

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

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

LIST OF PARTICIPANTSSTATEMENT

1		
2		
3	Martin R. Gold	
4	Alan W. Friedberg	
4	First Department DDC	9-34
5	Christine C. Anderson, Esq.	34-48
6	Kevin McKeown	48-63
7	Hon. Thomas A. Klonick	
8	Robert H. Tembeckjian	
8	Commission on Judicial Conduct	63-79
9	Justice Duane A. Hart	80-97
10	Pamela Carvel	98-109
11	Paul H. Altman	109-120
12	Luisa C. Esposito	120-128
13	William Galison	129-143
14	Eleanor Capogrosso, Esq.	143-158
15	Robert Ostertag	
16	NYS Bar Association	158-169
17	John A. Aretakis, Esq.	169-182
17	Michael Kelly	182-185
18	Kathryn Grace Jordan	
19	End Discrimination Now	185-191
20	James A. Montagnino, Esq.	192-203
21	Ruth M. Pollack, Esq.	204-216
22	Kevin Patrick Brady	217-219
23	Carl Lanzisera	
24	Americans for Legal Reform	219-225

1 task force should be formed to review
2 whether or not the Commission on Judicial
3 Conduct is an effective body and --

4 CHAIRMAN SAMPSON: When you say task
5 force, who do you think should be comprised
6 of this task force?

7 MS. JORDAN: I am not going to make
8 specific recommendations here, Your Honor,
9 because I don't have enough time to do that.
10 But I will get back to you with that.

11 I do believe, though, that we need a
12 multi-stakeholder task force to investigate
13 whether or not the Commission on Judicial
14 Conduct is doing its job. And, if it's not,
15 what kind of entity might replace it.
16 Because we definitely need to monitor the
17 judges and make sure that they are enforcing
18 the laws, because it appears that they're
19 not doing it at the moment.

20 CHAIRMAN SAMPSON: Ms. Jordan, thank
21 you very much.

22 MS. JORDAN: Thank you.

23 CHAIRMAN SAMPSON: The next witness
24 is James -- how do you pronounce your last

1 name, James?

2 MR. MONTAGNINO: Montag-neeno,
3 Senator.

4 CHAIRMAN SAMPSON: Montagnino.

5 AUDIENCE MEMBER: I object -- I
6 object, because I have personal knowledge of
7 his personal activities.

8 CHAIRMAN SAMPSON: There's no
9 objection right here. We're going to let
10 Mr. Montagnino make his comments.

11 And if you have comments to make, if
12 you're on the list, then we can listen to
13 your comments. Or you can talk to me after
14 this is over and then we can follow up.
15 Okay?

16 AUDIENCE MEMBER: Thank you. Thank
17 you very much.

18 CHAIRMAN SAMPSON: Thank you very
19 much. Go ahead.

20 MR. MONTAGNINO: Thank you, Senator.

21 I just want to begin by saying that I
22 don't have an ax to grind, I'm not here with
23 a specific gripe about anything in
24 particular with regard to myself.

1 On a personal level, I've been an
2 employee of the Unified Court System since
3 1995. I've been a court attorney/referee
4 for the last 10 years. I started out in my
5 legal career in the Bronx District
6 Attorney's Office. I was a prosecutor in
7 the Westchester DA's office. I was a Legal
8 Aid lawyer in Westchester. I was principal
9 law clerk to a county judge for five years
10 in Westchester.

11 The last three years, I've been a court
12 attorney/referee here in the Capital
13 District. And I love my job.

14 And one thing I've learned in years in
15 the judiciary is that with every decision a
16 judge makes, that judge makes one temporary
17 friend and one permanent enemy. And this is
18 something that really has to be considered
19 when weighing the probative value of
20 complaints that are made against judges over
21 the course of the years.

22 I can say with pride that my experience
23 in the Capital District, the Third Judicial
24 District, has been wonderful over the last

1 three years. As a court attorney/referee
2 I'm assigned to the chambers of various
3 judges on a rotating basis. I've worked
4 with Supreme Court justices, Court of Claims
5 judges, county judges, a Family Court judge,
6 some City Court judges. I've been all
7 around the Third District.

8 And I can say categorically that the
9 judges of this district do their jobs to the
10 best of their ability, they are hardworking,
11 they are ethical people. And one of the
12 reasons, one of the big reasons for that is
13 that the administrative judge for this
14 district, George Ceresia, is a man of the
15 highest moral and ethical caliber. And he
16 sets the tone for the way business is
17 conducted in this district.

18 Having said that, I'm here because in
19 the seven years that I worked as a court
20 attorney/referee assigned to the matrimonial
21 part in Westchester County, that same
22 condition did not apply to Westchester.
23 That for years in Westchester I, having been
24 assigned to matrimonial cases, saw on a

1 regular basis that the district
2 administrative judge entertained *ex parte*
3 communications from well-connected attorneys
4 and well-connected litigants, and those *ex*
5 *parte* communications often resulted in
6 transfers of cases from one judge to
7 another -- in one case, the change of a
8 decision that a judge had already signed and
9 sent out to the parties, based upon *ex parte*
10 communications.

11 I saw this for years and finally
12 decided that I had to take action, and I
13 brought an internal complaint to the various
14 chief administrative judges of the Office of
15 Court Administration, and the result of that
16 was retaliation against me. Not by OCA, but
17 by the target -- by the administrative
18 judge.

19 I'm going to cut through some of the
20 details and get to the point, what brings me
21 here today, Senator. I can certainly
22 understand the Commission on Judicial
23 Conduct taking a jaundiced eye looking at a
24 complaint brought by a litigant who lost a

1 case in court. In Westchester County, I
2 filed a complaint ultimately with the
3 Commission on Judicial Conduct that was
4 detailed. It named names, it gave cases, it
5 gave dates. Attached to it were photographs
6 of dumpsters, dumpsters of court records
7 that were ordered destroyed. Matrimonial
8 files by law must be retained permanently.
9 They were destroyed.

10 It would have been one thing if I had
11 been the only complainant, Senator. But a
12 retired acting justice of the Supreme Court,
13 Fred L. Shapiro, sent his own complaint to
14 the Commission on Judicial Conduct against
15 the same administrative judge, Judge Francis
16 Nicolai, alleging the same kinds of abuses
17 -- naming names, giving dates, giving
18 information that he had personally obtained.

19 And it wasn't just the two of us,
20 Senator. There was a third individual, the
21 principal law clerk to a Supreme Court
22 justice in the Ninth Judicial District,
23 Barry Skwiersky, sent his own complaint to
24 the Commission on Judicial Conduct, with his

1 information on routine, regular, consistent
2 patterns of misconduct whereby Judge Nicolai
3 would steer cases.

4 When a lawyer who had the right
5 connections didn't like the way his
6 matrimonial case was being handled, he could
7 go to Judge Nicolai -- without, of course,
8 opposing counsel having any idea of it --
9 explain the fact that he had a problem with
10 the judge who was assigned to the case, and
11 lo and behold, the case would be reassigned
12 to a more sympathetic judge.

13 There were written complaints. A law
14 guardian who was involved in a child custody
15 proceeding where the judicial hearing
16 officer who was presiding over that case
17 ordered that the father have the right to
18 see his children, and made it so under
19 supervised conditions to protect everybody's
20 safety. That litigant went *ex parte* to
21 Judge Nicolai, and Judge Nicolai told that
22 judicial hearing officer to change his
23 decision. He did that, and then complained
24 about it.

1 The law guardian, the attorney for the
2 children 'n that case, wrote a letter
3 herself to Judge Nicolai and said to him:
4 You can't do this, this is improper, this is
5 the worst of ex parte communications. And
6 what did that law guardian get for her
7 troubles? That letter that was sent to
8 Judge Nicolai he forwarded on to the woman
9 who was in charge of the law guardian panel
10 with a cover letter saying "For whatever
11 action you deem appropriate."

12 The bottom line, Senator, is that
13 without a hearing, without an investigation,
14 without any contact with any of the three
15 members of the court system and retired
16 member of the court system who brought the
17 complaints -- no contact with us, no
18 documents subpoenaed, no documents
19 requested, no information requested, no
20 testimony taken, no witnesses put under oath
21 -- the Commission on Judicial Conduct in one
22 sentence dismissed all three complaints
23 against Judge Nicolai, and that was the end
24 of the matter. With no accountability, no

1 explanation, no transparency.

2 And so I think, Senator, that at the
3 very least Mr. Tembeckjian himself mentioned
4 it this morning, and the commission has year
5 after year in their annual report themselves
6 asked for it, open up the proceedings to the
7 public. Why should this be secret? Judges
8 are public officials. They have a public
9 trust. Many of our judges are elected
10 officials. The public has a right to know
11 how complaints against judges are handled.

12 I'm sensitive to the concerns that many
13 judges have, because of the fact that they
14 are either appointed or elected officials,
15 that abuses can occur, that frivolous
16 complaints can be lodged for purposes of
17 political gain or, as happens very, very
18 often, most of the complaints -- I'm sure
19 Mr. Tembeckjian will confirm -- most of the
20 complaints come from litigants who simply
21 lost.

22 I know from personal experience, having
23 presided over contested matrimonial cases
24 for seven years, every day of the week,

1 Monday to Friday, you know, you can imagine,
2 Senator. it's human nature. If I make a
3 ruling that says this parent will have
4 custody of the child and the other parent
5 will not, how often do you think the parent
6 who loses goes home and says, well, I'm just
7 an unfit parent and that's why I lost?
8 That's not the way it works; we know that.

9 So it's so common, particularly in
10 family cases, custody cases and matrimonial
11 cases, the litigant who loses frequently
12 will try to blame someone: It's my lawyer's
13 fault, my lawyer did something wrong; it's
14 the judge's fault, the judge did something
15 wrong. Most of the time we know that's not
16 so.

17 The problem is, though, when you have
18 in with those thousands of complaints that
19 get dismissed without investigation where
20 you have a complaint that wasn't brought by
21 a disgruntled litigant or a disgruntled
22 former employee, but brought by three people
23 on the inside of the court system who give
24 information with dates and names and places

1 and photographs and copies of documents and
2 it's just tossed aside.

3 CHAIRMAN SAMPSON: But my question to
4 you is I'm assuming there was some sort of
5 retaliation because of these allegations
6 that you made; correct?

7 MR. MONTAGNINO: Yes.

8 CHAIRMAN SAMPSON: And that resulted
9 into negative evaluations; is that correct?

10 MR. MONTAGNINO: No, Senator. I've
11 never had a negative evaluation. In fact,
12 what happened, since you asked the
13 question -- I didn't want to get into
14 personal things, but I'm glad to do that --
15 Judge Nicolai essentially opened his file of
16 every complaint that any litigant who wasn't
17 happy with the result of their matrimonial
18 cases had with me. And he gave that over
19 the Inspector General for the Unified Court
20 System.

21 I went through about a month and a half
22 of hell having to answer for every decision
23 that anybody had a question about it: Why
24 did you rule this way? Why did you say

1 this? Did you say this? Did you talk to
2 this litigant? Did you not talk to this
3 litigant? I had to answer --

4 CHAIRMAN SAMPSON: That's a form of
5 retaliation.

6 MR. MONTAGNINO: Yeah. And at the
7 end of all that, at the end of all that --

8 CHAIRMAN SAMPSON: At the end, what
9 happened?

10 MR. MONTAGNINO: At the end, the head
11 of human relations said to me orally -- I
12 got nothing in writing -- she said, "I want
13 you to know there have been no negative
14 findings against you. And your personnel
15 file" -- she gave me a full copy of the
16 personnel file, she said, "it will not even
17 reflect the fact that an investigation had
18 ever been taken against you."

19 CHAIRMAN SAMPSON: And I think being
20 that no -- if you have complaints of
21 individuals on the inside, you would
22 probably want to look at that a little bit
23 closer because of the positions that you
24 have.

1 MR. MONTAGNINO: But there was a
2 little bad news attached. I got
3 transferred.

4 CHAIRMAN SAMPSON: You got
5 transferred up to what?

6 MR. MONTAGNINO: Well, I was ordered
7 transferred to Bronx County. And I made an
8 arrangement. I said, "Look, I'd rather be
9 transferred where we have our second home,
10 up in Saratoga Springs, we love upstate New
11 York. If you can do that, it will be
12 voluntary. If I'm forced to go elsewhere,
13 then I'd consider that a retaliatory
14 employment act under the Whistleblower Law."
15 And, you know, where it would go from there
16 would be something else.

17 And they were kind enough, they
18 accommodated the request. And so I
19 voluntarily transferred up here.

20 CHAIRMAN SAMPSON: Okay.

21 Yeah, I got five minutes, I know, I
22 know.

23 AUDIENCE MEMBER: I'd like to know
24 what happened to my transcript where you --

