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BEFORE THE NEW YORK STATE SENATE
STANDING COMMITTEE ON JUDICIARY

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

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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4	Alan W. Friedberg		
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1 are up.

2 MS. CAPOGROSSO: All right. There's
3 more --

4 CHAIRMAN SAMPSON: Ms. Capogrosso,
5 thank you. Thank you very much, but we'll
6 follow up. Thank you very much.

7 (Scattered applause.)

8 CHAIRMAN SAMPSON: The next witness
9 is Mr. Ostertag, former president of the New
10 York State Bar Association.

11 Mr. Ostertag, how are you, sir?

12 MR. OSTERTAG: Good afternoon,
13 Mr. Chairman.

14 CHAIRMAN SAMPSON: How are you doing?

15 MR. OSTERTAG: I have a question, if
16 I may, before you run the clock. Is there a
17 rule, does this committee have a rule about
18 the surreptitious videotaping of witnesses
19 who come voluntarily before this committee
20 to testify?

21 CHAIRMAN SAMPSON: We don't have a
22 rule because, if you notice, the proceeding
23 is being videotaped.

24 MR. OSTERTAG: I don't mean that one.

1 CHAIRMAN SAMPSON: Right. The
2 proceeding is being videotaped, and this is
3 open to the public. So, you know . . .

4 MR. OSTERTAG: Well, I've been
5 videotaped by Mr. Galison, I think it is. I
6 don't know where he is now.

7 CHAIRMAN SAMPSON: Well, you and me
8 both.

9 MR. OSTERTAG: He was sitting over
10 there, then he was over there, and then he
11 was up against the wall, and he was sitting
12 over here, and then he was up front, and now
13 he's up against the wall again.

14 CHAIRMAN SAMPSON: At least you were
15 videotaped. He tape-records it too, you
16 know. Watch what you say around him.

17 (Laughter.)

18 MR. OSTERTAG: I don't know
19 Mr. Galison. He was videotaping the faces
20 of Mr. Friedberg and Mr. Gold, who I also
21 don't know.

22 CHAIRMAN SAMPSON: No, I would
23 understand that, Mr. Ostertag. But the
24 proceedings are open to the --

1 Mr. Galison, could you cease the
2 videotaping to allow -- I want our witnesses
3 to feel comfortable to testify. Thank you
4 very much.

5 MR. OSTERTAG: Well, I was going to
6 give him the finger, but I didn't think
7 quickly enough.

8 CHAIRMAN SAMPSON: I'm glad.

9 MR. OSTERTAG: My name is Robert
10 Ostertag, and I am here on behalf of the
11 76,000-member New York State Bar
12 Association. We are a voluntary association
13 devoted to the concept of lawyers serving
14 their clients consistent with the highest
15 standards of professional integrity.

16 I would like to get back to what I am
17 here for. I have no complaints about
18 anybody, I have no inquested accusations to
19 make against anybody. What I want to
20 address is the question of when disciplinary
21 proceedings should be made known to the
22 public. And in considering this question,
23 we need to take note of the legitimate
24 competing interests that are involved.

1 For lawyers, their competence and
2 reputation is what they offer to the public.
3 It affects how they are viewed by individual
4 clients, judges, and the community at large.
5 The arguments and viewpoints of a lawyer
6 with a good reputation will be heard and
7 carefully considered, whether by his or her
8 clients, the court in which the lawyer
9 appears, or in the general community.

10 Lawyers spend years, a career, trying
11 to earn a stellar reputation. A good
12 reputation cannot be bought or easily
13 gained. It can be achieved only by a
14 lawyer's demonstrated actions and efforts on
15 behalf of clients over a period of time.
16 Gaining the type of reputation for which all
17 of us strive requires demonstrated skill and
18 expertise on a continuing basis.
19 Unfortunately, however, an earned reputation
20 can be lost, and it can be lost in a mere
21 moment.

22 I've practiced law for 50 years. My
23 reputation I think is beyond repute. I
24 recognize that it can be lost in a mere

1 moment.

2 For clients, they are entitled to know
3 that any lawyer they retain has integrity
4 and meets the standards of our profession.
5 When serious questions are raised about the
6 ethics, competence, trustworthiness of a
7 lawyer, the client is entitled to know. The
8 Bar Association understands that we should
9 not have a disciplinary mechanism whereby
10 clients are unknowingly represented by
11 lawyers who may not meet those professional
12 standards.

13 The problem, of course, is that when a
14 complaint is filed against a lawyer with a
15 disciplinary committee, the complaint may or
16 may not have merit. If the fact of the
17 complaint is disclosed and it is later found
18 to have lacked merit, the lawyer's
19 reputation will have been affected,
20 obviously so.

21 Anyone who is in any way in public
22 life, including lawyers -- and including
23 also legislators, as you know -- knows that
24 any initial story in the media about a

1 complaint that has been filed overwhelms any
2 follow-up story reporting that the initial
3 complaint was of no merit and that the
4 individual did not engage in any wrongdoing.

5 In such a situation, disclosure of the
6 complaint will have caused reputational
7 damage that cannot be erased. Thus, early
8 disclosure of complaints against lawyers is
9 unfair to those who, in the end, are found
10 to have done absolutely nothing that
11 supports discipline.

12 We recognize, however, that there are
13 situations where the public should be made
14 aware of the questionable conduct of a
15 lawyer without waiting for a final
16 determination of the disciplinary body.
17 Clients who retain a lawyer during the
18 pendency of a disciplinary proceeding or
19 continue to be represented by a lawyer
20 during this proceeding may be harmed in some
21 situations if they are unaware of serious
22 charges that have been brought but have not
23 yet been finally determined.

24 The State Bar Association has

1 considered these issues on several
2 occasions, with at least different
3 committees having examined the matter within
4 the last 15 years. While, as an association
5 of attorneys, we want to protect our
6 members, we recognize that we also have an
7 obligation to make certain that those
8 represented by attorneys are not harmed.

9 In light of all these considerations,
10 and the recognized competing interests, the
11 State Bar Association has concluded that
12 where there is a need to safeguard the
13 public, the Appellate Divisions, which are
14 in charge of lawyer disciplinary matters,
15 should exercise the authority they already
16 have in any appropriate disciplinary case
17 and consider interim suspension of the
18 subject lawyer pending the outcome of the
19 disciplinary process. With suspension comes
20 public disclosure.

21 This proposal achieves several
22 objectives. First, in those cases where
23 allegations have been made against an
24 attorney which are not serious or for which

1 there is not significant supportive
2 evidence, the attorney is protected. His or
3 her name will not be revealed unless and
4 until there is public discipline, meaning
5 that disciplinary action beyond a private
6 letter has been addressed to the attorney.

7 Where public discipline is not
8 warranted, the fact of allegations having
9 been made and the results of the
10 disciplinary proceeding would not be
11 revealed. The attorney's reputation would
12 remain intact.

13 However, to protect clients and the
14 public in those cases where serious charges
15 are brought and the initial evidence is
16 supportive of those charges, the courts
17 would step in and make a judgment as to
18 whether suspension and public disclosure is
19 warranted. This would be a determination
20 made by the judges of the Appellate
21 Divisions on a case-by-case basis. This
22 would place the decision as to whether to
23 suspend and disclose exactly where it should
24 be, with judges, whose fundamental role in

1 our society is to examine individual cases
2 and make decisions based upon the facts
3 placed before them.

4 I am aware that there have been general
5 calls for increased disclosure of
6 disciplinary proceedings. However, I do not
7 believe that those who have called for such
8 disclosures have done the careful analysis
9 that has been done by three Bar Association
10 committees, nor have they acknowledged the
11 competing interests that need to be
12 reconciled as I have outlined them.

13 The law recognizes that certain
14 proceedings need to be confidential to
15 protect innocent parties from being tainted.
16 Grand jury proceedings are the best example.
17 They have been secret for centuries, in
18 recognition of the need to protect innocent
19 parties.

20 Similarly, while the courts are open to
21 the public, certain cases, such as many
22 Family Court cases, are not public. The
23 Legislature has recognized that there are
24 situations in which the need for

1 confidentiality is superior to the desire to
2 have public disclosure in a democratic
3 society.

4 In conclusion, the State Bar
5 Association recognizes that disclosure is
6 necessary in certain circumstances. Where
7 clients and the public need to be protected,
8 we want the courts to use their power to
9 step in, suspend an offending lawyer, and
10 disclose to the public.

11 However, absent a finding by an
12 Appellate Division that there is a need for
13 immediate suspension and disclosure, your
14 association urges that disciplinary
15 proceedings not be open and that disclosure
16 be made only where there is a finding that
17 public discipline is warranted and that an
18 attorney has in fact done something wrong.
19 Innocent lawyers need protection as much as
20 other innocent parties, and our proposal
21 offers both lawyers and the clients they
22 serve the protections to which they are
23 entitled.

24 Thank you, sir.

1 CHAIRMAN SAMPSON: Mr. Ostertag,
2 thank you very much. And I'm very
3 interested that you at least and the
4 association recognizes there is some need I
5 guess to deal with the perception but most
6 of all having the public have faith in a
7 system like this.

8 MR. OSTERTAG: I understand public
9 concern about the issue.

10 CHAIRMAN SAMPSON: But at the same
11 time, we have to -- those counsels who have
12 done good jobs, just to be labeled for
13 complaints that should be dismissed or are
14 frivolous in its nature, at the same time
15 we're trying to do two competing concerns.

16 MR. OSTERTAG: I do understand that.
17 And I also recognize the fact that there are
18 complaints that are filed with -- I've been
19 involved in the grievance process for a
20 number of years. I've been involved in the
21 disciplinary process for about 19, 20 years,
22 off and on.

23 And I recognize that complaints are
24 filed and it's easy to make a complaint

1 about a political person or an attorney or a
2 political person who is an attorney,
3 particularly at election time or during the
4 proceedings that predate Election Day -- in
5 other words, a campaign time. And that's a
6 very difficult time for an attorney who is
7 running for political office.

8 You need only look at the television
9 channels in the last few days, last few
10 weeks, about this man in New Jersey who was
11 a former United States Attorney who has
12 become the subject of a complaint of
13 pay-to-play. And I don't know whether he's
14 done that or he hasn't done that. But if he
15 hasn't done it, his reputation has been
16 badly besmirched. And it happens over and
17 over and over and over again.

18 I recognize the need to protect the
19 public. I certainly would want to protect
20 the public. I must tell you that neither my
21 association nor I suffer wrongdoers lightly.
22 But I think there is a two-way street here.

23 CHAIRMAN SAMPSON: So thank you very
24 much for your comments.

1 MR. OSTERTAG: Thank you.

2 CHAIRMAN SAMPSON: The next person is
3 John Aretakis.

4 MR. ARETAKIS: Good afternoon,
5 Senator. My name is John Aretakis. I'd
6 like to thank you, and I'd like to thank you
7 for your overwhelming patience in this
8 hearing. And I thank you also, Mr. Spotts.

9 My focus is on the treatment and the
10 failure to follow procedure, the failure to
11 follow the law, and acting in excess of the
12 jurisdiction by the Third Department
13 Committee on Professional Standards,
14 otherwise known as COPS. In the First
15 Department we've heard it's called the
16 Departmental Disciplinary Committee, the
17 DDC. In the Third Department, in Albany,
18 it's called COPS.

19 I was born and raised in Brooklyn, and
20 for well over the last decade my only
21 practice for the practice of law has been in
22 Manhattan, in New York City. And for the
23 past 20 years, 80 to 90 percent of my cases
24 have been in New York City. But starting in