does that screening process or assignment
8 process work?

9 A Chief Counsel screens them and assigns them to
10 counsel. So I would -- I would get some assigned to me, and
11 the other assistant counsel would get some.

12 Q And so you would say roughly how many cases would
13 you be assigned to hear?

14 A Oh, well, if we get about, you know, I mean, over
15 600 complaints a year, then we're really talking about a
16 third of that. 200 or so odd complaints per person.

17 Q Okay. And can you just describe for me the general
18 process that occurs after you've been assigned a complaint?

19 A I receive a complaint. I make an initial review of
20 that complaint, read all of the documents that are inside a
21 file folder that's been prepared. So that can include, for
22 example, the actual complaint form, any attached documents
23 that somebody provides to us.

24 I make an initial assessment of what I think about
25 what is in that material. It may dictate whether or not I

1 assign it to an investigator because it looks like there's
2 something here that we need more information about, or it
3 may be something where it can be resolved through document
4 requests, which I'll make a note of that, and I may send it
5 off to have certain documents acquired.

6 For example, somebody makes a delay complaint, says
7 a judge didn't rule on a particular matter that they filed
8 on a certain date. Get a copy of the docket. See if, in
9 fact, they did file something. It was docketed, and it
10 wasn't resolved. Is the docket still open? Maybe it wasn't
11 entered into the docket and there is something, in fact,
12 there. Or it might indicate that there was, in fact, a
13 delay in responding.

14 Q In that example that you just gave you wouldn't
15 even assign an investigator? You would do that on your own?

16 A Generally I would not assign that to an
17 investigator because it's something that's really resolvable
18 by looking at documents.

19 Q So how many of those 200 cases would you say
20 investigators actually get assigned to?

21 A Well, it varies from year to year, and it's really
22 case specific. You know, some years the investigators may
23 get more, some less. I would say maybe in any given time --
24 I'm just trying to think about it in my own mind -- 30 or
25 more, maybe 30 or more a year.

1 Q And how many investigators do you have?

2 A We have three.

3 Q Does each deputy or counsel have their own
4 investigator, or the investigators service all three
5 attorneys?

6 A No. We have three investigators that basically
7 divide the state up into three zones. So one handles
8 primarily eastern side, middle, western.

9 Q Now, when you're doing this process are there any
10 report forms or anything that the JCB requires you to
11 maintain in terms of record keeping?

12 A Well, anything, of course, that happens on the file
13 I might make a memo to file on. When I make an initial
14 assessment we have a form that's in the folder where you can
15 actually write down -- you know, that's where I basically
16 write down my initial take on the matter. And it's also
17 good for me if I ever pick that file up, I get a quick
18 capsule summary of what's going on in here or what it's
19 about if anyone asks me.

20 There's no specific, quote, forms that you file
21 with the Board other than these matters eventually have to
22 be presented to the Board for resolution. So it's really a
23 matter of when is the matter ripe.

24 Q Okay. How often would you say you get anonymous
25 complaints assigned to you, out of those 200 let's say?

1 A Not often. I don't think that's -- that's never
2 been a large part of our case load, anonymous complaints.

3 Q But you have had anonymous complaints assigned to
4 you?

5 A I have.

6 Q And would you say that the Conduct Board addresses
7 those complaints at the same level that they would address
8 any other complaints?

9 A Yes.

10 Q Can you recall any discipline ever arising out of
11 an anonymous complaint?

12 A Yes.

13 Q So obviously they are taken seriously because you
14 can even recollect discipline arising from --

15 A I had to think for a moment, but yes.

16 Q Okay. The investigative process, you explained how
17 the -- that you make the decision whether to assign the
18 investigator?

19 A Um-hum, yes.

20 Q And do you direct the investigator in terms of what
21 you want, or how does that work?

22 A I generally give them what I call an assignment
23 memo, which gives them an analysis -- gives them my brief
24 summary of what the facts are as I read them in the
25 material. Gives my analysis of what I think are the issues

1 there, what areas I don't think we need to pay attention to
2 because it's a non-issue as far as canons are concerned or
3 anything like that, and where they can focus their time.

4 I don't generally suggest specifically who they go
5 out and talk to. They're smart guys, and they know how to
6 handle an investigation. I might say I would include X
7 person in your interviews and let them go from there and see
8 what they give me back.

9 Q So you may ask, you know, get this person
10 interviewed, but overall they have some independence in
11 their investigation?

12 A Yes.

13 Q And as I recall from Mr. Massa's testimony, these
14 investigators are retired FBI agents?

15 A Yes, they are.

16 Q So they know how to investigate stuff?

17 A Yes, they do.

18 Q Do they also prepare anything like reports that
19 they would have prepared when they were in law enforcement?

20 A Well, I don't know if it's exactly what they would
21 have prepared when they were in the FBI, but they prepare
22 reports of interview we call them.

23 Q Okay. Well, I'm a prosecutor, and I see like the
24 standard police reports that we get from the State Police
25 which have different boxes that have to be filled in.

1 A It's nothing like that.

2 Q Okay.

3 A There is no such thing.

4 Q More of a memo form, I guess?

5 A Yeah.

6 Q Okay. So their report would involve statement of
7 interviews?

8 A Correct.

9 Q What about document production? Would they attach
10 documents that they found?

11 A Sometimes. If they go -- if they conduct an
12 interview and somebody provides them with documents during
13 the course of that, they will attach that, reference them in
14 the report of interview, and they'll be attached.

15 Q Okay. And would they actually ask witnesses to
16 write statements out on a statement form, or would it just
17 be their recollection of what the interview entailed?

18 A I can't think of any instance where I've had an
19 investigator have somebody write something down.

20 Q So it's always they take notes, and they transcribe
21 the notes on to what they would call their statement of
22 interview?

23 A Yes.

24 Q Is a statement of interview signed by the witness,
25 or is this just a recounting by the investigator?

1 A It's a recounting by the investigator.

2 Q Anything else in those reports, maybe some
3 documents, statement of interviews, anything else?

4 A Reports of interview are the basic documents.
5 There may be just memoranda on perhaps additional inter --
6 additional investigation that did not entail an interview
7 but might have brought forth certain information. So there
8 might be some of those. But the vast majority of the
9 documents would be reports of interview.

10 Q Is it fair to say what the investigator does is
11 factual?

12 A Yes.

13 Q They go out and get the facts and put them down on
14 paper for you?

15 A Correct.

16 Q And then your job is you assess those facts?

17 A Yes.

18 Q Now, is that -- I guess in your rules you have
19 different levels of reports. I think one is called a
20 preliminary investigative report, and then I guess there's
21 the final report after it's gone to the Board and they've
22 authorized a further investigation. Is what we're talking
23 about initially when they go out, you send them out, is that
24 the preliminary investigation?

25 A It could be. I'm -- I think what you're describing

1 are phases of an investigation. So, for example, if they're
2 out there -- we get a complaint, and I assigned it to an
3 investigator. He goes out. He conducts interviews. We get
4 those back. I take a look at them. If I see that this has
5 revealed something, maybe we need to go further, maybe we
6 have all we need and it's ready to go to the Board for
7 presentation.

8 We have -- you probably heard we have something
9 called a notice of full investigation. Really by the time
10 we send out a notice of full investigation we've got our
11 facts together. You know, because you couldn't put a judge
12 on notice of what the allegations of the claims were unless
13 you knew something about them. And then you're really
14 looking for their answer at that point.

15 Q And I guess that's what I'm trying to get at.
16 Because we've seen some flow charts that are exhibits, and
17 Mr. Massa has testified about this preliminary part of the
18 process.

19 And I guess what I'm trying to verify, is this the
20 preliminary part where you review the complaint, say, hey,
21 there's something there, go to the Board and say we want to
22 investigate this further? Or do you review it and say
23 something's there, I need to investigate it before I go to
24 the Board? Or could it be either of those scenarios?

25 A Well, it's really a question of where are you

1 looking for the Board to go with this? So if I have
2 something that's been investigated, and I'm bringing it to
3 the Board for some kind of action, I'm either looking for a
4 final disposition, or I say, well, we've investigated this.
5 The claim has not been substantiated. We've conducted
6 interviews. It's not corroborated.

7 The Board can go and make a final disposition on
8 that particular complaint. They can dismiss it if they felt
9 that was the proper way, or they could issue something like
10 a letter of caution if they felt it walked the line on some
11 issue. But it could also mean that I've gotten to a point
12 where I've investigated the matter, have everything that I
13 need, I think it's significant, and at this point I'm asking
14 the Board to give me the authorization, make formal contact
15 with the respondent judge. And that would be the notice of
16 full investigation, which would be a first step toward going
17 to the Court, or it could be a step in a different direction
18 depending on the response that we get from the judge.

19 It may open up other avenues of inquiry that we
20 need to find that we didn't think of. Usually at that
21 point, as I said, we've talked to everybody that would be
22 relevant to the complaint or to the issue. And so a judge
23 may come back and say, well, I think you need to speak to X,
24 Y, and Z. We probably already did speak to X, Y, and, Z,
25 but --

1 Q What I'm trying to understand is that in the
2 preliminary investigation phase, because your rules indicate
3 that -- Rule 28 talks about preliminary Board review and
4 action.

5 A Could you tell me which rule are you looking at?

6 Q Rule 28.

7 A 28. This is our rule of procedure, correct?

8 Q Yes.

9 A Okay.

10 Q And then, in fact, Subsection C indicates they
11 direct Chief Counsel to proceed with a full investigation.

12 A Um-hum.

13 Q And I'm trying to understand in my mind in terms of
14 the preliminary investigation is just you look at the
15 complaint at that point, determine whether canons are
16 violated, and maybe we want to send an investigator out, or
17 are we doing full scale investigations at the preliminary
18 stage? Do you see what I'm saying?

19 A Um-hum.

20 Q Is the Board making the decision to send the
21 investigator out after your -- after recommendation from
22 you, or in the preliminary stage you review it and in your
23 professional judgement say I need this investigated and you
24 send the investigator out?

25 A The investigator has gone out at that point.

1 Q Okay.

2 A This -- the language preliminary inquiry versus
3 full investigation, it is very confusing because of the fact
4 that, as I said, by the time we are sending a notice of full
5 investigation we've done our investigation. Because we
6 wouldn't be contacting a judge to say we've got this -- this
7 issue if we didn't feel there was some -- some backing
8 behind it, some basis for that contact. We wouldn't just
9 get a complaint in the mail, and somebody says Judge X is
10 doing this, and we send a letter off and say, hey, he said
11 you're doing it. Give us a response.

12 Q Right.

13 A No. We want to go out and get some corroboration
14 or confirmation that we have good basis to even make this
15 contact with you at this point. And the point we do a
16 notice of full investigation we -- whether you call it
17 preliminary inquiry, whatever you want to put on it, there
18 has been an investigation.

19 If there's more that's going to come after that, it
20 would be when the judge comes back to us and says, this is
21 my response. And I believe if you haven't already, you
22 might want to talk to these individuals if you haven't
23 included them, because they can back me up on this. And
24 then that might be the additional investigation.

25 Q And I'm not trying to put words on you. I'm just

1 trying to verify from your own rules what it is you all do.
2 And I think it's fair to say -- I think I understand at this
3 point that basically your investigation is done by the time
4 you submit it for preliminary Board review except for the
5 judicial officer that would be notified to provide their
6 input?

7 A Right. And if they put us on a track of other
8 information, you know, because they can -- they can refer us
9 to other individuals, and often times they do. If there are
10 any witnesses you think we should contact, in fact, it's in
11 the letter, please let us know. And as I said, more often
12 than not we've already talked to those individuals.

13 Q So that would be either the exonerating portion or
14 the mitigating portion of it --

15 A Yes.

16 Q -- that the judge would provide? At this point you
17 have some type of conduct that you either want to proceed
18 with or not proceed with? If you proceed with it, the judge
19 then can give you information in terms of, hey, here are the
20 people you should also be talking to?

21 A Right.

22 Q In terms of the screening process that Chief
23 Counsel does, is he engaging in any of this at this point,
24 do you know, before it's assigned?

25 A No. Once it's assigned it's in the hands of

1 whoever the attorney is handling that matter. Chief Counsel
2 doesn't really get involved except to the extent of
3 obviously he is -- he serves in the role of Chief Counsel,
4 and certain things are run by Chief Counsel because of that,
5 you know, by anybody who's below that position.

6 Q So you submit -- the fact that the investigation is
7 done you submit for preliminary Board review some type of
8 document I take it?

9 A Um-hum.

10 Q That would be a recommendation, a memo? What would
11 it be?

12 A It's a memo that makes a recommendation for further
13 action or disposition.

14 Q Would it include the reports that the investigators
15 prepared?

16 A No, it does not. It does not include -- it is a --
17 you have to understand that at the Board meetings, you know,
18 they review hundreds of cases. There could be 130 cases on
19 one particular meeting. And so what we try to do are those
20 cases that are not as significant, those -- you know, the
21 vast majority which are not substantiated or meritless, we
22 try to distill down the information from any investigation
23 we've done into a one page memo on most of them, if it's
24 possible, and most often it is. Because those are --
25 usually a lot of those are frivolous.

1 The more significant ones vary depending on facts
2 involved in the case. They could include attachment of
3 documents. The fact that a document may not be attached
4 doesn't mean that the Board isn't made fully aware of what's
5 there. It's that it's delineated in the memo and analyzed
6 what counsel thinks about those particular matters.

7 It may not always involve -- in fact, the vast
8 majority don't involve attachment of, for example, the
9 actual complaint.

10 Q And I think you indicated that a small percentage
11 -- well, not small, but 30 out of the 200 cases would
12 involve investigators?

13 A Roughly per counsel I would think. I mean, I'm
14 thinking of my own.

15 Q Sure.

16 A My own statistics. I'm trying to think in my head
17 how many I gave out this year or last year, and I'm thinking
18 it's got to be between 30 and 40.

19 Q And I would imagine those types of memos would be a
20 little more detailed than what you refer to as the frivolous
21 ones that you were able to resolve without investigators?

22 A Those smaller memos that I'm referring to, which
23 are -- I guess we would call it disposition after
24 preliminary inquiry, those are ones that generally do not
25 involve investigators. They can be resolved on the basis of

1 documents, transcripts.

2 Somebody may make an allegation that a judge has
3 displayed improper demeanor during a proceeding. We get a
4 copy of the transcript. We review exactly what the words
5 were, what the judge said. We say, well, according to your
6 complaint you wrote the judge said this. That's not what
7 the transcript shows at all. That kind of thing.

8 So a lot of those particular matters are resolved
9 in that way. And to the extent we can, because of the vast
10 quantity, we try to distill them. I mean, you can have a
11 file that that's thick. It's sometimes difficult to distill
12 it into a one page memo, but we try.

13 The others that are more significant that have more
14 potential for going to court, those are more extensive
15 files.

16 Q Well, and I guess to the final report, at some
17 point --

18 A The final report, depending on the case, certainly
19 could be much more extensive than that.

20 Q That's -- let's move to that. If you move beyond a
21 preliminary report, is there much difference between the
22 preliminary report and the final report when you submit it
23 to the Board for final action?

24 A Well, I'm not sure if you're -- you're
25 understanding me correctly. The -- they're all reports to

1 the Board. It's just some that we designate -- we designate
2 in a category they're before the Board for disposition after
3 preliminary inquiry. And those are, generally speaking,
4 cases where we could resolve them on the basis of documents
5 or maybe even one interview, one or two interviews. But
6 those are even rare.

7 Anything else is usually a little more involved,
8 and it's also a memo to the Board presented just like the
9 others with information. But it might be more detailed
10 because the nature of the allegations are more detailed.

11 Q And in that situation the Board may move to a full
12 investigation, at which point the judicial officer is
13 notified?

14 A Yes.

15 Q You would then at some point come back to the Board
16 with another report?

17 A Yes.

18 Q And that -- is that report substantially different
19 from the preliminary report that would have been submitted?

20 A I think I understand what you're saying. There is
21 a report that would go to the Board that would be asking for
22 authorization to send the notice of full investigation.
23 They give me the authorization. I go back, contact the
24 judge through that notice of full investigation, see where
25 that takes us.

1 They may send a response that's so detailed it
2 actually clarifies everything, and there isn't anything else
3 that needs to be done. It might not. It might require a
4 deposition and additional interviews. Once that's completed
5 it will go back to the Board for what we call final
6 disposition, and the Board will decide what ultimately
7 happens with that case.

8 Q There would be a report submitted to the Board as
9 well asking for some kind of final disposition?

10 A Oh, yes, there would.

11 Q Is it a duplicate copy of the first record, or is
12 it added to the report, or is it a whole new report?

13 A It's generally a new report. There's a lot of
14 information that may be similar. Because when you were
15 presenting it to the Board to ask for authorization, the
16 basis for that is -- is very much the same as --

17 Q In that circumstance where now the Board is at a
18 point deciding whether to proceed with formal charges or a
19 letter of caution or a letter of counsel, at that point
20 where this is a disposition question, are the reports of the
21 investigators provided to the Board at that point?

22 A No, no. The Board always has access to this
23 information if they request it. And sometimes Board members
24 will bring up specific points and want to know something.
25 But generally it is a lengthy memorandum that has all the

1 facts of the case in it.

2 Q Okay. So nothing -- a Board member could say, hey,
3 I want to see the interview of Joe Doe, let's say? And I
4 guess the meetings are here, right, at your office, so you
5 could basically obtain that information for them?

6 A Yes.

7 Q I want to just talk a little bit about the deferral
8 and referral policies. Is that something as a Deputy Chief
9 Counsel that you're involved in, or is that something that
10 the decision is made by Chief Counsel or the Board?

11 A I've never been involved in that policy. That's
12 generally been something that either the Board or Chief
13 Counsel has been involved in.

14 Q Have you ever been involved in situations where
15 you're investigating a complaint and a deferral or referral
16 decision has been made on that complaint?

17 A I'm thinking here. I don't recall any situation
18 like that.

19 Q And I guess what I'm trying to get at is the
20 referral/deferral decision made before it gets assigned to
21 you?

22 A Well, if it wasn't assigned to me, I wouldn't be
23 aware of it.

24 Q And have you ever had a situation where you're in
25 the middle of an investigation and you uncover criminal

1 conduct or your investigator uncovers criminal conduct?

2 And if so, what's the next step?

3 A I'm trying to think here of -- I can't think of a
4 case that I've had personally that went that route.

5 Q So you've never actually personally been involved
6 in any referral to another law enforcement agency?

7 A No, not me personally.

8 Q I want to direct your attention to the brief that
9 you filed in the Lokuta matter, which I believe was in
10 September of 2009.

11 A Um-hum.

12 Q And we asked Mr. Massa some questions on that, and
13 he deferred to you. So that's one of the reasons that
14 you're here. I'm trying to create a time line as to what
15 occurred. And your brief is, I guess, the best public
16 record to do that.

17 And in particular, first off, you make a
18 representation in the brief on page 16, and I think it's in
19 front of you, at the bottom, that the federal government
20 didn't begin investigating Ciavarella and Conahan until the
21 summer of 2006?

22 A Yes.

23 Q Where did you get that information?

24 A That information was given to me by the federal
25 investigators.

1 Q Okay. So you spoke to them?

2 A Yes. And I received documentary information.

3 Q Was that in preparation for drafting this brief?

4 A I don't think so, no.

5 Q Okay.

6 A Not specifically for this brief.

7 Q Well, if you weren't involved in the referral
8 policies, why would you have been discussing matters with
9 the federal -- either the FBI or US attorneys?

10 A Well, this became an issue because Judge Lokuta --
11 the Judge Lokuta matter was raising certain defenses. And I
12 must say that it's difficult for me to speak about this
13 matter because it's pending, and the litigation is ongoing.
14 But generally the respondent judge, Judge Lokuta, had been
15 raising issues of conspiracy during her trial.

16 Now, from my perspective that later on bloomed into
17 other -- other things as she went on with this -- this
18 theory. And it became post trial something that she -- she
19 was putting out there that there was a motive or a
20 conspiracy that she was being retaliated against for going
21 to federal investigators.

22 So I wanted to know when did she go? When did she,
23 in fact, go to these federal investigators? Because if
24 she's claiming that this was all some kind of conspiracy
25 orchestrated by Conahan to retaliate against her for going

1 to federal investigators, then what did she go to them
2 about?

3 I knew that from trial. It wasn't about a cash for
4 kids scandal. And when did she go to them? And so they --
5 that is -- that information came from them. So then I could
6 put it into context with our chronology on when we were
7 investigating. And it didn't make sense to me that you
8 would talk to people in '04 and '05 who would give you
9 information, and it was supposedly in retaliation for
10 something she hadn't done yet.

11 Q And your brief makes that pretty clear, but for our
12 time line, because we've had other witnesses testify that
13 they went to the federal government sooner about what was
14 going on in Luzerne County. But you're indicating that you
15 actually not only spoke with some federal authorities, but
16 got documentary confirmation that their investigation of
17 this issue, I guess the juvenile issue, began in the summer
18 of 2006?

19 A Yes.

20 Q You indicate in there that the Lokuta complaint was
21 received before the federal investigation began, and that's
22 the importance of the summer of 2006 date. And I think that
23 your brief says that lokuta complaint was summer of 2004?

24 A Where are you referring?

25 Q You say two years prior to the feds -- I guess I'm

1 inferring from that. You say more than two years after the
2 Board received a complaint filed against the respondent by
3 her former executive secretary. That's on the bottom of
4 page 16.

5 So can we infer that it would have been the summer
6 of 2004 or before that that the Board got the Lokuta
7 complaint?

8 A Your inference is correct.

9 Q Okay. Now, I wanted to get that because I wanted
10 to understand the context of the Lokuta investigation.
11 Because you indicate later on in that same sentence that
12 seven months after the Board finished investigating and
13 deposing all Board witnesses and obtained the information
14 used as the basis for its prosecution.

15 In other words, the feds began their investigation
16 seven months after the JCB was, I guess, done with their
17 active investigation?

18 A Yes. We -- we really only had Judge Lokuta to talk
19 to.

20 Q Would it be fair to say then at that point it would
21 be late 2005 or early 2006 that your witnesses in the Lokuta
22 matter had been interviewed?

23 A I think it was 2005.

24 Q Okay. I'm just trying to --

25 A I don't believe any of the witnesses that we used

1 at trial had been interviewed in 2006. It was all 2004 and
2 2005.

3 Q You then go on to discuss -- I guess I'm trying to
4 address the conspiracy theory or the act of discovered
5 evidence theory that Lokuta was presenting. You indicate
6 that the Judicial Conduct Board secured a waiver of
7 confidentiality, and you say that on page 19 of your brief.

8 A Yes.

9 Q Now, you didn't say you secured the waiver of
10 confidentiality?

11 A No.

12 Q You actually said the Board did. Did the Board do
13 it or someone else?

14 A This was Chief Counsel Massa.

15 Q So Chief Counsel secured the waiver?

16 A Yes.

17 Q And that was from Conahan personally or his
18 attorney?

19 A According to Mr. Massa it was from speaking with
20 his attorney.

21 Q So Mr. Massa comes to you at some point to say I've
22 got a waiver. We can talk about what we did to dispel this
23 after discovered evidence suggestion? Is that fair?

24 A Yes.

25 Q What did Mr. Massa at that point tell you the scope

1 of the waiver was?

2 A It covered everything that's here.

3 Q Okay. Was there a written waiver, if you know?

4 A I never saw one.

5 Q You're aware that your rules require that the
6 waiver be in writing?

7 A I'm aware that the rules mention that. I'm not
8 sure if it precludes any other way of getting it. Certainly
9 would be better to have it in writing.

10 Q Well, Rule 18 indicates a judicial officer who's a
11 subject of a complaint made pursuant to these -- made
12 pursuant to these rules may request in writing that the
13 matter be made public or may waive confidentiality for a
14 particular purpose specified in writing?

15 A Right, they may. So I -- that's why I'm saying
16 it's not mandatory. Perhaps they could get it -- get a
17 verbal, although it might not be the best way to go.

18 Q Does the JCB have any forms for waivers of
19 confidentiality to avoid confusion and things -- I guess
20 this situation?

21 A To my knowledge, no.

22 Q Okay. How was it that Mr. Massa made the decision
23 to seek a waiver of confidentiality? Did you request him to
24 do it? How was it -- was it a result of a meeting? Did you
25 say I need -- I need a waiver so I can address these issues?

1 Or how did it come about that this stuff was included in
2 your brief?

3 A There was no discussion with Mr. Massa. I don't
4 know would be my answer. This -- this information, as I
5 think is readily apparent, is gratuitous to my brief. My
6 brief is -- the focus of this brief is addressing the issue
7 of after discovered evidence. There was a hearing in May of
8 2009.

9 The Court gave Judge Lokuta 90 days to conduct an
10 investigation and come back with what she believed or
11 asserted she had that would authorize after discovered
12 evidence meriting either a change of their decision or a
13 hearing. And so my brief was focused on those issues.

14 This information is on the end of the brief because
15 it was not originally envisioned as part of my brief. Mr.
16 Massa requested that I include this information in the
17 brief. And I believe it was to address, as he felt
18 necessary, Judge Lokuta's attorney raising the issue of that
19 complaint during those May hearings.

20 Q Well -- and I read your brief, and it was very well
21 written. And it did strike me as odd that this was all of a
22 sudden in the conclusion. And it was a long conclusion, and
23 then at the end this kind of appeared. You're not -- you
24 did author it?

25 A I've authored everything in this brief except for

1 what is on page 19, Paragraphs 1 through 6, and the two
2 paragraphs after it.

3 Q Who authored those?

4 A Mr. Massa.

5 Q So as you sit here you don't have any knowledge of
6 the authenticity of the allegations made in Paragraphs 1
7 through 6?

8 A Well, the -- the matters -- let's see, 1 through 6.
9 Oh, you're talking about all of these paragraphs? I'm
10 obviously familiar, as being a member of the Board staff,
11 that complaints existed. But this information that was
12 provided to me I took from Chief Counsel as accurate.

13 Q Well, when you say took, did he, I guess, forward
14 you this language to insert into your brief?

15 A Yes.

16 Q Okay. And you didn't actually pull any files
17 relating to the first anonymous complaint or the second
18 anonymous complaint? You didn't look at any of the
19 preliminary investigative reports, none of that stuff?

20 A No, I did not.

21 Q So this was given to you, and you accepted it
22 because Chief Counsel provided it to you?

23 A Well, he handled those particular matters.

24 Q Do you know, as alleged in Paragraph 1 I guess of
25 page 19, anything regarding that first anonymous complaint?

1 A Pardon me. Can you repeat the question?

2 Q Well, it says that there was an anonymous complaint
3 that was initially received by the Judicial Conduct Board.
4 It indicates that it focused on nepotism. Did you have
5 personal knowledge of that, or was that based upon Mr. Massa
6 providing you that information?

7 A Well, that was based upon Mr. Massa providing that.

8 Q And then the second numbered paragraph says
9 Judicial Conduct Board initiated an investigation of the
10 aforesaid complaint. Did you have any personal knowledge of
11 that?

12 A No. That was based on Mr. Massa who personally
13 handled those.

14 Q Did you see any documents relative to that?

15 A Well, no. He didn't present any documents.

16 Q So you didn't see any reports or anything like
17 that?

18 A At the time I was working on this brief, no. He
19 didn't come in with files or documents. It was just this
20 information.

21 Q Okay. Let me back you up to Paragraph 1 again.
22 And I'm sorry, I should have -- I'm going a little out of
23 order.

24 I wanted, for our time line, to understand when
25 that first complaint came in because it indicates that the

1 complaint, that first complaint, came in toward the end of
2 the Board's investigation against Ann Lokuta. Do you know
3 the timing of when that complaint came in?

4 A I do.

5 Q Is that assertion accurate that that first
6 complaint came in toward the end of your investigation of
7 Lokuta, which we've established was late 2005?

8 A That's a mistake.

9 Q Okay. Can you clarify for the record when that
10 complaint would have come in?

11 MR. TITUS: We have produced under seal that
12 complaint to the Commission so that you do know the date on
13 that. When the documents are under seal I don't know that
14 that permits public disclosure or discussion of that. But
15 we have -- we have made that available so that you -- the
16 Commission has that. But I'm going to ask the witness not
17 to discuss it publicly because it's under seal.

18 CHAIRMAN CLELAND: In fairness here, Mr. Titus and
19 I discussed this very issue yesterday afternoon, and we both
20 agreed that we don't know the answer to it. But I will also
21 acknowledge that the Commission has received the material,
22 and that we do know the date. Whether -- and in what way we
23 can use that date is still to be resolved.

24 BY MR. LEGG:

25 Q I had to ask the question. I wanted to give you

1 the opportunity to correct the record, which I think is
2 important as well.

3 A Thank you.

4 Q But I can't make you answer that question. I
5 understand all the privileges that apply and the Board's
6 objections.

7 Let me take you to Paragraph 7 on page 19. A
8 second anonymous complaint was received by the Judicial
9 Conduct Board regarding former Judge Michael Conahan.
10 That's the second anonymous complaint which you attached as
11 an exhibit to your brief?

12 A Yes.

13 Q And it's my understanding that this complaint must
14 have been waved around during one of the hearings in the
15 Court of Judicial Discipline?

16 A It was.

17 Q By Lokuta's counsel?

18 A Yes, it was.

19 Q So it was public prior to you attaching it to any
20 type of, I guess --

21 A In fact, it was mentioned in newspapers. I believe
22 Legal Intelligencer, the day before I filed my brief,
23 September 9th, had an article that not only referenced this
24 complaint, but I think it had written that it was shown to
25 Judge Lokuta's counsel, and he confirmed that that's what he

1 was waving around in the courtroom.

2 Q So this was essentially a public document at this
3 point in time?

4 A (Nods head up and down.)

5 Q Was it your decision to attach that as an exhibit?

6 A I thought it should be attached if I was going to
7 mention this, and because of the fact that that's what --
8 Mr. Massa did not say why he wanted this information
9 included. I just assumed it had to do with the fact that
10 she -- the Judge Lokuta's counsel had been waving that
11 letter around in the courtroom, and he felt it was important
12 that it be addressed. So I felt since it was already out in
13 the public domain, and I'm referencing it in this -- this
14 information that's been included in my brief, it might as
15 well be attached.

16 Q And we obviously know that it was received, I
17 guess, in September of 2006; is that a fair
18 characterization?

19 A I think that's correct.

20 Q And Paragraph 5 indicates that in accordance with
21 well-established procedures and practices the second
22 anonymous complaint was referred to the United States
23 Attorney's Office, Middle District of Pennsylvania. You
24 didn't have any personal knowledge of how that referral
25 occurred?

1 A No, no, I did not, not how the personal referral.
2 I was aware peripherally, because I was not involved in
3 these matters. They were not assigned to me. And I had no
4 involvement in -- in their investigation or -- that was
5 handled by Mr. Massa himself. Of course I was handling the
6 Judge Lokuta matter. So I was not part of any of that.

7 Q So you wouldn't have -- didn't have any personal
8 knowledge of the referral?

9 A No, no.

10 Q And nor did you have personal knowledge as to when
11 the referral occurred?

12 A I couldn't tell you the exact date. As I said, I
13 was peripherally aware that I knew this existed obviously
14 because I'm a member of the staff. But as to the time line,
15 I can't recall when that was actually done.

16 Q Well, when you say you had peripheral knowledge of
17 it, was the first time you became aware of this complaint,
18 was that in the Lokuta proceedings when counsel was waiving
19 it around, or had the office discussed it prior to the
20 Lokuta matter?

21 A Well, at some point in time this matter was before
22 the Board. And it would have been, you know, when we were
23 talking about these Board memos. They're a part of a
24 packet, part of an agenda that we all have copies of.

25 Q So although it wasn't assigned to you, you would

1 have seen --

2 A I could have seen the memo. I could have read the
3 memo. I'm sure I did.

4 Q Could you give us an idea of the time frame of when
5 that occurred?

6 MR. TITUS: I'm asking the witness to wait for a
7 second while I think about how far we can go with this
8 without getting into the Board discussions or deliberations.
9 If he has a recollection of the time, I'm going to let him
10 answer that.

11 MR. LEGG: That's all I'm asking is the date.

12 MR. TITUS: If he has a recollection.

13 THE WITNESS: Could you repeat the question?

14 BY MR. LEGG:

15 Q Do you have a recollection of when the complaint
16 would have -- the second anonymous complaint that's Exhibit
17 A to your Lokuta brief, when it would have been presented to
18 the Board or subject to some type of report to the Board as
19 a whole?

20 A June, 2007.

21 Q Okay. Do you know if at that point in time whether
22 it had been referred yet or not?

23 A That I don't know. I don't believe so.

24 Q That particular date, June of 2007, would that have
25 been the first moment that you would have had knowledge that

1 this other complaint, the second anonymous complaint, was
2 out there?

3 A I don't think that would be true.

4 Q Okay. And I guess what I'm asking is obviously you
5 were involved in investigating a judge in Luzerne County and
6 whether or not your knowledge of Luzerne County would have
7 been something that was utilized?

8 A No, it wasn't, not as far as that was concerned.
9 As I said, I was not assigned that matter.

10 Q Okay. Do you recall when you became aware of the
11 second anonymous complaint, if it was -- you said prior to
12 June, 2007?

13 A I'm sure I was aware of it in September of '06 when
14 that came in. I'm sure that that would have been discussed
15 in the office.

16 Q Why are you sure that that would have been
17 discussed?

18 A Because of the timing of it. We were -- we were at
19 a -- we had finished taking Judge Lokuta's deposition in
20 August of '06. And really that was all that had to be done
21 to complete that investigation. And so that matter was
22 going to go to the Board for a final disposition.

23 And we were at that crossroads where depending on
24 what Judge Lokuta would do would also dictate what we would
25 do. And there were discussions with her counsel relative to

1 that, and there was a time period given in which to make a
2 decision.

3 I believe September 27th would have been the
4 deadline of the decision. And, of course, September 28th is
5 when this anonymous letter arrived. And there was no
6 decision from Judge Lokuta. She let the deadline go.

7 Q So the timing was suspect?

8 A Yes.

9 Q And I guess am I inferring that there were
10 discussions that this would have been originating from
11 Lokuta?

12 A There were suspicions, yes. Somebody who already,
13 in our mind, had suspect credibility.

14 Q But it wasn't assigned to you?

15 A No, it was not.

16 Q Was any type of decision at that point made, if you
17 know, as to whether to investigate it?

18 A No.

19 Q That being the second anonymous complaint?

20 A No. I was not aware -- I was aware that that had
21 come in -- come in only because of that, that there were
22 suspicions. But I was not involved in any decisions on the
23 course of an investigation, where it went, or -- and I had
24 no knowledge about what was going on with that.

25 Q So you had never seen any reports relative to that

1 second anonymous complaint?

2 A No, I had not.

3 Q Were you familiar with what the well-established
4 procedures and practices of the JCB were at that point in
5 time with respect to referrals?

6 A Well, I knew that there was -- I mean, there are
7 rules, obviously, I believe it's 27 or 28 that refer to
8 deferrals for criminal investigations, that kind of thing.

9 I was also aware that we could refer things to
10 other agencies. Whether it was, for example, something that
11 might more appropriately be before the Disciplinary Board,
12 if it was really a complaint about a lawyer, or if it was
13 criminal conduct, that it could be referred to a criminal
14 justice agency.

15 And past practice with the Board, or the
16 functioning of the Board -- and when I say Board I don't
17 necessarily mean the Board, the 12 members themselves. I'm
18 talking about the office of the Board now, how that
19 functioned.

20 That seemed to be something that wasn't even
21 questioned, whether, you know, something involved a criminal
22 activity. We were not a criminal justice agency. We did
23 not have search and seizure powers or the staffing and
24 everything that is part of a criminal justice agency.
25 And it seemed to make more sense that those things would go

1 to them.

2 Q Well, do you know when the referral or deferral,
3 however you want to refer to it, when that was made on the
4 second anonymous complaint?

5 A That I don't know.

6 Q You said it did come up before the Board in 2007?

7 A Yes.

8 Q June of 2007?

9 A Yes.

10 Q But you don't know at that point in time whether it
11 had already been referred?

12 A No.

13 Q There's a reference in your brief to grand jury
14 testimony. Did you have any personal knowledge of that?

15 A No. That was Chief Counsel Massa's testimony.

16 Q Do you know when Chief Counsel Massa went to
17 testify before the grand jury?

18 A I couldn't tell you that, no.

19 Q And did you have any personal knowledge as to how
20 the second anonymous complaint ended up being referred or
21 deferred to the US Attorney's Office, Either in the course
22 of your discussions with the US Attorneys, Mr. Massa, or
23 otherwise?

24 A Not with discussions from the US Attorney. I know
25 that there was a meeting between Mr. Massa and somebody from

1 the US Attorney's Office. When that occurred, who that all
2 involved, I wasn't there. I couldn't tell you.

3 Q Okay. I just want to end up with some questions on
4 discovery, I guess. After formal charges are filed what is,
5 I guess, the protocol for discovery for, I guess, a jurist
6 attorney who wants to review your files?

7 A Well, we comply with the discovery rule, which does
8 not -- does not require that you --

9 Q Which discovery, civil or criminal?

10 A This would be the Court of Judicial Discipline.

11 Q Okay.

12 A Rules of Procedure. And they have a -- a discovery
13 rule. You'll have to forgive me. I like to have a rule in
14 front of me when I'm talking about it.

15 Q 401, I believe.

16 A I think you're right. Yes, that's correct. And as
17 you can see from this, this particular rule, especially
18 Subsection D. It says non-privileged evidence relevant to
19 the charges contained in the Board complaint, documents to
20 be presented at the trial, and statements of witnesses who
21 will be called to testify.

22 So we may, for example, have reports of interview
23 of individuals that we have spoken with, but they don't --
24 they don't address anything that's going to be subject of a
25 trial. We would not be required to give that over unless it

1 was exculpatory. So it's not as if they can get everything.

2 For example, we get a complaint. It may make five
3 allegations, one through five. We may find that one through
4 three are substantiated, and that's where we have
5 authorization from the Board to go forward with the Board
6 complaint on. The others have not been. They're not a
7 subject of the trial. They have nothing to do with what the
8 charges are made against the judge. So those interviews
9 relative to that would not be turned over.

10 Q Well, if you, in the course of your investigation,
11 discovered that the complainant made both accurate and
12 inaccurate allegations, wouldn't that to some degree be
13 exculpatory for the jurist in the sense that the person --
14 it would suggest some bias perhaps on behalf of the
15 complainant and provide impeachable material for counsel?

16 A Well, that would be if the -- if it was actually
17 the complainant who said something --

18 Q Okay. Well, in that situation?

19 A -- that was incorrect. What I'm saying is we may
20 have an allegation -- I'm trying to think of a good example
21 to give you.

22 Q Well, let me see if I can make it concrete. When
23 you say exculpatory material, as a prosecutor I have a
24 general idea of what that is. But can you explain what you
25 interpret that to mean?

1 A Well, I think one of the easiest ways is to think
2 of a scenario. You know, if you have a shooting on a
3 corner, and there's somebody there who saw it and, you know,
4 the allegation is that John Doe did the shooting, but this
5 witness says, no, it was, you know, Jane Doe. Well, that's
6 exculpatory to John Doe, you know. It's absolutely right on
7 target material to the core issue of the matter and would
8 exonerate them if it is true or believed to be true.

9 I think that some of the information that we have
10 that does not -- you know, that's why this rule is written
11 this way. It has to do with things that are at issue in the
12 trial. And unless you're talking about maybe an
13 inconsistent statement from the witness, not necessarily
14 that they felt that you committed judicial misconduct in
15 more than one way. We may find that, well, maybe you think
16 that's judicial misconduct, but it isn't. Maybe you -- you
17 know, depending on what the claim was.

18 Q Well -- and I think there's exculpatory evidence,
19 and then there's impeachment evidence. Do you routinely
20 turn over what I would refer to as impeachment evidence,
21 evidence suggesting that the witness may be biased, evidence
22 suggesting that the witness may be dishonest, things of that
23 nature?

24 A I turn over what the Board requires me to turn
25 over, which is exculpatory evidence relevant to the charges

1 contained in the Board complaint. If it falls into that
2 category, I turn it over. But if it doesn't, I don't just
3 open up the file for them to go through and take anything
4 they want. And the rule doesn't require me to do that.

5 Q Okay. And the rule doesn't require me as a
6 prosecutor to do that either, but I have an open file policy
7 in the interest of fairness and justice. And I can
8 understand why you'd want to protect witnesses, but why not
9 -- even if you redacted names, why not let the defense
10 counsel see what you got?

11 A Because it's irrelevant to what's on the -- on the
12 table. And some of these witnesses, for example -- we may
13 -- we may interview people that certainly didn't want to be
14 involved in an investigation. They don't want any
15 information connected to them if it has no relevance to it.

16 Q Well, you're making the determination of whether
17 it's relevant though based upon your perception.

18 A Well, I think every prosecutor who has a file makes
19 a determination about what's exculpatory and what's not.

20 Q Well, we --

21 A We don't have defense counsel make the decision for
22 them.

23 Q A lot of prosecutors have an open file policies.

24 A That's true.

25 Q And prosecutors also provide impeachment material

1 which really isn't exculpatory, but it basically goes to
2 undermine their own witnesses. And you're telling me that
3 the Board does not provide the counsel for the jurist
4 impeachment material?

5 A What I'm saying is the Board complies with the
6 rule.

7 Q Well, let's make this concrete. In terms of
8 Conahan testifying in the Lokuta matter you were aware that
9 there was a complaint against Conahan involving substantial
10 dishonesty. Was that provided to counsel for Lokuta?

11 A That would not be provided to counsel for Lokuta.

12 Q What if it had been substantiated and the Board had
13 substantiated some of the allegations? Would it have been
14 provided to counsel for Lokuta to demonstrate bias, motive,
15 dishonesty -- a dishonest character, any of those things?

16 A Well, I think you're making some assumptions about
17 a complaint. We receive an anonymous complaint that makes
18 claims and allegations that at this point are unproven.

19 Q I understand that. But I'm saying if it had been
20 substantiated. In other words, the Board was able to verify
21 that there was some dishonesty on the part of Conahan, would
22 that be considered just impeachment evidence that would not
23 be turned over, or would it be exculpatory evidence that a
24 jurist would have available to them to say, hey, this
25 witness the Conduct Board is putting forward really isn't a

1 good witness and has some reason to be dishonest?

2 A I think you're really getting into what would be an
3 evidentiary issue perhaps.

4 Q I think it's a fairness issue.

5 A Well, I think it's an evidentiary issue on what you
6 would need to turn over. For example, somebody could have a
7 criminal record, and you could go to trial, and not
8 everything in that criminal record could come out and be
9 used against them even though you may say this will show
10 they're a bad person.

11 The rules wouldn't allow you to do that. But
12 you're saying -- you're asking me if I would turn over --
13 obviously I didn't handle this matter, but you're saying why
14 would I not give to Judge Lokuta an anonymous letter with
15 claims in it that at that point would have been unproven?

16 Q No, I actually asked you if they had been
17 substantiated. I'm not asking you what you did.

18 A Okay. If you're saying they were substantiated,
19 then I would have to understand, well, substantiated in what
20 sense? Are you saying before the Board would determine that
21 it was worthy of filing charges, or they've made a
22 determination, but haven't filed charges?

23 Q Well, let's say you're able to substantiate that
24 you had a crooked judge?

25 A And, again, I would have to go back to an

1 evidentiary basis to say, you know, not every witness is
2 perfect, but does that mean that's something that can be
3 used against them?

4 Q And I agree with that. Believe me. I deal with
5 imperfect witnesses every day. But the fact is the
6 factfinder gets to see that they're imperfect. And that
7 goes back to fundamental fairness, doesn't it? Shouldn't
8 the factfinder get to see the imperfection of their witness,
9 or should the factfinder be shielded from the imperfection
10 and be led to believe that this witness has no problems?

11 A Well, they have the right to cross-examine them for
12 bias or any of these things. What's interesting -- more
13 interesting about this is this anonymous letter of 2006 is
14 something Judge Lokuta has publicly identified as
15 originating from her office. A staffer filed it.

16 Q And I understand that. She had that. Maybe I
17 shouldn't have gone with the Lokuta example. I just tried
18 to use that as a concrete example.

19 What I'm trying to get at is don't you think that
20 the rules, at a minimum, should be amended to provide that
21 you all provide impeachment evidence as well? Isn't that
22 just fair to the jurist who's been accused to know that you
23 have in your files potential information that this witness
24 is not credible?

25 And I'm not saying you may not use that evidence,

1 but I think that that's important. In other words, don't
2 you think that in fairness to the jurist they should have
3 all the same rights that a criminal defendant would have
4 when they're proceeding in terms of cross-examination? They
5 should have the ammunition or the bullets to go after a
6 witness.

7 A Well, it is a different proceeding. It's not a
8 criminal proceeding against a judge. It's really a civil
9 administrative disciplinary proceeding with what had been
10 identified as quasi-criminal overtones. So I wouldn't agree
11 necessarily that the analogy you're making is right on
12 target.

13 MR. LEGG: That's all I have, Mr. Chairman.

14 CHAIRMAN CLELAND: Okay. Mr. Listenbee, did you
15 have a question?

16 BY MR. LISTENBEE:

17 Q Yes, I did, Your Honor. Mr. Puskas, you indicated
18 earlier that you examine approximately 200 cases a year?

19 A Roughly.

20 Q And that you've been doing that since 2005; is that
21 correct?

22 A Well, I've been Deputy Chief Counsel since 2005,
23 but I've been with the Board since 2002.

24 Q So going back over that period did you receive any
25 complaints from children in the delinquency system in

1 general, their families, or specifically from Luzerne during
2 that entire period of time?

3 A I do not recall that.

4 Q Okay. You -- we've heard from Ms. Marks of the
5 Pennsylvanians For Modern Courts that one of the
6 responsibilities of the Judicial Conduct Board is to protect
7 the public. Did you have any specific outreach programs
8 designed to reach out to families or to children in the
9 delinquency system so that they would know that you existed
10 and be sort of apprised of how to reach you?

11 A I'm not aware of a particular program of that sort.
12 We have, you know -- at least since I've been with the Board
13 since 2002 we've tried to make real headway in getting our
14 name out there, and it really is true. I mean, even as a
15 young attorney I had sort of a vague notion that there was
16 an agency out there to which you could go if you had a
17 question of judicial misconduct.

18 But if somebody had asked me, you know, what's the
19 name of it, I wouldn't have been able to tell you. And I
20 think in 2002 there was real effort made from that point
21 forward, not only updating our brochures, our annual
22 reports, eventually establishing this website that we have.
23 And the outreach program that was actually in place was --
24 was really going from county to county talking to judges and
25 attorneys.

1 But I think you're actually referring to a segment
2 of the public that would not have been included in that.
3 And maybe that's something that we should look into.

4 Q You refer to the website. Is it -- was it possible
5 between 2003 and 2008 to actually file a complaint on your
6 website?

7 A No. I know Mr. Massa, when he testified, was a
8 little equivocal on that point. He's not so good with fax
9 machines, and he's not always good with technology. You can
10 download the form, hard copy of the form, fill it out and
11 mail it to us. But you cannot electronically file a
12 complaint through our website.

13 Q Does your website ask you -- ask people to actually
14 fax it in to you as well, or just you have to send it in in
15 hard copy?

16 A You have to send it in. I don't believe our fax
17 number is even something that's public. Because if we put
18 it out there, you can imagine we might have the fax machine
19 jammed up with things when we need to use it because we have
20 one fax number. So what we like is that people will fill it
21 out, sign the form, and send it in to us. I -- yes, that's
22 my answer.

23 Q Do you foresee any future activities that might be
24 designed to reach out to this group of folks in the
25 delinquency system who might have contacted you in Luzerne

1 had the system been available?

2 A I think it's certainly something that everybody is
3 going to look at now. You know, if there's anything that
4 can be done in that respect, it's really a matter for the
5 Board to decide. It's a question for our Board.

6 MR. LISTENBEE: Okay.

7 CHAIRMAN CLELAND: Mr. Puskas, thank you, very much

8 --

9 MR. PUSKAS: Thank you.

10 CHAIRMAN CLELAND: -- for your participation here
11 today. We will be in recess until 1:30.

12 (Recess taken from 12:21 to 1:30.)

13 CHAIRMAN CLELAND: Good afternoon. We're ready to
14 begin. Before we begin, Mr. Titus and I have conferred over
15 the noon hour. And for purposes of the record, just to
16 establish that he and I met for 45 minutes or so last
17 evening to discuss a possible resolution by which the --
18 this Commission would have access to documents and files of
19 the Judicial Conduct Board in accordance with the subpoena
20 that had been previously issued. And that was in accordance
21 with the suggestion in Justice Baer's concurring opinion.
22 And we were unable to -- despite the best efforts between
23 the two of us, which proceeded in a very amicable fashion,
24 unable to resolve the intellectual legal differences between
25 the two positions. Mr. Titus.

1 MR. TITUS: I think that's a fair statement, Judge
2 Cleland. The Board felt that under the existing law, case
3 law and so forth which could well be changed and we would
4 certainly follow whatever change there is, but under the
5 existing case law we could not produce, even under seal, the
6 investigative files.

7 We have complied with the Supreme Court ruling with
8 respect to the complaints, and we produced those. We felt
9 we couldn't -- we did appreciate the effort to try to
10 resolve.

11 CHAIRMAN CLELAND: And likewise. Our next witness
12 is John R. Cellucci. Mr. Cellucci is the president and
13 owner of John R. Cellucci -- I'm sorry. My tongue was tied.
14 A building and contracting, engineering, and land
15 development company. And, of course, is Chairman of the
16 Judicial Conduct Review Board.

17 He is a former professor of civil engineering at
18 the Pennsylvania Military College, has an interest in
19 educational institutions, including serving on the Board of
20 Overseers of the Widener University School of Law, and has
21 two children, both of whom are attorneys.

22 Mr. Cellucci, if you would please stand and take
23 the oath.

24

25 JOHN R. CELLUCCI, called as a witness, being duly

1 sworn, testified as follows.

2

3 MR. CELLUCCI: I do.

4 CHAIRMAN CLELAND: Thank you, sir. Please be
5 seated. Mr. Horoho.

6 BY MR. HOROHO:

7 Q Yes, thank you, Your Honor. Mr. Cellucci, welcome,
8 and thank you again for appearing in front of the
9 Commission. You are the current chair of the Judicial
10 Conduct Board?

11 A Yes, sir.

12 Q And you became chair in August of 2009; is that
13 correct?

14 A That's correct.

15 Q And you've been on the Board since 2006?

16 A And before.

17 Q Oh, and before, okay. When was the first -- when
18 did you first become a member of the Board?

19 A In August of 1999.

20 Q And have you served on the Board since that time?

21 A Yes, with the spacing in between, and then I was
22 reappointed.

23 Q Okay. Would you mind just going --

24 A And reappointed.

25 Q Okay. Would you mind just going through the years

1 for me? 1999, what was that, a three or four year term?

2 A Two -- to 2'05.

3 Q And then you were off the Board?

4 A Yes, sir.

5 Q For how long?

6 A A year.

7 Q Okay. And then you got back on the Board in August
8 of 2006?

9 A I was reappointed again.

10 Q Okay. And when you became appointed -- reappointed
11 in August of 2006, the chair at that time was Patrick Judge
12 according to the information?

13 A That's correct.

14 Q Okay. And also on the Board was Mr. Klett in 2006?

15 A Yes. No, wait. Patrick Judge, when I came on,
16 became the chair. He was vice chair at that time.

17 Q Okay. He became the chair in 2000 --

18 A 7.

19 Q August, 2000 -- I think August, 2006?

20 A I think 7. He was vice chair.

21 Q Yeah. This is the information that I think -- I
22 believe Mr. Titus provided to me. August of 2005 to August
23 of 2006 was Mr. Schultz, Mark Schultz, Esquire?

24 A That's correct.

25 Q August of 2006 through August of 2007 Patrick

1 Judge, Sr., August of 2007 through August of 2008, Judge
2 Panella?

3 A Correct.

4 Q Would that be correct, Mr. --

5 A That's correct. Yes, sir.

6 Q Okay. Now, first thing I'd like to review with you
7 is the internal operating procedures, what I'll sometimes
8 refer to as the IOPs throughout your testimony. Do you have
9 -- Mr. Breslin, could you have that document marked as our
10 first exhibit? And you can -- do you have a copy for --

11 A Do you need that? You can share mine.

12 Q No, I have a copy.

13 CHAIRMAN CLELAND: We'll have that marked as an
14 exhibit for this witness, which is the internal operating
15 procedures of the Board effective January 1, 2010.

16 BY MR. HOROHO:

17 Q Now, I'm not sure, did you have an opportunity to
18 review the transcript of Mr. Klett from back in December 8th
19 of 2009, his testimony by any chance?

20 A No, I did not.

21 Q Okay.

22 A I heard some of it. But no, I did not.

23 Q Okay. I just -- he told us at that time that the
24 internal operating procedures, one of the reasons that that
25 document was prepared and adopted was it was influenced by

1 what has transpired over the last six months in Luzerne
2 County.

3 A Well, we considered as a Board that they needed an
4 update, and I agreed to it. And that we would go over and
5 develop a new set. And --

6 Q There hasn't --

7 A Ed Klett was the chair of that Committee. And with
8 the input of all the Board members that we finally developed
9 this set. And we approved it on February 2nd, or whatever
10 it was. Well, no, that was retroactive to January. It was
11 actually approved in -- well, we had a conference. We had a
12 conference, yeah, on the 8th, and we made it retroactive to
13 the 1st of January.

14 Q Okay. Now, you talked about an update?

15 A We had an existing set of IOPs prior to that.

16 Q And when were they adopted? I was not aware that
17 --

18 A A long time.

19 Q I don't believe Mr. Klett indicated that. He
20 thought that the -- these were the first internal operating
21 procedures that have been drafted and adopted by the Board?

22 A Well, we had an operating procedure, and we have a
23 more complete one now.

24 Q Okay.

25 A But we did have one back when I first went on the

1 Board.

2 Q In 1999?

3 A 1999.

4 Q Okay.

5 A And primarily most of it came from the Chief
6 Counsel.

7 Q Okay. And Mr. Titus, I'm not -- I was not aware of
8 the prior --

9 MR. TITUS: I was not either. I mean, I understood
10 that there were practices that had evolved. I assume some
11 may have been in writing and others were not, but that was
12 my understanding.

13 BY MR. HOROHO:

14 Q Here's what I understand what was in writing as far
15 as direction for the Board prior to the IOPs. First of all,
16 you had the Constitution, Article 5, 18 -- Section 18.7 and
17 8. That was a written -- that's a written document for the
18 -- for the JCB, correct?

19 A Yes, as far as I know.

20 Q And you have your written Rules of Procedure, and
21 also the Member's Code of Conduct. They're right in the
22 rules, correct?

23 A Oh, yes.

24 Q Okay. But other than that these would be the only
25 internal operating procedures or any other document that

1 would interpret the Constitution, the Rules of Procedure,
2 the conduct as it relates to your internal policies?

3 A That's correct. And we -- the entire Board voted
4 on this.

5 Q Yeah, and they were adopted at a special meeting
6 held on January 8th, 2010?

7 A Conference call.

8 Q Conference call. Did everybody participate? Do
9 you know?

10 A I think there might have been one member that was
11 not participating.

12 Q Not that important.

13 A We had a majority.

14 Q Okay. That's what I'm saying.

15 A We had a majority.

16 Q Did anybody dissent?

17 A No.

18 Q Now, if you could turn to the first paragraph. And
19 it says, first sentence, these operating procedures are a
20 compendium of the policies, practice, and procedures in
21 affect at the Pennsylvania Judicial Conduct Board. And in
22 the third paragraph, if you can drop down with me, these
23 IOPs are meant to describe the internal practices and
24 procedures of the JCB.

25 The Constitution of the Commonwealth of

1 Pennsylvania, the Code of Judicial Conduct, the rules
2 governing standards of conduct of magisterial district
3 judges, judicial conduct rules of procedures, the conduct --
4 member conduct rules, and the relevant statutory and
5 decisional law remain the authority controlling law, and
6 jointly they're referred to as the Authority?

7 A Correct.

8 Q Okay. So these internal operating procedures did
9 not amend or change your Rules of Procedure that were
10 adopted in March of 1995?

11 A No. Actually what we did, we tried to update.
12 Because we felt some of those we needed additional
13 constraints, how we were going to operate more efficiently.
14 And so we, over a course of a couple months, were developing
15 these which we now have.

16 Q Yeah. I just want to make it clear that they were
17 internal practices and procedures, but they didn't change
18 the Constitution?

19 A No.

20 Q They didn't change your rules, and they didn't
21 change your --

22 A No, sir.

23 Q And --

24 A It's all internal.

25 Q Right. And as far as the hierarchy went as far as

1 the importance of these various rules and internal operating
2 procedures, you would agree with me that the Constitution
3 supersedes the rules, correct?

4 A Of course.

5 Q And the rules supersede the internal operating
6 procedures?

7 A Of course.

8 Q Okay. So if there's a conflict between a
9 constitutional provision and one of the new internal
10 operating procedures, you would agree the Constitution?

11 A That would prevail.

12 Q For example, if the Constitution mandates to
13 investigate each and every complaint that comes in and the
14 IOP does not, the constitutional mandate would control?

15 A That's correct.

16 Q Okay. Now, in addition to the written documents
17 I've cited, including your rules and the new IOPs, in 2006,
18 2007, and 2008 the JCB also prepared an annual report?

19 A Yes.

20 Q And obviously you're familiar with that?

21 A Yes, I am.

22 Q Your picture's in there, bio?

23 A Yes.

24 Q But there's also a mission statement. And would
25 you agree with me that part of the mission statement of the

1 JCB is the Board and its staff investigates every allegation
2 made against a Pennsylvania judge. This procedure is an
3 essential safeguard to the integrity of and public
4 confidence in the judicial process. Do you agree that's
5 what your mission statement says?

6 A Yes, I would.

7 Q Okay. Now, could you go to under Section 4, 4.01?
8 Now, that reads -- and, again, Roman Numeral IV. This
9 section has to do with complaints, preliminary inquiries,
10 and investigations. I want to make sure you're with me, Mr.
11 Cellucci, so I'll wait for you.

12 A All right.

13 Q Are you there? Okay. Under 4.01, it is the policy
14 of the Board that each and every matter shall be brought to
15 a prompt, efficient, and fair conclusion commensurate with
16 the available resources of the Board and its staff. Urgent
17 priority should be assigned to matters that involve the
18 potential extreme prejudice of the administration of justice
19 as well as matters having an immediacy factor, such as
20 complaints involving political campaign issues.

21 Now, Article 5, 18.7, that's the Constitution,
22 reads, the Board shall receive and investigate complaints
23 regarding judicial conduct filed by individuals or initiated
24 by the Board.

25 Now, was there a reason why that sentence or that

1 mandate was not included in this first -- first sentence or
2 two?

3 A No, I don't know.

4 Q And you have it. It says the policy of the Board.
5 You would agree with me that the Constitution is clear?
6 It's a mandate. So wouldn't you interpret that to be more
7 of a duty than a policy?

8 A It would be our duty and the policy where -- where
9 the complaints are in a proper form prescribed by the Board.
10 We were referring to political, where you have to address it
11 immediately. And we were looking for the Supreme Court to
12 give us a guidance on that.

13 Q Yeah. Here's what I couldn't find in your IOPs,
14 the statement that the Board shall receive and investigate
15 complaints.

16 A That's correct.

17 Q Okay. You changed complaints to matters. You
18 changed -- you took out the word investigate. You would
19 agree with me nowhere in your IOPs is the reminder of the
20 constitutional mandate to investigate -- to receive and
21 investigate complaints regarding judicial officers?

22 A I'll make a note of that. I'll bring that up at
23 the next Board meeting.

24 Q Now, it also -- first sentence it says commensurate
25 with available resources of the Board and its staff, back to

1 that first sentence.

2 A Yes.

3 Q Now, does that mean that if the JCB does not get
4 the requested funding during a budgetary process, that they
5 don't intend to investigate each and every complaint?

6 A We try to investigate every complaint, but it's
7 getting to a point where -- this last year I believe we had
8 671 complaints, and we really do need additional staff. But
9 instead of getting additional staff we've been cut back.
10 And that's why I think we put this in there, because we are
11 strapped.

12 Q Yeah. Well, I understand that now. My colleague,
13 Mr. Legg, Susquehanna District Attorney, told me that he
14 prosecuted 593 cases last year, 125 additional juvenile
15 matters. He's a one man show up there, part-time attorney.

16 According to your budgetary proposal in '07, out of
17 the 600 odd complaints you only prosecuted, I believe, two.
18 So are you telling us that those two cases are basically
19 putting the JCB on the brink of financial disaster here?

20 And just to be fair to you, this is your 2009, 2010
21 judicial budget proposal. In it it says during calendar
22 year 2007 the Board opened 620 complaints, disposed of 643.
23 But out of that, 615 were dismissed with just a preliminary
24 inquiry. And we talked about how that sometimes happens
25 without any investigators, without even staff attorneys. 17

1 resulted in dismissal after full investigation. 14 were
2 dismissed with letters of caution. 20 were dismissed with
3 letters of counsel. Two matters -- formal charges and
4 prosecutions were initiated in two matters.

5 So is what you're telling the Commission that those
6 two prosecutions now are causing you to not be as diligent
7 as the Constitution mandates you to be?

8 A Not correct.

9 Q Okay.

10 A Every case that we get we -- our staff reviews it,
11 primarily the Chief Counsel, and then the other two
12 attorneys. And they make recommendations to us. Now, if
13 there's not enough information -- not information, enough
14 that where the judge has done any wrongdoing, we dismiss it.
15 But it does take the staff's time. Every one of those cases
16 are reviewed.

17 Q Mr. Massa testified --

18 A So even though there was only two that wind up in
19 prosecution, we did -- all those ran through. And we get --
20 it's about this size -- of the complaints. And it takes the
21 average one, including the attorneys on the Board, a couple
22 of days --

23 Q And --

24 A -- for us to digest it. And you imagine the time
25 that the staff put into it.

1 Q Well, the staff is typically Mr. Massa and an
2 attorney reviewing those?

3 A Two additional attorneys.

4 Q Now, Mr. Massa said that since he began serving as
5 Chief Counsel he's added two investigators. So his
6 investigative staff tripled?

7 A Yes. And look at the amount of cases.

8 Q They've pretty much stayed the same over the last
9 couple of years.

10 A Yes. And like 50 more, 100 more.

11 Q Let me return back to this paragraph. The second
12 sentence, urgent priorities shall be assigned to matters
13 that involve extreme prejudice of the administration of
14 justice. And, again, I couldn't find the words extreme,
15 prejudice, or urgent priority in either the Constitution or
16 the rules. What did the Board mean by that?

17 A Well, some of the urgencies that would come
18 immediately where somebody said the judge was actively
19 participating in political activities, and that would be
20 urgent. Because there's an election going on, and we had to
21 address it. And that would be one of the -- I would say
22 that would fall in that category.

23 Q Okay. So because the next sentence has to do with
24 political campaign issues. I didn't see that in the
25 Constitution or your rules. But Mr. Klett said that this is

1 in response to what happened in Luzerne County. It wasn't a
2 political campaign issue in Luzerne County. It had to do
3 with a judge disregarding the rights of 6,000 juveniles.
4 Why was that such an important issue over and above what
5 happened in Luzerne County?

6 A Well, I can't speak for Mr. Klett, but I would say
7 it does not fall in that category personally.

8 Q I mean, the Board -- why does the Board sense that
9 there is such an issue with political campaign issues? I'm
10 trying to -- this is the provision that I would typically
11 see as far as your constitutional mandate and the reasons
12 behind it. And in it you're talking about politics.

13 A Yes.

14 Q Okay. All right.

15 A When I say politics, not us.

16 Q No, I understand.

17 A They come across our desk, okay, counsel.

18 Q Let me turn away from that just for a second.
19 There has been a lot of testimony about a September 28th,
20 2006 anonymous complaint. You're -- I'm sure you're aware
21 of it. It's been the subject of and mentioned throughout
22 the last couple of hearings. I think we have a copy of it,
23 don't we, Mr. Breslin? Can you take a look at -- do you
24 have a copy of that in front of you by any chance?

25 CHAIRMAN CLELAND: We have a copy for you. Mr.

1 Breslin has one. And, again, Mr. Titus, do you need a copy?

2 BY MR. HOROHO:

3 Q Now, this contains -- it's eight pages. And
4 according to Mr. Massa's previous testimony it contains
5 eight pages of allegations of nepotism, improper placement
6 of juveniles in privately owned judicial detention centers,
7 and other potential ethical violations. You're familiar
8 with this document?

9 A Yes, sir.

10 Q And would you agree with Mr. Massa's testimony that
11 -- that he did not see, out of the eight pages, any criminal
12 violations? And I'm using his words. I personally did not
13 see any criminal -- potential criminal violations. If he
14 told us that, would you agree with that testimony?

15 A I agree with it as if -- you go to page eight.

16 Q Right.

17 A Go to page eight.

18 Q Okay.

19 A The author of this anonymous letter states, I hope
20 that your Board acts upon these glaring violations of
21 ethics.

22 Q All right.

23 A It doesn't say anything about cash for kids which
24 are occurring in the Luzerne County courthouse.

25 Q Okay. Now, you received --

1 A The author -- the author of this document never
2 made any allegations, or we would have jumped at that
3 immediately.

4 Q Well, again, I think you just verified there was
5 eight pages of potential ethical violations. This would --
6 you received this first page September 28th, 2006, correct?

7 A Yes.

8 Q You have yet -- the JCB has yet to file any charges
9 of probable cause and a complaint with the Court of Judicial
10 Discipline, correct?

11 A That's correct.

12 Q Even though you just verified on the record that
13 these were glaring violations of ethics?

14 MR. TITUS: Objection. The questions are somewhat
15 argumentative at this point because we're recharacterizing
16 testimony. So I'm going to object to the form of that
17 question.

18 BY MR. HOROHO:

19 Q Okay. Let me rephrase it. First page is stamped
20 Judicial Conduct Board, September 28th, 2006. That's when
21 the JCB received this?

22 A We saw a summary.

23 MR. TITUS: That wasn't the question.

24 THE WITNESS: Oh, excuse me.

25 BY MR. HOROHO:

1 Q The first page.

2 A Yes, okay.

3 Q Okay.

4 A When was it received?

5 Q September --

6 A September 28th, 2006, received, right here in the
7 upper right-hand corner.

8 Q And these have to do with potential ethical
9 violations of Judges Ciavarella and Conahan, correct?

10 A That's right.

11 Q And the JCB has not acted on those allegations of
12 ethical conduct to the point of filing a formal complaint
13 with the Court of Judicial Discipline, correct, Mr.
14 Cellucci?

15 A That's correct.

16 Q Okay. Now, this is the first time you've testified
17 in front of this Commission, but this has not been the first
18 time that you've talked about the September 28th, 2006
19 complaint, correct? You mentioned -- you had a discussion
20 about this specific complaint with the Legal Intelligencer
21 that was reported in an article dated December 10th, 2009.

22 Mr. Breslin, could you provide a copy of that for
23 the witness and his counsel? And I'll mark this, Mr.
24 Chairman, as my second exhibit, please.

25 CHAIRMAN CLELAND: It will be so marked and

1 introduced.

2 BY MR. HOROHO:

3 Q Now, in that article it was reported, Mr. Cellucci,
4 that you told the Legal Intelligencer that the 12 member
5 Judicial Conduct Board tabled the anonymous complaint,
6 that's the September 28th, 2006 anonymous complaint, and
7 I'll use your words, without seeing the complaint or being
8 advised as to the nature of its allegations.

9 A No, not 100 percent correct. I did not see the
10 anonymous letter, but we had a summary.

11 Q I'm just referring --

12 A It's -- it's correct on one point, and it's not
13 correct. My statement was I did not see -- as a matter of
14 fact, it's only a matter of a few weeks ago that I actually
15 read this, the anonymous letter.

16 Q You only --

17 A It's only -- no, it's not very long ago that I
18 actually read the anonymous letter. It wasn't a complaint.
19 It was a letter.

20 Q Okay. I just want to -- for the record, so we
21 don't confuse the record, when you say the anonymous letter,
22 that's the -- what we've previously referred to as the
23 anonymous complaint dated September 28th of 2006? We're
24 talking about the same thing there, right?

25 A Yes, sir.

1 Q Okay. And you said as the chair of the JCB the
2 first time you've read this was just a couple weeks ago?

3 A Well, I don't remember exactly, but I read a
4 summary of it or a detailed description of it when we tabled
5 it. I'm under oath, so I will say that I said that I did
6 not see the anonymous letter. That part is correct. The
7 second part is not correct.

8 Q So I want to make sure --

9 A I saw a summary of it or bullet points or however
10 you want to call it.

11 Q Okay. When did you see the summary, just a few
12 weeks ago?

13 A No, on September 20 -- not September 28th. At our
14 meeting that we had, whichever date that was, at the Board
15 meeting.

16 Q Okay. So you -- you didn't ask for the complaint?
17 You just saw a summary?

18 A That's correct.

19 Q Okay. And when in '06 did that happen?

20 A That's what I just said. I'm not sure of the exact
21 date.

22 Q Okay. But you're sure it was in calendar year
23 2006?

24 A Oh, yes, 2006. I might have something here. 2006,
25 6/4/2007.

1 Q Okay. 6/4?

2 A The letter was received 9/28/2006.

3 Q Okay. And the Board first saw it when?

4 A In 6/4/2007.

5 Q Okay.

6 A It was received -- okay.

7 Q Okay. Now, can I just return to the article just
8 for a second? Second paragraph it says the 12 member Board
9 -- I think earlier on you said it was tabled. But it says
10 the 12 member Board did so without seeing the complaint,
11 which you just verified, but you did take a look at the
12 summary. But then you were not -- you were not advised of
13 the nature of the allegations. So you were not told that
14 this complaint contained potential ethical violations?

15 A Ethical. That's what we were told, or the summary
16 included that. No mention of criminal activity.

17 Q Okay. So in June of 2007 you were told by, I
18 assume, Mr. Massa, your Chief Counsel?

19 A Yes, sir.

20 Q Okay. That the JCB received an eight -- or a
21 complaint. Did he tell you it was eight pages?

22 A I don't recall if he said eight pages, but --

23 Q And it contained ethical violations and no criminal
24 violations?

25 A No criminal. And when I read this there isn't any

1 criminal, which your counselor gave me. This one right
2 here.

3 Q Okay.

4 A There is not any criminal allegations in this.

5 Q Okay. All right. No criminal violations, all
6 ethical violations. June 4th of '07 your Board tabled this,
7 did not act on it?

8 A Do you want to address why we tabled it, counselor?
9 There is a reason for it. I don't know if I'm --

10 Q Well, Mr. Puskas was here today.

11 A -- to elaborate on that.

12 Q Well, we've had a lot of testimony about generally
13 how things should happen with the JCB, first with Mr. Massa
14 going through the various rules, the screening, preliminary
15 investigation. Mr. Puskas showed up today and did a very
16 nice job of confirming that, okay.

17 There was obviously a preliminary investigation
18 done in this complaint. It was reported to the Board, the
19 JCB Board, on June 4th of 2007. And according to what you
20 told the Legal Intelligencer, at that point in time it was
21 decided to keep it under seal because a criminal
22 investigation was going on.

23 MR. TITUS: I object to the question as it's
24 phrased. I'm not sure where I read the words under seal.

25 BY MR. HOROHO:

1 Q Okay. Let me -- let me go back to --

2 A This is a reporter.

3 Q Well, did you tell the reporter -- one, two, three,
4 four paragraphs down, let's follow me -- follow. He -- this
5 is your quote. He, being Mr. Massa, correct? That's who
6 you meant with he, Mr. Cellucci, right?

7 A Right.

8 Q When you were quoted as saying he put it to the
9 Board for a vote you were referring to Mr. Massa?

10 A Yes, sir.

11 Q Okay. You were not referring to the current --
12 then current chair? It was Mr. Massa that made that --

13 A Current --

14 Q -- proposal?

15 A Current chair at the time was not available, and
16 I'll say no more.

17 Q Okay. All right. Follow me along. He put it up
18 for a vote, and we just followed the procedures of the Board
19 before us and before us and before us. We decided to keep
20 it under seal until the investigation was completed. The
21 investigation we're talking about is Mr. Massa found out
22 that there was some criminal investigation going on,
23 correct?

24 A That's correct.

25 Q But it had nothing to do with the complaint that

1 you received, that all had ethical violations?

2 A Well, it did because he was giving us guidelines on
3 what we ought do with this, and he did not want to
4 interfere. And that was the practice of the Board, sir, not
5 to interfere with federal, Attorney General, the 67 county
6 District Attorneys, not to interfere when they have an
7 investigation. And he was following the previous positions
8 that the Board held at that time.

9 Q Are you telling the Commission that it was the
10 previous policy of the JCB that -- let me give you an
11 example.

12 If a judicial officer was arrested for DUI, and the
13 complaint -- and at that time there was a complaint pending
14 before the JCB regarding strictly ethical violations, are
15 you telling this Commission that that ethical violation
16 complaint would be tabled until the DUI was resolved?

17 A I can't answer that as a general question. We take
18 each individual case individually, and we vote on it. We
19 may -- on what you just said, we may do it. We may not
20 have. On the years that I've been on that Board it all
21 depends on the situation.

22 Here, this one was a federal investigation. And
23 incidentally it took them over two years to indict them.

24 Q Okay. Now, this was -- you were reported as
25 indicating that this was a defer or kept under seal. Now,

1 this was not the Board meeting, June 4th of 2007, that Mr.
2 Massa reported to you that he was going to refer it to the
3 US Attorney's Office. Because Mr. Massa at the last hearing
4 in front of this Commission indicated that he did that
5 without the Board's knowledge and consent.

6 A Correct.

7 Q So that deferral by Mr. Massa -- or I'm sorry,
8 referral to the US Attorney's Office came after June 4th of
9 2007?

10 A As far as I know, yes.

11 Q Okay. And I think Mr. Klett mentioned of a Board
12 meeting in August of 2008. Was that reported at that point
13 in time, that Mr. Massa finally referred the anonymous
14 complaint to the federal government?

15 A I believe it might have been before that. I don't
16 know.

17 Q Okay. When specifically, Mr. Cellucci, did the
18 JCB, or Mr. Massa I should say, refer the anonymous
19 complaint, September 28th, 2006 complaint, to the US
20 Attorney's Office?

21 A You'll have to look through the records. I don't
22 know the exact dates. I know this is what transpired, but I
23 don't have the exact dates at my fingertips. I'm sorry.

24 Q It's an important date for us.

25 A Oh, I know. And we have checked our records. I

1 don't want to give you a date that I'm not sure of, sir.

2 Q Could you check your records and let us know when
3 Mr. Massa referred that to the US Attorney's Office?

4 MR. TITUS: We'll take the request under
5 advisement.

6 THE WITNESS: Advisement.

7 BY MR. HOROHO:

8 Q June 4th, 2007 your chair was Patrick judge?

9 A Judge -- '07?

10 Q June of 2007 Patrick Judge was the chair of the
11 JCB, August, 2006 to August of 2007?

12 A Yes, yes.

13 Q Okay. Were you aware then that Mr. Judge had a
14 professional, if not personal, relationship with judges --
15 then Judge Conahan?

16 A Absolutely not.

17 Q Were you aware of that?

18 A Absolutely not, not even inkling of it.

19 Q You are aware of it now?

20 A Oh, yes.

21 Q You are aware of the fact that this professional
22 relationship had to do with business dealings in
23 Pennsylvania and Florida?

24 A Yes, sir.

25 Q Okay.

1 A Only recently.

2 Q Okay. The chair of the JCB, when this anonymous
3 complaint came in, was Mr. Judge?

4 A Yes, sir.

5 Q It did not -- it was not acted upon in 2006 and
6 2007 during his term as chair?

7 A That's correct.

8 Q Okay. Do you know if Mr. Massa, in between the
9 Board meetings, contacted the then chair, Mr. Judge, and
10 basically said, I got this document, I'm not sure -- we
11 don't have a Board meeting, but I need some guidance? What
12 do you think I should do with it? Do you know if he had any
13 contact whatsoever?

14 A I do not. But I know his practice is not to do
15 that. Because I'm the chair now, and he hasn't tried to
16 discuss these matters with me.

17 Q What happens in between -- and I was president of
18 the Pennsylvania Bar Association. I know it's -- you know,
19 it's a -- maybe not -- it's a bigger -- maybe a bigger
20 organization, but in between our Board meetings, if
21 something would come in my Executive Director would call me
22 up say, hey, Ken, what do you want me to do here? Do we
23 have -- maybe we should call a special meeting of the Board
24 to handle this. Do you have a recollection of Mr. Massa
25 ever contacting the Board after September 28th, 2006 to have

1 any sort of special meeting to discuss what to do with this
2 anonymous complaint?

3 MR. TITUS: I'm going to object at this point and
4 ask the witness not to answer. I think we are really
5 getting into internal discussions within the Board and its
6 staff, and I'm going to object. I've let it go so far, but
7 I think at this point I'm going to object.

8 MR. HOROHO: For the record, Mr. Titus, could you
9 state your grounds, please?

10 MR. TITUS: Yeah. The grounds are A, the
11 confidentiality proceedings; B, we're getting into
12 attorney/client discussions; C, deliberative process, which
13 is an important aspect here.

14 MR. HOROHO: Again, we'll maybe have to argue this
15 in front of the court, but my purposes -- this was clearly
16 -- our position this was -- has been waived. You used it as
17 a -- as a sword at this point, and now a shield at this
18 point. So I'll just state my --

19 MR. TITUS: No. I understand that, but you do not
20 waive these kinds of -- this is not like a personal
21 privilege that I may have which I can waive. This is one
22 that's created institutionally for the Board. And there
23 have been a number of statements by this witness and by
24 others that if they consulted with counsel might not have
25 been made because deliberations of the Board are

1 confidential and should remain confidential. Under the law,
2 it stands.

3 And I've heard the policy arguments this morning,
4 and that law could change. But under the laws it stands.
5 Those are confidential, and I think there's an obligation to
6 observe the law as it stands.

7 MR. HOROHO: You do recognize, Mr. Titus, there are
8 exceptions and waivers to the constitutional privilege?

9 MR. TITUS: Yes. But I think it's different for
10 one's own personal rights. I can waive my 5th Amendment
11 right. I can waive any number of personal rights that I
12 have. But I'm not sure that an individual can waive and
13 then bind the whole Board. These are institutional.

14 CHAIRMAN CLELAND: I think that having stated the
15 respective positions of the Board and the Commission we'll
16 move on. And the record is -- is preserved and protected
17 and to be developed by legal argument at a later time if
18 need be.

19 BY MR. HOROHO:

20 Q Thank you. Mr. Cellucci, in your recollection did
21 Mr. Judge participate in the decision to either defer and
22 place under seal the September 28th, 2006 complaint? Did he
23 participate in that?

24 MR. TITUS: I'm going to object and ask that the
25 witness not answer for the reasons we've just stated.

1 BY MR. HOROHO:

2 Q Do you know if Mr. Judge participated in any
3 decision to defer the September 28th, 2006 complaint to the
4 US Attorney's Office?

5 MR. TITUS: I'm going to raise the same objection
6 and ask the witness not to answer.

7 MR. HOROHO: Just note those. And I'll ask the
8 court reporter to note those for our matter.

9 CHAIRMAN CLELAND: Yes. The -- the -- I will
10 assume that the objection and the response remains the same
11 to all questions that are objected to unless you assert a
12 different or lesser objection.

13 MR. TITUS: Yes.

14 BY MR. HOROHO:

15 Q Mr. Klett told us on December 8th, and I'm going to
16 use his words, if we are Monday morning quarterbacking,
17 knowing what we know now, I think the Board, staff, and the
18 prosecutorial authorities would have been all over this
19 earlier. Would you agree with that testimony?

20 A Again, I'll -- I'll let him repeat what Mr. Klett
21 said. I don't want to be a Monday morning quarterback. So
22 I decline to answer that.

23 Q Well, using Mr. Klett's words, if the Board would
24 have asked more questions in that June, '07 meeting and
25 asked for more details of an eight page complaint that

1 contained nothing but ethical -- potential ethical
2 violations, do you think that the group as a whole, the
3 Board as a whole, may have arrived at a decision, let's do a
4 little bit more investigating on this one?

5 MR. TITUS: I'm going to object to the question. I
6 don't think that necessarily states what Mr. Klett said.
7 There's some other inferences in there. I mean, I heard Mr.
8 Klett say if we had known what we know now, of course we
9 would have done something differently. But as you'll
10 recall, it's very clear in all these years there has never
11 been one complaint of this cash for kids scheme that was
12 going on, which was an outrageous scheme.

13 THE WITNESS: Absolutely.

14 MR. TITUS: No complaint ever addressed that.

15 BY MR. HOROHO:

16 Q I'm not sure if that's a privilege --

17 MR. TITUS: That was a argument.

18 MR. HOROHO: You're not directing the witness not
19 to answer?

20 MR. TITUS: Yes.

21 MR. HOROHO: On what basis now?

22 MR. TITUS: I don't think the question fairly
23 states what Mr. Klett testified to. That's my objection to
24 the question, to form.

25 BY MR. HOROHO:

1 Q Well, I'm not really -- I'm not necessarily asking
2 what he -- what Mr. Klett -- I mean, I can get what Mr.
3 Klett said from the record. I'm just using the words Mr.
4 Klett -- the only thing I'm using from Mr. Klett is his term
5 Monday morning quarterbacking. And I think this witness can
6 clearly answer the question knowing what you now know, okay.

7 A Let me rephrase your question.

8 Q If you were doing some Monday morning
9 quarterbacking and the Board is sitting at that meeting on
10 June 4th, you've -- and there was an eight page complaint
11 out there, wouldn't you think if there were more discussion
12 about this complaint and questions raised about this
13 criminal investigation that may have been or may not have
14 been tied to the ethical violations, don't you think at that
15 point -- you get 600 of these. You do a lot of
16 investigations. This one you shut down.

17 A Well --

18 Q You shut down.

19 A All right. You want my personal opinion?
20 Counselor, if I may answer. I have gone through, since I've
21 been on this Board, 6,424 complaints. I've read them
22 through carefully, decided, and voted on them. And we -- at
23 that time when I saw the synopsis of the -- or the summary,
24 in my mind I figured there's so much detail from what we
25 got, even in the condensed form, that it was someone within

1 the court system that wrote that. It wasn't an outsider
2 that was angry at judge so and so.

3 Q You were not told of that in June of '07?

4 A Oh -- oh, yes. We had a summary.

5 Q And in the summary it said that it's somebody from
6 the court system?

7 A No, I'm saying that.

8 Q Okay.

9 A I -- this is my assumption when I read it reading
10 so many of these complaints. And a red flag did not go up
11 because it was all nep -- it was primarily nepotism.

12 Q Except here's the big difference, Mr. Cellucci. In
13 addition to what you were told you were also told that
14 associated with these two judges was a criminal
15 investigation. Are you mean -- are you telling us that
16 didn't produce a red flag for you to ask some additional
17 questions, a criminal investigation?

18 A It --

19 Q How many of the thousands and thousands of
20 complaints have you read where the Chief Counsel came to you
21 and said, oh, by the way, there's a criminal investigation
22 from the US Attorney's Office going on? Are you meaning to
23 tell us that no additional questions were raised by any of
24 the Board members during that period of time?

25 A To my knowledge there weren't.

1 MR. TITUS: Objection as to what other Board
2 members -- I object to what other Board members said.
3 That's the deliberations of the Board.

4 THE WITNESS: All I know, the information we had,
5 in my opinion, it didn't raise a red flag that we got to get
6 on this immediately.

7 BY MR. HOROHO:

8 Q When a new Board member joins the JCB they go
9 through, I assume, some sort of training session?

10 A Yes.

11 Q They are reminded of their constitutional mandate,
12 the importance of that, I assume?

13 A (Nods head up and down.)

14 Q Could you do me a favor? And I'm going to refer
15 back to your internal operating procedures. Can you refer
16 me to any of the IOPs that would provide more assurances to
17 the public that there would be better communication between
18 staff and the Board and the complaints that once they've
19 been received would be reviewed in more detail so what
20 happened to this anonymous complaint would never happen
21 again? Could you refer me to any IOP that shows that? And
22 I assume it's Section 4, complaints.

23 A All right. I got the green light.

24 Q Pardon me? Go ahead.

25 A I said I got the green light.

1 Q Okay. Go ahead.

2 A Anyone would like to send and address it to the
3 Judicial Conduct Board, attention the Chair, and I'll look
4 it over, and I'll bring it up at the next meeting, and we
5 can add or subtract from these.

6 Q You mean -- you're talking about the IOPs?

7 A I want something that this Board is going to
8 function properly. And if any of you gentleman and lady
9 have anything that you would like to add, be my guest.

10 Q Okay. Well, I thank you for that because we -- we
11 probably will take you up on that offer. And if you
12 answered this, I apologize, but this -- the anonymous
13 complaint, according to Mr. Massa, was eventually deferred
14 to the US Attorney's Office. And, again, he testified, page
15 55 to 57 of his transcript, that he did that without the
16 consent of the Board.

17 A Yes. That was -- he was following the procedures.
18 And we've tried to tighten that up in these IOPs.

19 Q You know what, Mr. Breslin, could you show the
20 witness my next exhibit, which is the transcript from the
21 first November, pages 122 --

22 MR. BRESLIN: 122 to 125?

23 BY MR. HOROHO:

24 Q -- to 124. And while that exhibit's coming to you,
25 I will tell you that the first day that we had Mr. Massa

1 appear before us, I think, was November --

2 A 16th or something.

3 Q November 9th.

4 A 9th.

5 Q Mr. Massa did a very good job of taking us through
6 Rules 25 through 30 as it relates to what happens when a
7 complaint comes in. And then he talked about the referral,
8 what he believed to be the referral policy, on page 122. It
9 says, the complaint alleging serious criminal conduct, the
10 Board's protocol is to refer the matter to the appropriate
11 public agency, the local district attorney, the Attorney
12 General's Office, US Attorney, and to defer investigation --
13 further investigation until the criminal judge -- the
14 criminal charges are completed. Do you follow me here?

15 A Yes.

16 Q Okay. Now, who makes the determination, you or the
17 Board? Mr. Massa says the Board upon my recommendation.

18 Now, the next question is, now, is that
19 recommendation written? Do you prepare a written report as
20 it relates to referring a matter to the US Attorney's Office
21 or the District Attorney's Office? His answer, virtually
22 without exception that would be a written recommendation.

23 And he goes on to say that ultimately it would be
24 determined -- on line 14 of the next page, 123, if the
25 complaint contains criminal allegations and also ethical

1 allegations, you refer that portion of the complaint to the
2 US Attorney's Office or the District Attorney's Office, does
3 the Board continue to investigate the ethical -- alleged
4 ethical violations of the complaint? And the answer is it
5 may or may not depending on the circumstances.

6 And I asked him, who makes that determination?
7 Chief Counsel with the advice and consent of the Board.
8 Now, when he came back the next day in December, my
9 colleague was questioning him. He made it clear that with
10 the Conahan and Ciavarella anonymous complaint he didn't
11 just go off the track. He substantially deviated from the
12 Board policy because he did it without the Board's knowledge
13 and without the Board's consent.

14 Could you tell the Commission do you have any
15 reason why he did that? Why would he do that for this
16 complaint with these two judges?

17 A I don't know. I can't answer that.

18 Q Was there ever --

19 A He was doing his job, and I guess he felt he should
20 do this.

21 Q Did --

22 A But he didn't --

23 Q Has any members of the Board ever asked him, either
24 in '07, '08, '09, why -- why did you do that for this
25 complaint?

1 A I'm afraid that's internal.

2 MR. TITUS: I'm going to object. We're getting in
3 to deliberations of the Board, discussions of the Board.

4 BY MR. HOROHO:

5 Q Okay. That's fair enough. If you want to put that
6 on the -- you'll probably object to the next question, Mr.
7 Titus.

8 Mr. Puskas came in front of us today, and he talked
9 about the brief that he filed. And surprisingly it was a
10 little different than what Mr. -- I think Mr. Massa told us.
11 But in it it says that it was -- the complaint, the
12 September 28th, '06 complaint, was deferred after a
13 preliminary investigation regarding this anonymous
14 complaint.

15 And so I'd like the -- I'd like to ask for the
16 record do you know, because you were on the Board then, this
17 was '07, when did the preliminary investigation begin as it
18 relates to that complaint?

19 MR. TITUS: I am going to object.

20 BY MR. HOROHO:

21 Q Okay. Who initiated the preliminary investigation?

22 MR. TITUS: Which preliminary investigation?

23 BY MR. HOROHO:

24 Q The preliminary investigation that was referred to
25 in Mr. Puskas's brief, page, I think, 19. And let me refer

1 that to you. Page 19 of the brief it said No. 5. It was
2 forwarded to the US Attorney's Office after preliminary
3 investigation.

4 So my question for you, Mr. Cellucci, was who
5 initiated that preliminary investigation? Was it the Board
6 or Chief Counsel?

7 A Chief Counsel.

8 Q What role did the Board have in that preliminary
9 investigation, if any?

10 A It was given to us at the Board meeting. And it
11 was, again, I say a summary, bullet points, however you want
12 to word it. It was not the original anonymous letter, which
13 he usually does for some of the others. They summarize what
14 their investigation or what they thought it ought be,
15 whichever case, that they're presenting to us. So that was
16 not unusual from him to do that.

17 Q And when did he finally tell you that he did defer
18 it, sometime in '08 you said?

19 A No, he didn't defer it. The Board voted on it and
20 deferred it.

21 Q In June of '07, I understand. That was the -- and,
22 again, maybe I'm using my words incorrectly. But in June of
23 '07 the Board determined to table it or defer it?

24 A Yes, sir.

25 Q Okay. My question is when did Mr. Massa actually

1 refer it, send it to the feds?

2 A I --

3 Q You don't know that?

4 A I don't know the date.

5 Q Okay. But it was after June of '07?

6 A Yes, sir.

7 Q And it was obviously sometime before the end of '09
8 -- or beginning of '09? That's when the charged were --

9 A I'd say that's a fair assumption.

10 Q Okay. And I think I asked you to check your
11 records when, I guess, in '08 it was actually sent down to
12 the feds.

13 A Yeah, we're going to check that date.

14 Q Okay. Now, after it was sent to the US Attorney's
15 Office how often did the Board, the JCB, monitor the
16 deferral? And let me just preface that by saying that in
17 the Supreme Court's complaint -- or Supreme Court's opinion
18 of December 30th of 2009 they picked up on the testimony of
19 Mr. Klett on page 10 where they said Mr. Klett testified
20 that the JCB takes into consideration whether an
21 investigation into misconduct and waste its limited
22 resources, and the procedure was to allow the agency's
23 investigation to go forward initially and then to monitor
24 their -- that investigation.

25 Okay. What monitoring did the JCB, your Board, do

1 after the September 28th of '06 complaint was sent to the
2 feds?

3 A Our staff, directed by the Chief Counsel -- at the
4 end of our material he has a list of the judges that are
5 under investigation, and its preliminary investigation. Its
6 in the Court. And he does list and he listed that on the
7 back. Every -- in other words, every two months we got an
8 accounting, if you want to call it that, of where the
9 progress was on the cases that we had heard prior.

10 Q I understand. Maybe you misinterpreted my question
11 because you told me that this complaint was deferred. So
12 there was no action internally.

13 A But it showed up.

14 Q Okay. It showed up, but --

15 A Every two months.

16 Q I understand. But what Mr. Klett told us and what
17 the Supreme Court picked up on is that when the JCB would
18 defer a complaint to the District Attorney, US Attorney,
19 there would be some monitoring of their case, their
20 investigation, and obviously for the purpose of when are you
21 going to do something with the ethical part.

22 So my question to you is after the anonymous
23 complaint was sent to the feds what did the staff or the
24 Board do to monitor what was going on in the US Attorney's
25 Office to determine when it should act on the ethical

1 violations of this complaint?

2 A That was internal with the staff. So I -- I can't
3 give you an answer for that.

4 Q Well, is the reason that you can't give me it is
5 that it didn't happen? There was no monitoring by the staff
6 of that ongoing investigation?

7 A It was referred. It was ongoing investigation
8 every two months. And we didn't pick up on it, I suppose.

9 Q Isn't it true that there was no monitoring because
10 you were just waiting and assuming that something was going
11 to happen at the US Attorney's Office, and then that would
12 solve your problem?

13 A Well, my personal view, yes. I never thought it
14 was going to take them two years to break the case.

15 Q Two years. The complaint came in September 28th of
16 '06. From 2003 to 2008 6,000 juvenile cases -- 6,000
17 juvenile cases came through Judge Ciavarella. I assume, I
18 didn't check this, probably 2,000 from September 28th of '06
19 while the JCB waited, 2,000 juvenile's rights were violated.

20 In retrospect wouldn't it be important for the
21 Board to monitor in a more effective way what the feds were
22 doing so they could -- wait. Let me finish my question. So
23 they could act quicker?

24 MR. TITUS: Without any complaint having come in
25 from anyone that that was happening, how was the Board to

1 know it? The 2006 doesn't deal with that. And if nobody
2 complains and nobody brings the issue as to what's happening
3 in juvenile, how are they to know?

4 THE WITNESS: What happened to the person who --

5 BY MR. HOROHO:

6 Q Mr. Titus --

7 A -- made the anonymous complaint? Where were they
8 in those two years when this was going on? Where was the
9 District Attorney? Where was the person in charge of the
10 juvenile delinquents?

11 Q Mr. Titus asked --

12 A We had no way of knowing.

13 Q You're asking for --

14 CHAIRMAN CLELAND: I don't think we want to get
15 into a debate on this. That's for a different time. But I
16 think we ask the questions.

17 MR. HOROHO: Judge, let me answer Mr. Titus,
18 because what you're saying is not a red flag, okay. Go to
19 the complaint. Do you have the complaint in front of you?
20 Paragraph H, page 5. Frequently Judge Conahan, whose
21 closeness to Judge Ciavarella is so great that he purchased
22 the house next to his, will designate Judge Ciavarella to
23 act as President Judge even though there's no provision for
24 this practice in the Unified Court System in Pennsylvania.

25 MR. TITUS: Yes.

1 BY MR. HOROHO:

2 Q In I, I. Here's -- Judge Ciavarella's children
3 have been given access to Attorney Powell's Florida
4 condominium. Judge Conahan and Judge Ciavarella, William
5 Sharkey, and the judge's staffers have also been given
6 access to Attorney Powell's condo and to his yacht, Real
7 Justice.

8 You have your own investigators. You have red
9 flags. You did nothing with these red flags.

10 A Because the federal investigator, the United States
11 Attorney, was addressing those.

12 Q But --

13 A Not us. We are not a criminal. We cannot address
14 criminal activities.

15 Q How often --

16 A We don't even set the rules.

17 Q How often did Mr. Massa meet with the federal
18 investigators after the matter was deferred to the federal
19 government? And how often did Mr. Massa report back to the
20 Board, don't worry, they're real close, or none of that was
21 done? He did not report once to you about the federal --
22 the monitoring of the federal investigation?

23 A It was still under investigation. That's how we
24 report it on his summary.

25 Q The first summary. But after you got the first

1 summary, Mr. Cellucci, there was never any summary about I
2 met with the federal investigator, I met with the US
3 Attorney, you know, here's an update. Never received --
4 this -- the Board never received an update from Mr. Massa
5 after the matter was deferred. There was, in fact, no
6 monitoring of that investigation.

7 A Apparently there wasn't anything to monitor because
8 it took them over two years to crack the case. How were we
9 supposed to know with our three member. We have a small
10 staff. How would we ever --

11 Q Then be fair with me, sir.

12 A Yes, sir.

13 Q You told me that the complaint you received had no
14 criminal violations, all ethicals. Then why did you wait
15 two, maybe three years before doing anything, and you still
16 haven't done anything?

17 A We still haven't done anything.

18 Q Even though it was all ethical?

19 A We were waiting until the US Attorney completed his
20 investigation, and they indicted the two judges. They
21 pleaded guilty, and then they withdrew their guilty pleas.
22 It was --

23 Q And be fair with me. If they would have never
24 indicted in '09, if they had -- let's say, for example, they
25 wouldn't have indicted yet, you'd still be waiting.

1 MR. TITUS: That's a hypothetical. That's a
2 hypothetical. We don't know.

3 BY MR. HOROHO:

4 Q I think you can answer that. Hypothetically you
5 were waiting for an indictment. Until the indictment was
6 going to be filed you were -- you being the Board were --
7 was going to do nothing about an eight page complaint that
8 only included ethical violations?

9 A Isn't this Commission to find ways and means so
10 this would never happen again? Why are you putting all the
11 blame on a small organization like us, 12 members? They
12 don't receive any compensation.

13 I'll give you one, Mr. Chairman. I did a little
14 investigating on this, and I think one of the main things
15 you might want to consider is Rule 151-A where they informed
16 the juvenile of his right to an attorney. If he doesn't
17 have funds, they will issue one. I think it should be
18 changed. It should be changed to they are informed, and
19 they will be assigned an attorney without exception to those
20 who cannot afford to hire one on their own. And this way
21 this wouldn't happen.

22 If there was a -- if there was an attorney with
23 each juvenile, those 6,000 wouldn't have gone to the
24 detention center. Some would. Some were --

25 CHAIRMAN CLELAND: Let me just interject here. And

1 I appreciate your endorsement of that recommendation. We've
2 also received that from other witnesses, and that's
3 certainly a matter that we'll be thinking about. So we
4 appreciate that.

5 Also I want to address your comment that we're
6 placing the blame on the Board. The tone of the questions
7 may lead you to that conclusion. However, I think it's
8 important to note that we have not made any decision about
9 what the Board did or did not do. What we're trying to find
10 out, and what Mr. Horoho and Mr. Legg are trying to find
11 out, is what the Board did do so that we can draw
12 conclusions about what the Board did and whether it was
13 appropriate or not appropriate and what your staff needs are
14 and resources, limitations.

15 But if we can't find out what actually happened, we
16 can't make those recommendations. And so far we haven't
17 been able to find out what happened. And so that is the
18 frustration, I think, that Mr. Legg and Mr. Horoho are
19 expressing on behalf of all of us.

20 We don't want to assume that the Board has done
21 anything improper, but we can't draw a conclusion one way or
22 the other because we simply don't know. And I appreciate
23 the difficult position that Mr. Titus is in in giving you
24 advice, but I want you to understand our position as well.

25 We have not drawn any conclusions, but we have

1 developed considerable frustration, as I think has just been
2 exhibited. Mr. Horoho.

3 MR. TITUS: The frustration is two ways because we
4 feel we have an obligation to follow the law as we
5 understand the law exists. And we can't provide information
6 that the law tells us we can't. If the law changes, that's
7 fine.

8 I mean, I -- really, I listened to the policy
9 arguments this morning. And there's another side to these
10 policy arguments, because you do have issues as to openness
11 in this process. You're going to have collateral damages to
12 judges. You're going to have collateral damage to
13 witnesses.

14 So these are serious policy debates. But we feel
15 circumscribed by the laws that exist, and that's why we are
16 -- and it is a little frustrating to get beat up for
17 following the law.

18 CHAIRMAN CLELAND: Let me just turn it back over to
19 Mr. Horoho in a minute. But just so -- because we're making
20 a record, let me just indicate that the Commission has
21 suggested the possibility that we could receive your
22 documentation that we have subpoenaed under seal, and that
23 at least it appears from outsiders reviewing your procedures
24 and policies that you could deliver those materials to us
25 under the unusual facts of this case.

1 Now, I know that that's not an open and shut
2 question. There are ways that that could be debated, both
3 ways, given the policy. But we certainly want to make sure
4 that we have made that overture to receive the documents
5 under seal in accordance with your internal policies which
6 you write, apply, interpret, and can change any time you
7 apparently choose to do. Mr. Horoho, go ahead.

8 BY MR. HOROHO:

9 Q We're going to change the topic, and Mr. Legg will
10 handle that topic.

11 A Before you change the topic I'd like to say that we
12 are trying to address many of these questions that you have
13 brought up so we can be a better Board.

14 Q Well, in response to that --

15 A And -- and we need more staff. We need more funds
16 to -- in order to implicate this.

17 CHAIRMAN CLELAND: I'd really like to cut off the
18 debate and get to the facts, so maybe we could do that. And
19 I'll access my prerogative to see if we can develop the
20 factual record that we need.

21 MR. HOROHO: Mr. Legg.

22 BY MR. LEGG:

23 Q Mr. Cellucci, let me take you back in time because
24 in response to the Supreme Court's decision the Board turned
25 over under seal certain documents, one of which would have

1 been the first -- what is referred to or has been referred
2 to throughout these proceedings as the first anonymous
3 complaint.

4 That tag or that title comes from the Lokuta brief,
5 and I'm not sure if you're familiar with that brief. But
6 essentially it indicated that the Board received a first
7 anonymous complaint against Conahan alleging nepotism. I
8 questioned Deputy Counsel Puskas about his brief, and he
9 conceded that the brief contained an error as to when that
10 complaint was received. I gave him the opportunity to
11 correct the record, and he declined.

12 I'm going to ask you, as chairman of the Judicial
13 Conduct Board, whether at this point knowing that the
14 Conduct Board, through its counsel, have made an error in a
15 public filing, that, in fact, is, I guess, to some degree
16 not accurate, perhaps misleading, whether or not you, as the
17 chairman at this point in time, would be willing to correct
18 the record and say when that first anonymous complaint was
19 received?

20 MR. TITUS: I'm going to direct the witness not to
21 answer for the reasons we discussed this morning.
22 You do have it. You've seen it. It's under seal, and I
23 think we can't be discussing dates of documents under seal.

24 BY MR. LEGG:

25 Q Mr. Cellucci, would you agree with me that it's --

1 especially in filings with the Court of Judicial Discipline
2 it's important for your staff attorneys to be honest and up
3 front with that Court?

4 A Of course.

5 Q And would you agree with me that if an error is
6 made, it would be incumbent upon the staff of the Judicial
7 Conduct Board to correct that error publicly?

8 MR. TITUS: I'm going to object to this because
9 that's really asking a legal question as to what a lawyer's
10 obligation is. And I think we heard an explanation this
11 morning that was not material to the argument being made,
12 that it was actually peripheral, and that may bind it, as
13 lawyers do here. And I don't think he can answer for Mr.
14 Puskas.

15 BY MR. LEGG:

16 Q I'm asking what the Board's position is, not what
17 Mr. Puskas' position is. He is the chairman of the Board.
18 Does the Board want their attorneys correcting errors that
19 are made in public records?

20 A Of course.

21 Q Would you direct Mr. Puskas to correct that error?

22 A I would discuss it with Mr. Puskas and --

23 Q The first complaint, the first anonymous complaint,
24 can you tell this Board whether or not there was any
25 investigation conducted as to that complaint?

1 MR. TITUS: I'm going to direct him not to answer.

2 BY MR. LEGG:

3 Q Mr. Cellucci, in the Judicial Conduct Board brief
4 filed in the Lokuta matter there's an indication that there
5 was a investigation conducted. Do you have any reason to
6 dispute that assertion in that public document?

7 A I believe you have that in your sealed -- I think
8 you have that.

9 Q We have the complaint. What I'm asking is whether
10 or not there was ever any investigation?

11 A I don't want to discuss that because now we're
12 talking about something that's under seal.

13 Q Well, let me ask you this.

14 A Am I permitted to answer?

15 MR. TITUS: No. Go ahead.

16 BY MR. LEGG:

17 Q You've testified that as to the second anonymous
18 complaint the Board did vote to defer in June of 2007?

19 A That's correct.

20 Q As to the first anonymous complaint, can you tell
21 us whether that procedure was followed?

22 MR. TITUS: I'm going to direct him not to answer.

23 MR. LEGG: Same grounds?

24 MR. TITUS: Yes.

25 BY MR. LEGG:

1 Q Do you know if that complaint, that first anonymous
2 complaint, was ever submitted to the Board?

3 MR. TITUS: I'm going to direct him not to answer.
4 Really has to do with Board deliberations. You do know and
5 we have set forth the procedure that all complaints go to
6 the Board.

7 MR. LEGG: Could we just get for the record whether
8 or not there were deliberations that would rise to the level
9 of the privilege as opposed to no deliberations? Is it
10 counsel's position that deliberative process privilege will
11 apply to anything where there are no deliberations?

12 MR. TITUS: No. It does not apply where there are
13 no deliberations. And I believe the privilege would attach
14 to the disposition of the first anonymous complaint.

15 MR. LEGG: Well, can I ask if it was at least
16 submitted to the Board, not what the disposition was?

17 MR. TITUS: Sure. Because otherwise there wouldn't
18 have been deliberations.

19 MR. LEGG: So was it submitted to the Board?

20 MR. TITUS: I've indicated that for the privilege
21 to attach it would have to be there for deliberations.

22 BY MR. LEGG:

23 Q So it was submitted to the Board? Do you recall
24 that, Mr. Cellucci?

25 A I don't recall that specific incident. So I'll

1 decline to answer that.

2 Q Do you know if the Board saw anything besides the
3 synopsis that Chief Counsel would have prepared relative to
4 that first anonymous complaint? In other words,
5 investigative reports or anything of that nature?

6 A Well, obviously he did some homework on it, you
7 want to call it investigation or not, before he submitted it
8 to us.

9 Q When you say obviously --

10 A Chief Counsel.

11 Q When you say obviously, is that because he said he
12 did it or you recall it?

13 A Well, he gave us the synopsis of it. He wrote it
14 up.

15 Q Okay. So you recall seeing the synopsis on the
16 first anonymous complaint? Not the one that's before you,
17 but the first?

18 A No, I'm not saying that.

19 Q So actually as you sit here --

20 A I don't recall.

21 Q You don't recall anything -- as you sit here you
22 don't recall if anything was done or if you saw any reports
23 relative to that document?

24 A There's lots of confusion from my first and second
25 anonymous letter. I'm not sure I can answer that

1 accurately, so I decline to answer it.

2 Q Because at one point you indicated that you only
3 recently saw the anonymous letter. That is what we refer to
4 as the second anonymous complaint.

5 A That's right.

6 Q Recently, within the last few weeks or month?

7 A Yes.

8 Q Does that same answer apply to the first anonymous
9 complaint?

10 A Again, I'm not sure on that first and second.
11 That's still confusing.

12 Q As you sit here do you know if you've ever seen the
13 first anonymous complaint?

14 A I don't believe so.

15 Q Okay. So you haven't even --

16 A I don't know.

17 Q At this point you haven't even seen what has been
18 submitted to us under seal?

19 A No, I haven't seen what has been submitted.

20 Q So as chairman nobody reviewed with you prior to
21 submitting the documents to the Commission what was being
22 sent to the Commission?

23 A I told the -- our Chief Counsel whatever the
24 Supreme Court, whatever ruling comes down, we must comply.
25 And I told him to comply.

1 Q Well --

2 A I did not see what he sent, but I did tell him to
3 comply.

4 Q Okay. I take it at some point you're going to
5 review what was sent to us?

6 A I would think so.

7 Q I imagine the whole Board will in terms of
8 reviewing your own policies?

9 A Yeah. But I assume I would read that, yes. But I
10 can't publicly -- it's under seal. So if you call me in
11 here again, I couldn't answer it because it's under seal.

12 Q Let me see if I can get to an area that I think you
13 can answer without any difficulties because it's a generic
14 question about policies of the Board.

15 When you receive a synopsis, summary, memo from
16 Chief Counsel, does Chief Counsel include in that synopsis
17 prior discipline against the jurist or prior complaints that
18 may have been received? In other words, is there a
19 background section?

20 A Yes. And from what I recall, there's no letter of
21 counsel or letter of caution, no disciplinary action on
22 either judge from what I recall.

23 Q What if there was no formal discipline or informal
24 discipline taken, just noting that this is the fifth
25 complaint filed against this jurist even if the others have

1 been dismissed, is that noted in the summary?

2 A Oh, yes.

3 Q General question. I'm not asking about any
4 particular judge.

5 A Oh, yes.

6 Q That would be noted?

7 A It usually is noted, yes. We do -- we do look them
8 over, and we follow -- and with that -- I don't know if I
9 can answer this. He did state that -- okay. I was going to
10 give you a little more detail.

11 Q Oh, feel free, please.

12 MR. TITUS: I won't let him.

13 MR. LEGG: You don't have to ask Mr. Titus. Just
14 go ahead.

15 MR. HOROHO: You're doing a good job.

16 BY MR. LEGG:

17 Q Mr. Cellucci, I want to refer you -- because you
18 talked a little bit about that June of 2007 meeting. Can
19 you recall whether the synopsis provided by Chief Counsel
20 Massa included any indication that there had been a prior
21 anonymous complaint against Conahan?

22 MR. TITUS: I'm going to instruct him not to
23 answer.

24 BY MR. LEGG:

25 Q If that first anonymous complaint had been

1 dismissed, would that have been the decision that would have
2 been made by the Board?

3 A Oh, yes. We have to dismiss.

4 Q And if it had been deferred, would that have been a
5 decision made by the Board?

6 A Yes.

7 Q Do you recall whether or not a specific decision
8 was made with reference to that 2004 anonymous complaint
9 that was filed styled as the first anonymous complaint?

10 A I don't recall, but it had -- it had to have Board
11 action.

12 MR. LEGG: Mr. Horoho.

13 BY MR. HOROHO:

14 Q Let me refer back to your internal operating
15 procedures. And if you can turn to IOP 4.07. I'm not sure
16 what page that is, page nine. Now, this section was, I'm
17 assuming, correct me if I'm wrong, in response to this
18 referral issue that we talked about -- have been talking
19 about, right?

20 A Um-hum.

21 Q Now, let me start with saying that this is the
22 first time there were any written policies regarding any
23 referral policy of the Judicial Conduct Board, correct?

24 A In this format, yes, this is the first one. Now,
25 we had some in place, and this is an update because we feel

1 that they weren't sufficient and what -- and we ought do
2 something. So -- and these are new. They were just -- it's
3 only -- they're a month old.

4 Q Now, I've reviewed everything Mr. Titus has given
5 me, and what's provided on public as far as the policies,
6 and I was looking for a written referral policy. First of
7 all, the Constitution not only doesn't make it mandatory to
8 refer it, it doesn't even permit. There's no language in
9 the Constitution, 18.7 or 8, that even allows for the
10 deferral of a complaint pending a criminal investigation.
11 Agree with me?

12 A Well, there's a -- this policy was set up before I
13 ever came on the Board. And it was in place in '99 when I
14 first came on to the Board. And that seemed to be the
15 policy of the Board. Where it came from, I don't know.

16 Q Okay. And if you -- once you provide me that copy
17 of the 1999 internal operating procedures I'll compare them.
18 But first -- but I'm looking at Section 7 and 8 of the
19 Article 5, 18 -- Section 18. And neither of those -- and I
20 think Mr. Breslin provided you a copy of that. There's no
21 language in either of those sections that allows for a
22 deferral of an ethical complaint or a referral of an ethical
23 complaint to a prosecutor, tool, or governmental body in the
24 Constitution.

25 MR. TITUS: I mean, this really -- you're asking

1 the wording of it. Of course --

2 BY MR. HOROHO:

3 Q You agree with that?

4 MR. TITUS: -- the document speaks for itself, as I
5 say.

6 BY MR. HOROHO:

7 Q Now, Mr. Massa talked about when we -- when he was
8 talking about the informal referral policy he referred to
9 Rule 18 of your Rules of Procedure. But when I looked at
10 them -- and he referred to 18-C and 18-D. But 18-C, if you
11 can turn to that. First of all, 18 -- Rule 18 has to do
12 with disclosure. And C specifically says information
13 related to violations of criminal laws may be disclosed to
14 the appropriate governmental agency. There's nothing in
15 that provision that allows for a referral of a complaint
16 received by the JCB to an appropriate governmental agency,
17 correct? You have to agree with me there?

18 A Not only do I agree with you, I will look into that
19 matter, and we'll try to incorporate it.

20 Q But that was -- will you agree with me that you
21 haven't had a chance to review, I'm sure, all the testimony
22 from Mr. Massa. But this 18-C is what he was referring --
23 what he previously referred to, told the Commission he
24 relied on in referring the anonymous complaint to the
25 federal government?

1 A Well, I think that's in line with what I said. We
2 were following procedures that had been in place with the
3 Board. Now, maybe we do have to address that, and I will.

4 Q And you would agree with me, in fact, the Supreme
5 Court opinion, on page 12, talks about this tension between
6 the lack of permission by the Constitution and your internal
7 operating procedure somewhat allowing for a referral.

8 I mean, there is -- clearly there remains tension.
9 There is no written provision in your rules that allow for
10 mandatory or permitted referral of ethical complaints to law
11 enforcement. It might be in your internal operating
12 procedures, but it's not in your rules, correct?

13 A I guess I have to agree with you.

14 Q And we talked about this. When we talk about these
15 IOPs when there's a conflict between the Constitution and
16 the rules, those two supersede your internal operating
17 procedures? You agree with me on that?

18 A We have to follow the Constitution, of course.

19 Q Okay. Now, here's my biggest problem with your
20 attempt of the written referral policy. And follow me in
21 the first sentence here. Any complaint filed with the Board
22 that alleges criminal activity by a respondent judicial
23 officer shall be brought to the Board's immediate attention
24 by no later than 30 days. Do you have that in front of you?

25 A What page are you on, sir?

1 Q I'm sorry, page nine.

2 A I'm on page nine. Go ahead.

3 Q I'm not going to read word for word. But
4 essentially it deals with a complaint that alleges criminal
5 activity along with ethical activity. And then it goes on
6 to say that the Board may refer it, and they may continue to
7 investigate it, okay.

8 Now, that's a hybrid situation. That's a situation
9 where you get a complaint, and you have alleged criminal
10 violations and alleged ethical violations. But this
11 referral policy that's written does not deal with the --
12 what I call the non-hybrid situation, the situation that
13 happened in Luzerne County. You just told me -- wait a
14 minute. Wait a minute. Let me finish.

15 A We didn't know it happened.

16 Q No, no, no, no. You told me you agreed with me
17 that the complaint you received in '08, September of '08,
18 only had ethical?

19 A That's correct.

20 Q Okay.

21 A In fact, the author --

22 Q It had no --

23 A -- indicated that at the end.

24 Q The September 28th, '06 only had ethical, no
25 criminal. Yet your referral policy deals with the hybrid

1 situation. It doesn't deal with the situation that brings
2 us here today, which is the non-hybrid. Which I receive a
3 complaint. It's ethical. I read in the newspaper, somebody
4 tells me that there's a criminal investigation. I'm going
5 to refer it and defer it. That's not what your rules, your
6 new internal operating procedures, deal with. If this --
7 this deals with the one that comes in with ethical and
8 criminal violations both.

9 A Yeah. But your hybrid --

10 Q Would you agree with me?

11 A Your hypothetical situation, we didn't know it was
12 a criminal.

13 Q I understand. Prospectively. I'm trying to figure
14 out -- and you asked me for help from the Commission.

15 A We're willing to address that. Don't get me wrong.

16 Q Well, my suggestion is address it in -- address the
17 hybrid situation and address what happened here, which is
18 the non-hybrid situation where a complaint comes in -- this
19 is the testimony of record. A complaint came in, ethical
20 violations. Joe Massa gets some word about some criminal
21 investigation. The feds call him. He said okay. I'm going
22 to send it down to you. He reports to you and says, there's
23 a criminal investigation. At that point everything shuts
24 down internally.

25 That's totally different than what this rule says,

1 what this internal operating procedure says. And this is
2 the only written policy that you've come up with to deal
3 with what we've had to deal with here in Luzerne County
4 area. So would you agree with me that this is woefully
5 inadequate to deal with what happened with this anonymous
6 complaint?

7 A Until I can investigate that more thoroughly, I
8 won't say I disagree with you, and I won't say I agree with
9 you. We got to look into it. And we will try to correct
10 it. And if we can get some guidance from this Commission,
11 we'd be happy to incorporate it. We want to correct
12 anything that we feel is not right, and we can use your help
13 on some of it.

14 Q Okay. I appreciate it.

15 A And I'll gladly accept it.

16 Q And maybe another suggestion would be it says in
17 the case of a referral the Board may continue to monitor the
18 status to the extent practical. But it doesn't talk about
19 how often that monitoring should happen and how -- maybe
20 that's another suggestion on what you need to do.

21 And it also talks about the Board also shall
22 determine whether it will actively investigate any part of
23 the complaint that addresses potential ethical violations
24 that are severable from the alleged criminal conduct. But
25 there really aren't any considerations as far as how do you

1 sever, correct?

2 I mean, what happens if you get not like what we
3 have, but you get a complaint with criminal and ethical
4 violations? How do you kind of sever the two? What are the
5 considerations? How long do you wait? Who do you contact?
6 What's the Board's involvement? What's the staff's
7 involvement?

8 I don't see any of that in your policy, in your
9 written policy. And maybe I -- would you agree with me that
10 none of that's in here?

11 A Well, we have within 180 days the Board can receive
12 and the respondent judicial officer written pursuant -- to
13 notice of full investigation. We go into the full
14 investigation within 180 days. We're mandating our staff to
15 do it. And then whatever they come up with then we decide
16 whether it -- we should have an NOFI, notice of full
17 investigation. The judge or JP, whoever it may be, or
18 magisterial judge, then we notify them.

19 Q You know --

20 A So now we may have to tighten this up more.

21 CHAIRMAN CLELAND: I think we just want to schedule
22 a recess here. I'm just wondering when a good time to do
23 it.

24 MR. HOROHO: Maybe just with one or two more
25 questions, and then we'll change topic.

1 CHAIRMAN CLELAND: Sure.

2 THE WITNESS: Sure.

3 BY MR. HOROHO:

4 Q The Pennsylvanians For Modern Courts testified
5 earlier, and I do believe that every Board member received a
6 letter that kind of outlined some of the recommendations.
7 And they -- and I state in the letter, the people of
8 Pennsylvania need and deserve certainty, certainty that the
9 Board will investigate judicial misconduct in office
10 regardless of pending criminal investigation. And they talk
11 about the Rule 4.07 would not prevent the Board from tabling
12 or deferring a Luzerne County type investigation in the
13 future.

14 I guess my question is I agree with that. I think
15 we all agree with that. How do we make sure that a Luzerne
16 County type of investigation in the future does not get
17 tabled, not just for two or three years, but for two or
18 three months?

19 A I think we're all looking for answers to that.

20 Q Pardon me?

21 A We're all looking for answers to that, including
22 myself. And hopefully we'll -- we'll have some definitive
23 answers.

24 Q Well, when you say that, are you currently -- is
25 the Board currently considering additional changes to their

1 internal operating procedures?

2 A Yes. We have a -- we have a meeting next Monday,
3 and we're going to ask all the Board members if they have
4 additions, subtractions, add to that, yes.

5 Q This was officially --

6 A Yes, next Monday. This Monday we have a meeting.

7 Q And this was officially --

8 A And I will bring this up.

9 Q Because this is already adopted?

10 A I know, but we can change it.

11 MR. HOROHO: Change it, okay. Mr. Chair.

12 THE WITNESS: And I intend to. If we can find
13 better wordage or a better solution, we will change it.
14 These are not etched in stone.

15 MR. HOROHO: Okay. It's a good break.

16 CHAIRMAN CLELAND: Okay. Let's take a recess until
17 3:30.

18 MR. TITUS: Is Mr. Cellucci remaining on?

19 CHAIRMAN CLELAND: Are you done with this witness?

20 MR. HOROHO: No. We just have a couple more
21 minutes, yeah.

22 CHAIRMAN CLELAND: Are you literally a couple more
23 minutes? Do you want to finish up now before the break?

24 THE WITNESS: Let's finish up. I got a long ways
25 to go.

1 MR. HOROHO: No. We probably have another 20
2 minutes or so, half hour.

3 MR. TITUS: You have a half hour, and then you have
4 Mr. Klett.

5 CHAIRMAN CLELAND: Okay. We'll be in recess until
6 3:30.

7 (Recess taken from 3:09 to 3:30.)

8 CHAIRMAN CLELAND: I think we're ready to resume.
9 We've had a chance to discuss among the Commission during
10 the recess, and I think there's a few more questions for
11 you, Mr. Cellucci, from either Mr. Legg or Mr. Horoho. And
12 then Mr. Mosee has a couple of questions. Mr. Williams has
13 a question. And then I think we are going to turn to Mr.
14 Klett and have a few questions for him.

15 BY MR. LEGG:

16 Q Thank you, Mr. Chairman. Mr. Cellucci, I want to
17 thank you for being here. I know at times it may seem
18 adversarial. It's not intended to be that way at all. I
19 think you were trying to fulfill your duty, as the
20 Commission's trying to fulfill its.

21 So I do want to thank you for being here, and
22 certainly I want to thank you for your service to the
23 Conduct Board, which has spanned obviously a substantial
24 period of time.

25 And to some degree you may be one of the best

1 witnesses we had because you've been there for quite a
2 period of time, and you have this back drop. So with that I
3 want to go back to the IOPs just briefly, and I want to go
4 to 4.03, which is on page seven, if you could.

5 Did you find that provision, sir?

6 A I'm at page seven.

7 Q IOP 4.03, anonymous complaints.

8 A 03, anonymous complaints.

9 Q Now, is it fair to say that this provision was
10 specifically addressed to some degree as a result of what
11 happened in Luzerne County?

12 A Oh, yes.

13 Q Okay.

14 A Actually I'm not supposed to give the information,
15 but I will.

16 Q Okay. I like that. Keep going.

17 A Prior to this the Board -- and I don't know what
18 year, and I've only been chairman this year. I was a Board
19 member. They would not accept anonymous complaints. We
20 wanted them to sign it, so we didn't address it. And then I
21 figured, look, we get information. We should look into it.
22 And we established the anonymous complaint. But there was a
23 while there where we didn't address them.

24 Q And would that have been during your first term?

25 Would that have been during your first term as a member?

1 A Yes, yes, sir.

2 Q And was that policy changed before you completed
3 your first term?

4 A I'm not sure.

5 Q Okay.

6 A But we did address it and decided maybe we should
7 accept them.

8 Q Now, in particular that -- I want to refer you to
9 the second sentence of the 4.03 IOP. It says all such
10 anonymous complaints must be presented to the Board for
11 review and approval in advance of either opening a file or
12 initiating a preliminary inquiry or investigation. Would
13 you agree with that?

14 A Yes.

15 Q Okay. And do you have the rules in front of you by
16 any chance, your Rules of Procedure, Rule 25? And let me --
17 it may be faster for me to read it to you. Rule 25-A-2
18 indicates when the Board receives information from any other
19 source, and that would basically be not a signed verified
20 complaint, if Chief Counsel concludes that the matter should
21 be investigated, Chief Counsel shall prepare a written
22 complaint and notify the Board at its next periodic meeting.

23 Do you think that IOP 4.03 changes Rule 25 or is
24 attempting to change Rule 25?

25 A No, I don't think so.

1 Q Okay. Does the IOP --

2 A We're still going to do the preliminary
3 investigation according to the rule.

4 Q Well, Rule 25 suggests that Chief Counsel would
5 determine whether an investigation should be conducted. I
6 think the IOP's indicating that the Board would make that
7 decision.

8 A Yeah, you're right. Now we got it into the -- he
9 will still do it, but it's up to the Board to decide.

10 Q Okay. So you're basically directing, I guess
11 administratively, your Chief Counsel, even though Rule 25
12 says this, you're actually going to come to us with these
13 anonymous complaints, right?

14 A Yes.

15 Q And the Board's going to make a decision whether to
16 investigate?

17 A Yes, sir.

18 Q Would you agree with me that the Constitution
19 requires the Board to investigate?

20 A What you just read, I would think so, yes. I'll
21 agree with you.

22 Q Okay. So why does the -- I guess what's the
23 purpose of 4.03?

24 A I think we have to add to it.

25 Q Okay. And I guess a question that's been floating

1 around, and maybe with your experience on the Conduct Board
2 you can kind of answer this. If there's no dispute -- and
3 I'm not saying that that's the case here. Hypothetically,
4 if it's clear that there's been judicial misconduct and the
5 Board refuses to act for whatever reason, who is the Board
6 accountable for that decision?

7 A Well, it's always been majority rule. And I don't
8 see where we would ever do that, not as long as I'm the
9 chair.

10 Q Do you see any entity that reviews actions of the
11 Board that never rise to the level of formal complaints? Is
12 there any accountability for the items that never rise to
13 the formal level in terms of what the Board does?

14 A Well, yes. We get investigated. And we don't feel
15 that it's serious enough. And I'll give you a quick
16 example. When there's a case on child support or who gets
17 this weekend or that weekend, the poor judge, you're damned
18 if you do and damned if you don't. So somebody's not going
19 to be happy, and they report the judge. We look it over and
20 say the judge did a fair ruling on this. We don't see any
21 reason why, and we dismiss it.

22 Q Well, I understand that. But as we look forward in
23 trying to improve the judicial discipline system in
24 Pennsylvania, do you feel that there should be any entity
25 that has any type of oversight of the Conduct Board to

1 review the matters that never make it to public light? And,
2 again, you've sat on the Board for a long period of time.
3 Do you think it's important from the public's perspective to
4 have some type of audits, anything that would suggest, hey,
5 why -- why wasn't anything done in this case, or something
6 slipped through the --

7 A I don't think so.

8 Q You think it operates effectively the way it is?

9 A I don't think so. Before you know it you're
10 getting into politics. I don't think so. I don't see how
11 that would work. We would be constantly reviewing,
12 constantly -- and we'd never have the staff to do it. I
13 don't see how that would work.

14 Q And you've hammered the staff issue a couple times
15 and the resource issue. Do you feel that there's a resource
16 issue in terms of you don't have sufficient staff?

17 A Well, no. We don't have sufficient staff to
18 expand. You're asking us to expand.

19 Q No. I'm asking you whether there should be an
20 independent agency out there, somebody authorized to -- even
21 if it's under seal, to take a look at as an independent
22 agency, here's the stuff that never made it out of the
23 Board. Is there anything we have questions on?

24 Q Well, are you --

25 Q And --

1 A Are you going to get an independent agency for the
2 Supreme Court, Superior Court? Are they going to look into
3 it?

4 Q Well, you're the agency --

5 A I don't see how it would work. I would not -- I
6 would not recommend that.

7 Q So based upon your experience on the Board you feel
8 that there's no need for any type of outside entity to
9 review for accountability purposes what the Board's doing?

10 A Well, the Board is set up six democrats, six
11 republicans.

12 Q Some would say --

13 A Six non-lawyers, and six attorneys, three of which
14 are judges. So we try to have -- and when they set this
15 Board up they tried to have a balanced Board. So what
16 you're saying should never happen. So I don't think we can
17 -- it would be wise to set up an independent board. Before
18 you know it you'd have independent boards for every -- all
19 the different entities of the Commonwealth.

20 Q Yeah, I understand. I'm not a big -- I'm not a big
21 fan of that either. I mean, I have people auditing our
22 office as well. Most government entities have some type of
23 auditor that comes in periodically to review books, to
24 review items, and that's what I'm asking you.

25 Do you think there's any value to that? In other

1 words, to say if an auditor had come in in this case to say,
2 hey, we've got this complaint that was filed in '06. It's
3 been sitting around for a year and a half, two years. What
4 do you think we should do with it? Would there be any
5 value, or you just feel that would be obstruction?

6 A I think we can do this within as far as the
7 auditors go. We have to submit everything we do to the
8 AOPC. So in a sense they -- they're looking over our
9 shoulder.

10 Q And --

11 A In some aspects.

12 Q And your budget comes through the AOPC's budget?

13 A Yes.

14 Q And there's been testimony about requesting
15 additional funding over the years?

16 A Yes, we have.

17 Q And do you know whether or not that additional
18 funding has been granted?

19 A Somewhat. But this last year not only did they not
20 grant us, they knocked us down.

21 Q Is --

22 A To the tune of \$268,000.

23 Q Where do you find those resources?

24 A Where do we find what, sir?

25 Q You're short \$268,000. Are you going to have to

1 cut staff?

2 A Maybe -- let me correct that. It might be 168.
3 I'm not sure. But it's a considerable amount of money that
4 they cut. And, for example, we don't -- before we had
5 members from the western part of the state. So we would
6 have some of our meetings in Pittsburgh. I would fly out.
7 And, of course, the Commonwealth paid for that, my expenses.
8 That's the only thing we got is the expenses.

9 And then when the Board members retired we would
10 have a banquet, a dinner for them. We've cut that out.
11 We've cut all the dinners out. And now all the members must
12 go to Harrisburg. Now it's an inconvenience for those in
13 the western part, but you have to cut corners.

14 Q And Mr. Klett had testified that it's gotten to the
15 point where people don't stay overnight to save money for
16 the Board --

17 A Oh, yes.

18 Q -- at hotels? Mr. Massa testified that he has to
19 make decisions whether to order transcripts. Would you
20 agree with all of that?

21 A Yes. Because we don't have the funds.

22 Q So the Board is cognizant of the financial pitch
23 that's facing it?

24 A Very much so.

25 Q Can you tell me as you sit there how much the Board

1 has incurred at this point in legal fees for the challenges
2 to what this Commission has been statutorily empowered to
3 do?

4 A We don't have any final bills. I don't know at
5 this point.

6 Q Well, have you seen any bills?

7 A We had one bill come in. And I don't know if that
8 is for public.

9 Q Well, I think -- I mean, I think the taxpayers have
10 a right to know.

11 A \$36,000.

12 Q And when was that \$36,000, when was that?

13 A About a month ago or six weeks ago.

14 Q And Mr. Titus obviously has done a substantial
15 amount of work since that time. He's filed things in the
16 Supreme Court, two briefs. He's here with you today. At
17 this point do we have any idea what the bill is at?

18 A No, not yet. I really don't want to know.

19 Q And, in fact, there's nothing within the budget
20 itself, your budget, that would allow for payment of that
21 bill?

22 A No. I've referred it over to AOPC.

23 Q So the AOPC is going to have to deal with that at
24 some point?

25 A That's what I instructed our Chief Counsel. I said

1 send the bill to AOPC. Get an itemized bill and send it to
2 AOPC.

3 MR. LEGG: That's all I have, Mr. Chair.

4 CHAIRMAN CLELAND: Mr. Mosee.

5 BY MR. MOSEE:

6 Q Mr. Cellucci, if I could direct your attention back
7 to the IOPs on page nine. The IOP 4.08, general standards
8 for evaluating Judicial Conduct Board cases. My first
9 question is does that evaluation result in accepting the
10 case, or is this an evaluation that occurs after a case has
11 been accepted for further investigation?

12 A Well, initial complaint comes in. Our Chief
13 Counsel reviews it.

14 Q Does he use these standards?

15 A Within 30 days or so.

16 Q Does he use these standards when reviewing the
17 case?

18 A Yes, yes, he does.

19 Q So he evaluates the nature of the misconduct before
20 deciding whether to present it to the Board?

21 A Yes, sir.

22 Q Okay. It's interesting to me, and this is
23 something I wanted to point out to you, that the 14 points
24 under the nature of the misconduct are all stated in the
25 past tense. Likewise the extent of the misconduct, which is

1 the next section, and the judge's culpability, they're all
2 stated in the past tense.

3 So that if the situation presented to the Board was
4 one that represented ongoing conduct, there really wouldn't
5 be a standard for evaluating that.

6 A No. Except that where he lists them on the back of
7 the -- where each case, how far they have gone. And then if
8 it's still under preliminary investigation as a PI and if
9 it's under NOFI, which is notice of full investigation, it
10 may take months. Most cases we will complete in two, three
11 months. And some difficult cases it certainly takes longer.

12 Q Yeah, I'm not talking about what the Board is doing
13 or what counsel is doing. I'm talking about the actual
14 conduct. So if, hypothetically, a judge was asked or
15 somebody asked you to investigate a judge because of conduct
16 which persisted, which was continuing at the time the
17 complaint was made, you wouldn't have any provision to
18 address that. It's not a perspective that you've advised
19 anybody to take when evaluating the conduct. That's my
20 point to you.

21 And likewise up in 4.07, and this, of course, would
22 be notwithstanding some determination at a later point that
23 4.07 is unconstitutional. If it is constitutional, however,
24 you indicate that in considering whether or not to retain
25 jurisdiction you'll take into consideration whether your

1 investigation may be prejudicial to the process of a pending
2 grand jury investigation or other law enforcement
3 investigation. And you go on to say that you consider
4 whether it was duplicative, potentially overlapping, things
5 which frankly I don't believe any prosecutor is going to
6 reveal to you.

7 If you think Mr. Titus is tough, try to get some
8 information like this from a prosecutor. It's not going to
9 happen. And so I can only infer that what you're talking
10 about here is a situation where you're asked by a prosecutor
11 to defer.

12 And my question is, what would your position be
13 under those circumstances?

14 A Well, we go -- we don't get that many complaints
15 from the prosecutor. They're usually individuals,
16 attorneys, lay people that give us the complaints. And
17 that's what we go by was the complaints. We do get some
18 District Attorneys, but they're few.

19 Q This isn't a complaint that would necessarily
20 originate with the District Attorney bringing it to your
21 attention. This is a situation where hypothetically there
22 may be a dual subject matter in the complaint where you have
23 both the ethical matters and the criminal conduct, and the
24 Board finds out that there is an investigation.

25 Upon finding out that there is an investigation

1 what I'm suggesting to you is that it's unreasonable to
2 believe that you're going to get the kind of information
3 that's contemplated in 4.07 unless the prosecutor comes to
4 you and says, listen, I need you to hold off because what
5 you're doing is jeopardizing our investigation.

6 A Well, I would agree with that, yes.

7 Q I think it's something that you need to take into
8 consideration. And furthermore, consistent with what I was
9 saying about ongoing conduct, there is no mention of ongoing
10 conduct in this provision. It seems pretty one-sided. And
11 this may sound strange coming from a prosecutor, but that's
12 all you seem to be taking into consideration. It seems to
13 me that, again, if this is going to withstand constitutional
14 muster, that you ought to mention that in situations where
15 there is ongoing misconduct that that would be a factor that
16 you would take into consideration, and it would be given
17 significant weight.

18 A That's a point well taken, sir.

19 MR. MOSEE: All right. Thank you.

20 THE WITNESS: And we'll work on that one also.

21 CHAIRMAN CLELAND: Mr. Williams.

22 BY MR. WILLIAMS:

23 Q Yes. Mr. Cellucci, can you tell us again when you
24 were aware that Judge Conahan -- yeah, Judge Conahan and Mr.
25 Judge had a relationship?

1 A Absolutely not.

2 Q You said --

3 A We had no way of knowing.

4 Q But did you say that you were made aware of it
5 afterwards?

6 A From the press. That's how -- where I got it from,
7 from the public domain.

8 Q In 2006 you didn't know that a relationship --

9 A No, absolutely not.

10 Q To the present day?

11 A And as far as -- yeah, as far as I know, no one
12 else on the Board knew because nothing was brought up about
13 it at the Board. We would have brought it up.

14 Q And presently your Board reviews the full
15 complaint, not just bullet points?

16 A Oh, yes. Once -- well, that was anonymous
17 complaint, and he presented it to us as a synopsis. And
18 then we didn't do anything further. But when we get a
19 complaint our Chief Counsel or the other two attorneys, they
20 will go over the pros and cons, and then they present it to
21 us. And then we decide how serious is this? Is it a
22 dismissal? Is it a letter of caution, letter of counsel, or
23 full investigation?

24 Q I was just thinking that one of the things you
25 might want to require your members to do before they make a

1 decision on a complaint for a judge is to disclose whether
2 they have either worked in a campaign for that judge or
3 donated to that judge. I think that should be disclosed
4 before any decisions are made. Do you agree with that or
5 no?

6 A Well, our investigators does -- they do interview
7 different ones and try to get that information, whatever it
8 may be, and then they report back.

9 Q Did your investigators investigate the relationship
10 between Conahan and Judge at all?

11 A No. There wasn't any investigation at that point.
12 It was -- we didn't take any immediate action on it.

13 Q Well, wouldn't you agree that the member should
14 disclose that before a vote?

15 A Well, we did. We did look it over and saw it --
16 there wasn't anything criminal in it like we later found
17 out. And so we didn't proceed with it.

18 Q I'm saying for future practice don't you think the
19 members of the JCB should disclose before they take a vote
20 on whether to proceed against a judge or not to disclose
21 whether they have contributed to that judge's campaign or
22 worked on his campaign?

23 A The individual -- you're talking about the
24 individual?

25 Q The individual members of the Commission?

1 A Members. Well, they should recuse themselves.

2 Q They should, but I'm asking you --

3 A Yeah. We could put language in there. Because if
4 I contribute to a judge, I would have to say I'm not going
5 to vote on this. I -- I contributed \$1,000 to X, Y, Z.

6 MR. WILLIAMS: And I think that would give you more
7 transparency, and the people may have a little more faith in
8 the JCB.

9 CHAIRMAN CLELAND: Thank you.

10 THE WITNESS: Thank you.

11 BY CHAIRMAN CLELAND:

12 Q I'd like to just clarify one question just
13 following up on Mr. Williams, and then we're done.

14 A Yes, sir.

15 Q Then we're done. I'm referring back to the article
16 in the Legal Intelligencer. You said that you learned from
17 the press about the Judge Conahan relationship. And in the
18 press -- in the Legal Intelligencer you were quoted as
19 saying former Board Member Patrick Judge, Sr. recused
20 himself before the vote. He walked out of the office, out
21 of the meeting. He said, I recuse. I found out later he
22 had some business dealings with Conahan, which is what your
23 testimony was today. But which meeting was that?

24 A He was the chairman then, and he was the chairman
25 in -- that was in -- I guess in the June or so. It might

1 have been the May in '07, I think. I'm not sure. But it
2 was in that time frame within -- give or take a year or so.

3 Q Would that have been in -- was it the June, '07
4 meeting where the vote to defer was taken?

5 A Yeah, I believe it was '07. It was '07, sir.

6 Q So he did not recuse himself in any dealing with
7 that between September and June as far as you know?

8 A As far as I know.

9 CHAIRMAN CLELAND: Okay. Thank you, very much.

10 THE WITNESS: And he never did say why he recused.
11 He just said he would. I would like to thank this
12 Commission for giving me some good points, and we will try
13 to incorporate it. I think, counsel, you took them down.
14 So we will -- we will address those. And they were some
15 good points. So thank you, very much.

16 CHAIRMAN CLELAND: Thank you, Mr. Cellucci. I hope
17 I can reassure you again that we work toward a common
18 purpose even if we may approach it in a different direction.
19 So thank you, very much, sir.

20 THE WITNESS: You're quite welcome, sir. So I'm
21 now dismissed from the hot seat?

22 CHAIRMAN CLELAND: You are. Thank you, sir.

23 Mr. Klett, thank you for being here today. I
24 assume you're still under oath, the oath having been
25 administered before.

1 THE WITNESS: Thank you.

2 CHAIRMAN CLELAND: I know this is under difficult
3 personal circumstances. We appreciate your forbearance and
4 patience in waiting for us today. So thank you. Mr.
5 Horoho.

6 BY MR. HOROHO:

7 Q And I echo that also, Mr. Klett. I know that we
8 kept you waiting. And because of our length with Mr.
9 Cellucci, we will only have a few questions for you.

10 The first question is last time you and I -- you
11 testified in front of the Commission I asked you about the
12 first time you saw the anonymous complaint dated September
13 28th, 2006. And your testimony is -- my belief is that no
14 Board member saw it prior to the summer of 2009. I'd like
15 to ask you if you wanted to modify or supplement that?

16 A No.

17 Q No?

18 A Keep in mind that the typical protocol is for the
19 Chief Counsel to do a summary of the complaint. And I tried
20 to clarify that at the earlier -- in the earlier testimony.

21 I knew about the complaint prior to the summer of
22 '09, but I never physically looked at that complaint until
23 the summer of '09.

24 Q And when did you first have an opportunity to
25 either hear about -- hear the summary or -- I don't know if

1 your -- are you distributed a summary? When did you get
2 that?

3 A I'll say again, please.

4 Q The summary that you were referring to, you saw the
5 summary prior to the summer of '09?

6 A Yes. No. I saw the summary -- it would have been
7 June of '07.

8 Q Okay. There was some discussion and some testimony
9 from Mr. Cellucci that the Board is currently in the process
10 of reviewing the inter -- the internal operating procedures
11 that you just adopted with the purpose of reviewing and
12 making -- continuing to modify them.

13 A I don't know that one way or the other.

14 Q Okay. Is there --

15 A As far as I know they were adopted and are final.
16 But like -- like any other IOP or rule could be changed at
17 the discretion of the Board.

18 Q There's no Subcommittee that has been appointed to
19 study and ask for recommendations with the idea that maybe
20 you want to continue to modify those? At least Mr. Cellucci
21 I think --

22 A No.

23 Q Okay. Is there any plans to suspend any of the
24 provisions of the internal operating procedures?

25 A Well, I did share with you earlier today a personal

1 point of view having read the Supreme Court opinion over the
2 weekend that raised issues about the constitutionality of
3 our deferral/referral policy. And, again, I'm not the
4 chair. I'm simply a Board member. But my plan is to ask
5 Chairman Cellucci at our next Board meeting to appoint a
6 Committee to study that very issue.

7 Q Okay. And, you know -- and I think you and I have
8 talked about this during the break, that we're in the
9 process of what I call the -- what we call -- I think the
10 Commission calls the recommendation phase. We are doing
11 everything we can to gather information by looking forward.

12 I will tell you that in preparing for today's
13 testimony I went back and looked at the members of the
14 Judicial Conduct Board over the last few years. I knew and
15 know most of the lawyers and the judges on there. They are
16 very well respected. There's a tremendous amount of talent
17 with your -- with your group. I don't know the non-lawyers
18 as much.

19 So I guess my question is how can we help you, the
20 JCB, to tap into that talent in order to make Pennsylvania's
21 judicial system not just the most effective it's ever been,
22 but arguably to try to enhance it to be one of the best in
23 the country?

24 A I think the easiest answer is to increase our
25 appropriation. The -- I don't have specific numbers for

1 '06, but I think we processed say 450 complaints. You
2 probably have those numbers. I'm speaking figuratively
3 rather than specifically.

4 Since then we've added one investigator in
5 Pittsburgh. But as you know this year, '09, we processed
6 686 complaints. If we decide to override the current
7 referral/deferral policy, that will mean, I think, that we
8 will investigate each and every complaint to conclusion.

9 So we're going to -- we're going to have more work
10 rather than less work. So I think you could help us by
11 encouraging the budgetary process to give us more
12 wherewithal to hire one more lawyer and one more
13 investigator.

14 Q And how much would that be based upon your
15 experience? How much would one of those --

16 A I don't know.

17 Q Okay. In addition to those two, any additional
18 staff besides that do you think would be helpful?

19 A Well, again, let me harken back to the IOPs. There
20 were significant flaws in the old process. First of all, it
21 was very staff-dominated. We only saw what the staff chose
22 to T up for us. And the staff assumed responsibility maybe
23 because the Board created a vacuum.

24 But we have since in these IOPs, and maybe it's a
25 little bit illusive, but if you -- if you look at the IOPs,

1 you see that all power resides in the Board. And the staff
2 has no power to confer, consult with anybody other than the
3 Board except for a specific delegation.

4 One of the, I think, glaring shortfalls which I
5 alluded to earlier are not having an understanding of what
6 we had in inventory. And now we -- we have what's called a
7 intake and status log that logs in every single case.

8 Indicates to whom it's assigned, what's the nature
9 of the complaint, how serious is it and so forth. So at
10 least now we have a listing inventory. That intake log is
11 on every single agenda of the Board and is to be treated as
12 a running status of each and every complaint.

13 Previously, and this occurred while I was on the
14 Board, the staff would not even let us know what I will
15 describe as cases that have gotten long of tooth. So one of
16 the procedures we put in -- put in place was that at the end
17 of every year we had to have an inventory of cases that were
18 long of tooth.

19 So I think we've really shored up some of the
20 shortfalls. Our -- we're taking a lot of abuse over matters
21 about which we had little information. We're going to
22 correct that. I guarantee you. We're going to take heat,
23 then we're going to be in the process.

24 One other little subtle point. We now have a Legal
25 Review Committee triggered by that phantom addition to the

1 brief which you folks have been probing about. I don't
2 understand it. I don't know where it came from. But I
3 guarantee you it won't happen again.

4 We just recently reviewed a draft, 40 some page
5 response in Lokuta to the request for reconsideration. At
6 our recommendation we parroted it down to a page and a half
7 and the conduct -- the Court of Judicial Discipline denied
8 the motion within a couple days.

9 So I think there's a lot of room for pure lawyering
10 input.

11 MR. HOROHO: Thank you. That's all the questions I
12 have, Mr. Chairman.

13 CHAIRMAN CLELAND: Any other questions? Mr. Klett,
14 thank you, very much.

15 MR. KLETT: Pleasure.

16 CHAIRMAN CLELAND: We appreciate your participation
17 and your involvement here today. Thank you.

18 MR. KLETT: Very good, sir.

19 CHAIRMAN CLELAND: I believe that there is no
20 further business to come formally before the Commission
21 today. And we stand in recess until February 25th at --

22 MR. GIBBONS: A time to be determined.

23 CHAIRMAN CLELAND: -- a time to be determined.

24 Thank you, Judge Gibbons. We are adjourned.

25 (Whereupon, the hearing was adjourned at 4:03.)

1 I hereby certify that the proceedings and evidence
2 are contained fully and accurately in the notes taken by me
3 on the hearing of the above cause, and that this is a
4 correct transcript of the same.

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9 _____
Date

_____ Donna E. Gladwin, RPR

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