BEFORE THE NEW YORK STATE SENATE
STANDING COMMITTEE ON ETHICS AND INTERNAL GOVERNANCE

PUBLIC HEARING:

TO DISCUSS NEW YORK STATE'S SYSTEM OF

ETHICS OVERSIGHT AND ENFORCEMENT

Senate Hearing Room
250 Broadway
New York, New York

Date: December 9, 2021
Time: 10:00 a.m.

PRESIDING:

SENATOR ALESSANDRA BIAGGI
Chair

SENATOR LIZ KRUEGER
Co-Sponsor

PRESENT:

SENATOR GEORGE BORRELLO

SENATOR PHIL BOYLE

SENATOR BRAD HOYLMAN

SENATOR ANTHONY PALUMBO

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SENATOR BIAGGI: Okay.

All right. Good morning, everybody.

I am State Senator Alessandra Biaggi, as well as the chairwoman of the Senate Committee on Ethics and Internal Governance.

And I would like to thank everybody who is participating today and present today for being here in our second of the ethics hearings this year.

I want to acknowledge and thank Senator Liz Krueger for co-chairing today's hearing, as well as members of the Senate Ethics Committee, including Ranking Member Senator Palumbo, who will be here shortly; and my colleagues Senator Boyle and Borrello for joining us today.

I would also like to express my gratitude to leader and -- excuse me -- to the leader of the Senate Majority Conference, Andrea Stewart-Cousins, for supporting, and continuing to support, the Ethics Committee, and calling this hearing today.

We are here, as I mentioned, for our second hearing of the year; specifically, to examine New York's system of ethics, oversight, and enforcement, to identify areas of needed improvement, and to discuss alternative approaches to enforcing ethics within our state government,

something that I think many people are interested in across the state.

Earlier this year the committee convened for a hearing just a few days into the new executive administration, examining the role of the Joint Commission on Public Ethics, or, "JCOPE," as we all refer to it, and its failure to serve as an independent ethics body.

We heard directly from the executive director of JCOPE, Sanford Berland; former JCOPE Commissioner Director Julie Garcia; and various good-government groups.

We were also joined by legislators from Alaska and Rhode Island who outlined effective systems of ethics oversight within our own governments.

The testimony from our first hearing identified key areas for improvement within JCOPE, and subsequent legislative solutions to reform the commission, and to restructure an entirely new ethics oversight body, which we hope to do through Senator Krueger's bill.

The purpose of today's hearing is to examine the work of government agencies and offices beyond JCOPE who are tasked with ethics and anticorruption

work in New York, and to identify areas of improvement and legislative solutions within these bodies.

This hearing will also discuss Governor Kathy Hochul's new transparency and ethics policies, and identify additional areas for reform from the executive.

During today's hearing, we are joined by representatives of Comptroller Thomas DiNapoli's office, Nelson Sheingold, counsel to the New York State Comptroller; and Terri Crowley, executive deputy comptroller for operations.

We will also hear from good-government groups, and California State Senator Scott Wiener who chairs the California Senate Legislative Ethics Committee.

And many of you might know him because of his work also in housing across the state of California.

Before we begin, it's very important just to take a note of the offices that are absent from today's hearings.

And let the record reflect that the committee invited the new chair of JCOPE, Jose Nieves, to testify, who was appointed by Governor Hochul to replace Commissioner James Dering.

Additionally, we invited the principal representatives from the inspector general's office; governor's office of employer relations, or also referred to as "GOER"; the Legislative Ethics Commission; and the office of the attorney general.

Several have declined to attend in person; but, also, several have also submitted written testimony, which we will include when we have our report at the end.

As the chair of this committee, and as a legislator that is deeply committed to reforming government oversight and accountability, I would be remiss not to share my disappointment, of course, in the absence of those who are not here today.

And I hope that the -- in the future, we will be able to come together, to learn, to work together, and to be able to really take the task of transforming our government, to make sure that the systems that surround us are actually systems that can withstand accountability and anticorruption work, and really make sure that the state of New York is no longer considered a place where corruption, unfortunately, lives and thrives.

To transform this culture, I think that having an increased amount of transparency in

government is essential, and to be collaborative as well.

So I just highlight those things because it is an important part of moving forward.

And so let's hope, for the future, that we are able it to partner.

Without meaningful transparency and accountability, New York State will never reach its highest potential.

And I think that New York State is one of the greatest places on earth, and deserves the absolute best.

And so with new leadership at the helm, we are going to, hopefully, use this opportunity to enact real change next year.

And I look forward very much to working with everybody beyond not only today, but in this upcoming legislative session.

And so with that, I will hand it to my co-chair, if she would like to say a few words before we begin with our first panel.

SENATOR KRUEGER: Thank you very much.

I have to say, I think that Senator Biaggi pretty much said it all.

I think the one thing I would add, well, when

you talk about ethics in government, you sometimes default to the problem corruption.

But I would also argue, just looking at the number of different agencies in the state of New York who might have a role here, you become aware of how there is great confusion out there as to, who is instructing whom, who does one report to if one has a problem.

And, if you get conflicting information from different entities, what do you do with that?

So I would also argue that it's critical, if we want to accomplish the goals that Senator Biaggi just laid out, that we also ensure that there is a strong educational component of any entity that is responsible for ethics in the state of New York, because I fundamentally believe, after 20 years in government, almost no one runs for elected office with a goal of becoming corrupt. Almost no one takes a job in government because their goal is corruption.

They slip and slide off the road over the course of years.

They crossed lines because they didn't know the lines existed.

They crossed lines because they felt forced

into situations that they didn't know who to talk to to resolve the issue.

So my goal, also, in improving the models we use in New York State, to assure the people of New York State that we have an ethical and fair government, is that we make sure everyone has access to the information they need before they ever get to that point where they're making a decision that may put them across legal lines or moral lines; because I think it is so, so important that we make it extremely clear to anyone who is taking jobs in government, or who is doing business with government, that we all know what the rules are and that we're going to be held accountable to them.

So it's not just those in government.

I mean, JCOPE has an important role, that I believe they fail, in evaluating and educating lobbyists as well, who have a very unique role in government, and are often part of the problems when they blow up, but rarely are held to account.

So I look forward to our continuing efforts through hearings and through legislative change.

Thank you, Senator Biaggi.

SENATOR BIAGGI: Thank you, Senator Krueger.

Would Senators Borrello or Boyle like to say

a few words?

Okay.

SENATOR BORRELLO: Thank you.

First of all, I would like to say thank you very much for calling this hearing, Chairman Biaggi.

Thank you for being here; and also Chairman Krueger.

I'm a member of the Finance Committee, and certainly enjoy serving on that committee.

I would say that, you know, we have a crisis when it comes to ethics in New York State, and corruption is, unfortunately, baked into the system.

The biggest problem with it is a lack of transparency.

And, quite frankly, our former governor certainly ran roughshod over the legislature and the people of New York State with the way he controlled JCOPE.

You know, there's no greater example of that than the fact that they actually approved that book deal, that we now know was a disaster and a lie; and on top of that, he was rewarded handsomely for it.

So we need to take a good look at this situation.

Where are we going to improve ethics, and

how?

How are we going to ensure the people of New York have confidence that their government serves them, and that it is an open, transparent system.

We don't have that right now.

Ethics is just only a part of the problem, but it's certainly something that we need to start with.

So I'm glad to be here and discuss this, and I appreciate the conversation.

Thank you.

SENATOR BOYLE: And thank you, Senator Biaggi, for holding these hearings, and Senator Krueger.

I was fortunate to take part in the Albany hearings, and learned a lot.

And I hope to look forward to learning a lot more from our panelists today.

I think one of the problems, and you all touched on it, is the fact that, in Albany, it's really not so much the malfeasance that is done; but, who's doing it, whether they're going to be held accountable by ethics.

So when we look to replace JCOPE, or whatever

we're going to do, the next [indiscernible] -- I've been in the legislature 27 years, so I've seen several different iterations of this -- we're going to get it right this time with your leadership.

And thank you so much.

SENATOR BIAGGI: Thank you both so much.

And with that, we can begin with our first panel.

We will be joined remotely by Nelson Sheingold, who is counsel to the New York State Comptroller; and, Terri Crowley, executive deputy comptroller for operations.

And we're very grateful to have the office of the state comptroller here with us here today.

Thank you both so much for joining us remotely, and we look forward to hearing your testimony.

NELSON SHEINGOLD: Thank you very much, Senator Biaggi, and thank you for inviting us; and thank you, Senator Krueger, Senator Borrello, Senator Boyle, and all of the distinguished committee members.

I thank you on behalf of Comptroller DiNapoli.

My name, as Senator Biaggi said, is

Nelson Sheingold, and I have the privilege of serving as counsel to State Comptroller Tom DiNapoli.

I'm joined today by Terri Crowley, our executive deputy comptroller, who heads our office of operations.

New Yorkers have seen way too many scandals involving public officials in recent years.

The activities of those who abuse their office compel us to take all possible measures to restore public confidence in our government.

This can only be accomplished through enhanced transparency and accountability.

Under the state constitution, our state law, the state comptroller's office is the independent watchdog of taxpayer funds, and an integral component in the fight against public corruption, fraud, waste, and abuse.

Comptroller DiNapoli has been, and will always continue to be, committed to maximizing the authority and resources of this office to combat corruption, and eliminate waste, fraud, and abuse of public funds.

In the fight against public corruption, we work with law enforcement at all levels of

government, in all 62 counties of the state, with all of our U.S. attorneys' offices, the attorney general, the state police, the FBI, and numerous other federal, state, and local agencies, to aggressively root out public corruption and fraud.

This work has, thus far, resulted in over 250 arrests, and the ordered recovery of over $78 million since the inception of Comptroller DiNapoli's anticorruption initiative.

But fraud detection is simply not enough.

Through the hundreds of audits of state and local governments and public authorities we conduct every year, we proactively identify deficiencies in internal control gaps, and make recommendations to improve efficiency, and prevent fraud before it occurs, and before there's any misexpenditure [sic] of taxpayer funds.

The comptroller's duty to audit state payments, and the authority to review and approve state contracts before they take effect, are a core function of the comptroller's office, and vital checks on waste, fraud, abuse, and corruption.

For 2021, cumulatively, through October of this year, the comptroller's office has already approved over 14,000 contracts valued at over

$163 billion, and has approved nearly 171 million payments worth more than 174 1/2 billion dollars.

At the same time, this office has rejected over 1300 contracts and related transactions, valued at over $5.4 billion, and nearly 218,000 payments valued at nearly $262 million, primarily due to errors, improprieties, or lack of sufficient supporting documentation.

Our independent oversight of state contracts is an essential check and balance, and critical in providing assurance that public funds are being appropriately spent.

Unfortunately, over the last decade, through the state budget and legislation, our contract-approval authority has been chipped away at.

Now, a common justification for voiding our review rests on the supposed delay in the procurement process.

This is simply unpersuasive.

Actually, on average, our review of contracts takes less than a week. And when it takes us additional time to exam a proposed contract, and ask appropriate question, it's for a very good reason; namely, to fulfill our job, to ensure that public

moneys are appropriately spent.

We urge the legislature to eliminate any further circumventions of our approval authority, whether it be in the budget or through proposed legislative action, and to restore that authority that has been taken away over the last decade.

On this note, Senator Reichlin-Melnick recently introduced a bill which would restore much of our contract approval authority, which is pending before you.

Comptroller DiNapoli also believes that transparency is critical, and we've taken action to back that up.

The comptroller's "Open Book New York" website contains information on over 190,000 state contracts; the ability to search payments dating back to 2012; detailed revenue, spending, debt, tax limit, balance sheets, and property tax information for our over 3100 local governments in New York, dating back to '07. It has financial information for more than 500 state and local public authorities, also stating back to '07; and other related budgetary and financial information about state agencies to educate the public.

More specifically, in October we launched a

publicly accessible dashboard to track certain federal COVID funding, and state relief programs, so New Yorkers can monitor the spending of these funds in the state. This includes funds for excluded workers, child-care services, emergency rental and homeowner assistance, and small-business recovery.

Additionally, our fiscal-stress monitoring system provides an early warning to local government and their citizens regarding the financial state of their local governments which they live in.

Our audit reports that I mentioned earlier are all publicly posted on our website for citizens to review and use in making informed decisions as they participate in their government.

In closing: Comptroller DiNapoli has been, and remains, committed to using his office, and partnering with the legislature and executive, to promote accountability and transparency in government at every level.

And I look forward, as does Ms. Crowley, to answering any questions the panel may have.

Thank you.

SENATOR BIAGGI: Thank you very much for your testimony.

I will ask questions last.

And so, if Chairwoman Krueger would like to begin, I'm happy to start with her, of course, and then we'll go back and forth with questioning.

But thank you very much.

NELSON SHEINGOLD: Thank you.

SENATOR KRUEGER: Thank you both for attending, and giving us a chance to review your testimony and think of additional concerns.

So you referenced the contracts that the State of New York does, which are billions and billions of dollars a year, and the important role that the comptroller's office plays in both reviewing and auditing.

Can you help me understand, because I think lots of legislators don't necessarily, what role we can and cannot play in this process?

Because it is my understanding that we are not allowed to attempt to influence who gets what contracts in the state of New York.

But it's also true that it's very common that a business that might be in our district contacts us and says, We're trying to do business with the State of New York, and we wonder whether you can be helpful?

So help me understand where being helpful

stops, and crossing a line into attempting to influence the outcome of who gets a contract starts.

NELSON SHEINGOLD: Thank you, Senator Krueger.

Well, as you're aware, the legislature is exempt from the procurement lobbying laws that would directly apply to the vendors, or potential vendors, or sometimes losing vendors, frankly, who have contracts before the State.

So that would not apply as it would to some other people who reach out to us.

The key, from our perspective, is we do our reviews independently.

As you know, our reviews, just like our audits, are conducted by career civil servants who apply objective standards, to make sure what's before us comports with the law that applies to that particular contract; whether it requires competitive bidding, the process that was used to secure that, and whether the prices are reasonable.

So we will not be, and are not, influenced as to when it can cross the line, you know, crossing to areas of legislative ethics; and then, at worst, as, unfortunately, we have seen in some past scandals, outright corruption.

So, and there are obviously criminal laws and other laws that would limit that.

But once again, from our perspective, when we look at a contract, and our career, very experienced, very good, frankly, civil servant to look at it, we're going to look at it objectively, and we're going to look at what comes in from the agency, and do our own review.

SENATOR KRUEGER: So I could call you and say, "I really like this group, I hope they can get a contract," that wouldn't be crossing the line?

NELSON SHEINGOLD: Once again, everything would be that specific, Senator.

Like I said, and maybe this is something that warrants a review, but under the procurement lobbying laws that would apply, the legislature is not included.

So that would not be a per se violation like it would, say, if some vendor or chamber of commerce, or I can make up a million hypotheticals, would, where we couldn't look at it, and we would say, You have to go to the agency contact.

So that's, once again, the legal standard.

[Simultaneous talking.]

NELSON SHEINGOLD: Yes, please go ahead.

TERRI CROWLEY: I can say, from an operational perspective, what we would say to anyone who calls, we simply say the status of a contract.

We don't -- we make it clear that we are independent, whether it is a member, a lobbyist, another group.

And what our main objective is, we can tell you the status of the contract, and that's pretty much the extent of it.

SENATOR KRUEGER: Got it.

And so we know that a registered lobbyist can talk to you about their client's application for a contract; right? That's true?

NELSON SHEINGOLD: Correct. You're right.

TERRI CROWLEY: Yes.

NELSON SHEINGOLD: Correct.

SENATOR KRUEGER: And can a registered lobbyist for a client contact a legislator and ask them to get involved? Is that a conflict of anything?

NELSON SHEINGOLD: Once again, I -- you know, I'm going to not feign expertise in the lobbying law.

But, from our perspective, obviously, if they contacted us, that would be absolutely in a

restricted period and we would not converse with them.

The restrictions on conversations between lobbyists and the legislature, I would not fully opine on.

SENATOR KRUEGER: So I think there are a couple of holes in the law that we need to address.

But let me ask the reverse question.

Give me an example of a case of corruption in contracting that the comptroller's office got themselves involved in.

You know, what was the -- give me -- you don't have to name the names, but just give me an example of what actually happened, that made you realize that there was a violation of law here that you needed to insert yourself into in some way.

NELSON SHEINGOLD: First, if I could just spare a little bit, Senator Krueger, when we look at contracts that come in, and I mentioned some improprieties before, the primary thing we're looking at, once again, does it comply with the law? And to use a technical legal phrase, whether it looks kosher coming in. That's the primary, and we will look at it.

And I can think of examples, and it's hard

not to mention it, of ones that did not come here, which I can't believe we wouldn't have tracked and we wouldn't have flagged if they did.

The ultimate example being the whole situation with the Buffalo Billion and Alain Kaloyeros, which, on its face, is incredibly, incredibly tailored when it comes in.

So, if it did come in; and, unfortunately, it didn't under current law.

So it's very easy to pick, once again, situations like that.

As I said before, we reject thousands of contracts every year, based on different improprieties, and others.

And, also, and I want to point out one other thing, in addition to what we may or may not catch coming in that may be fraudulent, the very fact that our review is there serves as a deterrent because they know it's coming here.

And, in fact, and I take this as a mark of honor, we've had agencies tell us, and I've had vendors mention that agencies have said, Oh, I can't do that, or, Don't put in that clause, because the comptroller's office will never, ever approve that.

As you know, we also serve, as we look at bid

protests that come in, and we grant them, you know, several every year, where the agency is approved, the target-bid protest comes to us, and we'll say, No, that wasn't kosher.

So I can think of many examples of that off the top of my head.

But, unfortunately, a lot doesn't come to us anymore.

SENATOR KRUEGER: And it's great that you referenced the Buffalo Billions example, with the, sort of, I was going to say offshore contracting, but it wasn't offshore, you know, creating entities within a different state agency.

Does the comptroller's office have specific language that you think we need to put into legislation to prevent that from happening, and prevent people from being able to skip the comptroller's process?

NELSON SHEINGOLD: Yeah, well, first of all, I think what needs to happen is, Senator Reichlin-Melnick's bill needs a good look at, because, once again, that would restore us back to where we were in 2011, where we had much, much, much more robust review over SUNY contracts, CUNY contracts, and OGS centralized contracts, which

encompass billions of dollars and thousands of contracts every year.

So that would be the perfect first step to start and restore what was lost.

But then, going forward, it's -- we would say it's imperative to stop any further erosion, especially once it's restored.

This has been an erosion over time, starting with the big chip-away in 2011 and 2012 that I just mentioned. But, in every year's budget, there seems to be another part where we're not withstood and avoided.

So just to make sure it doesn't get slipped into the budget, that's not incorporating a language, and allow us to review it, both as an active review-and-oversight system; but, also, as a very effective deterrent.

TERRI CROWLEY: Yeah, and I would just like to add one thing.

A lot of our authority rests with Section 112 of the state finance law.

And you will see, as Nelson said, in this past budget alone, probably at least a dozen examples, you know, there's an appropriation, not withstanding Section 112 of the state finance law.

So every time that happens, we're taken out of the review.

So I -- to Nelson's point, I think what we would hope and recommend that you would -- you know, that the legislature would be very careful when inserting that language, because, again, it takes us out.

We were taken out of billions of dollars in this past budget. And it happens over and over and over again. So....

SENATOR KRUEGER: That's excellent to keep track of.

What about contracting through public authorities; is your role different when the contracts go through an authority?

NELSON SHEINGOLD: Yes. Under the public authorities law our role is different.

For a contract to be called by this office, it has to be over a million dollars. It can either involve a noncompetitive process or state money.

So, obviously, it's a much, much, much higher threshold, and we have to call for it to review it.

Now, I will note there is a bill pending in the Assembly, which would require public [indiscernible] -- that's a program bill

Comptroller DiNapoli -- that would require public authorities to promulgate guidelines, and internal procurement guidelines, that are consistent with the guidelines that apply to state agencies under Section 163 of the state finance law. It would hem them closer because, right now, it's completely inconsistent. They can come up with their own rules. And they could come up by a new resolution with a -- a resolution to avoid competitive bidding.

So it is a higher standard than it would be with state contracting, even before the 2011 chip-away.

SENATOR KRUEGER: Great.

I don't want to monopolize, so I'm passing it back to you, Senator Biaggi.

Thank you very much.

SENATOR BIAGGI: Thank you, Senator Krueger.

Those were excellent questions.

I just want to knowledge that we've been joined today by Ranking Member Senator Palumbo.

Welcome. We're happy to have you.

And I would like it to just hand it over to my colleagues; so, please.

SENATOR PALUMBO: Thank you, Madam Chair.

And thank you today for coming.

And this is obviously something that's of great significance to all of us. I know we've been talking about this for years.

So I'm just certainly pleased.

I've read through the testimony. And if I have any further questions, of course I'll jump in.

But I do certainly appreciate Senator Biaggi and Senator Krueger, the two chairwomen, for moving this ball forward, because this is something that we've all been critically concerned about.

And we certainly appreciate your input.

So, thank you.

SENATOR BIAGGI: Thank you.

And, yes, please, Senator Borrello has a few questions.

SENATOR BORRELLO: Thank you.

First of all, thank you both for appearing today; appreciate it.

I will say that Comptroller DiNapoli certainly has the utmost respect of myself and many others I would say on both sides of the aisle, and you've done a great job in that office.

I sit on -- I am the ranking member of the Procurement and Contracts Committee, which

Senator Reichlin-Melnick is the chair of, and I'm glad to hear there's legislation to try and restore your oversight of all these contracts.

My concerns lie with the shockingly increasing number of contracts that have been awarded to companies outside of New York State. That seems to have ramped up in the last several years, particularly under our former governor.

And my concerns are, a number of things.

First of all, I don't think New York State taxpayer dollars should be going to companies out of state.

Yes, it's a lot cheaper to go out of New York State, but that's because, largely, it's too expensive to do business in New York State. And I don't think our taxpayer dollars should be going in that manner to save money in that way.

But my question to you is:

When it comes to oversight of those companies, I have heard concerns that, quite frankly, it's difficult to understand the different state laws, and the lack of being able to fairly assess those contracts for companies that don't operate under New York State laws. That's a challenge.

So could you speak to that, and the ability for you to be able to root out corruption, and also being a proper oversight?

NELSON SHEINGOLD: Thank you, and I appreciate your kind words about our office and Comptroller DiNapoli's work.

Yes, you know, obviously, we cannot act to determine where contracts are let, and what vendors. That's limited by New York State law. We can only apply New York State law when we do our contract review.

But to your question, when you have out-of-state entities -- and, particularly, now I'm putting on my hat of investigations I have been conducting for the last, you know, in fact, 27 years of my life -- it presents some logistical challenges when you have allegations of particularly corruption.

They're out-of-state, sometimes not susceptible to administrative subpoena process, witnesses are not, you know, to be brought around the corner.

So in the corruption-investigation sense, it absolutely could present some challenges.

You know, contract review, when we do our

initial contract review, it's subject to authority. You know, that's more of a paper we're looking at, the documentation, we're asking documentation. We could hold back our approval, when the legislature has given us that authority, before we get certain documentation.

So we have leverage in that situation.

But, definitely, especially when you have an allegation of corruption, it could absolutely present some logistical and practical and legal hurdles.

SENATOR PALUMBO: Thank you.

Actually, I have a bill that did pass procurement and contracts this past year, to, essentially, give in-state contractors a last look, so that they can match the lowest responsible bid of an out-of-state contractor.

So in addition to that, I think being a better use and more responsible use of taxpayer money, in essence, would also give you a slightly easier job in being able to review those contracts and root out corruption.

Would you agree?

NELSON SHEINGOLD: You know, once again, especially in the corruption arena, like I said,

there are definitely hurdles when it's out-of-state or out-of-country vendors.

SENATOR PALUMBO: Great.

Well, and as far as -- thank you.

And as far as the oversight that you are currently -- this bill that Senator Reichlin-Melnick has, how would that improve -- in your opinion, how would that improve your ability to, you know, expand your oversight?

NELSON SHEINGOLD: Once again, it would restore what's been taken away over the last decade.

So, for example, if you look at the state procurement rules, before you even get -- competitive bidding process, first, you have to see if there's a preferred source available; then you look at the centralized contract; and then you get to competitive bidding.

Well, once again, back in 2011, by statute, our review of centralized contracts was taken away.

Now, we were able, through an MOU, to get some of it back. But once again, that's by a mere MOU.

So you're talking the second step in the flow chart that was statutorily removed from our oversight authority.

And then you see what was taken away in terms of SUNY and CUNY. Like Ms. Crowley said, we're talking billions of dollars that flow through that don't come before us.

So I think it would be a marked improvement in oversight and protection.

And as I said in response to Senator Krueger's question, we also can't, you know, be -- forget about the deterrent effect, and the check effect, it has on all state agencies and vendors.

SENATOR PALUMBO: Could you give me the percentage of what contracts, under the changes that were made in the last decade, what percentage of dollars, overall, that you are not overseeing at the moment because of the current situation?

NELSON SHEINGOLD: I don't have that number off the top of my head.

TERRI CROWLEY: Well, I could tell that we looked at -- went from 2011 to when the MOU took effect, it was close to $3 billion of contracts that were done without -- outside our review.

And just to underscore what Nelson said too, an MOU, yes, it's better than having no authority, but it's administrative, and it could be gone, you

know, if someone decides they don't want it in effect anymore.

So that's why we believe it's absolutely essential that our authority be restored statutorily.

SENATOR PALUMBO: All right.

Thank you very much.

NELSON SHEINGOLD: Thank you.

SENATOR BIAGGI: Thank you.

And so now we will hear from Senator Boyle.

And, again, just as a reminder, I will be asking questions last.

SENATOR BOYLE: Thank you, Senator.

And thank you for appearing, and I share my colleague's sentiments about Comptroller DiNapoli being the gold standard in terms of ethics in state government.

I've known Tom many, many years, and there's never been a hint of any scandal whatsoever. Truly amazing.

Just to go back to Senator Krueger's remarks about a legislator getting involved, I'll give you an example.

Say a constituent company of mine writes in, Hey, we're bidding on widgets for the New York State

government.

And we would typically write a letter, Please give, you know, the Smith Widget Company your utmost consideration in this.

You know?

Is it -- would there -- any be problem with that?

Or -- I mean, I just -- I mean, obviously, there's going to be no underhanded stuff in the legislator's office, I'm getting paid for it.

But would that be -- pass the smell test, in your opinion, Counselor?

NELSON SHEINGOLD: Once again, under the procurement lobbying law, that's a legal correspondence. It wouldn't fall within the rubric of the prohibitions of that statute. But, you know, once again, to emphasize, you know, what Terri said, we are going to look at it objectively.

We have to -- and I think this is an overarching theme when this committee and New Yorkers look at ethics and ethics reform -- you, me, both, actual lack of conflict of interest, and actual independence, and the perception of such.

I mean, we are very, very, very cognizant of that fact.

So we will receive anything that comes to us legally. We will put in the procurement record because we're above board. And then we will do our robust, independent, and objective review of that contract, because the only way we restore public confidence is actual independence and the perception of independence.

SENATOR BOYLE: All right. Thank you.

And one further question.

So I believe in your remarks you said that the review of a contract typically takes less than a week by the comptroller's office.

And I remember, our former governor, when they created the -- when they passed the 2011 laws, the big thing was, Oh, the contracts go to the comptroller's office, and months, years, later they're still looking at it, and it slows everything down.

So any way that you can work with the committee and the legislature for language, to make sure that that is not the case, and is not even the perception of the case, that they're not -- things are not being slowed down, so you can rightfully review these contracts to -- for ethics concerns?

Okay?

NELSON SHEINGOLD: Yes, thank you.

And we will gladly work with the legislature, to look at procurement reform.

And once again, on average, statistically, over the last few years, a contract stays here, an average, including the ones that last longer, 5.8 days.

So I give a little fudge on it. It's actually well less than a week.

And I want to again emphasize, ones that stay here longer, not that they're necessarily corrupt or infirmed, but there's a reason for it, because we're going to ask the appropriate questions.

You know, oversight, and checks and balances, are not built for speed; but quite the opposite.

But we will gladly work with the legislature, to reach a balance, and make sure that we have appropriate oversight of functioning. Absolutely.

TERRI CROWLEY: And I would just like to also just quickly underscore too, those contracts that are with us longer, keep in mind, some of our contracts are hundreds of millions of dollars, billions of dollars.

So, you know, it would be highly unlikely we could review a billion-dollar contract in 5.8 days.

But we are, you know, mostly under the time that we're given.

So it's, just -- you know, when you're looking at 14,000 contracts, and thinking, you know, the average is 5.8 days, that's a pretty good standard, at least in our book. So....

SENATOR BOYLE: Thank you.

NELSON SHEINGOLD: Thank you.

SENATOR BIAGGI: Thank you very much.

I would like to acknowledge that we have been joined by my colleague, Senator Hoylman.

Thank you, and welcome.

Senator Hoylman, we are on the comptroller panel right now.

And so, if I may --

And, of course, if you have questions, Senator Hoylman, just let me know.

-- I wanted to just ask a series of questions in different topics; so I just want to outline the different areas:

The first one being, your referral authority, a little bit about auditing.

And then two questions about sexual harassment, workplace discrimination, and the inspector general.

And so I just want to begin with your referral authority, because it's something we heard I think a lot about last year. And I think for a lot of New Yorkers, it was the first time maybe they had heard about that authority.

And so, under Executive Law, Section 63.3 -- right? -- the comptroller's office has the authority to make a referral to the attorney general to investigate potential indictable offenses in violation of the law.

So could you please explain the circumstances where the comptroller may make such a referral, and the process that your office follows to determine if the referral is actually deemed appropriate?

NELSON SHEINGOLD: Absolutely, Senator.

So as you articulate, Section 63.3 provides us with blanket authority to make a criminal referral within -- with any subject matter that falls within our general authority.

So, once again, if it's something that doesn't fall within the comptroller's authority, then we can't make a referral.

If it's something that falls within our authority, and we deem it to be potentially criminal, we could vest the attorney general's

office with jurisdiction; and, in fact, we have, on many, many, many occasions.

Of course, the latest and most notable being in regard to the book deal, which is in the paper.

But that's just one of dozens and dozens of occasions where we have made referrals, at least over the -- over a decade I've been in the office.

And in terms of when we make the referral and the process, it could come up in different ways.

So as I said earlier in my prepared remarks, we've done, you know, our work, our anticorruption initiative and the comptroller's strategic priority to root out corruption, has resulted in over 250 public corruption and public-forward arrests. We do those with local DAs, DAG, the U.S. Attorney.

So, generally, when we find a case of actual fraud; or potential fraud, I should say, we'll determine, you know, who is the most suitable law enforcement agency to work with. Sometimes it's the AG. Sometimes a local DA. It's, very often, case-specific.

Sometimes, in fact, very frequently, we'll actually get a reach-out from a state or a local authority, saying, Hey, we're hearing something about this. Can you look?

You know, and as the watchdog of the public fisc, we'll go in, we'll look. And when it obviously comes from a law enforcement authority, that's who we're going to work with, going forward.

So it's very fact-specific and fact-dependent.

But as you said, Senator Biaggi, we have the authority to refer to the attorney general's office, when appropriate, so long as it's something related to our inherent powers.

SENATOR BIAGGI: Okay. That's very helpful.

And so -- so you're -- one of the things that you mentioned was that, if it's not within your authority, then you can't, of course, refer it.

So are there instances when an issue is not within your referral authority, but then you can -- do you have the power to reach out to the entity or the authority that actually does have the authority to make that referral, for lack of better words, so that -- to make sure that that issue is actually in the right place?

NELSON SHEINGOLD: Absolutely. In fact, we do that every single day.

So Comptroller DiNapoli has established a hotline and Internet portal for the public to report

fraud.

We get over 4,000 fraud complaints, or potential fraud complaints, I guess I should say, or allegations, every year.

If it's not within our authority, we don't just sit on it. We will send it to who we believe to be the appropriate authority, or authorities, to look at it, to make sure that it ends up in somebody's hands so they can actually do something with it. And if there's any truth -- allegations, they could be addressed.

SENATOR BIAGGI: That's very helpful to know.

So going back to the referral authority with regard to the attorney general, is this done through an MOU, or is there a different set of powers that you are -- that you have vested?

And in your referral authority in each, whether it is a DA's office or a U.S. attorney's office, is it necessary to have an MOU; or is it simply just by the power that is delineated in the statute?

NELSON SHEINGOLD: The latter; it's by the power delineated in the statute.

So for the attorney general, because, under New York State law and the state constitution, the

attorney general doesn't have original jurisdiction over the vast majority of crimes.

They require, as you said, Senator Biaggi, to get a referral from us or another relative agency.

So, in that, so, lateral, like the book deal letter that has been published in the press, as you know, it's a good example. And they all pretty much look like that.

Now, unlike the AG's office, DAs, U.S. attorneys, and the other investigative bodies, they don't require a formal referral.

So, frankly, a lot of times it's just a phone call to deal with it, because they already have jurisdiction to investigate; whereas, the AG needs something in writing, under Court of Appeals decision, from the comptroller, vesting them with that authority under Section 63.3.

SENATOR BIAGGI: Okay. That is very helpful to understand.

And so where it is -- where there's no formal referral process, does the comptroller's office keep a record of all of the outreach that it makes to these various other agencies?

NELSON SHEINGOLD: Well, we track -- we obviously track cases that come in in complaints.

Like I said, a lot are just a phone call from a DA's office.

SENATOR BIAGGI: Okay.

NELSON SHEINGOLD: So the results in the case, obviously, you know, we'll keep records.

SENATOR BIAGGI: Got it.

NELSON SHEINGOLD: There's different levels of formality, depending on the nature of the referral, the reach-out, and the like.

You know, and I should also point out, Senator Biaggi, and I would be remiss if I didn't, Comptroller DiNapoli has established a process, that when we're doing the hundreds of audits I referred to earlier, be it of a local government, a state agency, operations, any part of this agency, if we even get a hint of fraud, we'll take a look at it and see if there's potential fraud there.

If there is, we'll tease it out, we'll see if there's fraud there. And if we do determine there's fraud, we'll make an active reach-out to whatever relevant agency is out there that's appropriate to address the situation.

So we're both proactive and reactive when it comes to fraud, given the vast gambit of this office's power.

SENATOR BIAGGI: That's very good to hear.

One final question under the "referral authority" category.

Do you think that your office would benefit from greater or broader referral authority?

Is that something you know, you've discussed internally, or even to the public?

Is there something that the legislature can do to give the -- besides, of course, Senator Reichlin-Melnick's bill, which I think is an excellent bill -- but that's a separate issue for contracting; this is more about your referral authority -- is there something that we can do to make sure that you are, basically, capturing all of these issues within your net?

NELSON SHEINGOLD: As you said, Senator Biaggi, I think Senator Reichlin-Melnick's bill, and I guess I should say, the preventing the further erosion of our [indiscernible] approval authority, goes a long way to making sure you increase what's coming through here, so we can actively look and make sure there's not fraud.

But in term of our improving our referral authority, right now it is very robust and related to our power.

So, obviously, we would discuss it internally. And if we have any ideas, we will circle back, absolutely, with the legislature and let you know.

But we have ample authority to refer right now, and to work with, frankly, any other agency that's joining us in the commitment to fight fraud.

SENATOR BIAGGI: That is very good to hear.

Thank you for that.

So, now, just moving on -- auditing category of questioning:

And I really have to just also say that I am very grateful to the comptroller's office, who helped my district during the beginning of the pandemic, deal with a very important, pressing issue in the city of Mount Vernon, and did it really, not only with excellence, but also swiftly.

And I believe it was one of the first times that there was a virtual component to doing audits, and it was still done on time, and it was still done in a way that was comprehensive. And it was very meaningful to ensure that the city of Mount Vernon could actually function, because it wasn't, unfortunately. And that was, obviously, a very big problem.

And so, just, thank you very much for that.

And so I think, under that category, can you just explain a little bit how your office approaches your auditing responsibilities, and how you prioritize audits that come in?

Because I am sure that you receive a lot of them, and it would be helpful to understand how you're triaging them.

NELSON SHEINGOLD: Absolutely, Senator.

So we employ, generally, a risk-based approach.

We employ that throughout the gambit of our audit authority, be it on payment audits -- [indiscernible] contract comes under our approval authority -- payment audits, local government audits, or state audits, because you've got to address where the problems are first.

So if we see a potential risk, which could come from citizen complaints; it could come from our fiscal monitoring system, that says, Look, there's a real problem, and it's been out in the municipality.

It can come from the citizens coming to us.

It can come from the legislature reaching out to us, and said, Hey, you've got to look here.

And, obviously, so we're going to employ that

risk-based methodology to determine where our assets are most needed to remediate a problem, and find out what's going on, and answer these questions.

Of course, in addition to that, on the local level, we try to make sure that municipalities don't escape audits for a long time, because, even if there's not smoke, it's always good to go in, because, like I said before, we're trying to shore up things to prevent or to minimize waste, fraud, and abuse.

So it's more than, like I said, fraud; it's waste also. And, you know, I try not to lose sight of that.

So it's a risk-based approach.

It's a universal approach, as we go through every year and categorize what we do.

And that's how we try to direct our resources.

TERRI CROWLEY: And I would just also like to add, from an operational perspective, which are the divisions that I oversee, we are auditing every single day. We are processing, you know, thousands and thousands of payments.

And as Nelson said, we have put in, and proudly to say, some pretty advanced data analytics

and risk-based procedures. But it's -- you know, there's multiple levels of audits.

But just to, you know, underscore, every single day we are auditing, and, you know, determining, you know, are payments legitimate? are the people that are getting them are those that are supposed to?

So it's -- it's here, it's here, it's -- you know. And then the bigger ones that we do programmatically.

SENATOR BIAGGI: That makes sense.

And so let's say, for example, in the audit there is corrective action that is suggested, and you give that to the town, municipality, whatever entity it is, and it's not followed.

Is there anything that your office can do as a result of the audit not -- the audit recommendations not being followed?

Can you go back and audit again?

Can you, again, refer it to any other entity or agency?

How does that work?

NELSON SHEINGOLD: So, in general, with our programmatic audits, our performance audits in localities and state agencies, we have very little,

if any, coercive authority to make them adhere to a corrective-action plan.

What we do is, we can make recommendation, and also very important, as I said earlier, we publicize it; it's on our website. We'll put -- we put out our audit, it's available to the general public. We put out our recommendations.

If the agency or municipality replies, we don't hide that. We attach it too, and then we'll put our response to that.

We absolutely do follow up audits, and we post those online too. And we'll put out there, what are they following, what have they administratively fixed, and the like.

So a lot of it is by, frankly, sunlight.

We get it out there, we tell the public, and we urge; and, hopefully, we facilitate citizens getting involved.

And we've had many instances where you see in the press, where a citizen said, Hey, the comptroller pointed this out. What are you doing?

So it's where we can make -- in those case, we can make recommendations, and -- for improvement, and, hopefully, educate, and arm and fuel, the public to take action.

SENATOR BIAGGI: That makes sense.

So then it -- would it fall within the governor's purview to require compliance?

Do you know who the proper power is?

Because, in the instance of Mount Vernon, that was just one example.

In order to address a comptroller, or others, who are perhaps not doing the job that they've been elected to do, which is different, of course, than appointed, it makes the accountability different, the executive was the only person that could, essentially, if necessary, remove the comptroller from office.

And so is it only the governor, and we just have to wait and see if the governor will do something like that?

NELSON SHEINGOLD: You know, it depends on what the nature of the audit is.

So if it's a state agency under the executive's control, obviously, the governor has authority to take action.

In most cases, putting Mount Vernon aside for a second, the governor doesn't have authority to do anything to localities, and it falls to the local boards and the local governing structure to take

appropriate action to, you know, remediate the issues that we pointed out.

So it -- really, you have to look at who -- you know, once again, who runs the municipality, who runs the state agency.

Obviously, we have constitutionally-protected home rule in New York. So we vest our municipalities with independent authorities in terms of governance, in most instances.

SENATOR BIAGGI: Okay. That's very helpful.

And just one final question in this category, and then we'll move on to the last one. I know my time is kind of ticking down here.

In terms of whether it's feedback or guidance or brute force --

And I use that last term very intentionally, because I really have in mind the former administration who sometimes used entities of government as retaliatory tools.

Do -- is the comptroller's office receiving feedback from the governor's office or from the executive branch regularly about who to do audits on?

Obviously, you mentioned that there's a broad range of people who are coming to you, there's a

hotline.

So, obviously, it's -- not that it's narrowed and only a few exclusive people can do this.

But I'm just curious about this one aspect, and I specifically am, because the comptroller's office is in a very unique position, I think, than almost any other office.

You have a power that is, in some ways, so removed from the governor's branch of -- of just the chamber and the agencies, that it allows you to actually do your job, as opposed to other agencies or entities, like a JCOPE, which is obviously very different.

And so I'm just wondering how you go about that, or how you would go about that, or if you've had experience, where a governor or a member of a governor's team has said, "Well, we need you to do this because," and the reason is very much not the reason why you would do an audit; and what you would do in that kind of situation, if that were to come across your desk.

NELSON SHEINGOLD: Well, you know, once again, it's hard to answer in a hypothetical.

I will tell you, as you pointed out, one of the virtues, or the main virtue, of the structure of

the comptroller's office in New York is that Comptroller DiNapoli is an independently elected constitutional officer, which is much -- as you said, Senator Biaggi, is much different than many other states and many other agencies.

So we don't have to follow the governor's direction, or anybody's direction, frankly, except for the taxpayers.

So we will absolutely interact with state agencies.

We do not take a combative approach, that is not Comptroller DiNapoli's style, because, frankly, that's not good government.

We will work with agencies, and Terri can attest to this. If there's something that needs to be done in the public interest, be it on contracts, we will work, how do we do this legally? who do we do this efficiently? and the like.

We won't be bullied, and we haven't been bullied. We won't be directed.

We'll do our job under the constitution, independently, where we need to go.

But, once again, good government is collaboration.

As Senator Krueger said before, there are

many agencies looking at this problem.

We shouldn't be antagonistic to each other.

When there's a problem and it's of public interest, we can work together, using our authority, to try and fix it.

SENATOR BIAGGI: I agree.

TERRI CROWLEY: And, Senator, I think too, just, it's almost the opposite the way it works.

I think every agency understands, and expects, we are going to audit you.

If you're making a payment, we are going to audit you, because that's what we -- that's one of our main focuses.

But to Nelson's point, and to Senator Krueger's point, even with regard to contract oversight, much to, you know, what some people would argue, our goal is to get to "yes."

We want to -- we work with agencies to -- because we understand that the contracts that they're trying to execute, for the most part, you know, and there have been some exceptions, is to provide essential goods and services.

So we want to get to "yes," but we want to get to "yes" in a legal, ethical, and correct way.

So -- but, you know, again, to the thing with

the agencies, I -- agencies expect, we are going to audit them, every single day.

SENATOR BIAGGI: That is good to hear.

Thank you for that.

I'm going to go to the second-to-last question because the last question is a little bit longer, and my time is ticking down here.

So in terms of the category of sexual harassment, workplace discrimination:

Does the comptroller's office have to approve any settlements that are made by state entities or by legal services contracts, for example, in a sexual harassment case, or settlement?

And, if so, how does your office review those settlements or contracts?

NELSON SHEINGOLD: Unlike the city comptroller's office, which has to approve settlements under state law, the state comptroller's office does not approve a legal settlement in a lawsuit.

That's within the purview of the attorney general's office, which, obviously, New York is also a separate constitutional actor.

So we will process the payment, and do what needs to mechanically be done.

But the actual authority, under New York State law, to enter into a settlement in the course of a lawsuit, be it in the court of claims, or 1983 action alike, is vested directly in the attorney general's office.

SENATOR BIAGGI: So is that a unique function of New York State?

Do other states do it like that?

Do you know?

Or is that just something that has originated through law, and that's just the way it's been, and it might be better to be under your purview?

The reason I say that is really because, sometimes it becomes -- because things are spread out, it becomes confusing, even to someone like myself who is paying attention and really in the weeds on the details.

And so I'm just curious if that's the best place for it, and if other states do it like that.

NELSON SHEINGOLD: Yeah, I'm not -- I'm not familiar with the practice across the country, what other states do at this. I'm only really familiar with the way of New York.

SENATOR BIAGGI: Okay.

NELSON SHEINGOLD: Does it? So I can't,

unfortunately, provide you with information on that.

In New York, as I said before, we do have an independent attorney general as the chief legal officer of the state.

So I think there's good reason where the chief legal officer of the state would sign off on a legal -- a legal settlement.

But --

SENATOR BIAGGI: That makes sense.

NELSON SHEINGOLD: -- it's the only structure that I've been familiar with.

SENATOR BIAGGI: No problem. I will have to follow up myself on that one.

Okay. And, then, just the final question is with regard to the inspector general.

So in the previous administration there were a lot of different concerns that were raised about the independence and the transparency of the office of the inspector general.

And in New York, the inspector general reports directly to the secretary to the governor.

On the federal level, agency inspectors generals are required to report to both, Congress, as well as to the head of their agency.

And so I have introduced legislation that is

very similar to the federal model, requiring the inspector general to report both to the legislature and to the secretary to the governor.

But it has also been proposed that the inspector general could report to a third party; the third party being the office of the state comptroller.

And so this might be a new idea for you, and you might need to take some time to think about it, and I definitely give you the opportunity to do that.

But, if you have any thoughts about that, today, or later, I would really appreciate discussing that with you, because one of the ways in which our former ethics complaints and violations of contracts and behaviors really fell through the cracks was because of the one-track reporting; from the agencies to the inspector general, and then the inspector general to the secretary to the governor; and whether or not the secretary to the governor wanted to allow that complaint to proceed.

There was really nobody else that could have any say in that process, which is highly problematic.

So if you have any thoughts now, I would love

to hear that. If not, I would love to also talk to you about this another time.

NELSON SHEINGOLD: Yes, and I would have to take a look at that proposal, and we would have to get back to you.

You know, I will make some thoughts, because I can't help myself. But, I don't know.

I'm actually -- I've been in the comptroller's office 11 years now.

Prior to that, I served as chief counsel for the state inspector general, under the most independent inspector general, as far as I'm concerned, the state has ever seen, Joe Fish.

And one insight I got from that experience, that I'll just throw out there, is you need two components for effective oversight, be it the IG, or anyone.

You need a system that works, of course, and that is not so inherently flawed that even good people can't make it work. But just as important, you need people who want to be independent, because you can have a somewhat flawed system, and a good person -- and by "a good person," somebody trying to do the public good, who wants to be independent -- can make some good out of it.

You can have the greatest system on earth. And if you have somebody who doesn't want to be independent, it's just empty words on a piece of paper.

So in terms of, anybody, you need a system that enhances, facilitates, independence; and then you need people who want to be independent running that entity and doing the work.

SENATOR BIAGGI: I agree.

Thank you very much.

And, Senator Hoylman, if you have any -- do you have any questions?

SENATOR HOYLMAN: Yes.

SENATOR BIAGGI: Oh, great.

SENATOR HOYLMAN: Sure. Why not?

SENATOR BIAGGI: So I will hand it over to Senator Hoylman.

SENATOR HOYLMAN: Good morning.

I don't know if you can hear me?

Yes.

Good morning.

I just -- you know, the news of the morning regarding the current situation at SUNY, and the resignation proffered by the chancellor, Jim Malatras, raises the issue of the blurring of

the lines of supposed independent state agencies.

In this situation, by most accounts, we had a chancellor, and I guess previously, a president, and I think at one point he was president of the Rockefeller Institute, another SUNY institution, who is working, in effect, as an arm of the governor's policy team, both political and policy, I would argue.

What is the concern there, or is there one?

I mean, I believe that SUNY needs to be a resource for policymakers.

But in this case, it seemed to have gone overboard, where the -- his office seemed to be a wholly-owned subsidiary of the executive.

And I think we saw that play out in the attorney general's report.

But those of us who have witnessed the collaboration between the SUNY chancellor, and in his previous roles with the governor, particularly when it came to statewide policymaking, always seemed unusual at the time.

Should we be building a wall between SUNY and the governor's office?

NELSON SHEINGOLD: You know, it's obviously a very general question, and a very important

question.

And Comptroller DiNapoli actually was interviewed yesterday by Alan Chartock, and talked a little bit about this. So if you haven't heard it, you know, I would -- I think it's a good place to go to get the comptroller's thoughts on this.

But it's always been a question, at least in the years that I've been in state government, about how independent all of these boards -- not just SUNY, all the authority boards and the like -- should be; and how do you guarantee independence when the appointing authority, you know, once again, is dominated by one branch?

Like, once again, one example I would give, moving away from SUNY a second, is, if you look at our ethics bodies in this state, where, you know, my 27 years in government, I'm on my third one already.

In the latest iteration, it took away the comptroller and the AG's ability to have a nomination to that body, just to spread out, and to disburse who these people are appointed by, and maybe help a little with the control.

So I think that this is an issue that needs to be looked at, probably for each individual authority, its mission, and the like.

But, once again, it also -- as I just said in relation -- last question, it also, frankly, comes back to people; it comes people -- it comes back to people in the executive, it comes back to people who are appointed to these various bodies.

SENATOR HOYLMAN: So that -- so the sheer number of gubernatorial-controlled appointees can make that difference on things like the board of trustees of SUNY, and other so-called "independent" authorities and agencies?

NELSON SHEINGOLD: You know, I think that's clearly a concern, at least as a matter of perception, at a minimum. And I think it's something, as the legislature has, worth further examination.

SENATOR HOYLMAN: Thank you.

NELSON SHEINGOLD: Thank you.

SENATOR BIAGGI: Thank you, Senator Hoylman.

Are there any further questions?

No?

Okay.

SENATOR PALUMBO: Just a couple.

SENATOR BIAGGI: Yes, okay.

Senator Palumbo, please.

SENATOR PALUMBO: I just -- I just wanted to

just make a general comment, that, you know -- and I do appreciate you folks coming, and I do appreciate the fact that you do work with municipalities.

There was an audit in my district on Fishers Island, which actually is, you know, almost England. It's about two miles off the coast of Connecticut and 11 miles from New York.

But that's, basically -- and it's a small municipality that had some real hiccups, because it was, kind of -- only about 300 full-time residents.

And the comptroller worked with them, because there were some real errors that were made. And it wasn't with a heavy hand that he came in to really try and to hurt someone.

You said, Look, folks. This is how you really do this, and you made some huge mistakes here.

And they were very receptive, of course.

And I just wanted to say that I do appreciate that.

And the comments that you were making regarding your audit authority are absolutely true, and you do great work, and as does Comptroller DiNapoli, as I think we all

collectively have said at least once.

You know, he certainly is a non-partisan, and very, very -- has a -- is a man of high integrity.

So we do appreciate the work that you do.

But that's all, just a quick comment.

But, thank you.

NELSON SHEINGOLD: Thank you very much.

SENATOR BIAGGI: Thank you, Senator Palumbo.

So before we conclude, I just want to say, thank you again for being here today to answer our questions.

I certainly learned a great deal about what we can do. And, also, I hope that the public also learned about what you do on a daily basis.

And I want to just commend you as being the only government entity that is here today; but we look forward to that number growing with your influence, and, hopefully, your experience here today.

So thank you very much for joining us.

NELSON SHEINGOLD: And thank you very much for inviting us.

TERRI CROWLEY: Yeah, thanks for the opportunity.

SENATOR BIAGGI: Thank you.

Very good.

All right. Our next panel will actually be several of our good-government groups, and so we're going to jump to Panel 3 before we jump to Panel 2.

And so we are going to hear from Blair Horner, Ben Weinberg, and Rachael Fauss.

So please come up, and get ready to give your testimony.

RACHAEL FAUSS: Good morning.

My colleagues have been very kind to say I should go first.

Can you hear me okay?

Well, my testimony should no longer say "good afternoon" because it's actually the morning.

So, good morning, Senator Biaggi, and other members of the Senate Ethics and Internal Governance Committee.

My name is Rachael Fauss, and I'm the senior research analyst for Reinvent Albany. We advocate for open and accountable New York State government.

And thank you for holding this important, timely hearing, and we appreciate very much that you're continuing the conversation from August, and taking a comprehensive look at our ethics oversight, by inviting other branches of government to testify,

like the state comptroller.

And I just have to say, having --ed to the testimony of the comptroller, I think it's so important, and I think -- I can't remember hearing where the comptroller's office ever talked about their oversight powers, especially around ethics. So I think this is new ground, and it was very interesting and important.

So, thank you.

First, we'd like to reiterate our point from the August testimony, that New York State has a serious and ongoing corruption problem. And the Joint Commission On Public Ethics is worse than useless and must be replaced.

But, obviously, this is not the entire subject of today's hearing, so we're going to focus on some of the other agencies, like the AG and comptroller.

Some of the recommendations we have discussed already, but I'll highlight some of the things that Reinvent Albany supports.

We think the Senate should consider amending Section 3 of the Executive Law -- this is on the referrals -- in particular, to remove the requirement that the AG -- to the governor after the

governor makes referral, asking the AG to investigate the executive chamber.

The law has a weekly report that the AGs must make.

The governor -- former Governor Cuomo waived this for the referral that was made -- AG, but the law requires it.

So I think that's something you should take a look at.

And as discussed, we think that you should examine broadening the comptroller's referral authority.

The Senate should also seek more information about the use and limitations of the standing agreement between the AG and the comptroller to criminally prosecute corruption.

And some of the discussion today I think was very interesting, and so you've begun that already.

The AG's office should prioritize and be provided additional budgetary resources, if necessary, to improve internal and external databases, including the New York Open Government website, and the Charities Bureau Registry.

These databases are important for the public, legislature, journalists, to connect the dots on the

flow of money in state government.

The legislature should conduct an oversight hearing on the AG Charities Bureau, to determine whether it has adequate funding and technology, as discussed previously.

I think that nonprofits constitute 18 percent of the state's workforce. And there's a few, in particular, that we think the AG is well equipped to oversee, like the SUNY Research Foundation and the many SUNY-affiliated charities that own public property. And we view these dozens of state-chartered entities as having among the highest corruption risk of any part of state government; in particular, as we saw with the Buffalo Billions scandal.

And, lastly, we think the Senate should hold a hearing, assessing the role of the AG's Public Integrity Bureau.

So at our last count, it had only a dozen attorneys fighting corruption across the array of state and local governments.

We understand you invited the AG to testify, and they did not come. But, you know, these are some questions, hopefully, that you can have them answer in some form.

Regarding the comptroller, we support the preaudit authority of the comptroller being restored in law for state contracts.

Obviously, we support the Reichlin-Melnick bill that was referenced by the comptroller's office.

And just would draw your attention, also, to the Procurement Integrity Act of 2018.

This was I think a program, though, of the comptroller's. It's something that I think you could look at for potential language.

And I just notice -- just note that, in addition to the 2011 actions that took place, and then the erosion of the powers through the budget for specific appropriations, executive orders also have very frequently removed the comptroller's authority under Sections 112 and 163 of the state finance law.

And, you know, I know the Senate took some action on executive orders earlier this year, but it's something I think you should look at a little bit more in terms of your powers to potentially rescind ones that may be an overreach.

The comptroller should also be given oversight of more public authority contracts, as was

discussed.

And we think that it's important to look at the OSC's potential oversight of use of forfeiture funds by local law enforcement agencies. This is another area of potential corruption risk.

And look into national best practices around transparency of settlements that are approved by state comptrollers, including for sexual harassment cases.

On the IG, we support considering additional qualifications for the position of inspector general, to create more independence, such as bars on current government officials, lobbyists, vendors, et cetera, from serving as IG, and believe the legislature should consider requiring Senate confirmation of this position.

And I know you mentioned your bill, Senator Biaggi. Haven't had a chance to read it just yet, but I look forward to reviewing it.

On the Authorities Budget Office, this is another area where they are a small agency that oversee more than 600 public authorities, and do work on ethics policies and conflicts of interest.

Right now they have a skeleton crew of only twelve, and we support budget -- raising their

budget to $5 million.

And the last recommendation I have is, the legislature should look into creating a doing-business database.

Ideally, this would be linked to campaign finance reform as well, for limitations on contributions from vendors. But this is something that you could even consider doing outside of the realm of campaign finance, just as a way to help you, again, connect the dots and follow the trail of money through state government.

Thank you for your time.

I appreciate the hearing.

BLAIR HORNER: Good morning. My name is Blair Horner. I'm executive director of NYPIRG.

Thank you, Senators Biaggi, Krueger, Hoylman, Palumbo, Borrello, Boyle, for all being here this morning, and wearing a mask, to talk to us.

The ongoing fallout from the previous administration is added -- mounting pile of evidence that New York's ethics enforcement is in crisis.

The State's failure to establish and maintain clear ethical guardrails and independent oversight has contributed to the long history of scandals and eroded the public trust in state government.

The most recent disclosures by the attorney general of sworn depositions of the former governor and his top aides revealed shockingly unprofessional behaviors by top-ranking state public officials.

That has to stop.

NYPIRG strongly believes that the Joint Commission On Public Ethics and the Legislative Ethics Commission should be replaced with an independent ethics enforcement agency that would monitor and enforce ethics for the executive and legislative branches.

The flaws recently revealed were mirrored by predecessor agencies; namely, they relied on commissions in which the members were directly appointed by the political leadership of the state.

That obvious and inherent conflict of interest undermined the agencies and fueled public cynicism, and they didn't work.

The fundamental problem is that JCOPE's basic commission structure is flawed.

The fact that the members are directly appointed by the state's elected leaders severely undermines its independence and accountability.

Regarding the Legislative Ethics Commission,

including legislators on the panel destroys its independence.

Having the regulator sit on a commission that regulates legislative and -- executive ethics is an obvious flaw.

How best to reform?

Well, one model is New York State's Commission on Judicial Conduct.

The commission is established under the state constitution, which helps limit political pressures on decision-making.

Under this model, and this legislation introduced by Senator Krueger, most of the appointments to the new ethics commission would come from the courts, thus reducing -- thus, giving it sufficient independence.

But a constitutional amendment takes time.

We recommend that you consider legislation that, while relying on bipartisanship, uses randomness in the appointment process.

You can read it in our testimony; I go into more detail.

The recommendation proposes that you replace the appointment processes for both JCOPE and the Legislative Ethics Commission.

We use the selection process from the California Redistricting Commission as inspiration.

By the way, we also agree with OSC having its powers restored and enhanced.

There is a reason why the comptroller is a separately elected official, and that's their job. And when you erode their authority, it leads to, at least indirectly, corruption.

We also urge that you establish a code of conduct that makes clear that government officials are the servants of the public and must behave in a professional manner.

In our testimony, we cite the European Council's language as an example.

And as you know, since the IG is chosen by, and effectively reports to the governor, and according to the former top lawyer -- former governor, the person has a conflict of interest in terms of investigating the governor's office.

Of course, that's just her opinion.

The current IG views her role differently. And as you heard from Nelson earlier, Joe Fish viewed his job differently as well.

But we shouldn't have to rely on just the luck of having good people in positions. Structures

need to be put in place.

But the direct selection of the IG by the governor, requiring the IG to report -- governor's office, undermines independence.

A review of best practices nationwide shows that New York's law falls far short of what the public should expect.

The nation's Association of Inspectors General offers model legislation to establish IG offices.

We urge you to review that model, and implement measures to enhance New York's IG's independence.

Government officials are public servants; they're not royalty or dictators. They are charged with serving the needs of the public.

In order for the public to have confidence that their tax dollars are being used appropriately, and that their public servants are behaving ethically and professionally, there must be independent oversight of all public servants, even the governor.

Accountability is the key to maintaining public trust in democracy.

State ethics agencies and inspectors general

are central to maintaining that accountability.

The public expects government officials to be held accountable for effective government, and to eliminate fraud, waste, abuse, corruption, illegal acts.

And please act to make these goals a legal reality.

Thank you for the opportunity to testify.

Ben.

BEN WEINBERG: Thank you.

Good morning, Chair Biaggi, and members of the Senate Ethics Committee.

My name is Ben Weinberg, and I am the director of public policy at Citizens Union.

Citizens Union is a nonpartisan good-government group dedicated to making democracy work for all New Yorkers.

For over 120 years, we serve as civic watchdog, combating corruption and fighting for political reform.

And we thank you for giving us the opportunity to speak before you this morning.

Our previous testimony back in August before, this committee focused on the major flaws of JCOPE, and the need to replace it with a constitutionally

established independent ethics agency.

We won't go into that today, but we hope the legislature would push for such a solution, and make other structural and operational improvements to enforcement.

Today we would like to recommend several other measures that could improve the system of ethics oversight in New York.

JCOPE clearly is not the only agency tasked with keeping our government clean.

Other relevant agencies were mentioned today: the AG, the Legislative Ethics Committee, the IG, as well as the board of elections, including its chief enforcement officer.

So I'll start by something that Rachael mentioned before, which is empowering the attorney general to independently initiate investigations, and prosecute cases involving public corruption.

The current state law does not permit the AG to start investigations into ethics violations or public corruption without a direction, request, or permission of the governor or state agency head.

Citizens Union, many other groups, attorney general, throughout the years have been stressing that those structural flaws prevent

enforcement of the laws that are on the books, and allow for troubling ethical scandals that have rocked Albany for decades.

In fact, the Attorney General Leticia's investigation into former Governor Cuomo, that has exposed so many disturbing details, would not have been conducted if it wasn't for a referral made by the former governor. And if it weren't for a unique political situation that, quote/unquote, forced the former governor into making this referral, the public would have not known about the scope of misconduct exposed in this investigation.

This case only stresses the need for the AG to be able to begin investigations on their own accord.

And we recommend the legislature to amend the Executive Law to extend the authority in that manner.

Restore the state comptroller authority to review state contracts before they are executed.

This was mentioned by my colleagues, and by the office of the state comptroller, so I won't repeat that.

I will just say, we support restoring that power through state law.

3. Replacing the Legislative Ethics Commission with an independent body.

Blair touched on that.

But the Legislative Ethics Commission suffers from the same problem as JCOPE. Its leaders are appointed by the same people that it is the -- the commission is meant to oversee.

An independent state ethics watchdog with the power to address ethical issues in the legislature most likely requires amending the state constitution.

This newly formed body should replace both JCOPE and the LEC. And a constitutional amendment sponsored by Senator Krueger and Assemblymember Carroll accomplishes that, and we applaud them for their leadership on this issue.

A few other -- several legal solutions that would strengthen the prevention and misconduct, and could assist with the work of oversight agencies:

The first is, improving the public accountability of state spending, and reducing the nonspecific funding in the budget.

A significant portion of funds set out in every annual budget has really real no criteria for spending, no indication of who controls funding

decisions, and, later, reporting requirements.

In 2019, which we checked -- that was the last time we checked, that we found $12 billion of these nonspecific opaque funds in the proposed budgets.

This invites for misuse and corruption, and makes it hard for oversight and enforcement bodies to identify and investigate misconduct.

We recommend a series of reforms for the budget process laid out in our written testimony, including publicly posting comprehensive information regarding the distribution of nonspecific lump-sum funds, including detailed purposes, criteria for spending decisions, requested spending, and other accommodations.

Creating a doing-business database to track entities, Rachael mentioned that.

We support it wholeheartedly, including setting restrictions on donations from people who appear on that database, including lobbyists.

And I would also like to point out that donation bundling by lobbyists and other fundraising intermediates should also be restricted.

There are several bills that address different parts of this problem, including

Senator Myrie's bill that passed the Senate, and is co-sponsored by Chair Biaggi and other members of this committee.

I'm running out of time, so I'll just mention a couple of other things that would help prevention of misconduct.

The first one is, significantly limiting outside compensation by state legislator.

The 2018 Special Compensation Commission recommended a model based on the congressional model, with a cap on legislative base salary, on income earned from outside -- sorry -- on outside income.

Although, as we all know -- probably know, this was eventually revoked by Supreme Court.

The legislature should adopt those recommendations.

Outside income limitations are really standard ethics practices, and they do help to maintain a clean and transparent government.

I think I will end here.

Thank you for the commission for -- for the committee convening today's hearing, as well as the August one; and for inviting us to provide public inputs on how to improve ethics oversight.

SENATOR BIAGGI: Thank you all very much.

I again learned something new just through your testimonies. So that is very helpful, and also the purpose of these hearings.

And so just to begin questioning, Senator Krueger, and then it will be Senator Borrello. And if Senator Hoylman has any questions. And then Palumbo, and Boyle.

SENATOR KRUEGER: Thank you, all three of you.

I think I have worked with all of your organizations over the years.

So when you were testifying [indiscernible], I have another bill that I hadn't thought about in the ethics framework, but I wanted to ask you what you thought about it.

It was a bill I put in fairly late in session, which would say that lobbyists and employees of the governor couldn't be made trustees of independent state boards.

And at the time, I did it because I was thinking of naming it the Larry Schwartz Bill.

But it struck me that we claim we have all of these independent authorities and boards.

I mean, obviously, the SUNY chancellor is the

newest example of the question.

But that there is perhaps something wrong with the concept that governors can fill them with the people who already work for him, or her, excuse me. We finally have a "her," so I have to make sure I'm gender-careful here.

But, also, why would we allow lobbyists to be on our boards?

Isn't there something fundamentally in conflict with the goal?

So I hadn't actually run that by anybody.

I just put the bill in and thought, I'm not going to get this through Governor Cuomo, but I'll stick it in to be irritating.

So what do you think?

BLAIR HORNER: Great idea.

RACHAEL FAUSS: I've taken a look at the MTA in particular, as, you know, part of my role in Reinvent Albany. And, you know, we support, you know, at a minimum, that state vendors shouldn't be, or people who deal -- who work for companies that are vending with the State shouldn't be, on those bodies, or people who have, you know, reported that they lobby that same entity.

I mean, it's basic -- it's basic

conflicts-of-interest issues.

I think when you have this disclose-and-recuse regime, where someone will disclose -- you know, in theory, disclose, and then recuse themselves, you know, you have to ask the question: Why is this person serving on the board in the first place if they're going have to keep recusing themselves from making those decisions?

So, you know, yes, I think we -- at a minimum, if people have direct conflicts before that agency, they most certainly should not be serving on it.

And you can go further than that, as your bill -- it sounds like your bill does.

BLAIR HORNER: I mean, in a sense, you know, it's leverage. Right?

So if you have -- somebody has their hooks into you, and they appoint you to some entity, then you do what they want.

And that's not the point of the entity in the first place.

All of these boards are supposed to be created as political insulation from the winds -- you know, the political winds of the day, and they're supposed to have expertise, and they're

supposed to be independent.

And so I think you're on the right path.

I mean, when we talk about -- and even in your bill on replacing JCOPE, it's all these belt-and-suspenders about how you can't be a lobbyist, you can't be former elected official, you can't be, you know, the third cousin of any of these people.

I mean, that's the way we should go.

There's 20 million people in the state.

I'm sure we can come up with enough independent people to sit on these boards, or maybe we should get rid of them, the boards, [indiscernible], in some cases.

SENATOR KRUEGER: Ben, did you have something --

BLAIR HORNER: I'll just add, the public campaign finance board, you know, one of the newest independent boards, or semi-independent boards, that were established does have a limitation on lobbyists, as well as, if I remember correctly, party officials, former party officials, which is the same situation that would cause a conflict of interest. And it should be expanded to other boards as well.

SENATOR KRUEGER: So I've also been doing some work with Zelnor Myrie and our elections committee, and what a radical notion.

It turns out you can be an election commissioner and be running for something at the same time.

And I was like, excuse me?

That can't possibly be the case.

But apparently it is.

So we're trying to fix that through another set of laws.

BLAIR HORNER: Typically, it has an advice-and-consent authority as well.

And so, I mean, if you and the House start making the standard to the executive, that no one goes on these boards if they have these problems, you could certainly push back.

SENATOR KRUEGER: Larry, you mentioned -- and I had not heard of this before, the "code of conduct" concept.

BLAIR HORNER: Yes.

SENATOR KRUEGER: So would that have legal standing if you violated it, or is it more a --

BLAIR HORNER: Yes.

SENATOR KRUEGER: -- here, we all know what

the rules of the road are?

BLAIR HORNER: The state has Section 74 of the Public Officers Law, which is sort of a code of ethics now.

The -- one of the things that's been shocking to me, and it's, you know, sort of, in my opinion, an example of the growing toxicity of public service, is the way sometimes people behave: screaming, ranting, raving, yelling, cursing out public officials in public.

I mean, that kind of stuff shouldn't exist as -- if you're a public servant. Imagine if you had a butler that did that? You would never hire that person to be your butler.

So I think, you know, the idea of adding to the conduct -- the appropriate conduct that we expect from public officials, one that, again, it attracts the council in Europe language -- that was the only one could I find, but there may be others -- would be, I think, a clear indication, that when people are asked to behave a certain way, that they have an opportunity to push back and say, It's not appropriate, I can't do that.

So, yes, it would be part of the Public Officers Law.

SENATOR KRUEGER: Okay. Thank you.

Thank you, all of you.

SENATOR BIAGGI: Thank you, Senator Krueger.

Senator Borrello.

SENATOR BORRELLO: Thank you, Madam Chair.

First of all, thank you all for being here; I appreciate it.

Time is somewhat limited, but I will -- so I'm going to kind of focus a little bit on Mr. Horner's request.

I think we all can agree, number one, that, you know, everything is broken when it comes to JCOPE, and everything, it needs to be replaced.

My concern really is about preserving not just the independence, but also the bipartisan manner in which this is done.

You mentioned following the Commission on Judicial Conduct.

And that you -- are you suggesting that judges would appoint members to an ethics commission to oversee elected officials?

BLAIR HORNER: Essentially, yes.

The way that the joint commission -- I'm sorry -- the Commission on Judicial Conduct's commission is appointed is by the executive and

legislative branches. So those individuals are not being -- are not picking the people that are regulating them.

And so in a mirror-image way, this is Senator Krueger's bill, the majority would be appointed by the courts.

Hawaii has this enshrined in their state constitution. They have a special court for ethics. And from that entity comes the ethical -- their commission equivalence in Hawaii.

SENATOR BORRELLO: Well, and I understand if the idea is a mirror image. But it's not an exact mirror image, because we would be talking about judges that -- aren't elected judges appointed by the governor now picking who would sit on this board?

How would you structure that to ensure that these -- the unintended consequence isn't to create, essentially, a ripe environment for partisan political attacks?

BLAIR HORNER: Senator, you are pointing out the obvious weakness in the proposal.

It is clearly -- I mean, you know, we're -- I think if there needs to be a hearing on the independence of the judiciary, maybe we all should

have it.

But on a sort of a technical level, they are not regulated -- the judicial branch is not regulated by the state's ethics laws of the state ethic -- Public Officers Law in this manner by the new JCOPE.

And so the way that we -- Senator Krueger's bill attempts to deal with it, and the way that we would propose to see it, is that you would strictly narrow the types of people that could be appointed, and you have a public process for how that would happen, so that if there are people that are -- had their hooks placed into them indirectly through the courts, from the governor, that there would be a way for that to be made public and to challenge it.

I mean, the hard part is, as you can all know this, is someone has to, at the end of the day, pick these people.

And how do you do that, and how do you insulate it as much as possible?

So the judicial branch is not technically, you know, under the scope of JCOPE, or its replacement agency.

And so that's how we view it -- and we agree with Senator Krueger -- that's how we viewed a way

to deal with the problem, was to have the extra entity make those choices.

SENATOR BORRELLO: Yeah, and I agree.

But, ultimately, it's the voters that are the ultimate judge on ethical behavior. They should certainly want to remove anyone from office that isn't, you know, performing ethically and doing the job of being a public servant.

As you pointed out, we are public servants.

And we certainly went 18 months with a governor that considered himself a dictator. And, unfortunately, we handed him the reins, and the keys to the car, for those 18 months, pretty much, exclusively.

So, you know, with that being said, I want to go back -- idea of, who do we have that has a clear understanding?

I mean, you can pull people off the street if you want. Right?

But, ultimately, you can get someone who has a clear understanding of the issue, and how to address it ethically.

And I don't see judges, who -- by the way, who -- I think there's a number of issues. That those that are unelected, those that have very long

terms, 14 years and plus, and then, ultimately, those whose salaries are controlled by the legislature and the executive.

So I don't think that's the solution.

Quite frankly, I think more of a transparent public process, even if those folks are elected officials, or not, ultimately, there needs to be some accountability, and not just this, like we see with JCOPE, where we just snap -- they snap their fingers and, all of sudden, we hear something from them without really having any open, transparent meetings.

And even the case of JCOPE, you know, we didn't have a representative from the Senate Majority until, what, March of 2021, which, effectively, gave the governor control over that process for the longest time.

So it's definitely broken, but, so far, I haven't seen a solution that kind of creates what you're trying to imagine here without someone having influence.

BLAIR HORNER: Senator, you and I can continue this conversation in January when the legislation starts -- whatever legislation starts to cook up, cooks up.

But I -- look, I agree, I understand your point. I've heard it from members. You know, I understand it.

And, in the short term, as I mentioned in the testimony, even if you were to move to a constitutional amendment, however it ultimately played out to be stronger, you still have to deal with, what do you from now until then?

And -- because, at the fastest, that's three years.

And I think the public wants, and deserves, a new ethics agency pronto.

And we go through that as well, some suggestions on that, where that does rely, more or less, it sounds like, on the kinds of ideas that you have.

SENATOR BORRELLO: Great.

SENATOR KRUEGER: I'm happy to talk to you about my constitutional amendment, which you may or may not have already looked at. And I am also happy to talk about amendments of it.

But it was retired judges, not current judges.

SENATOR BORRELLO: Okay, okay.

SENATOR KRUEGER: So it wouldn't be a

question of, you know, we're paying their salary, and they have some expectation --

BLAIR HORNER: What she says.

SENATOR KRUEGER: -- or, we have some expectation of their not being independent.

They're folks who were already judges.

SENATOR BORRELLO: Certainly happy to have that conversation with you.

SENATOR KRUEGER: Great.

SENATOR BORRELLO: Thank you.

And thank you all for being here.

SENATOR BIAGGI: Thank you.

And Senator Hoylman.

SENATOR HOYLMAN: Yes, just following up on that issue of judicial independence, I just wanted to mention that the New York State Commission on Judicial Nomination, which recently put forward a slate of candidates for the current governor to choose from for the court of appeals, is, essentially, dominated by the governor, in conjunction with the Office of Court Administration, the chief judge.

So we as legislators have to look at that.

You know, years of collaboration, and much of it well meaning, between the executive and the OCA,

to somehow foster greater independence on the part of the highest levels of the judiciary from the executive.

It's something that my committee on the judiciary is looking at, in terms of refining that commission, and then working, perhaps downward, to foster greater independence between the judiciary and the governor.

BLAIR HORNER: I mean, you know, it's been said, you know, crisis, you know, offers opportunities.

And the crisis that we've now had to go through for the last four months does create opportunities to revisit issues, and I think independence is central, generally.

I mean, this is outside -- your issues are outside of my -- our area of expertise, but certainly agree with you, conceptually.

SENATOR BIAGGI: Thank you.

And Senator Palumbo.

SENATOR PALUMBO: Thank you, Madam Chair.

Thank you all for coming.

And those are very good points that Senator Hoylman brought up as well.

And as we heard from the comptroller, I think

it also comes down to, of course, we can make a very good system, but it's those involved. Right?

I mean, you kind of -- Rachael, we kind of reinvented Albany, you know, a couple months ago -- right? -- because the person we were dealing with, you know, was a narcissist.

But, you know, at the end of the day, when it comes to JCOPE, and how about something like, we have -- because you can't grieve a judge.

Judges aren't really -- the Commission on Judicial Conduct, it enforces any untoward conduct by a judge.

And a lot of it is pretty obvious, because they're not political, they're not partisan. And I think that's what the rub is.

Senator Borrello mentioned it as well.

Because we're trying to figure out, we are political people inherently.

So, clearly, you know, we want to avoid, obviously, political hit-jobs, or something that is really unethical on the other side, by an ethics body.

So how about the creation of a body -- and I've actually advocated for Senator Krueger's bill on the floor of the Senate.

I think that's really one of the smarter fixes, or smartest, that we can think of in a regular basis.

But how about a committee, similar -- bar association, that would make a referral then -- appellate division, who can, ultimately, issue a binding decision, like happens with lawyers.

So what say you?

And reconcile that however you would like, any way you can.

BLAIR HORNER: I won't speak for my colleagues, but I've heard, you know, "the trusted source"; you know, you rely on the trusted source to figure things out.

And then the question is: Well, who is the trusted source?

So the state bar, for example, lobbies the legislature. So that's tricky.

I've heard about, well, how about the deans of law schools?

And that's also tricky, because all the law schools are in universities that lobby the government, and they sometimes get gigantic government contracts.

And so -- you know, and so that's a conflict.

Right?

So you end up with these sort of, you know -- at least in my mind, end up with these sort of Rube Goldberg sort of structures that are relatively complicated, that rely on transparency standards for who is eligible, and to the greatest extent possible, some sort of filter, so that, you know, it's hard to rig it.

There's enough people looking at it that don't have a stake in the outcome.

So -- but I -- you know, the bar, I mean, obviously, is a, you know, reputable organization. I don't think there's anything wrong with that. But they do have business before the government, and they do, often, are lobbyists.

And so when it comes to JCOPE, or the new JCOPE, that regulates the lobbying industry too.

And so that issue creates tension.

SENATOR PALUMBO: Sure, sure.

And when you think about what happened with the governor -- Rachael, were you about to say something?

RACHAEL FAUSS: Yeah, yeah.

SENATOR PALUMBO: I'm sorry. Go ahead.

RACHAEL FAUSS: I know, just on the

discussion of, what do we do? what do we replace JCOPE with? I mean, these are not easy questions. And, obviously, this is something we've been wrestling with for a long time.

But I think, you know, there's a few things to look at.

I mean, there's the, who is appointed; who is eligible to be appointed? as Blair noted, and many of you did as well.

You know, I know that the hearing that you had in August was fascinating about the Legislative Ethics Commissions and, you know, Alaska and other states, where there's public members.

So, you know, there are -- yes, there are people who are regulated, but maybe they're not the balance of the commission. Maybe they're the minority of the commission.

You know, there's redistricting commission models across the country, where you have a pool of people, who, anyone can apply to become a commissioner, and then there are criteria for who can serve. And then those people can be selected, you know, either randomly, or perhaps by, you know, different parts of government.

So there's -- there are a lot of different

mechanisms to diffuse any one regulated entity from controlling the process.

And I think that that's really looking at how to put those together in a way that makes the most independent process, is really important.

And these are some of the things that we have been looking at and considering.

And I just wanted to, you know, mention that there are lots of different models for independent ethics oversight.

I think, unfortunately, none of them exist in New York now, other than, you know, some on the sort of judicial level.

But just from our perspective, you know -- you know, retired judges might be one thing.

But, you know, the judiciary itself, yes, they're not regulated, but we don't view them as necessarily independent of the governor.

And I just would like to, you know, put that as, you know, a concern that we've had.

And then when you think about retired judges, you have to think about, potentially, you know, age, diversity, representing the state is potentially an issue too.

So those are just some of the considerations

that we've been thinking about in terms of independent ethics oversight that I wanted to share.

SENATOR PALUMBO: Sure. And that almost overlaps with the same issues with the IG.

Is there a public integrity bureau in the attorney general's office?

And no appointed IG, who actually had no teeth anyway, they can't even impanel a grand jury.

So what are they there for, other than it almost seems like political patronage is what it was looking like, when you have a leak of a confidential executive committee decision, or executive decision, on JCOPE, and it ends in, what, a week, or whatever it was.

And that's -- that is such -- it's a flagrant violation of law, but they absolutely were terrified, I think, of the executive at that point, and retaliation --

BLAIR HORNER: Well, I thought --

SENATOR PALUMBO: -- because that was his message.

BLAIR HORNER: -- I thought the AG's deposition sort of helped fill in some of the blanks on that, where the former top lawyer -- governor, Linda Lacewell, was saying that the IG is not

allowed, under the law, to investigate the governor or the governor's top aides.

And so that I think might be the rationale as to why the AG -- the IG did not follow up on the JCOPE complaint, because -- which I agree should be in the slam-dunk category.

You would ask the person who called the speaker, and say, How did you find out? And why didn't anyone on your staff tell anybody that you got contacted?

They didn't do that.

SENATOR PALUMBO: Phone records and text messages. It took a couple hours to put it together.

BLAIR HORNER: And then the IG is the only person who can look into. Right? And then the IG is, supposedly, not allowed to do anything.

And by the way, again, the current IG, as I understand it, does not view the world that way, and as Nelson Sheingold mentioned in his testimony. Joe Fish didn't either.

You can ask former Governor Paterson about that.

So, you know, Fish was very aggressive, even with a weak system.

SENATOR PALUMBO: Sure. And that's where we need to make the system -- you don't need to have that one particular person who is maybe willing to push the envelope, to go after the governor. I guess that happened in Governor Paterson's administration.

BLAIR HORNER: That's right.

SENATOR PALUMBO: You need a system that is, obviously, as good as it can be, and I think maybe even combining those.

You know, one last comment. I'm sorry. I know I'm a little over time.

But, just generally, would you -- do you have any comments regarding combining JCOPE, legislative ethics, the whole shooting match, into one body?

RACHAEL FAUSS: We certainly support having one entity that makes the rules for ethical conduct.

I think the issue of advisory opinions coming from both bodies, and which one are you supposed to follow, is an obvious problem.

So, you know, absolutely.

And I think that gets at the issue of people who are -- should not be regulating themselves. So....

SENATOR PALUMBO: Very good. Thank you.

BLAIR HORNER: Again, Senator Krueger's bill sort of does that, but it doesn't deal with the IG.

And so, you know, IGs -- I mean, that's a great question.

I'm sort of thinking about, well, why would you need a separate IG if you had what we wanted?

Probably not.

But the IG, you know, when you look at it, sort of the national level, again, I just suggest you guys take a look at the Association of Inspectors General, which is this national trade association. You know, they sort of view their world a little bit differently, have different tools to do the investigations.

But I certainly, just thinking about it, I wouldn't think that that necessarily precludes it from being in the -- you know, an agency -- a real ethics agency that was independent.

SENATOR PALUMBO: Sure. A division of the IG, even.

BLAIR HORNER: You may not need it, that's right, if you had the tools to do it.

So, I'll stop.

SENATOR PALUMBO: Thank you all.

BLAIR HORNER: Sure.

SENATOR BIAGGI: Thank you.

Senator Boyle.

SENATOR BOYLE: Thank you, Madam Chair.

And thank you -- panelists for sharing your expertise.

And thank you, regarding the inspector general, in particular. I think that's a crazy system that needs to be really overhauled.

I do want to reference Senator Krueger's earlier comment about the election commissioner.

I would like to look at that bill, because I thought election commissioners could not run for office.

As a matter of fact, we had a case in Suffolk County where Senator Palumbo and I both reside, where our election commissioner tried to run for the state Senate, and was booted off the ballot when they found out he was taking an unpaid leave, or whatever it was.

But the courts did not agree.

And so I did not think election commissioners could run, but we could get -- bottom of that.

They definitely should not be allowed to run.

[Simultaneous talking.]

SENATOR BOYLE: And my other -- just a

comment -- if you want to weigh in, fine -- regarding the New York State Attorney General's referral -- the need for a referral.

I think it's a crazy system that they -- he or she that are in that position cannot start their own investigation.

I would harken back, I held a press conference in -- last August regarding a serial killing in my district, Gilgo Beach, or, the "Long Island Serial Killer," you may not have heard about it. Ten -- between 10 and 16 bodies found along the beach.

The early parts of that investigation, the then-Suffolk County Police Chief James Burke kicked the FBI out of the investigation.

No one -- it didn't make any sense to anybody why you would kick the FBI out of a serial-killing investigation.

He -- Burke subsequently went to jail, as did our former district attorney, his top aide.

It's not a good situation. It was not a good situation in Suffolk County.

I held a press conference, asking for the attorney general to do an investigation -- [indiscernible] an investigation of the early

investigation of the serial killing.

She -- her office was very responsive. They called back, said, We would love to, but we need a referral.

So was the governor going to do it?

Was the comptroller -- the comptroller, he said, That's not really my area.

So a clear case of potential corruption in a police department, from the chief, and the district attorney, and the higher ups, and the attorney general could not look into it because she did not have a referral.

A perfect example of why this system does not work.

Thank you, Chair.

SENATOR BIAGGI: Thank you.

BLAIR HORNER: I'll just mention one quick thing on the -- just, elected officials.

The head of JCOPE initially was an elected official. Janet DiFiore was the elected DA from Westchester.

And so, there, I mean, you're regulating the lobbying industry?

So there's a lot of things to sort of clean up.

Good point.

Just, FYI.

SENATOR BIAGGI: Thank you.

I have a few questions, so please bear with me. And, again, thank you so much for being here.

I think the theme, and I think it's important to focus on this theme, instead of another theme which I'll mention, which is, that the theme I think is that a lot of what we have created does not work, full stop, period.

And so we're trying to either decide if we need new systems or to transform what's in the system already.

And I think it's important to have that be the theme with a lot of what we are dealing with, because -- and, Blair, you mentioned it -- JCOPE doesn't work.

There's all these different entities, and people are confused. And it's, frankly, really intentionally designed to lead people down a road that might not end anywhere, might get stalled, might take years to review, and it's really not actually ethical in the essence of it.

And so just taking it back to where we are today, which is with a new governor:

Governor Hochul has a series of reforms that she has mentioned. It's her transparency platform.

And so there are a few of them.

Agency transparency plans. Ethics training for employees. FOIL becoming a more expedited process. And then, personal recusal from certain entities.

And so just from a general stance on this issue, what is your assessment of these measures?

And, are there any additional steps beyond what the governor has identified that would you like to see, perhaps as a prelude -- State of the State coming up?

RACHAEL FAUSS: I can certainly speak to the agency transparency plans. I've looked at a number of them.

You know, I think they were an important, you know, first step, to at least get them on the record about what their intentions are.

And it's -- most of it is just compliance with existing law. You know, there's been a lack of compliance, in particular, on -- in open data.

I would just highlight that, you know, the -- there has been an executive order in place since 2013, and most state agencies are not fully

complying with that.

You know, I think the governor's directive to agencies to produce these agency plans had a number of areas that they could look at. You know, retention schedules, FOIL, open-meetings law, open data; but didn't necessarily mandate that they address all of those issues.

And it's -- there's not necessarily a kind of thought that it's going to be an ongoing process.

You know, we would like to see agency transparency plans published annually, and updated and, you know, actual metrics for how the agencies are going to be working towards that.

You know, the MTA's, to their credit, they actually put in some metrics about how they're going to be, you know, complying with the law.

You know, there was a new law the legislature passed, the MTA Open Data Law, that we supported. And they specifically said about when they were going to be complying with it, and the steps they were going to take.

So, you know, I think the transparency plans were a good first step, but there is certainly more that can be done to institutionalize them, and make them not just be, you know, a one-off effort.

And, hopefully, the governor will be looking at that as an option.

BLAIR HORNER: Just [indiscernible].

Well, you know, I think, since the governor -- the current governor doesn't have to sort of defend the previous governor, she's already taken some good first steps in terms of executive orders. There's more she can do.

As the comptroller's office mentioned, they put out a dashboard, to track federal money that's coming in under the -- you know, the various federal bailout programs due to COVID.

And, well, why not a dashboard for all spending -- right? -- that somebody could understand. And you wouldn't have to rely on, you know, necessarily, you know, the various core staff to tell you what's in the budget. Or Senator Krueger.

And so -- and on the recusal issue, the -- you know, I think it was great the governor put it out publicly, but it relies really on the internal subordinate lawyers monitoring it, which is a terrible position for them to be in. And doesn't really -- now, completely understandable, given that you have this car crash called "JCOPE." But that,

technically, should be the way it works.

You want to have a recusal process, and you're asking for an opinion, you go -- this independent agency, and they bless it, and you make it public, and then it's, like, okay, well, those guys are watching it; not the people who work for me.

So I think, you know, there's limits to what you can do with executive power.

I just want to echo Rachael's point.

You know, New York City has this whole sort of metric system, where there's an annual report that comes out, that monitors how spending is done, and whether or not the agencies are meeting performance standards.

You really use that at the state level.

It's hard to know, really, what's going on. And sometimes things get circumvented under New York State law.

Sorry, I digress.

There's -- it's supposed to be an independent evaluation of the state's tobacco control program; and yet, you know, they haven't put out a report since 2017. They're always under pressure from the executive to sort of, you know, play ball.

And so it's not independent. Right?

So there's -- there are so many things that are happening in state government.

Let me just stop there.

The current governor, though, must have -- be overwhelmed with all the incoming.

And so I have a million ideas, but whether or not she can pick and choose the best ones, I guess, would be up to her.

But just to react to your point, on her executive actions, a dashboard on spending, DOB could do that. And, metrics, the agencies presumably have that, and they can publish that.

And so there's things I think she can do with her executive power to go even beyond what she's done so far.

So, more. We want more.

SENATOR BIAGGI: Ben, did you have any --

BEN WEINBERG: No. I think [simultaneous talking; indiscernible] --

SENATOR BIAGGI: Okay.

That's actually very helpful.

I think that a lot of what we do every day could be better served by having metrics and databases. And I think you're right, to expand it

beyond just COVID, because there really is no way to track a lot of, besides, of course, downloading Senator Krueger's mind into a jump drive, which I wish that we could do because my life would be much easier.

BLAIR HORNER: We would need more than one thumb drive, though.

SENATOR BIAGGI: But it makes it very hard, even --

[Simultaneous talking.]

SENATOR BIAGGI: -- but, true, you have a set of knowledge.

But having an ability to even be able to say, well, we put money into the budget for this program, and how many people did it serve? And what was the amount that we actually spent? And what have we actually not spent, and what's left over, and where does it go? And what should we not actually allocate next year?

It's very common sense, and yet -- and a lot of businesses do it. And I know, actually, mayors across other cities do it, like in Boston.

But we do need to bring it to the state of New York, because it also allows us, as legislators, to do our job better, and we can redirect funds, and

also understand where there is lots of pitfalls.

So I don't mean to belabor the point, but it's really something I've become almost obsessed with. And I really am glad that it's coming up several times today.

We talked a lot about the inspector general, and so inspector general reform is clearly a very important theme of this hearing.

And, of course, I mentioned the bill that I had introduced, with a different reporting structure.

Also, Governor Hochul has mentioned that she is rethinking the appointment process of the inspector general, which is, of course, appointed by the governor.

And so I think, you know, beyond what we've already discussed today, which is the bill that allows for the legislature to have a role, as well as the secretary to the governor, and, potentially, the comptroller, is there anything beyond these structural changes, with regard -- IG, in the appointment process that you would like to see for the inspector general, that is missing from the bill, or that we maybe have overlooked?

RACHAEL FAUSS: Well, I have yet to review

your bill, so apologies.

SENATOR BIAGGI: That's okay.

BLAIR HORNER: But I said it in my testimony, you know, bars on the types of people who can serve.

That's not in there.

I think that's crucial, in addition to sort of a, you know, reporting to more than just the executive. So....

SENATOR BIAGGI: Right.

BLAIR HORNER: Yeah, I mean, an active advice-and-consent process, either by the Senate or by both houses, is, I think, you know, a way to sort of deal with it; plus, as Rachael just mentioned, a restriction on the type of people that can be advanced.

SENATOR BIAGGI: Right.

Okay. I think that makes lots of sense.

I think also a theme of the IG's office, specifically, is this lack of transparency, which is why I'm disappointed that they're not here today, because having a hearing allows us to talk to them and to understand:

What do you do?

What is going on in there?

What's backed up?

What are things that you want the legislature to have help on?

So I hope that that changes in the future.

But what the Hochul Administration has done is pledged to release all of the findings of the future and past investigations by the IG office, dating back to 2020.

And I think the "Times Union" mentioned that, basically, what this means is that there is a three-year gap -- last known action taken by the inspector general under Governor Cuomo.

Do you see this as being a concern?

Are there additional steps that the IG's office can take to increase accountability, but also transparency?

And -- because releasing reports is one thing, and that should be a given.

But what else can they do proactively without the legislature and our legislation requiring them to do it?

RACHAEL FAUSS: I don't know if they do an annual report, but I think a lot of agencies do -- a lot of oversight agencies do. I mean, JCOPE actually does.

But, you know, I think something that we've

noted with a lot of agencies, where we, you know, submit complaints, is they kind of go into this black box and you have no idea where they go.

It's like, okay, well, we made a complaint -- board of elections, or we made a complaint to JCOPE.

And, you know, just even having aggregate data about how many complaints are received; how many, you know, metrics, again, as you were saying, about the office's performance, that could be helpful.

So, maybe, I think looking at annual reporting requirements could be interesting, perhaps.

SENATOR BIAGGI: I think that's a great idea.

BLAIR HORNER: I think the model legislation is worth looking at.

I mean, just by the sheer volume of what the model legislation, as compared to this sort of three-paragraph version in New York.

By the way, there are other inspectors general too. I mean, you have the MTA, you have Medicaid.

And so there should be some way to sort of look at this sort of holistically.

And so I -- I mean, I just suggest that you

take a look at the tenure of Joe Fish.

I mean, here's a guy who made it work, in our opinion, and he is very, very aggressive. And he had the sort of structure that currently exists, and yet pumped out, I don't know, scores of reports. And he was very influential in looking at some of the pay-to-play activities around "casinos" decisions back in 2010, I guess it was.

SENATOR BIAGGI: Right.

Okay. That's helpful.

SENATOR KRUEGER: [Inaudible.]

SENATOR BIAGGI: Yes, please, Senator Krueger.

SENATOR KRUEGER: Was there a statute change around the IG between then and now?

BLAIR HORNER: I don't recall there being one?

SENATOR KRUEGER: Or it's just different interpretation about what the job description --

BLAIR HORNER: Well, to Governor Paterson's credit, I presume. Right?

I mean I met with Fish when he first started, and he had been involved in, I guess, the commission dealing with Serpico back in the day.

I mean, he was a guy late in his career. He

was not going to be pushed around. No one was going have their hooks into him.

And he's, like, I'm not ending my career in this job, and then not doing what I'm supposed to do.

So he just stood up -- pressure, as far as I could tell.

SENATOR BIAGGI: I think that that's a good influence on all of us.

Okay. I'm going to skip over, just because a lot of what my questions are on the IG were regard with the bill, so we'll talk about that, hopefully, afterwards, and I'm sure there will be some amendments that can make it better.

Let's just see.

Okay. I think there's just two final questions, under the "attorney general" category.

So the AG runs something called "New York Open Government," which is fascinating, if you take a look at it, but it exists. And it's really, essentially, this data aggregation for all of the data that is released publicly by New York State agencies.

For those who are watching, who don't know, you should definitely check that out.

Can you talk about your experience with open -- with this Open Government database, and whether it's actually useful at all?

I know it hasn't been updated for years.

So what is your experience working with this database?

What should we be doing with this database, and how can we actually use it?

BLAIR HORNER: Let me just mention one quick thing.

I worked -- this idea came from then-Attorney General Andrew Cuomo --

SENATOR BIAGGI: That's -- oh, yes. I forgot to mention that irony.

BLAIR HORNER: -- and I headed it up.

So I can tell you, it was a brutal experience just getting access -- information that was publicly available.

The idea was to have one-stop shopping. The problem -- and then it evolved over time.

And once it got past these sort of technical -- like, I'm like Koko the gorilla when it comes to technology. Right? So in the beginning I dealt with that part, and then somebody else dealt with it, and I went back to working at NYPIRG.

The problem is, always, you're relying on the state agencies to get you the data. And I don't know what the status is in terms of their resources. But that is always going to be the problem because they don't have any independent authority currently to collect the data or require that the data be even accurate.

SENATOR BIAGGI: Right.

BLAIR HORNER: But it was supposed to be one-stop shopping, and so you can look at, you know, charities' information, contract information, campaign contributions. The sort of the backbone of it was really the -- sort of the legislative side to it, the bills.

And so -- and then from there it was lobbyists, campaign contributions. Then you looked at contracts, and, et cetera.

And so it was -- so, yeah, I mean, I use it.

But it is only as useful as the agency has resources for it, and the accuracy and up-to-datedness of the data that it collects.

BEN WEINBERG: I'll just add, you know, in many cases, it is more useful than how the agency presents the same data.

The state board of elections is the most

obvious situation, where their public database of contributions is almost impossible to navigate through. And the AG system is just more user-friendly.

But as Blair mentions, really, I think a more comprehensive solution for that is a legislative-solution model like New York City has, where, you know, the Open Data Law in New York City mandates that all agencies send, you know, a variety of databases directly to one hub.

And that is, honestly, I think revolutionized the way that the data is seen and tracked in New York City. And that helps us in good-government groups, that helps the press, and that helps other watchdogs.

RACHAEL FAUSS: I just would reiterate, we think there's a lot of potential with the -- this database and for one-stop shopping, as Blair said, because, you know, if you're trying to connect the dots on state spending, the best way to do it is to search one place.

You know, say there's a state vendor and you've got a concern about them, you just search one place and get all the information about, you know, what contracts do they have, what campaign

contributions are they making, what bills are they lobbying on, et cetera.

That's -- that should -- it should be easier for the public and the legislators to connect the dots, and the potential is really there.

And I think that, you know, the exercise of the AG's office doing that, and -- is really important because it kind of points out the flaws in the data. Like Ben said, the board of elections data is bad.

The AG has made it more user-friendly. But there's also, you know, data-integrity issues, where, you know, in some places, looking at the campaign contribution data, you will find the same vendor spelled four different ways.

IBM Corp. IBM Corp. IBM.

It's just -- it's kind of maddening, and I think it's something that I -- not a lot -- you know, very much in the weeds, but it's kind of crucial to integrity, and anticorruption efforts, as if -- if your data is terrible, it's going to be harder to -- you know, for the enforcement agencies to do their job. So....

SENATOR BIAGGI: Right.

That's pretty remarkable, actually.

And just for the record, because, you know, being candid, obviously, most important, I did not even know that this database existed until recently.

And it's actually something that I have been talking about. But to see that it exists, so that the infrastructure is at least there, and that we can deal with what we've got and make it better, is really, frankly, very promising to me. And do I think it would be very useful to a lot of legislators, as well as the public.

So this is something that I'm really excited to work on, which sounds so silly, but it really, I think, can transform the way we actually work and make decisions. And that's the whole point at the end of the day.

I believe that that is all of the questions that I -- oh, I actually have one final question.

Apologies.

You had mentioned this, but I just want to get this on the record very clearly, when we were talking about the inspector general's powers, and who they may investigate.

And so, Linda Lacewell, the former DFS superintendent and aide to Governor Cuomo --

BLAIR HORNER: The minister of defense.

SENATOR BIAGGI: -- among other things --
What's that?
BLAIR HORNER: The minister of defense, as you may recall.
SENATOR BIAGGI: Yeah, minister of defense, amongst other -- yes, that's a really nice way to put it.
Thank you for doing that for me.
I appreciate that. I had a loss of words there.
-- she had testified in the AG's investigation, that the inspector general is legally prohibited from investigating both the governor and the secretary -- governor.
And so just to make it very clear on the record, for the three of you:
Do you believe that the inspector general may investigate the governor or the secretary -- governor should the need arise?
And do you believe it would be a conflict of interest for the inspector general to investigate the person who appoints them?
Two separate questions.
RACHAEL FAUSS: I haven't looked at those particular legal issues, but, obviously, if all that is true, that is a massive problem, because that's

their job.

So, you know, I would assume that the person -- you know, Linda Lacewell's statement is accurate. And I think that -- it's alarming and extremely troubling.

And, obviously, your legislation to look at the IG and fix it, I mean, that's perhaps something to look at, and make sure it's addressed in that.

BEN WEINBERG: I'm not a lawyer, nor a counsel on this issue.

I would hope that that statement was made after the legal counsel telling her that that is the situation.

But as Rachael said, if that is the case, it makes the whole position quite redundant and pointless.

BLAIR HORNER: Well, I mean, there's a logic to it. Right?

She reports -- people, in the case of the inspector general, so how can she investigate them?

Now, again, as we mentioned before, Joe Fish did, and the current IG says she can.

So it may not be a legal issue as much as the way it's set up that creates this inherent.

And by the way, it's also convenient, because

it might have been a convenient legal interpretation to keep the IG from following up on the book leak in JCOPE, just, coincidentally.

So I -- you know, I think that -- what the law is, it certainly seems fuzzy enough that you guys recommend we clean up. But I think the whole issue of having the IG report -- secretary, effectively, the governor, is a fundamental flaw.

SENATOR BIAGGI: Yep. I happen to agree.

Thank you all so much.

As always, we really appreciate the time that you take, the care that you take, and also, really, the dedication to ethics, and to supporting us, in making sure that we do our jobs as best as possible.

So I have a lot of hope for the 2022 legislative session, and I look forward to working with you all.

BLAIR HORNER: One month.

SENATOR BIAGGI: One month. Exactly.

Happy holidays.

Thank you so much.

SENATOR KRUEGER: Thank you.

SENATOR BIAGGI: All right.

All right. So next up will be, actually, a virtual panel, and we will be hearing from a

legislator from California, Scott Wiener, and also his legislative counsel, which is the person who serves on -- excuse me -- serves as legislative counsel to the ethics committee that he also serves on as well.

And it's noon, so that's about right.

Okay. Why don't we take just a 15-minute -- 10- to 15-minute break.

Let's take a five-minute break for the restroom, and come back at 12:20.

Thank you.

Okay. So we're not going to take a break.

I'm glad that the -- this is so fun.

Okay. That's great.

I'm glad that....

Okay. Whenever you're ready.

CA SENATOR SCOTT WIENER: We're ready?

SENATOR BIAGGI: Yes. Good morning to you, and good afternoon to us, because -- since you're three hours behind.

I'm very grateful for you to join us today.

And, also, just before we begin, are we waiting for your counsel, Erin Peth?

CA SENATOR SCOTT WIENER: No, she's here.

SENATOR BIAGGI: She's there?

Okay, great. That's wonderful.

All right. Well, thank you very much for joining us. We're really grateful to have you.

I often joke in New York, no matter what we're doing, California seems to lap us, unless Senator Hoylman seems to be on to what's going on in California, and then also gives a lot of competition.

So I know you have a nice -- a good friend here as well.

But we're really grateful that you joined us, to share what's going on in California, especially because your ethics rating in your state is actually much higher than New York's.

So we look forward to hearing your testimony, and also engaging in some dialogue afterwards.

CA SENATOR SCOTT WIENER: Great.

Thank you, Madam Chair, and committee members. And hello to my friend and law school classmate, Senator Hoylman.

So I'm Scott Wiener. I have the honor of serving on the California State Senate, representing San Francisco and the northern part of San Mateo County. I've been in the Senate since 2016.

I serve as chair of our Senate Legislative

Ethics Committee, and I also chair our housing committee.

So thank you for inviting me today.

I will be focusing on our Senate ethics requirements.

I'm also joined by Erin Peth, who is the chief counsel to our committee on legislative ethics. And before joining the Senate, Ms. Peth was the executive director of California's Fair Political Practices Commission (FPPC), which is our statewide ethics agency with broad oversight over government ethics issues, as well as campaign finance issues.

So Ms. Peth is very expert in these issues, and will be able to help out with -- if there are some questions that I can't answer. She has very, very broad knowledge.

So California has a robust set of ethics requirements for government officials. We have a layered approach to our ethics rules. Some are in our state constitution, and statute and regulations issued by the FPPC, and internal agency rules.

The Senate, we have adopted specific internal ethics rules to cover all of our staff members, and those provisions are contained in our standing rules

and in our Senate Standards of Conduct.

That calls for the creation of a legislative ethics committee, which is comprised of six senators, at least two have to be from each party, and the chair and vice chair can't be from the same party. The two leaders are president pro tem and the minority leader are ex officio members.

We receive complaints related to members or staff. We review those complaints.

Sometimes we hold public hearings.

Sometimes a public hearing is not warranted, and we can issue anything ranging from a warning or admonition, to stripping a member of various rights or privileges, a reprimand, a censure, and, potentially, expulsion.

If the respondent is a member of our staff, then we transmit our findings to the rules committee for appropriate action.

We, also, California law and our standards require all senators and staff to attend a comprehensive ethics training once every two years.

Also, each senator is required to have an individual review session with Ms. Peth every two years; so, one-on-ones, in addition to the

larger group trainings.

I know there has been some concern in New York about leaks from ethics hearings, as I understand it.

We have very, very strict rules for our ethics committee about not disclosing information. And any member who discloses information is subject to discipline.

So we take confidentiality very seriously, and our members have respected it.

Our ethics committee work very, very well together in a bipartisan nature.

I'm a liberal Democrat from San Francisco. My -- our vice chair is a very conservative Republican from Bakersfield. And the two of us really work hand in glove in overseeing the committee, and we talk regularly. And it's been a good bipartisan, often consensus-driven, committee, which is really important in the ethics arena.

The standard of conduct in the Senate would -- it contains 12 standards, and they were adopted in 2014 after three different senators faced criminal prosecution in that year for separate incidents.

It was not best year for the California State

Senate, 2014; but we've moved past it, and we did adopt these very detailed rules.

The standards really have two fundamental principles:

The first is, that holding public office is a public trust;

And the second, is that trust is eroded by actions that appear to place the official's private interests over public interests.

The standards are very clear that appearance is also important, even if a rule hasn't been violated.

And I think we all know that in public service, that, you know, appearance of propriety is quite important.

The standards establishes zero-tolerance policy for unethical behavior, and also create a duty to report violations.

The standards strive to have all senators and staff be independent and impartial, and to make decisions through the established process of government, and not to use public office, of course, to obtain personal benefits.

So, again, thank you for the opportunity today, and Ms. Peth and I are happy to answer any

questions that you may have.

SENATOR BIAGGI: Thank you very much, Senator, and we're going start with Senator Hoylman.

And, really, I just appreciate also your -- the words that you mentioned about your working across the aisle.

I think it is needed probably more than ever, and it's a really good inspiration to those of us in New York; so, I want to give you credit for that.

Senator Hoylman.

SENATOR HOYLMAN: Hello, Senator Wiener.

CA SENATOR SCOTT WIENER: Hello, Senator.

SENATOR HOYLMAN: It's good to see you.

You know, we went to law school together many years ago, and I try to emulate Senator Wiener from the East Coast. He's kind of like my West Coast counterpart, except he's much taller, and represents a lot more people. I think you have a million constituents, I think, the last time I checked. Your districts are very large out there. But we've worked together on a lot of legislation.

But I wanted to ask you about outside income, and whether that is an issue in California.

Does the California State Legislature allow your members to have part-time jobs outside of their

legislative duties?

CA SENATOR SCOTT WIENER: I think under limited circumstances. But Ms. Peth actually could probably comment on that in a more detailed way.

I take the approach, I don't allow myself to have any outside income, period, even if it's allowed.

But there are -- you know, it is allowed under certain circumstances.

SENATOR HOYLMAN: I was just wondering if that's something the legislature has looked to address.

I've carried legislation for a number of years that would, essentially, limit it to things like teaching courses; essentially, no more than around 10 percent of your base income, modeled after the United States Congress which has strict rules around that.

Also, my legislation would prohibit the practice of law by members, because I felt, like, you know, you can't have both a duty to your client and a duty to your constituents, particularly when one is privileged.

Do -- are -- is the practice of law -- and, again, if your counsel is there -- is the practice

of law permitted by legislation?

CA SENATOR SCOTT WIENER: It is, but Ms. Peth can elaborate further.

I think we have -- I think we're fairly permissive.

SENATOR HOYLMAN: Got it.

Has it led to --

CA SENATOR SCOTT WIENER: Ms. Peth can comment further.

ERIN PETH, ESQ.: Yes, so to echo what Senator Wiener was saying, it is allowable for our members to have outside employment.

As a practical matter, we do have a full-time legislature in California, and I think, you know, they are, obviously, incredibly busy people.

So we do -- but we do have some members who are members of the bar, who have retained, you know, some sort of position in a law firm.

We obviously do have conflicts-of-interest provisions.

So those outside sources of income could arise in a conflict-of-interest situation, depending on what decisions the members are involved in.

SENATOR HOYLMAN: Thank you.

No, that's interesting.

I wanted to know if New York was an outlier in that regard.

It sounds like --

CA SENATOR SCOTT WIENER: I have a feeling that -- I mean, so many state legislatures are part-time. There is the whole other issue of, you know, especially large states, like Texas, that have part-time legislature. And you're forcing people to have outside employment, and that can create a conflict.

SENATOR HOYLMAN: Right.

And that's the problem I think a lot of our colleagues, you know, we're all under economic pressure at home.

Our salaries are reflective of, you know, I think more of a part-time legislature, on some respects, than a full-time legislature. And so our members who are lawyers, and who have private employment, you know, need that supplemental income.

I wish that, in New York State, we could do what the city council has done here, which is have an independent commission, fully, that sets our salaries, rather than make it subject to political horse-trading, which is, I think, sadly what's happened in New York for decades. And even in the

last iteration of an attempt at a commission for a salary, we ended up, Senator Wiener, and like lawsuits, and some sort of halfway approach, where the legislators were afforded a salary, but only partially. And I think there may still be an appeal around that issue.

So it's -- like, to a finer point, which is -- a finer -- to drill down on that, how are your salaries set in California?

CA SENATOR SCOTT WIENER: Yeah. So we have a citizens commission, I can't remember the formal name, that sets salaries for legislators and for our statewide constitutional officers, like governor, attorney general, et cetera. And once a year there is a cost-of-living adjustment.

And so we just -- we get a memo, to your -- saying, there's no increase, or you're going to get a 2 percent increase, or whatever the case may be, and, there can be shenanigans.

Our last -- when Governor Schwarzenegger was governor, they -- he got the citizens commission to take a wrecking ball to legislative salaries during the last recession, and to really take a big whack in reducing those salaries. That was just a political attack by Governor Schwarzenegger.

But, that aside, I think it works reasonably well.

SENATOR HOYLMAN: Thank you.

Senator Biaggi, I think it's something we should --

SENATOR BIAGGI: I agree.

SENATOR HOYLMAN: -- we should look at, to really, fully, remove the pressure of outside income on our members who, all in all, are trying to do the right thing and provide for their families.

But there's -- it's a very expensive state, and particularly city, to live in.

CA SENATOR SCOTT WIENER: I think it's -- I think it's incredibly important.

When I first moved to San Francisco in 1997, the San Francisco Board of Supervisors, which is more than a full-time job, given the intensity of this great city, they made $24,000 a year, and only the voters could set the salary.

And so voters, at one point, finally raised it to 36,000.

But, ultimately, the solution is a -- the charter amendment to transfer it -- a civil service commission, and so the board now actually gets a real salary.

SENATOR HOYLMAN: Good seeing you, Scott.

CA SENATOR SCOTT WIENER: You too, you too.

SENATOR BIAGGI: Thank you, Senator Hoylman.

And, actually, I could not agree more with that approach, and I think we should do something about it; so we must.

Senator Borrello, please.

SENATOR BORRELLO: Thank you, Chairman -- Chairwoman. Excuse me.

It's the mask, I promise.

[Laughter.]

SENATOR BORRELLO: Senator Wiener, thank you very much for coming on and speaking with us. We appreciate it very much.

I thought it interesting that you pointed out that you are co-chair of this ethics commission; is that correct?

CA SENATOR SCOTT WIENER: No. I'm the chair, and then my Republican colleague is vice chair; but we operate together.

SENATOR BORRELLO: Right.

So -- and you said that you're obviously a liberal Democrat and he's a conservative Republican.

CA SENATOR SCOTT WIENER: "She."

SENATOR BORRELLO: She, she. Excuse me.

And that this is really worked very well in that model.

And that -- so, you know, Chairwoman Biaggi mentioned that California is far and above New York as far as ethical standards.

So would you attribute the bipartisan nature of your commission as being pivotal to that, you know, based on what you said?

CA SENATOR SCOTT WIENER: Well, I'll be honest, our legislative ethics committee had not been constituted for several years, because I don't know if it was because there weren't complaints coming in, or what the reason was. But -- and it was only about a year ago, or earlier this year, that our Senate leader reconstituted the committee.

So if we're good on ethics, and we try hard, that did predate the reconstitution of the ethics committee.

So I don't think that that bipartisanship is the reason that we have the culture that we have.

I think we have strong ethics rules, which is -- and laws, which is probably I think the most fundamental issue.

But having had -- there have been -- and I can't get into the details because it's

confidential -- you know, complaints that come in, it has been really helpful to have that bipartisan working relationship in the ethics context.

I try to have it in other contexts as well, and sometimes it works, sometimes it doesn't.

But on the ethics front, I think, you know, we have tried hard for it to work.

But I also think that it has to do with, also, like the personalities of who is on the committee from both sides, because we can, you know, imagine situations where, for example, certain members of Congress, you know, that we all know, we might not want to have on that kind of committee.

And we -- you know, so having the right personalities of people who really are willing to set aside partisanship in the ethics context, and really just look at the facts, and try to work together, because it does build confidence. Right?

If you have a unanimous consensus that this was a violation, or this wasn't a violation; or it was a violation but it was minor, so it just warrants a private, you know, admonishment letter; or this is so significant, it, you know, needs a public hearing, and -- if do you that unanimously, it's very powerful, and it builds confidence in the

result.

SENATOR BORRELLO: Okay. Thank you.

With that being said, then, you've got yourself, you've got a bipartisan membership in this commission. They're elected officials, they're sitting legislators.

And what's the overall makeup of your state legislature, like, Republican versus Democrat?

CA SENATOR SCOTT WIENER: We have, in both houses, more than 75 percent Democratic members.

So in the Senate it's 31 out of 40 are Democrats. In the Assembly it's -- is it 60, or 61?

We've had some resignations recently, and some -- not for ethics reasons -- and we have some vacancies. But there were, I think, 61 in the Assembly.

So it's a strong majority.

It's -- we have, on our ethics committee, it's four Democrats and two Republicans, in addition -- two ex officios who are our two leaders.

And it requires a two-thirds vote for us to take action as well.

So, yeah.

SENATOR BORRELLO: So despite having super majorities in both houses, you still have what would

be considered a balanced ethics commission, based on that, and that seems to have worked well for you?

CA SENATOR SCOTT WIENER: Yeah -- yeah, the -- yes, it does work well.

SENATOR BORRELLO: Great.

Just one final question, and I know my time is almost up.

Do you have an actual vehicle to remove an elected official within your law?

I mean, I think one of the troubling issues, and I'm speaking more as a former local government official, that there's just no -- there's no vehicle to remove an elected official, except for the governor.

CA SENATOR SCOTT WIENER: We have the power in our constitution, each house determines the qualifications of members, and if someone is to be seated. And we have the power to expel a member if we deem it appropriate. And, obviously, that's an extreme power, but we do have the power.

I don't think that power exists -- well, in local government, it just depends on the charter of the city. But each house of the legislature does have that power.

SENATOR BORRELLO: So since you have that

power, would you consider that, basically, the teeth in your ethics commission, or at least some of it?

CA SENATOR SCOTT WIENER: I mean, that would be more than teeth. It's pretty nuclear. And, you know, obviously, under extreme circumstances, it can absolutely be warranted.

But we also, you know, even issuing a letter of admonishment, or finding, if it's made public, which we have the power to make it public, can be very powerful. You know, obviously, no one wants that kind of letter to be issued.

SENATOR BORRELLO: Yeah.

CA SENATOR SCOTT WIENER: But we can also take away rights and privileges. We could -- I think we can take away someone's office, or someone's staff.

Ms. Peth will correct me if I'm wrong.

We can say, strip someone, or maybe the rules committee, but the body has the power to strip someone of their committee assignments, for example; or perhaps to say, you can't introduce legislation this year.

So we have pretty broad powers short of expelling someone, to create strong incentives not to mess up.

SENATOR BORRELLO: Great. Thank you very much.

Thank you.

SENATOR BIAGGI: Senator Palumbo.

SENATOR PALUMBO: Thank you, Madam Chair.

Senator Wiener, nice to see you.

CA SENATOR SCOTT WIENER: You too.

SENATOR PALUMBO: By way of follow up:

What are the, almost like, the practical aspects of, for example, a very serious violation, and now your committee determines that someone needs to be removed?

Does that then go -- full Senate?

CA SENATOR SCOTT WIENER: Yeah. So any kind of action, like, certainly, expelling a member, removing someone from committees, I think, you know, maybe saying a person can't introduce legislation, I think that would -- we would refer that -- and Ms. Peth will correct me if I'm wrong -- rules committee. And then it would probably go for -- floor for a full vote of the Senate.

Ms. Peth, am I being accurate there?

ERIN PETH, ESQ.: Yes, that's correct.

CA SENATOR SCOTT WIENER: Yeah.

SENATOR PALUMBO: Okay. Thank you.

And is there any sort of an appellate process that they can -- you know, that it can be -- if the member objects, of course, to expulsion, they probably would, is there any further, if you want to call it "due process," or, that's it, they're done, pack it up?

CA SENATOR SCOTT WIENER: I don't think so.

I think our constitution, and this is similar -- U.S. Constitution, that's full power in each house of the legislature to determine the qualifications, et cetera, of members.

And so that would be I think not -- not justiciable in the courts. I think the courts would likely find that it's co-equal branch of government, and there's no -- Senator, I will say that I found this out on a personal level, when I was running for reelection last year.

Initially, a former state senator had announced he was going to -- in San Francisco was going to run against me.

He was clearly and unequivocally termed out -- had termed out 20 years before. There was no argument that he was not termed out.

And so I thought, okay, well, if he files to run, we'll just, you know, make sure -- you know,

we'll file an objection -- secretary of state, or do something, to keep him off the ballot.

And multiple lawyers advised us, very smart lawyers, that a court was very unlikely to take action; that it was ministerial action to put him on the ballot. And it would be up to the Senate, if he were to win, to decide not to seat him.

So this is really all within the ambit of each house of the legislature.

I don't know what the New York constitution says, but ours is very similar to the federal Constitution.

SENATOR PALUMBO: That's interesting.

And you said, so he's termed out.

You have term limits in the Senate in California?

CA SENATOR SCOTT WIENER: We have term limits in the legislature.

It used to be, it was horrible, it was six years in the Assembly, eight years in the Senate.

And so in the Assembly, in particular, you would have speakers who would either have had six months under their belt, or were about to be termed out.

It was reformed about 12 years ago, that we can do 12 years either in one house or divided between two houses.

So we have a 12-year term limit.

So that's three 4-year terms in the Senate, or six 2-year terms in the Assembly.

I don't recommend term limits. So....

SENATOR PALUMBO: Well, thank you, Senator.

And the use of the word "justiciable," it sounds like you paid attention in law school.

I know Senator Hoylman is not here. So, you know, we're going to quiz him as well.

But, well done.

But thank you again.

Enjoy the holidays.

We appreciate you coming.

CA SENATOR SCOTT WIENER: Thank you. You too.

SENATOR BIAGGI: Thank you.

Senator Boyle.

SENATOR BOYLE: Thank you, Madam Chair.

Thank you, Senator, for joining us.

And also kudos to California, if you said that you didn't need the ethics committee because there were no complaints for a few years.

We would have it every few weeks, I think, so that would never work for us.

Just to get back to your idea of expelling or reprimanding or punishing members of the legislature, can you or your counsel give any examples recently of anybody recently kicked out, or at least censured, or something, or...?

CA SENATOR SCOTT WIENER: Well, since I'm in my -- I'm about five years in, it hasn't happened.

There's was -- we had -- we had a period about three years ago where we had some sexual harassment problems in both houses. One of my colleagues, actually my seatmate, ultimately resigned. There were a few resignations in the Assembly. And I know there had been talk about potential severe actions, up to and including expulsion. Nothing formal, it was just talk about it.

But, ultimately, the members at issue resigned, and so that became moot.

But as far as I can recall, there have not been any censure or expulsion motions.

I know, in 2014, before I was there, we -- actually, it was two -- three senators resigned: two for corruption, one because he was found not to live

in his district.

I actually think he was treated unfairly. It was a bad situation.

But the other two were straight up corruption, including one from San Francisco who was involved with like gun-running, and things like that. It was really a bizarre situation.

So they would have been expelled -- I believe, would have been expelled; but ultimately resigned, and went to prison --

SENATOR BOYLE: Wow.

CA SENATOR SCOTT WIENER: -- those two.

SENATOR BOYLE: Well, very good.

Thank you.

CA SENATOR SCOTT WIENER: The third one was ultimately, down the road, I think, pardoned by [indiscernible].

SENATOR BOYLE: Well, we have similar problems in New York, but mostly in the governor's mansion as opposed to the legislature. So....

But thank you for joining us, Senator.

SENATOR BIAGGI: Thank you so much.

I just have a few questions, just to kind of bow -- put a bow on today's questioning with you, because you've answered a lot of them.

And I'm going to ask you the question that I asked also the members of the Senate from Alaska and Rhode Island when we had our last hearing.

And the reason I'm going to ask this question is because of this very undercurrent in New York.

New York ranks 31st when it comes to ethics, and just overall corruption and transparency efforts; whereas California ranks second.

So, really, hats off to all of you for that.

And so, from your vantage point in California, what is your perception of how New York handles ethics?

And please be as honest as possible, and the reason I say that, it's not really not a joke, even though it's almost laughable just how absurd it is.

But we want to be able to understand how the rest of the country and the world views us, and so it's important that you be as honest as you absolutely can be with us. No offense will be taken.

CA SENATOR SCOTT WIENER: So I grew up in New Jersey, in the southern part of the state. And I know New Jersey has a certain reputation. I don't know where New Jersey currently ranks on that list.

But -- so -- no, I don't -- and I don't

perceive New York to be in that category.

I actually, you know, my perception, which is really based on the news -- obviously, I'm not personally involved -- is, you know, I saw, obviously, everything that happened with your former governor, and not just the issues that caused him to resign, but just sort of the way he seemed to move in the world, which is -- would not make me happy if our governor did that.

SENATOR BIAGGI: Yep.

CA SENATOR SCOTT WIENER: But -- and then the speaker of the Assembly, you know, I saw that.

But I never attributed that to -- I couldn't -- I had no way of knowing if that was a broader issue, or it was just like a few -- you know, there's always going to be people who act in inappropriate ways even in the best of systems.

And, ultimately, the system caught up with them, and they left.

So I really don't have a perception one way or the other.

I would say if I did, but I don't.

SENATOR BIAGGI: I appreciate that. That means a great deal.

Okay. So just two more questions.

So your committee -- you mentioned this, that your committee is tasked with developing the standards of conduct for all the senators, Senate officers, and also employees.

Can you just share a little bit more about that work, and just how often your committee revises the standards, and do you find that this process is effective?

We have some role in some of those kinds of issues. But a lot of what we are dealing with, when it comes to ethics in New York, specifically with members and legislative officers, is from a section of our law and statute, Section 74 of the Public Officers Law.

So this is a little bit different.

So I'm just wondering about the process.

CA SENATOR SCOTT WIENER: Yeah, so we -- these standards were adopted, I think it was in 2014, or thereabouts, and so they're still pretty fresh. They're not like, you know, 50-year-old standards.

I -- we -- I know that, in going through some recent processes in the committee, we noticed that there was some language that needed to be tightened up a little bit.

And so I know we were looking at potentially just making some things clearer, because, you know, until you start implementing standards, sometimes you don't know if they have been drafted, you know, as tightly as they could be.

I don't think we're planning any significant or substantive changes at the moment.

Again, these are only seven years old and they seem to be working well.

But I think we -- you know, I mean, if we ever see a gap, or something, that, you know, we didn't anticipate, we wouldn't hesitate to take a look and to propose modifications.

SENATOR BIAGGI: Would you be able to modify them -- well, that's actually much better.

Would you be able to modify them at any time, or does it have to be a certain time of year?

CA SENATOR SCOTT WIENER: No, it's at any time the committee could propose a modification to the full Senate, and then it would just be voted on by the full Senate.

SENATOR BIAGGI: Okay. That makes sense.

And then, in terms of the other house, obviously there's the Senate, and the --

Is it called "the House" in California, or

the Assembly?

CA SENATOR SCOTT WIENER: It's Assembly.

SENATOR BIAGGI: It's the Assembly. Okay.

-- so in the Assembly, do you have standards that are mirroring each other?

And the reason -- let me just share the reason why I asked this question.

Because, obviously, these are two separate houses with two different types of bodies, and so we're very much aware of that.

But in New York, our rules are -- for -- certain rules are different. And so what that leads to in New York is a little bit of confusion as to, if you're a staff member, as opposed, you know, in one house versus the other house, it might be a different process. Where do I go? Who do I talk to?

It becomes a little confusing.

So, just, can you walk us through that; is there a similarity?

CA SENATOR SCOTT WIENER: So we do -- we do have, for example, we have joint rules of the legislature, which mostly govern the legislative process and calendar so the two houses are in sync.

And then each house has its own rules, and

the Assembly have their own standards of conduct.

One area where we have worked together is around workplace conduct, and, like, this was created -- a workplace conduct unit was created after the sexual harassment situations that I mentioned a few years ago. So in that area we have worked together.

But perhaps Ms. Peth can comment further on those issues.

ERIN PETH, ESQ.: Yes, so the Assembly does have their own ethics and their own standing rules, and so they're pretty similar to our standards of conduct in the Senate.

But we have, actually, as we talked about today, pulled those standards of conduct out in a separate sort of stand-alone document.

But I would say, overall, the rules are pretty similar.

But I understand what you are saying about confusion. You know, we do have staff members, I'm sure you do in New York also, that switch between the houses.

So I think keeping the rules as consistent as possible is helpful.

We also have many Assembly members who then

are ultimately elected to the Senate.

So we do try to work together, to make sure we're staying consistent.

And in my capacity as chief counsel -- ethics committee, there's a staff member on the Assembly side who has the same -- basically, the same position. I work really closely with him as well, so that we make sure we're staying consistent in our advice, so that we, you know, sort of minimize, as you said, confusion by the members and staff.

We want to make sure the houses sort of have the same advice and counsel coming out as well.

SENATOR BIAGGI: [Simultaneous talking.]

Go ahead.

CA SENATOR SCOTT WIENER: One thing I will just add, that is probably a California-specific issue that will become, hopefully, less of an issue, is that, historically, before the current iteration of term limits, so, preterm limits, and then when we had separate term limits for each house, the senators were overwhelmingly former Assembly members; served in the Assembly, and then moved -- got elected to the Senate.

And so, as a result, the Assembly does a lot of initial training of new members, in terms of all

the way the house works, the, you know, ethics, everything else, that you need to know as a new member of the legislature, and like pitfalls, and, you know, don't talk about -- you know, legislation when you're having a fundraiser, or all these things that someone can easily, if they don't have strong training, could have a lapse.

And so because the Senate historically was overwhelmingly former Assembly members, the Senate had less training because the members were already, you know, experienced Assembly members.

With the change -- 12-year term limit, where you can be in one house, we have more and more senators, like myself, who never served in the Assembly, who went right from local government, or from no office at all, to being a senator.

And so we've sort of recognized recently that we're going to have to -- we need to have more training because we have more and more senators who have no previous legislative experience.

And so we're going to be making -- our pro tem has indicated that we're going to ramp that up.

SENATOR BIAGGI: That sounds, actually, quite important, and I agree with that.

And I think when it comes to training,

I think as much as you can possibly get to be very clear about the boundaries is essential.

And so -- and we have the same kind of dynamic in New York, with a lot of people who have not served in government, who are now in government, and really just need maybe a little more help.

Just two more questions, but going back -- workplace conduct unit that you said that you created, what is the makeup of that?

And, also, did you have to create it by legislation? by rule? by regulation?

CA SENATOR SCOTT WIENER: That was created -- well, we did a few things.

The legislature used to be exempt from retaliation claims.

We removed -- we legislated to -- we legislated the elimination of that exemption.

In addition, I believe it was by rule that we created the workplace conduct unit.

Ms. Peth is nodding her head.

I'm trying to dredge my memory back.

That unit is not comprised of members. That is -- there is -- it's made up of staff, and there's an outside person. But Ms. Peth perhaps can describe it.

ERIN PETH, ESQ.: Yeah, I'm happy to.

CA SENATOR SCOTT WIENER: We were trying to create a safe place for people, you know, particularly in the sexual harassment context, to be able to come forward and make a complaint.

SENATOR BIAGGI: That's great.

ERIN PETH, ESQ.: Yes, and so kind of echoing what we said earlier, there was a lot of -- during sort of the "Me Too" movement a few years ago, there was a lot of criticism that the Senate and the Assembly were handling those kinds of complaints and allegations in different ways.

And so the houses worked together to create that workplace conduct unit.

It's actually located in the office of the legislative counsel, which is a -- basically, the legislature's lawyers. So they created a separate unit within that office of legislative counsel, and they staff it with lawyers and investigators who basically do the preliminary, you know, review and the investigations. And then it goes to, I believe, and I would have to -- I -- we can provide this to you, but I believe that there -- the California Supreme Court Chief Justice appoints people to then review -- review the reports that are produced by

the investigators and the lawyers. And then it goes back -- House to actually figure out, you know whether -- you know, if the allegations are proven true, what is going to be the results?

You know, so that goes back to what Senator Wiener was saying earlier, in terms of the House still having control over obviously employees, but also members, in terms of what type of discipline would be appropriate.

But I'm happy to follow up with more detail on how those appointments happen, if that's helpful.

SENATOR BIAGGI: I would love that, actually, because it's an interesting, and I think -- "interesting" is not the right adjective.

It's a smart way to handle those kinds of issues.

And the fact that it goes -- chief judge is actually another check on what is happening internally, because I think a lot of the criticism in New York as well, is that, when things are handled internally, then how could you be impartial if you have to make a decision about a colleague or somebody else. But having that extra check is important, and then bringing it back.

So I know it's a challenging way to set it

up, but I would like to actually have more information about that. That would be really, really great.

This last question -- and, frankly, if you can't answer it, that's totally fine -- but this is something I think that is -- it's important to me for the reason of just coming out of a cycle that we repeat and repeat and repeat, because of elections, because of dynamics. And it's, basically -- and it's more of like an ethical question as opposed to legislative ethics.

And so I know, Senator Wiener, you had mentioned, just, you want to be very focused on those questions. And so, again, it's okay if you cannot answer this.

But, in the legislature, in the Senate, are the legislative budgets equal across both houses?

Meaning, if you have -- obviously, you have Republican colleagues, and so they get a budget to set up an office, they get a budget to set up staff. And then, of course, you know, as -- you know, the other party, the Democratic party, gets the same kind of thing.

Do both parties, no matter whether you're in the majority or the minority, get the same budget?

The reason I say this is because there is just a sense of fairness, I think, that goes into this, that it kind of -- it goes back and forth, at least in New York -- right? -- the majority has a larger budget, presumably because there's more people and you need more staff, of course, to run the Senate, which makes sense.

But when it comes to the individual members, I'm just wondering what California does, and if you have an imbalance or the same.

CA SENATOR SCOTT WIENER: The two houses are very different.

The Assembly, each member gets a pot of money, and so they can hire fewer staff at higher salaries, or more staff at lower salaries, for example. And it's up -- speaker.

So even among Democrats, like different people may get different pots of money.

The Senate is much more regimented.

So when I came in, it was, like, if you were a senator that represents more than one county, you get 12 staffers, with very regimented slots of what those are, ranging from chief of staff, down to like a legislative aide or an administrative assistant.

And if you represent one county, you got 10.

Over time, you know, you might get different staffers for different reasons.

But I think it's a little more regimented in the Senate.

I believe Democrats and Republicans get the same staffing in the Senate, I believe.

You know, their -- yeah -- I mean -- and, of course, our budget, in general, is bigger because we're a much bigger caucus.

But the Republicans also have, you know -- you know, minority staff on each committee, and -- or they may have one consultant who handles multiple committees.

You know, we have, at this point, a declining number of Republicans. So some of my Republican colleagues have complained to me that they serve on so many committees, because they're stretched to different committee.

SENATOR BIAGGI: Sure.

CA SENATOR SCOTT WIENER: But, yeah.

SENATOR BIAGGI: Okay. That's very helpful.

Yes, I know it used to be us.

We were -- oh, yes, yes. Please, yes, Senator Boyle.

And thank you for answering that question.

CA SENATOR SCOTT WIENER: And I do have to, unfortunately, run in a minute.

SENATOR BIAGGI: I know, two minutes.

CA SENATOR SCOTT WIENER: But I can do one more question.

SENATOR BOYLE: Very quickly, Senator; and thank you very much.

And thank you, Madam Chair, for bringing that up.

This is an issue, before I was elected to the state legislature many years ago, I served on Capitol Hill as a congressional staffer for five years. And whether you were the most senior Republican or Democrat, or minor, everyone had the exact same amount for staff. Central staff was different, obviously; but for the different offices in Congress.

And I believe that we had a court case in New York State. I believe our colleague, Senator Krueger, when she was in the minority, was -- with our late colleagues, Tom Kerwin, the Assemblyman, to try and get equal staffing at equal amounts.

SENATOR KRUEGER: We sued.

SENATOR BOYLE: You sued/they sued. They

lost.

And I believe -- I believe, in some of the testimony, there was to say that, Well, if the speaker said that a Republican had one dollar for their staff, would that be acceptable?

The judge said, Yes, because, you know, it's a different thing. We're not getting involved with [indiscernible] a judicial thing.

But I do hope the state legislature looks at that, for fairness and equity.

And I congratulate you for mentioning that.

SENATOR BIAGGI: Thank you very much.

And, Senator Wiener, thank you so much for spending time with us.

And, Erin, the same for you; we appreciate it.

And I really do look forward to working with both of you, hopefully, in the future, not just ethics, but, of course, on other things.

So thank you very much for taking the time.

CA SENATOR SCOTT WIENER: Yes.

And congratulations to New York for, as you said, lapping us on safe consumption sites.

We're jealous in San Francisco because we needed to do it for so long.

But you all beat us to the punch.

Congratulations.

SENATOR BIAGGI: Thanks very much.

Have a good rest of your day, and happy holidays.

CA SENATOR SCOTT WIENER: Happy holidays.

ERIN PETH, ESQ.: Thank you.

SENATOR BIAGGI: Thank you.

Okay. So we're just going to take a 10-minute break before our final panel of the day.

We actually added on someone from the judicial conduct panel -- commission, rather. Excuse me.

Yes, just 10 minutes, and we'll come back.

So, 1:10, we'll return.

(A recess was taken.)

(The hearing resumes.)

SENATOR BIAGGI: Okay, wonderful. Welcome back, everyone.

We are on our final panel of the day, and we're very, very grateful to be joined by Robert Tembeckjian, who is from the Judicial Conduct Commission, to hear about what the commission does, of course, and, also, some of the ways in which it works.

And we're very grateful that you're here today, of course.

I'm a member of the Judiciary Committee, but we also have with us, of course, the chair of the Judiciary Committee here too, Senator Hoylman.

And so, with that, we give you the floor to please share your testimony.

ROBERT H. TEMBECKJIAN: Thank you. I appreciate that very much.

I wanted to just make a couple of points, before we get to questions, on the significance of the independence -- the structural independence of any new commission or ethics entity that you propose, and some of the other considerations that should go into the structure of a robust ethics enforcement entity.

And I do that from the experience of having been an ethics enforcement officer for the judiciary for more than 40 years, and I've been the administrator of the commission since 2003.

Structural independence is critical.

We are created in the state constitution, and the commission itself is a body of 11 members, 4 of whom must be judges, 5 of whom are lawyers, 2 of whom are laypeople. And that balance in membership

is very significant.

The judiciary does not control the investigation and enforcement of discipline against judges, but it does have a participating role and voice, so that decisions are not made without the input of people who understand something about what judges do and what they experience in the day-to-day.

At the same time, it is, I think, especially important that there be non-lawyer members, because so much of what government does, especially in the field of ethics enforcement, is aimed at bolstering public confidence and the integrity of our form of government.

The public has a way of viewing judicial misconduct differently and from a different perspective than lawyers and judges do.

And it might not surprise you that judges and lawyers are among the least likely to make complaints about judges, because it's their world and its their livelihood.

Bringing laypeople -- conversation is very important perspective to keep mindful of as you're crafting the way forward in New York for ethics enforcement in the future.

Within the structure, not only because we're in the constitution, but the structure of the commission itself, means that no one appointing authority controls the body.

There are six different appointing authorities.

The governor appoints four members, the chief judge of the state appoints three, and the four leaders of the legislature each appoints one. And none of them designates the chair or chief executive officer.

The commission itself elects its own chair for a two-year term. And then they retain an administrator who serves as the chief executive officer, and, under statute, is responsible for the day-to-day operation of the agency.

And that is extremely important because, in other states, where the chief judge, for example, chooses the chief executive officer of judicial enforcement, if the Judicial Conduct Commission is upsetting the court system or the chief judge, let's say, by being too effective or too aggressive or too robust, they serve at the pleasure of the chief and they can be dismissed.

As we've seen in other context, if you are

running afoul of the governor, and the governor appoints you as either the chair or the chief executive officer, the governor can make a change, and effective enforcement, essentially, is going to be shadowed by the fear of losing your job for doing it effectively.

So I would urge that any legislation that you craft or constitutional amendment take care for that.

And, secondly, most significantly, if -- if -- even the most perfect constitutional or legislative structure is going to be ineffective if it's not well funded; if it doesn't have the resources to do its job. And if the resources are going to be controlled by some entity that has a stake in the game, that's going to present problems.

As my friends, Senator Krueger and Senator Hoylman, well know, for the last 10 years, the division of budget, in its submission of the executive budget -- legislature, which includes my commission's budget, has, essentially, frozen us out. They keep us flat year after year after year.

The decision was made some time ago for our budget to be submitted separate from the judiciary so that they couldn't control our operations by

controlling the purse strings.

But if you don't have a governor who is -- to the subject, and a division of budget that, essentially, keeps you flat because they consider you, despite the constitutional separation, as an executive branch operation, which we are not, it forces me to come -- legislature year after year to ask for the funding that we need.

And I've been very fortunate with this representation, that the legislature has been responsive. But it shouldn't have to come to that, really.

I'd like to see a system, and I think this is reflected in the constitutional amendment that Senator Krueger has proposed, by which the ethics enforcement entity submits its budget requests to you directly, without the filter of the governor. And then you decide, as the legislative body and the representative of all of the people, what that effective or appropriate level of funding should be.

I'd like to see that for our own commission too.

And I must say that, in recent weeks, I have suggested that -- staff of the new governor. And, lo and behold, unlike the previous 10 years, they

actually seem to be attentive -- subject.

And I have some hope that, this year, when the executive budget comes out, it reflects this respect for the independence of the commission and the constitutional independence of this body, and the importance of ethics enforcement.

I certainly hope that that's the case.

Two more points that I think are really significant.

One is transparency.

Whatever the structure is, there must be, I think, a public window into what the work that the ethics commission or body is doing.

If the public can't see that ethics are being enforced, they're not going to believe that it's happening, even if, at the end of a long inquiry, there is some discipline imposed.

Under the law in New York, which is in the minority of states, judicial discipline only becomes public at the end of the process.

In most states, once the body formally charges a judge with misconduct, the matter becomes public, in the same way that a grand jury investigation is private, confidential, but once charges are preferred or indictment is returned, the

matter becomes public, and so forth.

There have been over the years, you know, some discussion about changing that.

Even without that, we contribute -- transparency of our operation by putting on our website virtually everything.

We have disciplined 903 judges in the last 40 years. Every single one of those decisions is on our website. The records on which those decisions are made are available -- public.

We have all of our rules, internal and external, published on the website.

All of our press releases are on there. Of course, those are public documents anyway.

We have a code of ethics that we've adopted in addition to what's in the Public Officers Law. That's available on our website.

Judges can see/the affected body can see, what it is we do, how we do it. And lawyers that represent them when they do get into trouble, will appreciate and understand how the commission works, because our website is so full. I mean, I think it's fair to say that it is probably the most comprehensive website of its type around the country, in terms of judicial disciplinary

enforcement, and probably, compared to other ethics entities in New York State, it's a cut above.

And, lastly, and most significantly, is to build in, I think, a regular, required "training and education" component.

Judges are required to attend education and training programs after they are elected or appointed to new office or elevated from lower court to higher court.

The Office of Court Administration makes education training programs available throughout the year for all levels of the court system, including all of the different categories of judge: county court judge, Supreme Court, and so forth.

The Judicial Institute, which is designed to put these programs on, makes it a point to include at least two ethics components to every training of newly elected or newly appointed judges, one of which is presented by representatives of the Judicial Conduct Commission.

We tell judges not only how we operate and how we're structured, but how to avoid getting into trouble, and avoid having to see me on any occasion, other than the training and education that welcomes them -- bench.

I know there are regular training and education programs and seminars that the legislature runs.

I think the executive branch really needs to do the same.

It's not just being able to go online and sort of check off the box of an online program; but to actually have structured programs that deal with the specific ethical areas that legislators or executive branch employees, as we do for the judiciary, are likely to get in trouble for, so that they can avoid them.

And I think it's one of the most effective roles that we play.

I would rather scare them straight to stay away from me during their tenure on the bench, than to wait until they get into trouble before they first come to appreciate exactly what it is that we do, and the powerful disciplines that we can impose.

As you know, the commission can impose public admonition, public censure, removal from office for egregious misbehavior, retirement for medical or physical -- mental or physical disability.

We also can privately caution for minor violations, and that's an important factor to build

in. There are -- not every violation of an ethics code requires public discipline in the opprobrium of the public.

There is a place for private warnings to, "Don't do it again. Be a better public servant."

We don't have the power to suspend, and that's something that we've also discussed at various times with the legislature.

So having an appropriate range of disciplines that can be imposed is also, I think, very, very significant.

And I'm aware, from having observed your first hearing in Albany, and watching a little bit on video today, that, certainly, this group of senators certainly seems to be aware of and sensitive to these general subjects.

You can tell from the questions that you have been asking, and the areas that you want to cover, with the other witnesses.

I hope you are able to persuade the balance of your colleagues to be as attentive to these issues as certainly all of you have been.

And I appreciate your having me here, to be able to share some of my experiences, and, certainly, to answer whatever questions you might

have.

SENATOR BIAGGI: Thank you so much.

ROBERT H. TEMBECKJIAN: And maybe, Senator Biaggi, to show that it's nothing to be afraid of for other entities to come before this body and speak to them.

SENATOR BIAGGI: That's right. That is exactly right.

If that could the theme of this hearing, I would put it right at the top.

So, thank you for saying that.

We'll start with Senator Krueger, and thank you for your testimony.

ROBERT H. TEMBECKJIAN: Thank you.

SENATOR KRUEGER: So thank you, Robert, for actually volunteering to come, as opposed to being worried about coming to talk to us today.

ROBERT H. TEMBECKJIAN: Well, I've had experience in speaking before you, and I know it's nothing to be afraid of.

It's actually what we call "good government."

SENATOR KRUEGER: That's right, we do call it "good government."

And I always -- we've gotten to know each other over the years because of your budgets

[indiscernible] with the previous governor.

But, also, I don't know if you remember, but the very first time I think I talked to was because the building I lived in was in a legal dispute with -- between tenants, and a judge, in open court, called out to people, "How many people here haven't gotten a raise in 14 years? I haven't."

"Senator Krueger?"

I said, "I haven't either."

Because that was true.

And then continued on about, Why would you go to work if you don't get paid?

ROBERT H. TEMBECKJIAN: Right.

SENATOR KRUEGER: And so then I asked her in open court, "Are you going to recuse yourself now that you've done this?"

She said, "Of course not."

And then I didn't know what to do with that, because I'm not a lawyer. I just knew the words "recuse yourself."

ROBERT H. TEMBECKJIAN: Well, you might remember that we publicly censured a judge from Western New York, who had urged other judges not to preside over cases in which the lawyers were members of the legislature; effectively, trying to freeze

the legislature out of court until they mandated a pay raise for judges.

And he eventually apologized, and acknowledged that what he did was improper. But he was, nevertheless, publicly censored for it, in part because we have, I think, a robust enforcement mechanism for the judiciary, that we could certainly use for the executive, and perhaps the legislature too.

SENATOR KRUEGER: Right.

So that was a real lesson for me, because then I -- again, I wasn't the lawyer. I was a -- just somebody in the case.

And I asked my lawyer, "Will you file with the commission?"

And the lawyer didn't want to, because lawyers don't necessarily want to be seen as troublemakers with judges, which is, I think, one issue.

But then I learned what the commission did, and how valuable it is.

So it seems to me, it's critically important, and it's such a good model, for looking at how we deal with other ethics issues, because of exactly what you just said to us.

You know, and we've talked about, you know, a JCOPE proposal, or alternative to JCOPE proposal, and the importance of independence, the importance of transparency, the importance of it being an educational and a training function as well, to prevent people from making mistakes and crossing lines, and just what you just described.

I've always found it fascinating, we elect people judges, and then we just assume they would know what to do.

How ridiculous. Right?

They knew how to run for judge.

ROBERT H. TEMBECKJIAN: Yes, they did.

SENATOR KRUEGER: But it doesn't mean they know how to be a judge.

ROBERT H. TEMBECKJIAN: Right.

SENATOR KRUEGER: And, so, all these functions are so important.

So I just think it's very valuable, as the committee continues to look at what we're trying do, that we look at the language in your statute that created you, and take some of the really important models there, including your point that you have your own code of conduct that you built in.

ROBERT H. TEMBECKJIAN: Yes.

For our commission members, that's right.

SENATOR KRUEGER: Okay.

And so judges can actually be found to have failed to sort of stand up under your code of conduct.

ROBERT H. TEMBECKJIAN: Oh, well, there is a code of judicial conduct which is mandatory and must be observed by all judges. That's based on the American Bar Association model, code of judicial conduct. And it's that code that we impose on judges.

But for our own commission members, we have adopted an additional code of conduct that's more stringent than what is in the Public Officers Law, in part because we want to impress on the public that this is a body that is [sic] above reproach.

That it's not satisfied only to adhere to the more generalized ethics mandates of the Public Officers Law, but recognizing that there are peculiar responsibilities to a judicial enforcement entity that require language that wasn't in the Public Officers Law.

And so we adopted that for our own members, and it's another way, I think, of impressing on the judiciary and the public that we take our

responsibilities seriously enough to impose additional burdens on ourselves.

And this is on a commission membership, by the way. As you know, the commission members all serve without compensation. It's volunteer work. But they're all, you know, highly civically-minded, and understand the importance of what it is that they're doing.

SENATOR KRUEGER: You know, I just want to say, I think that is such a great model for us to think about, even just for elected officials, and for people who work for the executive, a code of conduct.

I often explain to people that I actually think elected officials should be held to a higher standard than the rest of the people of New York State, because no one put a gun in our heads and said, You have to serve as elected officials.

We went out there and asked people to vote for us, to give us the power to decide the laws they're going to live under.

So it's always seemed to me that that then obligates us to a higher standard of following the laws because we're writing the laws.

And so I think the concept of a -- and we all know, we take an oath of office, and it's one sentence, about upholding the Constitution.

And I'm not going to test anyone, but would I flunk if someone gave me a constitutional test to find out how much of it I knew that I was trying to uphold.

ROBERT H. TEMBECKJIAN: Right?

SENATOR KRUEGER: Right?

So, you know, actually having a code that we all have to actually read and think about, and sign off on, I think also would be a really valuable idea for us.

So I appreciate that as well.

ROBERT H. TEMBECKJIAN: And we certainly feel the same way about the judiciary.

In fact, the court of appeals, in upholding some of our removal decisions, has commented specifically on the importance of holding judges to a higher standard than that of the marketplace, certainly, because if the public is going have confidence in our system of government, it has to believe that the people who arbit our disputes are and appear to be fair and impartial and independent, and also accountable for when they transgress.

And if that doesn't happen, then our entire social structure is going to collapse, and the way we settle our disputes will move from the courtrooms and civilized discourse into the streets.

And it's one of the things that distinguishes the American form of government from so many others, it's that -- is that we have structures and forms, we have purposely, you know, divided government, so that there are separate and independent branches.

And although not everybody necessarily respects and appreciates that, you know, those of us on the enforcement end at least try to live up to that high standard.

And I think, in my experience, although, as I've said, you know, we've disciplined over 900 judges in 40 years, which is more than 20 a year, the vast majority of judges in New York State, 3400 of them, are capable, honorable, honest, hard-working people who try to get it right.

And the public needs to know that, for those relative few who get it wrong, there is going to be recourse. And that's what we try to accomplish.

And I think, as I heard from some of your witnesses earlier this morning, they seem to think that we do a fairly good job of it.

SENATOR KRUEGER: And just one more question, if I might, because you listened to the testimony of other people, some of the discussion.

So are there lessons from your work, with having your own inspectors doing these kinds of cases, when we're looking at trying to make improvements in our model of inspector general?

I mean, is there just sort of protocols of how you handle these investigations, that you feel, like, you know, you figured it out over 40 years, not you personally, but the commission, and that perhaps we're not giving the right instructions to our inspector general?

ROBERT H. TEMBECKJIAN: Well, one of the distinctions between the inspector general model and the commission model is that, while the inspector general can decide what to investigate and what not, as the relative equivalent of the judiciary, I don't have that authority.

I have to make a recommendation to an 11-member body, which means that I need to persuade them that there is basis here to investigate a complaint. But it also means that I can't tank one; that I can't -- you know, I can't sort of look the other way perhaps because the complaint is against

my employer, or the person to whom I'm supposed to report.

A system that is designed that way, without accountability, without some check and balance, is one that's likely to fail, or likely to pick on what we call "low-hanging fruit," the easy cases.

But when the complaints are against those who are in authority, they're more likely to turn the other way, particularly if they serve at the pleasure of the person against whom the complaint might be made.

Even if the inspector general -- and I have -- and I make no comment on the integrity of the people who have held this position. I happen to know some from the past and I have the highest regard for them.

One in the past that I know, investigated a complaint against the governor that appointed her. That was some years ago.

But even if every decision of an inspector general is honest, and would stand up to public scrutiny, if the structure is as it currently is, the public is not going to believe that a complaint against the governor, or the secretary to the governor, or anyone on the governor's staff, or

anyone close to the governor, or a commissioner that the governor appointed, is going to get robust scrutiny.

The only way that you can convince the public that high officials are being held accountable is to hold them accountable, and to show that you've done it.

And when was the last time that a commissioner appointed by a governor, or a governor, or someone on the governor's staff, was actually reproached by the inspector general?

It doesn't happen.

It just doesn't happen.

Now, maybe they're all behaving appropriately all the time and there's no ethical transgression.

I think the record of the last two years has shown that that would not hold up to scrutiny, that statement.

But, even assuming that it was, the structure is not one that promotes confidence that the watchdog is actually watching.

SENATOR KRUEGER: Thank you.

Thank you.

SENATOR BIAGGI: Okay.

So, Senator Palumbo.

SENATOR PALUMBO: Thank you, Madam Chair.

How are you?

ROBERT H. TEMBECKJIAN: I'm very well, thank you, Senator.

Nice to see you again.

SENATOR PALUMBO: Nice to see you as well.

You know, it's solidifying in my head, I think, what this right model is, and you are obviously a representative of that.

I think, incrementally, we're getting there in the legislature. We're certainly not there yet, but the education and training seems to be the point.

And that almost segues into the upstate judge who said don't preside over any legislator.

ROBERT H. TEMBECKJIAN: Right.

SENATOR PALUMBO: Since you have, and you may have seen that we had Senator Wiener from California on, the chair of their ethics committee, and they have, various levels of punishment, and that, from the public's point of view, seems to be critical.

Because -- and I just -- of course, I'm making kind of general comments, but I will have a question, or maybe if you want to just expound upon it.

That that judge, yes, he said, well, I said maybe it was improper and inappropriate for me to say that. I apologize. I was in a bad mood that day. You know, the dog, whatever, got lost, but you still censured him.

ROBERT H. TEMBECKJIAN: Yes.

SENATOR PALUMBO: And that's almost a really important point, in my opinion.

I'm a former prosecutor. I'm the son of a homicide detective. When I got my -- I came right out of law school, went -- DA's office. Actually worked right around the corner for a little bit for [indiscernible]. And he said, You've got to have compassion.

Like, there's a balance there.

But I think, from the public standpoint, you don't either just hammer someone. You can say, Look, yeah, it was wrong, and, yeah, you apologized, but you should know better.

ROBERT H. TEMBECKJIAN: Right.

SENATOR PALUMBO: And your training tells you you can't say things like that. And don't take the position if you're not going take it seriously enough to control your mouth.

So I think that is a very important aspect of

it.

And then, when we have, and this is really -- let me ask just one quick question before I get to my second point.

It's just a majority vote of the commission renders the punishment? Or is it, basically, deliberated upon, and then they come out with something?

How does that work; what's the process?

ROBERT H. TEMBECKJIAN: Well, we have a couple of different levels of quorum-and-vote requirement.

This will be in stark contrast to the way JCOPE is currently organized, but, to authorize an investigation, it takes a simple majority of the commission members, without regard to whether judge members are for or against the investigation.

And, the commission has the statutory authority to delegate to a panel of at least three members the authority to investigation.

So as opposed to JCOPE, where two out of the dozen or so commission members can thwart an investigation, on our 11-member commission, 2 of them can actually authorize one.

Now, what we have done as a practical matter

over the years, is to make sure that every commission member gets every complaint that comes in. And that's between 1500 and 2,000 a year.

And every commission member votes on every complaint.

But it's a simple majority that's required to authorize investigation, in order to -- so that's six out of eleven.

In order to publicly discipline a judge, it requires a quorum of eight members, so at least eight have to be present and participating. But it still requires six votes to discipline. So it's a majority of the whole number regardless of however many were actually participating in the case.

And sometimes, you know, a member is going to be disqualified from a matter because they know the individuals involved, or there is some other disqualifying interest.

But it's a simple majority to investigate, and an absolute majority to publicly discipline. And that's worked very well over the years.

SENATOR PALUMBO: It almost seems like you would rather have more investigations, because it's simply an investigation, than less.

Because, with that JCOPE example, with the

leak, that it was just suppressed and squashed, that it just was so flagrant and offensive to everyone.

That's something that I think we're dealing with at this point: It's just the public perception, is that whatever we do isn't going to fix anything anyway. It will be the same old, same old.

And that's what we're looking to avoid.

ROBERT H. TEMBECKJIAN: Well, I think that's exactly right. Investigation is not discipline. It's not a finding of wrongdoing. It is a collection of the facts in order to determine whether or not somebody has violated the rules and should be punished for it.

And the majority of our investigations result in no action against the judge.

We -- I mean, we might -- we discipline 20 judges a year, but we investigate 150 complaints, 200 complaints. We do initial inquiries on about four or five hundred out of the 1500 or 2,000 that we get.

As you might imagine, a lot of the complaints we get are just from people who are unhappy that they lost, and they blame the judge, and it's not really ethical misconduct.

And in that way, we actually protect the independence of the judiciary, because we absorb a lot of the anger of the litigating public that went to court and lost, and who can't believe that on the merits they lost, so the judge must be corrupt.

We absorb that criticism so it's not directed at the judiciary.

We explain to each complainant why their complaint was dismissed; or, in the cases where we take action, what prompted us to take action.

And I would say that the nicest letters that we get, although there aren't all that many of them every year --

SENATOR PALUMBO: I know your pain. We all know your pain.

ROBERT H. TEMBECKJIAN: -- are from complainants who say, Thank you. I appreciate that you looked at it, and you have explained to me why the judge didn't do anything wrong. And I feel satisfied that at least I was heard.

And that's an important function that ethics enforcement entities play.

It's not just that they get the bad guys who did it wrong and who deserve to be disciplined, but it helps to underscore for the public that there's

actually somebody out there paying attention to their grievances, and explaining to them why, well, in this case, it really doesn't amount to something that should lead -- criticism or the discipline of a public official.

SENATOR PALUMBO: Sure, sure.

And just, lastly, do you -- can you issue subpoenas?

ROBERT H. TEMBECKJIAN: Yes. The commission can issue subpoenas in our statute. As the administrator I can issue subpoenas.

And when we refer a matter to a disciplinary hearing, which my staff presents the case against the judge and the judge defends, the hearing officer can issue trial subpoenas.

So subpoena power obviously is extremely important, not only to compel testimony, but to collect documents, because a lot of our cases, and a lot of yours, would, essentially, be document-driven; memoranda that are made, disclosure statements that are filed that might not be complete or accurate.

There's all kinds of documentation in these cases. And without the authority to get those records, no investigation could really be thorough,

or comprehensive.

SENATOR PALUMBO: Exactly. And I think that's probably an extremely important point that, even with JCOPE, they couldn't even authorize a subpoena to ultimately get into, you know, for example, the leak information.

That's an easy one. That should take you about 20 minutes to figure out how to solve that one. And it was [simultaneous talking; indiscernible] --

ROBERT H. TEMBECKJIAN: Well, yeah, I mean, I think anybody watching would have known who needed to be interviewed by the investigators.

And to say, as I've heard, that, well, the IG or JCOPE, you know, the IG can't investigate the governor.

But interviewing the governor about someone else's misconduct is not investigating the governor.

If the allegation is that someone from JCOPE leaked to the governor, you ask the person who got the call, "Who made the call?"

You're not in trouble for having picked up the phone, but the person that dialed is.

So it wouldn't have been investigating the governor, to ask him, Who called you and told you

what the JCOPE confidential vote was?

SENATOR PALUMBO: Sure.

ROBERT H. TEMBECKJIAN: And we all know it didn't happen.

SENATOR PALUMBO: Right.

Thank you, and happy holidays.

Thank you for coming.

ROBERT H. TEMBECKJIAN: Thank you. Same to you. Thank you.

SENATOR BIAGGI: Thank you.

Senator Hoylman.

SENATOR HOYLMAN: Thank you, Madam Chair.

And thank you for this hearing, for the second hearing, really important, and an important time to do this.

I want to ask you a few questions.

So the makeup of your commission is, between the governor and the chief judge, seven appointments?

ROBERT H. TEMBECKJIAN: Correct.

SENATOR HOYLMAN: And which is a majority of the 11 appointees. The members of the legislature, each conference only has one appointee.

So not unlike JCOPE, to some extent, or the commission on judicial appointments, between the

governor and OCA, they have controlling authority.

Any concern about that?

ROBERT H. TEMBECKJIAN: Well, it hasn't been a problem for us, and I think it's because there have been -- there are two other built-in safeguards.

One is, that the appointing authorities make their appointments for four-year terms, and they're staggered.

So no appointing authority can appoint more than one member in any given year. It would take four years for there to be a complete turnover. When a new governor, for example, comes in, and if the new governor is inclined to turn over employees -- or, members from the predecessor, it would take four years to effect that kind of change.

SENATOR HOYLMAN: Well, we've seen a three-term governor who ended up having almost total control over --

ROBERT H. TEMBECKJIAN: Right.

SENATOR HOYLMAN: -- [simultaneous talking] commissions, authorities, and [simultaneous talking] --

ROBERT H. TEMBECKJIAN: Well, with us, because --

[Simultaneous talking.]

ROBERT H. TEMBECKJIAN: -- because the governor appoints only four out of the eleven, doesn't appoint the chair and doesn't appoint the chief executive officer, it takes a while to change the orientation, let's say, if there is going to be some view that the commission needs to change because a governor wants to get it under his or her control.

SENATOR HOYLMAN: And on the other side of the coin, it's going to take a while to untangle, you know, control if it's vested for, you know, 12 years, or something approaching that.

ROBERT H. TEMBECKJIAN: Well, that might be so.

But our experience over 40 years has been that governors have come and gone.

Chief judges and legislative-appointing authorities have come and gone.

But in 45 years, since the commission was first a temporary entity, and then codified in the state constitution, I'm only the second chief executive officer.

We have had enormous success I think, in part, because we have had stability.

The day-to-day operation of the entity is by professionals whose work is in this highly specialized field of judicial ethics enforcement.

It's not subject -- easy whim of one or two appointing authorities to change.

And because our budget is not controlled by the judiciary, the chief judge can't make that effect, or have that effect.

And because the governor appoints only four out of eleven, doesn't appoint the chair, the chief executive officer, the governor doesn't have that power either.

The way that we can be inhibited is by budgetary constraint.

And that's where you and I, and Senator Krueger and I, have our annual conversation about the division of budget, you know, essentially, trying to freeze us out. Not out of malice. I think it's just because that's the way they operate.

Their mandate is "no."

Say no.

Say no, say no, say no.

And ours is, we have a constitutional role to play, you can't do this on a pittance.

It requires attorneys, investigators, administrative staff. It requires physical structure.

SENATOR HOYLMAN: Well, on that note -- on that note, what is, I agree, the resource question goes -- heart of your ability to be independent.

ROBERT H. TEMBECKJIAN: Right.

SENATOR HOYLMAN: What is the preview that Senator Krueger is going to be receiving in the [indiscernible] year?

ROBERT H. TEMBECKJIAN: Well, our current budget, after years of division of budget recommending flat, and your adding to it, we're at about 6.5 million. And I'm asking for just under 7.2.

We are authorized to have 50 full-time employees, but we only have the funding now for 43.

I'd like to get that up.

And a couple years ago we were down to 38. But because of the additional funding that you provided, we were able to incrementally get that up to 43.

We run a statewide operation. We've have three offices. There are 3400 judges spread out through over 1200 courts in New York State. It's

physically challenging.

And in the last two years, year and a half, we have spent a lot of resources on an electronic virtual mode of operating because of COVID.

And I think that we will probably stick with that even after the COVID experience is far enough behind us, to be able to go back to work without masks and in greater proximity to one another.

But it takes money to do that.

SENATOR HOYLMAN: Yeah, I went to your website again. Yeah, I do look at it.

ROBERT H. TEMBECKJIAN: I know you do.

I can tell by the questions you're asking me here.

SENATOR HOYLMAN: By the way, you need to update the new minority leader for the Senate. It still lists John Flanagan.

But --

ROBERT H. TEMBECKJIAN: Well, but the appointee was made by Senator Flanagan.

SENATOR HOYLMAN: Oh. So you wouldn't change that?

ROBERT H. TEMBECKJIAN: Right, until the next appointment. So his term is up, and then the new --

SENATOR HOYLMAN: It's still, even though --

okay.

ROBERT H. TEMBECKJIAN: -- yeah.

SENATOR HOYLMAN: -- okay. That's interesting.

ROBERT H. TEMBECKJIAN: He is an appointee of Senator Flanagan. And I think it was --

SENATOR HOYLMAN: So he remains. And the new appointee doesn't --

ROBERT H. TEMBECKJIAN: Correct. Right.

SENATOR HOYLMAN: Okay.

ROBERT H. TEMBECKJIAN: When the appointing authority changes, the members that that appointing authority put on, don't. They serve four-year terms --

SENATOR HOYLMAN: They serve four. Okay. That's a good point.

ROBERT H. TEMBECKJIAN: -- under the constitution, which is another protection.

SENATOR HOYLMAN: Thank you.

So in terms of transparency, do you think that the public should be entitled to the transcripts of your hearings?

ROBERT H. TEMBECKJIAN: Oh, well, if the -- if a public discipline has been imposed, the public is entitled to it.

SENATOR HOYLMAN: But what if a public discipline isn't imposed?

ROBERT H. TEMBECKJIAN: If a public discipline is not imposed --

SENATOR HOYLMAN: Why should it be in a black box?

I mean, it's like every other -- there are so many analogies of where hearings, whether they're decided for or against the defendant are made public.

Why in this case are they protected?

And certainly legislators would be subject to that kind of scrutiny.

ROBERT H. TEMBECKJIAN: Right. And you know that I agree with you.

The -- we have proposed, in fact, when Judith Kay was the chief judge, she actually -- she actually proposed, legislation that would have made commission proceedings public at the point that a judge is formally served with charges, which means that the transcript of the proceeding, whatever the result, would be public.

That's a matter for the legislature.

The legislature did not adopt that legislation when Judge Kay proposed it.

And although there are, you know, periodic discussions about reviving it, it really hasn't picked up any traction since.

SENATOR HOYLMAN: Well, look in 2022, I think we're going to be looking to revive that.

ROBERT H. TEMBECKJIAN: Well, that would be very interesting.

And as long as you're going to be doing that, let me recommend something else for us, that would actually also be apropos for a legislative or executive ethics, which is that resignation from office under investigation should not end the inquiry by the body.

If you have engaged in ethical misconduct, and it would ordinarily or otherwise deserve public discipline, you shouldn't be able to avoid it by leaving office.

Under current law, we have only 120 days after a judge resigns to impose discipline, but the only discipline we can impose under law in that case is removal from office; the reason being, that removal under the constitution also bars you from ever being a judge again.

But if you have done something censurable or admonishable, why should you be able to evade the

consequences of that by resigning and thwarting the body because we lose jurisdiction at that point.

SENATOR HOYLMAN: Particularly if that investigation might lead to exposure, an understanding, of criminal misconduct.

ROBERT H. TEMBECKJIAN: Well, yes, we do have the authority to make referrals, and we often do, to district attorneys or U.S. attorneys. But that's not a public act.

And if they don't take action, then the public is never going to know.

And the same is true, by the way, of referrals that we make -- attorney grievance committees, because there are occasions when we come across what appears to be misconduct by lawyers.

We don't have jurisdiction over them. We refer them to the grievance committees. Those proceeding are confidential. And sometimes they go into, you know, the black hole of disciplinary space and nobody knows what happened, least of all the clients who might be adversely affected by a lawyer who should be disciplined.

SENATOR HOYLMAN: Well, thank you for your excellent work.

Thank you, Madam Chair.

ROBERT H. TEMBECKJIAN: Thank you.

SENATOR BIAGGI: Thank you very much.

And just one comment from Senator Palumbo, and then I will close this out.

SENATOR PALUMBO: Yes, thank you.

I just want to follow up on Chairman Hoylman's comments regarding disclosing.

Did you say that was -- that the legislation was to disclose from Judge Kay at the time of the complaint or time of finding?

ROBERT H. TEMBECKJIAN: Not the original complaint. At the time that the commission authorizes formal disciplinary charges against the judge.

So it would be after investigation, but before discipline; not the initial complaint.

I think there would potentially be great damage to the judiciary to unfairly sully a judge simply by making public the filing of a complaint, which could be politically motivated, it could be personally motivated.

In the same way that a grand jury investigation is confidential, commission complaints, or -- to the commission, and our investigations, I think must be confidential, and

also to protect the integrity of the investigation.

I mean, we don't necessarily want everybody knowing when we're investigating, so that we can be assured of getting honest and fair responses to our inquiries not coached by people who know we're coming, necessarily.

But if the commission, as a responsible body, concludes at the end of an investigation that there's reason to believe that misconduct has occurred, but can't impose discipline until the judge is charged and has a trial, that should -- in my view, that should be public just like an indictment is public.

SENATOR PALUMBO: Sure. And that was exactly what jumped out at me, because you mentioned earlier that attorneys, similar to appointees by the governor, are afraid to come forward and actually say something.

So if you know that a judge upstate, for example, that you practice in front of on a weekly basis or more, you're not going to really give that judge up because, if it doesn't go -- if he's not removed or she is not removed, you have a big problem now.

ROBERT H. TEMBECKJIAN: And that's exactly

right.

SENATOR PALUMBO: And that's why I think that would be -- and I'm sure we'll debate this. I'm on the judiciary committee with the chairman as well, that as those come through, that I think there's got to be that threshold first; otherwise, your investigation will -- can be spoiled.

ROBERT H. TEMBECKJIAN: Well, you know, there are any number of times in a year when we'll get a phone call from a lawyer who will say, I've seen misconduct I think by a judge, but is there a way that I can report it without being the complainant?

And the fact that, under law, our commission has the authority to investigate or initiate complaints on its own motion, it doesn't have to be a third-party complaint that we get from someone else, is also a very important structural feature that should be built into any ethics enforcement operation, so that I can take that information from the lawyer on the telephone, reduce it in writing, present it -- commission, and say, This individual indicated to us what certainly seems to be misconduct if it's true, but is afraid to be the complainant.

So I'm asking the commission to authorize

inquiry on its own, and it will do so.

And then, under our statute, I reduce the complaint itself in writing so that, when it's presented to the judge, the judge will know the four corners of what he or she is being accused of.

But that's a very important feature: to give the investigating body some responsible way of initiating investigations on its own.

SENATOR PALUMBO: Which is perfectly relevant to us with, you know, hostile work environments, sexual harassment, and so forth.

So I think that makes sense.

ROBERT H. TEMBECKJIAN: Well, I think so.

SENATOR PALUMBO: Thank you again.

And now, that's it; so, now, happy holidays, again.

Thank you.

ROBERT H. TEMBECKJIAN: That's okay.

SENATOR BIAGGI: Thank you.

I have just have a few follow-up questions, and they're kind of themed, that draw the line through what you're doing and the commission to JCOPE. And I think there's a lot of different threads that I've learned.

I think the first thing, with regard to the

complaints initially not being public, one of the things that happened in the last, you know, six to eight months was that the governor -- former governor threatened to release all of the complaints from JCOPE that people made about legislators, as a threat, which is absurd and, also, completely unprofessional.

But I think it makes me wonder, and also think about, the differences between how complaints are made, and you just touched on a really significant piece.

But, also, when a complaint is made, is that judge notified that a complaint has been made against them?

Because in -- I mean, who knows what happens in JCOPE -- quite literally, who knows what happens in JCOPE. I don't even think the people sometimes inside know what's going on there.

But the reality is, there is some kind notification that's kind of lacking in our current ethical structure that we hope to take apart.

But as it stands, my understanding is that it's really inconsistent.

So are the complaint -- are the complaints made public -- not made public -- people, but --

person who the complaint is being made against?

ROBERT H. TEMBECKJIAN: Not necessarily.

We're not required to advise a judge of every complaint against him or her that has come in, and there are a couple of important reasons I think why that's significant, and why I wouldn't want to change that.

First, if the complaint is true and we're going to investigate it, we don't necessarily want the target, so to speak, or the subject of the inquiry, to be able to influence witnesses before we've had a chance to talk to them; or to create or to lose documents before we've had a chance to collect them.

But, secondly, and I think more significantly, particularly for the judiciary, every time a judge is going to run for reelection, or be up for appointment, they have to fill out a waiver of confidentiality as to any complaints about which they are aware. They have to fill out a form.

In fact, we actually removed a judge from office, and it was held by the court of appeals, because, on an application to the governor -- this is back when Pataki was the governor -- he omitted -- he answered falsely the question, "Have

you ever been the subject of an investigation by an ethics body?" when, at that very time, he was under investigation by the commission.

And when that came to light, the nomination was withdrawn, and, obviously, the judge/he was ultimately removed from office for lying on an affidavit or on a sworn form to the governor.

But more often than not, since the majority of our complaints are dismissed without action against the judge, if the judge knows about 20 or 30 complaints that have been made over the course of a 10-year term, and then is applying for a new position, or is filling out a screening committee affidavit for endorsement for reelection, they're going have to disclose all of those frivolous complaints because they knew about them; whereas we won't reveal them, and we might provide a letter -- judge that says, you know, You have never been under investigation by the commission. You have never been found to be in violation of the rules.

But if the judge knows about it, they're going have to disclose it.

And think about the havoc that you can create by papering a judge with complaints so that you can sully their reputation for when they run for

reelection.

We actually had -- one of the saddest situations that I ever came across in all these years involved a judge many years ago in Tompkins County, who was running for reelection. And it doesn't matter which political party the judge was running for. The chair of the opposing party sent a letter of complaint -- commission about that judge, which was ultimately dismissed because it was a frivolous complaint, but made public four days before the election. Over the weekend, a complaint has been made -- judicial conduct commission against Judge So-And-So, and they're looking into it.

Well, yeah, we look at every complaint that we get, but we didn't investigate that one.

But between Saturday, when this was disseminated locally, and Tuesday's election, the incumbent lost because of mischief, of malicious mischief, I think, by a political party leader of the other side.

So I'm not comfortable with the notion that any complaint against a judge should be disclosed, unless there has been some level of verification that it is true.

SENATOR BIAGGI: So can I just distinguish something, because I think you bring back some unfortunate memories for some of us from 2016, when things are just made public, and then it really does -- it has an incredible -- can incredible impact about just -- about anything.

But if you have one investigation -- and I agree with everything you've said, actually.

And I'm wondering if there's a distinguishing factor between that one complaint that's made, and then -- point that you had made about the example of, like, well, if this person had like 20 to 30 -- if there is an instance where a judge has 20 or 30, or 15, or even 5 feels like a lot, to be honest, and there is a consistent pattern of what is being complained about from a different person, although, in many instances, it could be, again, an attorney that, because you -- that person wants to be anonymous, and the body decides to do this investigation on their own, you might not know who it is, if it's the same person over and over again, obviously, that's a different situation, but the point being, if the person has a similar track of, like, hey, this is kind of a theme going on here, does the body then look closer?

Like, what do you do in that kind of instance?

ROBERT H. TEMBECKJIAN: We try to evaluate each complaint on its own merits. But we are certainly aware of cumulative complaints against the same judge.

But we also do, I think, a very important analysis of the nature of the court, the nature of the complaints.

I mean, as an example, nobody who goes into family court is ever happy, unless it's a simple adoption and they walk out with their child.

Nobody is happy coming out of family court, no matter who wins or loses.

And family court judges have, I think, probably the most difficult job in the Unified Court System, and everybody is going to complain against them, because --

SENATOR KRUEGER: Now they have blogs, where they put their complaints on the blog.

ROBERT H. TEMBECKJIAN: I know. We've seen it.

SENATOR KRUEGER: I've had that where constituents would be, you know, We all hate this judge. They didn't give you full custody.

You know?

ROBERT H. TEMBECKJIAN: Right. Right.

-- so we try to do that kind of analysis.

The same thing with a criminal court judge, who -- you know, who might be known as a tough sentencer; or, conversely, you know, a lenient sentencer.

So there's always somebody.

Police unions or district attorneys might complain about the lenient sentencing judge, and defendants and the families of defendants might complain against the tough-sentencing judge.

We try to avoid investigating anybody for calling the cases as they see them, unless there is some element of misconduct involved, so that, if a judge is a tough sentencer or a lenient sentencer, but it's within the law, and they're abiding by the law, they're following the law, that's not a matter of ethical wrongdoing, and it shouldn't -- it shouldn't impact our decision on whether to investigate a new complaint against that a judge for being a tough or a lenient sentencer.

On the other hand, if we have had numerous complaints about a judge's irascibility on the bench, and they seem to be coming from sources that

have no connection to one another, it tends to lend some credence -- latest complaint, and we might be inclined to investigate it and then do our own observation, by going to court, sitting in the spectator section on random days to see what's going on.

And, nowadays, we can actually order the audio of a court proceeding, and hear whether the judge was acting intemperately, using fowl language, yelling unnecessarily, you know, flying off the handle, and so forth.

And I must say that the advent of audio recordings in the courts has had two effects.

It has demonstrated for us that, often, complaints of judge's inappropriate demeanor are not substantiated when we actually hear the audio.

But I also think the fact that they're being recorded tends to serve as a check on their demeanor, and the decorum of the court is preserved.

And so that's a good thing.

The tapes actually help the judges, but I think their behavior is moderated because they know they're being recorded.

SENATOR BIAGGI: Makes sense.

That makes a lot of sense.

Okay.

Just three questions that are really short.

The first one is, inside of the commission, do you have jurisdiction to look at all of the judges in New York?

And I ask this specifically because, and this was a bill that Senator Hoylman had had, about how ICE agents can come in court. And when we realized that OCA set these rules, that, basically, they were not allowing ICE agents in court, it didn't actually go down -- town and municipal level.

And so it creates this imbalance of, like, how are the rules even applied if OCA can't tell municipal judges what to do, and, like, where are we going here?

So do all the judges fit within the purview of the commission?

ROBERT H. TEMBECKJIAN: Yes.

We have authority over all of the judges in the Unified Court System.

If your judgeship is created in the constitution, we have authority over you. That's from the town and village courts, all the way up to the Court of Appeals.

SENATOR BIAGGI: That's very good to know.

Okay. Thank you for that.

In terms of the referrals database -- referrals -- not database, but in terms of the referrals that you make that are not perhaps within your purview -- right? --

The comptroller's office made some similar comments about that -- right? -- something might not fall within their purview, they're going to send it out.

-- I seem to think that there is -- that there's an importance about the tracking of this.

It might seem just like administer -- just an administer -- excuse me -- an administrative detail that's annoying and you don't want to deal with that. But somewhere along the way, you would probably want to know where this thing originated from, and who sent it where it was going.

And so is there -- you had mentioned the same kind of process.

Does the commission also do that, or is there -- do that, meaning, to be specific: keep a database or not?

ROBERT H. TEMBECKJIAN: No, we don't have a database of that, although we do have a record of every -- I should say, we don't have a separate

database for the complaints that we have referred, but we do have a master database --

SENATOR BIAGGI: Got it.

ROBERT H. TEMBECKJIAN: -- of all of our complaints, including the dispositions, so that I can -- within that, manipulate the fields, to be able to determine how many referrals we've made in a given year. And we report those in our annual report.

The ones that we ask for follow-up on are complaints that we referred that might involve the judge.

So let's say there's an administrative issue that we become aware of involving a judge. We refer that -- Office of Court Administration, and we ask them to report to us on what the result was.

And they will tell us:

We sat down with the judge, we gave her education and training.

We gave him a copy of the manual.

Et cetera, et cetera.

If we are referring anything else over individuals over whom we have no authority, we have not, except out of curiosity, asked for follow-up.

With the grievance committees, because they

regard the commission as the complainant when we make a referral, they will tell us, ultimately, the result of their inquiry.

And that's how I know that a lot of the complaints that we send over there don't result in disciplining of attorneys, because they regard us as the complainant, and then they notify us that the complaint was dismissed, or there was no action taken against that individual.

But -- so that's the degree to which we do that:

We follow up if it's a judge.

If it's to a grievance committee, they will tell us what the result is because they regard to us as the complainant.

And if it's anyone else, they're not obliged to tell us, and we don't ask.

SENATOR BIAGGI: Right.

Okay. It makes lots of sense to me.

Final question, and then I believe that we are concluding for the day.

When you mentioned that there's this gradation of what you can do -- right? -- from -- with everything but suspension -- censoring, removing, people can retire -- and then there was

also the private conversations or private --

ROBERT H. TEMBECKJIAN: A private caution.

SENATOR BIAGGI: -- private caution -- right? -- for like some minor violation --

ROBERT H. TEMBECKJIAN: Right.

SENATOR BIAGGI: -- suspension seems to fall within the middle -- right? -- of those two extremes.

ROBERT H. TEMBECKJIAN: Right.

SENATOR BIAGGI: And so can you just give like one example on each side of, like, what is an example -- what is a private minor violation; how can people think about that?

And then, also, because suspension is not part of this repertoire, if suspension were to fit in, what is an example of why somebody would be suspended?

One example on each.

ROBERT H. TEMBECKJIAN: In terms of a private caution, let's say one of the rules of conduct is that a judge is required to file an annual statement of financial disclosure.

And if they're late, they get a notice to cure, which gives them 30 days to file. And if they don't, then there's a notice of delinquency.

It's required for the ethics commission to refer that to us.

And if the judge was -- and we've had this situation -- the judge filed late because he was hospitalized, or because the judge's spouse was in hospice care, and there were a couple -- we send them a private letter.

And, of course, only upon their actually filing, so they correct the violation. But there's no suggestion that they were withholding information or not reporting income.

You know, we look at the compassionate view, and conclude that that's really -- that's not a public discipline. There's a reasonable explanation for why the judge was late.

Or, judges are expected to, you know, respect and comply with the law. And that means, among other things, in town and village court, as elsewhere, before someone testifies, you've got to give them an oath. And sometimes the judge forgets to give the oath, because it's sort of an informal setting, even though it's a court proceeding. But it's not a habit, and no rights were affected.

And so we'll just sort of privately remind the judge, Remember to administer the oath before

you take a statement from the witnesses.

On the opposite side, where suspension -- suspension is, you know, there is some behavior that is worse than a censure, but not really quite removable, particularly if the judge acknowledges or recognizes the wrongdoing and is making some effort to improve.

So let's say we -- you know, we had a case some years ago of a judge who was using a court staff -- we had a couple of cases of this type -- a judge who was using court staff to do personal chores for the judge beyond the norm.

I mean, we're not talking about calling to make a reservation at a restaurant.

But having, you know, a staff member pick up the judge's dry cleaning, or do some -- type the resume for the judge's spouse, or watch the judge's child in court after school or in chambers after school on more than an emergency basis.

We had another judge who had used her staff to produce material for the judge's religious institution, for a retreat that was -- a religious retreat. And they felt coerced to do it because they owe their job -- judge. And if the judge says, you know, My religious institution is having a

retreat, and I want to you make these booklets for me, and, you know, I would like you to attend if you'd like to attend, you kind of can't say no.

That's a serious violation.

But, in both instances, the judge acknowledged, when confronted by the commission, "That I really shouldn't have done that, it was really wrong, and I will never do that again," I would have recommended suspension if we had that authority.

But because the judge was contrite, and otherwise was making an effort, the commission and I agreed that censure was the right result.

So it's out there for other judges to know you can't do this, and there is a consequence.

No judge likes to be censured.

You might be relieved that you weren't removed. But the opprobrium of your colleagues and the public disgrace is not something that any judge, or any public official, is going to welcome or brush off. And so it was a tough hit.

But that's the kind of thing where I think suspension would have been an appropriate result:

Give them time to really reflect on what they did, and when they come back, they'll be better.

SENATOR BIAGGI: I think that makes a lot of sense, actually.

So I think we have a lot of work to do after today.

Thank you so much for your testimony, for showing up today.

I certainly learned a lot about what your commission does, and also how it can parallel track what we do when we build our new ethics body.

And, also, just how you go about certain things, I think, is very enlightening to how we can also internally do a lot of things as well.

So thank you very much.

ROBERT H. TEMBECKJIAN: Well, I'm glad to be of help.

And I hope when I see you all at budget time, it's with a smile on my face instead of a hat in my hand.

[Laughter.]

ROBERT H. TEMBECKJIAN: Thank you very much.

SENATOR BIAGGI: Thank you.

And that concludes our hearing.

So thank you all for joining.

Thank you for attending, asking questions, and participating.

I really do look forward to this becoming legislation, and, hopefully, the law.

So, let's -- to onwards and really positive things in the future.

Thank you.

(Whereupon, at approximately 2:00 p.m., the public hearing held before the New York State Senate Standing Committee on Ethics and Internal Governance concluded, and adjourned.)

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