

SUPREME COURT OF THE STATE OF NEW YORK
THIRD DEPARTMENT

CHIEF JUDGE'S HEARING:

COMMISSION ON STATEWIDE ATTORNEY DISCIPLINE

COURT OF APPEALS
20 Eagle Street
Albany, New York 12207
July 28, 2015

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think that there is an opportunity to really educate here, to understand more about what the current process is. What are those inconsistencies? And if the goal is to create a statewide system, what are the benefits of that within the process? Because I think if the process is clear and the standards are clear, while it's a change, over time people will come to respect that system. But I think it's a lot of education, a lot of work beyond just your recommendations.

MR. JOHNSON: Any other questions for Ms. Silver?

Ms. Silver, thank you for an excellent presentation this morning. We appreciate your time. Thank you very much.

MS. SILVER: Thank you.

* MR. JOHNSON: May I call to the lectern Mr. Benjamin Cunningham, who is a legal services consumer. Mr. Cunningham, good morning, sir. Thank you for being here today and thank you for expending the time, we appreciate it. We're happy to hear your testimony. And if you would like to take questions afterwards, we're happy to pose those to you.

MR. CUNNINGHAM: Thank you very much. Thank you for providing the invitation for me to appear today and testify. I'm a member of the public, I'm a consumer of New York State, an American citizen. And what brings me here today is the fact that — not only that, I'm a nurse by trade. I'm not a member of an organization. I'm not a member of the legal community. I'm a homeowner, father, the guy next door.

I filed a disciplinary complaint against an attorney who I

hired to represent me in the Second Circuit Court of Appeals, the attorney defrauded money out of me. I paid him a \$7,000 down payment and - I paid him a \$7,000 down payment. The attorney signed an attorney agreement contract with me, but the attorney never filed a brief. A government attorney never participated - both attorneys never participated in the appeal and the Second Circuit went ahead and dismissed the appeal on the pro se status as frivolous.

The attorney signed the attorney agreement contract in November 2011 and he filed - sixty days later he filed his appearance in the Second Circuit. Two months later. So that was a gap. But he didn't file a brief. And when I brought this to the attention of the Disciplinary Committee in Manhattan under docket number 2012-2312 the staff there was very unprofessional. They told me I'm not allowed to have a copy of the attorney response and I said that's a violation of your mission statement. And they said, well this is our internal, independent - what do you say, that's they're independent -

MR. JOHNSON: Rule?

MR. CUNNINGHAM: Rule of their own decision, whatever. There's nobody here to represent the public. Every person that stood up today represents an organization. Who represented me, the public, the litigant, the consumer who hired an attorney? These attorneys who practiced an ethical violation and criminal conduct is getting a free pass by the Disciplinary Committee. And while they're doing that, there's no oversight, there's no advocates to protect the public's interest.

And the Disciplinary Committee process is not transparent.

For example, the decision the committee used, the reason for dismissing my Disciplinary Committee complaint is vague. It's not withstanding to the average public matter, consumer.

The lawyer charged me - I'm sorry, I paid a down payment of \$7,000 and I owe the attorney \$60,000. He's been billing me for an appeal that never happened. And I produced all the evidence to the Disciplinary Committee and to this day it's not explained in full form and I wasn't invited to come down to face the attorney. The only thing they told me was it was dismissed, insufficient evidence, it's too vague.

Now, I mentioned to the committee's chief counsel named George Dopico, I said, Sir, I'm not satisfied with the committee's ruling, where do I go to file an appeal to the Disciplinary Committee? This is your last level. There are none. Well, my gut reactions told me go up to the Appellate Division, First Department, and ask them and they said, we are, our deputy clerk by the name of Margaret, S-O-W-A-H, that's the person here who reviews the Disciplinary Committee decisions when a member of the public is dissatisfied with the ruling. I said, well why isn't that being posted in all the Disciplinary Committee branches? It's not. It's a big secret. They're keeping that from the public. Why?

So I say it's not fair. The public is not being fully represented at the Disciplinary Committee. I'm a nurse. If I violate a patient's medical rights or patient care rights, do you know how much trouble I would be in? But a lawyer can violate a client's civil rights and get away with it. Something is wrong. The system

is broken. And this Disciplinary Committee, there's no oversight. I don't know what's wrong. The public trust is eroded. There would be many more members of the public here if this committee hearing, public hearing today, was broadcast in the media. A member of the legal community is the one who alerted me to the hearing today.

Any questions, please feel free to ask. But I have one question. Is it possible there could be a liaison in store, a public liaison, representing the public's interest in the State of New York? Maybe that would be a deterrent to these lawyers, because these lawyers are going back out there robbing more and more clients. There's no deterrence. What is the problem, ladies and gentlemen?

MR. JOHNSON: So Mr. Cunningham, number one, I'm sorry for your troubles. Number two, I thank you for coming from New York City to be here today, I know it's been a difficult journey, but I appreciate you coming here on this summer day. Number three, we're listening very closely. Number four, if I could take that last point you just made, which is an interesting point. What you're suggesting is that perhaps there should be some liaison or ombudsman or someone to render advice or provide assistance to folks who feel that they've been aggrieved by a lawyer's conduct so that they can navigate the disciplinary system themselves to achieve the outcome that they think is just and fair in terms of ensuring that the lawyer who's done them harm is properly disciplined. That's what you're talking about, right? Liaison, an ombudsman, is that what you're referring to?

MR. CUNNINGHAM: Yes, that's one aspect.

MR. JOHNSON: Yes, I understand that's one aspect. That's

an interesting aspect that I haven't heard before because the issue becomes who does an aggrieved client turn to in terms of the lawyer's alleged misconduct towards them. Should they spend more money on another lawyer to get advice on that issue. And so I think what you're saying makes sense in terms of consideration.

Is there anything else you would like to tell us before you leave here today, Mr. Cunningham?

MR. CUNNINGHAM: Yes. The Appellate Division deputy clerk I provided the same evidence and she affirmed and the evidence came from the lawyer's own admission. The lawyer's own admission letters where he never filed a brief, yet he charged. He got away.

MR. JOHNSON: Mr. Cunningham, my colleague, Mr. Guido, has a question for you.

MR. GUIDO: Mr. Cunningham, I also get a little distressed when I hear statements like yours where you've had such a terrible personal experience in dealing with the personnel, the grievance, and I'm frankly a little surprised because I know my colleagues in the First Department well and I'm not sure what happened here.

But the thing that struck a note to me was when you said you were not permitted to see the explanation submitted by the attorney. That's rather unusual and it seems to me that that's a product or a function of what we call the screening process or the intake process of complaints that varies among the different Judicial Departments. So bear with me, I'm going to explain that. When complaints are filed with the Grievance Committee they go through a very rigorous screening process to determine if in fact it is

something that's within the jurisdiction of the Committee and is it something that should be open for investigation or not. And if it is not and it is rejected, there will be no communication with the attorney requesting that attorney to answer. In most cases, when the attorney is requested to answer it's because that determination has been made that this is something that warrants investigation.

Because you're in the First Department it seems to me, it sounds to me, as if this screening process that they have there differs in that they may ask for an answer from the attorney upfront before they formally decide to open the complaint, and then after getting that answer they chose not to go forward. That's what it sounds like, I'm not sure.

MR. CUNNINGHAM: Can I answer that question?

MR. GUIDO: You can, but what I wanted to tell you was, what I wanted to show you was, that these kind of differences in the screening process, the way we evaluate complaints, what is being told to complainants and how that differs among the various departments, all of that is being examined with a view as to whether or not changes need to be made and uniformity should be in place in terms of how we're engaging with complainants such as yourself so that all complainants are treated the same.

And in addition to that, we're also examining what right of review are we giving to complainants whose complaints are either rejected in the screening process or even dismissed. Are we treating all complainants the same throughout the state or are some enjoying different benefits.

And one of things that disturbs me is, because I can tell you my experience in the Second Department, if you had written a letter to the Presiding Justice in the Second Department complaining about your experience and what had transpired, you would have gotten a complete detailed explanation written back to you, maybe which you ultimately didn't agree with, but at least explaining to you in detail how the process transpires and how we see it from our point of view.

So these are the kind of things that this Commission is going to address so hopefully all complainants will have whatever right of review is available throughout the state and get the same level of communication so that you can better understand why or why a committee didn't go forward.

Again, all complainants will not always agree, but you're entitled to get the full explanation from the body that's making that determination. I interrupted you, so go ahead.

MR. CUNNINGHAM: So what is your question? Because you mixed apples and oranges. With respect.

MR. GUIDO: It wasn't a question, it was to tell you these kinds of things are being examined in terms of what happened to you, you weren't fully informed, you didn't have the right of review, you claimed you were misinformed. These are the kinds of things we are trying to address because no complainant should have to go through this kind of trial where they're left in the dark as to exactly how this all transpired. So you just reinforced why we need to have this Commission and why we need to make sure that we have some kind of

uniformity in this respect. Because this isn't just about treating lawyers the same, this is also about treating public and complainants so that they get equal treatment throughout the state and there shouldn't be disparity in that respect either. So I don't know if that gives you a measure of comfort, but it reinforces why we're doing this.

MR. CUNNINGHAM: Thank you. The lawyer did file a response. I wasn't entitled to it. Now, I don't know how the process works in the other departments throughout the rest of the state. I don't know, I'm not a connoisseur, I'm a member of the public, and my jurisdiction is the First Department, so I can only focus on the First Department.

MR. JOHNSON: Mr. Cunningham, thank you. There's one additional question. But I think that's the point Mr. Guido is making, that we've actually been looking at it rule by rule, department by department, to see disparity, to see how things are being handled so we can make those recommendations. So, when you give us specific examples like that, that's very important for us to understand one specific issue and how it works. So I don't think there was a question, but I think there was an effort by Mr. Guido, and I think a successful effort, to say we recognize you as a homeowner, an American, a nurse, someone from the First Department, a father who's coming here today to try to take what occurred to him and improve the system in a big way. And that's why we're here, that's why we've traveled to Albany and we'll travel to Buffalo and around the state to do that. So, I have one question from my

colleague, Mr. Zauderer.

MR. ZAUDERER: Thank you. Again, thank you for your very articulate and compelling presentation, in my view. And I just want to clarify a couple of facts about the situation which as you described sounds very significant to me as one commission member. Am I clear that at no point, either formally or informally, you were offered an explanation as to why the brief was not filed or money returned? Did you get an explanation from the lawyer? Did you get an explanation informally from the staff when you've made a complaint? Do you have any idea?

MR. CUNNINGHAM: Yes, I have documents as evidence presented, if you need it, that I'm going to leave here today if possible. But I have a decision from the Disciplinary Committee and I can read it to you. It doesn't mention any reason why the attorney didn't file the brief, didn't mention any reason why I wasn't entitled to the attorney's response. It didn't mention any reason, what evidence they used to dismiss the complaint.

MR. ZAUDERER: I would like to see that if the Commission receives it. But other than that, what you're going to give us, was there any explanation given to you orally or otherwise by the Committee?

MR. CUNNINGHAM: Yes. In writing, very vague - insufficient evidence. And verbally they said it's confidentiality. When I asked the Chief Counsel, can I have a copy of the Committee's evidence that they used to determine to dismiss my valid complaint?, and he said no not even we are entitled, it's confidential, the

public cannot have access, not even us attorneys, us investigators.

MR. ZAUDERER: Did you ask for your money back from the lawyer? Did you refuse to pay the bill and did the lawyer respond?

MR. CUNNINGHAM: No, I asked the Disciplinary Committee. Also the lawyer's malpractice license expired and I mentioned that to the Committee as well. And the Committee said we don't have jurisdiction to entertain getting your money back, you're on your own with that. About the ethical violations we feel that he didn't reach - his conduct didn't reach the level of ethical violations. I owe him \$60,000 as of today.

MR. JOHNSON: Are those documents for us?

MR. CUNNINGHAM: Yes.

MR. JOHNSON: May I have those?

MR. CUNNINGHAM: Yes. Shall I bring them to you?

MR. JOHNSON: Yes, sir. We'll be in touch. Thank you very much. God bless you.

MR. CUNNINGHAM: Thank you, everybody.

MR. JOHNSON: Thank you, sir. Our next witness this morning is Jennifer Wilkov who is a member of the board of It Could Happen to You. Ms. Wilkov, good afternoon.

MS. WILKOV: Good afternoon. I would like to thank the Commission and Chief Judge Lippman and Chief Administrative Judge Prudenti for this opportunity to testify before you this afternoon at this hearing.

I am the victim of a prosecutorial attorney as well as judicial misconduct in a matter that left me with an E felony when I