

BEFORE THE NEW YORK STATE SENATE  
STANDING COMMITTEE ON JUDICIARY

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Public Hearing on the  
Appellate Division First Department  
Departmental Disciplinary Committee,  
the Grievance Committees of the  
Various Judicial Districts, and the  
New York State Commission on Judicial Conduct

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Hearing Room 6  
Empire State Plaza  
Albany, NY

June 8, 2009  
10:35 a.m.

PRESIDING:

Senator John Sampson  
Chair  
Senate Standing Committee on Judiciary

PRESENT:

Senator John A. DeFrancisco (R)  
Senator Bill Perkins

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1 Committee.

2 Welcome, gentlemen. Good morning.

3 MR. GOLD: Good morning. Thank you.

4 Mr. Chairman, distinguished members of  
5 the committee, my name is Martin R. Gold. I  
6 am a lawyer in New York City and a partner  
7 in Sonnenschein, Nath & Rosenthal, a large  
8 national law firm. I'm a volunteer member  
9 of the Departmental Disciplinary Committee  
10 for the First Judicial Department appointed  
11 by the Appellate Division. I am also a  
12 senior member of the policy committee of the  
13 Disciplinary Committee.

14 The chairman of the committee, Mr. Roy  
15 Reardon, very much wanted to be here today  
16 and to attend this hearing and participate,  
17 but another commitment made that impossible.  
18 And he asked me to attend in his place, and  
19 it's my pleasure to do so.

20 With me is our chief counsel, Alan  
21 Friedberg. Together we will provide you  
22 with a description of the operation of the  
23 attorney disciplinary system in the First  
24 Department and answer any questions you may

1 have concerning our operation.

2 The Departmental Disciplinary Committee  
3 was established by the Appellate Division,  
4 First Department, to assist in the court's  
5 role in disciplining attorneys in the First  
6 Department, which consists of New York and  
7 Bronx Counties. Members of the committee  
8 are all appointed by the Appellate Division.  
9 They are all volunteers.

10 There are approximately 80,000  
11 attorneys in the First Department. As I  
12 have indicated, Mr. Reardon is chairman of  
13 the committee. The committee also receives  
14 hands-on guidance from the Policy Committee  
15 appointed by the Appellate Division from the  
16 members of the committee. The Policy  
17 Committee oversees the general functioning  
18 of the committee and the staff and also  
19 provides direction on pending issues.

20 Now, the Appellate Division has adopted  
21 public rules and procedures governing the  
22 Departmental Disciplinary Committee and  
23 rules governing the conduct of attorneys.  
24 These rules are available to the public,

1 together with the rules of professional  
2 conduct which govern attorney conduct, on  
3 the Departmental Disciplinary Committee  
4 website, which is part of the Appellate  
5 Division website.

6 Also available on the website is  
7 information about the committee, including  
8 information concerning how a complaint can  
9 be filed. Information about filing a  
10 complaint is also available to members of  
11 the public who call or visit the committee's  
12 offices. Complaint forms are available in  
13 English, Spanish, and Chinese.

14 It is important to note that the  
15 purpose of attorney discipline is not to  
16 mediate disputes between attorneys and  
17 clients or to vindicate the rights of  
18 complainants. Such matters can best be  
19 handled by the court system. Generally fee  
20 disputes, issues of legal strategy, and  
21 single incidents of malpractice that might  
22 be addressed in a civil matter do not  
23 constitute misconduct. The Appellate  
24 Division and the committee must devote its

1           limited resources to the limited remedial  
2           options within its jurisdiction.

3           Pursuant to Section 90, Subdivision 10,  
4           as Senator Sampson mentioned, of the  
5           Judiciary Law, all materials concerning an  
6           investigation or proceeding concerning an  
7           attorney's conduct are sealed until the  
8           Appellate Division issues a decision  
9           sustaining charges of misconduct concerning  
10          an attorney. When the Appellate Division  
11          issues such a decision, the record of all of  
12          the proceedings becomes public.

13          The Office of the Chief Counsel of the  
14          Disciplinary Committee is staffed by 23  
15          attorneys. The **staff attorneys** screen  
16          complaints, investigate allegations of  
17          misconduct, and **prosecute cases at hearings**.  
18          As I have indicated, **Mr. Alan Friedberg is**  
19          the **chief counsel**.

20          Here is the process by which a  
21          complaint is handled. When a complaint is  
22          received at the committee, it is immediately  
23          assigned to a staff attorney to be screened.  
24          Investigations may also be commenced by the

1 chief counsel on his own initiative, even in  
2 the absence of a complaint from a third  
3 party.

4 Since numerous attorneys have offices  
5 in more than one location in the state, the  
6 address that an attorney lists in  
7 registering with the Office of Court  
8 Administration determines which disciplinary  
9 body exercises jurisdiction over that  
10 attorney. Complaints against an attorney  
11 who is registered at an address in another  
12 judicial department are referred to the  
13 appropriate disciplinary body. Accordingly,  
14 each regional disciplinary agency is able to  
15 keep a record of all complaints filed  
16 against that attorney.

17 Complaints against judges are referred  
18 to the Commission on Judicial Conduct; we  
19 have no jurisdiction over them.

20 The staff attorney who screens the  
21 complaint reviews the entire complaint,  
22 including attachments, and may choose to  
23 interview the complainant, obtain court  
24 documents, or obtain documents or

1 information from the attorney who is the  
2 subject of the complaint. If the staff  
3 attorney believes the allegations are likely  
4 to warrant formal charges, he or she refers  
5 the matter to the chief counsel for  
6 immediate assignment.

7 If the chief counsel concurs that the  
8 allegations are likely to warrant formal  
9 charges, the complaint is immediately  
10 assigned to a staff attorney for  
11 investigation, which may include obtaining a  
12 written response from the respondent  
13 attorney, scheduling testimony of the  
14 respondent attorney or others, and obtaining  
15 records, including court records and bank  
16 records. All of them, we have subpoena  
17 power to do that.

18 In cases where there's conclusive  
19 evidence of serious misconduct or failure to  
20 cooperate with the committee, the committee  
21 is authorized to make an immediate motion to  
22 seek an attorney's interim suspension during  
23 the proceedings.

24 If the allegations appear less serious,



1 the screening attorney may determine to seek  
2 the written response of the respondent  
3 attorney. When that is obtained, it is sent  
4 to the complainant, who is requested to  
5 reply to the attorney's response. After  
6 obtaining this information, the screening  
7 staff attorney may recommend, in writing,  
8 dismissal or assignment of the matter to a  
9 staff attorney for further investigation.

10 Each recommendation is reviewed by the  
11 chief counsel, who may determine to assign  
12 the matter to a staff attorney for  
13 investigation or recommend dismissal of the  
14 complaint.

15 If the recommendation of the chief  
16 counsel is to dismiss the complaint, the  
17 chief counsel signs the recommendation  
18 memorandum and the entire file, including  
19 the memorandum, is sent to one of the 55  
20 members of the Departmental Disciplinary  
21 Committee who must approve the dismissal.

22 If the complainant seeks  
23 reconsideration, the matter is sent to  
24 another attorney committee member who must

1           also approve dismissal. And if there's  
2           disagreement, we have procedures to deal  
3           with that.

4           The committee members are appointed by  
5           the Appellate Division and include  
6           experienced practicing attorneys, former  
7           prosecutors, and approximately one-third are  
8           lay members.

9           CHAIRMAN SAMPSON:        So this committee  
10          that reviews it, they are appointed by  
11          members of the disciplinary --

12          MR. GOLD:        These are the members of  
13          the committee, the disciplinary committee,  
14          all of whom were appointed by the court.

15          CHAIRMAN SAMPSON:        Okay.

16          MR. GOLD:        The types of complaints  
17          that are dismissed include those complaints  
18          expressing general dissatisfaction with the  
19          outcome of a case without an allegation of  
20          specific misconduct by an attorney, a very  
21          common kind of complaint. There's a losing  
22          side in every litigation.

23          CHAIRMAN SAMPSON:        We know that.  
24          And, Mr. Gold, we're just trying to keep

1 everything within five minutes, because we  
2 have quite a few --

3 MR. GOLD: Well, I'm going to the  
4 heart of what you're asking about --

5 CHAIRMAN SAMPSON: Okay. If you can,  
6 that would be great.

7 MR. GOLD: -- is how these things are  
8 reviewed internally and what are our  
9 procedures.

10 The committee has discretion to refer  
11 action concerning possible misconduct by an  
12 attorney until litigation in the court  
13 system is concluded. The exercise of that  
14 discretion is done on a case-by-case basis.

15 If the staff attorney determines that  
16 the allegations do not constitute  
17 misconduct, the screening attorney may  
18 recommend that the complaint be rejected  
19 without seeking a response from the  
20 respondent attorney. In such a case the  
21 screening attorney's written memorandum is  
22 reviewed again by the chief counsel, who, if  
23 he agrees with the recommendation, signs the  
24 memorandum, and again the entire file is

1 sent to a committee member who must approve  
2 the rejection.

3 Following an investigation, which may  
4 include depositions, subpoenaed documents,  
5 interviews, the attorney writes a memorandum  
6 recommending action on the complaint. The  
7 memorandum again must be approved by chief  
8 counsel. If the recommendation is for  
9 dismissal, the entire file again goes to a  
10 committee member for approval. And again,  
11 there's a procedure for reconsideration if  
12 the complainant seeks such reconsideration.

13 If the recommendation is for a letter  
14 of admonition or the filing of formal  
15 charges, it must be approved by two separate  
16 attorney members of the Policy Committee of  
17 the committee, which is composed of nine  
18 attorneys and three laypersons. The members  
19 review a file; if two members approve an  
20 admonition, a confidential admonition is  
21 sent to the respondent attorney and the  
22 complainant is notified.

23 An admonition, although private, is  
24 considered discipline and may be used as

1           aggravation if further charges are filed  
2           against the attorney. If two attorney  
3           members of the Policy Committee, after  
4           reviewing the file, approve charges, the  
5           Appellate Division appoints a referee who  
6           conducts a hearing, which is essentially a  
7           trial. The rules of evidence apply.

8           The referee's recommendation is then  
9           reviewed by a panel, usually of four members  
10          of the Disciplinary Committee, who make a  
11          recommendation to the Appellate Division as  
12          to misconduct or possible action.

13                 SENATOR PERKINS:       Excuse me. Maybe  
14                 we can get to the balance of what you're  
15                 going to share with some questions that I  
16                 think are coming up.

17                 MR. GOLD:        Fine.

18                 SENATOR PERKINS:       For instance -- if  
19                 you don't mind, Mr. Chair -- I'm looking  
20                 sort of like for some statistical  
21                 information in terms of how many  
22                 complaints --

23                 MR. GOLD:        I'm coming to that, but  
24                 I'll --

1                   SENATOR PERKINS:        So I might as well  
2                   ask the question so you can get to it, and  
3                   that way we can try and have a conversation.

4                   Because, you know, one of the wonderful  
5                   things, Mr. Chairman, is that this is such a  
6                   great turnout, there's a lot of folks here.  
7                   And it's going to take a lot of time, so --

8                   MR. GOLD:        Well, let me just jump to  
9                   the statistics that we have.

10                  SENATOR PERKINS:        Okay.

11                  MR. GOLD:        In 2008 the committee  
12                  received approximately 3300 complaints  
13                  concerning attorneys. Five hundred  
14                  twenty-five of these were dismissed without  
15                  seeking responses from the respondent  
16                  attorney because these complaints did not  
17                  describe conduct that violated the rules  
18                  which the committee enforces. An additional  
19                  367 complaints were referred to other  
20                  disciplinary agencies, such as when a  
21                  complaint is made against an attorney in a  
22                  different department.

23                  And also included in that number are  
24                  complaints against nonattorneys, such as the

1           unauthorized practice of law. Those things  
2           we refer to the district attorney's office.

3           Of the remaining cases, responses are  
4           sought and other forms of investigation are  
5           commenced.

6           In 2008, 21 attorneys were disbarred  
7           after hearings, that's after full hearings.  
8           Eight attorneys submitted disciplinary  
9           resignations, 22 attorneys were suspended,  
10          and two were publicly censured. In  
11          addition, approximately 1900 complaints were  
12          dismissed by the committee and 58 attorneys  
13          received private admonitions.

14          Now, I can say -- these are the 2008  
15          statistics -- I've been a member of the  
16          committee for quite some time, and I would  
17          say that this was a representative year.

18          CHAIRMAN SAMPSON:       That's usually  
19          the -- that's the norm, or are there more  
20          complaints, less complaints?

21          MR. GOLD:           I think this is typical.

22          CHAIRMAN SAMPSON:       Typical?

23          MR. GOLD:           Mm-hmm. A typical kind of  
24          a year.

1                   CHAIRMAN SAMPSON:       And when you were  
2                   talking about the issue, if there is a  
3                   question where, say, the staff attorney is  
4                   uncertain whether this rises to the level of  
5                   an attorney being disciplined, does he then  
6                   go speak to the chief counsel?

7                   MR. GOLD:       Absolutely.   Each staff  
8                   attorney -- now, let me turn this one over  
9                   to Alan Friedberg, because he handles the  
10                  staff.

11                  MR. FRIEDBERG:    If there's any  
12                  question that there might be misconduct, we  
13                  would proceed with it.

14                  But we get many complaints that are  
15                  just somebody who might have lost a criminal  
16                  or civil case and just said "I lost, and I'm  
17                  blaming it on my lawyer."   If there's no  
18                  grounds for misconduct, then those are  
19                  rejected without seeking a response.

20                  But in most cases we do seek the  
21                  response of the attorney, and then that  
22                  response, which we call an answer, is sent  
23                  to the complainant for what we call a reply.  
24                  And then when that comes in, we make a



1           determination in every case.

2           And that's 3300 to 3500 complaints a  
3           year, I review them. And for any dismissal,  
4           a committee member must review it, an  
5           attorney committee member. And if  
6           reconsideration is sought, a second attorney  
7           committee member must review it.

8           For anything that may go to charges or  
9           an admonition, two attorney Policy Committee  
10          members must review it and approve.

11          CHAIRMAN SAMPSON:       And dealing with  
12          the -- and usually there's one staff  
13          attorney who works on these complaints? Or,  
14          I mean --

15          MR. FRIEDBERG:       Well, almost all the  
16          attorneys screen cases except for several of  
17          the supervisors. So it's just randomly  
18          given out to the next attorney. Our intake  
19          people just give it out --

20          CHAIRMAN SAMPSON:       How many cases do  
21          they normally handle?

22          MR. FRIEDBERG:       Well, they normally  
23          have about 50 cases for -- not for  
24          screening, for investigation. And they

1           probably would screen 3300 complaints  
2           divided by 21 or 20 attorneys who are  
3           screening, 150 a year, three a week, I'm  
4           assuming.

5           Most of our staff is very experienced.  
6           Many are former prosecutors.

7           MR. GOLD:        Senator, let me just add  
8           one thing.  In cases where there's internal  
9           disagreement or, say, the chief counsel in  
10          his own mind looks at a case and says "This  
11          one is kind of close, I don't know what we  
12          ought to do," he'll take it to the chairman,  
13          to Mr. Reardon.

14          Sometimes when Mr. Reardon looks at a  
15          case, he says, "Let's bring this to the  
16          whole Policy Committee."

17          CHAIRMAN SAMPSON:    I gotcha.  So if  
18          there's a question such as that, it then  
19          goes to the entire Policy Committee?

20          MR. GOLD:        It could, yes.

21          CHAIRMAN SAMPSON:    How many members  
22          of the Policy Committee?

23          MR. FRIEDBERG:       There's 12.  All  
24          appointed by the Appellate Division.



1                   perhaps results in serious penalty.

2                   MR. GOLD:       I should say that in the  
3                   First Department, because of the nature of  
4                   what goes on in the Island of Manhattan, we  
5                   get an awful lot of very major complaints  
6                   involving complicated financial issues.  
7                   Sometimes -- we don't get too many of them,  
8                   but we do get some of these cases which are  
9                   very complex and involved.  Sometimes they  
10                  involve allegations of mishandling of funds  
11                  in connection with estates or trusts or  
12                  securities matters or things of that sort.

13                  And we deal with all of those kinds of  
14                  matters, and we have members of the Policy  
15                  Committee who are skilled and experienced in  
16                  mostly all of these areas.

17                  Now, by the way, at the present time  
18                  one of the issues that's facing us, which is  
19                  very important to us, is immigration cases.  
20                  We are very concerned that people who are  
21                  coming into the United States and are here  
22                  and are subject to the immigration  
23                  litigation system, too many of them are  
24                  being inadequately represented by counsel.

1           Now, we just handle one little aspect  
2 of that. We're concerned when lawyers take  
3 advantage of some of the vulnerable  
4 population.

5           CHAIRMAN SAMPSON:       No, I have seen  
6 that. And you're correct about that, I have  
7 seen that, especially with respect to my  
8 constituencies; these individuals have paid  
9 a considerable amount of money and it hasn't  
10 gone anywhere.

11          MR. FRIEDBERG:        Judge Katzman of the  
12 Second Circuit has established a panel of  
13 people from various fields who work in this,  
14 and we're working very closely with that  
15 panel. And we are very concerned about  
16 people who take advantage of perhaps the  
17 most vulnerable people around..

18          CHAIRMAN SAMPSON:       Thank you very  
19 much.

20          Senator DeFrancisco?

21          SENATOR DeFRANCISCO:    No, thank you.

22          CHAIRMAN SAMPSON:        Senator Perkins,  
23 you had a question?

24          SENATOR PERKINS:         Can you just give

1           us -- you just mentioned two major sources,  
2           I guess, of complaints. One has to do with  
3           the escrow accounts and the other one sort  
4           of neglect.

5           MR. GOLD:        Yes.

6           SENATOR PERKINS:    Now, what falls  
7           into sort of the neglect category?

8           MR. GOLD:        Well, a typical kind of  
9           neglect case, someone will write a letter  
10          and say, "I hired a lawyer, I paid him  
11          X thousand dollars as a retainer, and then I  
12          couldn't get him on the telephone and he  
13          didn't do anything for me." That's a  
14          serious matter. That X thousands of dollars  
15          is important to the client. Lawyers are not  
16          supposed to neglect matters for clients.

17          And generally what we do with those is,  
18          depending upon whether or not the client has  
19          been adversely affected already by what's  
20          happened -- I mean, if the statute of  
21          limitations has run or something like  
22          that -- we treat those as serious matters.

23          In the absence of something serious  
24          having already happened, and certainly if

1           this is a first offense against that lawyer,  
2           it would normally result in a letter of  
3           admonition. So even though neglect is the  
4           largest single category of matters that we  
5           have, it's not often the most serious in  
6           terms of the discipline.

7           The mishandling of client funds, a  
8           client escrow account or maybe estate funds  
9           or something like that, is probably the most  
10          serious and comes with the way the court  
11          deals with that --

12          SENATOR PERKINS:        Would you say most  
13          of your cases are in that area of the escrow  
14          accounts?

15          MR. GOLD:            No.

16          MR. FRIEDBERG:        Not most, but many.

17          SENATOR PERKINS:        But many.

18          MR. GOLD:            Yes.

19          SENATOR PERKINS:        Most would be in  
20          the neglect categories?

21          MR. GOLD:            Right.

22          SENATOR PERKINS:        Let me ask two  
23          quick other questions, just for the sake of  
24          discussion.

1           Are these processes open, do they have  
2 any transparencies? Or are these behind  
3 closed doors, totally confidential?

4           MR. GOLD:       They're absolutely closed.  
5 Because of Section 90, Subdivision 10 of the  
6 Judiciary Law, everything is confidential,  
7 sealed, not subject to -- it's not available  
8 to anybody in the public at all.

9           SENATOR PERKINS:     The good news or  
10 the bad news is it's sealed; right?

11          MR. GOLD:       That's right. Unless and  
12 until the Appellate Division orders public  
13 discipline against the lawyer. That would  
14 be either a censure, suspension or  
15 disbarment. Until one of those happens, the  
16 whole file is closed.

17          So for example -- and by the way, I'm  
18 glad you asked that, Senator, because that's  
19 important in terms of what's before you. We  
20 get these complaints from complainants who  
21 think that they've been injured, and we deal  
22 with them fairly.

23          A complainant has a limited role in  
24 terms of our proceedings. He's not like a



1           plaintiff in a civil litigation who's able  
2           to prosecute a case by himself. He's more  
3           like a complainant in a criminal matter who  
4           refers things to a district attorney and  
5           then watches to see what the district  
6           attorney is going to do.

7                     And if we decide to dismiss a matter,  
8           we'll advise the complainant, our procedure  
9           is to advise the complainant that we've done  
10          that. But we don't tell them why, or we  
11          don't tell them what we've discovered in our  
12          investigation. We don't disclose anything  
13          in our file to the complaint because we're  
14          not permitted to.

15                    CHAIRMAN SAMPSON:     I think that's  
16          understandable. A lot of people need to  
17          understand that you're not permitted to  
18          provide that information unless the  
19          Appellate Division, if they choose to  
20          suspend or admonish an individual, at that  
21          point in time.

22                    I think that this is a misunderstanding  
23          that some people have, and I'm glad we were  
24          able to clear it up to a certain extent at

1           this point in time.

2           MR. GOLD:       Now, by the way, the  
3           Appellate Division, I should add, with  
4           respect to that point, has the legal  
5           authority under Subdivision 10 to open the  
6           file at any point with respect to any  
7           particular matter.

8           CHAIRMAN SAMPSON:     I think Senator  
9           DeFrancisco has a question.

10          SENATOR DeFRANCISCO:     Just very  
11          quickly to follow up on that. I think that  
12          was a great analogy, because I've heard some  
13          complaints about these things are not open  
14          to the public. But you're not a plaintiff,  
15          you are someone referring to an agency, just  
16          like a DA doesn't have to prosecute every  
17          case if they don't think the evidence is  
18          there or that the testimony is not  
19          supportable by other facts that they learn.  
20          And I think that's a big confusion in the  
21          general public.

22          But one other question. What happens  
23          if there's a complaint by somebody against  
24          an attorney that's found to be unfounded?

1 Will that attorney at least get notice that  
2 somebody's complaining about something under  
3 those circumstances? Because no doubt that  
4 person is unhappy. And wouldn't the  
5 attorney at some point, after it's  
6 dismissed, be entitled to know what the  
7 complaint was?

8 MR. GOLD: Well, it depends upon the  
9 time within the matter and the stage of the  
10 matter and also the nature of what's  
11 occurred.

12 As I indicated before, if a complaint  
13 is filed and on its very face it doesn't set  
14 forth any disciplinary matter, then the  
15 respondent may not even be notified of this.  
16 The complaint is simply dismissed on its  
17 face, administratively, internally at the  
18 commission, and the attorney, as far as  
19 we're concerned, doesn't need to know that  
20 anybody complained about them because as far  
21 as we're concerned, they didn't complain  
22 about them. You know? They didn't complain  
23 about them with anything even close to  
24 something.

1           It doesn't have to get to a very high  
2           level before we'll send it to the respondent  
3           and ask him for a response. That happens in  
4           a substantial majority of cases.

5           MR. FRIEDBERG:       Once the attorney  
6           learns about it, obviously at the end of the  
7           case we will notify them as to what  
8           happened.

9           CHAIRMAN SAMPSON:     Mr. Gold and  
10          Mr. Friedberg, I want to thank you very much  
11          for taking the time.

12          And the reason I let it extend over the  
13          five minutes is because I really wanted them  
14          to explain the procedures and the process  
15          with respect to dealing with these  
16          complaints.

17          Thank you very much.

18          MR. FRIEDBERG:       We stand ready to  
19          cooperate with you and answer any questions  
20          today or any other day.

21          MR. GOLD:           And we plan to stay here  
22          for the day and be available to you in case  
23          you have anything further you'd like to ask  
24          us about.

1                   CHAIRMAN SAMPSON:     Thank you very  
2                   much, gentlemen.

3                   MR. FRIEDBERG:     Thank you for your  
4                   time.

5                   CHAIRMAN SAMPSON:     The next witness  
6                   is Christine C. Anderson, who used to be a  
7                   former employee with the First Department  
8                   Disciplinary Committee.

9                                   (Applause.)

10                  CHAIRMAN SAMPSON:     I think we should  
11                  try to keep our -- no need for applause,  
12                  ladies and gentlemen. We're just trying to  
13                  keep an orderly process and just keep it  
14                  moving.

15                  Ms. Anderson, thank you very much.  
16                  We're going to try to keep it under five  
17                  minutes. We allowed them to go over just to  
18                  explain the process, to lay the groundwork.  
19                  Okay?

20                  MS. ANDERSON:     So you can just do  
21                  five?

22                  CHAIRMAN SAMPSON:     No problem,  
23                  Ms. Anderson. Thank you very much. We just  
24                  want to get to the -- we have your