

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

PROBLEM SOLVING COURT TASK FORCE

Miami, Florida Hearings

October 17, 2007

8:30 a.m. to 6:00 p.m.

MEMBERS OF THE TASK FORCE:

JAY CLARK, CO-CHAIR
RICK JONES, CO-CHAIR
MARVIN SCHECHTER, CO-CHAIR
ELIZABETH KELLEY
GAIL SHIFMAN
VICKI YOUNG

ALSO PRESENT FOR NACDL:

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1 MR. JONES: Good morning, Professor Winick. My
2 name is Rick Jones from New York and I'm one of the members
3 of the National Association of Criminal Defense Lawyers
4 Problem-Solving Court Task Force. We are delighted to have
5 you here this morning.

6 We are happy to be here in Miami and we
7 are very pleased and grateful to the Carlton Fields law
8 firm for allowing us this fantastic space and we're excited
9 to take your testimony.

10 We have, as you know, received your
11 written submissions and have read them, I certainly have,
12 and am excited to hear what you have to say and to engage
13 in a conversation with you this morning.

14 As you can imagine when we decided to
15 undertake this project about six months ago coming out of
16 our Cincinnati meetings, we had no idea the sort of ground
17 swell of interest that there was in this topic.

18 And as we have begun to think about
19 traveling around the country on sort of a listening tour to
20 give folks like yourself and other stakeholders in the
21 specialty court world the opportunity to tell us what's
22 been going on for the last decade or two really, we have
23 really sort of been overwhelmed by the responses.

24 And so we have a very full agenda today
25 and I've been tasked with the responsibility of keeping us

1 on track, and so we've got an hour to spend with you, and
2 so what I would like to do to begin is to just -- for
3 purposes of the record, I'm going to read your very short
4 biography into the record, and then we're going to ask you
5 for no more than 10 or 15 minutes of introductory remarks
6 so that we have a wealth of questions that we'd like to
7 engage in with you.

8 And so once you give us your opening
9 remarks -- and, really, if you could hold it to 10 to 15
10 minutes, that would be wonderful -- we're going to then
11 just have a free-form discussion, okay.

12 Let me read into the record real quickly:
13 Professor Bruce J. Winick is a professor of law and a
14 professor of psychiatry in behavioral sciences at the
15 University of Miami in Coral Gables, Florida where he has
16 taught since 1974.

17 He's the co-founder of the School of
18 Therapeutic Jurisprudence. Professor Winick has authored
19 numerous books the latest of which are Civil Commitment, a
20 Therapeutic Jurisprudence Model, Judging and a Therapeutic
21 Key, Therapeutic Jurisprudence in the Courts, Protecting
22 Society From Sexually Dangerous Offenders, Law, Justice and
23 Therapy, and Practicing Therapeutic Jurisprudence Law as a
24 Helping Profession.

25 He has also authored more than 100

1 articles and law reviews and interdisciplinary journals.

2 Professor Winick is co-editor of the
3 American Psychological Association books and book series,
4 Law and Public Policy, Psychology and the Social Sciences.

5 He's a legal advisor and member of the
6 Board of Editors of Psychology, Public Policy and Law, and
7 serves on the editorial board of Law and Human Behavior.

8 Professor Winick has received numerous
9 awards, including the University of Miami's Provost Award
10 for outstanding scholarship, the Thurgood Marshall Award of
11 the Association of the Bar of the City of New York, and The
12 Human Rights Award of the American Immigration Lawyers
13 Association.

14 Professor Winick previously served as New
15 York City's director of Court Mental Health Services and is
16 general counsel of its Department of Mental Health.

17 And let me just say before I turn the
18 floor over to you, Professor, that I neglected at the
19 outset to introduce my colleagues to you, and maybe better
20 than me going around the table and telling you who they
21 are, I will let them tell you themselves who they are.

22 MR. SCHECHTER: Marvin Schechter. I'm an
23 attorney in New Jersey.

24 MR. CLARK: Good morning, professor. I'm Jay
25 Clark. I'm an attorney from Cincinnati, Ohio.

1 MS. SHIFMAN: Good morning. Gail Shifman from
2 San Francisco.

3 MS. YOUNG: Good morning. Vicki Young from San
4 Francisco.

5 MS. KELLY: I'm Elizabeth Kelly from Cleveland.

6 MR. JONES: So, professor, if you would give us
7 the benefit of your opening thoughts.

8 PROFESSOR WINICK: Let me at the outset just say
9 how delighted I am to be here before the NACDL. I have
10 represented you in numerous amicus briefs and court
11 appearances, including the U.S. Supreme Court. My heart is
12 with you.

13 I practiced on the defense side from time
14 to time although I'm largely a professor. I do teach
15 advanced and constitutional law. I was once the general
16 counsel of the ACLU of Florida here. When I was a young
17 lawyer growing up in New York I argued the case that
18 declared the New York death penalty unconstitutional.

19 And so my perspective in thinking about
20 these courts is certainly that they should be consistent --
21 fully consistent with the defendant's rights and with
22 constitutional values and I wanted to make that point at
23 the outset.

24 Now, this movement, problem-solving
25 courts, in many ways originated here in Miami. I mean, I

1 suppose we could go back and look at the Juvenile Court
2 that started in Cook County in Chicago in 1899 as a
3 forerunner of these courts, but their modern iteration
4 started here in Miami in about 1989 when Janet Reno and
5 others started the nation's first drug treatment court.

6 That court, as I think you know, was a
7 response to the abysmal failures of the criminal justice
8 system to deal effectively with the increasing problems
9 certainly at that point of drug addiction. People would be
10 convicted, sent to prison, get out and go right back to
11 their habit. We had very high recidivism rates. There was
12 a great deal of frustration.

13 The court found itself inundated. Too
14 many people were being dealt with. So this was a response
15 that tried to sort of steer it in a different direction and
16 the idea is and was that people would be given an option to
17 enter into what really is a diversion program.

18 There, of course, have been many
19 diversion programs and this is, I think, best understood
20 within that context, given an option to accept diversion in
21 which they would agree that they have a drug problem, agree
22 that they wanted to deal with it, and they would enter into
23 literally a behavioral contract with the court agreeing to
24 stay off drugs, to submit to a periodic urinalysis, to
25 report to court every two weeks or so.

1 And the judge would function in a very
2 different way. This wasn't judge/adjudicator. This is
3 judge as a coach as part of a interdisciplinary team trying
4 to help the defendant in accordance with his goal to get
5 off and stay off drugs and they've been very successful,
6 though I have my own concerns about the research
7 methodology underlying the studies.

8 But I think we can do a better job of
9 testing these things but it's always hard for us to
10 adequately fund and execute research studies of what we do
11 in the courts, but I think certainly anecdotal evidence and
12 the empirical evidence, although not perfect, certainly
13 suggests great success that a lot of people go through this
14 program and do well, graduate two years later. Their
15 charges are dismissed. It gives them a new lease on life
16 and many of them have not recidivated or recidivated to a
17 much lesser extent than criminals that have not gone
18 through.

19 There are now probably 2,000 or so
20 problem-solving courts in America, many hundreds in other
21 countries, especially in Australia, New Zealand, to some
22 extent England, Scotland, big time in Canada, and we've
23 seen a variety of spinoffs including domestic violence
24 court. We have one of the large domestic violence court
25 programs here in Miami.

1 Mental health court was started in
2 Broward County by Judge Wren who is here and will address
3 you today and there's more than 100, probably several
4 hundred domestic violence courts.

5 And we see various hybrid courts. We see
6 juvenile drug treatment courts, dependency courts, drug
7 treatment courts. We see reentry courts, sort of a
8 back-end drug treatment court for people getting out of
9 prison who enter into, again voluntarily, a form of
10 judicially supervised parole that helps them get off their
11 drugs. And so we've seen a proliferation of this model.

12 Again it's not judges in the way we're
13 accustomed to. It's not judges making decisions about
14 disputed issues of fact for which we certainly want fair
15 and impartial judges.

16 But I think the recognition, the reality
17 is that judges do a lot more than simply decide disputed
18 issues of fact. Often people are not pleading not guilty.
19 They are guilty and in these programs they're expressing a
20 willingness and interest in dealing with a problem that
21 they have, and the judge's role is primarily to help them
22 with that problem in ways that have been proven successful.
23 These programs are designed to avoid the revolving door
24 that we too frequently see in our justice system.

25 Now, I might say at the outset in a

1 certain sense that if we were designing this system would
2 we want judges to play this role? I don't think so.
3 Judges aren't clinicians. Judges aren't really by
4 temperament always suited to play this role, and yet I
5 think it's a pragmatic solution to a problem that's created
6 by sort of there being a vacuum in the community.

7 We don't legislatively allocate funds to
8 the kinds of programs that we need in our communities to
9 prevent problems like drug addiction, spousal violence,
10 child abuse and neglect, untreated mental illness. These
11 are all very difficult psycho/social problems and we know
12 how to deal with them. We have programs that are good for
13 dealing with all of these kinds of issues but the
14 legislature hasn't adequately funded them.

15 I think we should have treatment on
16 demand for these kind of problems in our communities. I
17 think we should have preventative services so that people
18 getting into these kinds of difficulties can opt for
19 treatment, and I think we would avoid many of the problems
20 including much of the criminality that often occurs when
21 people's problems remain untreated.

22 That's how I think we should go. We
23 don't do that and as a result this is sort of, as I said, a
24 pragmatic solution where the courts have stepped into that
25 vacuum. Society doesn't deal effectively with these

1 problems with the result that they get dumped at the
2 doorstep of the courthouse, and here the court has stepped
3 up to the plate and has offered what I think is a very
4 exciting program that has actually helped people.

5 We have to be very, very concerned about
6 whether the people deciding to opt for these programs are
7 doing so voluntarily and I'm fully in accord with that
8 notion.

9 I think we're talking about justice in
10 plea bargaining, a voluntarily relinquishment of a known
11 right or privilege. We want people to know what they're
12 getting into, to do it with eyes opened, to make voluntary
13 choices and not coerced choices.

14 Now, of course, this is within the
15 context of the criminal justice system, but that doesn't
16 mean that legal coercion any more than plea bargaining is
17 legal coercion. The court basically said it's okay to plea
18 bargain in cases like versus Hayes. The fact that the
19 prosecutor is going to perhaps bring harsher charges if the
20 defendant doesn't plead is not itself coercion, the court
21 had said.

22 And so again this is a course of context
23 but it is not legal coercion but I think it's essential for
24 a variety of reasons both constitutional and therapeutic
25 for us to understand the strong value of having clients,

1 defendants, make decisions with eyes open and voluntarily.

2 We need to do that because people are
3 waiving rights. People are subjecting themselves to
4 greater risk if they fail and, let's say, their probation
5 is revoked. Defense lawyers have an obligation to fully
6 explain to their clients those options just as they do in
7 plea bargain.

8 And I think that we need to do this on a
9 voluntary basis for therapeutic reasons. People who enter
10 into a rehabilitative or treatment program because they
11 feel coerced into doing so are going to go through the
12 motions maybe but not gain a hell of a whole lot out of it.

13 The ultimate objective is for them to, in
14 accordance with their stated views, solve their problems,
15 learn how to live a life without drugs, let us say, learn
16 how to avoid domestic violence, let us say, if they're
17 people with untreated mental illness, learn the value of
18 feeling better on the medication that, although not
19 perfect, certainly decreases their most bizarre
20 symptomatology and allows them to live more safely and
21 effectively in the community.

22 These are good and important lessons. We
23 shouldn't ram them down people's throats. We should not do
24 it with paternalistic attitude. My fear is that judges in
25 these courts are sometimes more paternalistic than I would

1 like to see.

2 I think paternalism doesn't not work.
3 It's better to give people choices and to allow them to
4 make these choices, give them all the time they need to
5 make these choices in a voluntary way and treatment will be
6 better.

7 Now, as you know, I am the co-founder of
8 a movement called Therapeutic Jurisprudence and there's a
9 relationship between that movement and these courts.

10 Therapeutic Jurisprudence is essentially
11 a scholarly approach, an interdisciplinary approach to
12 legal scholarship and reform that says let's understand
13 that law itself and how it's implemented, how it's applied.
14 It's a therapeutic solution that is going to have an impact
15 on people's emotional well-being.

16 Just as the folks in law and economics
17 have shown us that law has economic impact, we should be
18 concerned with laws and efficiency.

19 Our take is let's be concerned with law's
20 therapeutic impact. Often law is anti-therapeutic. Let's
21 see if we can study that with the tools of behavioral
22 sciences, understand law and how it functions a lot better,
23 and let's see if we can reshape law when consistent with
24 justice values, when consistent with due process in ways
25 that can make it less inter-therapeutic and more of a

1 healing force. In that sense, I see these courts as
2 playing the therapeutic jurisprudence role. They are
3 designed to help people when needed and desired.

4 Again I've been a long critic of
5 paternalism. Therapeutic jurisprudence is not
6 paternalistic. Paternalism is anti-therapeutic. But the
7 idea is to understand law as a richer level, to see law's
8 impact on people's emotional lives in this way, and so I
9 would see these courts as practicing therapeutic
10 jurisprudence. I would see the relationship between
11 therapeutic jurisprudence as symbiotic.

12 I don't approve of everything that these
13 courts do. I certainly have concerns about the voluntary
14 issues that I mentioned. I certainly have concerns about
15 these courts being used to widen the social net and sweep
16 into it people that would not otherwise have been charged
17 with crimes. I'm a critic of that.

18 There's a concern about are we making
19 resources available on a selective basis only to people who
20 go to these courts. I'm concerned with that. We should
21 make resources available across the board to everyone in
22 the community who needs them.

23 But with those caveats, I think these
24 courts are doing a good job, are allowing us to understand
25 a new potential of the courts to help people. I think

1 that's a good thing.

2 I think defense lawyers need to be on
3 guard to fully advice their clients and to help them
4 through the process, but I think on the whole, even if we
5 wouldn't have thought of this system, thought of having
6 judges in this role, they're doing good.

7 We're trying increasingly to teach judges
8 some of the skills they need to do to perform these
9 functions, sort of psychological insight social work
10 approaches and the like.

11 When I give these lectures to groups of
12 judges there's always a judge in the back row that says,
13 "Professor Winick, I'm not a social worker" and I say yes,
14 you are. When you're playing these kinds of roles, when
15 you're dealing with problems of social pathology, of drug
16 addiction, of juvenile delinquency sometimes, of spousal
17 abuse, of child abuse and neglect, in effect you are
18 functioning as a social worker. The court is functioning
19 as a psycho/social agency and, in a way, consistent with
20 due process. You can either be a good social worker or a
21 lousy one so learn some of the stuff and get with the
22 program.

23 Anyway, maybe I should conclude these
24 introductory remarks so as to give you all an opportunity
25 to ask me whatever you'd like to.

1 MR. JONES: Thank you very much, professor. You
2 made my job real easy and we appreciate those comments.

3 We're going to start our questioning with
4 Mr. Schechter.

5 MR. SCHECHTER: Professor, I read with great
6 interest the dialogue between you and Susan Stefan. It
7 reminded me of the old Saturday Night Live stick, Point
8 Counterpoint.

9 PROFESSOR WINICK: Susan just left. It wasn't
10 at all at that level. It was friendly.

11 MR. SCHECHTER: It was a friendly and profound
12 discussion on some of the problems.

13 PROFESSOR WINICK: Exactly.

14 MR. SCHECHTER: But I was struck by her stark
15 criticisms and so were you, I think. She said that mental
16 health courts are nothing more than a way of segregating a
17 segment of the population into one area much like what was
18 done to Black Americans during the Civil Rights pre-era.

19 She also said that a lot of what you are
20 talking about depends on a lot of ifs: If the judges are
21 trained. If the defense attorneys understand it. If the
22 police get greater sensitivity training.

23 I had the opportunity yesterday to spend
24 a couple of hours in Judge Rosinek's court, and I was
25 struck by two things and I want to ask you. The first one

1 is about choice and then I have a follow-up question.

2 Let's talk about the choice issue. A
3 number of the defendants who came in were newly arrested,
4 had bails already set of \$12,500 and up for minor purchases
5 of cocaine on the street, were facing statutory sentences,
6 as the judge informed them, of six, 15, and even in one
7 case of 20 years.

8 The judge turns to the individual and
9 says, "Now, would you like to go into a program? If you
10 do, I'll release you on your own recognizance and you start
11 in the county program tomorrow."

12 One, is that a choice? And, two, what
13 does that say about the motivation of the defendant to
14 really take care of their drug problem?

15 PROFESSOR WINICK: I think you put your finger
16 on a very serious problem here. I would ask a few
17 questions, kind of background so we can put that into
18 perspective. Are these charges that every criminal
19 defendant would receive in this context or are these
20 special charges that are trumped up or made higher to sweep
21 people into drug treatment court? I certainly would be
22 opposed the latter.

23 But if we assume that this is the general
24 charging pattern occurring here in Miami, the general bail
25 pattern, then that's the reality.

1 Just as in plea bargaining, you know, we
2 know the if defendant pleads not guilty he's going to get
3 sentenced to a certain period by the judge. If he pleads
4 guilty he's going to get a lesser term or maybe even
5 probation.

6 In the same sense as plea bargaining can
7 be said to be coercive -- and I see the coercive impact --
8 this can be said to be coercive.

9 Now, is it really coercion? What is
10 coercion? Again coercion in this context is not when
11 someone comes up to you and puts a gun to your head. It's
12 a coercive of offer. When someone is making an offer, the
13 law does not treat it as coercion unless it's unlawful or
14 improper or immoral.

15 And if you look at different areas across
16 the board, contract law, plea bargaining, the like,
17 informed consent in medical areas, I think you'll see that
18 people have to be able to make choices even though they're
19 often difficult choices. You know, the individual facing
20 the choice to have triple bypass heart surgery or maybe
21 you'll die in a few months if you don't, maybe you'll die
22 if you do. That's a tough choice.

23 But, of course, we're going to say that
24 as long as that individual has the information that's
25 needed, the time to make the decision, we're going to

1 consider it really a voluntary choice.

2 Let's understand that the alternative
3 would be to take choice away from people, and I don't think
4 we want to take choice away from people. We're committed
5 to autonomy within our constitution vision. We want people
6 to make choices.

7 So I would say this is a constrained
8 choice. It's not a totally free choice but very few
9 choices in life are totally free. You know, is the
10 decision to go to law school a totally free choice or is it
11 shaped by a variety of social and family and economic
12 pressures.

13 MR. SCHECHTER: Depends on your mother.

14 PROFESSOR WINICK: It depends on your mother,
15 exactly. So, in a way, let's put it in that perspective.

16 Now, I would not want to see the judge
17 kind of milk that discrepancy. I would rather see the
18 judge kind of allow the defendant to come to his own
19 conclusions free of the potential pressures, let me put it
20 that way, that those choices give you.

21 And I say that again because I do believe
22 in voluntary choice and I do understand that we have to
23 sometimes make hard choices as part of the plea bargaining.

24 But I would say that the defense lawyer
25 has a very important role here, to mitigate, to take his

1 client aside to explain the options.

2 The options might be better for the
3 defendant if he goes for the program but, you know what, if
4 he's going to go for the program just to get out of perhaps
5 a stiffer bail, a stiffer penalty or to get released on his
6 own recognizance, it might not work.

7 If he doesn't really want to do this --
8 you know, "They're going to drug test you every week or so.
9 The judge is going to know if your urine is clean or dirty.
10 If you don't really want to get off drugs, if you don't
11 think you're ready for that, don't do this," is what the
12 defense lawyer should be telling the client and what the
13 judge should be telling the individual.

14 If the individual does it with the wrong
15 expectation and the wrong reasons and fails, that's not
16 good for the individual. He's going to face stiffer time,
17 and so I would say that we should make the choice very
18 clear to the individual, "There's some benefits here but
19 only if you're really ready to deal with the problems."

20 You know, we call these problem solving
21 courts as though the judge can waive the magic wand and
22 solve someone's problems. In reality the individual has to
23 want to resolve his or her own problems. The judge can
24 assist but only assist. And so the real question is, "Are
25 you ready to deal with that?" Maybe not, maybe yes.

1 Maybe we shouldn't have criminal offenses
2 for certain types of possession of drugs. I'd probably buy
3 that. But in reality we do criminalize a lot of drug
4 offenses and so people who are caught with drugs are in
5 that difficult situation.

6 It's a tough choice and I would say
7 within the context of that tough choice, yes, we can say
8 this is a voluntary choice even if constrained just as we
9 would often in the plea bargaining context.

10 And so the next question is how can the
11 judge make the individual experience this choice as more
12 voluntary and less coercive because, if the experience is
13 coerced, it's not going to work. It's going to lead to
14 psychological reactants.

15 You know, I can make my kids wash the
16 dishes but they're going to do a lousy job. I'm going to
17 have to wash them again. How can I figure out a way to
18 spark their intrinsic motivation and get them into it?
19 Maybe by giving them a reward, upping their allowance,
20 whatever.

21 How can we induce rather than coerce?
22 And I guess persuasion works better than pressure and I
23 think that's the direction we have to go here both for
24 reasons of respecting the defendant's rights and for
25 reasons of treatment efficacy.

1 MR. SCHECHTER: Let me ask you a second
2 question. The debate between you and Ms. Stefan seems to
3 be very black and white. Hers is this doesn't belong in
4 the criminal justice system, period. If society wants to
5 deal with mental illness and people in the community who
6 commit crimes because of mental illness, the answer is to
7 pour resources into mental health problems and
8 alternatives. Your answer is that's a great idea but it's
9 not a reality.

10 And so while you have genuine concerns
11 about the court becoming involved in these matters, as a
12 practical matter you want the courts to continue to be
13 involved in this and to get all kinds of great and
14 wonderful training.

15 Here's my question. Why does it have to
16 be black and white? Why couldn't there be a middle ground
17 which neither of you really seem to discuss in the debate
18 that I read.

19 For example, in New York we have a system
20 where retired judges become hearing judges and take motions
21 to suppress and main -- all kinds of other things away from
22 the main judge. They deal with it in a separate courtroom
23 and then, to make sure that it's done right it's subject to
24 the approval of a sitting judge.

25 Why couldn't we have some kind of

1 administrative court system which has the of enforcement
2 but is off to the side, would have all of the community
3 resources? We wouldn't have to indulge in this fiction
4 that the defense attorneys are really doing defense work
5 when they're not? The prosecutor is really doing
6 prosecution work in the drug court when they're not? The
7 judge is really a social worker and not a judge because
8 that's what he's really doing? Why wouldn't that kind of a
9 system be a lot better and would you support that kind of
10 alternative model?

11 PROFESSOR WINICK: I think I might. I'd want to
12 know a little more about it. You know, one of the reasons
13 for success in these programs, I think, and the literature
14 talks about it in terms of there's magic in those black
15 judicial robes, you know, the judge is a tremendous
16 authority figure and many of the individuals in these
17 judicial programs have never been exposed to an authority
18 figure in the past that has cared about them, that cares
19 about their well-being.

20 This is a revolution and right there I
21 think is an important part of the effectiveness. The judge
22 is concerned. The judge cares. The judge is reinforcing
23 their appropriate behavior, "Gee, I'm so delighted to see
24 that you're urine is clean," let us say. "I'm so happy
25 you're taking your second trip. Look at you, you're doing

1 great. Let's all give him a round of applause" and
2 everyone in the courtroom does that. That sort of
3 behavioral shaping, let's call it that, in psychological
4 terms is very effective.

5 If the judge wears that black robe and
6 has the mantle of judicial authority and looks the part and
7 does the same thing, I think that would work. I wouldn't
8 have objections to that.

9 MR. SCHECHTER: Okay. Thank you.

10 MS. SHIFMAN: Professor, I wanted to ask a
11 follow-up question that you described that may or may not
12 be present in a drug court situation, but when you step
13 into a mental health problem solving court you now have a
14 defendant who may not possess the ability to actually have
15 free choice or to truly understand what is being said to
16 them, and so I'm having trouble with your response in the
17 context of a mental health court and how do you address
18 that?

19 PROFESSOR WINICK: Representing people with
20 mental illness is a real challenge for a defense lawyer.
21 In all aspects of our criminal process we see increasing
22 numbers of percentages of people in the criminal justice
23 system who have mental illness, again showing the failure
24 of our community mental health system which is not putting
25 the money in. We don't have the programs and so people are

1 getting into tough difficulties, often getting arrested
2 often for minor offenses. They're urinating on someone's
3 lawn. Their trespassing into stores. They're speaking
4 belligerently. Their real problem is mental illness.

5 In the criminal process generally, even
6 though a lot of people have mental illness, we would ask
7 the question: Are they competent to stand trial? And
8 that's a very low threshold of ability. Or is their mental
9 illness so significant that it interferes with their
10 ability to understand the nature of the proceedings and
11 assist counsel in making their defense? Does it have those
12 kind of cognitive impairments, communicative impairments
13 that really should in a way disqualify the defendant from
14 going forward with facing charges, with pleading, with
15 having a trial? And that's a small little category and it
16 should be a small little category.

17 And so certainly we should have
18 competency assessments if the individual in mental health
19 court appears to be so bizarrely psychotic that he's not
20 competent. That person can't make a known and important
21 choice.

22 But if he passes that threshold and if he
23 is competent, then maybe we need more competence
24 assessments in that context. Then just as in the criminal
25 process generally, that individual will have choices within

1 the context of the attorney/client relationship in criminal
2 practice.

3 Generally defendants are making choices:
4 Do I waive jury trial? Do I take the stand? Do I plead
5 guilty? These are tough choices and the choices are made
6 with the attorney guiding him as counsel, and I suspect
7 that would occur here as well.

8 We have a model of, you know, the fully
9 competent, voluntary person making voices. In reality, a
10 lot of people with mental illness don't meet that model,
11 but a lot of people not mentally ill do not need that model
12 through reasons of literacy, language difficulties, or
13 intelligence deficits or simply social deficits.

14 A lot of clients in the criminal process
15 don't understand the complex terminology, don't understand
16 their rights, are making decisions without full awareness.

17 But you know what it's like in a medical
18 practice. People go to the doctor and the doctor gives
19 them the options and the alternatives and the costs and the
20 benefits, and this and that, and they often say, "I don't
21 get this stuff, doc. Whatever you think."

22 And I think we have that in the criminal
23 justice process often too, defendants saying to the defense
24 lawyers, "What do you think?" "I don't know." And I think
25 that is the reality of the practice in our criminal justice

1 system with people with mental illness even apart from
2 mental health court.

3 So I would say, yes, it isn't perfect in
4 that sense but we're doing the best we can. We should
5 eliminate those who are so blatantly incompetent that they
6 can't make decisions, but if they past that threshold
7 should we bar them from making a decision that might really
8 be in their best interest because they have mental illness?
9 Boy, I'm concerned that that would be discriminating
10 against them because of their mental illness. Certainly
11 Susan Stefan would join me in that concern.

12 MS. SHIFMAN: In the context of a mental health
13 court, though, where, as Marvin described it in the drug
14 court he was in yesterday, the defendant walks in. There's
15 this instantaneous offer and possible choice that needs to
16 be made right at that moment in the door, and the defense
17 lawyer is then asked with their client probably -- or they
18 have very brief contact with the client to make a sort of
19 mental health assessment on their own about whether or not
20 the individual has the capability of making the important
21 choice to perhaps go into the diversion program -- mental
22 health diversion program, perhaps plead guilty, you know, a
23 post-plea diversion sort of situation without really
24 understanding the full context of that individual.

25 Isn't that a lot different than the

1 setting where you've got a more serious criminal case and
2 the defense lawyer has the ability over time to make cogent
3 assessments about --

4 PROFESSOR WINICK: Let me fully agree with you.
5 I don't think we should rush -- I don't think we should
6 pressure the defendant to make an instantaneous decision.
7 To the extent that's happening, I'm against it.

8 I think we should slow it down. I think
9 we should assess the defendant so that we adequately
10 understand what his abilities are. I think we should spend
11 the time with the defendant to explain his options, and
12 only then should we honor choices that allow him to make
13 those decisions.

14 In reality we need more resources in the
15 criminal justice system maybe to do that. We need to do
16 that in the non-mentally ill criminal justice system as
17 well. We need more Public Defenders if we're truly going
18 to honor the right of effective assistance of counsel. I
19 fully, fully, fully agree.

20 MS. SHIFMAN: Are those assessments happening in
21 the mental health courts on the front side or are they
22 happening post diversion?

23 PROFESSOR WINICK: You mean, competency
24 assessments?

25 MS. SHIFMAN: Competency or just straight out

1 psychological assessments.

2 PROFESSOR WINICK: You know, we have Judge Wren
3 with us so maybe we will hear more from her about the
4 realities in her court. I don't know the answer to that.
5 I would hope they are. I would like to see that occur. I
6 think that the criminal defense lawyers should insist on it
7 if they're uncertain about, you know, what to do in the
8 circumstances. Achy versus Oklahoma, a Supreme Court case,
9 that allows an indigent defendant to have had the court
10 appoint a forensic evaluator to assist in determining what
11 defense to make. Should I make an insanity defense? Is my
12 client incompetent, etcetera, etcetera.

13 I do think we need to slow it down both
14 with respect to the defendant's rights and to make sure
15 that the decisions are being made in ways that will more
16 likely produce an effective rehabilitative response if the
17 defendant decides to go in that direction, so I would say
18 yes, we should do that.

19 MS. YOUNG: I have a question. Vicki Young.

20 When you're talking about addressing a
21 problem and the need for an authority figure, that that's
22 the role that the judges play in these courts, and you say,
23 well, judges, when you make this presentation, someone is
24 always in the back raising their hand saying, "Well, I'm
25 not a social worker" and you're saying, "Well, you are."

1 PROFESSOR WINICK: You're functioning as one,
2 right.

3 MR. YOUNG: How do you view the role then of the
4 prosecutor and the defense attorney in that setting because
5 what you're -- if you're going into a treatment or restore
6 the justice mode, aren't the main players the judge and,
7 let's say, a probation officer, not that the person has
8 been convicted yet, but what roles do the attorneys have in
9 that system?

10 PROFESSOR WINICK: They're more minor roles I
11 think and I think we all need to think through a lot more
12 than we have what the role of the prosecutor and the
13 defense attorney through these processes should be.

14 To some extent there's talk about
15 relaxing the advocacy role, the defendant being part of the
16 advocacy team. That gives me some concerns. I understand
17 it. I understand that if you're representing a client who
18 has said, "Gee, I do want to deal with my drug addiction.
19 I do want to take my psychotropic meds. I do realize I do
20 feel better and do better when I'm on them. Help me do
21 that," that once the individual has signed onto that
22 program, hopefully in a very voluntary, understanding way,
23 maybe part of the lawyer's role is to help him to succeed
24 but also to protect his legal rights and interest if, let
25 us say, he's violating the terms of the program. His urine

1 is dirty or whatever.

2 If there's a factual dispute about that I
3 would certainly expect the defense attorney to advocate for
4 his client that, "No, that's not a mistake, judge." But if
5 it's not a mistake and the defendant in advance has agreed
6 to this program and it seems like the defendant wants to
7 get off his drugs, then I guess the defense is put in a
8 very strange position for defense lawyers because they're
9 kind of standing by watching this process, trying to I
10 think assist the process in the goal of rehabilitation.

11 I do think, though, they should always be
12 mindful of protecting their clients' liberty and rights in
13 that process. It might be a somewhat relaxed advocacy role
14 because it's not an advocacy context often, unless maybe
15 there is some allegation that the defendant hasn't
16 complied, in which I think it shifts immediately to an
17 advocacy role and the lawyer needs to follow that.

18 If not, and the defendant is reporting
19 and doing well, I mean what's the defense lawyer and the
20 prosecutor's role? They clap with the others. They
21 encourage their client. Again it's a strange role and I
22 know we're all on the defense side wondering about that
23 role, but it's also a strange role for the judges.

24 And yet here is a pragmatic program
25 that's helped a lot of people and yet we don't seem to have

1 the societal commitment and resources to do the community
2 programs, the preventative programs that we need to do, the
3 assisted community treatment programs, the treatment vans
4 that we should fund in our community for people.

5 There's a lot of things we should be
6 doing. I think we as lawyers who know about these problems
7 need to be better advocates in our legislative processes
8 but in reality it's not happening and, as I said, this is a
9 pragmatic solution and I think it's better than the
10 alternatives.

11 MS. YOUNG: But the way -- as Marvin described,
12 it seems to me that the validity of the court depends a
13 lot, as you say, that they've voluntarily chosen to
14 participate, it's as knowing as it's going to be a knowing
15 decision to go into the mental health court or go into the
16 drug court, and that it's the role of defense counsel to
17 make certain that the defendant understands what they're
18 getting into.

19 But if that decision is really being made
20 in the 15 minutes after they come out of the holding tank
21 and the next day after they are arrested before you see all
22 the police reports, the attorney doesn't have the
23 information to help someone make a knowing decision but
24 that's when the main decision is made. And once they
25 decide to go into the courts, at this point it's sort of --

1 PROFESSOR WINICK: I agree.

2 MS. YOUNG: I'm not sure what the role is after
3 that point.

4 PROFESSOR WINICK: If I was on an NACDL Task
5 Force I would make that recommendation. I would say you
6 should not rush these things so quickly, and you should
7 have adequate time and resources and opportunity for the
8 kind of counseling that we all know should occur between
9 attorney and client, and if that means hiring more defense
10 lawyers, we sure should do it.

11 MS. KELLEY: Elizabeth Kelly from Cleveland.

12 Maybe I'm looking for a problem where one
13 doesn't exist but I see many of these various
14 problem-solving courts' success being predicated on the
15 judge who presides over them, and I see a potential for
16 these courts basically developing into a cult of
17 personalities, and although that might not happen in a
18 major metropolitan area, I can see a greater potential in
19 the smaller communities.

20 And I'm also wondering about the success
21 of a given court after a judge retires, a judge who may
22 have a very good commitment to that particular issue.
23 Could you address those concerns?

24 PROFESSOR WINICK: Yes, I think you make very
25 valid points. I would agree with them. To some extent,

1 you know, the success of the program might turn on the
2 idiosyncratic nature of the judge. Some judges are great
3 at this. Some judges have natural clinical, social worker
4 skills. They know how to talk to people. They know how to
5 respect their dignity and to make them feel valued and to
6 pump up their feelings of self efficacy, which is so, so
7 important. A lot of these folks have such a low opinion of
8 themselves, such a low sense of self effectiveness that
9 they're just failing at whatever they do.

10 Some judges are so good at this, others
11 aren't, and I do think you're right, we do need to do more
12 training, more standardization of the role of these judges.
13 I would love to see us teach these skills in a more
14 effective way and more personal way to judges who play
15 these roles.

16 I think we have a responsibility --
17 judges have a responsibility to do this, to learn some
18 insight from psychology and social work and so forth, and I
19 think this is a training challenge that we should try to
20 deal with.

21 Also I do think that you're right, that
22 there is a potential here for judges playing this role to
23 abuse their authority, to act too paternalistic. And,
24 again, whenever I give these lectures to judges I tell
25 them, "Don't be paternalistic. It doesn't work. It's

1 offensive. None of us like paternalism. You're much
2 better off giving people choices."

3 Are some judges overly paternalistic?

4 Yes. Do some judges abuse these roles? Yes. And I think
5 we need to be concerned about that and I would hope that
6 would be part of the report to warn us, to warn the system
7 about judges who might go off the deep end in that regard.

8 You also make a point, which I agree
9 with, what happens when some charismatic judge has done a
10 good role in these courts retires and some other judge gets
11 sent in who might not have the ability. Well, you're
12 right, and the program might not work.

13 We have to be very careful in who we
14 select to play these roles. We probably need to give some
15 thought to rotating them in and out. There may be some
16 burn-out in this area as there is in any area of judicial
17 work.

18 But I think these are the kind of
19 problems we see all the time on the judiciary. We need to
20 be on guard about them. We do give judges a lot of power.
21 Some of them abuse that power. It's the role of defense
22 lawyers to police that. It's the role of our appellate
23 courts to police that. We should be concerned about it.
24 I'm concerned about it. I agree with you.

25 MS. KELLEY: You said we need to be doing a

1 better job of training. Who is the "we" in your
2 sentence --

3 PROFESSOR WINICK: Good question.

4 MS. KELLEY: -- and would you be in favor of a
5 type of sort certification or other type of credential.

6 PROFESSOR WINICK: You know, I haven't thought
7 about the certification but it might be a good idea. We
8 certainly have judicial training in general for judges who
9 become new judges. To some extent, I think judges who are
10 appointed to playing these roles do need to have some
11 judicial training not only about the rules of evidence and
12 how to conduct the courtroom, but also in some insights
13 from psychology and social work.

14 You're dealing with -- you know, in drug
15 court you need to understand substance abuse issues, how
16 the drugs work. You need to understand the idea that
17 recovery isn't a straight line. People fall off the wagon.
18 Instead of coming down heavy on them you need to encourage
19 them to get back on the wagon. It's a process and so we
20 need to teach that to these judges.

21 Certainly judges playing the role that
22 Judge Wren plays needs to understand psychopathology and
23 how the medications work and some clinical issues and
24 clinical jargon and ditto for domestic violence court. So
25 we do need some specialized training of judges in these

1 areas.

2 There's a lot of tricky issues with
3 patients with dual diagnosis, have substance abuse and
4 mental health problems, and I think the National Judicial
5 College in Reno periodically offers a course in that. Do
6 all judges who play these roles take those courses? I
7 doubt it. I think it probably varies.

8 Who is the we? I guess the judicial
9 process. All of us have to be concerned that judges
10 receive appropriate training. I'm not sure who the "we" is
11 but I certainly do think it would be appropriate for a task
12 force making recommendations in this area recommend that
13 judges have appropriate training or retraining. I don't
14 know about certification. I'd want to think about that.

15 MR. JONES: We're going to hear from Jay and
16 Marvin and then I have one final wrap-up question for
17 you.

18 MR. CLARK: Professor Winick, you at some point
19 in your comments gave us three topics that we should be
20 concerned with: The voluntariness of the choice issue; the
21 widening of the net and charge others who may not be
22 charged; and then what I've got, the case of the improper
23 allocation of resources to the detriment of others.

24 We spent a lot of time talking about the
25 choice issue. Could you talk about the last two, the

1 widening of the net and how you would maybe remedy that,
2 and the improper allocation of the resources.

3 PROFESSOR WINICK: I would not want to see
4 people charged with these kinds of offenses just to sweep
5 them into drug court or mental health court who would not
6 prior to these kinds of judicial models have been charged.
7 So I guess what that means is that we have to have a good
8 understanding of what the baseline is, what prosecutorial
9 charging patterns seem to be, what police arrest practices
10 seem to be.

11 And maybe that's not an easy question but
12 I suspect that defense lawyers in the communities have a
13 fairly good understanding of this, and I do think it's very
14 important that we not, as I said, sort of widen the social
15 net.

16 I think these programs are good and help
17 people. As I see it, they're the lesser of evils in a
18 certain sense and so I wouldn't want to see us sweeping
19 more people into these programs just to give them this door
20 out. That would validate much of Susan Stefan's criticisms
21 and to that extent I would agree with her.

22 Susan and I were colleagues on the
23 faculty and we're both scholars in the area of mental
24 health law, and we actually agree on a lot of things,
25 although we disagree on some things, and we aired our

1 differences in the pages of that forum in a way that we
2 thought would be a very good way of probing our differences
3 and discussing the issues.

4 MR. CLARK: Professor Winick, on the charges
5 that would not otherwise be charged, who do you define
6 that, as people who are not guilty but are being charged in
7 a sweep? I want to make sure I know what you mean by
8 that.

9 PROFESSOR WINICK: Police officers arrest
10 practices and prosecutorial charging practices. If we see
11 a difference once a court of this kind grows up that all of
12 a sudden they're arresting more people or charging more
13 people just to give them the, quote, benefits of the court,
14 that's what I mean. That would be of concern.

15 As I say, we have to understand what the
16 baseline is and that might not be easy but as defense
17 lawyers, public defenders offices would have a good idea of
18 this.

19 Again I do think we need to develop
20 alternatives to these programs. For example, in mental
21 health court, let's train the police not to arrest these
22 people. They don't belong in the criminal justice system.
23 We could have those roving, assertive treatment vans that
24 could help them, induce them to take treatment, take them
25 to their treatment clinics and the like that would be

1 preferable.

2 And if we can teach our police officers
3 to understand mental illness, to understand community
4 resources, and to themselves divert people to those
5 programs rather than take them into the criminal justice
6 system, to the jails, that would be better. This is the
7 Memphis model and I'm fully, fully, fully in favor of that.

8 And I do think we should have more
9 preventative resources in the community, as I said in my
10 opening statement, and so this is a pragmatic solution.
11 But until and unless we achieve that millennium -- and I
12 would hope we would try to do that -- I think these
13 programs are doing more good than bad and are in effect
14 helping people and, therefore, they're a welcome edition to
15 the criminal justice system.

16 And, you know, given the numbers, it's an
17 edition that has been accepted by the judiciary and by the
18 public. I think in the early days there was a lot of
19 controversy, "What? That's a judge. A judge doesn't do
20 that." I think they're more respected now by fellow judges
21 and a more accepted part of the system and so we need to
22 think about, okay, how do we prevent the type of abuses
23 we've have been talking about.

24 MR. SCHECHTER: Professor, I'm Marvin Schechter.

25 Yesterday there was a very telling moment

1 in Judge Rosinek's court. A client of the Public Defender
2 came before the court who had disappeared from his program
3 since August and nobody knew where he was, and all of a
4 sudden he came out of the audience and he stood up at the
5 podium, and much to the surprise of the attorneys and
6 everybody in the courtroom he said, "I'm here." And Judge
7 Rosinek said, "Where have you been?" He said, "I've had a
8 lot of problems. I can't afford to pay the program so I
9 dropped out for a while but here I am." And the judge
10 said, "Well, you can't do that" and the judge was clearly
11 upset. It was the one jarring moment I think in the
12 several hours that I had seen him operate.

13 And he then turned to what -- I call them
14 my client and I was just participating from the audience.
15 I was an observer. And he turned to the client and he
16 said, "Are you dirty right now?"

17 PROFESSOR WINICK: "You're dirty" meaning "Are
18 you on drugs"?

19 PROFESSOR WINICK: Yes. And the client said,
20 "Yes." And the judge followed up with the question, "What
21 are you using?" And he said, "Cocaine." And the judge
22 said, "When?" And he said, "Yesterday."

23 Now, you can imagine for a criminal
24 defense attorney sitting in a courtroom hearing that
25 exchange what that does to you. You know better probably

1 than most that we are deeply bound under the code of ethics
2 to protect even to the point of going to jail the
3 attorney/client privilege.

4 So here's my question. Maybe what's
5 needed is an end to the charade that the defense attorney
6 sitting there as a lawyer in this context of violating what
7 clearly is one of the disciplinary rules that swear us --
8 swear us to protect the confidences of the client and have
9 a new ethics code inserted into the canons to protect the
10 defense attorneys and/or the prosecutors in the context of
11 these specialty courts so that we no longer hear -- and
12 this is what I want you to address -- so we no longer hear
13 from NACDL members around the country this refrain, "I love
14 the drug court. I want it to work. It's good for my
15 client. It's better than jail but I cannot continue to
16 work in that court and be true to the canons of ethics and
17 to the client/attorney privilege."

18 What should we do about that? Would you
19 support a new canon like that and have you worked on one or
20 in your experience ever talked to a judge or a lawyer about
21 that?

22 PROFESSOR WINICK: Let me just try to understand
23 a little better. Was it the defendant who admitted he used
24 cocaine --

25 MR. SCHECHTER: In open court.

1 PROFESSOR WINICK: -- or his lawyer?

2 MR. SCHECHTER: No, in open court. The client
3 admitted. The attorney was seated at the table maybe five
4 feet, never said a word and it went into the record.

5 PROFESSOR WINICK: Here is what I think of the
6 circumstance. This is a treatment program and in
7 general -- and the judge is part of the treatment program.
8 In general when people enter into treatment programs, a
9 variety -- especially drug treatment programs, a variety of
10 federal law provisions protect confidentiality. We may
11 need to clarify the reach of those provisions in this
12 context.

13 It seems to me that a defendant who in
14 the context of a program admits that he has used cocaine
15 should not have that statement used in evidence against
16 him, kind of almost as an adjunct of a medical -- of a
17 doctor/patient, therapist/patient communication.

18 I would like to see us explore the
19 confidentiality of the statements made there. Now, I think
20 in practice that guy is not going to be arrested.
21 Prosecutors don't seem to charge in those circumstances.
22 They're not subpoenaing people at the programs to find out
23 if they're urine is dirty and then slamming them. I think
24 that's right. If it's not right I would be very concerned.

25 But I think if that is right, maybe the

1 practice reflects the fact that we understand that this is
2 a treatment program and we can cloak it with a certain
3 agree of confidentiality.

4 So my first reaction is let's think that
5 through. Secondly, is there a need for us to rethink
6 professional ethics in this context? Yes, I think there
7 is. Is there a need for us to reinstitutional ethics?
8 Yes, I think there is and maybe because this is a different
9 ball game, maybe because judges have a potential for abuse
10 that we need to think about. Judges should not be
11 paternalistic and this brings forth their paternalism.

12 I do think we need to creatively think
13 about the roles of defense lawyers, prosecutors and judges
14 in these courts, and to think about whether we need to vary
15 ethical standards somewhat and I'm not sure exactly where.

16 Have I myself thought or written about
17 this? Not a whole lot actually, but I do think it's a very
18 important and interesting challenge and I would certainly
19 welcome the NADCL to make a contribution in that area. And
20 I think I have suggested this to judges groups, that they
21 developed again ethical guidelines and the like that are
22 more particularized to this role so I think those are very
23 good ideas.

24 MR. SCHECHTER: Thank you.

25 MR. JONES: Thank you, professor. This has been

1 a very fascinating and incredibly useful conversation. We
2 could not have asked for better opening act as we start our
3 listening tour in our public hearings around the country.
4 We greatly appreciate you being here and I know that we
5 have our next set of speakers so thank you very much.

6 I've been asked to give us a five-minute
7 bathroom break and we will do that and we'll reconvene in
8 five minutes.

9 PROFESSOR WINICK: Thank you. My pleasure.

10 (Time noted: 9:26 a.m. to 9:33 a.m.)

11 MR. JONES: All right. We're going to start.

12 We're once again honored to have Judge Ginger Lerner-Wren
13 with us this morning to talk about the work that that she
14 does in Broward County running that mental health board.

15 Once again for the record -- and I think
16 before we actually get into the substance of Judge Wren's
17 comments, if we could just -- I know there are a number of
18 people in the back and I know you all know who we are.
19 Tell us very briefly who you are. That would be
20 wonderful.

21 MR. HOOKER: I'm Bob Hooker. I'm a public
22 defender in Puma County, Arizona. I'm a member of the
23 NACDL court.

24 MR. JONES: Thank you for being here.

25 MR. DE MARIA: I'm Eric De Maria, assistant

1 public defender, coordinator of the presentation. I'll be
2 speaking to you a little later today.

3 MR. JONES: Thanks for being here.

4 JUDGE POLLACK: I'm Gisele Pollack and I'll be
5 speaking with you a little later as well.

6 MS. DANUE: Shawn Danue, assistant state
7 attorney, here for Katherine Fernandez-Rundel from the
8 State Attorney's Office in Miami County.

9 MR. JONES: Great. Thank you so much for being
10 here.

11 JUDGE POLLACK: And I have my assistant state
12 attorney with me, Sue-Ann Robinson, who is still getting
13 coffee.

14 MR. JONES: Great, great. Thank you very much.

15 I am going to at this point read into the
16 record Judge Lerner-Wren's biography, and then we're going
17 to ask you, Judge Wren to give us 15 minutes of your
18 opening comments and then we hope to have a very thorough
19 discussion with you as well.

20 Judge Ginger Lerner-Wren was elected
21 county court judge 17th Judicial District in 1996 and
22 assigned to a criminal division which she maintained a full
23 criminal case load.

24 Based on her expertise in mental health
25 and disability law gained in her capacity as public

1 guardian of the 17th Judicial Circuit and a staff attorney
2 for Florida's Protection and Advocacy Agency, Judge
3 Lerner-Wren was selected by Chief Judge Dale Ross to serve
4 as the mental health court judge for the nation's first
5 court dedicated to the decriminalization and treatment of
6 the mentally ill in the criminal justice.

7 Hailed as the national model and best
8 practice, Broward's innovative mental health court was the
9 model for congress as it passed criminal reduction and
10 diversion legislation in 1999. Broward's mental health
11 court was profiled at the White House conference on mental
12 health in 1999.

13 In July of 2002 President Bush appointed
14 Judge Lerner-Wren to the president's New Freedom Commission
15 on Mental Health where Judge Lerner-Wren chaired the
16 Criminal Justice Subcommittee.

17 Judge Lerner-Wren speaks nationally and
18 internationally on a wide array of subjects including
19 mental health courts, therapeutic jurisprudence, and public
20 policy matters related to the criminal justice system.

21 Presently Judge Lerner-Wren serves on the
22 national advisory council for SAMHSA to continue efforts in
23 seeing the commission's work implemented across the county.

24 Judge Wren also presently serves on the
25 Florida NAMI and Nova Southeast University Center for

1 Psychological Studies Board of Advisors. The Broward
2 County Mental Health Court has been featured on NPR, Good
3 Morning America, CNN and profiled in countless articles in
4 public articles nationally and internationally.

5 Judge Lerner-Wren has received numerous
6 awards and has been honored for her innovative work in the
7 promotion of justice and human rights for the mentally ill
8 in the criminal and justice system.

9 She is a graduate of the University of
10 Miami and received her JD from Nova University Center for
11 the Study of Law.

12 And, as I said before, we are very
13 pleased to have her. The floor is yours, judge.

14 JUDGE LERNER-WREN: Thank you so much. This is
15 a thrill and absolutely honor and privilege to be here.
16 And I was listening to the inquiries made by all of you to
17 Professor Winick and they are completely on target and
18 really important and significant and so this is for me a
19 great privilege.

20 I thought what I might do just to
21 maximize our time together is, since Professor Winick did
22 such a nice job of laying out some of the history behind
23 the evolution, if you will, of problem-solving courts from
24 a jurisprudence standpoint in the United States and
25 internationally, because they go hand in hand, I might

1 focus a little squarely on I think substantively what we
2 need to focus on in terms of some of the concerns, issues
3 and considerations --

4 MR. JONES: That's great.

5 JUDGE LERNER-WREN: -- that your committee is
6 looking at.

7 I thought what I might do for the sake of
8 a logic model, if you will, for the purposes of my brief
9 discussion is kind of take you back a little bit in time
10 maybe just over a decade of where we were in my community
11 from a social perspective, from a legal and criminal
12 justice perspective, so you can get a flavor of the fabric
13 of what Broward County was experiencing, which is very
14 consistent with what every jurisdiction and community
15 experiences really throughout this country.

16 And, as I do that, I would remind all of
17 you, first of all, that I have, as you may have gathered or
18 may not have gathered because I'm not clear how much -- how
19 knowledgeable the connection of the dots is, for example,
20 with civil rights, public interest organizations, for
21 example, and the work that you all do but I am civil rights
22 lawyer -- was a civil rights public interest lawyer. That
23 is where -- the sector that I came out of.

24 I served, for example, for the -- when we
25 talk about a protection advocacy organization, that is a

1 federally mandated legal watchdog statewide system that is
2 federally funded, for example, and goes state by state.

3 In the State of Florida, for example,
4 ours is called the Protection and Advocacy Center, the
5 Persons with Disabilities, Inc. and then in every single
6 state that has one it may be called something different.

7 Having said that, in Broward County back
8 in 1997 when I was not on the bench, at that time I was
9 overseeing a federal class action on behalf of the
10 plaintiffs involving constitutional violations from one of
11 our South Florida psychiatric state hospitals.

12 The federal lawsuit was called San Juan
13 versus Chiles and I was asked by the advocacy center to
14 serve on that litigation as the plaintiff's monitor, if you
15 will, through the implementation of a rather unique kind of
16 consent, somewhat different than institutional settlement
17 agreements of the past involving state institutions.

18 That work fortunately really led to
19 working with some of the most knowledgeable experts both in
20 law -- in disability law and in psycho/social
21 rehabilitation.

22 The goal of that particular federal class
23 action was not so much, if you will, to improve the
24 conditions of the psychiatric institution and bring them
25 into constitutional alignment, if you will, but instead to

1 drive the development of the community-based system of care
2 in a very creative way.

3 So I left that position after a few
4 years. You know how it is when you're monitoring and
5 trying to bring about some kind of social legal reform. It
6 only goes so far, if you will, and from that particular
7 position I chose to run for a judicial seat.

8 As things I guess happen while I was
9 campaigning, in my county we were experiencing a confluence
10 of very serious issues and let me just kind of clip them
11 off because you'll hear about these type of problems
12 community by community no matter where you take public
13 testimony.

14 First of all, we had no, zero, authentic
15 community-based mental health system of care. It was not
16 navigable. It is to this date not navigable. It is
17 nonexistent. There are bits and pieces of fragmentation of
18 some formal treatment in our community and no real,
19 authentic state, social, administrative entity to assist
20 families and individuals with access of care.

21 I'm very, very fortunate to be appointed
22 by President Bush to the president's New Freedom Commission
23 on Mental Health where I did chair on behalf of that
24 commission.

25 Not since President Carter has there been

1 a national commission to study the national mental health
2 system in the United States. There were only 15
3 appointments in the country and I was very fortunate to be
4 appointed to that commission which issued a report to the
5 White House in 2003.

6 And the interim report filed by the
7 commission really I think was incredibly honest and
8 forthright in terms of assessing just the state of the
9 mental health care delivery system in this country.

10 And basically we found -- and certainly
11 the commission found that the state of mental health
12 delivery in our country is in shambles, that while the
13 executive order by the president asked us to do certain
14 things in order to make recommendations to congress and to
15 the White House, it was the commission's view in total that
16 we were not able to make really any real recommendations to
17 the White House or congress other than one, and that is the
18 honest recommendation that the entire mental health care
19 delivery system in this county must be transformed
20 effectively, totally, substantially transformed because
21 there is -- was and is no real way to, quote, fix it in the
22 way it is. That's how seriously defective, flawed and
23 nonexistent mental health care delivery in this country is.

24 The commission basically found three
25 significant barriers. One has to do with stigma and

1 discrimination surrounding this population. And I want you
2 to hold on to that thought and concept because that has a
3 lot to do with what we're working on. It's kind of like
4 the 800 pound -- what is that, the elephant or the gorilla
5 in the room. I don't remember how you say that.

6 But you have to hold on to that because
7 it's here and it's with us and it is pervasive and it
8 drives a lot of, you know, what we are dealing with and
9 addressing and I want us to keep that as the enlarged
10 picture from the human rights standpoint as you continue to
11 do your work because we understand its significance very
12 well.

13 Just briefly the other major barrier was
14 the fragmentation of systems across the country generally
15 and, of course, the third has to do with financial
16 barriers. Very specifically, most individuals -- even
17 without mental illness most families don't have health
18 insurance, and even if they are lucky enough and fortunate
19 enough to have health insurance, they do not have parity
20 with mental health care. So not being able to access care
21 becomes really the priority problem for Americans in this
22 particular country.

23 Back to Broward County now 10 years
24 rollback, we had a significant jail overcrowding problems.
25 Most of you will hear testimony from all sectors that jails

1 the women, not that the men should not also think about
2 this. I think we all should, but it's a hidden issue and
3 I want to raise it now, upfront issues of sexual abuse,
4 incest, domestic violence either as children or in
5 adulthood.

6 The evidence through the Department of
7 Justice figures are that for 85 percent plus of women in
8 the criminal justice system they do suffer from major
9 mental illness including post-traumatic stress disorders
10 and other mental illness that simply do not show themselves
11 very apparently to the cover, if you will.

12 Also consistent with the data is not only
13 that individuals are suffering from serious and persistent
14 mental illness but that we also have a very close -- that
15 the majority of the individuals or a good portion of
16 individuals with mental illness are also suffering from
17 serious substance abuse.

18 Disorders, you'll hear language, as you
19 move forward, with individuals called co-occurring. You'll
20 hear that. That again has to do with not only the
21 significant fragmentation of funding change, service
22 systems, etcetera, and broken systems of care in our
23 country, but also significant discrimination and stigma
24 surrounding this population.

25 As you move forward you might also

1 consider that even as far as we've gotten, for example, in
2 drug courts, that historically drug courts have not
3 permitted individuals with diagnostic -- with disorders
4 mental illness diagnosis to even enter drug courts.

5 And that is an important issue that I
6 also wanted that you all should know and consider because
7 again that 800-pound gorilla or elephant, depending how you
8 know that euphemism, is in the room with us at all times.

9 So in Broward County we have the jail
10 overcrowding problem. We've had tragic deaths in our jail,
11 two at this time. We had a scathing grand jury report
12 focusing on the lack -- serious lack of community-based
13 services in Broward County and we had a very, very high
14 profile case involving a mentally ill young man who
15 actually had significant brain injury but it was mimicking
16 schizophrenia in Broward County.

17 He tragically ran into an elderly woman
18 in a grocery store. He was charged with murder and one of
19 our very charismatic public defenders, who you will hear
20 from his chief assistant later on this morning, represented
21 this individual and when he ultimately was acquitted sued
22 the State of Florida, was awarded \$33 million for civil
23 rights violations by the State of Florida, and 33 million
24 represented every hour that Aaron Wynn was in four to five
25 point restraints based on expert testimony. So it really

1 was a reflection of his torture hours that that award was
2 made.

3 All of these elements came together back
4 in 1997 in Fort Lauderdale and we had a number of
5 individuals, not a whole lot but a few, one being our chief
6 assistant public defender, Howard Finkelstein now the
7 public defender in Broward County, very charismatic,
8 extremely articulate, wonderful with the media, and our
9 circuit judge Mark Feister at the time who said we are
10 really -- our people are really in trouble in the jails.

11 They just kind of understood at this
12 pinnacle moment that individuals that were being arrested
13 keep going in front of judges, judges that didn't know what
14 to do. They were often holding individuals with mental
15 illness who were psychotic in the courtroom in contempt of
16 court for their bizarreness, for their manifestations of
17 symptoms that they just were not being treated for.

18 Individuals being held on petty, low
19 level offenses, quality of life, nuisance type of offenses,
20 couldn't get out of jail on \$25 bonds.

21 The Department of Justice's Special
22 Memorandum supports after study that individuals in the
23 United States, for example, important data, with mental
24 illness versus not with mental illness spend on average up
25 to 210 days longer in an incarcerated setting than

1 individuals without mental illness.

2 Really important, important data. The
3 suffering is huge. The human rights issues are tremendous.

4 And so back in 1997 when I came to the
5 bench -- without opposition, I might add -- I was assigned
6 to a criminal division, and I really had no criminal
7 background 10 years ago and I was like, "Oh, wow, that's
8 interesting," and I just, you know, was very lucky that I
9 had great mentors and a great chunk of time to get up to
10 snuff.

11 But there was also a sense at that point
12 that I was so equipped, if you will, from a constitutional
13 standpoint, from a psycho/social rehabilitative standpoint
14 that if you have the knowledge, if you know that people are
15 sitting in jail cells that are significantly ill and
16 suffering you can do something. You cannot sit quietly any
17 more. You just can't do nothing. You have to take
18 ownership and responsibility of these human rights issues.

19 And back in Broward County the
20 consensus -- we had local consensus that from a criminal
21 justice standpoint we wanted -- the community wanted to do
22 something, and something was better than nothing, that we
23 could no longer sit by and allow people blindly to be
24 incarcerated and stay incarcerated or just constantly
25 revolve in and out of jails, homeless shelters, hospitals,

1 jails, homeless shelters, street. It is a life filled with
2 trauma, abuse, shame and suffering.

3 And we did not have the political will
4 from our sheriff 10 years ago, for example, to implement
5 what Professor Winick describes as our CIT model so
6 beautifully created out of Memphis. There was just no
7 political will for that.

8 So the consensus was, "Okay, what do we
9 do?" And actually it was the Public Defender's Office out
10 of Howard Finkelstein's concept -- I was not on the bench
11 yet -- who said, "I want a court. I want a specialized
12 court. I want somebody -- a court who can address the
13 complexities that this population brings, that can marshal
14 resources, know what to do, alleviate suffering, follow
15 legal process, do it right." I don't know. He just had a
16 light bulb, a concept, if you will.

17 I came to the bench right around that
18 same moment and sure enough within a couple of months I
19 received a call from our chief judge. Nobody asked me. It
20 was just kind of, you know, fate, that would I -- no, the
21 call was, "Congratulations. You are our new mental health
22 court judge. When would you like to start?"

23 I was like there's no road map for this,
24 and I think that that's the other piece, there's no road
25 map. And I was like, "Oh, gosh, what an honor. Could I

1 just have 10 days?" I was afraid he would change his mind.
2 He's very conservative, our former chief judge, didn't
3 really understand the amount of the human rights aspects of
4 all of this, and I was very afraid that he would change his
5 mind so I asked for 10 days.

6 And the first thing I did was I reached
7 out to some national scholars and experts because I
8 understood from a civil rights vantage point it's really
9 important to have our constitutional issues and our
10 political issues and our social rehabilitative issues -- I
11 certainly understood all the different little pieces, and
12 the critics, the criticism, the potential flaws, the
13 potential flaws in advance. I was lucky enough to know
14 what you need to know. What is that saying? You know what
15 I mean. I know enough to know what I need to know.

16 MR. JONES: I'm going to very reluctantly --

17 JUDGE LERNER-WREN: Oh, I'm sorry.

18 MR. JONES: -- just because we have so many
19 questions that we want to get to --

20 JUDGE LERNER-WREN: Three issues and you can do
21 that.

22 MR. JONES: Absolutely.

23 JUDGE LERNER-WREN: Constitutionally -- it's
24 really important. Constitutionally was the first
25 consideration and reached out to both Michael Pearlman,

1 professor and scholar, writes the treatise on mental health
2 disability law and has forever out of New York University
3 Law School. He has consulted with me on the development
4 and design of the court. And also consulted with the
5 Department of Justice through their civil rights division
6 through Justice and other query and now you can proceed.

7 MR. JONES: Thank you for that. Our questioning
8 is going to be led off this morning by Elizabeth Kelly.

9 MS. KELLEY: Good morning.

10 JUDGE LERNER-WREN: Good morning.

11 MS. KELLEY: You addressed several times in your
12 remarks either directly or indirectly the closing of the
13 institutions back in the '70s for both the mentally ill as
14 well as the mentally retarded.

15 And as a criminal defense attorney one of
16 my biggest frustrations is that if, in fact, a client has
17 done what he or she is charged with, after I have
18 negotiated a wonderful plea and got him or her probation
19 and tried to set up the appropriate support systems within
20 the probation order, the one piece that I could never solve
21 for is housing and all of that means.

22 And this is a frustration which spans all
23 income levels. It is the same frustration for the indigent
24 client as for the client who may come from a very affluent
25 suburban family who just can't take him or her in any more

1 because it is such a drain on the family emotionally and to
2 some extent financially.

3 Can you address what Broward County is
4 doing about that, that piece of the puzzle, and what other
5 jurisdictions are doing?

6 JUDGE LERNER-WREN: I'd also like to address the
7 first piece of it. The Broward County model does not -- is
8 a pretrial -- pretrial mental health strategy. We do not
9 consider ourselves a program. We do not have problematic
10 standards like a drug court model. It's purely voluntary.

11 I will not have nor do I have any desire
12 to require any kind of plea to access this court. It is
13 primarily diversionary in nature. It is meant to find the
14 sickest of the sick in the jail system and move them out to
15 be independently evaluated by what we consider to be the
16 more appropriate system of care, that being the civil
17 system.

18 And so the Broward County model, which
19 was the first model of this court, I want you to kind of be
20 knowledgeable that all models may not be consistent with
21 the Broward County model, but we believe that the Broward
22 County model does classically represent the greatest
23 protection constitutionally and ethically -- and I'll get
24 to your question in just a second -- and that is nothing
25 more than a strategy. It is not a program. It is a

1 criminal justice diversionary strategy built around
2 constitutional and consumer oriented principles.

3 MS. SHIFMAN: Is that for felonies and
4 misdemeanors?

5 JUDGE LERNER-WREN: Misdemeanor. I'm a
6 misdemeanor court. I don't have a felony court.

7 The question on housing is a very serious
8 issue nationally. The greatest issue nationally. It's
9 almost impossible to be successful in either recovery
10 and/or any kind of social control compliance out of the
11 criminal justice system without a roof over your head.
12 It's just a social problem that is -- that everybody is
13 struggling with.

14 I was very blessed, for example, in my
15 county after I did not allow individuals to be discharged
16 back into the jail system that had come, for example,
17 through my mental health court. We kind of flooded the
18 acute health system until I got a plan that I got my own
19 residential treatment facility. To support the court I
20 have a homeless shelter for the homeless that are mentally
21 ill.

22 MR. JONES: How big is it?

23 JUDGE LERNER-WREN: 24 bed transitional but we
24 do the best we can in treatment matching. We do the best
25 we can in treatment housing. And we do have effectively

1 one very positive outcome -- huge positive outcome of
2 centralizing resources through a court or a model in any
3 fashion is you can take the inventory of what a community
4 may have in housing and really maximize it through some
5 type of coordination.

6 So this court brings together
7 coordination, integration in the service systems that just
8 don't exist. That has been a very, very significant
9 addition, if you will, to individuals being able to receive
10 proper services, treatments, support, housing and really
11 being able to access it where social service nets have
12 failed or do not work.

13 MS. KELLEY: I'll ask another question then.
14 You refer to the 800-pound gorilla or elephant. It's been
15 my experience that there are two different kinds of
16 800-pound gorillas.

17 JUDGE LERNER-WREN: I'm sure there's many
18 gorillas.

19 MS. KELLEY: I wondered if you could address
20 this. The difference in perception on the part of both the
21 prosecutors as well of a judge of a defendant who has
22 mental health versus a defendant who has mental illness.

23 JUDGE LERNER-WREN: In my view, you know, I
24 think one of the greatest achievements that this paradigm
25 shift, bringing on these mental health courts have done is

1 educating judges and lawyers. Forget about not knowing
2 about mental retardation. Nobody knew anything about
3 mental illness either. They didn't know about anything,
4 nothing.

5 We had globally interfacing with
6 individuals with all kinds of neurological diseases, mental
7 illnesses and brain disorders and nobody was educated on
8 anything.

9 I mean, I think the greatest most
10 brilliant advent of these courts is the awareness and the
11 education that its brought. And, yes, there's a lot of
12 educational work that has to be done with that population.

13 And what about our geriatric population
14 and individuals that are suffering from Alzheimers and
15 dementias and other kinds of organic brain disorders and
16 neurologic disorders? There's a tremendous amount of
17 education that needs to happen.

18 I almost think though that historically
19 when we look back at the legislative advances, I mean, it
20 has been the area of mental retardation that has actually
21 left the area of mental illnesses so there's a great irony
22 there.

23 MR. SCHECHTER: Judge, I'd like you to address
24 two things. One, how does the screening process work to
25 get into your court? The defendant is arrested. He's

1 arraigned. What happens? How does it get your attention?
2 And, secondly, any opinions you have about the same process
3 for a felony court such as they have in Brooklyn, New
4 York.

5 JUDGE LERNER-WREN: Sure, if you go back to --
6 everything begins and ends with the objectives and the
7 goals of the court, constitutionally. I guess if you go on
8 hierarchy, the hierarchy would be first and foremost
9 constitutional protection. Protection is number one.
10 Number two, public safety always has to balance out and be
11 more important than treatment.

12 You know, so we have -- when we
13 designed -- when I designed along with our experts the
14 design features of this court, we have a hierarchy. We
15 have principles that guide us always, always so we don't
16 get derailed in terms of issues of balancing, all these
17 considerations, because there's so many considerations.

18 But the referral process was based on the
19 design feature of rapidness, swiftness in the sense that we
20 are really on the misdemeanor level, misdemeanor level.

21 We wanted to design a process that
22 individuals could get into a more appropriate system of
23 care again based on the criminalization. We know about the
24 criminalization reality so we wanted to get them to as
25 quickly as we could so they wouldn't get sicker -- more

1 sicker and suffer in a jail situation.

2 The screening process was meant to be
3 very open, consumer friendly. The screening process
4 actually takes place with our clinical team in the
5 courtroom. You don't really have to be a rocket scientist
6 respectfully to know if somebody is hallucinating,
7 delusional, psychotic. It's pretty clear if someone is
8 screaming or identifying themselves as working for the FBI
9 or responding to internal stimulus, whatever it might be.

10 I mean, honestly, it's amazing. You
11 can't believe how sick individuals are oftentimes when
12 they're coming into the jail system. They are really in an
13 emergency situation. Oftentimes it's like somebody having
14 a heart attack. If you're not mentally ill and you're
15 having a heart attack people come and they take you to a
16 hospital. If you're mentally ill and you're in the midst
17 of a psychotic episode, forget it. In this country they
18 take you to jail. It's that clear oftentimes.

19 And I think that while conceptually a lot
20 of these -- you know, the context of you have to kind of
21 see it on the street to know what's really happening in our
22 criminal justice system. Many of you know, have
23 experienced, many individuals coming in are very sick.

24 So the assessing in our court, in our
25 model is actually happening swiftly. Hopefully we're

1 trying to get people after they can't bond out. If they
2 can't bond out at first appearance, we'd like to see them.
3 We hold court every single day on demand. I do that in
4 addition, of course, to my regular county duties.

5 MS. SHIFMAN: I'm a little confused. So
6 somebody is brought into the system through the police.
7 They're booked at the jail. There is no assessment done at
8 the jail.

9 JUDGE LERNER-WREN: There is an assessment done
10 at the jail.

11 MR. SCHECHTER: By who?

12 JUDGE LERNER-WREN: The jail staff, personnel.

13 MR. SCHECHTER: And do they notify the court,
14 "This is a potential" --

15 JUDGE LERNER-WREN: As a potential referral
16 source, you bet. The jail is a potential referral source.
17 Community mental health case managers are a source. Family
18 members are a source. Other judges are a source.
19 Attorneys are a source. Anybody who has any information
20 that somebody may be in need of the services of the
21 division are a source.

22 MR. SCHECHTER: And then what happens to the
23 person's court papers? Are they marked in some way at the
24 arraignment and it says, "Send this case to Judge Wren?"

25 JUDGE LERNER-WREN: We have -- what we have

1 created in our -- I guess just for flow of case management,
2 flow purposes, is just a transfer order. The clerk's
3 office generates a very simple one-page transfer order, and
4 then the person appears in court for, you know, the whole
5 kind of assessing, if you will. Is there a psychiatric
6 emergency on foot? Is there or isn't there? You know,
7 conversations, colloquy about -- description to the court
8 about whether someone is interested in being in the court.

9 A lot of it is depending upon whether or
10 not there's a psychiatric emergency, again kind of coming
11 from a medical triage standpoint for the goal of diversion,
12 that being, of course, the primary goal of this particular
13 model.

14 MS. SHIFMAN: Do you have any more questions?

15 MR. SCHECHTER: Yes, one more. Of all those
16 sources inputting that X is a potential problem -- a mental
17 health problem that needs the mental health court, what
18 role does the defense attorney, the public defender, your
19 legal aid attorney play in that role? And tell us about
20 your personal experiences interacting with that particular
21 individual.

22 JUDGE LERNER-WREN: You bet.

23 MR. JONES: Just to amplify on that, can you
24 just tell us the composition of the court.

25 JUDGE LERNER-WREN: I'd love to do that so you

1 get a mental picture. Our clinical team, I have a head
2 clinician. She was hand picked. She's a consumer expert
3 in consumer-oriented recovery. Also she acts as what we
4 call our boundary scanner. She's a systems-wide expert.
5 She has real authority. Better than my judicial role
6 authority. She works for the Department of Children and
7 Families in this state so she has some administrative teeth
8 from our state social service system. She serves two
9 functions.

10 I also have a mental health court monitor
11 in the court. She's kind of the eyes and ears of the
12 court. She will follow individuals into the community, let
13 us know how they're doing. If there are issues, they come
14 back and certainly address them. She keeps our data --
15 does data work for us. And then the attorneys --

16 MR. JONES: Let me ask a question about the
17 mental health monitor. Does that person have specialized
18 training or is that person just a college graduate?

19 JUDGE LERNER-WREN: That person has -- I'm on my
20 second mental health clerk monitor, but it's very important
21 that -- I think she has terrific expertise in the area of
22 community based case management in some form, whether they
23 apply it forensically that's great but, yes, community
24 based case management experience for this kind of role is I
25 think essential.

1 MR. JONES: So you're going to talk about the
2 attorneys.

3 JUDGE LERNER-WREN: When we first started the
4 court I didn't have any funding. I still don't have any
5 funding. The court doesn't get any monies federally even
6 though it was the model for the congressional legislature
7 that funded it and seeded other courts. I prefer it that
8 way. And the lawyers were my existing -- pre-existing
9 attorneys, prosecutor and defendant counsel from my regular
10 criminal division.

11 That has since changed over time. The
12 state attorney's office has added a mental health
13 prosecutor that does some dual functions, multiple
14 functions now. And then the Public Defender's Office also
15 has a special public defender, if you will. I don't mean
16 "special" like a conflict special. I mean like a specific
17 person to serve in mental health court.

18 It was very clear and important upfront
19 that both attorneys on both sides maintain, if you will,
20 their traditional role and function from an ethics
21 standpoint.

22 And the court, again, constitutional
23 protection extended to the individual's protection of
24 rights is number one. Even though we have an like an
25 overall umbrella mission, the integrity of the process to

1 me -- the position of the process is that that role and
2 function be absolutely, you know, consistent with each role
3 and function.

4 MR. SCHECHTER: Does the defense attorney give
5 you specific information about the client that helps you in
6 any way?

7 JUDGE LERNER-WREN: No.

8 MS. SHIFMAN: Just to follow up on that before I
9 get into my question, so the defense attorney still
10 functions as, you know, there's a Motion to Suppress
11 here or --

12 JUDGE LERNER-WREN: This is not a trial court.

13 MS. SHIFMAN: So it's a state diversionary
14 court?

15 JUDGE LERNER-WREN: I do preside over a judicial
16 trial division. This is not adverse. This is a recovery
17 oriented, diversionary process and it is done in -- again,
18 you have to have some element, I think, of adversity in the
19 sense of the lawyer role. While I think your suggestion in
20 terms of maybe the paradigm supports some slight
21 modification of an ethics model or canon, I would say it's
22 something to consider.

23 But I really think it's critically
24 important that while we may not be following a trial
25 function in this division, that still traditional ethics

1 are absolutely essential because even though somebody may
2 opt in, we have to make sure that those constitutional
3 rights are protected.

4 And so issues of informed consent, issues
5 of voluntariness, issues of choice -- I mean, these
6 strategies over 10 years, for example, in Broward -- you
7 know, in Broward we moved over 7,000 people out of jail.

8 MS. SHIFMAN: Through the mental health court?

9 JUDGE LERNER-WREN: Right, and into psychiatric
10 hospitals if necessary or community-based care or home.
11 But the point of having these constitutional protections
12 and making sure these individuals have informed consent is
13 critical.

14 MR. JONES: Just one more point. So you run a
15 traditional courtroom, a traditional criminal court --

16 JUDGE LERNER-WREN: I do mental health court on
17 the side.

18 MR. JONES: What you do is you carve out some
19 portion of each day --

20 JUDGE LERNER-WREN: On my lunch hours and
21 Thursday afternoons is when we do mental health court.

22 MS. KELLEY: So procedurally your court is a
23 pre-plea diversion?

24 JUDGE LERNER-WREN: Correct.

25 MS. KELLEY: If they successfully complete the

1 program --

2 JUDGE LERNER-WREN: It's not a program. It's
3 not a program. It's a strategy.

4 MS. KELLEY: If they complete the strategy --

5 JUDGE LERNER-WREN: There is no completion.

6 MR. CLARK: How do you define success then?

7 JUDGE LERNER-WREN: I move people that are sick
8 into a hospital.

9 MS. KELLEY: So the offense, if you will, is
10 still on their record?

11 MR. SCHECHTER: In other words, they were
12 arrested?

13 JUDGE LERNER-WREN: Yes, meaning -- yes, if an
14 individual -- again it's important to know that this is not
15 a program.

16 MR. JONES: Please define strategy for us and
17 what do you mean by strategy? What does that mean?

18 JUDGE LERNER-WREN: Sure. This is a
19 post-booking diversionary strategy so we try to find
20 individuals in the jail system who are in need of either
21 emergency, psychiatric intervention and/or are seriously
22 mentally ill and if we can move them out of the criminal
23 justice system -- because remember I'm dealing with
24 low-level misdemeanor offenses. That's why we started it
25 on a misdemeanor level, then we want to divert them out

1 because we know the statistics from the Department of
2 Justice. Individuals with mental illness spend up to three
3 times longer incarcerated -- you know, time than
4 individuals without mental illness.

5 So diversion is the goal. And if there
6 are individuals that do not need hospitalization, the goal
7 is once they are, quote, ready for discharge from the
8 receiving facility or stabilization unit, they come back.
9 They do not bounce back into the jail system.

10 We are notified 24 hours before their
11 discharge. They come back into my division. We have a
12 conversation. I am able at that point to take a look at
13 public safety issues. We kind of take a look at a number
14 of variables.

15 At the same time we have issues of
16 whether or not they want to challenge their charge, make
17 sure they understand that they have the right to challenge
18 the charge by way of trial. We do, from a case management
19 standpoint, offer a plea of convenience, if you will, if
20 they want like a magistrate process.

21 If they do wish to plead no contest, for
22 example, to a simple trespass, I do offer that. And if
23 they want to, then I say from that vantage point, if they
24 want to plead no contest, in this State of Florida we do
25 have an adjudicatory section, for example, known as

1 withholding of adjudication. I will offer them that
2 agreement. I will give them credit for their treatment and
3 they will dispose of their case that way.

4 If there are public safety concerns, then
5 the conversation may be either -- their options may be
6 different. With the help of their defense counsel they can
7 understand their options such as they can stay and work in
8 the court. Then probably it's a little more akin to a drug
9 court model. They stay with us.

10 We do not use traditional probation. We
11 try not to use traditional probations for the reason,
12 Elizabeth, you talked about and -- or they can go back into
13 the traditional criminal justice processes where, of
14 course, they'll go to trial.

15 MS. SHIFMAN: So there is a criminal justice
16 adjudication once they're released from the mental health
17 facility?

18 JUDGE LERNER-WREN: Only if they choose to enter
19 a no contest plea. Then, like any no contest plea, there
20 will be some case disposition. But again this is a matter
21 of choice after consultation with defense counsel.

22 Every individual coming into the mental
23 health court gets a lawyer. It is paramount that every
24 individual have their legal rights, constitutional rights
25 protected effectively through this process. It is a

1 paramount consideration.

2 MS. SHIFMAN: So from a practical level, the
3 mental health court in your county in a sense serves as
4 emergency intervention?

5 JUDGE LERNER-WREN: It is. It was always
6 designed to be -- it was always designed, quite frankly, to
7 be a human rights strategy. That is how we designed it
8 from the beginning and all of its design features are set
9 forth in that spirit, and that is what makes Broward County
10 I think so classically important. We understand exactly
11 what we're doing at every minute. We are sure in our goals
12 and our mission.

13 MS. SHIFMAN: Do you have some sort of written
14 documentation that you can provide to us that lays out the
15 admission statement for the mental health court? That
16 would be really helpful.

17 JUDGE LERNER-WREN: Sure. I brought it here
18 today. I don't know, Scott, if I got e-mailed, but I can
19 e-mail it. This is our special report that was done in
20 June.

21 MS. SHIFMAN: We have that.

22 JUDGE LERNER-WREN: Oh, you do have that. It
23 does briefly set forth the framework of our mission. I
24 probably do have writings that are more detailed. I'd
25 certainly be happy -- if you tasked me to, I'd certainly be

1 happy to do something more in alignment with what you're
2 looking for.

3 But, again, these design features have
4 been talked about nationally all over, reviewed with
5 Bassalon Center, and taught by the Department of Justice
6 for the Bureau of Justice Assistants, and it's always been
7 my belief that being able to specifically outline
8 principles, legal principles, constitutional principles,
9 consumer rights principles, civil right principles are
10 really significantly important.

11 Again these strategies have great
12 promise. They also have great limitation and the perils,
13 if you will, and the risk of having them distorted or used
14 improperly are always present if judges and creators or
15 architects of this strategy really aren't as well educated
16 under the law as we are.

17 MR. JONES: One more and then we'll finish.

18 MS. SHIFMAN: Very briefly because we don't have
19 a lot of time.

20 JUDGE LERNER-WREN: I know. I'm sorry.

21 MS. SHIFMAN: The interaction between the drug
22 court and mental health court. You yourself indicated that
23 many of the individuals who come through have both serious
24 mental health issues and also are substance abusers.

25 JUDGE LERNER-WREN: They have a substance abuse

1 disorder.

2 MS. SHIFMAN: So does the mental health court
3 intervene on an emergency basis if they also have substance
4 abuse issues?

5 JUDGE LERNER-WREN: That's a great question.
6 Again we really try to -- we've really become a de facto
7 social service orchestrator through the court and so issues
8 of integration of treatment and integration of care become
9 critically important.

10 I do not have a large interface between
11 drug court and mental health court for the very reasons
12 historically sadly that I commented on. They have been
13 somewhat parallel thought processes.

14 As a result of the evolution of mental
15 health courts and the knowledge base of our judges and
16 interest in this, we are starting to see some hybrids
17 develop. We are starting to see some of those barriers --
18 discriminatory barriers reduced and eliminated.

19 You're going to start to see more
20 interface. You're going to start to see more hybrid
21 models. You are going to start to see more drug courts
22 thankfully letting individuals in with diagnosis of
23 disorder who could never access those courts because the
24 education and the awareness and the conscientiousness is
25 shifting and it's a very positive thing.

1 MR. JONES: Last question, Vicki.

2 MS. YOUNG: When you said the court is a
3 diversionary strategy at the outset, are you saying it's
4 diversionary in placing a person in a treatment facility
5 versus in a jail?

6 JUDGE LERNER-WREN: No.

7 MS. YOUNG: Because I thought if it's diverted
8 then the misdemeanor would end up being dismissed and now
9 I'm getting confused when you say no contest pleas.

10 JUDGE LERNER-WREN: I can understand that. The
11 word "diversion" -- just the jargon of it can mean so many
12 things. The word "diversion" for the purposes of our model
13 means really taking someone out of one system and moving
14 them into a more appropriate system even if that system is
15 the community, even if that system is the community, and
16 meaning it is not necessary for someone to be diverted out
17 of our jail system necessarily to go into a hospital.

18 We are really very astute in
19 understanding the issue of criminalization and we are
20 trying to divert out any appropriate individual out of jail
21 back into the community with mental illnesses wherever we
22 can. So diversion does not necessarily mean dismissal of
23 the charge. Historically it did.

24 Our prosecutor's office when we first
25 started the court back in '97 would dismiss. I don't know.

1 For some reason that shifted and their position was, "Well,
2 we don't really want to offer dismissal here."

3 I have to tell you I'm not so hung up on
4 the issue of dismissal versus non-dismissal because these
5 individuals understandably have racked up potentially
6 hundreds of priors because of the revolving nature of this
7 population.

8 I am less interested in the issue
9 respectfully, of withhold, adjudications or whatever for
10 quality of life offenses than I am getting them out of
11 jail, back into the community, accessing care,
12 knowledgeable about how to do it, and hopefully using the
13 court wherever possible to keep that continuity of care.

14 The balancing of accessing good quality
15 care in the community is so paramount to some of these
16 other little nuances, if you will. Particularly -- again
17 this is a misdemeanor level, not a felony level that we're
18 talking about, so you have to kind of carve my remarks, if
19 you will, into that context.

20 MS. YOUNG: How much --

21 MR. JONES: Go ahead.

22 MS. YOUNG: Is there a problem of once they're
23 placed into treatment and they're getting treatment at some
24 point they stop taking their medication or, you know, walk
25 away from the facility? I mean, is there -- do we get into

1 revolving --

2 JUDGE LERNER-WREN: Again I'm not a drug court
3 model holding, but for individuals that we may be following
4 in the court -- you know, medication compliance, the recent
5 studies show clinically, first of all, that a good
6 percentage of individuals with serious and persistent
7 mental illness, first of all, number one, do not remain on
8 their medications whether they're in the criminal justice
9 system, not in the criminal justice system.

10 It's no different than you or I that when
11 we get a prescription for antibiotics and we start to feel,
12 we go, "Oh, we're better now" and we don't want the side
13 effects and the side effects are real, very important to
14 consider.

15 So the recent research is, first of all,
16 that the new psychotropics don't necessarily bring to bear
17 any greater effect efficaciousness than the older
18 psychotropic medications. Many individuals do not
19 necessarily stay or remain on their medications when they
20 start to feel better and their symptoms are remitted.

21 It is -- these chronic disorders are so
22 difficult to manage. They are quite nefarious and the side
23 effect issue is real, not perceived, and that there are
24 other cognitive therapies and supports, quite frankly, that
25 research and evidence showing are just as valid in support

1 if people can get really nice and wrapped in services. Do
2 people walk away? At times. If we're monitoring them? It
3 happens.

4 MR. JONES: We're running a little long and I'm
5 starting to have a greater appreciation for the guys that
6 run the New York subway system because I can't keep these
7 trains running on time. I've gotten the high sign from
8 Norman Reimer who is in the audience who is our executive
9 director, and he would like to ask you one question and
10 that absolutely is the last question and then we will end.

11 MR. REIMER: Thank you, chair, and I apologize.

12 Because of the limited time there is one
13 thing that I wanted to ask you that is of concern as I
14 listened and that is is the defense attorney involved in
15 identifying the client for diversion into this alternative
16 system, and when the person goes into that system are the
17 statements that are made presumably to get treatment
18 protected?

19 JUDGE LERNER-WREN: In my court their protected
20 and I think they need to be protected. I will not have
21 anybody talk about facts, for example, of any case.
22 Anybody starts to talk about facts, I say, "Please don't
23 talk about facts. I don't want any constitutional rights
24 waived and given up."

25 MR. REIMER: To your knowledge, if they end up

1 going to trial --

2 JUDGE LERNER-WREN: Never.

3 MR. REIMER: -- are the statements accessible to
4 the prosecution?

5 JUDGE LERNER-WREN: I would say I never heard of
6 it, never experienced it. It's somewhat delusional,
7 respectfully. It just doesn't happen. But, again, if you
8 go back to the paramount features of the design features or
9 the principles that constitutional rights of an individual
10 are of paramount, I don't want anybody talking about facts.
11 I don't want any conversations.

12 If somebody is psychotic -- for example,
13 sometimes they just want to talk. They just have to talk
14 and a lot of people really haven't listened to them and
15 they have been totally neglected and abused. You know
16 what, I'll just shut the record. I'll just shut the
17 record.

18 You know, individuals -- the evidence is
19 that individuals who are listened to -- and you're trying
20 to enhance trust and connection so the individuals can
21 reduce the discrimination and the stigma surrounding these
22 disorders and feel like a human being with dignity and
23 respect, you know, you've got to let them talk. Their
24 stories really, really matter and their personhood is
25 everything. So while you're trying to enhance their

1 personhood and the humanity of what's happened to them, you
2 can shut the record down.

3 MR. SCHECHTER: For the clarity of our record,
4 Judge Rosinek did exactly that, he shut the record down and
5 made it so comments couldn't be recorded.

6 MR. JONES: Judge Wren, we have only scratched
7 the surface of this and this has been a fascinating and
8 enlightening conversation for us. We would appreciate any
9 additional written materials that you want to send us and,
10 with your permission as we continue on this journey, we may
11 come back to you with written questions of our own.

12 JUDGE LERNER-WREN: Sure, and I would invite any
13 of you individually or collectively to come watch the
14 mental health proceedings. I know in our division we've
15 had delegates, individuals from all over the world and
16 including representatives from Human Rights Watch who use
17 the court as a human rights recommendation in its 2003
18 publication and research called Ill Equipped having to do
19 with human rights violations in U.S. jails and prisons in
20 this country.

21 So I invite you all to come and I applaud
22 you for your efforts and remember the gorilla or elephant
23 in the room.

24 MR. JONES: Thank you so much for your time and
25 work that you do.

1 I know Judge Pollack is here so we can
2 just -- she just stepped out. As soon as she comes back we
3 will start.

4 (Time noted: 10:33 a.m. to 10:36 a.m.)

5 MR. JONES: We are very, very pleased. This
6 conversation we're going to have will dovetail nicely with
7 the one that we just had because we are joined by Judge
8 Gisele Pollack who runs the Broward County Misdemeanor Drug
9 Court, which was mentioned in our last conversation, and
10 she's also joined this morning by Eric Schwartzreich who is
11 a defense attorney practicing in that court, and Sue-Ann
12 Robinson who is an assistant state attorney in that court,
13 what we more commonly call in New York a district
14 prosecutor. And we are very, very pleased to have both of
15 you here and to hear from both you.

16 I will leave it up to you all how you
17 want to divy up the 15 or 20 minutes or so that you've got
18 to give us in opening statement because, as you can see, we
19 are anxious to question and understand exactly how the
20 court works.

21 With all apologies to Eric and Sue-Ann I
22 am at the outset, for purposes of the record, going to read
23 in Judge Pollack's bio and then turn the floor over to you.

24 Judge Gisele Pollack graduated summa cum
25 laude with a bachelor of arts degree from the University of

1 Miami and with a juris doctorate degree from the University
2 of Miami Law School.

3 She practiced law for nearly 25 years
4 specializing in criminal law and was the senior assistant
5 public defender assigned to the Adult and Family Drug Court
6 Division of the 17th Judicial District.

7 She was elected countywide as a county
8 court judge on August 31, 2004.

9 She served as a member of the board of
10 governors for the United Way of Broward County Commission
11 on Substance Abuse, Fort Lauderdale's Anti-Drug Coalition,
12 a board member of the Broward Alcohol and Drug Abuse
13 Advisory Board, and a board member of the Boys and Girls
14 Club of Harver Ranches, an advisory board member for the
15 Junior League of Greater Fort Lauderdale, Women Building
16 Better Communities, member of the Broward Workshop
17 Community Justice Committee, advisory board member of the
18 Susan B. Anthony Residential Treatment Center for Women and
19 Their Children, and the Urban League of Broward County
20 Youth Empowerment Program.

21 Judge Pollack is a member of the National
22 Association of Drug Court Professionals, and chair elect of
23 the Florida Association of Drug Court Professionals.

24 She has been a faculty member for the
25 Justice Management Institute and the National Drug Court

1 Institute, and Judge Pollack instituted the first
2 misdemeanor drug court in the country on September 9th of
3 2005.

4 Welcome to all of you. We are happy to
5 have you and the floor is yours.

6 JUDGE POLLACK: Thank you very much. It is an
7 honor and a pleasure to be here. My background a criminal
8 defense and I started off in private practice for about
9 five years here in Miami and then I went to Broward County
10 where I was an assistant public defender for nearly 20
11 years, and I was the felony assistant public defender in
12 the felony drug court when it commenced for 10 years as the
13 paperwork states.

14 Often I would hear -- and I'm glad that
15 Scott Ehlers brought -- there's a booklet for critical
16 issues for criminal defense attorneys that I was someone
17 who helped to write that manual with defense attorneys from
18 around the country through NDCI because we knew that our
19 roles were different as being a team player in drug court.

20 I will tell you that I was one of those
21 attorneys in felony drug court who had a very difficult
22 time letting go of the podium. I was the one that would
23 come up and observe -- we were very early in our felony
24 drug court. We were the third in the country. Miami was
25 the first with Goldstein and Broward County was the third,

1 so there were not a lot of rules back then, and the
2 National Drug Court Institute was being developed so we did
3 the best we could.

4 And then we became a mentor court and
5 groups from around the country would come and visit and the
6 main thing they would say to me was, "Why are you so close
7 to the podium?" Because it's so important in a drug
8 court -- and it is and I know it is -- for the participant
9 to develop a relationship with the judge because it's part
10 of the recovery. They get praise from someone in our
11 position of authority. That means the world to them and
12 they start to internalize wanting to do good things for
13 themselves as a result of that.

14 And, you know, that's what it's all
15 about. It's about assisting someone in their recovery so
16 that hopefully they don't get rearrested and we know from
17 the human element hopefully they don't lose their lives
18 because there's three results from the disease of addiction
19 and that is jails, institutions and death.

20 And, you know, I also come from a
21 recovery background so I have that element as well for
22 many, many years, so I was able to understand a lot of the
23 aspects as far as cross training and being in a drug court.

24 To make a long story short, I became a
25 county court judge and I knew that many of the felony drug

1 court graduates had started off with alcohol and marijuana
2 because they would tell me that. So for them it was a,
3 quote/unquote gateway drug.

4 I'm not saying that marijuana is a
5 gateway drug. I'm not telling you whether it should be
6 legal or illegal and I'm not going to talk about this
7 because when I started this court I had plenty of calls
8 accusing me of reefer madness but I'm not going to talk
9 about that.

10 All I know is that it is a gateway drug
11 for some people, and we have a majority of young adults in
12 our court, 18 to 25, many of whom started smoking
13 marijuana, cannabis, if you want to call it that, when they
14 were 12, 13, 14, at time when the brain is significantly
15 developed.

16 By the time I get them at 18 they have no
17 direction whatsoever in their lives. They have no job they
18 can get. They are -- even if they come from a
19 single-parent household or full-parent household, many of
20 them are in a position akin to what we see with foster
21 children when they have not been adopted and they go out
22 into an independent living situation at 18 with no more
23 funds and they have to make it on their own.

24 The parents a lot -- often times they are
25 just in a very precarious position, and what I have seen is

1 the court has helped them to get cleaned up long enough --
2 because they're using to get rid of the stress, forget
3 about their problems. They don't want to think about the
4 responsibilities.

5 And what I see is we get them cleaned up
6 long enough to be able to realize that they can do
7 something in this world and they can stand on their own two
8 feet and make a life for themselves. And so in that sense
9 it became more about the lifestyle than the drug itself.
10 It was more a gateway to help people.

11 Why we developed a court was there was a
12 diversion program with the State Attorney's Office for no
13 pros'ing, if you will, of these charges if they completed a
14 diversion program for the cannabis charge.

15 What would happen is they would agree to
16 do the program, they would go into the PTI office and they
17 would test positive and they'd be kicked out of the program
18 because they lost their possibility of having a dismissal
19 right then and there. And I knew that was going to happen
20 and I had no discretion whatsoever to ask the state
21 attorney to change their mind. That was it.

22 And I knew and would see it in our court.
23 Many times they relapsed two, three, four months in a row
24 until we'd do a little intervention to get them -- you
25 know, we'd do increments, sanctions -- excuse me, sanctions

1 and incentives and it follows a true drug court model.

2 It is a program. We do monitor. We do
3 help them along. I do try to keep them out of jail. In
4 essence it's decriminalizing because the charges get
5 dismissed. Under Florida statute we allow dismissal of
6 charges, and primarily if they're there on diversion, true
7 diversion, they get a dismissal of the charge.

8 We knew there was a necessity for this
9 because kids who were going off to college would lose their
10 scholarship because they had a criminal record, and as they
11 would go into the PTI office and they would get tested and
12 they would be positive.

13 In this program they're given the
14 opportunity to clean up their act. They really have a
15 problem going on, otherwise would they continue to use
16 after an arrest? So it really intervened in many areas and
17 we think it's been very successful and very necessary.

18 And soon after, the State Attorney's
19 Office dropped their diversion program for cannabis
20 charges, so instead of the 200 that we initially
21 contemplated in the court grew to nearly 500 and its
22 growing because there is no other way to get a dismissal in
23 Broward County.

24 We are the first exclusive misdemeanor
25 court. We have a felony drug court which deals with

1 possession of marijuana and charges over 20 grams in any of
2 the other drugs.

3 I am very pleased to have Eric
4 Schwartzreich and Sue-Ann Robinson with us today so that
5 they can tell you more about their role in a particular
6 court.

7 MS. ROBINSON: As a state attorney, and just
8 from the prior conversation, there is a conflict in the
9 role because we do have a county court division and we have
10 a drug court division, so oftentimes the same defendant
11 that I'll have for a charge in the county court division
12 will, in fact, transfer into drug court, and then at that
13 point then you have to change your hat from prosecutor who
14 is seeking conviction on cases where the defendant is
15 guilty to a treatment program team member.

16 So initially, just to kind of give you a
17 road map of what I have to do --

18 MR. JONES: If you could just, in the course of
19 doing that, give us just a brief sort of sketch of how long
20 you've been in the State Attorney's Office, what you've
21 done prior to going into that court, and how you got into
22 this court. That would be useful as well.

23 MS. ROBINSON: Okay. I graduated from Florida
24 International College of Law in May 2006. I have been at
25 the State Attorney's Office -- this is my first job from

1 law school so about a year or so.

2 Prior to entering the drug court division
3 I was in another criminal division in the North High Lake
4 courthouse and prior to that I was in another county court
5 division.

6 MR. JONES: Were you doing more traditional
7 prosecutorial work in those courtrooms?

8 MS. ROBINSON: Yes, prosecutorial.

9 MR. JONES: What your experience has been now --
10 how long have you been in the --

11 MS. ROBINSON: I've been in drug court eight
12 months.

13 MR. JONES: Give us your experience. Give us
14 your thoughts of your experience.

15 MS. ROBINSON: Well, initially going to drug
16 court was -- because of the conflict and because of the
17 role shift, it was a big job to take on. It was a big
18 challenge.

19 MR. JONES: Did you ask for it or were you
20 assigned?

21 MS. ROBINSON: I was assigned. So it was kind
22 of, okay, we're going to have two divisionS. At first you
23 think of it as, well, it's just additional work but it's
24 actually primarily the most -- the biggest challenge is the
25 role shift, from knowing a defendant in a criminal

1 adversarial setting to being in a not adversarial setting
2 with the same offender.

3 So for me that experience has been that
4 as I've been in the court I've really gotten to see
5 literally, you know, many people change their tune from
6 when they're in an arraignment in a traditional adversarial
7 setting, kind of not guilty or -- in an adversarial setting
8 to where they are seeking help from the court, actually
9 wanting to turn their life around, wanting a dismissal of
10 the charge because they want to move past this and not
11 re-offend. So that has been my experience in drug court as
12 far as offenders.

13 MR. JONES: Thank you.

14 MR. SCHWARTZREICH: My name is Eric
15 Schwartzreich. I'm originally from Westchester County,
16 Newark. I went to college in Ohio. I assume we have some
17 Ohians here. Came down to Florida in 1991, went to Nova.
18 Went to law school at St. Thomas University, then worked in
19 the Broward County Public Defender's Office in Broward
20 County with Gisele Pollack before she became a county court
21 judge.

22 I left the Public Defender's Office and
23 started a law firm called Carter, Schwartzreich & Yates in
24 1998 and I predominantly focused on criminal defense work,
25 predominantly state cases, some federal case. Most of my

1 cases are felonies, homicide cases, sexual battery cases,
2 armed battery cases. I do have a lot of work in front of
3 Judge Pollack's courtroom.

4 I am president of the Broward Association
5 of Criminal Defense Lawyers which is our organization in
6 Broward County for our defense lawyers. We have monthly
7 meetings and we address issues that involve the local
8 defense bar.

9 I am in favor of the drug court. I'm in
10 favor of any specialty court. It's not mandatory. It's
11 not obligatory. Our clients do not have to go there. A
12 lot of times as defense attorneys we are problem solvers
13 and I like to have the opportunity to have as many options
14 as possible.

15 This is always a great option to have,
16 and one of the best things that I like about drug court is
17 the guarantee that if you get the dismissal, which you can
18 get in drug court, you can qualify under Florida statute
19 for an expungement so the charge can disappear and someone
20 can go on -- the client can go on with their life and
21 honestly be able to answer that they have not been in
22 trouble with the criminal justice system. That's a great
23 benefit.

24 A lot of these clients that I see in drug
25 court are 18 to 25 years of age and a lot of these

1 judges -- no disrespect, Judge Pollack -- you walk into
2 their courtroom and they're pompous and it's a cold
3 environment, and Judge Pollack's courtroom and Judge
4 Pollack addressed it a little bit.

5 While this is a judicial place to be, she
6 is more of a human being, and while the criminal justice
7 system is putative in nature, you feel that when you go in
8 there, the purpose is more for rehabilitation, and Judge
9 Pollack makes the defendants -- the individuals accused of
10 the possession charges feel very comfortable. It's an
11 environment that my clients tend to like. They don't get
12 nervous.

13 Their parents, when they have these 18 to
14 25 years old, they come to me and they want help and they
15 think that marijuana has affected their child's life, and a
16 lot of times they want help but they don't seek help.
17 Otherwise they get that kind of help when they go to Judge
18 Pollack's courtroom.

19 It's also very important -- I don't know
20 about in other states, but in the State of Florida if you
21 have a possession of marijuana charge it's a misdemeanor.
22 And I imagine some of the statutes may be similar in your
23 state.

24 So even if you're not in a vehicle at the
25 time, if you get into an adjudication which is -- whether

1 you're in the vehicle or not, you lose your driver's
2 license for a period of two years and that is something
3 that is very difficult, especially for someone who is 18 to
4 25 years old that's going to school or has their first
5 child or getting out of the house. It's very important not
6 to get that adjudication, and, of course, drug court
7 ensures that.

8 When Judge Wren was in here, I don't know
9 who asked the question. I don't know if it was you, Rick.
10 There was a question about confidentiality and if any of
11 these -- if the environment, this can be used against them,
12 if constitutional rights get waived.

13 I have never seen, since I've been
14 practicing in Broward County -- I'm not saying there's not
15 a first time, but I've never seen any statements that have
16 been used -- and there are, you know, privileges that
17 apply -- by any counselors or anything that's happening in
18 drug court been used in any prosecution. I don't think
19 that will happen. I don't know if the prosecution can
20 address that.

21 You know, we have a prosecutor's office
22 in Broward County that's very aggressive that she works
23 for. Mike Sachs is the prosecutor and they prosecute
24 everything, I mean, the residue cases, not as aggressive in
25 this county.

1 Dade County is prosecuting residue cases,
2 and residue cases are obviously easier to defend, but when
3 you've got a lot of marijuana cases being prosecuted and
4 you have the option of going into drug court, I think it's
5 a great thing to be able to have to take advantage of for
6 our clients.

7 MR. JONES: Thank you.

8 Our first question can be lead off by
9 Vicki Young.

10 MS. YOUNG: My first question, Judge Pollack, is
11 your assignment to the misdemeanor drug court is that full
12 time misdemeanor drug court or do you also do a separate
13 trial court as well?

14 JUDGE POLLACK: Currently I have two divisions.
15 I have a regular criminal division and a misdemeanor trial
16 court division.

17 MR. JONES: Thank you. And I have noticed that
18 you were on the task force when we were in San Francisco.
19 We had an opportunity to speak with Jeff Toma who was also
20 on that committee with you, and obviously we're from the
21 National Association of Defense Lawyers.

22 We're having a hard time grasping the
23 role of defense counsel in drug court, whether misdemeanor
24 or felony drug court, versus, you know, the defense
25 attorney as defense attorney. And since you have 10 years

1 of experience as being -- well, prior to that you were the
2 trial deputy, then you were also assigned as defense
3 counsel to the drug court, and now you're the judge in drug
4 court.

5 Can you speak to the various interplay
6 between the judge and defense counsel and the defendant in
7 that setting?

8 JUDGE POLLACK: I sure can. And I think I
9 started off by saying that I had a hard time stepping away
10 from the podium, and the reason why I was at the podium is
11 because I wanted the ability to, you know, touch my
12 client's hand if he started to talk about things, you know,
13 and if he started to talk about more, I would get more
14 assertive in that regard and that's why I was so close,
15 because I was very protective.

16 That's the environment I grew up in. I
17 grew up in an environment where more often than not my
18 client would say the most ridiculous things and they think
19 they're helping themselves and would incriminate themselves
20 all the time, you know, and that was invariably the case
21 and they do it now. I know, I know. And so I never
22 hesitate either as a judge to say, "I don't want to hear
23 about the facts" just like Judge Wren was saying.

24 And I as a felony drug court public
25 defender, I was very -- first of all, Mr. Schwartzreich and

1 Jason Crist before him as the president of the Broward
2 County Association of Criminal Defense Attorneys were
3 invited to the table every planning meeting. Very
4 important that the defense attorney and the state attorney
5 invited to all the planning meetings when you're planning
6 this court.

7 We had the felony drug court as a model
8 and I was present at every meeting, and when they first
9 started the court in Broward County they used the same
10 agreements for diversion that the state attorney had been
11 using for their no pros and that agreement had the
12 requirement of the admission of guilt that could be used
13 against them if they didn't submit -- if they were rejected
14 from the pretrial diversion program, and it would not be
15 used against them unless they went to trial and they
16 testified, and then it would only be used for impeachment
17 purposes, so if they got up there and said something
18 counter to what they said in the agreement.

19 So I right away thought that it would be
20 a good idea to take that out, so I took that out and we
21 developed our own agreement and now defendants don't have
22 to make any incriminating statements whatsoever about the
23 case itself, and even if they did, there are rules of
24 confidentiality that apply.

25 I would say that the most difficulty and

1 challenging role for a defense attorney in any drug court
2 is being a team member when you're talking about the
3 attorney/client privilege. You have to draw the line
4 there. You have to draw the line there.

5 Now, if the client happens to get
6 something out -- now rarely as a judge -- and maybe that's
7 because of my background -- will I ask the person straight
8 out, "Are you using? Are you dirty right now?" I mean, I
9 already have my suspicions and then their course of action,
10 based upon that, there's another way to get around that,
11 you know.

12 And hopefully they'll voluntarily -- I
13 mean, they know at that point -- they've got some knowledge
14 as to what this is all about, and I know as a recovering
15 person that that knowledge hurts your use. It starts to
16 play with your head. You know, the disease is not as happy
17 when you know you shouldn't be doing this. And the first
18 thing that we do is we give them education in the program
19 so they know that it's not okay to do what they're doing.

20 Getting back to your question, I think
21 the defense attorney has an obligation to step in there and
22 say, "I don't want him answering that question, judge."

23 MS. YOUNG: So like Marvin was saying, yesterday
24 that a judge just asked someone, "Are you using?" and the
25 public defender or the attorney in court didn't do

1 anything --

2 JUDGE POLLACK: I would have done something.
3 Now, the judge might have fought me on that and we did
4 battle many times, which is not good. I will tell you it's
5 not good for someone's recovery because you've got people
6 battling.

7 The reason for the non-adversarial role
8 is that when you're adversarial it takes the focus away
9 from the person's recovery, and takes the focus away from
10 them and puts the focus on the battle going on in the
11 courtroom, so it's not about them any more, which it should
12 be, and it's more about the battle.

13 And often defense attorneys can be seen
14 as enablers. You have to know where the balance is. I
15 think there is an obligation to protect your client and I
16 think that that's paramount. Now, you can't give that up.
17 I wouldn't ask anyone to give that up.

18 Now, if you're in the felony drug court
19 and you're dealing with Oxycotin and Xanax, alcohol mixed
20 together, Ecstasy, whatever all of those drugs are in
21 combination where someone can OD very easily,
22 methamphetamine, have a heart attack very easily, now you
23 have to make a decision as an attorney. Am I more
24 concerned about this person's life or am I willing -- I
25 mean, it's a real balancing act.

1 Do I have a feeling that this person is
2 going to go out there and kill themselves? Do I have an
3 obligation to work with them, to hone up so they can help
4 themselves? I think I would and I'd take them outside the
5 courtroom to do that, and if they go and lie to the judge
6 about something, then I can step in and tell the judge I
7 need to withdraw and they know exactly why I need to
8 withdraw.

9 No, I wouldn't throw the client in. I
10 don't think that would be my position as a defense
11 attorney, but I do think I have an obligation to try to
12 talk that person into complying with treatment -- more
13 intense treatment to help them get cleaned.

14 Does the same apply in a marijuana court?
15 I don't know of any ODs from marijuana, but then again I
16 have plenty of individuals who are not just smoking
17 marijuana, and I've had one that's doing all those drugs,
18 and the attorney put up a fight at first with me when I
19 took him in and wouldn't let him take a plea and reset him
20 to three days to make sure he was cleaned out, bring him
21 back.

22 I wasn't going to hold him in a holding
23 cell for 30 days, 60 days. I don't think I have the right
24 to do that, but if he's going to take a plea he needs to be
25 clear headed. The attorney fought his one obligation that

1 he had to and then he let go because he knew, he knew, and
2 the client wasn't saying anything either.

3 It turned out later that the person is
4 very happy that he got cleaned up and they come back later
5 and they say thank you and they're doing much better.

6 But is it different in that court than a
7 marijuana court as far as the drug someone is using? Yes.
8 Do you have to balance all these things? Yes. And after
9 you take someone outside and you talk to them you say, "I
10 really think you should give in and get with the program
11 here," and they say, "No," that's their decision and I
12 don't think you can override it.

13 Unless that person starts lying to the
14 judge about something and at that point -- you know, I
15 never had to go that far because usually someone in that
16 type of court who's in that particular situation knows it's
17 in their best interest because they're not -- they're in
18 pain at that point most of them. They're in physical pain,
19 and a dismissal is a dismissal is a dismissal. It's a win
20 win.

21 MR. JONES: Eric, can you amplify on any of
22 those adversarial, ethical issues?

23 MR. SCHWARTZREICH: If I had my druthers, I'd
24 rather litigate. But, I mean, these are not our decisions,
25 but sometimes, like Judge Pollack, we wear many hats. We

1 all want to help our clients. Our instinct is to go in
2 there and try to get it dismissed, or it was a
3 constitutional issue leading up to that, was it a bad
4 search leading up to that.

5 There are clients that come to us that
6 legitimately have drug issues, that legitimately have
7 problems, and I don't feel like the people in drug court
8 are do gooders. I'm not saying that they come in here and
9 want to help everybody. It's not mandatory. It's an
10 option.

11 And I like that, that we have an option,
12 and I like that I have the ability to do more, and
13 sometimes be more than a lawyer and help them through legal
14 skills, but try to help them to get help.

15 And, you know, at the end of the day if
16 I've helped a client by getting a dismissal and I've helped
17 someone with a drug problem, and I've never had any of my
18 clients -- I don't know what other attorneys that have gone
19 through drug court that have repeated and been back, but if
20 I've actually gotten a dismissal, which is a great legal
21 result, and then get them an expungement and get them help,
22 I feel as a defense attorney I've been given the
23 opportunity through Judge Pollack's drug court to do
24 something wonderful for our clients.

25 MR. JONES: A follow-up?

1 MS. YOUNG: Well, one question and we're talking
2 about the -- you said it's their decision to go into drug
3 court. And when we first started this morning there was
4 discussion about the role of the defense attorney in making
5 certain that the defendant understood the pros and the cons
6 of going into drug court.

7 But that's contrasted versus they come
8 out, you know, they've been arrested and, at least in the
9 scenario we were given, if they sort of say, "Yes" -- "if
10 you go into drug court, you're going to get out of custody,
11 but if you don't go to drug court, you're going to -- you
12 know, stay to fight the charge, you may stay in custody."
13 You don't have enough time to really advice the client or
14 get the information they need to make that decision. Can
15 you speak to some of these?

16 JUDGE POLLACK: I think you do. You visit your
17 client and you get the ties to the community and do a bond
18 motion.

19 MS. YOUNG: I wasn't talking about the bond
20 part. If they say -- how can you discuss the pros and cons
21 of whether you should go into the program if you don't have
22 enough information to even make an evaluation was it a bad
23 stop or not?

24 JUDGE POLLACK: Oh, I see what you mean. I
25 think you have an obligation -- that was the other thing I

1 meant to mention -- to review the discovery and review all
2 the police reports. I had complete view of the state
3 attorney's police reports and I reviewed them all before I
4 even spoke to the individual about their options.

5 And I would go up there and I would
6 tell -- you know, I would put on the record -- if I thought
7 they had a particularly good Motion to Suppress, to protect
8 myself I would put on the record that I've explained to
9 them that they have a particularly good Motion to Suppress,
10 I think, and at that point they're choosing to waive their
11 right to that Motion to Suppress to try the program.

12 Now, in Broward you can opt out of the
13 program and then go to a regular division and assert all
14 your rights. You can demand a speedy trial again, argue
15 your Motion to Suppress. You can go to trial. You can
16 take discovery. You can do everything that you originally
17 were going to do, so I don't see --

18 MS. YOUNG: As a pre-plea court versus a
19 post-plea court?

20 JUDGE POLLACK: We have both. Some people don't
21 qualify for the dismissal and they have to make a choice.

22 MS. KELLEY: Somebody goes to the regular
23 division and loses their Motion to Suppress or any other
24 pretrial issues, can they then go back to drug court?

25 JUDGE POLLACK: It's happened but it's not

1 suppose to happen. They can go back to drug court perhaps
2 on probation or they can get permission -- you've done
3 that.

4 MR. SCHWARTZREICH: There have been issues where
5 you get permission and you get a battle with the State
6 Attorney's Office and you have to go to the supervisors,
7 but, I mean, that is a situation that's probably the way
8 I'd like to see it done because then you have the best of
9 both worlds.

10 I've got clients that I'll look at the
11 police report, I'll look at the probable cause affidavits
12 or A form or narrative reports and then make a
13 determination to go into drug court. They don't
14 automatically have to go there.

15 And a lot of our clients, it's private
16 attorneys, especially when they're misdemeanors. They're
17 either OR pretrial or released on their own recognizance or
18 on pretrial release. The bonds are de minimis. Maybe
19 they're \$100 on a possession of marijuana. So most of
20 these clients are out and then you can have the opportunity
21 as a defense attorney to evaluate the case and then you can
22 go into drug court.

23 I think that drug court needs to be that
24 way because it can be considered malpractice if as
25 attorneys we're not looking at the pleadings and what they

1 have and what other options our clients have.

2 MS. KELLEY: Does the State Attorney's Office
3 play a gatekeeping role in going back to drug court and
4 getting into drug court?

5 MR. SCHWARTZREICH: I think they can address --
6 they're involved. I mean, sometimes if I've had a
7 client -- and I'm not speaking from a personal background
8 now but in speaking with other attorneys that someone has
9 been to court, regular division. They've been litigating,
10 whether it's Motions to Suppress, whatever their issues
11 are. They want to get back into drug court. Sometimes
12 they have to go up the chain of command and speak to
13 someone in the State Attorney's Office to get back into the
14 program.

15 I believe it's the State Attorney's
16 Office that decides who qualifies for drug court; is that
17 correct?

18 JUDGE POLLACK: Yes. But it's also judicial
19 pretrial intervention so they may object to someone coming
20 in but we can take them anyway. I mean, if it's counter to
21 the statute, they have the right to appeal.

22 MR. SCHWARTZREICH: I mean, sometimes they'll
23 object even though it's a possession of marijuana. They
24 feel that maybe upon the facts this guy got a break and he
25 was dealing. But our position is then why did you charge

1 as possession and not as possession with intent or some
2 type of delivery case. Sometimes they're objecting to it
3 but you battle the state attorney sometimes ON getting them
4 into the program.

5 MR. SCHECHTER: The great majority of defense
6 attorneys that appear in your court I assume are not
7 privately retained?

8 JUDGE POLLACK: No.

9 MR. SCHECHTER: It's mostly the PD?

10 JUDGE POLLACK: Most of them are private
11 attorneys or they have no attorney. If they're not
12 represented, I give them full opportunity to have the
13 public defender appointed and they choose to go without a
14 lawyer.

15 MR. SCHECHTER: Without any lawyer?

16 JUDGE POLLACK: Uh-huh.

17 MR. SCHECHTER: That's fascinating. Yesterday
18 in Judge Rosinek's court, 98 percent, maybe 99 percent were
19 all PD cases. I didn't see a private attorney in that
20 courtroom and that's been my experience around the
21 country.

22 JUDGE POLLACK: Yes, in felony drug court, yes,
23 but across the board and even in my regular division they
24 try to represent themselves and I try to talk them out of
25 it because you're talking something adversarial. They're

1 not competent to do that but, by the same token, I'm not
2 going to -- Professor Winick, who was also one of my
3 professors from law school, who I adore, said it. You have
4 to be careful who's doing the court.

5 I mean, I'm someone who's not going to
6 put people in that position and I would hope that anyone
7 that wants to do drug court work would do so because they
8 are genuinely desirous of helping the person in front of
9 them and ultimately the community, but you've got that
10 person in front of you that you are trying to help.

11 MR. SCHECHTER: Eric, let me ask you --

12 MR. SCHWARTZREICH: Can I ask you one question?
13 Most of the people throughout the country that have private
14 lawyers don't go through the drug court?

15 MR. SCHECHTER: In New York we don't see private
16 attorneys.

17 MR. SCHWARTZREICH: Is that because they're
18 litigating --

19 MR. SCHECHTER: The majority of the clientele
20 are poor people. They cannot afford private attorneys so
21 it's mostly legal aids and PD and various other groups set
22 up by the City of New York who represent the great majority
23 of clients in the drug court, and that's true out in Long
24 Island. That's true in Westchester because I know the
25 Westchester PD does most of those cases.

1 MR. JONES: What happens frequently is that --
2 and we heard this also when we spoke to some folks in
3 California. What also happens is that because there is --
4 and one of the questions I want to ask you is about the
5 composition of your staff.

6 What often happens -- because there is a
7 public defender who is in court every day, what will often
8 happen is that the privately retained clients, the private
9 lawyers will sort of leave their client at the courthouse
10 doorstep and leave it to the public defender to shepherd
11 them through after that, and not continue to come back over
12 and over again, so that phenomena exists in New York.

13 MR. SCHWARTZREICH: That I've seen. But I do
14 believe if you have a client, they've retained you to take
15 them to drug court, you should walk them through the
16 process and be there because you don't know what's going to
17 happen, if they're going to show up and test positive or if
18 they're stoned or you're going to have a judge that's going
19 to have some questions for them.

20 I'm not saying Judge Pollack would do
21 that but I really feel that attorneys, even if they have a
22 client in drug court, have an obligation to stay in that
23 case until the case is over.

24 But that's interesting to me, and I know
25 you have a question. I don't know if it's a Broward County

1 lifestyle or South Florida or Dade, but I see a lot of
2 private attorneys taking advantage of drug court.

3 I don't know if wealthier people are more
4 recreational users here or as opposed to up north, but I
5 find it interesting that a lot of people elsewhere are
6 indigent or poor and don't have private attorneys because
7 there are a lot of private attorneys in drug court and I
8 see them in there.

9 MR. SCHECHTER: Let me ask the tougher question
10 about these drug courts. One of the phenomena we heard
11 about is that you get the case and you see a valid Motion
12 to Suppress, but because you're a public defender and you
13 have a huge case load and you're underfunded you move the
14 case into the drug court and you forego the Motion to
15 Suppress. Is this something we should be worried about?
16 Is this going on? Have you seen this?

17 MR. SCHWARTZREICH: That would that be a
18 concern, yes, but the public defender in Broward County,
19 Howard Finkelstein, he's very proactive. He -- and this is
20 a different issue. He's very anti this -- what do they
21 call it -- meet them, plea them, where you meet someone at
22 arraignment and his PD. He's a staunch advocate against
23 that.

24 And he seems like the type of public
25 defender -- and I know him personally, but he seems like

1 the type of public defender that would discourage that and
2 would want to fight cases, and discourage his attorneys
3 foregoing constitutional issues.

4 But, certainly, I mean, do I see that
5 issue and could it be a concern? A client comes to private
6 lawyer, there's a motion there -- a constitutional motion.
7 There's drug court and maybe you take that option or that
8 attorney talks that person into taking that option instead
9 of filing the motion.

10 But you have to ask yourself are the
11 results the same? I mean, you're getting the dismissal in
12 the drug court. And, yes, maybe if you have a
13 constitutional issue the case gets thrown out, but at the
14 end of day are the results -- I mean, in my opinion, the
15 results would almost be the same.

16 I mean, if you get a dismissal or a case
17 gets tossed, you end up getting an expungement, yes, your
18 client has gone through drug court and perhaps gotten some
19 treatment but he should only get that treatment if they
20 needs it because no one should be in drug court if they
21 don't need it.

22 But aren't the results or isn't the end
23 game the same whether it's through the constitutional
24 issue or whether it's going through drug court in your
25 opinion?

1 MR. SCHECHTER: No, it's not the same because if
2 you opt for the constitutional issue, the lawyer has to do
3 quite a bit of work, has to present that motion, has to
4 argue it, has to call witnesses, cross examine witnesses
5 and there's no guarantee at the end it's worth all that
6 trouble that the client will win the Motion to Suppress.

7 If, on the other hand, I'm an overworked,
8 underpaid legal aid attorney with not adequate resources
9 and I have a big trial coming up, and the case comes in on
10 Tuesday morning and I take a look at it and, yes, maybe
11 it's close on the constitutional issue, it's just easier
12 for me to divert the client into the drug court.

13 MR. SCHWARTZREICH: Well, In that sense, then
14 that's should be a problem and that's a lazy attorney. But
15 what I was getting at is the end game in that situation,
16 what's really matters is doing what's in the best interest
17 of our client.

18 If that attorney exercises the option to
19 forego a constitutional issue, shame on that attorney and I
20 don't find an excuse that an attorney is overworked. We
21 all have ethical obligations.

22 But if it wasn't for the option of drug
23 court, the client -- which is what we're here for, at the
24 end of the situation, if the client gets that case
25 dismissed as opposed to that legal aid attorney filing the

1 motion, isn't the end game the same for that client and
2 isn't that client in the same position?

3 What I'm getting at, is there a
4 difference legally if a client gets to the end game because
5 he went through drug court or if a lawyer crafted a clever
6 motion on a Fourth Amendment issue and won that issue and
7 got the case dismissed that way and the client is in the
8 same position.

9 What I'm getting at is I'm like that we
10 have the option. This is not an obligatory thing.

11 JUDGE POLLACK: The bottom line is I'm not
12 making that decision. The client is making that decision.
13 And I have an obligation -- and wouldn't excuse someone
14 because of their case load. That's not something that I
15 can conscientiously do. I took an oath and that's not
16 within my responsibility as an attorney. But, you know, do
17 other people feel that they can do that? And I guess there
18 is and that's why we have problems in our profession.

19 But, for the most part, I believe that
20 what should be done and that is to have a conversation with
21 that person at arraignment, "Here are your choices. I
22 reviewed this. You have a pretty good Motion to Suppress I
23 think, but, of course, I can't guarantee anything." You
24 know, it can always go both ways.

25 How many times was the most pressure you

1 had on yourself was a client who you really felt was
2 innocent and it can go either way? But here you got -- if
3 you want to do this option, whether they need it or not,
4 some people -- it's not just the drug use. A lot of times
5 it's the social aspect or someone has behavioral problems,
6 lack of responsibility.

7 They need to get -- you know, I got one
8 of these 18 years old that has been doing drugs since they
9 were -- they just have no life and they need the structure
10 to get on with their life. It may not be a drug problem
11 that got them in there, but you got to give them all the
12 choices. You've got a 99.9 percent chance of getting a
13 dismissal in this courtroom, "What do you want to do?"

14 MR. JONES: I have a couple of questions. One
15 is foundational. If you can give us an understanding of
16 the composition of the court, the players, the staff, the
17 people that are there.

18 And, secondly, I'm interested in terms of
19 what it is that you guys are offering -- and I know it's
20 young but in terms of racial and ethnic background, in
21 terms of sex, male, female. How does it play out and break
22 down in those areas as well.

23 JUDGE POLLACK: And I'd be happy to answer all
24 of that and as briefly as possible. I just want to say one
25 thing. In felony drug court, everyone has a lawyer for the

1 most part with few exception.

2 In misdemeanor it's different. There's a
3 lot of people that don't want -- if they're going to do
4 something like this in the program, they don't want to pay
5 for it. In Florida they have to pay for the services of
6 the public defender right away.

7 To answer your question -- and this is a
8 good study area because one of the questions that I'm
9 curious about is as far as diversity --

10 MR. JONES: Tell us about the composition of
11 your court.

12 JUDGE POLLACK: We have the state attorney, the
13 judge, the defense attorney on the team.

14 MR. JONES: The public defender is the same
15 person every day or someone different?

16 JUDGE POLLACK: No, the same person every day.

17 Now, I'm going into a situation where
18 they've asked me, "Is it okay" -- because they don't have
19 the staff to put in the courtroom -- "that you call us when
20 you need us," okay.

21 MR. SCHECHTER: The PD?

22 JUDGE POLLACK: Right. But I am one of those
23 judges that will not let someone go into custody for a
24 dirty urine or let them make their mind up of choosing
25 direction during a plea instead of a program or

1 transferring out of the court without getting some legal
2 advice from their lawyer, so I will have them call their
3 lawyer. They know they can do that with me for the most
4 part and hopefully that doesn't change.

5 Is that a great system? No. Would they
6 like it differently? Yes. Do they have enough attorneys
7 in their office to staff what we're doing? I'm letting go
8 of the regular division. We're creating two divisions --
9 I've been holding two divisions for a long time and two
10 judges are going to take over and they don't have the
11 staff, so that's an interesting situation.

12 But, yes, for the most part, same PD or
13 private defense attorney. We also have as part of the team
14 a case manager that deals with issues such as counseling,
15 education and schools and scholarships and getting a job.

16 MR. JONES: What's the educational background of
17 that person?

18 JUDGE POLLACK: That person is a licensed mental
19 health worker and works for a licensed mental health
20 substance abuse facility.

21 MR. JONES: Okay.

22 JUDGE POLLACK: Then we have a supervision
23 person from the sheriff's office who does the supervision
24 part of it.

25 MR. JONES: What does that mean, supervision?

1 JUDGE POLLACK: That person has them report to
2 them, checks on them, helps them -- well, our supervision
3 is a day reporting center which helps. We have a job bank.
4 They have special programs over there for employability
5 skills and cognitive programs, some Thinking For a Change
6 Programs. They have a whole bunch of things that they're
7 helping on a reentry basis for others. That's why
8 supervision was developed.

9 When we started this program because we
10 don't have PTI officers in misdemeanor court, for drug
11 court -- they do in the felony drug court --

12 MR. CLARK: What's PTI?

13 JUDGE POLLACK: Pretrial intervention. We have
14 a lot of acronyms. In the drug court, there should be some
15 intervention and treatment and we have all of that and we
16 have them all in the courtroom, so we work five, six people
17 as a team to monitor everybody, okay. And in the future we
18 have to have staffings, which is where we all talk off the
19 record before court starts about the problem cases.

20 MR. JONES: That doesn't happen now?

21 JUDGE POLLACK: It happens in many courts.

22 MR. SCHECHTER: Right.

23 JUDGE POLLACK: See we started before staffings
24 became the thing, and because of volume -- Broward County
25 Felony Drug Court has 2,500 individuals in it. It's the

1 third largest or one of three largest in the country, and
2 now we have quite a few in our courtroom and we have one
3 day because of my regular division, so we're hoping to
4 change that to two days so we can have staffing.

5 And again the defense attorney always has
6 a different role. She takes the client out, talks to them
7 separately about a few separate issues that they don't
8 share with the team.

9 Is that okay with staff?

10 MR. JONES: Yes, and the diversity.

11 JUDGE POLLACK: The diversity aspect, we just
12 did our numbers. It's definitely 85 percent male, 15
13 percent female, about half and half black and white. Now,
14 I don't know what that's all about yet.

15 MR. JONES: What is your suspicion?

16 JUDGE POLLACK: What is -- and this is what I
17 wanted to address. One of the key components of the drug
18 court is immediacy of treatment when someone is less in
19 denial. They get arrested, "Oh, my God. What do I do? I
20 need some help." As time goes by they will say, "I'm fine
21 again. I don't need help." So you want to get them in as
22 soon as possible in a drug court.

23 With a misdemeanor drug court they didn't
24 agree to that, so what I have is not only my arraignments
25 from my other division coming in but I have transfers from

1 other courts, so by the time I get them it's about two to
2 three months old. I'm not thrilled with that and I'd like
3 to do something different but the time has not come for
4 that, and we'll get into the reasons why, but it just
5 hasn't happened yet and I hope it can happy happen in the
6 future.

7 What was the question?

8 MR. JONES: I'm interested in that it's 50
9 percent black and white.

10 MS. KELLEY: Is that Hispanic?

11 JUDGE POLLACK: I don't know if it's because --
12 there can be a disproportionate minority arrest factor, I
13 don't know. There could be a disproportionate amount of
14 people wanting to go on to college and wanting a clean
15 record and not losing their scholarships.

16 We have like four different groups. Some
17 are the young adults that are going to go to college. It's
18 the last time they're going to go, "Oh, my God. I'm going
19 to lose my scholarship. I'll never do it again" and the
20 fun is over and they didn't belong in the criminal justice
21 system to begin with.

22 Then you have a group that they've been
23 using since they were young and they're all screwed up and
24 they're uncomfortable in their own skin and they're going
25 to keep picking up arrests.

1 And what we have seen are some people --
2 I don't know if you saw our stats. We did some numbers.
3 Anyway, it does have a reduced recidivism factor.

4 Then there are some that don't want to
5 lose their driver's license and they will take probation
6 and they're hard core criminals and we have the most
7 problems with. You've got a couple of different groups.
8 But where the racial factor comes in, I don't know yet.

9 MR. JONES: But I suspect there are more white
10 clients, consumers, defendants in the drug court than there
11 are in your -- I suspect it's probably skewed 90/10 or 95/5
12 in your other courts; am I wrong about that?

13 JUDGE POLLACK: Yes.

14 MR. JONES: In the more traditional criminal
15 justice courts, I would suspect that they're not 50 percent
16 white?

17 JUDGE POLLACK: Correct, and I think that deals
18 with the disproportionate minority factor in arrests
19 possibly. But I have a feeling that they're arresting
20 young adults across the board because we're getting of a
21 more -- we just did the numbers. It was more white than
22 black in our drug court.

23 MR. JONES: Your drug court?

24 JUDGE POLLACK: Yes.

25 MR. JONES: This is county court where it's a

1 misdemeanor.

2 JUDGE POLLACK: Right.

3 MR. SCHWARTZREICH: You're talking about DUIs in
4 the majority, I would imagine. I mean, that's like the
5 gold or the platinum of county court, in possession of
6 marijuanas and -- those are the types of -- I'm sitting
7 here thinking maybe that explains why because it's the
8 county court as opposed to a circuit court where you've got
9 your felony charges.

10 JUDGE POLLACK: We want to do the research on
11 this. We want to find out what's going on, and these are
12 some projects that we've been working on as far as getting
13 researchers involved. We have an evaluator from Nova
14 Southeastern and another university to get some grants for
15 research to figure out these issues. We don't know exactly
16 what's going on.

17 We know there's probably a
18 disproportionate minority factor in arrests because I think
19 that's across the board.

20 Is there that certain factor in whether
21 or not they're going to take advantage of a program?
22 Whether or not they're going to -- is it a young adult
23 thing to use marijuana or is it, you know, a white versus
24 black, more incentive to do a program? I don't know. Does
25 it have to do with family factors and who their support

1 systems are?

2 MR. JONES: Last question.

3 MS. KELLEY: Let's say I have a client who's
4 paranoid/schizophrenic, first offense, is picked up for
5 misdemeanor possession of something. For whatever reason
6 he's sitting in jail, cannot or will not post bond. I'd
7 like him to be on your docket instead of Judge Wren's
8 docket, A, because at the end of the day potentially the
9 offense could be expunged and, B, I perceive it as being
10 more streamline, that is, he can stay on one docket.

11 Do you yourself have the authority to
12 give him a bond on his own recognizance and basically tell
13 the jail not to divert him to another docket?

14 JUDGE POLLACK: What I would do, respectfully,
15 is talk to Judge Wren. I would give her a phone call and
16 tell her what I have, and can we work together to have this
17 person in drug court, let's get the person evaluated
18 immediately within two days to see if that person is a
19 danger to himself or others or can be released right back
20 into the community or whether we need a facility for this
21 person. What do we need to treat first, let's find out,
22 and let's give him the opportunity.

23 MR. JONES: Once again I have not been
24 completely honest. I said that was the last question but
25 I'm getting the high sign from Scott who would like to ask

1 a question.

2 MR. EHLERS: I was hoping you could discuss
3 briefly the role of graduated sanctions, standards for
4 sanctions, how much time can someone be sent to jail for
5 whatever violation it may be. And in the case of
6 marijuana, I think it's very interesting because I would
7 think typically these defendants wouldn't be going to jail
8 at all.

9 JUDGE POLLACK: I try my best.

10 MR. EHLERS: I guess they could be on probation
11 and if they test positive, their probation could be
12 violated typically, but how much time are you sending
13 people to jail for and for what?

14 JUDGE POLLACK: If they go to jail it's a
15 maximum of 30 days in a substance abuse program. I don't
16 believe in letting them do less than that. I want them to
17 hear the messages.

18 And we're fortunate here in Broward
19 County to have substance abuse programs where they bring
20 recovery and talk about recovery and that's what they do.
21 And they graduate and they bring meaning into this program.
22 They got it. I like to use that as a last resort. I'll
23 try everything I can before that.

24 But then, you know, it becomes a joke.
25 I've got someone who I've warned already a couple of times,

1 "You've got to get cleaned up here, what's going on, or
2 transfer out of the court. If you don't want to get
3 cleaned up, transfer out." "I don't want to go. I don't
4 want to go," right? They don't want to go. They don't
5 want to stay. I mean, as a judge I can't let them continue
6 to keep testing dirty and --

7 MR. EHLERS: So the client would prefer to go to
8 jail for 30 days than to transfer out of your court, have
9 it taken care of in regular court, and get less than 30
10 days, I would assume?

11 MS. SHIFMAN: Can they do that?

12 JUDGE POLLACK: All the time.

13 MS. ROBINSON: Some people really recognize that
14 they have a problem and view the court and the team as
15 trying to help them, and so sometimes they will go with the
16 recommendation of the court in the sense that they're like,
17 "Okay, I messed up again." They come in and say sometimes,
18 "I'm embarrassed to tell you that, you know, my drug test
19 is going to be positive," etcetera, etcetera and they're
20 not happy that they're going to a substance abuse program
21 in custody but a lot of times they'll go because they want
22 to stay in the program. They want to stay and be monitored
23 and get help really.

24 MR. SCHECHTER: Just to clarify our record,
25 yesterday in Judge Rosinek's court that happened several

1 times, people just begged to stay in that court, and he
2 said to them several times, "Look, you're testing dirty.
3 You have been doing this for months now. What do you want
4 with your life?" And to a person -- at least I was only
5 there for three persons, but there were three persons who
6 said, "Please, I want to stay here." Very interesting.

7 JUDGE POLLACK: And they don't have treatment
8 cells in Dade County. At least we have treatment cells.

9 MS. SHIFMAN: So the treatment program you're
10 talking about is at the jail?

11 JUDGE POLLACK: Yes, and I will let them do the
12 60-day program if they're being held on a felony charge
13 that they can't bond out on that they got -- after they
14 were in the program, now they get a felony, or in the
15 transfer between the two courts they pick up the felony
16 possession and they can't bond out. So while they're
17 waiting resolution of that case, I'll keep them in a 60-day
18 program.

19 So just while they're in jail, they're in
20 a treatment program but I hesitate to use the jail for
21 them. I really don't want to. But I will also tell you
22 that there are some judges -- county court judges who for a
23 positive urine they will put them in for six months to a
24 year.

25 MR. EHLERS: For one positive?

1 JUDGE POLLACK: Mr. Schwartzreich?

2 MR. SCHWARTZREICH: That's true.

3 MR. JONES: That's it. That's it. We're done.

4 I want to say sincerely that I appreciate
5 having you guys here and it's been incredibly enlightening
6 for us. With your permission we may reach out to you again
7 as we continue along this road and come visit --

8 JUDGE POLLACK: On felonies too.

9 MR. JONES: Absolutely. We will take you up on
10 that and thank you. Thank you very much for being here.

11 We are at this point going to take a
12 15-minute break so that our wonderful stenographer, Ana,
13 can avoid carpal tunnel syndrome and we will see you back
14 in 15 minutes.

15 (Time noted: 11:34 a.m. to 11:50 a.m.)

16 MR. SCHECHTER: Our next speaker is Barry Wax
17 who is the current president of the Florida Association of
18 Criminal Defense Lawyers, the Miami chapter, and a director
19 at large for the statewide Florida Association of Criminal
20 Defense Lawyers.

21 He has been practicing criminal defense
22 work exclusively for the past 23 years and has appeared in
23 state and federal courts throughout the country.

24 As a dedicated criminal defense lawyer he
25 has defended a wide range of cases with emphasis in complex

1 criminal cases including first degree murder, capital
2 litigation, economic crimes, federal criminal offenses and
3 post-conviction matters.

4 Barry is also the chairperson for the
5 Florida Association's Annual Death is Different Seminar
6 which provides certification in capital cases for defense
7 attorneys as mandated by the Florida Supreme Court.

8 A graduate of Florida State University
9 and the University of Miami School of Law, Barry's office
10 is located here in Miami, Florida.

11 Barry, thanks a million for coming down
12 today. We appreciate it. It's always great to meet the
13 president of one of our affiliates.

14 What we've been doing here this morning
15 is we ask each of the speakers to talk for about 15 to 20
16 minutes. The reason for that is we have a lot of questions
17 that we're trying to get out as we listen to you.

18 So on that note, the floors is yours.

19 MR. WAX: Thank you, Marvin. I appreciate it.

20 On behalf of the Florida Association of
21 Criminal Defense Lawyers Miami I would like to thank and
22 NACDL for this invitation to testify before the
23 Problem-Solving Court Task Force.

24 Our local organization is comprised of
25 330 criminal defense attorneys in private practice and

1 federal and state public defenders. Virtually our entire
2 membership has regular contact with the specialized courts
3 of Miami-Dade County.

4 The advent of problem-solving courts or
5 specialized courts has affected the relationship between
6 attorneys at law and the courts, particularly as it relates
7 to shaping public and social policy through the
8 adjudication of disputes.

9 Traditionally case law evolved and
10 statutes would be promulgated as a consequence of action
11 taken in courtrooms to resolve a lawsuit or a criminal
12 case.

13 Social issues, while important, were not
14 a primary deciding factor in the resolution of a legal
15 issue or management of the docket. The constitution,
16 statutes, historic decisions and the facts of the specific
17 case guided the court through the process.

18 When counseling a client on their
19 individual case, an attorney could explain the substantive
20 and procedural aspects of the journey which confronted the
21 client as his or her case made its way through the justice
22 system based on these bedrock concepts.

23 With the advent of problem-solving
24 courts, the justice system began implementing policy to
25 address the social issues with which modern society is now

1 confronted.

2 Whether it's a drug court, domestic
3 violence court, mental health court or habitual offender
4 court, policies are now in existence by which judges are
5 handling cases.

6 These policies have been created as a
7 result of joint efforts between judges, court
8 administrators, prosecutors, public defenders and clerks of
9 the court as a means by which they can control ever
10 increasing case loads and dockets.

11 In a great majority of cases this
12 approach becomes the primary consideration rather than the
13 impartial adjudication of the dispute before the court.
14 And the purpose of these policies is to address the social
15 issues which caused an individual offender to be arrested
16 in the first instance, all too often at the expense of
17 individual rights.

18 Does the court remain truly impartial?

19 Should a client be assigned to one of
20 these specialized courts, counsel now has the added
21 responsibility of explaining the effect of the policies to
22 the client.

23 Invariably the defendant's confidence in
24 the impartiality of the courts and effectiveness of his or
25 her attorney is called into question. It is not at all

1 uncommon for a defendant to ask, "How can I expect to get a
2 fair trial? They already think I'm guilty."

3 In the great majority of these
4 specialized courts the defendant does not have the option
5 of opting in or out. They're automatically assigned to
6 these divisions.

7 In the case of, for example, a habitual
8 offender court, the effect can be dramatic. Can a
9 defendant who is diverted to a court solely on the basis of
10 his or her prior record truly be presumed innocent.

11 One need only observe a bond or pretrial
12 detention hearing and it is evident that constitutional
13 protections such as the government's burden of proof are
14 minimized if not covertly eliminated.

15 When a defendant is given the option of
16 opting in or out of the program as in a drug court, the
17 dilemma is not as severe.

18 However, if the entire judiciary in a
19 given jurisdiction is following a policy to the effect of
20 treating a defendant who opts out of a drug court in a more
21 punitive manner, then there really isn't a fair ability to
22 opt out.

23 Furthermore, in many jurisdictions the
24 defendant may not first assert his or her legal rights,
25 say, by filing a motion to suppress evidence obtained in

1 violation of his or her constitutional rights, and, then,
2 if the motion is denied, elect to enroll in drug court.
3 It's all or nothing.

4 That is not the say that problem-solving
5 courts are ineffective. In many cases they obtain their
6 goals of reducing recidivism, assisting addicts in
7 overcoming their addictions, and breaking the cycle of
8 domestic violence.

9 The mental court here in Miami-Dade
10 County has done wonders obtaining outpatient treatment for
11 mentally ill offenders who otherwise would be subjected to
12 incarceration.

13 As a result of the enlightened approach
14 of Judge Steven Lightman, for instance, many mentally ill
15 persons in Miami-Dade County would be subject to arrest,
16 are automatically diverted out of the criminal justice
17 system and into treatment. But again this is an instance
18 of the justice systems supplanting state and local
19 governments in the provision of social services.

20 In truth, our justice system began to
21 create specialized courts when judges were assigned to the
22 criminal division or the civil division. Later juvenile
23 court were created.

24 This trend clearly led to the current
25 practice of splintering courts into highly specialized

1 divisions, and it is unique to state courts and possibly
2 large metropolitan areas.

3 The federal courts have no such
4 segregation of which I'm aware. Courts in rural, less
5 populace areas may not even have separate criminal and
6 civil cases. Judges still preside over both.

7 Are specialized courts then a method of
8 dealing with large concentrations of the population?

9 Does the manner in which an individual
10 gets treated in the justice system depend upon his or her
11 geographic location?

12 Does the control of social issues in
13 metropolitan areas become more important than the
14 preservation of individual rights?

15 Are these philosophical questions being
16 considered or must we disregard them and others because
17 there is no alternative solution?

18 Is the court system now the primary
19 option for addressing broad social issues.

20 The answers remain to be seen but the
21 dialogue must occur. I am hopeful that this task force
22 will be instrumental in fostering this exchange of ideas
23 throughout the country.

24 Thank you.

25 MR. JONES: Thank you. I have to apologize for

1 not being here at the start of your comments. I had to go
2 back to check out of the hotel --

3 MR. WAX: Don't you hate it when that happens?

4 MR. JONES: -- that's connected to this very
5 building and probably would have been here in advance of
6 starting up but I forgot what floor we were on.

7 MR. WAX: Let's go to the tape.

8 MR. JONES: And these guys will see over lunch
9 messages from me on their e-mails trying to find out what
10 floor we were on. So I had to go to 40 and they sent me
11 back up here so I apologize. I apologize for that.

12 Gail is going to start our
13 questioning.

14 MS. SHIFMAN: Thanks, Barry.

15 MR. WAX: My pleasure, Gail.

16 MS. SHIFMAN: Your comments are probably the
17 reflections of most of us as criminal defense lawyers have
18 felt ourselves, and in seeking to come up with some sort of
19 recommendation as we go forward through our public hearings
20 and listen to various witnesses, are hopefully questions
21 that we're going to be able to answer with some specific
22 recommendations.

23 Some of the issues that you raised are
24 broad social issues that obviously the five or six or seven
25 of us will never be able to answer on our own so we

1 appreciate your comments.

2 I wanted to ask you as a long time
3 criminal defense lawyer and as the president of your
4 organization whether or not you have lawyers come to your
5 organization, the Florida association, with specific
6 questions about their roles in these alternative
7 problem-solving courts.

8 MR. WAX: I don't think people have come to us
9 with questions about how to handle a specific situation.
10 I think more often than not they come to us with concerns
11 that deal more with the procedures that they're having to
12 address when they go to these courts rather than the
13 individual cases.

14 We're very fortunate in Dade County that
15 the criminal defense bar has a very open dialogue with the
16 judiciary. Our chief judge, Joe Farina, is available. All
17 we have to do is pick up the phone or send an e-mail.

18 Our chief administrator criminal judge --
19 and this is in state court -- Stan Blake is open and very
20 responsive to meeting with us and significantly addressing
21 issues of concern that we have.

22 Even our chief judge in the federal
23 courts here, Fred Moreno, who came up through the state
24 court ranks and was a criminal defense lawyer in his career
25 is also very responsive to the defense bar.

1 So we don't have -- at least we can
2 eliminate the initial impasse of trying to get through to
3 the judiciary, and we're able to open a dialogue with them,
4 whether it's in conjunction with the prosecution or just
5 talking with the administrative judges from the defense
6 perspective and implementing policy and procedure.

7 MS. SHIFMAN: And the specific concerns that
8 have been raised by your lawyers.

9 MR. WAX: The specific concerns that have been
10 raised by the lawyers for the most part -- and they are
11 few. I will tell you they are few -- primarily deal with
12 issues such as defendants not being transported over to the
13 courts, you know, going into hearings where the presumption
14 is against the client receiving bond, the feeling as if
15 there's a policy in place which is going to result in every
16 case being treated identically, at least at the initial or
17 first appearance stage, regardless of the circumstances of
18 the case.

19 Those are the kinds of issues that get
20 dealt with by the defense bar because once the case starts
21 going through the system, going through the specialized
22 courts, those policies are in place that I referred to in
23 my comments, and the attorneys have to some extent become
24 sensitized to them, and I don't want to say callous but
25 they're not tilting at windmills.

1 They don't want to fight the system
2 because the truth of the matter is ultimately at the end of
3 the day the result is an exceptional result. When you are
4 in a court and you can obtain a dismissal of criminal
5 charges for a client, a defense attorney, that's the best
6 thing that you can do for your client.

7 MS. SHIFMAN: And this habitual court that you
8 mentioned, what is that?

9 MR. WAX: I will tell you that I believe that
10 this is one of the biggest mistakes in the specialized
11 court system.

12 In Dade County -- and I'm not sure if
13 it's in Broward or not, although I suspect that it may
14 be -- they have created courts which deal with habitual
15 offenders.

16 MS. SHIFMAN: Misdemeanor and felony?

17 MR. WAX: No, felony only. There was talk about
18 creating a misdemeanor court, and, in fact, the State of
19 Florida enacted a habitual misdemeanor statute. It's
20 absolutely ridiculous and I don't think anyone pays much
21 attention to it, at least in South Florida.

22 But when you traditionally -- we have
23 like an alphabet soup of habitualization in Florida. We
24 have habitual offenders, habitual violent offenders,
25 habitual violent felony offenders, prison releasee

1 reoffenders and on and on and on. And what happens is is
2 the penalties for crimes -- the statutory maximum penalties
3 will increase.

4 There are statutes that have been enacted
5 in the State of Florida as a consequence of crimes that
6 have been committed. I know the Jessica Lundsford murder,
7 which you all may be familiar with in Central Florida,
8 where the individual was on probation, ultimately led to
9 the enactment of the statute in Florida called the
10 Anti-Murder Act where probationers -- although probationers
11 generally are held with no bond on a violation of
12 probation, there is now a presumption against their
13 receiving bond and in certain cases a prohibition against
14 their receiving bond.

15 And what this alphabet soup I described
16 has resulted in is the creation of specialized courts
17 specifically for habitual offenders.

18 MS. SHIFMAN: So if someone gets charged with
19 one of those --

20 MR. WAX: New law offense and you qualify as a
21 habitual offender, you're going to be diverted to these
22 courts in Dade County. There are two of them.

23 MS. SHIFMAN: What do these courts do?

24 MR. WAX: They are trial courts the same as any
25 other trial court's condition except the people who are

1 assigned to those trial courts are habitual offenders.

2 It's not -- like, for instance, in Dade
3 County when someone gets arrested and the case gets filed
4 with corrections in the clerk's office, they get blind
5 filed to a judge's division.

6 I believe there are 21 or 23 some odd
7 circuit court felony charges. There may be more now in
8 Miami-Dade County and it's a rotating blind wheel, so the
9 first offender that comes in will go to Division 1 and the
10 next offender will go to Division 2 and on and on and on on
11 a rotating basis.

12 What happens with a habitual offender
13 court is that the cases get isolated and reassign to this
14 court.

15 MS. SHIFMAN: And does the habitual offender
16 court fall under the generic problem-solving court?

17 MR. WAX: Well, if you think about it in terms
18 of why the habitual offender courts were created, I think
19 they do. I mean, you're thinking of problem solving in
20 terms of solving, for instance, the drug addiction, mental
21 health, domestic violence issues, but here you're dealing
22 with the recidivism issue primarily with violent offenders
23 which creates a problem for the community, and so this is
24 yet another example of a splintered off court.

25 You know, as I said in my comments

1 originally, we became specialized by going, okay, here's
2 judges who are going to preside over criminal cases and
3 here's judges who are going to preside over criminal cases
4 and then we said, okay, here's another group of judges that
5 are going to preside over juvenile cases, and then we said
6 here's another group that are going to preside over family
7 law cases, and then we're going to carve out family law
8 domestic violence cases, and now we've got habitual
9 offender cases, and in the civil arena we have complex
10 business courts that are being carved out.

11 MS. KELLEY: In terms of these habitual offender
12 courts, is there anything, for want of a better phrase,
13 special a judge can do because I would imagine for many of
14 these offenders prison is mandatory.

15 MR. WAX: Prison can be mandatory depending on
16 the nature of the offense. In many cases it is mandatory.

17 MS. KELLEY: So if someone is facing mandatory
18 time, are they still put on the habitual offender docket?

19 MR. WAX: Certainly. It's not the ultimate
20 sentence that's the decision-maker about how they get into
21 those courts. It's their prior record. It's whether they
22 qualify as a habitual offender that puts them into that
23 court.

24 MS. SHIFMAN: If the prosecutor has charged
25 it.

1 MR. WAX: If the prosecutor charged it. I can't
2 tell you if they have to file the Notice of Intention to
3 treat them as habitual offenders to get them into that
4 courtroom. I'm not certain of that. It may be that they
5 have to because there is a predicate notice that has to be
6 filed to get that sort of treatment.

7 MR. SCHECHTER: Does the notice have to be filed
8 to get into court?

9 MS. SHIFMAN: I would think so.

10 MR. WAX: I think the notice has to be filed by
11 the prosecution. It's not the typical situation for a lot
12 of these people who are represented by the Public
13 Defender's Office, for instance, where the public defender
14 is going to be able to be proactive, for instance, like a
15 private practitioner might be.

16 For those of us that practice in federal
17 court, when you have a drug offender and he's a repeat
18 offender and you want to avoid the filing of an 851
19 information, you got the case, you can get in line with the
20 prosecutor and say what do we need to do to avoid this 851
21 information that doubles the minimum mandatory?

22 So you've got people that are subject to
23 habitual offender treatment, but their attorneys, by virtue
24 of their case load or just the fact that they are not yet
25 aware of the case being assigned to them, doesn't have the

1 opportunity to get proactive with the prosecutor and say,
2 hey, how can we avoid the filing of this habitual notice.

3 By the same token, you've got prosecutors
4 whose policy it is to always file the habitual notice. I'm
5 not talking about line prosecutors. I'm talking about
6 elected prosecutors who this is their policy.

7 MR. SCHECHTER: The dichotomy that you are
8 making is when you use the term "problem-solving court" is
9 who's problem is being solved.

10 Now, for the mental health court and for
11 the drug court we've heard from some very distinguished
12 speakers. The premises of those courts is crimes are being
13 committed because of a drug addiction or mental illness and
14 it's in the interest of the community that we divert those
15 cases out because the crime is not the problem. It's the
16 sickness that the person has.

17 What you're talking about this is a
18 problem-solving court, but the legislature of the state has
19 said we want to fast track second felony and second violent
20 felony offenders into one court because we want to really
21 keep an eye on those kinds of individuals. We want one or
22 two judges to really specialize in that.

23 It's very similar to the domestic
24 violence court which originally started out as a sickness
25 problem but have morphed into -- a lot more into what

1 you're talking about, as a court where you go in and the
2 defendant almost has -- it's really stacked against them,
3 because the policy that's started to morph is we're going
4 to go after the person for this issue. I understand that
5 dichotomy.

6 Let me just switch you for a minute to
7 the ethics problem because we've talked about this. A lot
8 of the literature talks about this ethics problem defense
9 attorneys have in being part of this team approach. I'd
10 like you to address that. How do we get around that?
11 Isn't it being violated on a daily basis for defense
12 attorneys? And, if it is being violated on a daily basis,
13 how do we participate? Should we have some alternative?
14 Should it be a new model? How do we get from under this
15 new issue, but do what you've suggested, which is we want
16 to get that great result?

17 MR. WAX: I think then what you turn around is
18 you start redefining the role of a criminal defense
19 attorney, and I think redefining that role -- there are two
20 aspects to it. You would have to redefine it in terms of
21 your individual attorney/client relationship and you would
22 have to redefine it in terms of your role as an officer of
23 the court.

24 You know, philosophically you know when a
25 group of defense attorneys get together they're going to be

1 all over the board. Everybody is going to have a different
2 opinion of how to deal with something.

3 So, first, talking about, for instance,
4 whether we can participate in the process, whether we can
5 be part of the implementation of the court, and I think by
6 all means we have to be part of the implementation of that
7 process.

8 And I don't think it creates an ethical
9 dilemma for us to be part of that process, rather it's
10 something that enables us to make sure that things like the
11 attorney/client privilege or the preservation of individual
12 rights are preserved in the context of these courts.

13 For instance, when someone goes into a
14 drug court, when they opt into a drug court, they have to
15 waive, for example, their right to a speedy trial. They
16 have to give up that and say we're going to give that up
17 for as long as we have to stay in the program.

18 Now, some of the drug courts require on
19 the front end, for instance, a plea, like a deferred
20 probation plea that says you plead now, you complete your
21 probation, and at the end we'll vacate your plea and
22 dismiss your case. Other courts don't require that you
23 enter any sort of plea before going into the program.

24 Some of the courts -- I know that the
25 statute says that in Florida, at least, that a defendant, a

1 first offender with no prior felony history, can go into
2 the court whether they want to or not.

3 But what about first, second and third
4 offenders who have to get the permission of the prosecution
5 to go into the court? If the purpose of the court is to
6 address the social evil of addiction leading to drugs, then
7 without the voice or participation of a defense attorney,
8 many times the people who need it most, the second, third,
9 fourth, fifth defenders who are recidivating and committing
10 all sorts of crimes are not going to be able to get into
11 these courts and get the kind of treatment they need which
12 is really the lynch pin to solving the recidivism problem
13 or the escalating criminal problem that we get.

14 So to that extent, I think that, from a
15 systemic perspective, the attorney has to get involved and
16 that it's not unethical.

17 From an individual perspective of the
18 attorney/client privilege, that's something that's going to
19 be determined between you and your client.

20 When I have an individual who comes into
21 my office -- and my approach to the way that I practice law
22 in many cases is a social approach as opposed to an
23 advocacy approach.

24 Now, certainly there are cases that that
25 wouldn't hold true for, but let's take the case of a young

1 offender, let's say someone under the age of 21 who is
2 committing offenses as a consequence of their drug
3 addiction and they come into my office with their parents.

4 And as we've all had the situation occur,
5 you ask the parents to leave the room so you can talk to
6 the child or the young person and try to get them to
7 establish trust with you and tell them, "I'm not going to
8 go running to your parents, and I'm not going to tell your
9 parents everything you tell me but I really do need to
10 defend you properly. You know, what's going on here? Talk
11 to me not about the case. I don't care about the facts or
12 what's in the arrest affidavit. Talk to me about who you
13 are and what's going on in your life, in your head and why
14 stuff is going on."

15 And then you say to yourself, well, okay,
16 I can take this case to the mat. I can file motions to
17 suppress. I can take the case to trial and I can probably
18 win. Is that in my client's best interest? Is that what
19 my client wants? Is that what they want to do.

20 Or can I get them involved in a drug
21 court where they're going to get that guaranteed dismissal
22 that's not even an outside chance if they complete the
23 program they're going to have any record whatsoever, and
24 maybe, just maybe, we're going to nip the problem in the
25 bud.

1 The problem is, as I see it in that
2 situation, is the concept of forced treatment, is the
3 concept that you're saying to someone, "Go into this court
4 and take the medicine."

5 You know, it's like -- I was talking with
6 a judge about this the other day. It's a Clockwork Orange.
7 Is it better to have the free will to murder or commit
8 crimes than it is to have no free will at all? You know,
9 what are we really doing? Are we forcing people toward a
10 certain path because we think that that's the way to go?

11 Any one of us with that experience with
12 addiction or alcoholism know that if the person is not
13 motivated to take control of their own problem, everything
14 you're doing is a short-term fix.

15 So someone graduates from drug court --
16 and I love the drug courts. I think Judge Rosinek, he's a
17 fantastic human being. I mean, why would anyone -- Gisele
18 Pollack, she's fabulous. She was a great defense attorney
19 before she took the bench. I mean, they care.

20 But what's to really stop someone from
21 not going to these courts as a means to an end, a
22 dismissal, and then the day after they graduate, "Hey,
23 let's go celebrate. Let's go smoke a joint. Let's go have
24 a drink," and then you're back on that slippery slope
25 because there is no supervision.

1 We know the courts are effective though
2 because we know, at least from the perspective of
3 rearrests, they work. We just don't know about the
4 perspective of how many of those people go back to using
5 drugs or any other substance of choice. They just don't
6 get rearrested.

7 I'm not saying that's a good or a bad
8 thing. Don't get me wrong. I'm just saying that when you
9 look at it from the ethical perspective, as you suggested,
10 Marvin, that when we deal with an individual client, we
11 really have to address those individual client's needs and
12 wants.

13 When you get a client on a drug case, by
14 the way, who's a professional, you know, I mean, a doctor
15 or an accountant or a pilot, you know, whatever, and
16 obviously you're saying to yourself, hey, you know, you got
17 licenses at stake. You have livelihood at stake. Do you
18 really want to fight this or take the drug program because
19 you're going to get that dismissal?

20 And you know that the stress of their
21 lives or their jobs or their financial circumstances is
22 going to probably result in their doing what they have to
23 do under penalty of incarceration or conviction, and then
24 as soon as they're out of that program, you know, there's
25 no hammering any more. They're going to go right back to

1 it.

2 MR. SCHECHTER: So you get around the privilege
3 problem by meeting with the client and saying, "Look, if
4 you want to go to drug court route, it's going to involve
5 you being part of this team effort" --

6 MR. WAX: Right.

7 MR. SCHECHTER: -- "which means that the
8 attorney/client privilege which belongs to you, you're
9 going to have to give that up because I'm going to be in
10 court talking to these guys."

11 Judge Pollack this morning indicated that
12 what's coming to Broward are staffing meetings, which is
13 popular around the country, where you will sit in with
14 Judge Pollack and her team around the table in advance of
15 the court date talking about your client.

16 MR. WAX: Right. You know, that's a fine line
17 too.

18 MR. SCHECHTER: How do you do that?

19 MR. WAX: Are we saying to ourselves let's
20 divulge only as much as we need to, which is the approach
21 that I would advocate. I don't think we need to go into
22 certain things that are very, very privileged.

23 In those circumstances, is it just a
24 question of saying, okay, step one, admit you have a
25 problem. You know, that's the first thing you have to do.

1 Are we really breaching privilege in that manner? And if
2 we are breaching privilege, is it a slippery slope?

3 MR. SCHECHTER: But it's easy to say it. It's a
4 lot harder to do it. Let me give you an example. Your
5 client is not in front of Judge Pollack for three months.
6 Comes back. They do a urine test. The client tells you
7 privately, "I'm clean." You say, "You've been clean the
8 whole time?" He goes, "No, I used some coke right after
9 Judge Pollack's last saw me because I knew they wouldn't
10 test it. I got around it."

11 Now, you're sitting at the staffing
12 meeting the next morning. Do you tell Judge Pollack that?

13 MR. WAX: Absolutely not. Absolutely not.

14 MR. JONES: I see Judge Pollack waiving.

15 JUDGE POLLACK: I know. I know.

16 MR. WAX: She knows why my answer is no, you
17 know, absolutely because above all else my duty is to my
18 client. Absolutely, positively my duty is to my client and
19 I can't change that, and that's the dilemma I think we are
20 in many, many times.

21 I mean, that's like when your client is
22 cooperating with the government to try to get a sentencing
23 reduction. How many of those debriefings have you been in
24 where you feel like you want to excuse yourself and go take
25 a shower, you know, because you just feel like what you're

1 doing is so contrary to the core values of being a criminal
2 defense attorney, but your duty is to your client in seeing
3 that they don't go away for many, many years?

4 It's just I think these are the issues
5 that we as criminal defense attorneys are confronting now
6 on a regular basis.

7 You know, we have a board meeting tonight
8 of the local chapter and I was putting the agenda together,
9 and one of the things on our agenda is discussion of a
10 draft proposed advisory ethics opinion of the Florida Bar
11 which deals with the issue of do you tell the court when
12 your client is using an alias, okay. You know, what is the
13 attorney's obligation?

14 And, you know, these committees are made
15 up of a vast divergence of attorneys and, you know, a civil
16 attorney will come into court and say, "Well, you tell them
17 it's the wrong name," you know, and the criminal defense
18 attorney is like, "What, are you out of your mind? I can't
19 do that."

20 You know, these are is the kind of issues
21 that unfortunately weren't around when Abe Lincoln was
22 practicing law. You know, we all read about Abe Lincoln
23 and what a fine lawyer he was, and all the things that he
24 gave us that we should do in our practice, but we are
25 confronted with so many issues nowadays, none the least of

1 which is the problems and the social issues of large
2 metropolitan centers that have to be dealt with differently
3 or the docket gets crowded.

4 When I was a young public defender that
5 was the best job I ever had in my life. You know, you
6 tried your cases and you knew that you could bring that
7 court to a halt. If that judge wasn't working with you and
8 giving you pleas that were better than the prosecutor's --
9 of course, this is before the guidelines came in, but, you
10 know, that you weren't doing everything, you could just
11 announce ready on every trial and your team would be right
12 behind saying -- when the judge goes, "You can only try one
13 case at a time," and you go, "Yeah, but here's the rest of
14 the team. Send us out to different judges" until you got
15 what you want.

16 You can't really do that any more. You
17 can't get those results by taking that tact any more so now
18 we have the dichotomy, the dilemma. At what point are we
19 pushing that line, you know, that demarcation that says you
20 don't disclose this or you don't take this approach and
21 you're sort of pushing it and pushing it.

22 MS. SHIFMAN: So the private lawyers that you
23 know who take these cases that go to drug court or mental
24 health court, are they seeing the cases all the way
25 through?

1 MR. WAX: No.

2 MS. SHIFMAN: So they basically see the case
3 through the acceptance of --

4 MR. WAX: You hand it off.

5 MS. SHIFMAN: -- being a diversion?

6 MR. WAX: There's very few attorneys that go
7 into drug court with their clients. You can try to go.
8 You can go occasionally. I know that the drug court cases
9 that I've had -- in fact, Judge Pollack was the public
10 defender in the felony drug court in Broward and I had
11 cases in there and I used to show up for my client's drug
12 court reports. I showed up for the initial intake. I
13 showed up for the review, and people kept coming up to me
14 saying, "Why are you here? You don't need to be here" and
15 I'm like, "No, that's my client. I've been paid to
16 represent this person."

17 Drug court is an easy fee. It's an easy
18 fee. And I'll be honest with you, when people come to me
19 on a drug case and I talk to them about drug court, in many
20 cases -- and I know this might sound strange -- I turn to
21 them, I go, "Look, if you want drug court, don't hire me.
22 You don't need to pay me. I'm not going to do something
23 differently for you than if you go unrepresented or you get
24 a PD."

25 A lot of lawyers are okay with taking

1 that fee and they'll justify it by saying, "Well, I'll seal
2 your record up for you later" but the court shows you how
3 to seal your record too in a lot of cases. That's part of
4 their process or their out-the-door portion, "This is how
5 you seal your records." I don't feel good about taking a
6 fee in those courts.

7 Now, I have taken fees where in those
8 courts where the prosecutor has said to the client, "You're
9 not eligible" and then we had to file a Motion to Compel to
10 get them into drug court, and I had to do that in Palm
11 Beach County not too long ago. So that was the situation
12 that was successful and I felt that my presence and my
13 advocacy was necessary.

14 MR. SCHECHTER: On that last issue, would you
15 support either through the Florida Association or any CDL a
16 requirement that any defense attorney who undertakes a drug
17 court or specialty court client must appear at each
18 appearance?

19 MR. WAX: No, I couldn't.

20 MR. SCHECHTER: Why not?

21 MR. WAX: It's tortious interference with
22 business relationship or something like that. Look, your
23 counsel, our wisdom, has some value so if a client comes to
24 you and wants your advice, well there's a value to that
25 advice. You know, I wouldn't feel right taking the same

1 retainer that I take initially. Like I have a threshold
2 retainer for my services. I wouldn't feel comfortable
3 taking that retainer for a drug court case. It's not
4 right. I wasn't raised that way. I don't do that.

5 But I do think that there's a value if
6 someone comes to my office and says to me, "I've got a
7 dilemma, Mr. Wax. I don't know if I should go to drug
8 court or fight this case. I don't know how this is going
9 to effect my future. Can I seal my record?" And you spend
10 a couple of hours with that person and you give them advice
11 and they take your advice and they make a decision. We
12 should be compensated for that. But just because I do
13 that, should I have to show up in court with them? I don't
14 think so.

15 MS. SHIFMAN: Even though, frankly, once they're
16 on the drug diversion program they're more likely to make
17 admissions and statements to the judge?

18 MR. WAX: Yes. And, you know, if they get
19 bounced out of the program that all gets used against them.
20 So it's like that queen for a day letter that we see so
21 often, you know, once you start talking, there's no going
22 back.

23 MR. JONES: When you say if they get bounced out
24 of the program, that's used against them. Every person who
25 has sat in that chair before you has said that's not the

1 case. Do you have specific instances of that being the
2 case?

3 MR. WAX: Not personally.

4 MR. JONES: Someone you can point us too?

5 MR. WAX: Not personally but I don't buy that.
6 I mean, if you're making an admission of using drugs,
7 that's not relevant to whether or not you committed a crime
8 that got you there in the first place. I don't see any
9 basis for admission of that statement.

10 But if someone is making admissions,
11 like, for instance, while they're in the program, I believe
12 that when someone comes in and admits to using drugs, I
13 don't think they're ever going to bring a new charge
14 against them. I don't think that's going to happen. I
15 think that's contrary to the program. But if they're
16 making admissions that got them there in the first place --

17 MR. JONES: Well, the underlying charge that got
18 them there in the first place is possession of, whatever,
19 cocaine, marijuana, you choose, and during the course of
20 their tenure in the drug court they are making admissions
21 that, say, you know, "I was using during the relevant
22 period when I got arrested" or "I had it in my system" or
23 "I had a dirty urine" or half a dozen other things that
24 they're saying. Your belief, I guess, is that those
25 admissions that are relevant, that the state's attorney

1 from the drug court shares -- now that the person has been
2 bounced out -- with the prosecutor prosecuting the case in
3 regular court, you believe that those admissions, because
4 they're relevant and material to the underlying charge in
5 the prosecution and the government meeting their burden,
6 are therefore admissible?

7 MR. WAX: I would say that they would try -- if
8 you're going to trial. I mean, I think you need to make a
9 distinction. Are you talking about their admissible -- for
10 evidentiary purposes in a trial because, let's face it,
11 especially in the cities, when is the last time a
12 possession of cocaine case went to trial? I mean, you
13 know, just as a practical matter it doesn't happen.

14 Where they really become admissible and
15 what creates a problem is how that person gets treated when
16 they go back to a regular division? In Broward County, for
17 instance, those people are going to get a plea offer of
18 drug offender probation.

19 You know, drug offender probation is 18
20 months of intensive supervision that goes beyond normal
21 probation, and that's why when you're in Broward County you
22 don't want out of that drug court because drug court is
23 effectively probation, but if you violate it the
24 consequences are much less severe.

25 Not to pick on Broward County. I do a

1 lot of work up there and, unlike a lot of my colleagues in
2 Dade County, I don't mind practicing in Broward County. I
3 like it and I get good results up there.

4 But the truth of the matter is that they
5 have the largest percentage of individuals in state prison
6 of any county in Florida is Broward County, and that's
7 because it is a very harsh county with a prosecutor -- an
8 elected official -- who has significantly harsh policies.

9 Whereas in Dade County, if you come out
10 of Judge Rosinek's program unsuccessfully and you go back
11 to a division judge, many times the disposition is going to
12 credit time served, pay your court cost and go home. No
13 probation at all. So in that case, it never gets used
14 against you.

15 And, believe me, someone who can't make
16 drug court, when confronted with a choice of credit time
17 served or go to trial, it's a no brainer, "Time served.
18 Let me go out of here. I don't have to deal with this any
19 more." So, as a practical matter, I don't think you ever
20 get into the evidentiary, admissibility issues that will
21 keep Mr. Winkie up all night.

22 MR. JONES: Should there be then -- you've
23 talked about that moment when you're sitting in your office
24 with the client -- if it's a young client, the parents are
25 gone or if it's a professional, it's a licensing issue.

1 You are a professed advocate fan of specialty courts, drug
2 courts, I think that's what you said.

3 MR. WAX: I think they serve a great purpose.

4 MR. JONES: You are sitting there and having a
5 conversation with your client. You're saying, "I have a
6 case that I can win, I think, if I'm aggressive and I do
7 the things that I do and litigate it zealously. But I
8 think you also have other concerns with the licensing and
9 whatever else it is, you want to go to college, and this
10 means this road, this fork in the road. Drug court means
11 dismissal and expungement and all those kinds of things."

12 Do you think that there should be some --
13 and maybe you spend -- and I believe you even said it --
14 two hours with the person before you say, you know, "Go to
15 drug court and I can't take the fee and God be with you."

16 But do you think that there should be --
17 because I suspect most lawyers don't. Do you suspect or do
18 you think that there should be some mandatory or at least
19 some guidelines or outlines of a conversation that --
20 whether it's a public defender or publicly retained or
21 appointed counsel should have with a person, an individual,
22 before they go down the road of drug court?

23 MR. WAX: Yes.

24 MR. JONES: Are there a number of delineated
25 things that that person should know before they go down

1 that road?

2 MR. WAX: Definitely. Absolutely. It's the
3 same way that I don't want someone handling a death penalty
4 case, you know, doesn't have the training on how to handle
5 the death penalty case. You want lawyers --

6 MR. JONES: But this is different. In a death
7 situation, you're talking about "I don't want an
8 incompetent lawyer handling a death penalty case." This is
9 a case where the client has to have the power of
10 information before they make a decision.

11 MR. WAX: And I don't want an incompetent lawyer
12 handling this situation because the magnitude of this
13 possession case on that individual can be every bit as
14 equal to the magnitude of the death penalty case on that
15 defendant.

16 If this task force can come up with a
17 guideline for attorneys to counsel people, then you may
18 have achieved something which would have a greater effect
19 than dealing with the actual process of these courts.

20 You know, when I was in law school no one
21 taught me to you to quote a fee, you know. No one taught
22 me really how to interview a client. I waited tables for
23 years. That's how I learned to interview people. That's
24 how I learned my skills.

25 You know, if someone ever gave me

1 training on how to counsel someone who's faced with "Do I
2 take a specialty court," whether it's drug court or
3 domestic violence or anything else, "or do I take the
4 fighting road," you know, then that certainly would have
5 provided me with so much assistance, especially as a young
6 attorney.

7 And when you take that and you combine it
8 with the case load demand, say, of a public defender, you
9 know, who doesn't have the luxury that I do of spending two
10 hours with a client, who's doing triage, you know, to be
11 able to look at this and say to them, "Look, here's what it
12 is." And I'm not talking -- I'm not talking about a canned
13 speech, which may be what some people turn it into. But
14 absolutely guidelines?

15 MR. JONES: Yes.

16 MR. WAX: I think it would be fantastic,
17 fantastic without question, without question.

18 MR. CLARK: What do you think the most important
19 thing a defense attorney needs to talk to that client about
20 before going to specialty court?

21 MR. WAX: I think the most important thing would
22 probably be consequences. I think it would be
23 consequences. I think that we're always trying to help our
24 clients make informed, reasoned decisions based on the
25 options that they're presented with, and if we can advise

1 them of the consequences and let them choose, then that's
2 the most important thing that we've done.

3 I don't make decisions for my clients. I
4 just don't. You know -- hey, half the time they don't
5 listen to me anyway. They do what they want and we all
6 have those war stories. But the truth of the matter is
7 that I don't want to make the decision for them. I want to
8 give them the tools to make the decision.

9 Now, many times they'll ask me my opinion
10 after I give them the tools, and they'll say, "Well, what
11 would you do if you were me?" And I'll look at them and
12 many times I'll say, "I would take the drug court."
13 Sometimes I say to them, "I would fight."

14 And, remember, one of things we have not
15 spoken about is the client comes to you and you know
16 they're not going to make the drug court. You just know
17 it's not going to happen, you know. And then they're
18 buying themselves into those short-term imprisonments to go
19 to forced treatment and sit around with everybody else in
20 group therapy that's not doing anything for them and
21 they're twiddling their thumbs but they don't want out of
22 their program.

23 Listen, if I was in Judge Rosinek's or
24 Judge Pollack's court, I wouldn't want out of that program
25 either because I know what's waiting down at the other end

1 of hall.

2 And then you have a client who comes to
3 you -- I have clients who come to me and I say to them,
4 "Listen, let's get you time served and court cost and get
5 out of here so you can get back to the pipe." I don't use
6 that words with them but I know that's what's going on in
7 my head.

8 Am I doing that person a disservice by
9 not trying to get them off or help for their treatment, or
10 am I being realistic in saying this is the best thing I can
11 do for this client? This is the best possible result I can
12 get for them because they're not going to be having to go
13 to this program and get dirty urine, or they're not having
14 to go to treatment and not getting anything out of it when
15 really they haven't hit rock bottom yet and they're not
16 ready for treatment and they need to get worse before
17 they're going to get better?

18 Am I abdicating my responsibility as an
19 officer of the court or am I preserving my responsibility
20 to my client in that situation? And that's a dilemma that,
21 you know, we never can answer. But, at the end of the day,
22 did we do the right thing, you know? That's really what it
23 comes down to in many cases.

24 MR. SCHECHTER: One of the things I was struck
25 by in talking to Judge Rosinek yesterday was the fact that

1 he's one judge with this enormous case load and does not
2 seem to have a lot of support in terms of programs. A
3 number of people yesterday in his court, there was no
4 solution for them. They couldn't get into a hospital to be
5 stabilized because they didn't have the right insurance or
6 no insurance at all.

7 And yet at the same time, I think it's in
8 Miami-Dade, a court has been established to handle complex
9 business cases of \$75,000 and above. And I thought Judge
10 Rosinek's point to me was well taken, it tells you where
11 the priorities are.

12 The question I have for you is what
13 should this panel take a look at? Should we also consider
14 issues of whether the drug courts need more money?
15 They seem to be -- or specialty courts other than habitual
16 offender court? Do they need more money to operate better?
17 Do they need better training?

18 Do we need public defender and legal aid
19 budget lines to have specific attorneys assigned to these
20 courts that don't take away from the other line attorneys
21 in a public defender, legal aid office? Would your
22 organization support that? Should we not even bother to
23 look at that, etcetera?

24 MR. WAX: No, our organization lobbies the
25 legislature on issues of concern to our clients and issues

1 of concern to our membership. I think that all the
2 organizations from the top down, national and local, are
3 getting more involved in those issues, but that's what I
4 was really getting at in my opening comment.

5 The courts are now being asked to provide
6 the social programs that the local and state governments
7 should be providing. I mean, in the Reagan era we saw the
8 deinstitutionalization of mental health treatment, which in
9 light of the type of treatment they were getting might not
10 have been such a bad thing at the time, but the problem is
11 we created an overwhelming homeless population as a
12 consequence of that that was thrown onto the streets, and
13 the state and local governments -- and then the courts,
14 because the police started arresting all of these people,
15 it becomes a criminal justice issue, and now the courts are
16 being asked to step in and provide the social programs that
17 should be provided by the legislature before people ever
18 get into the courts.

19 And I think that if we're going to be
20 effective as an organization, maybe we need to, again,
21 reorient our thinking in terms of are we going to lobby for
22 more money for the court system, which, in my opinion, in
23 many cases it's too late, or are we going to start getting
24 legislatures and our elected officials to put their money
25 where their mouth is and put it into education at the

1 early stages, to put it into the schools, to put it into
2 street policing situations, to put it into the development
3 of values.

4 I was driving my daughter to school this
5 morning. She's 12. We dropped off my nine-year old at
6 elementary school and I was taking her to middle school,
7 and at the elementary school lane, the car pool lane, there
8 were cars parked. It's a drop-off lane but the whole lane
9 was taken up with people who park their cars to go inside
10 of the school with their children.

11 And I turned to my daughter and I said,
12 "You know, when I was in school, when I was growing up, we
13 learned about social contact." They don't teach it
14 anymore. She even said to me, "They don't teach us that,
15 dad." I said, "I know." They used to teach us, you know,
16 act appropriately in society so that you can make the world
17 a better place, and I think that's where our efforts need
18 to be put, not in the court system, although that's noble
19 and that's appropriate and perhaps necessary, but we need
20 it to put it in other places. We need the funding to stop
21 it before it starts. That's my personal opinion.

22 As an attorney, fund the courts. They
23 need it. Why do we get five percent of the budget? We're
24 a co-equal in the government. Why are we the red headed
25 step child? Why are we always fighting? Why are judges

1 always up in the legislature begging for money.

2 Why does the chief judge of the supreme
3 court of Florida have to go to the legislature and beg for
4 more judges when the legislature is out there creating
5 habitual offender statutes and increasing the prison
6 population and the rate of trials and the whole system is
7 about to collapse under its own weight? But let's get
8 tough on crime, you know, because we get re-elected. I'm
9 just preaching to the choir.

10 MR. JONES: We're running out of time.

11 MR. WAX: I'm glad about that.

12 MR. JONES: I have one last question for you.
13 I'm interested -- and we're interested as a committee -- in
14 sort of the racial justice and the fairness of drug courts
15 and other specialty courts, and I know Judge Pollack, when
16 she was giving us her testimony, said that 50 percent of
17 the defendants in her courtroom are white. And I suspect
18 that in very few other criminal courtrooms anywhere will
19 you find that 50 percent of the defendants are white.

20 And I think about -- you know, you talked
21 about taking your daughter to school and I think about our
22 education system and I know that we have two different and
23 competing high schools operating in this very same
24 building. We often have all the white kids in the AP
25 courses and all the black and brown kids in all the other

1 courses just sort of eking out an education.

2 And I'm wondering if we're creating some
3 of those same patterns in our criminal justice system that
4 because you can get your case dismissed and because you can
5 have your record expunged if the few white folks who
6 actually are found in the criminal justice system are all
7 getting diverted into these programs, these specialty
8 courts, where they get treated special, and we are creating
9 this two-tier system sort of like we have in education? Do
10 you have any thoughts about that?

11 MR. WAX: I'd be speculating if I said I had any
12 knowledge on the racial imbalance of the courts because,
13 you know, all too often I'm dealing on an individual basis,
14 you know. I have clients -- really, I have white clients,
15 black clients, Hispanic clients, immigrant clients, so I
16 don't even look at my own practice and break it down
17 because I try to deal with people as individuals and not as
18 some racial group or ethnic group. It's not something I've
19 done.

20 But I don't see it as a problem in Dade
21 County. I don't see it as a problem in Broward County. I
22 think it's skewed towards the demographics of the county.
23 I think if you have a county -- you know, Broward County
24 has changed a lot. Judge Pollack, I heard when she was
25 talking about that, one of the things that didn't come up

1 was Broward's composition. Broward has a large Jewish
2 population, it has a large Christian population, it has a
3 large black population, and I think the court skews to all
4 of those demographics pretty equally. In my experience,
5 pretty equally.

6 Now, in the regular divisions, you know,
7 we've seen studies about how they get treated,
8 unfortunately to show that people of color are treated
9 differently for committing the same crimes but that's not
10 the purpose of this court. I'd be speculating.

11 MR. JONES: Listen, we appreciate you being here
12 and I'm again sorry that I missed your opening remarks but
13 I can assure you that one of the first things I'm going to
14 do when able is read them because I do want to
15 understand --

16 MR. WAX: I'll give you a copy if you'd like.
17 It's the beauty of computers. It's just wonderful. It's
18 like the CMECF system.

19 MR. JONES: It's the best.

20 MR. WAX: Isn't that the best?

21 MR. JONES: I'll take you up on it.

22 MR. WAX: This was great fun. I didn't know
23 what to expect and I was hoping I wouldn't make a fool of
24 myself. Don't write that.

25 MR. JONES: Mr. Brummer is going to be with us

1 on the phone and Rick De Maria who is here from that office
2 is going to talk to us, but we are going to do that without
3 the able assistance of Ana who needs a break. Why don't we
4 come back after you folks get a plate and we'll start at
5 one.

6 (Time noted: 12:45 p.m. to 2:03 p.m.)

7 MR. JONES: We are very pleased to have you here
8 with us this afternoon and are quite interested in engaging
9 you in a sort of rigorous discussion about the pros and
10 cons of specialty courts, particularly as it applies to
11 Broward County, and we heard from a number of different
12 judges, lawyers and state's attorneys who practice in
13 Broward County. So your perspective -- both of your
14 perspectives are particularly interesting to me and to us.

15 I generally start by reading into the
16 record the bios of our particular speakers but I don't have
17 a bio, and what I do have, though, for Mr. Finkelstein is a
18 resume.

19 And so I would just like to say that we
20 are joined this afternoon by both the public defender and
21 chief assistant public defender from Broward County and you
22 guys should decide among yourselves how you want to use the
23 15 or so minutes to give us your opening remarks, and then
24 we, as I said, have a number of questions for you. So
25 having said all of that, I will now turn the floor over

1 how.

2 MR. FINKELSTEIN: And I'm going to be brief --
3 for the record, Howard Finkelstein, the elected public
4 defender for the 17th Judicial Circuit which is Broward
5 County.

6 I'll be brief in my remarks because you
7 guys I'm sure are very educated in the issues and I think
8 it's going to be more important that I respond to whatever
9 questions you have.

10 One of the things -- I think, to put it
11 in a perspective, I'm the person who created the first
12 mental health court in the country. I think it's important
13 to understand that it didn't come from me out of some
14 prophetic vision. It didn't come because I was enlightened
15 or even smart. It came about by accident, and it came
16 about because I had been involved in a case of a young man
17 that suffered brain injury, got charged with manslaughter,
18 gets indicted.

19 As a result of representing that
20 individual I became acutely aware of the deficiencies of
21 mental health system, the community-based mental health
22 system in Broward County.

23 I had written a letter to the grand jury
24 that had indicted my client basically demanding that they
25 conduct an investigation of the mental health system.

1 They picked up the challenge. They
2 generated a grand jury report which to this day is very
3 helpful although nothing that came about as a result of
4 that has actually ever been implemented.

5 After that report was done, I convinced a
6 judge, Mark Spicer, who was the first felony mental health
7 court judge to create, for lack of better word, a committee
8 where we would address all the mental health conditions in
9 Broward County and there were many of them.

10 During our first meeting it became
11 obvious that none of the important players were willing to
12 come and sit down at the table. It became very obvious to
13 me that in government, government agencies are very willing
14 to point their finger at what somebody else did wrong, but
15 are almost never willing to talk about what they're not
16 doing.

17 So Doug and myself, Doug Brawley, created
18 a brief little newsletter and what the tactic was was
19 anybody who wouldn't come to this meeting, we would send to
20 every elected official in the state of Florida basically
21 saying really bad things about the people that wouldn't
22 come to meeting. By the second meeting, everybody in the
23 system was there.

24 At that meeting, was an individual by the
25 name of Ben Drasen who is the risk manager for the state

1 hospital. Basically his job was to deal with lawsuits when
2 they screwed up. At the time they were arresting people in
3 the state hospitals that set their beds on fire.

4 I was particularly appalled by it because
5 the reason they were in the state hospital was because they
6 had gone through the Baker Act, the involuntary commitment
7 procedure, because they were a danger to themselves or to
8 others.

9 So they were deprived of a freedom, put
10 in a state hospital and when they acted consistent with the
11 reason they were there, then they were arrested and put in
12 jail.

13 Well, when the risk manager started to
14 say and explain what their motivations were, in a very
15 unartful way, as I am prone to do, I responded, "You're
16 just an F'ing liar." Well, everybody goes crazy.

17 We were in a courtroom and it was clearly
18 not the most appropriate way to express my feelings, and
19 the judge looked at me and said, "Howard, what is it you
20 want?" And I said, "I want my own damn court," and as the
21 words came out of my mouth, there was like silence.

22 Everybody said, "Oh, my God. Maybe that's the answer."

23 That's how this whole concept was born.
24 It wasn't thought out. It wasn't planned. It wasn't a
25 methodical, scientific-based response to the problems in

1 the mental health system.

2 I thought that was important for you just
3 to understand it historically. With that, the first mental
4 health court in the country was created and that was a
5 misdemeanor mental health court.

6 I think it's important that you
7 understand from my perspective, the only reason that that
8 mental health court is in existence and the only reason it
9 should be in existence is because of the failure of the
10 community-based mental health system and the failure of the
11 criminal justice system to divert people.

12 The truth is that court should not exist.
13 There is no need for that court if you have a proper
14 community-based mental health system and you have a proper
15 diversionary aspect of those who are mentally ill who find
16 their way into the system because there are many problems
17 with mental health courts. There are many problems with
18 the traditional adversarial roles and whether
19 constitutional rights get -- I don't want to use the word
20 "trampled" but get transgressed for what many people
21 believe is in the best interest of the client. And that's
22 a very, very slippery slope because if you as the lawyer
23 have decided that you're -- what's in the best interest of
24 your client is not what your client wants, then who's
25 advocating for your client? That's the -- I don't want to

1 say it's fatal but it's certainly a significant,
2 fundamental flaw in the system.

3 The other side of it is the benefit of
4 the mental health court for misdemeanors, anyhow -- and
5 felonies have different problems and different benefits --
6 is it takes the sparsity of resources that exist and put
7 them in one place so they can be accessed. That's the real
8 benefit so that when an individual is in front of a judge,
9 the judge doesn't have to enter an order saying, "I want
10 this person to be evaluated and they need housing and they
11 need counseling." Those people are right there in the
12 courtroom so the judge can say, "Okay, Mr. Smith, please go
13 over there and talk to Mrs. Jones who's with probation or
14 talk to so-and-so who is with the regional health care who
15 will work out some sort of aftercare and treatment and
16 housing."

17 If you didn't have it in one place, you
18 would basically have a mentally ill person, who was
19 struggling just to deal with their own lives, walking out
20 of that courtroom and would have to go to five different
21 locations when I think all of us who ever tried to find an
22 apartment and move found it overwhelmingly emotionally and
23 we're not mentally ill. Well, you guys are probably not
24 mentally ill. I don't know about me. So that's the real
25 benefit.

1 The secondary benefit -- and this is an
2 important one. Growing up as a public defender -- and I've
3 been a public defender for 31 years -- most of 31 years. I
4 grew up when mentally ill people were brought into
5 courtroom handcuffed, handcuffed to the chair. The
6 prosecutor and the public defender were talking about them,
7 even though they were present, as though they weren't
8 really there. The judge and the public defender and the
9 prosecutor were resolving how this person's life would
10 unfold from here as though this person was merely a fly in
11 the wall watching.

12 It was cold. It was not of a nurturing
13 or healing environment and what became painfully obvious to
14 me was that the criminal justice system was putting more
15 hurt on those that were mentally ill and already hurting,
16 that by bringing them into the criminal justice system we
17 were inflicting additional pain and it had very, very
18 significant consequences.

19 Mentally ill people, even in the throes
20 of the mental illness, know they're mentally ill. They
21 know they're being treated differently. Shame and guilt
22 become intimately and inextricably interwoven into their
23 psyche so that when they get into the criminal justice
24 system it starts to get them to become sicker.

25 With mental health courts everybody from

1 the bailiff to the court reporter to the judge to the clerk
2 is much more sensitive, much more tuned in. It becomes an
3 environment that is a safe environment rather than an
4 environment that hurts them.

5 That is a huge benefit but I thought it
6 was important that you understand that there are two sides
7 to this equation, and I think if anybody comes in here and
8 tells you, oh, no, it's all good or all it's bad, they got
9 blinders on. It is not. It is a mixed bag and it's one
10 which I worry about all the time.

11 Felony mental health court is a more
12 important animal but a much more difficult animal.

13 In misdemeanor mental health court,
14 you're basically dealing with non-violent crimes. Victims,
15 if there are victims, are not significantly harmed and the
16 people have not engaged in behavior where there's a public
17 recoil, if you will.

18 You get into felonies and it is
19 different. I know many mental health advocates who will
20 tell you, well, there's no difference because you're
21 mentally ill. It's all about mental illness. That's easy
22 for us to say, but if you're the victim of somebody who is
23 mentally ill and you've been assaulted, beaten, hit, raped,
24 etcetera, it doesn't really matter much to you if your
25 wife, your daughter or husband has been permanently injured

1 whether the person who did it was mentally ill or not. It
2 really just doesn't matter.

3 It becomes much more difficulty in
4 balancing the public safety with the sensitivity to the
5 mentally ill. It's a very difficult, difficult line and it
6 becomes even more difficult -- the slippery slope that I
7 described to you -- with misdemeanor mental court because
8 if you have the public defender who is trying to do what's
9 in the best interest of their client and the client doesn't
10 like it, well, it could have significant, life-long
11 consequences.

12 For instance, everybody agrees that the
13 defendant was insane at the time of the commission of the
14 crime, maybe a third degree felony. You just conferred
15 jurisdiction over that individual for the rest of their
16 life. It's a life sentence, at least in the State of
17 Florida. I can't speak for other states.

18 So if someone is declared NGI, now that
19 judge gets to controls everything about that person for the
20 rest of their life. They might have been better in a
21 regular courtroom. They might even have been better off
22 getting a year or two years in jail and going on with their
23 life. So these are very difficult balancing acts that we
24 engage in.

25 With the felony mental health court you

1 also get the benefits of the resources all in one place.
2 You get higher -- much more highly trained prosecutors,
3 public defenders and, most importantly -- because these
4 courts are really judge driven. They really are -- it's
5 the judge that controls the tone, the tempo, and really
6 where the disposition is and that's both a good and bad
7 thing.

8 The good thing is if you get a judge that
9 really gets mental health and really gets what the system
10 is about, they can do wonderful, wonderful things. If the
11 judge is not somebody that is that tuned in, then you have
12 one judge handling all of these matters reeking havoc in a
13 lot of different ways.

14 So I'm always reminded that when you
15 build a system that you should build it on principle and
16 not personality because when the personalities change, then
17 you're up -- what is it, up the creek with whatever.

18 So I can tell you we're very lucky we've
19 had in misdemeanor mental health court -- I believe you've
20 met with Judge Lerner-Wren and she is -- she lives and
21 breathes this stuff but, like most people who are zealously
22 committed to a cause, they are probably more prone to see
23 all the good and not the bad, and I'm just here to tell you
24 that even as the creator of this court, there is both good
25 and there is both bad and I worry about it all the time.

1 I can tell you that we keep some of
2 our -- most offices usually have their less skilled lawyers
3 handling drugs and mental health stuff. We have some of
4 our best lawyers, most experienced lawyers in here for that
5 exact reason, because I know there is this slippery slope
6 and I need lawyers in there who at least, hopefully, will
7 know when it's time to walk across the line and sing
8 Cumbaya and when it's time to stay on this side of the line
9 and throw the gauntlet down. I wish I could tell you we
10 get it right all the time. We don't. We don't.

11 I know I said I'd be short and I wasn't,
12 other than my height.

13 MR. JONES: Mr. Brawley.

14 MR. BRAWLEY: Howard was talking about the
15 Mental Health Court News, which I was the publisher for
16 about six issues of this document, and one of the headlines
17 on one of the big issues we had was "Finkelstein Saves Man
18 From One Ten Tower Jump."

19 And to understand this, we have a
20 10-story courthouse and right across the street there's a
21 40-story building and there was an individual one morning
22 who tragically was teetering on the edge of that building
23 and the police -- it was about 10 o'clock in the morning.
24 The police called up Howard and Howard was on the phone.
25 They said, "Howard, you need to come over. We've got an

1 individual who is going to jump but he wants to talk to
2 you." And I came into Howard's office --

3 MR. FINKELSTEIN: Proves how mentally ill he
4 was.

5 MR. BRAWLEY: I came into Howard's office just
6 as that conversation was going on and he looked a little
7 rattled. He lit up a cigarette and he said, "I'm going
8 right over there," and he said, "but three things can
9 happen here and two of them are bad." I said, "What?" He
10 said, "You know, this guy could -- I could walk over there
11 and he could see me and he could jump or he could -- you
12 know, I could walk over and see him and he could wrap his
13 arms around me and we both could jump or he could down."

14 Of course, he came down and Howard was a
15 big hero and there were helicopters and everything flying
16 around and it was really quite interesting. We got some
17 very dramatic pictures.

18 The tragic thing is 24 hours earlier this
19 fellow was in the emergency room of Broward General
20 Hospital right down the street and he told them, "I'm going
21 to kill myself. I'm distraught." "No, you're not," and,
22 you know, he was up on the building 24 hours later ready to
23 jump.

24 He didn't -- he wasn't able to get into
25 the civil system and that's been -- I've only practiced law

1 in Broward County and I don't know if it's different in
2 other counties. I know this statutory scheme in Florida
3 for the rights of mentally ill individuals is very strong
4 and very good and, theoretically, if it was followed, there
5 would not be a need for mental health courts, no doubt.

6 But most of our litigation in our office
7 has been to enforce that statutory scheme and we have most
8 of the big cases that do enforce the scheme. But for some
9 reason -- and I'm not sure how many years it goes back in
10 the county where I practiced -- the civil system and the
11 criminal system have not interacted.

12 In most jurisdictions, the criminal
13 justice system, if they get somebody -- for most
14 non-violent crimes, if they can get somebody into the civil
15 system -- and I'm talking even jurisdictions in Florida --
16 that's good enough for them. You know, they're in a
17 system. They can get help. They can get services they
18 need. They don't need to be criminalized or prosecuted.

19 We have a very weak civil system in
20 Broward. Maybe the hospital districts haven't been as
21 involved as they have in Dade. I'm sure there are a number
22 of other reasons, but it's as if our prosecutors can let
23 these go no matter how small and the defendants have great
24 difficulty accessing the civil system so, you know, that
25 certainly is what is fueling a lot of the need for these

1 types of courts in our jurisdictions.

2 When Howard became public defender he
3 created a position, mental health court chief, so I've had
4 the opportunity sort of to wrap my arms both around the
5 civil and criminal systems because I supervise attorneys in
6 both of those systems, and what we need the most is people
7 not even entering into the criminal justice system.

8 We need -- forget post-arrest diversion,
9 forget mental health courts. We need, and we are trying to
10 establish and get a grant for, pre-arrest diversion, places
11 where a police officer who is hopefully CIP trained --
12 which I think we have 285 in Broward County which is just a
13 smattering of police officers -- can really take people to,
14 when appropriate, when they don't have to arrest them, when
15 they don't have a violent crime and get them services and
16 keep them out of the system all together because everything
17 else you're just playing catch up and it's much better that
18 they not even enter the system, in my view, and get help
19 through the civil system.

20 That's all I have at this point.

21 MR. FINKELSTEIN: We're here to answer
22 questions.

23 MR. JONES: Thank you very much for that both of
24 us and we're going to start with Jay Clark.

25 MR. CLARK: Mr. Finkelstein, one of the

1 reoccurring themes that we have on this task force is the
2 tension between the defense attorney's job as an advocate
3 for his client and then as a team participant in any of
4 these specialty courts but I think even moreso in mental
5 health courts because of the unique influence that mental
6 health problems have in the first place in trying to
7 communicate with your client.

8 MR. FINKELSTEIN: Correct.

9 MR. CLARK: What suggestions can you give us on
10 maybe safeguards or how we can protect our client's rights,
11 communicate with them what their options are, and let them
12 know what their choice is even getting through the mental
13 illness?

14 MR. FINKELSTEIN: First of all, call me Howard.

15 The only safeguard is a good lawyer
16 that's able to communicate with the mentally ill to make
17 sure, as best as they can, that they understand their
18 options. But, as you just said, it's very difficult. By
19 definition, you've got a client who's mentally compromised
20 or they wouldn't be there. The degree of how much they're
21 compromised, that's really the factor.

22 The lawyer and, secondarily, the judge
23 have to make sure that they know where the line is. They
24 need to know, one, if the client doesn't want to do it, the
25 client gets their call and this is hard, and I teach my

1 young lawyers this, because they're sitting there and they
2 know their client is going to make the wrong decision.
3 They know it. They see it and they know this is better.
4 But to me it's really simple. If you choose not to
5 advocate what your client wants, then there is nobody in
6 the courtroom advocating for the client. That's
7 unacceptable.

8 So it involves consultation, it involves
9 counseling, but it really involves a lawyer being tuned in
10 to know when to fight and when not to. I don't know that
11 procedurally there's any kind of safeguard you can draft
12 because mental health stuff is so unique. Each person and
13 each situation is unique. That's why I don't have --
14 remember this is misdemeanor court. I don't have my baby
15 lawyers in there. Fred Goldstein, 30 years he's been a
16 public defender doing nothing else but mental health.

17 So I've taken one of my best, most
18 experienced, highest paid people and I've put him in there
19 because of exactly what you have said. It troubles me
20 greatly. It troubled me when I created the court and
21 troubles me today.

22 In Broward we're very lucky in that Judge
23 Lerner-Wren is truly someone whose heart is in helping the
24 mentally, and I think if you've met her you'll get that.
25 And whether you agree or disagree with some of the things

1 she may have said, she's clearly there to help people.
2 That having been said, if it was a different type of judge
3 it would be a bigger problem.

4 But even with Judge Lerner-Wren, there
5 are times when the judge just is wrong and I expect my
6 lawyers to point out as zealously, frankly, and strongly
7 exactly how wrong she is, and if that doesn't work they
8 call me I'll come down and do it.

9 MS. YOUNG: In listening to Judge Lerner-Wren's
10 presentation on the misdemeanor mental health floor, she
11 said it wasn't a court, it was a strategy. And then I have
12 to -- I still can't get my hands around so if they come in
13 on a non-violent misdemeanor and they're determined to fit
14 this strategy, then everything is done to assist placing
15 them in somewhere outside of the jail, but then I couldn't
16 tell. The criminal case still is going on or isn't or that
17 part I didn't --

18 MR. FINKELSTEIN: The fact that you're confused
19 means you're getting it. You're getting it. This is a
20 problem. It's fuzzy. What's the word? It's like dough.

21 The state attorney is really the one who
22 gets to choose. We don't have -- we try. When we created
23 this court I wanted a rule that says if you successfully
24 complete this thing, case dismissed. I couldn't get it
25 from the state attorney.

1 I knew that if I wanted to get this court
2 up, I had to get it up and I had to take whatever I could
3 get in an agreement, fashion it in the best way.

4 What you're pointing out is a problem
5 because there's not necessarily uniformity. The judge may
6 in some cases dismiss a case but based on what?

7 MS. SHIFMAN: Only because the DA agrees.

8 MR. FINKELSTEIN: Or if the judge is feeling her
9 oats that day. She may just do it and the state -- you
10 know how it works in these kinds of courts, "Oh, I'm not
11 going to appeal." You know, it's political. It's smarty.
12 "Well, the judge did this and we don't agree but we're not
13 going to say anything to the press or appeal." That's no
14 way to run a system.

15 It's better than not having that option
16 because at least it's a possibility that the case will be
17 dismissed. The state sometimes can be persuaded to do so.
18 But to me any time you have a system that by definition
19 isn't a system because there are no hard and fast rules --

20 MS. YOUNG: She said it's a strategy.

21 MR. FINKELSTEIN: It's a courtroom. It's a
22 case. I would disagree. I understand what she's saying,
23 that, yes, it's a strategy of wellness and healing. It's
24 still a courtroom. It's still a case. I don't go down
25 that road.

1 MS. SHIFMAN: Not only did she say it was a
2 strategy. She also said there really wasn't any successful
3 completion of it.

4 MS. KELLEY: It's not a program either.

5 MS. SHIFMAN: I mean, her testimony basically
6 came across as it was an emergency intervention and a way
7 to get people out of the jail.

8 MR. KELLEY: She called it a human rights
9 strategy at one point.

10 MS. SHIFMAN: Right, but a way to get people out
11 of the jail. So in order for these defendants to access
12 these non-community based services, these court services,
13 do they also have to be willing to either enter a plea of
14 guilty or get a dismissal or can they also go to trial as
15 an option?

16 MR. FINKELSTEIN: They can't go to trial as an
17 option.

18 MR. BRAWLEY: But they can opt out of court. If
19 they want to litigate anything, they can't go to trial in
20 that court, but she would gladly transfer them to a court.
21 The case can then be randomly assigned to the 16 other
22 judges who litigate cases.

23 MS. SHIFMAN: Then for these people that need
24 the intervention who may not have a place to live, who
25 might not have access to -- serious mental health issues,

1 their choice is being back on the street and litigating
2 or --

3 MS. YOUNG: Or in jail and litigating?

4 MR. FINKELSTEIN: Yes. And that raises another
5 question that goes along with what you said, how voluntary
6 is it?

7 It's a voluntary court but you don't have to be
8 there. But if the option is you're homeless, you're out on
9 the street, you're not getting treatment, well, gees, if I
10 was on the other side I could make an easy argument that
11 that's not voluntary. You are zooming in on the
12 problems.

13 MS. SHIFMAN: And does this also -- the
14 availability of these emergency services, for lack of a
15 better term, also apply to those people who are not
16 seriously mental ill but who may be suffering from post
17 traumatic stress disorder or depression?

18 MR. FINKELSTEIN: Post-traumatic stress,
19 probably yes. Post-traumatic stress is a very different
20 animal and the treatment is also very, very different.
21 That's not a matter of psychotropic medications.

22 Depression, it would depend. It would
23 have to be very, very severe so it was considered a major
24 mental illness.

25 Now, I don't want you to walk out of here

1 thinking this is some great treatment. We live in Florida.
2 Let me start there. And I know I'm going to regret this.
3 We're still in the south with everything that that means.
4 We are 47th -- we're behind Mississippi and Alabama for
5 God's sake.

6 MR. SCHECHTER: In?

7 MR. FINKELSTEIN: In mental health treatment, in
8 education. We are the bottom of the bottom of the bottom
9 and we're proud of it in Florida.

10 So understand -- my wife is from San
11 Francisco. It's a very enlightened place as New York is.
12 Cincinnati I can't say, and Cleveland got the Rock and Roll
13 Hall of Fame so you're cool.

14 Totally different place down here and so
15 we don't have great treatment. We have been able to
16 muscle, cajole, lobby, kiss butt to get access to things
17 that maybe wouldn't have been there more for political
18 reasons because -- and let me be frank with this.

19 I have my own TV show and the only reason
20 I bring that up is do not underestimate the fact that that
21 TV show has allowed us to succeed. It's not because I'm
22 that good of a lawyer. I'm not. I'm a regular lawyer. I
23 went to law school and I've been practicing law and all
24 that, but I can tell you the difference that has occurred.

25 Whereas before I would call somebody up

1 and I would say -- problem with mental health, whatever it
2 was. They might call me back. They might call me back and
3 say, "Screw you." They might call me back and say, "You're
4 a moron." Now when I call what I get is, "Wow, that's
5 brilliant. I never thought of that. Tomorrow we'll have
6 it implemented."

7 Now, I know it's not because of anything
8 I just came up with. The one thing that I have brought to
9 South Florida is I do understand how the media works. I
10 know how to harness it, and I know how to frame issues so
11 that politically those in power would choose to give us
12 what we want just because it will make their life easier.
13 That's how we've gotten some of these things. She probably
14 talk to you about the Cottages in the Pine.

15 MS. SHIFMAN: The 24 beds treatment.

16 MR. FINKELSTEIN: I called it call it Club Med
17 for the Head. That was something where we bullied DCF, the
18 Department of Children and Families and these were the
19 homes that the doctors used to live in. It's a wonderful
20 thing to be able to get but it doesn't house that many
21 people. How many people is it?

22 MS. SHIFMAN: 24.

23 MR. SCHECHTER: It's a drop.

24 MR. FINKELSTEIN: It's just a drop. So is it
25 better to have a drop than not a drop? Yes, it's better.

1 MS. SHIFMAN: Where do the rest of the people
2 go? To the state mental health facility?

3 MR. FINKELSTEIN: You can't get into state --
4 well, our state hospitals you can't even get into them
5 anymore. You know, we used to have thousands there when it
6 was deinstitutionalized under the Reagan years. Either the
7 state hospitals have come up with a secret cure for mental
8 illness and they have not told anybody about it or they're
9 just throwing patients out in the street because there used
10 to be thousands and now we're talking scores and that's a
11 big difference.

12 MR. BRAWLEY: You can't get committed on a
13 misdemeanor offense, so Wren's court, she couldn't
14 committee somebody to a forensic state hospital. Now,
15 there are factions that are trying to overturn that case
16 which came out of our office. We litigated that. For a
17 commitment, it has to be a circuit court so a county court
18 judge can't commit a misdemeanor defendant to a forensic
19 state hospital.

20 MR. JONES: What's Chatahootchi?

21 MR. BRAWLEY: Chatahootchi is a forensic state
22 hospital. There are five total beds for the entire State
23 of Florida. I think around 11,000. We just got an
24 increase.

25 MR. SCHECHTER: Who makes the decision that a

1 defendant will be diverted into the felony mental health
2 court and what is your role in that process?

3 MR. FINKELSTEIN: It's really up to the
4 defendant and the defendant's lawyer and again that court
5 is voluntary too. And we've had problems. We've had
6 different mental health court judges that were more or less
7 sensitive to the rights to mentally ill people, and the
8 truth is the decision the lawyer makes in many ways is
9 forum shopping.

10 MR. SCHECHTER: I was going to ask that. Isn't
11 the real problem with the felonies that those are the
12 really big profile cases for the public?

13 MR. FINKELSTEIN: Right.

14 MR. SCHECHTER: So everybody is watching them.
15 The beat reporters are there in the courthouse and now it's
16 easier because they have to watch that one courtroom. It's
17 really a forum shopping.

18 MR. FINKELSTEIN: Can be.

19 MR. SCHECHTER: You make a decision based on the
20 facts. You say to yourself, "Judge So-and-So is in mental
21 health and I've got Judge X in Part 72 and" --

22 MR. FINKELSTEIN: You can always tell the New
23 York lawyers with the "parts."

24 MR. SCHECHTER: -- "and the Part 72 guy, he
25 doesn't like this kind of case. I'm going the other way."

1 MR. FINKELSTEIN: Yes.

2 MR. KELLEY: You talked earlier about your role
3 with the media and your ability to exert some political
4 pressure to make change, and then Mr. Brawley talked a
5 little bit about prosecutors not wanting to let go of a
6 case.

7 Is there any way of influencing a
8 prosecutor's office pre-indictment not so much not to
9 indict but rather at least not to over indict?

10 MR. FINKELSTEIN: Yes. When I was elected close
11 to three years ago our office didn't get involved with
12 cases pre-arraignment. My predecessor for more financial
13 reasons, because if you didn't get involved until
14 arraignment, which was like six weeks after arrest, you
15 didn't have to have lawyers, you didn't have to have
16 investigators, it was cheaper, it was good politically for
17 him because that way he wasn't treading on the property of
18 the private defense bar who in return would contribute
19 mightily to his re-election campaign.

20 When I took over, having been in private
21 practice, I knew that what takes place pre-indictment,
22 pre-arraignment sometimes sets the tone for the whole case.
23 In fact, you win or lose your case before then. So we have
24 created an early representation unit and we have our mental
25 health lawyers who are equipped to go to case filing and

1 they have in the State Attorney's Office prosecutors that
2 are tuned in and sensitive to these issues.

3 So we can affect those decisions.

4 Whether we are successful or not depends upon the
5 individual prosecutor and the state attorney in Broward --
6 is Stephanie Newman still making the decisions?

7 MR. BRAWLEY: No, she's pretty much backed out
8 of it.

9 MR. FINKELSTEIN: The one we had was reasonable,
10 she got it, good person, good lawyer. That's probably why
11 she backed out of it.

12 MR. BRAWLEY: She wants to be a judge.

13 MR. FINKELSTEIN: So we can have that effect but
14 I don't know how often it actually happens. I mean it
15 does.

16 MR. KELLEY: Do you know if other public
17 defender's offices have a similar division?

18 MR. FINKELSTEIN: I think most do of some sort
19 but indigent defense in America is in crisis. I don't know
20 if you know. They just cut our budget 3.6 percent, like we
21 were underworked and overpaid before, and it's getting
22 worse and worse.

23 You look at the ABA standards for case
24 loads and I look at PD case loads. It's a joke. They're
25 talking about you shouldn't handle more than 40 or 50 cases

1 at a time. You find me a public defender anywhere that has
2 under 100 cases. I don't know where they are.

3 I can tell you I have some of the best
4 case lawyers in the state and my lawyers are -- right now
5 felonies are probably averaging about 105, 106. That to me
6 is unconstitutional. I believe it's violative of the Sixth
7 Amendment.

8 And you may ask yourself why don't public
9 defenders refuse to take cases because of excessive case
10 loads? And here's the answer, and it's a really crappy
11 answer. Public defenders are either appointed or elected.
12 If you're appointed and you file a motion saying, "Sorry,
13 I'm not going to do these cases," you lose your
14 appointment. If you're elected, you're not going to get
15 reelected.

16 I want you to know that we are preparing
17 our office to probably be the first one in the country to
18 file --

19 MR. JONES: How large is your office?

20 MR. FINKELSTEIN: About 152 lawyers now, 200
21 total staff.

22 MR. JONES: Did you run against the incumbent?

23 MR. FINKELSTEIN: No, the incumbent retired and
24 nobody ran against me.

25 MR. JONES: You were unopposed?

1 MR. FINKELSTEIN: I was unopposed.

2 MR. SCHECHTER: You are about to file what?

3 MR. FINKELSTEIN: I'm preparing the office to
4 file a motion to refuse to accept cases because of
5 excessive cases under the Sixth Amendment.

6 MR. SCHECHTER: State court or federal court?

7 MR. FINKELSTEIN: I'm not allowed to go to
8 federal court.

9 MR. SCHECHTER: Why?

10 MR. FINKELSTEIN: Because it's a state statute.

11 MS. KELLEY: Where are you going to file it?

12 MR. FINKELSTEIN: I don't know yet. What we're
13 working on first -- once you file that motion, it gives the
14 judge the ability to look at your office, look at your
15 management decisions and I need to remove all of the
16 weaknesses that a judge might shove down some particular
17 orifice.

18 So I'm looking at -- the bottom line is
19 judges are not going to be sympathetic to this because
20 it's an expensive issue and everybody knows what's
21 happening in this country is wrong. Everybody knows
22 there's two standards of justice.

23 If you could afford to hire one of you
24 gentlemen, you get a lawyer who gets on the case, you meet
25 with the person, you meet with the family, you're involved

1 in the pre-filing decisions.

2 You have a public defender, most public
3 defenders meet their clients at arrangements. What I call
4 meet, greet and plea plead, walk up and say, "Hi, my name
5 is Howard. I reviewed the probable cause affidavit and I
6 think you should plead guilty to this felony." That's
7 what's going on in this country.

8 MR. SCHECHTER: You should be aware such case
9 was filed in New York --

10 MR. FINKELSTEIN: I know.

11 MR. SCHECHTER: -- in federal court by the union
12 for the legal aid attorneys back in the '70s before a
13 federal judge named Orin Judd who declared that those case
14 loads were unconstitutional and limited it to 70.

15 MR. FINKELSTEIN: Right.

16 MR. SCHECHTER: You should have access to
17 that.

18 MS. SHIFMAN: Wasn't there also a suit filed in
19 Michigan?

20 MR. SCHECHTER: I don't know if we won that or
21 lost that. I know the one in New York they won and I even
22 know some of the people that testified in that and they're
23 still around.

24 MR. FINKELSTEIN: I know one of guys in that
25 office and he's an appellate lawyer down in Fort

1 Lauderdale.

2 But it's a problem. I mean, more than
3 just a problem. The truth is we have accepted the very
4 notion in America that you get what you pay for and that is
5 repugnant to the Constitution.

6 MS. SHIFMAN: Speaking of getting what you pay
7 for, in the felony mental health court what is it that they
8 get?

9 MR. FINKELSTEIN: What is it they get? What do
10 they get? They get hopefully a more sensitive, more
11 lenient judge. They get a one-stop shopping where you can
12 go in and you can grab services around them.

13 MS. SHIFMAN: What kind of services?

14 MR. FINKELSTEIN: Hopefully access to housing.
15 You get a felony mental health probation officer who is
16 somebody who is supposedly more sensitive. And where that
17 comes up is when the mentally ill, let's say, don't file
18 their monthly report between the 1st and the 5th, which is
19 standard, instead of going to get a warrant that's issued,
20 hopefully they go to the judge and maybe they will set up a
21 status hearing. Those are some of the things. What you
22 basically get is a kinder, gentler court hopefully. That's
23 what you get.

24 MR. BRAWLEY: Felony mental health probation
25 started the felony mental health court. It's a different

1 animal than it is today. There were a series of horrific
2 child rapes and multiple murders in Northern Florida and
3 some of them -- an abduction was on film with the old guy
4 taking the girl and there is really a zero tolerance policy
5 for probation so it's a nice label. I don't know if it is
6 even a kinder, gentler probation. We're really taking a
7 look at our felony mental health court.

8 MS. SHIFMAN: Because it's problematic?

9 MR. BRAWLEY: Like you said, what are you really
10 getting? Are you really better off having everything with
11 this one judge or are you better off having 20 enlightened
12 jurists who really care? And our judiciary is changing
13 too.

14 MS. SHIFMAN: And would the people who might be
15 in felony mental health court even be eligible for those
16 services? Are they limited to certain kinds of felonies?

17 MR. BRAWLEY: Yes. No domestic violence.

18 MR. SCHECHTER: No sex crimes?

19 MR. BRAWLEY: Sex crimes can get in there but no
20 repeat habitual offender court clients. We have a court
21 for people that have significant prior records and no
22 domestic violence cases.

23 MS. SHIFMAN: So assault with intent to murder,
24 you could be in mental health court.

25 MR. BRAWLEY: Theoretically you could be.

1 MR. SCHECHTER: Child sex abuse?

2 MR. FINKELSTEIN: You could.

3 MR. SCHECHTER: You could be ahead of other
4 states.

5 MR. FINKELSTEIN: Yes, we are a little bit ahead
6 but practically, it may not be practical.

7 MR. BRAWLEY: If that person is seeking
8 probation, for example, if they are competent seeking
9 probation, you have to have a certificate of eligibility so
10 you'd have to find a treatment provider willing to treat
11 your child sexual batterer.

12 MR. SCHECHTER: You're not going to find that.

13 MR. KELLEY: So in the felony mental court
14 system, who makes the decision that a felon is eligible?

15 MR. FINKELSTEIN: There's an administrative
16 order basically but it's --

17 MR. KELLEY: Pre-arraignment or post or both?

18 MR. BRAWLEY: The ways you're going to get in
19 there, if you're incompetent you can move the case in
20 there, if your client is incompetent to proceed, so that's
21 almost always going to be post-arraignment.

22 And also if you're seeking to access
23 felony mental health probation, that special probation can
24 only be conferred by the felony mental health court judge.

25 So if you're competent in seeking that

1 particular type of probation, you can move in there
2 post-arraignment or if you're incompetent, and we don't --
3 people aren't found incompetent prior to arraignment
4 because we have to know what charge they're incompetent for
5 so it's all post-arraignment.

6 MR. KELLEY: What if you're competent but your
7 attorney can make a tenable argument that you weren't sane
8 at the time of the act?

9 MR. FINKELSTEIN: Then usually it's a trial and
10 you stay in your division because then you're litigating,
11 unless the state agrees and you stipulate to a not guilty
12 by reason of insanity.

13 MR. BRAWLEY: The insanity in Florida, generally
14 speaking, defense attorneys aren't going to pursue that
15 avenue because essentially you're putting your client under
16 the auspices of the jurisdiction of the court.

17 MR. FINKELSTEIN: Not to mention, it doesn't
18 work. The only time you're going to see insanity defenses
19 work is if they're in crimes of no violence. If we didn't
20 learn anything from the Jeffrey Dahmer case -- if Jeffrey
21 Dahmer wasn't insane, who was killing and eating his
22 victims, then who is? And remember again, this is
23 Florida.

24 MS. YOUNG: Is this the order that you are
25 talking about?

1 MR. BRAWLEY: That is the administrative order
2 for felony mental health.

3 MR. JONES: Let me ask you this. Do you
4 staff -- I understand, I think generally, how you staff the
5 mental health court. Do you think differently -- or do you
6 staff differently the drug courts, the domestic violence
7 courts, the habitual offender courts?

8 MR. FINKELSTEIN: Drug court, I'm very lucky.
9 My lawyer is both a doctor and a lawyer and he's somebody
10 that is in his own recovery and he felt he wanted to
11 contribute to the community by helping people. Boy, when
12 he fell into my lap, "You're a doctor, you're a lawyer,
13 you're recovering, you want to help." It doesn't happen
14 that often so I have somebody that's great in there. He's
15 a good looking, well dressed, soft-spoken.

16 MR. BRAWLEY: He's fluent in five languages.

17 MR. FINKELSTEIN: Talking about a no brainer as
18 an administrator, and I have him in there for another
19 reason. I don't know if you know my drug court lawyer
20 before that -- but she's gone -- was Judge Pollack and this
21 guy who is kind of when I say a male version.

22 You have people in there looking
23 horrible. They may have been on a three-day crack binge.
24 They smell like vomit. They look like crap. And then
25 there's Gisele when she was a public defender or Rudy who's

1 our present public defender in there dressed to the nines
2 and coifed beautifully and the juxtaposition is more of a
3 message than anything that's said in that court. You can
4 continue to be like you or you can be like them.

5 The other person I have in there, and I
6 chose this specifically, is a guy that has multiple
7 sclerosis and he came to my office because he could no
8 longer run his own private practice because MS was starting
9 to debilitate him. I put him in there for this reason.

10 I know a little bit about recovery from
11 drug addiction having been addicted to drugs myself 20
12 years ago, and one of the things I learned about recovery
13 was if you walk into a cancer ward and you tell those
14 people, "If you do these 12 things, I'll guarantee you'll
15 get well," every one of them will do every one of those 12
16 things.

17 You walk into a room of drug addicts and
18 say, "You do these 12 things and I'll guarantee you'll get
19 well," every one of them will say, "I'll do one. Two
20 doesn't apply. Three is okay." I wanted them to see there
21 are some diseases you have a choice with and there are
22 some diseases you don't. My other public defender doesn't
23 have a choice. He has a disease that he struggles with
24 every day. They have a choice. It's a very powerful
25 message.

1 MR. JONES: But they're subtle messages. Do you
2 think they're getting it?

3 MR. FINKELSTEIN: Some get it and some you have
4 to hit over the head with a two-by-four. So that's what I
5 do. In mental health court, it's people that have
6 experience with mental health. We had for a while -- one
7 of my lawyers was a psychologist and a lawyer. We've got
8 Anne Marie in there who's been around for some 23 years.

9 MR. BRAWLEY: We've got a psychiatrist and a
10 lawyer.

11 MR. FINKELSTEIN: Another one comes to me.
12 She's a professor of psychiatry at the University of Miami
13 and she's a lawyer. Gees, this is going to be great.
14 She's going to cross examine their psychiatrist. I did it
15 more for amusement but it really worked out well.

16 So in mental health court I have people
17 there that get it, understand the language, understand the
18 law, and are experienced. Also because of this whole
19 slippery slope of when to fight and when to sing Cumbaya.

20 And the repeat offender court, the rock
21 court, that you put your trial animal. You put your
22 young -- you know, your young studs or studesses, whatever
23 it is that want to go in and they just want to try back to
24 back. You get incredible training because it's trial after
25 trial after trial.

1 Those courts bother me, mostly because
2 I've seen some really outrageous sentences coming out of
3 there. Somebody steals a bike and they get 30 years. I
4 understand they're getting 30 years not for the bike but
5 for the other stuff, but you can say that all you want but
6 try to explain to somebody's mother why he's doing 30 years
7 for stealing a bike.

8 I don't like those courts. I think that
9 they're primed and geared more for the political bang the
10 judges get which is, "He gave out all these sentences."
11 Don't get me wrong, some of the people that are in there
12 need to go away for ever and ever and ever. I get that.

13 As you can hear, I've got mixed feelings
14 on these -- I call them boutique courts, for lack of a
15 better word. There's good things in all of them and there
16 are things that are troubling.

17 MS. SHIFMAN: What about -- we heard from
18 Miami-Dade, from Bennett Brummer and Rick DeMaria. They
19 were talking about where the state's attorney certifies
20 that the defendants will not get any jail time and so no
21 lawyers are appointed to them and they're in these
22 specialty courts where they make all kinds of admissions.

23 MR. FINKELSTEIN: I hate that.

24 MS. SHIFMAN: Is that happening in your
25 courtroom as well?

1 MR. FINKELSTEIN: Every now and then it happens.
2 This has become a mechanism to save money. It's becomes a
3 mechanism -- by certifying someone doesn't get jail time,
4 then we don't have to pay for a lawyer. It's simple, we're
5 going to heard the cattle. I don't like it.

6 I think any time you have a systematic
7 approach that removes the lawyer from the equation, watch
8 out. Usually they remove the lawyer not for something
9 that's in the best interest of the defendant. That's
10 basically been my take on it.

11 I know they do that a lot down in Dade.
12 Dade is a different animal than Broward. Much larger, much
13 more overwhelmed in numbers. They also -- they hate mental
14 health courts. When I was creating it I used to speak with
15 Bennett and -- and I can't remember her name -- Rebecca Cox
16 and Michael somebody from their office. They didn't like
17 the courts because they thought it added to the
18 stigmatization of the mentally ill and there's a lot of
19 validity in what they're saying.

20 I believe that they were different
21 because their judiciary was more enlightened than ours.
22 Broward County until the last 15 years was the Deep South.
23 Think My Cousin Vinnie.

24 MR. SCHECHTER: What's changed.

25 MR. FINKELSTEIN: The demographics have changed

1 and the politics have changed and we went from an old
2 southern, you know, "What we have here is a failure to
3 communicate, boy" type judge to -- most of South Florida is
4 really New York, New Jersey displaced anyhow, and the
5 demographics and the politics have changed, and our
6 judiciary changed and became a kinder, gentler one. But,
7 interesting note, they formed their own good ol' boy system
8 too and it became about who you knew more than what you
9 knew.

10 And we're going through another change
11 right now in Broward County where the judicial
12 administration was just overthrown basically and resigned
13 and we have a new judicial administration now, and I don't
14 know where that's going to lead.

15 MR. JONES: We're running out of time but I do
16 want to ask you. I know that Judge Pollack, I believe it
17 was, spoke to us about the fact that 50 percent of the
18 defendants in her courtroom are white -- I think it was
19 Judge Pollack -- and I know that 50 percent of the
20 defendants throughout the system are not white.

21 And I'm wondering -- I suspect it's more
22 like five percent or less are white. And I'm wondering
23 whether or not -- and part of that is because when you go
24 into her courtroom you face the possibility of having your
25 case dismissed and also having your record expunged.

1 And I'm wondering whether you've noticed
2 or you believe or you think -- and you can draw as well --
3 that we're creating sort of a two-tier system of justice
4 where these specialty courts, these boutique courts, are
5 available in a more substantial, meaningful way, sort of a
6 get-out-of-jail free ticket for white folks, and black and
7 brown folks are not getting that same benefit? Is there
8 any racial disparity that you can talk to us about?

9 MR. FINKELSTEIN: I hope to God not. I'm going
10 to start there. This is the first time I've heard that
11 figure. That's alarming to me and I can assure you I will
12 look into that tomorrow. I hope to God not because that to
13 me is the fatal flaw that all of the good on the other side
14 will not overcome. It just can't.

15 We cannot continue to send the message
16 that there's a system of justice for white people as
17 opposed to black and brown people or for rich as opposed to
18 poor, and if the line is drawn there then there is nothing
19 on the over side that overcomes it.

20 I'm glad you mentioned Judge Pollack
21 because I didn't get a chance to talk to about -- she has
22 this misdemeanor marijuana court. I like Judge Pollack a
23 lot. I like her personally. If there's a nicer person on
24 the planet I've never met them.

25 I don't know how to say this but it's

1 dumb. It's a stupid court. Either legalize it, give them
2 a fee of \$50, get out of there. What happens is the
3 recovery community has gotten a foothold in the criminal
4 justice system and these people never met anybody who ever
5 used drugs that wasn't a drug addict.

6 These are the same people that when you
7 go to a drug rehab and you do the evaluation and the
8 interview, nobody has ever done that interview and said,
9 "You don't need our services. Go and be well."
10 Everybody's got a problem.

11 The biggest problem with marijuana in
12 this state, in this country is that it's illegal. And to
13 understand, we using the concept that the government can
14 act as parents to protect us have decided that marijuana
15 can harm us and so they want to protect us from marijuana,
16 and if we don't listen to them, damn it, we're going to
17 really hurt you. Just think about how ass backwards that
18 it. "We want to protect you. Oh, you're not going to
19 listen? Now, we're really going to hurt you."

20 Well, to me, in the state of Florida, if
21 you get caught with a misdemeanor amount of marijuana --
22 you're from San Francisco. I think it's decriminalized
23 there I think.

24 MS. SHIFMAN: Not really. It's complicated. We
25 still have the DEA.

1 MR. FINKELSTEIN: To me, in Florida if you get
2 caught with a joint, they take your driver's license for
3 two years. So now -- "Okay, marijuana is bad for you.
4 You're 18. You got caught with a joint. Now we're going
5 to take your license away. Now you're not going to be able
6 to go to college. You're not going to be able to get a
7 job."

8 It's ridiculous. It's Draconian. It is
9 nonsensical. And Judge Pollack has created this court, I
10 think well intentioned, but I think it feeds into this
11 incredible strain of stupidity of how we deal with
12 marijuana.

13 The bottom line is we are throwing
14 resources at these people. It's like eight months, 10
15 months. You get counseling. It's -- sorry, and I like
16 her. It's dumb. It's stupid. It's a waste of resources.
17 Get them in get, get them out. They're either going to
18 smoke or they're not going to smoke.

19 And if you think -- and it's that same
20 stuff. Let me tell you the stuff I've heard from Judge
21 Pollack's courtroom, "The marijuana of today is not the
22 marijuana of your generation."

23 MR. SCHECHTER: That's the second biggest
24 problem with marijuana is quality.

25 MR. FINKELSTEIN: That's always been one of my

1 problems.

2 MR. SCHECHTER: I'm listening to you.

3 MS. SHIFMAN: Now we have a nice record.

4 MR. FINKELSTEIN: They sit there and they say,
5 "It's not the marijuana of your father's generation. It's
6 so toxic and people are committing home invasion robberies
7 to steal" -- it's dumb. They're not doing it. It's not
8 addictive and, yes, are there better strains? Yes, if you
9 want to pay for it. You can get -- there are better
10 strains of scotch. The whole thing is backwards.

11 MS. SHIFMAN: All you need is a medical
12 marijuana card in California.

13 MR. FINKELSTEIN: Yes, I tried to get one when I
14 was out there. That's another story.

15 I still don't get it. It reminds me --
16 this war on drugs -- and I'm not equating all drugs, but we
17 live in a time when a large portion of this world wants to
18 blow us to kingdom come and we think it's smart to declare
19 war on our own citizens because they want to smoke
20 marijuana? That's wrong.

21 MR. JONES: Anyone else? Scott.

22 MR. EHLERS: I have a question about treatment
23 and drug court and whether it's -- are medicines allowed in
24 treatment? Can they use methadone in treatment?

25 MR. FINKELSTEIN: Methadone, no.

1 MR. EHLERS: There's other forms of, you know --

2 MR. FINKELSTEIN: Like Oxyconton?

3 MR. EHLERS: -- anti-depressants? There's
4 another one that's like a lower level. It's not
5 methadone.

6 MR. FINKELSTEIN: S-u-b-o-x-o-n-e or something?
7 It's a fairly new drug?

8 MR. EHLERS: Yes.

9 MR. FINKELSTEIN: No, they don't allow that.
10 They don't allow methadone. I fought a lot of battles with
11 them. There are many people in the recovery community that
12 believe that you need to turn your life over to a higher
13 power, to God, to Jesus, and that if you do that, that's
14 all you need. They can't be more ignorant.

15 People that need medications because of a
16 biochemical imbalance, that is a separate issue, separate
17 and apart from alcoholism and addiction.

18 A lot depends upon the treatment
19 providers, but mostly now the world has gotten a little
20 more educated about dual diagnosis problems, people who are
21 bipolar and have alcohol and drug addiction but it depends.

22 There is a natural resistance of people
23 in the recovery community to any form of medication because
24 they believe the 12 steps are the path to recovery, and
25 like many fundamentalists of every religion on this planet,

1 the fundamental believers believe there's one path, one
2 path only. It's their path and if you get off of it
3 somehow you're condemned to something else.

4 But we have been successful in arguing
5 that if they need those medications, with the exception of
6 methadone and the other drug, that they don't allow in the
7 program. That's a totally different path.

8 MR. EHLERS: And alternatives to 12-step
9 programs, is any of that available?

10 MR. FINKELSTEIN: It's available in the sense
11 that it's available but it's frowned upon. It's not really
12 accepted. The people that do this work are people mostly
13 that are in recovery themselves, and they have come from a
14 very bad place in their life and they've risen to a very
15 high place and they know that their path works. And my
16 experience has been that most recovering addicts and
17 alcoholics are not particularly liberal-thinking people
18 when it comes to alternatives paths. It's been my
19 experience.

20 MR. JONES: Thank you very much. We will --
21 what I should say, anything that you think that would help
22 us as we continue along this journey, please forward it to
23 us or to Scott, and with your permission, as we go long, if
24 there are any additional questions that we come up with, if
25 we can forward it to you. But we greatly appreciate this

1 conversation. Thank you very much.

2 MR. FINKELSTEIN: You're very welcome. Good
3 luck, guys. I think what you're doing is important. I
4 don't know where it's going to go.

5 (Time noted: 3:03 p.m. to 3:36 p.m.)

6 MR. JONES: We are quite pleased to have Judge
7 Jeffrey Rosinek with us. Your reputation, I should say,
8 judge, precedes you. Marvin Schechter was with you
9 yesterday.

10 JUDGE ROSINEK: I almost got busted.

11 MR. JONES: He has told us a great deal about
12 the wonderful work that you do in your courtroom and we're
13 looking forward to this conversation. I see you've got
14 Power Point. I don't know if you have an idea how long the
15 Power Point will last.

16 JUDGE ROSINEK: We have -- our time total is an
17 hour and you want to spend how much time in question and
18 answer?

19 MR. JONES: We want to spend as much time as we
20 can in question and answer.

21 JUDGE ROSINEK: I will run through this because
22 you have the Power Point. You can print it up and give it
23 to people afterwards. Briefly, it's just the concept of
24 drug courts.

25 Involved in this, you will have not only

1 our history, but also there are the 10 components of drug
2 courts that have been established nationally and most
3 states have adopted them legislatively which we have. We
4 did that in about 1998 we adopted that although our court
5 started in 1989. Ours was the first drug court in the
6 United States.

7 MR. JONES: Let me ask you. Before you launch
8 into it, tell us who you have with you.

9 JUDGE ROSINEK: I have Sandy Lonerger who is the
10 chief of operations for Dade County, and Sandy, about two
11 and a half years ago, became the supervisor for the
12 administration for our drug courts. Before that we had
13 different people.

14 Until Sandy got involved and became a
15 convert and a missionary at the same time, we just didn't
16 have a great deal of cooperation. But the administration
17 without administration really helped me. And we are like
18 an island floating somewhere and she attached us to the
19 land which is really great. She'll answer lots of
20 questions about administratively how it's done.

21 We brought Sergio. He's one of our case
22 managers. Up until two years ago we had no case managers
23 for drug court. Our drug court is one of the largest in
24 the United States. We have approximately 2,200 cases and
25 no case managers until a few years ago because we had no

1 money for case managers.

2 And what we started was a 501C3 --
3 excuse me, I did not start it because as judge I can't do
4 things like that but I'm very, very fortunate I had a
5 criminal defense attorney who started it, who you will meet
6 at 4:30, Richard Baron, and he started it with a little of
7 my help and we have raised money through grants, through
8 collections, through donations to pay for our case
9 management.

10 We now have six case managers. We're
11 getting an intake officer for our program, and we're going
12 to have -- we have the dollars. We want to get a family
13 psychologist to be a part of our team and do a number of
14 things.

15 The reality is they have taken so much
16 pressure off of me they made my life easier. They made me
17 live. I think that A judge can easily burn out. You saw
18 my calendar yesterday and that was not a big calendar and
19 we only had -- yesterday was Tuesday. In the morning, 120
20 cases. In the afternoon, about 45, 55.

21 MR. JONES: What we'd like to do is to give you
22 the opportunity to walk us through your presentation and
23 then maybe have five minutes each from Sandy and Sergio to
24 tell us what they do and give us the benefit of their sense
25 of the specialty court, and then we will engage you in our

1 questions.

2 MS. SHIFMAN: Can we get Sergio's full name for
3 the record? Did we get that?

4 MR. MURIEL: Sergio Muriel, M-u-r-i-e-l.

5 JUDGE ROSINEK: One of the things I truly
6 dislike is the term specialty court because it's not a
7 specialty court. It's a saving grace court, second chance
8 court. Specialty means like -- have you heard the term
9 "boutique courts"?

10 MR. JONES: We heard that too.

11 JUDGE ROSINEK: Which is really horrible because
12 ours is a true court, it's a real court, it's a circuit
13 court. It's the highest trial level court without doing
14 trials, and I don't want to become a second-class court
15 because most of the time we're treated like that, and too
16 often by the private defense bar. I feel like a day care
17 center. They drop their clients off and I never see them
18 again. At three o'clock they're suppose to go home by
19 themselves. Sometimes they can't even cross the street but
20 their parents dropped them off and that's one of the
21 problems.

22 Anyway, the necessity in Miami is what
23 really started it all. In the 1980s Miami was the cocaine
24 capital of the world. Miami Vice was the major show at the
25 time and the question is whether we were Miami Vice or

1 Miami Vice was really just depicting what we were here in
2 the community.

3 In 1980 we had 120,000 new residents
4 dropped off within two months from Cuba. All the prisons
5 were opened up and all the mental institutions. There were
6 120,000 new residents in a matter of three months.

7 All this comes to being and what's
8 happening is our local jails were filled up. The feds come
9 in and say for every person you bring in, you have to let
10 somebody out. So what we were doing is we were taking in
11 kids who were arrested or people who were arrested for
12 possession of cocaine and possession of marijuana and we
13 were allowing the robbers and burglars out, so something
14 had to be done.

15 Our chief judge and his assistant,
16 Wellington and Kline, they literally spent a year searching
17 up what to do and they came up with this concept. The
18 concept would never have come to being had not middle class
19 kids been arrested because we had kids of color were
20 arrested and no one gave -- you know, "Well, this is jail,"
21 but now, "My children are being arrested? Somebody has to
22 do something about it. Get them out of jail."

23 We were grateful in the 1980s that middle
24 class kids were arrested for cocaine, for marijuana because
25 their parents got really actively involved and did

1 something in this community.

2 It was an innovative program because ours
3 was the first one in the United States. And after a year
4 of research, collaborative partnerships with the
5 prosecution, the Public Defender's Office, county
6 government, corrections, police agencies to come up with
7 this, basically the rewards, reducing recidivism, reduction
8 of crime. Remember the average addict commits an average
9 of 66 crimes per year. You save somebody for that year 66
10 crimes or less.

11 Cost in savings for the community, big
12 dollars, not only in the criminal justice but we have the
13 Jackson Memorial Hospital complex over there. We have
14 thousands of kids, people who OD every single year. That's
15 millions of dollars in cost to the community, medical
16 costs.

17 You know, for every person that ODs, you
18 are going to be paying thousands and thousands of dollars
19 to salvage that life, and so if we can keep the person off
20 the drugs, that happens.

21 In human savings, people now have a
22 future because the concept was you do the program, you stay
23 in drug court for a year, you stay clean, and the felony is
24 thrown out. It's dismissed for no pros.

25 This is the 10th component that was

1 developed by the National Association of Drug Court
2 Professionals. We adopted it in the late '90s. This is
3 part of the national association theme of what a drug court
4 is.

5 Drug courts integrate alcohol and other
6 drug treatment processes and generally it's a
7 stabilization, treatment and then a transition phase where
8 you get involved in employment, education, housing,
9 aftercare. If you do not treat the entire person, your
10 program will not work. You have to make sure that -- if
11 they're not working, they don't have the education, they
12 don't have housing, if there's no aftercare for these
13 people, you are not going to have a successful program
14 because they'll be back in the system.

15 Non-adversarial approach. The state and
16 the defense bar may disagree on different things but
17 generally the concept is for the benefit of the client,
18 defendant. The judge, the defense team, the prosecutor
19 work together. The team focuses on the participant's
20 recovery and behavior and that's really important.

21 Eligible participants identified early.
22 For us, the person gets arrested today, tomorrow they
23 appear in my court. They get arrested today, they're
24 brought -- if they don't bond out, they're brought over.
25 If it's a cocaine charge, tomorrow we call the drug court

1 calendar and I'll see them tomorrow. That's how quickly we
2 work with these people.

3 If they're in a program -- the people
4 that are in a county program, they're taken by the bus
5 immediately that afternoon and put in the program that
6 evening, so within 24 hours they're in a program. The
7 faster you get a person in a program, the better it is for
8 treatment.

9 Drug courts provide access to continuum
10 of everything -- continuum of care because. As you see, we
11 just don't treat this one symptom of drug abuse. We deal
12 with co-occurring problems, all those listed there,
13 cultural and gender problems. All these things are treated
14 by us. We have to handle the entire person. That's why
15 it's called a holistic court. We have to handle everything
16 of that individual including --

17 MR. JONES: As I'm looking at this list, I don't
18 see sort of domestic and domestic violence problems listed
19 there. Do you deal with those as well?

20 JUDGE ROSINEK: The answer is yes. I don't know
21 why it's not there. The answer is yes. We deal with the
22 family problems and that should be put in there because --
23 especially with the juveniles, their parents must get
24 involved in treatment. We handle -- we send people to
25 family counseling. We do that too. That should be

1 included in that too.

2 Abstinance. We test and test. A minimum
3 of twice a week we test, and when they come to court
4 they're tested right there. If they're dirty, we ask them
5 "Are you clean or dirty?" That means, "Have you used?
6 Will drugs be in your system?" If they tell us the truth,
7 generally there may be a sanction, but a light sanction.
8 If they lie to us, they will most probably end up in jail
9 for two weeks for lying.

10 You cannot help an addict to recover
11 unless that person becomes truthful, and obviously that's a
12 violation if they're using and it's a violation of pretrial
13 release or bond release. But if they tell us the truth,
14 the sanction is not going to be that sanction, especially
15 at the beginning.

16 And we may give them community service or
17 they go to NA meetings, but they're not going to be sent to
18 jail immediately because we understand that relapse is
19 part -- well, we understand that it takes time for them to
20 get off of drugs and that after 30 days, if they relapse,
21 we understand that concept and then we'll give them a
22 sanction but not a severe jail sanction.

23 MR. SCHECHTER: Judge, just for the record, can
24 you explain to everybody what an NA is?

25 JUDGE ROSINEK: NA, AA, Narcotics Anonymous,

1 Alcoholics Anonymous, this is fellowship. We can in Dade
2 County alone 110 AA separate meetings and about NA 75
3 separate meetings. We have in the courthouse at 5:30 every
4 night NA or AA meetings. They can do the meetings right in
5 the courthouse if they can't find a place.

6 If it's an open meeting, anyone can
7 attend. Sometimes they have closed meetings where only the
8 people who are in recovery can go. Sometimes it's a step
9 meeting where they work the steps. The 12 steps as part
10 of the AA plan of recovery, and this was started in the
11 1930s by Bill W.

12 And NA has adopted -- we have Alcoholics
13 Anonymous, Narcotics Anonymous, Cocaine Anonymous, Heroin
14 Anonymous. We have Methamphetamine Anonymous. We have
15 Alanon for parents and friends of people who are
16 alcoholics. We have Alarteen for teenagers to go to
17 similar meetings with other kids who are teenagers.

18 So those are fellowships. They're not
19 treatment. There are many people who have gone through AA
20 and NA and have never gone through treatment and they have
21 stayed clean for years and years and years. They have gone
22 to recovery and are in recovery and they are in recovery
23 because of that. They have never gone through a drug
24 treatment program or an alcohol treatment program so it's
25 helped lots of people, but for us it's a benefit, it's a

1 help, it's an aid, and we work close with these independent
2 organizations.

3 Again substance abuse is not an island by
4 itself. There has to be a coordinating strategy which
5 governs us and addiction is chronic. We understand
6 relapsing. There must be cooperation.

7 Failure to sanction. Rewards are -- good
8 reports are rewarded. We give out rewards, so not only
9 sanctions. Then we have lesser rewards that we give out.
10 One, we have bus passes. Bus passes -- if you travel on
11 our Dade County bus system and metro system and go to work
12 or to school, you're talking about \$125 a month you are
13 going to be spending on that. We give free bus passes, and
14 so those people doing really well, we give it free to those
15 individuals.

16 And if they use during that month, then
17 they have to pay us back \$75 back for that bus pass. But
18 if they're doing well, they get the bus pass free and
19 really gets them to meetings, it gets them to school, it
20 gets them wherever they have to go.

21 And the key is, though, the last one, the
22 response of the court is predictable and swift. If you do
23 this, this is what's going to happen. If you do this, this
24 is what's going to happen. They know in advance if they're
25 going to use and they're going to lie they're going to jail

1 for two weeks automatically. They know that, and the
2 public defender tells them, the prosecutor tells them. The
3 people sitting, "Tell the truth, tell the truth" and for
4 some reason people still lie and they go to jail.

5 MS. SHIFMAN: If they tell the truth, do they go
6 to jail for just a couple of days?

7 JUDGE ROSINEK: If they tell the truth and
8 they're dirty and they're not in the program, they will go
9 to jail for one day. If they're still in the program,
10 they don't go to jail at all. So they just have to tell
11 the truth, but sometimes their mother is there or their
12 girlfriend is there or their husband is there and they
13 don't want to tell the truth because they have lied to
14 them.

15 Now, sometimes if I see kids and I know
16 I'm going to discipline, I tell them to take the kids
17 outside because I don't want to discipline in front of the
18 kids or I'll have the public defender or if there's a case
19 manager, "Tell them the truth. Maybe ask your mom to leave
20 for a minute so you can tell the truth." "Mom, I've been
21 clean. I used that to go to a movie with my friends."
22 Right. So sometimes we have to do that and sometimes it's
23 too late. We don't know about that until afterwards and
24 they're going to pay the penalty.

25 Monitoring is really important and we

1 have to monitor every part of their outcome.

2 And continuing education, again we go
3 through training programs. We learn new techniques, new
4 methods. All of us go to school. I know that Sergio and I
5 met because we were both in the same class learning about
6 drug addiction. I went back to school to learn about it
7 and he became a case manager and I was stuck as a judge, so
8 and that's the process.

9 We go to conferences and we raise the
10 dollars to send our people to conferences to learn. We
11 bring in individuals. Right now we are bringing in entire
12 teams to train our case managers about new techniques in
13 handling clients and that's really important and so we have
14 the money we could do this.

15 Forging partnerships, drug court, law
16 enforcement, all that stuff, that's really necessary.

17 And same thing. Bottom line, be
18 flexible. We learn every single day something new. I've
19 been doing it now for nine years and it's a phenomenal
20 experience.

21 Prior to this I was what's called the
22 backup judge. It's a trial division judge and all I did
23 was major trials. I did death penalty trials and I did the
24 rape trials and all those things I did for about six years,
25 and then I went from that to I'm sending somebody to jail

1 for dancing. I feel so guilty about that and it's a
2 difference.

3 So education is the key. Being flexible
4 is really the process that we have to go through.

5 Significant issues. Tampering. One of
6 the things we learned is drug addicts lie generally when
7 they talk and they will try to beat the system. They
8 cheat. You can do a lot of things. The last one is called
9 Whizzinator. It's a false penis in colostomy bag and they
10 will have it mixed with the different types of -- looks
11 like urine so it tests negative so they'll try anything.

12 So we have all the methods to detect all
13 these things. We work on relapse prevention and they have
14 to report.

15 Common issues, the judge -- each judge
16 that handles a drug court -- now, there are in the United
17 States -- how many are there now? There are nearly 2,000
18 problem solving courts throughout the United States.
19 Everyone has a different judge, different personality.
20 Some judges have no personality, but some attorneys have
21 the same personality as the judge, little if limited.

22 For us, common issues: Housing, housing,
23 housing. If they're living on the street they can't do
24 anything so we have to try to find housing for people. We
25 work with the Homeless Trust. We have Science for

1 Affordable Housing, 50123 to raise dollars.

2 And our first grant was to provide first
3 and last month's security for people who have a housing
4 problem. We pay for three quarter housing for individuals.
5 The housing is a loan. We have collected about, oh, maybe
6 10 percent back but it's not as important as getting them
7 into housing.

8 Education, education, jobs, jobs, jobs,
9 people, places, things have to be taken care of, and then,
10 of course, spirituality. For many individuals it's really
11 important.

12 As we talked about this, you heard about
13 this during the day, that we handle people with dual
14 diagnosis.

15 We have graduations. We have things like
16 our county commission. Our job is to bring in people who
17 have money or who have access to money, let them know what
18 drug court is. He's chairman of the county commission.
19 Very important.

20 MR. JONES: Let me stop you there one second.
21 On the co-occurring and the dual diagnosis, suppose I get
22 arrested for spousal abuse and in the course of that arrest
23 you find a bag of cocaine in my pocket, and in the course
24 of processing me through the system you discern that I have
25 some level of mental illness. How does it get decided

1 whether I end up in drug court, domestic violence court?

2 JUDGE ROSINEK: You will be in two courts,
3 domestic violence court on the DV, automatic. That's
4 severed. The rest will come to us. Including that if you
5 need mental health, we'll get you in a program that's for
6 dual diagnosed individuals.

7 If we and domestic violence know and if
8 you have a case manager, our case manager goes you with to
9 domestic court and that's the greatest thing about our
10 case managers, because when they walk into all the other
11 courts, they're representing the fact that this other
12 person is in treatment and they can tell how well they're
13 doing in treatment so that the judge in the other court
14 understands the person is getting the help that that person
15 needs.

16 And we just had some young man who was
17 arrested for domestic violence. He was homeless, taken in
18 by this guy. Lots of abuse and problems. The guy reported
19 this kid beat him up in domestic violence court. The case
20 manager went three times. Finally the case was thrown out.
21 The kid is doing phenomenally in the our court.

22 So if it were not for the case manager,
23 that kid would have been in domestic violence court not
24 knowing what the hell to do. He's a very quite kid who had
25 never spoken to the public defender about the fact that,

1 "I'm in two courts" and, you know, what happens when --

2 MR. JONES: But it's possible for me to end up
3 in two courts for one arrest?

4 JUDGE ROSINEK: Yes.

5 MS. SHIFMAN: It's possible to be in three?

6 JUDGE ROSINEK: If you had a DUI at the same
7 time you'd be in three courts.

8 MS. Lonergen: Or a juvenile dependency or
9 delinquency.

10 JUDGE ROSINEK: It sucks. We're trying to now
11 work on this like a unified family court. At least it's
12 handling family problems, domestic violence problems,
13 dependency. But with the criminal, we haven't done it yet
14 and the reason why it hasn't been done thus far, it's not
15 as important.

16 MR. MURIEL: A lot of times also if you have a
17 client that comes in with a domestic violence charge, you
18 can work with that client in the domestic violence court
19 and get that taken care of and work on the addiction. A
20 lot of times those things happen because of the addiction,
21 because of the alcohol, and you can stop the addiction or
22 help with getting a client referred to get mental health
23 and get on medications, a lot of times those things won't
24 happen any longer.

25 JUDGE ROSINEK: We hear the perpetrator of the

1 abuse, domestic violence, 75 percent of them are addicted
2 to something and 50 percent of the victims are addicted to
3 something.

4 MS. Lonergen: A lot of times in domestic
5 violence they make the mistake of sending the client like
6 to, I don't know, anger control or anger management and all
7 it really makes them is a better abuser.

8 JUDGE ROSINEK: And angrier.

9 MS. Lonergen: Yeah. I mean, you have to
10 understand what addiction is and how it affects, like the
11 judge said, holistically the individual, and then do the
12 proper course.

13 MR. MURIEL: We have an opportunity to assess
14 the client and access what his needs are which is his main
15 problem before the other problems.

16 JUDGE ROSINEK: And the other is domestic
17 violence in Dade County is a misdemeanor, cocaine is a
18 felony. DUI is a misdemeanor, cocaine is a felony. The
19 trouble is too often the misdemeanors control the felonies
20 because if a person gets a DUI, they can never get a
21 withhold in the State of Florida. They're always a
22 convicted person which affects their felony, affects their
23 future.

24 Now, we have monthly graduations. Top is
25 the supreme court chief justice two years ago. Bottom is

1 the drugs off the United States. President Bush announced
2 in our court a year and a half ago his drug policy for
3 2005/2006 right in our court which is really cool for us.
4 It's the only time we made the Miami Herald. They really
5 think well of us.

6 Heart. We started a homeless program in
7 1996, a homeless court, where we take people who are living
8 on the streets, get them residential programs, keep them in
9 a court for a year. Generally they're in their own house,
10 they have job, and the case is thrown out.

11 We have -- we work closely with our
12 school system to get them -- and I know Marvin saw this
13 yesterday -- where I would say, "Did you graduate from high
14 school?" "No." "You will this year." "Excuse me?" And
15 we give them the papers to get into school and that's
16 really important.

17 And we will pay for things. If they go
18 to the culinary arts, we will pay for their aprons. It's
19 embarrassing to say we will pay for their knives, but we
20 have to buy their knives. Pray to God nothing happens with
21 them.

22 Jobs, supportive housing. Friends of
23 Drug Court is a 501C3. You'll meet Richard Baron in a
24 little bit about that.

25 And we have an office for jobs in our

1 program. In about a month we will have an office in our
2 building for supportive housing too. We share the same
3 office.

4 This is a flow of treatment. We have
5 private treatment programs. When we started -- I started
6 nine years ago, about 95 percent of our people were in the
7 county program. Right now it's about 65 percent and 45
8 percent -- no, about 60 percent, 40 percent in private
9 programs.

10 And the reality is we do a lot of stuff
11 with the community. We help feed people in the community.
12 We help collect for different things. We get people
13 involved in community service.

14 Expansion of the drug courts. You have
15 been talking about this all day. Adult, Juvenile,
16 Dependency, DUI, Domestic Violence Courts all based upon --
17 all based upon the drug court model and this is just some
18 stuff that you have in the packet, a lot of that stuff
19 there.

20 MR. JONES: Thank you.

21 JUDGE ROSINEK: So that was a basic presentation
22 which should take me 45 minutes and I spoke very rapidly.

23 MR. SCHECHTER: You always speak fast.

24 JUDGE ROSINEK: Marvin knows I'm from Brooklyn.
25 I'd like to introduce Dave Paulus who is our prosecutor.

1 He's in charge of the narcotics division for Dade County,
2 and so right now you want to have us open up for questions?

3 MR. JONES: If each one of you will take five to
4 seven minutes.

5 Thank you for coming and we're happy to have
6 you. If you just take five minutes or so and give us the
7 benefit of your background and the work that you do, we'd
8 be very grateful. And then once you've done that, we have
9 a number of questions that we'd like to ask you guys, but
10 we'd like to hear from you first.

11 MR. PAULUS: Good afternoon. My name is David
12 Paulus. I am an assistant state attorney. I work for
13 Kathy Fernandez-Rundle, our elected state attorney. Thank
14 you for having us here.

15 Drug court is really an innovative
16 concept that started back in the late 1980s when
17 Ms. Rundle, our now elected state attorney, was the chief
18 assistant for community prosecutions back at that time, and
19 she was actively involved in participating in the creation
20 of drug court, so it's very near and dear to her heart, as
21 we say in the office.

22 Back in the 1980s, if you recall, what
23 was going on in Miami from the media, from the news
24 accounts, from the different movies and sitcoms of Miami
25 Vice, we had a serious drug violence problem. We had

1 cocaine cowboys. We had a lot of bad things going on in
2 Miami, and so the resources of the state for the state
3 attorney's office were devoted towards narcotic
4 trafficking.

5 And as the chief narcotics, currently, to
6 some extent, that still goes on, fortunately not as much as
7 the dramatized violence we've seen in yesteryears, but you
8 still have a significant drug threat in terms of kilogram
9 quantities of drugs, heroin, Oxyconton, Ecstasy and the
10 like, but those issues were very much in the forefront of
11 our minds back in the 1980s.

12 However, toward the last part of the '80s
13 there was a bit a paradigm shift fortunately and part of it
14 came out of Ms. Reno's office. Janet Reno, the elected
15 state attorney, looked at it and said, "You know what?
16 We're not treating the users and the users are part of the
17 drug problem," and if you have an individual that's
18 addicted to crack cocaine and they continuously use and
19 use, what are they doing to our environment? They're
20 committing the crimes. They're breaking into homes.
21 They're stealing out of cars, whatever they're doing to get
22 their fix.

23 That was sort of the impetus towards
24 creation of the drug court where Judge Stanley Goldstein
25 was the active participant, and the paradigm shift was

1 towards if we can have a treatment component in the
2 judicial system, it will save the lives of the individuals,
3 which is setting the trend to treat, and safe future
4 victims from crime in Miami.

5 And I've got to tell you, I've been the
6 chief narcotics since 2000 and I've worked hand in hand
7 with Judge Rosinek and it has been a tremendous success.
8 It really has been. And we still fight crime. We still go
9 after narcotraffickers.

10 Part of what I do is to work with Judge
11 Rosinek in drug court and it's highly successful, and I'm
12 not going to go into the details you just heard from Judge
13 Rosinek. I don't need to go back over that again. He did
14 a better job.

15 JUDGE ROSINEK: First time you've admitted it.

16 MR. PAULUS: But I have to tell you this. The
17 one little slide that I happened to walk in on that was on
18 the board that talked about the personalities is key. The
19 reason drug court works today and presently is because of
20 that man right there, Judge Rosinek. I don't know if
21 gentlemen and ladies have had an opportunity to sit in drug
22 court and actually watch it this week, but it truly is
23 something special by the personalities of the people
24 involved.

25 MR. JONES: Let me interrupt you one second.

1 MR. PAULUS: Yes, sir.

2 MR. JONES: Two questions come to mind
3 immediately listening to you. One is just a question about
4 logistics really. You're the chief of narcotics?

5 MR. PAULUS: Yes, sir.

6 MR. JONES: So you're not in court every day?

7 MR. PAULUS: I supervise Ms. Akila Baine.

8 MR. JONES: Who is there every day?

9 MR. PAULUS: Who is my prosecutor day in and day
10 out.

11 MR. JONES: And what you're saying is obviously
12 is a credit to Judge Rosinek but Judge Rosinek is not going
13 to be there forever.

14 MR. PAULUS: He's not? You're leaving us.

15 JUDGE ROSINEK: I bought a farm in Spokane,
16 Washington.

17 MR. PAULUS: We're still negotiating his
18 release.

19 MR. JONES: What do you think about the notion
20 of building a court around personality instead of
21 principles, and how does that factor into sort of the
22 thoughts and the comments you've made about Judge Rosinek?

23 MR. PAULUS: Well, it's really a combination
24 because look at Stanley Goldstein. He was phenomenal. He
25 had a way with -- we don't call them defendants. We call

1 them clients as part of the non-adversarial approach
2 whereby the prosecutors, the public defenders, the private
3 lawyers and judges coming together as a team approach as
4 opposed to the typical adversarial approach.

5 In every other courtroom, you have
6 conflict with defense attorneys and that's what we do in
7 terms of litigating serious cases. In drug court it's very
8 much a team approach. You can have framework. We have a
9 procedural framework in place. We have a Florida statute
10 which designates whose eligible, but we also have a more
11 liberal administrative order which bends the rules somewhat
12 so we can get more people in because we understand that
13 under certain bridge of framework it doesn't really address
14 the entire issue.

15 But it is personality. You have to have
16 the right judge in that courtroom. You have to have the
17 right prosecutor and the right public defenders. If I took
18 one of my prosecutors that is typically into prosecuting
19 violent crime, large scale cases, it may not be the best
20 fit for this courtroom because it takes a certain quality
21 of an individual to appreciate what's going on. They have
22 to really not just accept the concept but embrace the
23 concept.

24 And by doing that -- and when we talk
25 about personalities, of course we're going to lose Judge

1 Rosinek some day, but I'm hopeful that whoever might be his
2 replacement will buy into the philosophy. In my opinion,
3 you have to buy into the philosophy as the prosecutor,
4 public defender, and as the judge, court administrator, and
5 it works. And if you can sell that, you can buy into the
6 philosophy, it works.

7 And I've had circumstances -- Judge
8 Rosinek can attest to this, and the names please, that
9 we've have had certain personnel in courtroom that we
10 thought was a good fit, and it was not a good fit, sir, and
11 things were not working well in drug court at that time.
12 And we'd tweak it and we'd play with it and massage it a
13 little bit and eventually it works out.

14 And right now I'm proud to say we have a
15 great group of people, it's very effective, and the proof
16 of that is that the individuals that complete drug court
17 have a very small, minute recidivist rate. I think we
18 calculated it to be about -- four percent, judge?

19 JUDGE ROSINEK: Within Dade County.

20 MR. PAULUS: Within Dade County. The people
21 that completed the problem, went all the way through and
22 did everything they were suppose to and they were actually
23 rehabilitated, very low recidivism.

24 MR. SCHECHTER: Recidivist rate how far out?

25 JUDGE ROSINEK: One year, four percent; two

1 years, six percent.

2 MR. SCHECHTER: What's the success rate?

3 JUDGE ROSINEK: About 65 percent. Most of the
4 people drop out the first month because that's not what
5 they want to do, and we have to include those individuals
6 as dropouts. It's a shame but they just realize that it's
7 not for them. And then some people can never do the
8 program. They try two years, three years.

9 One of our greatest fault is that we try
10 not to get too personal. We have graduation on Friday.
11 You guys are going to be in Key West. It's a shame. We'll
12 have a graduation on Friday. We have one person been in
13 the program four and a half years and finally graduating.
14 It took four and a half years and I'm not really sure why
15 we didn't give up on this person but the kid wanted to do
16 it and wanted to do it and couldn't do it, and finally the
17 last eight months suddenly it was like this catharsis,
18 "Wow, I can stay clean. I really can." Got a job and it's
19 a totally different person. But it's amazing. No one
20 expected him to graduate and it took four years.

21 We had one kid who graduated from high
22 school, college, gave up heroin and graduated from the
23 program five years ago. But we believe that a person
24 cannot graduate on methadone. If you're taking
25 methadone -- you have to be off methadone before you

1 graduate. You have to be four months clean. So he wanted
2 to stay on methadone through college. He got his degree --
3 we were in agreement with him and he got his college
4 degree. He got off methadone and graduated from the
5 program.

6 MR. JONES: I want to finish and let them do
7 their intros.

8 MR. PAULUS: The beauty of the drug court is
9 that it uses really a carrot and stick approach. There are
10 techniques which the judge uses to coax people along to do
11 what they need to do in the program at different phases and
12 different stages. We all recognize that the people that
13 are addicted to drugs or alcohol -- you know, the concept
14 of free will for those of us who can control ourselves is
15 an easy concept. For those who are really addicted, it's
16 not such an easy concept, and we also again understand that
17 in drug court to the extent that they're going to relapse.
18 They're going to relapse. It will happen. Anyone who
19 expects otherwise is really being foolish. It's going to
20 happen.

21 How do you address that in a courtroom
22 situation? If someone has gone into Phase II and they test
23 dirty in court and they've used cocaine, what does that
24 mean? Well, they've used cocaine and they've also
25 committed a separate crime. Does that mean now that the

1 state attorney is going to go and try to prosecute them for
2 that separate crime? Perhaps in some another jurisdiction,
3 perhaps, but that doesn't happen in drug court.

4 The issue comes down for the court is are
5 they honest about it because part of what we try to address
6 is to try to get them out of the denial stage. If you can
7 get someone to admit that they're a drug user and drug
8 addict, they might be amenable to treatment. They're
9 certainly more amenable than if they're in denial.

10 So what happens in court is they come up
11 for report setting and the judge says, "Are you dirty or
12 are you clean today?" And what the judge is really looking
13 for is to see how honest they're going to be. If the
14 person says, "Yes, judge, I'm dirty," then the judge may
15 have a sanction. It perhaps could be additional narcotics
16 anonymous meetings. It could be community service. It
17 could be another day in jail depending on their past
18 history.

19 But if they're honest with the judge,
20 there's going to be a less severe sanction than if they
21 lie. If you go into court and you lie to Judge Rosinek or
22 any other judge that's in there, it's probably going to be
23 up a two-week jail sanction. That's pretty significant.

24 And the interesting part about this court
25 is that individuals could have gone to the other 22 felony

1 circuit courts they were originally filed in, probably
2 obtained what we call credit for time served, been out of
3 the system and they wouldn't be here subjected to
4 additional jail time.

5 And this process goes on anywhere from 12
6 to 18 months. You heard the judge has had someone there
7 for four and a half years. I suspect that individual has
8 probably failed to appear in court several times and was
9 probably gone for six or seven months or longer at a time
10 and would come back to court, and it might be at that
11 opportunity the state may have discussions with the court
12 about whether the person should still be in court or not,
13 because what we've tried to accomplish is we have a
14 non-adversarial relationship in court, and that's very
15 important for the people that observe court and the
16 declines that are involved.

17 But we do go in chamber for serious and
18 sometimes heated discussion about whether someone should be
19 in court or not, and sometimes the court rules with the
20 state and sometimes it rules with the defense and that's
21 why we have judges.

22 We may have a disagreement. Someone who
23 has been malingering and comes and goes, comes and goes
24 from the state's perspective has done what? They've used
25 up space for someone who really wants to be in the program,

1 and part of what we've found out over the last couple of
2 years is that drug court is immensely successful and there
3 are a lot of clients. At any given time we've had 1,700
4 2,000 cases in the system pending. That is a humungous
5 audit.

6 And I've had numerous conversations with
7 the judge about we've got to be careful with the numbers.
8 We have to keep the audit in a manageable proportional
9 because we have one prosecutor perhaps, maybe one, maybe
10 two public defenders, one judge. We have a couple of
11 clerks and support staff that are working long hours. I
12 mean, sometimes they don't get a lunch break until one or
13 two in the afternoon because they don't have the time.

14 And it got so bad last year that Judge
15 Rosinek had to make a really harsh decision, which I know
16 he was very reluctant to do, is he had to close drug
17 court's doors. He told the chief administrative judge, "I
18 cannot take any more clients. I want to." And everyone
19 that knows Judge Rosinek knows he has a heart of gold, "but
20 I can't do it any more."

21 And what that caused was that other
22 judges then had to do their own pseudo drug court for the
23 last year and, quite frankly, the success of that was not
24 very good because, again, it goes in part to the
25 personalities. If you have someone who adopts the

1 philosophy, who is willing to implement it, and spend the
2 time in court -- and sometimes you have to really take on
3 almost a parental role with some of these people, you
4 really do because they are not getting it, and they have to
5 be coddled at times, they have to be yelled at at times,
6 and they have to be punished at times.

7 And some of our judges don't have their
8 own time or perhaps the inclination to want to do that, and
9 there's nothing wrong with those judges for that. They're
10 not in drug court. But the attempt to actually farm out
11 drug court clients that would have come from their
12 divisions to see if they could solve the overflow problem I
13 don't think was super successful.

14 And if we had additional resources for
15 more prosecutors, more judges, it would be nice to have a
16 couple of drug courts because then you could really resolve
17 a lot of issues. But, as we all know, in the fiscal issues
18 coming up facing State of Florida in particular, you know,
19 the resources are getting scarcer and scarcer.

20 And I hope to address some of the issues
21 you guys are interested in and ladies are interested, and
22 if I can answer any questions I'd be more than happy to. I
23 will let you do that from Judge Rosinek.

24 MR. JONES: Thank you.

25 MS. Lonergen: Sandy Lonergen. I'm the director

1 of operations for criminal court in Miami. I oversee 28
2 judges, the mental health program, the interpreters
3 program, the court reporters program and, as of a few years
4 ago, drug court.

5 My role in drug court is as an
6 administrator is to look at how efficient the program is
7 running, what can we to fine tune it, understand the
8 concepts -- understanding the concept of addiction, look at
9 where do we fit in and how can we bring in resources.

10 Sustainability. The data is out there.
11 Everybody knows drug court works. Everybody knows this.
12 That's why we continue to strive to open drug courts even
13 though Florida is going through a major issue with funding.
14 So sustainability is one of the things that I work on.

15 I work on -- if the judge spearheads a
16 new program, a new project, I make sure that that project
17 happens. I'm the liaison between new legislation, the
18 state attorneys, the public defenders. I basically am a
19 conduit.

20 JUDGE ROSINEK: She's also my conscience, my
21 Jiminy Cricket. She tells me when I'm screwing up.

22 MS. LONERGEN: But I am going to play court
23 administrator now and I agree and disagree with you in
24 part. The judge is the pivotal force. I mean, the judge
25 drives the courtroom. But part of the reason that the

1 attempted satellite drug courts, if you will, failed was
2 not just because the judge was not maybe buying into the
3 whole treatment idea or it wasn't that they believed or
4 didn't believe in drug court, there was no team.

5 The state attorney that's over there was
6 not trained to look at a client, if you will, or a
7 defendant in a therapeutic way. They're there for
8 prosecution. They're there to move these cases along and
9 be compliant as far as time stamps, you know. We have X
10 amount of days to file this, X amount of days to file that.
11 And that's the way I looked at cases before I came into
12 drug court.

13 Now, the same holds true for the public
14 defender, you know. Why should they put their client
15 through what treatment is when they can get them credit for
16 time served and the person is out the front door and
17 doesn't have to come back, at least for this particular
18 incident, right?

19 Well, we all know that we're a victim of
20 our own success. We have grown tremendously to the point
21 that we are now having to look at making very hard
22 decisions, which is looking at our administrative order and
23 say can we continue to keep this case loads? We only have
24 one attorney. We only have one PD. We only have seven
25 case managers.

1 We could do more if we had the resources
2 to expand the drug court and right now we don't, and you
3 don't want to sacrifice the quality of treatment or the
4 quality of care that you're providing someone because you
5 know that that optimum care is what's going to give you the
6 outcome that you're looking for.

7 You don't want a watered-down version
8 because you're just pushing people through, and you
9 certainly don't want to take your team to the point of
10 exhaustion and we've been through that. Our state attorney
11 fainted twice last week in the courtroom. It's just the
12 sheer volume.

13 So what will I do? I request new judges
14 every year. The legislature has been --

15 JUDGE ROSINEK: I've been denied every year.

16 MS. LONERGEN: I was going to say it a little
17 nicer, but, yes, we haven't gotten new judges, and when we
18 have gotten new judges, there has been pressure on the
19 chief judge from other areas that we need to put them in
20 other areas. And it is a difficulty job. I wouldn't want
21 to be the one saying where our judge goes.

22 All I can say is that we continue to
23 work. We continue to strive to perfect what we do. Every
24 year, every month we learn more about addiction. We learn
25 more about treatment. We learned that things we were doing

1 six years ago do not work and things that we thought
2 wouldn't work do.

3 It is crucial that the team is aware of
4 what new trends are out there, what works, what doesn't
5 work. I know we have people come over and tell us we
6 should have tried this type of treatment which is very
7 amazing, and I'm not a doctor but I research it and I come
8 back with a million questions to the doctor and say, "Well,
9 what about this? Can we do this? What happens if?" And,
10 you know, you have to be comfortable to make the decision
11 that will make your court better.

12 Colorado closed their drug court, what,
13 two years ago or three years ago and opened it right back
14 up the following year.

15 JUDGE ROSINEK: The State of Connecticut closed
16 theirs for a few years and opened it up.

17 MS. LONERGEN: The problem is how do you go
18 before the legislature or the county commissioners, because
19 we are a local offshoot in Miami. How do I go to my county
20 commissioner and say, "Because we had nine babies last year
21 that were born drug free in drug court, because of that 1.5
22 million or more per child that is born addicted you're not
23 going to have to pay. You don't have to pay 15 million."

24 Well, you know what, if it would have
25 been allocated, right, and then we have this baby born drug

1 free and then we say, "Oh, you can save those 15 million
2 and put them somewhere else," they can see that. They say,
3 "Wow, this really works." But I go there and say, "Because
4 we did this you don't have to worry about this," it doesn't
5 work the same. It doesn't work the same.

6 And part of what I do is we try to
7 educate as many people as I can to say you don't have to
8 believe that drug court is where we go, "Don't do that
9 again" and they're having it easy. No, they have it easier
10 when they do one day in jail and they get credit for time
11 served and they go home to beat up their mom, beat up their
12 grandmother or whoever to get money for drugs, you know.

13 That's what we need to tell them. They
14 come. They have to do this. They have to do that. If
15 they fail, they go to jail. If they fail, this happens.
16 They have to face their fears. They have to face their
17 these. You know, these people are human being after all
18 and that's what I do.

19 MR. JONES: Thank you. And your sense is that a
20 team approach is more important to the success of a drug
21 court than the individual personality of the judge.

22 MS. LONERGEN: I believe that the chemistry in
23 the team is extremely important. If you don't have the
24 chemistry, you don't have anything. The judge leads the
25 team but the judge needs support from people like Sergio

1 that have that background in how to deal with addiction one
2 on one because, you know what, as an administrator I'm a
3 realist and I'm not going to have a judge that goes to
4 Miami-Dade at night and puts himself through -- how many
5 courses, judge? I don't even want to know but it was over
6 a year, okay, to learn about addiction. I'm not going to
7 have that all the time.

8 But I do need one judge that has -- that
9 believes that these are not lost souls, that you're not
10 necessarily doing drugs because you want to, that there is
11 some sort of thing in your body that makes you an addict.

12 MR. JONES: Thank you. Sergio.

13 MR. MURIEL: My name is Sergio Muriel, case
14 manager for court, more on the -- obviously the clinical
15 side background, the clinical side.

16 I really have an opportunity to go in
17 and -- I really deal with the individual separately. You
18 really get to know the client. You do a brief assessment
19 on the client, and by doing a brief assessment on each
20 individual, the way it's designed is that we're able to
21 really see what each individual client has, what are some
22 of the problems that he has, and you can really address
23 that.

24 If -- first of all, what the client is
25 addicted to just for the basic thing that if he's addicted

1 to heroin, we're able to address that right away before --
2 let's say, he goes to jail and has a seizure in jail
3 because of detox or withdrawals, so we're able to address
4 that right away and let Judge Rosinek know he needs an
5 order to get him into a detox before he sends him for
6 treatment.

7 And then if there's a -- as you said, a
8 domestic violence, if there's any issues like that, they're
9 involved with any of the courts, we're able to address that
10 and set up something where we're able to go with the client
11 and make sure there's not a warrant issued for that client
12 because he's in our court.

13 We're able to send clients to trauma
14 services. A lot of times, many times there's a lot of
15 abuse involved in early childhood, which is really a lot of
16 the problem with a lot of these clients, particularly with
17 females, a lot of sexual abuse, and we're really able to
18 identify that and send them to a place where a specialist
19 is able to see them.

20 Again you mentioned mental health issues.
21 I think, first, we find out if the client has any
22 insurance, which most of our clients do not. Fortunately,
23 we have a lot of resources. We're continuing to gather
24 resources every day as much as we can. Obviously this is
25 not nearly enough to go around. We refer these clients out

1 to see a psychiatrist. In some cases, it's unfortunate but
2 they have to wait two or three weeks before they actually
3 see a doctor and get the medications that they need.

4 So a lot of times while they're in
5 custody waiting for that jail sentence, we supply
6 medications and whatnot before they're sent to a
7 residential treatment or outpatient services.

8 One of the main things that we're able to
9 do as case managers is we're really able to be there for
10 the client. Many of the clients that come through there,
11 maybe they come from broken homes or their parents may be
12 involved in addiction, or whatever it may be, they haven't
13 had the guidance or the direction that maybe most of us
14 have had in this room, so they haven't had anybody there to
15 tell them -- maybe push them in the right direction, so a
16 lot of what we're able to do is we're able to be there for
17 them.

18 Obviously when they go to treatment, they
19 go to outpatient or residential. They have a main
20 therapist there. By us being there with them, calling them
21 on the phone, we're able to maybe be like a big brother and
22 give them some individual counseling, kind of push them
23 along. If they're starting to veer away a little bit,
24 we're able to bring them back.

25 Before, for instance, there was case

1 managers -- I mean, 2,000 clients. You can imagine how
2 difficult it is to keep track of all the clients, so that's
3 one of the main things we're able to help out with as
4 opposed to -- as the judge mentioned, it's very important,
5 it's vital that we get the clients immediately. That's so
6 important, that we are able to have contact with the
7 clients right away hopefully before the relapse, but, if
8 not, by being sanctioned right at the relapse is very
9 important because they need to know -- every addict is
10 going to forget what happened yesterday very quickly.

11 MS. LONERGEN: I just want to add one thing we
12 haven't mentioned before and I think it's key. Judge
13 Rosinek came up with the concept of introducing case
14 managers for a very specific population. We had folks that
15 we knew were going to fail. You know, those addicts that
16 are high recidivism and just very difficult.

17 And he was sitting around one day talking
18 to himself because back then there wasn't many people --

19 JUDGE ROSINEK: Nobody listened to me.

20 MS. LONERGEN: -- that he could rely on. No,
21 honestly, he was the one that came up with the whole
22 concept of the case managers for pregnant females, direct
23 file juveniles -- they're still juveniles but they come to
24 the adult court -- and those folks that have a high
25 recidivism rate. And he said to me, "Sandy, I would love

1 it if we get 25 percent graduating drug court," and we
2 ended up with 79 percent of that population graduating
3 which was a huge surprise to all of us but, you know what,
4 when I started working --

5 JUDGE ROSINEK: It was 69 percent. I love 79
6 but I really think it's 69.

7 MS. LONERGEN: Okay. I'll go with you because
8 you're the judge.

9 JUDGE ROSINEK: Even when I'm wrong, I'm right
10 as a judge.

11 MS. LONERGEN: The reason is the case managers.
12 These guys if they OD, they're at midnight at the hospital.
13 If they're having a hard time at two clock in the morning,
14 guess who they call? The case manager and they answer the
15 phone.

16 JUDGE ROSINEK: It's true.

17 MR. JONES: So besides you there's six other
18 case managers?

19 MR. MURIEL: Yes.

20 MR. JONES: But you don't serve the entire
21 population? You serve that segmented portion of the
22 population that she just described. So what's your
23 individual person case load?

24 MR. MURIEL: It's approximately 30 and sometimes
25 more. We're not able to get everyone who would need a case

1 manager.

2 MS. LONERGEN: We sure don't.

3 JUDGE ROSINEK: But they're incredible.

4 Truthfully they are incredible. I have gotten calls from
5 them, a kid is being arrested. It's now 11:30 on a
6 Saturday night. The case manager is there. The police is
7 there. I'm speaking to this kid's manager who is speaking
8 to the police trying to stop the arrest because it's truly
9 a stupid arrest. Or a girl is at a crack house and
10 suddenly she calls the case manager who goes to the crack
11 house on Sunday morning at two clock in the morning to
12 salvage this girl. Or the kid is taken to the
13 crisis center.

14 They work 24 seven. They are incredibly
15 underpaid, incredibly underpaid, and they are the backbone
16 of our program. I mean, without them we would lose
17 hundreds of people a year, truly lose hundreds of people a
18 year, and some of them I mean losing them to death.

19 But this case manager concept has
20 salvaged lots of things including me. I mean, they have
21 renewed me as a judge because it was exhausting. I was a
22 case manager for 2,000 clients. My telephone, I would get
23 calls from defendants all the time. Now they take the
24 calls. At first I had to give up -- and that was the tough
25 part. I had to give that up and they told me, "Judge, I'm

1 the case manager, you're not. Back off," and it's true and
2 they do a phenomenal job and so we're just really grateful
3 for them.

4 MS. LONERGEN: And for the defense bar sometimes
5 it's very difficult to understand or to accept that a case
6 manager may drop your client and come back and tell the
7 judge, "Judge, he's dirty." You know, we're there to treat
8 the person and we've overcome a lot of issues and we're
9 glad that we have because they are -- I don't know what I
10 would do without the case managers now.

11 MS. YOUNG: Well, I guess -- and I can
12 understand your case load is 30, and I guess is there only
13 one public defender assigned?

14 JUDGE ROSINEK: There are now two.

15 MS. YOUNG: But if you have a case load of 2,000
16 so each one is caring -- so are you viewed as augmenting
17 the role of counsel or do the people that are your clients
18 end up sort of transferring allegiance or whatever, if
19 there is such, to the case manager because that's who's
20 advice they're going to heed as opposed to defense counsel?
21 I mean, what it --

22 JUDGE ROSINEK: Case managers do not give legal
23 advice and they're told not to give legal advice. Same
24 thing, counselors in programs do not give legal advice.
25 They're told not to. They do it all the time, but they're

1 told not to give legal advice. And when it comes to legal
2 advice, that's private counsel or the public defender.

3 When it comes to treatment, that's their
4 job. They work with treatment, the individuals going back
5 to school, staying clean. They go to their house, make
6 sure the family is okay.

7 They don't talk about the case at all,
8 the facts of the case. No one ever talks about the facts
9 of case because none of us care about them. But it's not
10 allegiance. There are different allegiances because people
11 in court, really, they show me their type of loyalty as a
12 human being. They show their case managers their loyalty.
13 They show counselors their loyalty and they're represented
14 by an attorney, and there's this client/attorney
15 privilege -- client/attorney loyalty that's there but
16 different.

17 The case manager does what the case
18 manager does to get the person in school, get the person
19 the proper treatment, get the person the proper medication,
20 make sure the person shows up on time for appointments and
21 stuff like that. The legal aspects of that case, if there
22 are some, are argued by the attorney in court.

23 MS. YOUNG: So there's no confidentiality with
24 case manager, even if they're in some sort of treatment?

25 JUDGE ROSINEK: There's always

1 confidentiality.

2 MR. MURIEL: We can discuss some of the
3 information but we cannot discuss the specifics, that way
4 we can speak to the client. And a lot of times we work as
5 a team. We have meetings on Mondays and Fridays but we
6 need specific consent from the clients to speak with them
7 about specifics. We even need a consent release to speak
8 with the parents. I will only speak to the mother and
9 father and I will tell them that the client is okay and in
10 treatment, but I won't discuss any of specifics of the
11 client without the consent of the client with anyone.

12 MS. SHIFMAN: What about their lawyer? Do you
13 speak with their lawyer about the specifics, because you
14 might have different information than their lawyer has?

15 MS. LONERGEN: We have staffings, if you will.

16 MS. SHIFMAN: So the defense lawyer goes in the
17 back, sort of like a pretrial conference, to talk about
18 what's going on for the day and what's on calendar?

19 JUDGE ROSINEK: Usually on Mondays. We take the
20 major cases that we know they're going to be a problem and
21 discuss them before court and we go down, and we have the
22 public defender there, the prosecutor is there, case
23 manager there, the coordinator is there and I'm there.

24 When a defendant signs a waiver,
25 speedies, part of it is the right -- the attorney and the

1 client sign a right to allow me to speak to the client
2 outside the presence of the attorney about anything except
3 the facts of the case and that way clients open up to me
4 maybe sometimes more than an attorney -- maybe more than an
5 attorney, and generally it's about a problem that they're
6 having at home. It has nothing to do with this case. It's
7 usually a family matter, a financial matter, and they feel
8 that I can handle that.

9 They will come in, my door is open. They
10 walk in and we'll talk about lots of things. If it's a
11 problem about drugs or something, if there's a case
12 manager, I'll speak to the case manager about it. If it's
13 a problem about a person who's using something, I will tell
14 them to contact their attorney, let their attorney know
15 about it, and I want them to speak to their attorney right
16 away about that problem.

17 MS. SHIFMAN: Let me ask you a follow-up
18 question. When you have these -- what do you call these
19 again?

20 JUDGE ROSINEK: Staffings.

21 MS. SHIFMAN: When you're having these staffings
22 and you might be discussing about whether or not to drop
23 someone from the program based on statements they might
24 have made to you or the case manager, right? You know,
25 what is the role -- I mean, realistically or practically,

1 what is role of defense counsel in being represented if
2 they're making these admissions that may result in them
3 moving into criminal court?

4 JUDGE ROSINEK: It's an interesting dynamic
5 because it's more difficult to get thrown out of drug court
6 than to get into drug court and that's one of the things
7 that we do. We talk about -- nothing affects us. If
8 they're going to be in treatment, they tell me they're
9 using.

10 Truthfully, we have lots of juveniles
11 that come in and say, "I have a problem. I'm in a gang and
12 I'm forced to sell drugs." They come in and tell me that
13 stuff, and I think, oh, crap, what am I going to do with
14 that stuff? I'll say, "Let's think of alternatives," and
15 I'll speak to their attorney and case manager. "Let's talk
16 about alternatives. Do you have relatives in Tampa? Move
17 to Tampa so you don't have to be involved in this stuff."

18 And it's a very interesting thing. Things that
19 they tell me rarely are used against them. Like if they
20 have an armed robbery, that's a different story. At that
21 point and time I say, "You best speak to your attorney
22 about that. I don't want to get involved."

23 MS. SHIFMAN: But these things get disclosed
24 while the prosecutor is present for the staffing as well?

25 MR. PAULUS: But the triggering mechanism is not

1 that act of whether they relapsed or not. The triggering
2 mechanism would be they failed to appear for court, they're
3 lying in court or they go out and commit a new set of
4 crimes for which they have been arrested for. They go out
5 and commit an armed robbery, it doesn't really make a
6 difference what they say or didn't say. They're getting
7 out of the program because they violated the program rules.

8 You have to understand it's between the
9 team. I understand it's a little surreal to people who
10 have never been there before and also to some other
11 prosecutors and defense attorneys who have never been part
12 of drug court.

13 It's an alternative universe in many
14 respects because the prosecutor is not acting like a
15 prosecutor and the defense attorney is not acting like a
16 defense attorney. It's more of a team approach with the
17 case managers, with the judge, with the staff to see what's
18 the best treatment option for this individual because
19 everyone has made the decision, "We're not prosecuting you."
20 The defense is saying, "We're not defending you." The
21 prosecutor, "We're not prosecuting you. We're going to try
22 to get you rehabilitation." That's sort of the goal. So
23 the statements come up, it's never a situation where
24 defense says, "Oh, my God, don't say that because the
25 prosecutor is going to write that down and prosecute you."

1 That doesn't happen.

2 MS. LONERGEN: We'll tell them sometimes --

3 JUDGE ROSINEK: The client will say something in
4 court and I'll say, "Motion to strike granted" quickly, get
5 rid of it, because we just can't have -- they'll say
6 something in court which could be used against them if they
7 were somewhere else and I'll strike it from the record.

8 Most of the time I'll say, "Sidebar." If
9 I want to throw somebody out, we're going to be talking
10 about it at sidebar. And I've had many times the state has
11 said, "Judge, I don't think you're giving the person a
12 proper chance." I'm getting the public defender and the
13 state attorney attacking me for throwing somebody out of
14 the program, and generally I'll listen to them and I'll
15 say, "Okay. We'll give them one more chance, one more
16 shot, but, PD, best speak to your client. Can we get a
17 case manager for this individual? Let's get a case
18 manager. Let's try something else."

19 It really is different. It's a totally
20 different world. The prosecutor listens to a lot of things
21 and has nothing to do with prosecuting that case. I mean,
22 the prosecutor is part of the team, and when we're talking
23 about treating that individual, we're talking about an
24 individual and not a crime.

25 MS. LONERGEN: For example, we had a person the

1 other day that the judge was going to give him two weeks
2 because he was dirty and he denied it and the whole thing
3 and the public defender said, "You know these are the
4 rules. You know the rules. You came and you did this."
5 The state attorney and said, "Well, judge, instead of the
6 two weeks, I think it's better if he goes and spends it at
7 a living facility and gets this and this and this." Now,
8 he ended up going to a living facility instead of the jail
9 and it was really the state attorney who made the argument.
10 It crosses over.

11 MR. JONES: I want to get some other people into
12 this. Let's do Elizabeth then Marvin then Jay.

13 MS. KELLEY: Judge, on the Power Point
14 presentation, you have a slide that listed Campus Life
15 Program. Could you tell us how --

16 JUDGE ROSINEK: Yes, we don't have a lot around
17 the United States. They started this -- it's the same
18 thing where you have the campus police arresting people for
19 drug crimes and they go before a campus court and sometimes
20 it's a student court that the administration and the
21 student government allows to exist as opposed to
22 prosecuting somebody for a drug charge, and they do a
23 treatment program through the Department of Health or the
24 Health Department and the campus. I don't know the number
25 of universities that have it.

1 I submitted a program -- a suggestion to
2 the University of Miami to try this and, I don't know, I
3 didn't get much of a response, but I think that there is a
4 major alcohol and drug problem on college campuses. When I
5 went to school, it was alcohol and then the marble and the
6 chisel, but we had an alcohol problem and maybe a marijuana
7 problem when I went to school, but now it's much heavier
8 drugs.

9 We have lots of kids that are being
10 arrested from FIU, Miami-Dade, University of Miami, local
11 colleges that come through our program, so a campus program
12 is really a great start and would be something that, if you
13 guys get behind it, you can really push it carefully into
14 the colleges in your areas.

15 MR. SCHECHTER: I just want to put this thing to
16 rest.

17 MR. JONES: Let Sandy finish.

18 MS. LONERGEN: I was going to say, in the
19 horizon we are keeping our eye on the baby boomers because
20 we're starting to see that they are -- I know -- they are
21 starting to use and sometimes abuse prescribed medication,
22 so I'm predicting that within a few years we will have to
23 look at this population in a totally new way. This is what
24 I do, I look --

25 JUDGE ROSINEK: Elderly drugs.

1 MR. SCHECHTER: In this relationship that you
2 develop with the client and then at staffing meetings a lot
3 of confidential stuff comes out about the client, and then
4 somewhere along the line, in some small amount of cases you
5 have to kick the person out of the program so they're out.

6 Is it the policy of the State Attorney's
7 Office to in any way in a new crime for which the person is
8 prosecuted to go back to the drug court people, issue
9 subpoenas, try to find out information that can be used to
10 impeach the defendant if he takes the witness stand in a
11 new case? Do you ever do that? Has it ever happened? Do
12 you know of any situation?

13 MR. PAULUS: To my knowledge, it has never
14 happened.

15 MR. JONES: Is there anything that bars you from
16 doing it and could it happen going forward?

17 MR. PAULUS: Well, I mean, in a case scenario
18 whereby the person came to court and said, "Judge, I used
19 last night. I was totally cracked out and, by the way, I
20 shot my mom" and that statement is made in open court in a
21 public forum and now we have a murder prosecution because
22 he gets out of drug court. I would suspect that the public
23 would want the prosecutor in that scenario, since it's in
24 the public record, to that get information because it would
25 be relevant to the murder charge.

1 But where they're kicked out on --
2 whatever violation, very rarely does the prosecutor in drug
3 court have any real communication with the prosecutor in
4 the other court other than, "We refer the case to you."
5 They don't share information. We don't talk about
6 information. It doesn't really work like that. It's so
7 treatment oriented.

8 MR. CLARK: But it could?

9 JUDGE ROSINEK: Well, it's a possibility the sun
10 will not rise tomorrow.

11 MR. SCHECHTER: It's not happening right now?

12 MR. PAULUS: To my knowledge, it's never
13 happened.

14 JUDGE ROSINEK: There is nothing that prevents
15 it. It's never happened. And if it happened, the
16 credibility of the state attorney would be dissipated in my
17 courtroom. I mean, we'd have to change the entire policy
18 if it happened once. It's never happened once.

19 MR. SCHECHTER: It would go really to the heart
20 of the whole concept because what you require, truth from
21 the defendant, would be totally undercut so you couldn't
22 get it any more. You couldn't guarantee it.

23 JUDGE ROSINEK: It could have happened with one
24 prior prosecutor but she left.

25 MR. CLARK: Judge, we're obviously concerned

1 about how do we explain this to our client given his
2 options, whether to stay in drug court or go to one of the
3 other courts and take your chances there.

4 At looking at the Power Point handout
5 that you gave us, it shows -- there's a video or DVD,
6 defense attorney, court staff, judge explained program.
7 What is that video or the DVD about?

8 JUDGE ROSINEK: It's an 18-minute DVD that
9 starts with just an introduction by myself, the
10 coordinator, speaking about what the overall policy is of
11 the drug court, what we do there.

12 It has Kathy Fernandez-Rundle, state
13 attorney, speaking about why she's in favor of it, then a
14 state attorney speaking.

15 It has Bennett Brummer, the public
16 defender, speaking about why he thinks it's important to
17 have it, and then the public defender and assistant public
18 defender speaking.

19 It has our county coordinator speaking.
20 It has our treatment person. It has a person from the Jobs
21 program speaking, and then a liaison from school board
22 speaking, and it gives an overall of what is happening.

23 The public defender then also hands out
24 some type of handout about what to expect in drug court,
25 and then we ask in court, "Do you understand it?" If you

1 don't, then we have somebody else explain it. It may be
2 either a case manager, it may be my bailiff.

3 If they still don't understand, I send
4 him back to the public defender, "You try to explain it,"
5 and one of the public defenders goes out and speaks to the
6 individual, and then they decide if they want it.

7 Basically the bottom line is, "If you
8 don't know, an arraignment is in 21 days. Take it now.
9 You have 21 days to find out because at arraignment, if you
10 want to get out, you get out no matter what." So then once
11 they sign a waiver -- the public defender signs a waiver,
12 they're in drug court. The only way they get out is if
13 they're clean.

14 MR. CLARK: That was the next question. Before
15 I get there, is it possible to get a copy of DVD and given
16 to Scott?

17 JUDGE ROSINEK: Absolutely.

18 MR. CLARK: On that same Power Point slide, it
19 talks about signs waiver, medical releases. I want to
20 make sure, what is the waiver they're signing? What is it
21 they're waiving?

22 JUDGE ROSINEK: Waiver to a speedy trial.

23 MR. CLARK: That's it?

24 JUDGE ROSINEK: The only other thing is, the
25 bottom line, they can talk to me about anything except the

1 facts of the case. It's public defender document.

2 MR. JONES: In both of your -- Sandy and Dave,
3 your opening comments, you both talked about the sort of
4 undeniable benefits of drug court and that your proponents
5 of it, and I believe Sandy said that everyone agrees that
6 it's worked. And then you also talked about the
7 sustainability and funding issues and lack of resources and
8 not having enough resources, not having enough judges, not
9 having enough case managers, all of that.

10 And I'm wondering, because earlier in the
11 day we took testimony from Bennett Brummer, who is a long
12 time elected public defender in this county, and one of his
13 chief deputies, and they clearly want to see you out of
14 business.

15 And my question is how much of an
16 impediment is it to the work that you do to growth and
17 sustainability and resources and all those kinds of things
18 and legislation, how much of an impediment is it to you all
19 that Bennett Brummer and his office really is so adamantly
20 opposed to what you guys are doing.

21 JUDGE ROSINEK: It's ironic because he was part
22 of the founding -- he just got an award for his wonderful
23 work. He spoke at the National Association of Drug Court
24 Professionals about how, of course, if it wasn't for him it
25 wouldn't have happened and he's in favor of it and so I

1 have difficulty. I guess when he's speaking to his
2 brethren he says that.

3 MS. YOUNG: Let me interrupt for a second.

4 JUDGE ROSINEK: It's shocking if he said that.

5 MS. YOUNG: What I recall -- and he said he was
6 one of the three founders. I thought he actually liked
7 drug court. He said Miami-Dade's drug court is a very good
8 drug court. What he regretted is what it became in other
9 places.

10 MR. SCHECHTER: In the international model. The
11 DV court.

12 MR. JONES: And this is obvious -- I mean,
13 obviously we will ultimately go back to the record, but I
14 thought Marvin asked specifically his deputy --

15 MS. LONERGEN: Who's his deputy was here?

16 MR. SCHECHTER: DeMaria, Rick DeMaria.

17 MS. LONERGEN: Oh, he's from domestic
18 violence.

19 MR. JONES: When asked if he could get rid of
20 all of these courts, would he do it and he said yes.

21 MS. SHIFMAN: I believe he said because he
22 regretted what spun off the success.

23 JUDGE ROSINEK: He's against specialty courts.

24 MR. SCHECHTER: Rick is right. That was the
25 question.

1 JUDGE ROSINEK: The expansion of drug court to
2 other models. He's against the mental health court. I
3 understand that. But, as I said, I was shocked when you
4 said that because he got the national award for it and he's
5 part of the founders. I'm thinking, wait a minute, is he
6 speaking differently to you? And he's not because he is
7 against all the other courts. He leaves us alone.

8 MS. LONERGEN: Actually when we had a
9 moratorium, he wrote a letter asking for more resources.

10 MR. JONES: Maybe he opted you out.

11 MS. LONERGEN: Maybe.

12 JUDGE ROSINEK: It's difficult when you
13 fathered a child to say I don't want to be with the kid any
14 more, and that's what it is because I think he thinks that
15 this is fine -- this concept here but I think it has been
16 bastardized by other things and I think that's what he
17 feel.

18 MS. YOUNG: You mentioned that -- you said
19 Colorado and Connecticut had stopped drug court but then
20 they started them again, and can you speak, if you know,
21 why is it they stopped them? Is it just funding --

22 MS. LONERGEN: I can't speak for specifics but I
23 understand there was a funding issue back in Colorado. I
24 don't have a lot of details.

25 JUDGE ROSINEK: I think it was a funding issue.

1 In the State of Florida about five years ago the
2 legislature enacted a legislation that said that in every
3 circuit there shall be a drug court. Then they realized
4 they have to fund it. So the next year they changed it,
5 every county may have a local drug court and local option
6 and that's the problem.

7 In the State of Florida we have built in
8 the last six years, 90,000 additional prison beds,
9 something like that, and we have cut treatment dollars, so
10 it's a major, major problem.

11 Right now we're going through a tax
12 crunch. We don't know what it's going to look like. We
13 don't know what this new bill will be that's going to come
14 out of the legislature in reference to real estate taxes
15 which affect local options, so we have a major funding
16 problem as every drug court in Florida has.

17 We are more fortunate. We have a county
18 commission that provides a major support for us in
19 treatment. We have the county treatment program which
20 handles 60 percent of our treatment virtually for nothing,
21 that the county will pay the money, because that's how it
22 started 18 years ago, and it's just ongoing treatment which
23 we're very fortunate to have.

24 We have gotten in the past a few 100,000
25 from the county. That was cut back. We get \$40,000 this

1 year. Another county commission gave us \$10,000 to help
2 augment our cost for our case managers.

3 Our court will now pick up two case
4 managers' salaries. We just got an e-mail today that said
5 as a result of the review of the budget, the money was
6 there for those two case managers, and now we have to find
7 for money for the rest of the case managers and that's
8 where you get to Ritchie -- Ricky. But I think it's a
9 financial problem.

10 We are a successful drug court but we
11 have lots of problems, and if the finances continue, then
12 we're going to have major, major problems. We cannot
13 continue to grow as we are.

14 As I said, we had a moratorium. We
15 dropped back 450 cases in four months. In one month we
16 added 250 cases again, so we're over our 2,000 numbers.
17 It's a problem. It's not a priority even in this community
18 and this is the first. It's not a priority drug court. We
19 should have had a second drug court.

20 MR. SCHECHTER: That's really what you said,
21 David, is that we really should be talking about a second
22 drug court.

23 MR. PAULUS: We should of. We had the
24 resources.

25 MR. SCHECHTER: This is so rare that we find the

1 prosecution, the defense and the judiciary all on the same
2 side and you can't convince the legislature to give us a
3 second court? Is it that bad?

4 JUDGE ROSINEK: That's one of the big things.
5 And then it's -- if we get another judge, the question is
6 where does it go? Where's the greatest need? I, of
7 course, say it's drug court because we salvage lives.
8 Incredibly we salvage lives.

9 MR. SCHECHTER: How about cost?

10 JUDGE ROSINEK: And for cost and for everything.
11 But we created a business court because there was a great
12 upcry from the downtown community of cases that are just
13 lingering there for years that are in excess of \$7,500 so
14 that court opened up last year as opposed to giving us on.

15 And we have a major upcry from the
16 prosecution for our repeat offender courts, so we created
17 two repeat offender court. Now, those repeat offender
18 courts each have 225 cases. The downtown court has 125
19 cases and we have 2,200. Still not a priority and I don't
20 know what to do. I expected the private bar to scream and
21 cry and yell when we shut the drug court and there was not
22 even a whimper. Two letters to our chief judge.

23 MS. LONERGEN: They didn't whimper but what they
24 did do was continue the cases of their client, and as soon
25 as we opened again, boom, everybody transferred in.

1 JUDGE ROSINEK: The private attorneys did a good
2 job holding their clients.

3 MR. JONES: Anyone else? Thank you very much.

4 JUDGE ROSINEK: You're very, very welcome.
5 Thank you.

6 MR. JONES: We appreciate this conversation and
7 we would ask you a couple of things. One is that as we
8 continue on this journey, as we continue to go around the
9 country, if you come into possession of information that
10 you think would be helpful, please forward it to us. We'll
11 take all the submissions that we can get. And also, with
12 your permission, as we go along, if we have more questions
13 for you guys, we'd like to be able to get those to you.

14 JUDGE ROSINEK: And if you come into a lot of
15 money, call us.

16 MR. JONES: We appreciate this and we thank you
17 for your time.

18 (Time noted: 4:55 p.m. to 5:00 p.m.)

19 MR. JONES: Welcome, gentlemen. We have saved
20 the best for last, I believe. End of a long day. We are
21 excited about having this conversation with you. Your name
22 has come up once or twice during the day so we are looking
23 forward to this conversation.

24 What we'd like to do is give you guys 15
25 minutes or so, and you can divide it however you see fit,

1 to tell us a little bit about the work that you's doing and
2 your connection to problem-solving courts and, as you can
3 tell, we have a number of questions and areas that we'd
4 like to talk to you about.

5 So with that, if you could just basically
6 identify yourselves for the record and then give us your
7 opening statement.

8 MR. BARON: I'm Richard Baron. I'm an attorney
9 here in Miami but I'm here today as President of the
10 Friends of Drug Court.

11 MR. MARKUS: I'm David Markus. I'm a local
12 attorney that practices in front of drug court and I'm a
13 graduate of drug court.

14 MR. JONES: Fantastic.

15 MR. BARON: I didn't know what I was going to
16 say when I got here so I guess I'll tell you why I got
17 involved with Friends of Drug Court and what it means to me
18 and a lot of other people.

19 Twenty two years ago this month I was
20 sitting at my desk with a propane barbecue gas tank under
21 the desk, a hole drilled through my desk and a blow torch
22 attachment coming through the hole firing up cocaine pipes
23 compulsively smoking cocaine 14 hours a day. I was doing
24 that for two and a half years and the preceding 10 or 15
25 years was a progression of drug addiction.

1 I didn't know I was a drug addict. I
2 thought I had a drug problem and I made a lot of money in
3 terms of my legal practice so I didn't have to steal money
4 from my clients and I didn't even have to work. I just sat
5 and smoked cocaine until one day it was either quit smoking
6 or die.

7 And what happened was that I quit smoking
8 and I got a second chance at life and for the next 22
9 years -- that was October 10th, 1985, the day I picked up
10 my white chip from Narcotics Anonymous, and for the
11 succeeding 22 years and a week I didn't have to pick up
12 drugs.

13 And that happened, in part because I
14 wanted to stop using, that was the small part, but the
15 major part because there was an Alcoholics Anonymous and
16 there was a drug treatment center in Mississippi that
17 literally saved my life. I had heart problems, lung
18 problems and I was a very, very sick person.

19 I lost everything. I lost my wife, my
20 family, my home, my practice, my self esteem. I didn't
21 lose my license because I didn't cross that line like a lot
22 of other lawyers did.

23 So I was given a second chance and I came
24 back to this community and most, if not all, but
25 significantly most of this community welcomed me back with

1 open arms.

2 And I was known as a drug addict because
3 I had disappeared and people were talking, "Where is
4 Ritchie Baron?" "Probably down in his office smoking
5 cocaine." So I figured if I was that notorious in my drug
6 use, I'm going to be notorious about my recovery. I was
7 very open about who I was, that I was a drug addict, and
8 that I had a disease -- I have a disease and that I wanted
9 to bring the awareness of the disease to the forefront,
10 that anyone can get it. I was a nice Jewish boy from
11 Brooklyn, New York and I got the disease.

12 And I became very outspoken about
13 recovery. Recovery became my main focus in life and is
14 still a very important part of my focus and I got to know
15 Judge Rosinek. Actually I knew his predecessor. I was
16 never involved in the formation of the drug court but I was
17 happy to see it come on board. And I knew the previous
18 judge. I never had a case in that court.

19 But I got to know Judge Rosinek, had a
20 few cases, got to respect very much what he was doing,
21 appreciated what he was doing. I saw a man really give 100
22 percent of his energy, time, caring, to helping people from
23 the lowest to the highest levels of life. Some of the most
24 significant people in the community went through drug court
25 and some of the lowest scum, and Rosinek treated them all

1 the same, and he cared about the individual and made a
2 difference.

3 And one day we were talking and he said,
4 "You know, there are so many kids I'd like to help and I
5 don't have the funding," and together we came up with the
6 concept of filing a 501C3 to see what money we could raise
7 to help the defendants in drug court and help the drug
8 court itself.

9 So it was just a dream but I took it, I
10 took the ball. I never filed a 501C3 application. I've
11 done several since for other drugs court when they tried to
12 get out of it. It was a huge pain in the butt but we did
13 it. We got the 501C3 acknowledgment and we went to work
14 trying to raise money.

15 And what we do is we have fund raisers.
16 The judge asks every graduate for a voluntary contribution
17 as part of the packet to Friends of Drug Court. I've
18 spoken to the state attorney's office and got Friends of
19 Drug Court to be one of their charities they recognize when
20 pleas are made and Friends of Drug Court is one of the few
21 charities that are considered by the court.

22 I've met with each of the judges in the
23 criminal division either individually or collectively to
24 convince them to keep the Friends of Drug Court on the
25 forefront of their minds when financial deals are being

1 plead and people -- usually wealthier people are catching
2 breaks in the system by pledging large amounts of money to
3 charity to get a reduced charge, take a plea for lesser
4 charges, and I tell the judges collectively and
5 individually "Keep the Friends of the Drug Court in mind."

6 And there was a recent case within the
7 last couple of weeks where a young man was playing with a
8 gun and killed his best friend and he was charged with
9 second degree, and the state and the judge in this case
10 worked out a plea of manslaughter where he got 10 years
11 probation and part of his probation was every six months he
12 has to contribute \$2,500 to Friends of the Drug Court.

13 I mean, you can't bring back the child
14 that was killed and his parents weren't particularly happy
15 but it was clearly an accident. But the structuring of
16 that type of plea was a win/win for almost everyone, and
17 the Friends of Drug Court was the beneficiary of that
18 because of the efforts of Judge Rosinek as much as he can
19 under the canons of ethics. And me and other adversaries
20 from the drug court do remind the courts of our existence.

21 We've had very successful fund raisers.
22 We raised \$180,00, which, coincidentally, Rush Limbaugh was
23 going through his problems and he donated \$100,000. We've
24 raised about a million bucks since we have been in
25 existence since 2003 and a lot of it is 100 and \$200

1 contributions, and you heard the 100,000 from Rush
2 Limbaugh, and we raised 180 that night of which we got 90
3 so -- 10 percent of it came from one function but 90
4 percent of the money comes from people contributing, going
5 out -- I'm always looking whenever I have an opportunity.
6 If someone wants something from me, "I'll contribute to
7 your charity but I want you to contribute to mine."

8 So my thrust is and my involvement with
9 Friends of Drug Court is to administer the program. And
10 here is incredible statistic. Almost 100 percent -- 99.9
11 percent of our dollars goes back into helping drug
12 addiction in the system and one percent used for
13 administrative cost, and that one percent is used for an
14 independent person to come and look at our books. I'm the
15 one in charge of the books. I would have volunteered to
16 pay that but I was insulted that they actually need it for
17 the 501C3.

18 So that's our expense. Everything is run
19 out of my officers. We don't charge for anything. We lend
20 money to drug court for people who need it for housing,
21 books, clothing, health care, eyeglasses, hearing aids, any
22 valid purpose where an indigent person -- most drug court
23 defendants are indigent, and by the time they get to us
24 they're broke and indigent, if that's not redundant.

25 And they know they have up to six months,

1 if they're in the program for six months. And they don't
2 have to be perfect in the program, just stay in there,
3 because drug addiction is a relapsing disease and a few of
4 us don't relapse but most of us do, but we understand that,
5 and if somebody is in the program and needs a loan for
6 housing or for school, books, tuition, that type of stuff,
7 we lend them the money.

8 The repayment rate is not great. We hope
9 to get it back. We recycle the funds. We really don't
10 expect to get it back so we really count on outside
11 support.

12 The bulk of our money goes to help the
13 court which is unfortunate because I think the county
14 should have to pick that up. We got approval for two case
15 managers. Friends of Drug Court funded about \$45,000 a
16 year through work expansion. So that's a pretty good drain
17 on the budget but it's money well spent because the more
18 case managers in the system, the better the defendants'
19 care is, the better the defendants' schooling, work
20 opportunities, all those things.

21 All that is much more closely monitored
22 because if there are only two case managers for 2,200
23 defendants, you can imagine the chaos. Even five is chaos.
24 We could probably pay for one more. We hire the person and
25 we screen with a panel and the judge and pick out the best

1 candidates and we have a terrific group of case managers.

2 In a nutshell that's what the Friends of
3 Drug Court does. It's an opportunity for me to give
4 something back because I feel as though I've been given a
5 second chance and I want to help as many people as I can
6 get that same blessing.

7 And one of the people who I know is also
8 blessed with a second chance is sitting to my right, one
9 terrific lawyer in our community and I'll let him tell you
10 his story. I'll just tell you when I need someone to come
11 speak, the first person that says yes is David.

12 MR. JONES: Before we get to you, David, how
13 many people make up Friends of Miami-Dade Drug Court
14 besides yourself?

15 MR. BARON: There's five members on the board.

16 MR. JONES: And is the process of applying for
17 books and whatever else, is it a formal process or informal
18 process? How does that work?

19 MR. BARON: The person that needs money contacts
20 the judge's JA. They contact me and I contact the
21 defendant or someone in my office contacts the defendant,
22 have them come in, explain what their need is. If it's
23 reasonable -- there's no committee meeting decision. I
24 make the decision unless it's a significance sum, but under
25 \$1,000 I'll make the decision. And we prepare a note, have

1 them sign the note, write them a check.

2 Usually if it's a housing, it's first,
3 last, security and I like to give that directly to the
4 landlord, and someone from my office or myself will go out
5 and look at the housing.

6 When we were new at this three years ago
7 we got burnt. I wouldn't be surprised if some of those
8 checks were used to purchase drugs. Drug addicts are very
9 creative people but it's very simple process.

10 MR. JONES: It's almost like a micro lending.

11 MR. BARON: Except there's no interest and
12 there's no real expectation.

13 MR. JONES: David.

14 MR. MARKUS: My name is David Markus. I was a
15 beneficiary of drug court. I've been an attorney for 26
16 years. I was a prosecutor for five years and I started
17 using drugs as a prosecutor and wound up in full blown
18 addiction and then arrested. I went to drug court and what
19 it did for me was it gave me -- it put some time between my
20 arrest and when the Florida Bar was going to deal with me.

21 Because we have a fairly progressive bar
22 here and if your problem is personal drug use and you
23 haven't stolen your client's trust fund money or done
24 anything particularly outrageous, basic drug addiction, if
25 you get yourself in a program and go through drug court

1 they're going to work with you.

2 And if it wasn't for drug court I would
3 have had some sort of adjudication, and under our bar rules
4 that's an automatic disbarment and it would have been a
5 real struggle for me financially, obviously. I have a
6 wife -- had a wife and child but the bar basically backed
7 off and gave me a chance to go through treatment and to go
8 through drug court and thank God for that because I was
9 able to keep my license and keep my practice.

10 It's been about 13 and a half years since
11 then and now I appear there again as a lawyer. I was
12 appearing there before as a lawyer.

13 MR. JONES: You went to drug court in
14 Miami-Dade?

15 MR. MARKUS: I went to Judge Rosinek. It was a
16 little awkward when I walked in on my case and he said,
17 "Mr. Markus, can I call your case out of turn?" I said,
18 "No, not today. I'll just wait." And it was a lot of --
19 it was very humiliating at first, but when people saw that
20 I was getting back on my feet and serious about staying
21 clean, I got a tremendous amount of respect from judges and
22 other lawyers.

23 And now people come to me when other
24 lawyers are having drug problems or when judges think other
25 lawyers are having drug problems. I mean, the signs are

1 obvious. You don't show up. You're not behaving the way
2 you ordinarily behave, and they come to me and they ask me,
3 "Can you go talk to this guy?" and drug court give me that
4 gift.

5 I think as a lawyer representing
6 defendants, I listened to the panel before. I think we're
7 very unique in this community because of the attitude of
8 the state attorney. He was sincere in what he said to you
9 about they're not interested in prosecuting you if you're
10 in drug court. They're really interested in helping you
11 and they really bend over backwards.

12 When someone is in drug court and has the
13 willingness to try, even though they screw up, they come
14 back and have the willingness to try, they work with you.

15 Judge Rosinek does the same. I've had
16 many clients go out and use and they didn't have court for
17 another two or three weeks and they probably could have not
18 done anything about it, and his policy basically is if you
19 walk in through the front door and you're honest with me
20 about what's going on and demonstrate a willingness to try
21 again, you're probably going to walk out through the front
22 door.

23 And he has the faith of the community --
24 and I'm talking about the defendant community -- because of
25 the track record established and people are willing to

1 trust him and put their faith in him and he's very well
2 known.

3 I regularly attend Narcotics Anonymous
4 meetings and I hear what people in the program are talking
5 about, and he's built a reputation for himself and his
6 court as being something that is of help to them rather
7 than someone who's going to put them in jail.

8 I've seen him put people in jail for a
9 couple of weeks. If people lie, they're going to jail. If
10 people don't show up, they're going to jail. But people
11 who demonstrate a willingness to try to do something, they
12 work with them.

13 There's a lot of lawyers that have bar
14 problems and there's a couple of lawyers that are currently
15 in drug court that I'm aware of, one is a prosecutor. Did
16 you know that?

17 MR. BARON: No.

18 MR. JONES: He's not prosecuting now?

19 MR. MARKUS: Well, ex-prosecutor now. That's
20 one of the consequences that happened to him, but there's
21 lawyers in drug court that get a second chance.

22 Florida has so many licensing laws where,
23 if you have an adjudication, you lose your license. You
24 can't be a cosmetologist in the State of Florida if you
25 have a felony adjudication. And, you know, people who go

1 through drug court can keep their occupational licenses
2 because the case ends up getting dismissed at the end of
3 day. It gives a wide spectrum of people in the community a
4 second chance at life and it's a blessing for me and I try
5 to give back as much as I can.

6 MR. JONES: The clients that you have in drug
7 court are clients who are retained, not appointed?

8 MR. MARKUS: Generally speaking they don't
9 appoint people and send them to drug court because the
10 public defender usually keeps those cases. The public
11 defender doesn't declare a conflict on walk-in defendant
12 cases if someone is going to drug court.

13 MR. JONES: Do you actually make the appearance
14 with your client at drug court?

15 MR. MARKUS: I make the initial appearance with
16 my client and there's really no need for me to appear after
17 that. The only time I need to appear is if there's a
18 problem. If the person is going to their meetings,
19 dropping clean urine, there's really not much of a role for
20 defense counsel. And he has and monthly report and I
21 generally do not appear for the monthly report. I speak to
22 the client ahead of time, "Is there a problem? Anything I
23 need to know about? You want me to go to court with you?"
24 If they tell me they have a dirty urine, then I go to court
25 with them.

1 they're not going to stay clean. They're just going there
2 to avoid the criminal conviction and along the way some of
3 them develop the desire, "Hey, maybe this is a lifestyle I
4 want to adopt." Because there's many defendants, I'm sure,
5 that the day they graduate from drug court, they go out and
6 get high. I wouldn't have a statistic on that, but I know
7 that occurs because some people are there for the wrong
8 reason, but the recidivism rate for drug court is so much
9 lower than the rest of the system it's really noticeable.

10 MR. BARON: I think you might be surprised how
11 many people light up that joint.

12 MR. MARKUS: I don't think many people do. I
13 think it's a rarity.

14 MS. YOUNG: When we started this morning and we
15 heard about drug court, one of the comments that Professor
16 Winick was talking about was how important counsel are in
17 the initial decision that the client has of do I do drug
18 court versus go to county -- go to the other court and do
19 time served, or whatever, or is there a Motion to Suppress.

20 And what I'm hearing you say is for
21 people, primarily professionals that have a license at
22 stake or immigration problems, that's kind of a no brainer
23 because we have to do it because I have to have a
24 dismissal, so that's a shorter discussion. But how much
25 time is either available or needed to discuss with others

1 what the options are and maybe in your private practice --

2 MR. MARKUS: On a retained client, as much time
3 as I need. Privates counsel are not generally appointed to
4 simple possession cases unless the defendant says he
5 doesn't want to go to drug court initially, then we get
6 appointed and then we can speak to them at that point and
7 they can still go back.

8 MS. YOUNG: Anecdotally is there any way you
9 would hear or at a meeting or something saying, "I didn't
10 know what I was getting into. I didn't have enough time"?
11 I mean, is there anything out there anecdotally that you've
12 heard --

13 MR. MARKUS: I think a lot of people don't
14 realize that it does take a lot commitment to succeed in
15 drug court but it takes the exact same commitment to stay
16 clean, and people who want to stay clean and go to drug
17 court, it's not a hard program to do because all you have
18 to do is do what you're doing anyway and just show up to
19 court once a month.

20 The only difference between going to drug
21 court and going to Narcotics Anonymous is you're monitored,
22 drop urines and go to court initially, but everything else
23 you're doing to help yourself stay clean you would do
24 anyway.

25 The problem client is the client who's

1 not really a drug addict in the sense that he's bottomed
2 out and he's done, a recreational user. And if they're a
3 blue-collar worker without a license to lose or citizens, a
4 lot of them just don't want to be bothered with what they'd
5 have to do for that year and they'd rather just take a
6 suspended entry of sentence and pay a fine and call it a
7 day, but that's the client's choice. That's not my
8 choice.

9 MR. BARON: I have an interesting anecdote. The
10 hardest case I ever had in drug court was convincing the
11 prosecutor to drop the intent to distribute charge because
12 it's only a possession in court. Now, there is a provision
13 in the statute that allows you to bring it to the court and
14 the court makes the decision to take someone who is
15 discharged with intent and they usually don't. I have a
16 wonderful relationship with Judge Rosinek but he generally
17 denies intent cases.

18 I had a case where the client convinced
19 me that when the cops searched him, they pulled the cocaine
20 out of his pocket and it was a good story and the
21 prosecutor wouldn't budge. Sorry, he was a real hard ass.
22 He wouldn't budge and I kept delaying the case, and it was
23 Ray who now works for me who got busted as a prosecutor.
24 It's interesting how life works. Its unbelievable.
25 Wouldn't put this kid in drug court.

1 So I then -- I was out of work for
2 several months. I had physical problem not related to
3 drugs and the case was delayed and delayed. Finally I get
4 back there one day and there's a new prosecutor. And I'm
5 not exaggerating, I must have been in that courtroom 15 to
6 20 times trying to convince the prosecutor just to make it
7 a simple possession and on 14 of those times it fell on
8 deaf ears.

9 And on the 15th time the judge says to
10 me, "Richard, we have to get this case moving." He turns
11 to the prosecutor, "What do you want?" "Why don't you drop
12 the intent charge?" "Done." It was just the luck of the
13 draw. He liked my tie. It's that simple. You just never
14 know and the guy graduated from drug court.

15 He didn't really have a drug problem but
16 he did not have a guilty finding and I don't know how he
17 was going to win his case. I was happy to get him in drug
18 court and drug court works.

19 And, anecdotally, when I'm sitting in
20 court and I hear these guys take pleas, credit for time
21 served, I don't know if they're first time offenders or 50
22 time offenders, part of me wants to jump up and say, you
23 know, there's a better way.

24 And occasionally the judge will see me
25 sitting there and say, "Mr. Baron, will you speak to this

1 defendant?" But if I'm not there or someone the judge
2 knows is in recovery is not there, they're not advocates
3 for the court. They want to move the calendar along.

4 And they're knowledgeable. When they had
5 the moratorium I went to all the judges and asked them if
6 they would in effect run the drug court for a year, do the
7 same thing Judge Rosinek did, have the defendant's come in
8 once a month, and if they're clean when they're coming in
9 here once a month, dismiss the case and some of the judges
10 are doing that.

11 I know of half a dozen cases that I'm
12 involved in where I go to court once a month with the
13 client -- in this case I send David there, but there
14 there's six different cases with four judges who are
15 actually doing -- who do the first time offenders finding
16 in the record so there's a commitment in the community.
17 It takes a community.

18 MS. YOUNG: Being defense counsel, you can
19 understand that we're having trouble either grasping or
20 appreciating the role, if any, defense counsel as defense
21 counsel have in drug court or is it really a defense
22 attorney in a more therapeutic role that we didn't go to
23 law school for?

24 MR. BARON: I understand your dilemma and
25 speaking for me, my role is to get them in there because

1 it's really self fulfilling. You go in there and lawyers
2 can't do much once they're in. You get them in and you're
3 doing your client a big favor. You get them into drug
4 court, you're acting as a lawyer. You explain the
5 consequences of losing the motion to suppress, losing the
6 opportunity to go to drug court and having a guilty
7 finding. So our job -- I see getting them into drug court
8 as first time offenders. Once they're in there, there's
9 nothing to do. There really is nothing to do. The court
10 runs itself.

11 MS. YOUNG: I can't run the Motion to Suppress
12 and see what happens and then go to drug court?

13 MR. MARKUS: Very rarely. Let's get realistic.
14 All these courts, they're case management devices and the
15 institutional pressure is do get it off the docket. So,
16 generally speaking, when someone comes up for arraignment,
17 the case is set for plea in 10 days, unless the person is
18 right there and then, they want to go to drug court. And
19 if they don't exercise the option to go to drug court
20 sooner than later, sometimes it's not available. There's
21 some statutory language in our statute that says you have
22 to go to first opportunity.

23 And I have clients that want me to do the
24 Motion to Suppress and I didn't really consent and I'm
25 willing to do it, but it's a tremendous risk when the

1 client is an immigrant. It's a foolish risk.

2 And one of the things that I bring to the
3 table as a covering drug addict in dealing with clients
4 with drug possession charges is I have a good sense of
5 who's a recreational user from talking to them and who
6 isn't, and I can help break through the denial of their own
7 addiction and talk to them on a recovery level as well as a
8 legal level and help them make a smart legal decision as
9 well as a smart personal decision.

10 MR. JONES: I'd be interested to hear -- I know
11 what drug court has meant to you in your life and I know
12 that you're a big fan, proponent of Judge Rosinek and drug
13 court.

14 I would be interested to hear from you,
15 someone who has taken the journey through drug court, what
16 you think -- critically speaking, what do you think could
17 be done better and how drug court could improve -- leaving
18 aside the funding issues, what do you think about the
19 experience could make it better, more meaningful, more
20 productive, more useful to the person who is going through
21 it?

22 MR. MARKUS: I don't think that you can separate
23 the funding issues because I think it's perfect the way it
24 is if it was more properly funded than judicial treatment.

25 Your question about the case managers

1 was right on point. There has to be a load of ratio to
2 where a client has a personal case manager, personal
3 relationship and has somebody to talk to.

4 MR. JONES: Let me ask the question differently
5 then because there are obviously people that drug court is
6 obviously not reaching, opt out, dropped out. What can
7 they do to reach those folks?

8 MR. MARKUS: You know the saying, you can lead
9 the horse to water but you can't make them drink. I think
10 that applies here. Some people just don't want to do it
11 and some people just don't want to get cleaned. And just
12 because they've been arrested doesn't mean they have an
13 epiphany and say, "Wow, this is terrible. I want to get
14 cleaned. I don't want to do this again." That's not
15 reality. Some people have to be arrested 10 times before
16 they reach that point, by then it's a little late for drug
17 court but by then they can't get cleaned and lead
18 productive lives, but you can't force somebody into
19 recovery.

20 You can pressure somebody into drug court
21 with legal consequences but the decision has to come from
22 within the heart of the person and I don't think that
23 there's a whole lot more that can be done than is being
24 done other than making it a little more personal by
25 making -- you go to drug court and Judge Rosinek has so

1 many cases on a given day. He must have 100 cases and he's
2 there all day and he's got to crank through them all and,
3 you know, there is a certain factory-like feeling when
4 you're the client.

5 And my experience, frankly, wasn't
6 typical because he knew me, he took an interest in me, and,
7 you know, he'd call me out of turn. I wouldn't have to
8 wait for two hours because he knows I'm in other
9 courtrooms, so I probably had a little easier ride through
10 drug court than the average guy had the public defender or
11 this sense of problems.

12 Additionally I made it through there --
13 you know, I was highly motivated. I wanted to get clean
14 for me, apart from the legal consequences. So once I
15 started I never used again, and, you know, when you're that
16 type of person, the clients that never use again, they're
17 in and out of there very quickly because they're doing the
18 work. There's not much that the judge needs to do.

19 It's the clients that are relapsers that
20 the judge has to pay attention to, and those people need a
21 little more personal attention from the case managers and a
22 lot of times it's just having -- in Narcotics Anonymous or
23 AA you have a sponsor that you call and talk to about
24 what's going on in your life.

25 And if these people had some variation of

1 a sponsor through a case manager where they can talk about
2 that fight that they had with fair wife last night, maybe
3 instead of going out and getting high over it, to have
4 somebody to talk to, you know, maybe that will prevent a
5 relapse but that takes money which is not available.

6 MR. BARON: From a bird's-eye view, one size
7 does not fit all. You look at the statute, it's very
8 precise how long drug court is and what you have to do, and
9 I've had clients that really were at the wrong place, wrong
10 time, got busted for possession, and they weren't drug
11 addicts, yet they have to go through the entire system,
12 urine, go to meetings, and it's unfortunate that's the way
13 it is. And the opportunity to go through the court
14 system -- drug court system needs to be different than the
15 regular court, but if you can tweak it so it's
16 individualized, more rather than one size fits all, it
17 might make the administration of justice more appropriate
18 and certainly benefit some of the clients.

19 MR. MARKUS: Under our statute it's a year
20 regardless. The judge does not have discretion to say,
21 "You know, 10 months have gone by. You haven't missed a
22 meeting. You've shown a good attitude. I think that's
23 enough."

24 I don't know what's magic about a year.
25 It's just a number out of the air and I think it's to

1 satisfy the public and make the public feel like they're
2 being properly protected.

3 But you have a man like Judge Rosinek, he
4 should have the discretion to say, "You know, you've been
5 here nine months. I think you're fine. You're done. Let
6 me make room for somebody else." He doesn't have that
7 ability.

8 MR. JONES: But is that because you like
9 Rosinek? If there was a judge in there who you thought was
10 just horrible, would you then want to pull back on that
11 ability?

12 MR. MARKUS: A lot of this, the reason for the
13 success of this program is because of the judges who have
14 been assigned to this program. You know, you can't put
15 anybody in this job. The judge who was here before, Judge
16 Goldstein, had a very similar attitude as Judge Rosinek.

17 MR. BARON: Former cop.

18 MR. MARKUS: Yes, a motorcycle cop. He had the
19 same attitude and the community had the same response to
20 him. You couldn't put any judge in this job. This is a
21 job that, among the judges, it's a volunteer and not
22 assignment.

23 But I guess you could swing it back the
24 other way. I wouldn't want a situation where it was
25 open-ended, where the judge said, "You know what? I think

1 you're full of crap. Sit here for another year" and be
2 completely arbitrary. Yeah, I'd like the door to be one
3 way as a defense lawyer.

4 MR. CLARK: We don't have many of those.

5 MS. KELLEY: Admittedly this is off topic but
6 given the fact that both of you are in front of us, I can't
7 let the opportunity pass.

8 Do you ever feel that there's a blurring
9 between your role as defense attorney and recovering person
10 and, if so, how do you make peace with that and does it
11 trouble you?

12 MR. MARKUS: That's always a challenge. I don't
13 reveal to every client that I have that I'm in recovery.
14 People hire me because they want a lawyer and not a sponsor
15 and I don't push AA down their throat. If someone
16 demonstrates an interest with recovery, I might break my
17 anonymity because I want them to see that there's hope, and
18 if people can get clean and this is how you do it, I'd be
19 an example.

20 But I have many -- I represent a lot of
21 drug dealers, okay. If you do criminal practice, I mean,
22 come on, that's what we do. As a recovering person, it
23 disgusts me that these people are out there selling crack
24 but I'm their lawyer and I'm not there to judge them.

25 If you do criminal work, you have to have

1 the mentality that you're not there to judge your client's
2 conduct. You're there to serve a specific function, and I
3 think it wraps it up a little more when you have a drug
4 dealing case and you're in recovery, but it's not all that
5 hard to separate after a little while.

6 The hard thing is to avoid the impulse to
7 tell everybody your business, tell them about yourself,
8 because that's not why they're hiring you and you have to
9 develop a sense of when people really want to know about
10 that and when it's your ego talking and you just want to
11 brag about yourself.

12 MR. BARON: That's why I have --

13 MR. MARKUS: Richard is at the line at the
14 grocery store. We don't agree on this.

15 MR. BARON: I have a totally different attitude.
16 I think the 12-step program, ethics in life, uses the word
17 alcohol and the first step when you're powerless over drugs
18 and alcohol and our lives are becoming unmanageable, that's
19 the first step. The 12 step, having reached sobriety as a
20 result of this program, we reach out to other alcoholics.
21 The 12-step program that's the only time the word alcohol
22 and drug addiction is used.

23 It's an ethic in life and I've grabbed
24 onto that ethics in life because it's changed my life and I
25 actually practice law with the 12-step model.

1 I think most of my clients come to me
2 because they know I'm a recovering person and they need and
3 want what I have to offer. And, yes, the ego is involved.
4 My ego is enriched by the fact that I get calls all the
5 time from people in the community whether it be judges or
6 businessmen or gardeners or whoever they might be because
7 they know I understand drug addiction and I've been through
8 it as an addict and help me with their child, their
9 brother, their wife who has a criminal or some other
10 problem dealing with drugs.

11 They're coming to me because they know
12 I'm an addict. They're not coming to me to defend them so
13 much but to help them with the addiction. The drug dealer
14 is coming to be defended and I can understand David not
15 wanting to share with a drug dealer, "Come on, brother,
16 let's go to a meeting." I don't get many of those cases.
17 Most of the people I get are people in crisis and trouble
18 in detox so I have absolutely no problem. There is no
19 blurring in my mind and I'm easy.

20 MR. MARKUS: I have a death penalty case I'm
21 involved in and the client -- drugs are a big factor in
22 what he did, and ironically he went through a treatment
23 center that I bring a meeting to on an occasional basis,
24 and it's even possible that we might have crossed paths
25 without knowing each other at the time because it was

1 about two years ago.

2 And I go back and forth, should I talk to
3 him about my experience, because he did go to treatment.
4 He went voluntarily which means somewhere within there
5 there is a desire to stay clean and a want to stay clean,
6 but I haven't told him that. I'm not ruling out that one
7 day I won't.

8 But you have to be very careful because
9 then you change the relationship that you have with your
10 client. You open yourself up to allegations of ineffective
11 assistance of counsel which is spurious. It's not an easy
12 decision and it's one that I'm very selectively of.

13 Richard and I have different practices.
14 Most of the people that come to me come to me because they
15 want a lawyer and they're in trouble and they don't need
16 recovery. Richard gets a lot of people that come to him
17 because they know he's in the recovery community and
18 they're looking more for his help with that and the legal
19 problem is the side line. It's sort of a reverse.

20 But the client's that come to me that
21 know I'm an addict and have come to me for that reason, I
22 have no problem talking to them about recovery. I tell
23 them the meetings I go to. I sometimes become friends with
24 them. I encourage them to come to this meeting, "I'm going
25 to be there. I'll introduce you around. I'll make you

1 feel comfortable." You just have to take it -- like he
2 said, one size fits all is not always the right answer.

3 MS. KELLEY: Would you do that while the case is
4 pending?

5 MR. MARKUS: I have done that while the case is
6 pending. I did that with a young kid who wants to stay
7 clean but doesn't know how. He's 18 years old. He's on
8 probation. He came up dirty and he came with his mother
9 and I told him and his mother what I did and I opened
10 myself up to him, and why I chose him, I think a lot of it
11 was because of his youth. It was somebody who came to me
12 strictly as a defense lawyer. They had no idea I was in
13 recovery but, yes, I do that quite often but it's an
14 individual decision.

15 MR. JONES: Scott.

16 MR. EHLERS: If you could create your ideal
17 system, would drug court be part of that? You overcame
18 your addiction without drug court and --

19 MR. BARON: Only because I never got arrested.

20 MR. EHLERS: But at the same time -- I think
21 that part of the task force's goal is to make
22 recommendations at the end of all this. Part of those
23 recommendations may be, you know, you could improve drug
24 court in the following ways.

25 It may also be -- you know, especially in

1 the context of mental health court that we're talking
2 about, you know, it seems like mental health courts came
3 about really because society isn't doing the job it should
4 be doing in terms of providing mental health services
5 outside of the criminal justice system.

6 Do you have some -- you know, if it was
7 up to you would you do something different besides drug
8 court? Are there ways in which you would improve drug
9 court.

10 MR. BARON: I would legalize marijuana. I think
11 it's a scourge that it's a crime to be in possession of a
12 simple nickel bag of marijuana. Not every nickel bag user
13 is an addict and what do you think?

14 MR. MARKUS: I would fund this program. I would
15 make it available to everybody who needs it because every
16 dollar spent in drug court you could probably save 50 in
17 the future, process time and incarceration. And I don't
18 know if I would have gotten clean had it not been for the
19 drug court. I think if I would have lost my license --

20 MR. SCHECHTER: What if you were to lose your
21 license for using drugs?

22 MR. MARKUS: You are going to lose your license
23 in the State of Florida if you get arrested and have a
24 felony conviction.

25 MR. EHLERS: I'm trying to get beyond I guess

1 the walls that we're living in right now. If you could use
2 drugs and not lose your license.

3 MR. MARKUS: No.

4 MR. BARON: I wouldn't. I would certainly want
5 to see more drug courts. I think Dade County needs at
6 least two and I want to see the system expand. I want to
7 see it get better and the money is an issue. I want the
8 legislature to stop building prisons for drug addicts
9 because most criminals come into prison testing positive
10 for drugs. Drugs are somewhat related to most criminal
11 cases. So what our legislature has done is warehouse them
12 in a cage, spend billions doing it, and when it comes to
13 funding the 23 circuit courts they keep going back. It
14 works so much better the other way.

15 So what I would want to do is spend money
16 to educate the legislature, get the legislature to realize
17 that the funding of drug court is a win/win and the funding
18 of prisons is lose/lose and what you are doing? You're
19 caging people so they become animals.

20 MR. JONES: Anyone else.

21 Thank you, gentlemen.

22 MR. MARKUS: Thank you very much.

23 MR. JONES: That was really great testimony and
24 we appreciate it. And I will say to you as I did to
25 everyone else all day, if during the course of this work

1 that we're doing you become aware of material that you
2 think would help us, we'd appreciate it if you send it to
3 us, and, with your permission, as we continue our work, if
4 we have more questions for you, we'd like to send them on
5 to you as well.

6 MR. BARON: We'd appreciate that.

7 (Adjournment: 5:58 p.m.)

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Male Voice: So, why don't you guys introduce yourselves and then we'll -

Ms. Elizabeth Kelley: Elizabeth Kelley, Cleveland.

Ms. Vicki Young: Vicki Young, San Francisco.

Mr. Brummer: I can't hear Ms. Young's name.

Ms. Young: Oh. Vicki, sorry.

Mr. Brummer: Can you get a little closer to the microphone or speak a little more loudly?

Male Voice: Maybe we should put it down there because --

Male Voice: Maybe - here's - you can probably work off those mikes. Why don't we try this and this.

Ms. Young: Vicki Young, San Francisco.

Mr. Brummer: Hi, Vicki.

Ms. Gail Shifman: Gail Shifman, San Francisco.

Male Voice: Did you hear that, Bennett?

Mr. Brummer: I did.

Male Voice: Okay. Go ahead.

Mr. Marvin Schechter: Marvin Schechter, New York City.

Mr. Brummer: Mr. Schechter, can I have your first name, please?

Mr. Schechter: Marvin. M-A-R-V-I-N.

Mr. Brummer: Thank you, Marvin.

Male Voice: And there's one more of us who is not here but will be here shortly. His name is Jay Clark and he's from Ohio.

Mr. Brummer: Great.

Male Voice: So, having dispensed with all of that, why don't you and Rick in whatever order or fashion you decide, give us 15 or 20 minutes on specialty courts.

Mr. Brummer: Great. First of all, I want to wish you bon appétit. Hope that my dealing with this subject doesn't ruin your appetite. It tends to ruin mine. I want to thank you for holding the forum and for giving me an opportunity, and Rick an opportunity to state our positions based on our experience with these type courts which I would say is consistently and extremely negative. We strenuously oppose these specialized and problem-solving courts. Simon

Bolivar said that an ignorant people is the blind instrument of its own destruction. And I believe that our lack of vision and [inaudible] of the judicial branch is a significant threat to us maintaining our liberty. And I mean, you know, it has to do with [inaudible] the Geneva Convention, it has to do with [inaudible] habeas corpus renditions, search and seizure. I don't have to tell you what's going on in the country. In general, we need the courts to stand up, to perform their traditional roles and here we see the courts being subsumed by the Executive Branch and the executive functions. There are a number of them. I could give an example of [B-O-K-A-W-I-T-Z]. One is juvenile court, child court enforcement court, domestic violence court and I might throw in the Broward Mental Health Court although we had a very tangential experience with that. These courts are generally problematic. But I can tell you about our experience in Miami that these courts have consistently operated in an unethical, immoral and illegal manner. And exhibits that we submitted to you indicate that that's not a member of our opinion, that's findings, essentially, by the 3rd District Court

of Appeal, the Appellate Court in Miami-Dade County. It gives you two appellate decisions from this year - one relating to the Domestic Violence Court and the contempt there, and one relating to Juvenile Court with their unwillingness to comply with state statutes that they give people hearings within 24 hours. And we had to sue them to make them comply.

But there are other things that are probably just as bad or worse. These courts are very often not impartial. They are almost always captured by or designed to be controlled by special interests or agencies. The interests of those interests and agencies are often opposed to the exercise of independent judicial judgments and constitutional values. They often deprive our clients of due process, the right to a lawyer, the right to a jury trial as indicated in the cases in the cases that we've given to you. It's not a matter of opinion on my part. They deprive people, our clients especially, of a right to a meaningful hearing as well. They lack a sense of proportion in juvenile court, not just in Dade County but across the state of Florida and across the nation. Juveniles are shackled

indiscriminately. All juveniles in Florida are generally shackled. And by shackled, I mean, not just handcuffs and not just leg irons, but belly chains with their hands chained to their bellies and they wear little jumpsuits like enemy combatants. This is in juvenile court, one of our gentler and kinder specialty courts.

What I'm trying to say here is that when the executive and the judicial functions are combined, the executive is the only survivor. These problems that we see reflect courts intentionally and persistently failing to comply with the law. In child support enforcement court, after years of abuse of poor people who were too poor to pay their child support, we filed approximately 30 petitions for habeas corpus all of which were granted by the appellate court - people who were illegally incarcerated. And eventually the appellate court did the responsible thing and said something about the conduct of the child enforcement court. And they said first of all, that recreating debtors' prison was abhorrent - which, of course, it is. The debtors' prisons are the most repugnant of

institutions. And then in another case, the Garcia Case - that was in Clark vs. Manning that they said that - in Garcia, they said that the child support court had engaged in - this is a quote - "a pattern of either purposeful misapplication or at best willful ignorance of the law" - the law, of course, prohibited the court from depriving people of their liberty absent evidence of their present ability to pay. But after 30 petitions for habeas corpus, all of which were granted, the court persisted in doing that. This is pretty typical of what we see.

I think what I'd like to do is yield a few minutes here to Rick and then come back to - let me just summarize now and then I don't have to worry about coming back after Rick. I think that one of these problems is that these courts erode proper adjudication. They erode a meaningful opportunity to be heard. There's little or no meaningful litigation in these courts. They amount to low quality, biased assembly lines. And the danger here is that there is no judicial review. There's no meaningful judicial review in most cases. Many of the people

don't even have lawyers. And as this punishment increases, and, most dangerously, as government intrusion is made easier, the consequences are becoming more drastic for individuals and families. And it's always for a good cause that they're doing this. Rick, do you want to see if you want to --

Mr. Rick DeMaria: Sure, let --

Mr. Brummer: If you have any extra time while people are eating, I can talk some more if we have the time.

Mr. DeMaria: I think we have few minutes. I'll talk fast. I think what we've seen all morning is that there's been this undercurrent of society has problems and these courts have to step up and address these problems. And when you talk about a court having to address a social problem, moving out of their traditional role to adjudicate impartially in the traditional sense, these courts judges are charged with a mission, an objective to repair, to fix, the societal problem. And I think anybody - because these courts are made up of human beings - besides being institutions, you're talking about human beings, these judges - when they have a conflicting agenda or

mission - that is to fix this problem at the same time try to somehow balance that mission with guaranteeing somebody a right to a fair trial, to make sure the Constitution is complied with, what I see happening - and I've been in the Domestic Violence Court now since 1995 - probably in this court, I've got more experience in this court than anybody there in the building right now. And what I see is that the Constitution will yield. The individual rights and liberties will yield every single time. Because that powerful objective, that mission that has been forced upon these courts, will take precedence. And we've heard a lot of people talk about that this morning and, yeah, we could maybe do some things. Professor Winick spoke about, yes, but we could maybe set up some procedures to correct that and, you know, we know that's a potential problem. But I'm here to give you specifics about how the Domestic Violence Court operates here that might highlight how that happens. And instead of just saying, oh, we've got due process issues, I'm going to give you some specifics as fast as I can.

Let's talk about the right to counsel. In Florida, there's

a statute that says the court signs what's called an order of no incarceration. That means no matter how the case is resolved, that defendant, that person, cannot be sentenced to jail. Even if that person is indigent, when the court signs an order of no incarceration, the judge is required outside of extreme circumstances, to discharge the public defender. Now, what that means to an indigent person is that person will be left having to defend him or herself in that court because they're indigent. They can't afford to hire a lawyer. How does that come about, this order of no incarceration? Well, how it comes about in this Domestic Violence Court here in Miami is that the state attorney will simply say to the judge at the arraignment calendar, Judge, we ask the court to certify, quote, unquote, "no jail." Almost every single time, the judge will rubber stamp that state request and sign that order of no incarceration. Now, we were previously appointed, probably, to everybody who's indigent at the first appearance hearing. We're discharged on the spot. Ask yourself a question - why? Why would the state attorney's office ask the court to order

no imprisonment, sign an order of no incarceration? Why? I can tell you why. The only valid reason from their perspective would be to get the defense attorney off the case because it's much easier to deal with an unrepresented client. And these people stand there before this court and are unrepresented. And then what happens? The state attorney can talk about plea offers, probation, anything. Now is there a benefit? Sure there is to the client in terms of they can't go to jail. Now if they take the diversion program, pre-trial diversion it's called - and they complete it, the case will be nol-prossed of course. If they don't complete it or they, quote, unquote, "bounce out," then the state comes in and says, "Judge, he didn't comply with the pre-trial diversion program." And it could be for any reason. It could be because this person has changed his or her mind that they don't want to do it, they want to have a trial. And then you know what happens? The state says, "Judge, [inaudible] that order of no incarceration." And almost every single time, that judge will rubber stamp that, and that order of no incarceration is gone. And then, of course, we're

appointed to the case.

If - once that happens and you have an unrepresented person, no counsel, then you see the slippery slope, then you talk about right to a jury trial. Sometimes these people want a jury trial. And what's happening here is that they are being dissuaded. Now individual judges handle it differently, but what I'm seeing as a trend that's getting worse. You want to have a jury trial, first off, on a battery charge which is a valid [inaudible] crime of [inaudible] common law and in Florida, you're entitled to a jury trial, you're not entitled to a jury trial. We're going to have a bench trial. There's no lawyer there to say otherwise. You might say, well, how do I find out about that case if I'm not there in court? Okay, if you can believe this, courtroom staff - non-lawyer courtroom staff recognize these problems and bring them to our attention. That's how egregious some of these things are. So, I'll go down to the judge and say, "Judge, it's a [inaudible] common law crime, entitled to a jury trial." "Oh, no, I saw a contempt case that said if it's under six months, you've got to ask for contempt."

Circumvention of the right to council, circumvention of the right to a jury trial. Also, they're browbeaten into going bench. You want to have a jury trial. You want to have a trial. Do you see that book of Florida rules of criminal procedure? Yes. Do you know what's in that book? No. Well, if you want to go to trial, you've got to know that because you're going to be held to the same rules that everybody's held to here. You sure you want to go to trial? And of course, what happens then, the person buckles, takes the plea deal and away they go.

The sales pitch that these people receive oftentimes at the arraignment counter once they're unrepresented - you cannot believe. You might say the judge is simply presenting the options to the unrepresented person, but you will see subtly that there's the sales pitch to accept, for example, pre-trial diversion program. Now, you can go to trial, and you may win. If you lose, I could sentence you up to the maximum. That's an option for you. Or you could later take probation and, of course, that's a - you'd have to comply with that. But there's

another thing you can do that the state's offering and I think they are in this case, you can accept the pre-trial diversion program. And you go to classes. When you comply, they're going to nol-pros the case - which may be a good resolution, but there's no doubt there's a sales pitch going on over the years time and time again. It's endless.

The political pressure that's brought to bear, the Executive Branch functions that are brought to bear - let me give you some examples of that - a recent egregious example. There is the Federal Brady Hand Gun Violation Prevention Act. When you get arrested for a domestic violence offense, the courts automatically issue what's called a Stay Away Order. It's a condition of pre-trial release that prohibits you from having contact with the alleged victim. It simply said that basically. All of a sudden one day the form has been modified, the court's order has been modified to say this - that the court finds that the relationship between the parties, the defendant and the alleged victim, meet the definition of "family" under Florida statutes. You say, well, why in the world is that in there?

Were we told about this beforehand? No. It was just inserted without our knowing it. We kind of caught it on the sly. Well, why is that in there? And here's what happened. You want to see the blending of the Executive with the Judiciary and how the Judiciary can become a functionary of the law enforcement executive agencies? Because the federal - federal law enforcement authorities and the state law enforcement authorities told the judiciary, hey, we need this language in here so we can prosecute federal fire arms violations. So we want you to put those fact findings in that order. And by golly, they were put in. Now you might say, "Well, what are the factual findings made?" You know who makes those factual findings? It simply comes down like this. The State Attorney's Office simply stands up and says, "Judge," at first appearance, "we found they meet the definition of 'family.'" Box checked off, away we go. No evidentiary hearing. And the consequences are severe.

In addition, because domestic violence is seen as such a tremendous problem, not only locally but nationwide, there

are tremendous numbers of external organizations that are brought - bring together pressure to have things done their way, to see things their way, to see dispositions handled their way. And they're not concerned about the Constitution and they're not concerned about due process. There are roughly - and I counted them - approximately 20 community organizations that have a part to play, have influence with this court. Everything from the Department of Children and Families, Family and Victim Services, Florida Immigrant Advocacy Center, the Jewish Community Task Force Against Domestic Violence, the Haitian Neighborhood Center, Farmer National University, Latino Alliance, law enforcement agencies, the Mailman Center, Domestic Violence Fatality Review Team, Oversight Board, our kids. It's endless. And the pressures are immense. These judges have to operate under a political magnifying glass.

Some more specifics. We have a new calendar in Domestic Violence Court here in Miami called the Extended Judicial Review Calendar. Extended. Now what does that mean? Well, that means that if there's been some suggestion that the defendant has

a drug or an alcohol problem, in addition to completing the Domestic Violence Treatment Program which is mandated by the legislature in Florida, mandated by the legislature in Florida upon being convicted of an offense, you will now get drug and alcohol treatment and you will have to come back to court a couple times a week - at least initially, to maybe drop urine, to be talked to by the judge, what are you doing, etc., etc. And, of course, you have to pay for all this, never mind the additional pressures that this has brought to bear upon a family and someone who has to work - maybe someone who is a blue collar worker that doesn't have the luxury of coming and going as they see fit, the possibility that maybe they lose their job, family stress will increase. And if there was violence to begin with, might that increase it? No consideration given to that. Because why? There's a problem and we're going to fix it. That's why. And that's why we're doing it. Is it effective? There's no evidence it's effective whatsoever. It was just created out of whole cloth - let's do this. And away we go. And that's how it's done here.

It used to be when someone was arrested for domestic violence down here and the alleged victim would come to court, usually at first appearance, the judge would automatically issue a stay-away order as I said before. But almost all the time, if the alleged victim said, "You know what? I want to have contact with my husband or my boyfriend." And the courts almost always would enter an order modifying the stay-away order, so that these two people could have contact, peaceful contact as the order said. And now things have changed. Now the granting of a modified stay-away order is the exception. Now, it's, "You know what, yes, I understand" - usually it's a woman - "ma'am, that you want to have contact with your husband, but no." Because in essence what are the judges saying? "I know what's best. I know what's best." And so part of the irony of this court is the very people they are supposed to protect, these alleged victims, to quote, unquote, "stopping the violence," and to empower - usually it's - the idea is to empower women because they supposedly are the victims of domestic violence. What's happening is you've got big brother stepping

cause for failure to do what the court said to do, and that will be initially classified as civil contempt. Now, the problem is how do you set a purge for civil contempt in this situation - that's very difficult. Well, recently, one of the judges got frustrated with two separate individuals on a given civil injunction contempt calendar - we are not involved in that calendar, we were not present when these two individuals came in, separate cases, both were summarily sentenced to jail - 179 days for one respondent, 240 days for the second. Now you might ask yourself - what a strange number. 179 days. How come that number? Because in Florida, if it's 180 days or more for contempt, you're entitled to a jury trial. And anybody here thinks that was coincidence - really. Now, the other one - and I don't know how that happened - 240. But away they went. How did we find out about it? Court staff who were so outraged. Both of these two - we saw these two individuals in jail, went over there to see them - both of them - both of them were homeless. One of them was actually living in an ALF. Now, I don't know what history about these folks. I know for

civil, it was not because there was no purge. Then the default type of contempt is criminal, see? So none of them were complied with - none.

Years ago - and I'll say one more thing and then I'll stop talking. It's this. When I was a brand new lawyer, it was in the 1980s, I went to a federal seminar here locally on the topic of forfeiture. I don't remember why I went, but I remember the keynote speaker was Local District Federal Court Judge Hoover. He's now a senior judge here - very distinguished jurist. And he - I guess I was so surprised because he was talking about - he said this to the lawyers in the group. I am afraid we are losing our civil liberties. A federal judge said this. I see it day in and day out and we need to be afraid. And this is the quote I remember he said. He said, "These things are being done because of the idea of necessity, out of necessity, under the guise of necessity and the necessity is the creed of slaves." And I think that's where we're heading. You know we talked about earlier, lawyers may be changing our ethical obligations that we could be allowed to do some different things,

you know. Are we really so far away from the old - are we heading to an old Soviet Union model where your job as a lawyer is simply to hold your client's hand as they go off to the gallows - here's what's going to happen next. Let me explain to you what's going on. Is that what's going to happen to us? You know what? I know it sounds outrageous, but personally, I think that's exactly where we're heading. I'm not saying we're on the launch pad, but we're on the way to the launch pad. I really do believe that. Thank you.

Male Voice: Well, let me - thank you - let me ask both of you - because one of the reasons that we decided to start this listening tour and start these public hearings in Miami is because in many ways, Miami is sort of ground zero for this whole notion of specialty courts and drug courts. And we know that when she was State's Attorney, Janet Reno was instrumental in creating the first of the drug courts. And so I guess my question to both of you, really, is when these notions and these ideas and these specialty courts were in their infancy and were getting off the ground, what was the

conversation and what role if any did the defense, bar, and particularly the Public Defenders Offices throughout Florida play in those sort of enabling, very beginning conversations?

Mr. DeMaria: Bennett?

Mr. Brummer: I think I can address that pretty well. There were three of us who co-founded the first drug court. There was Janet Reno, the Chief Judge, Judge Weddington and me as public defender. It was around 1989. I can tell you first of all that the drug court is not a court. The drug court is a drug diversion program run under the egis of the court, but it is not a court because it makes no adjudication whatsoever. Participation in that court is totally voluntary on the part of any client that we have. They have the right to opt in. They have the right to opt out at any point, and go back into the normal process. There's no plea required. As a matter of fact, the case goes away if they successfully complete the program. The only right that they waive is the right to speedy trial because the program takes a year. So they waive their right to speedy trial, but they retain all

were sensitive to the ideology.

Male Voice: And when the Domestic Violence Court came about --

Mr. Brummer: I opposed it.

Male Voice: That was done without your buy-in obviously.

Mr. Brummer: Absolutely. To this day I find it abhorrent.

Male Voice: I have a question for you, Rick.

Mr. DeMaria: Go ahead.

Male Voice: I didn't quite understand the explanation - how in Domestic Violence Court, the state has enacted a statute which seems to - according to your explanation - deprive a defendant of the right to counsel in the event a judge signs an order of non-incarceration.

Mr. DeMaria: Yeah.

Male Voice: How is that possible? And has it been challenged? Because what you're telling me is once the order is signed, the person still has a criminal charge

pending against them, they're in a criminal court albeit a specialized one, facing potential criminal sanctions including jail, they go for a period of time totally unrepresented, and then when it doesn't work out and they've made all the admissions and the state knows the entire case inside out, the judge then vacates at the state's request, the non-incarceration.

Mr. DeMaria: They can.

Male Voice: Can and do.

Mr. DeMaria: Yes.

Male Voice: And then you're assigned.

Mr. DeMaria: Right.

Male Voice: So, my question to you is, (a) has that been challenged? Has there been any kind of litigation by your office or anybody, challenging the right to counsel.

Mr. DeMaria: It's not so much that they're - they could still, of course, if they could, hire an attorney. They have a right to counsel, but they're not entitled to - even if they're indigent, the appointment of a public defender. That's what the statute says. Now, of course, that leaves them

without counsel.

Male Voice: Right.

Mr. DeMaria: Oh, you can go hire a lawyer if you want, but of course, they have no funds to hire a lawyer. They were deemed to be indigent to begin with. So that's how the statute is set up. In terms of a challenge, I'm unaware that the statute has been challenged. And I think - I wasn't prepared to address the law in that regard - but it's my understanding that if a person is not being - cannot be subjected to jail, then they do not have necessarily - called a right to the public defender even if they're indigent. They have a right to counsel, but not court appointed counsel.

Female voice: Is that just on DV cases?

Mr. DeMaria: No. That can happen anywhere - that could happen anywhere.

Mr. Brummer: In misdemeanor cases. But there are a lot of people who get convicted of misdemeanors on a regular basis without counsel because the [A-R-G-I-S-I-N-G-E-R] says that incarceration is the touchstone for that.

a psycho-educational model. And yes, if you are -

Female voice: What does that mean?

Mr. DeMaria: Huh, what does that - good question. What does that mean? It mean's they're going to get up there and lecture and educate you about why you're a quote, unquote batterer.

Female Voice: Who lectures? The judge?

Mr. DeMaria: No, no. That happens - yeah, no, it's the program. They call them facilitators. They're not therapists. They're called facilitators because therapist, again, suggests the person must have some ailment. And that's taboo. So, the facilitator lectures about the dynamic of domestic violence, about the so-called cycle of violence and all these types of things. So - but back to your question, yes, if you are convicted of a domestic violence offense on a misdemeanor level whether you take a plea, whether there's a withhold or not, whether you accept pre-trial diversion, you - the law requires that person undergo the domestic violence treatment program which is mandated. It's a Duluth model, 26

weeks, etc. Now, if the court provides oral reasons on the record for not imposing it, they can do that, but that really, practically speaking, does not happen.

Female voice: So in the DV court diversion is - there's a diversion eligibility? Or not really?

Mr. DeMaria: It's not a diversion from the court. Pre-trial diversion is a state attorney-run not program, but process, where the state attorney only has the power to say, I'll tell you what, if you want to enter into the pre-trial diversion program and you complete all the program requirements and you pay the fees, at the end of that successful completion, we will nol-pros the case.

Female Voice: Okay, so that --

Mr. DeMaria: But it's the same program that's being offered to people who are on probation. It's the same exact program that one would be sentenced to after going to trial and losing.

Female Voice: Right. Right. And so in the DV courts in Dade County, I would imagine there's a lot of

immigrants, green card holders, maybe illegal residents.

Mr. DeMaria: Yeah, we had - yes, yes, yes.

Female Voice: And so they're coming through this court, the prosecution is saying we don't want to incarcerate - for some of them, they're taking pleas which could cause their deportation.

Mr. DeMaria: In a domestic violence offense as defined by federal law which incorporates your basic, your classic DV offense -

Female Voice: Right.

Mr. DeMaria: -- if you take a plea, whether it withhold or not, that could subject you to deportation no matter what your status unless you're a U.S. citizen.

Female Voice: So 35 to 40 percent of the people - are they being advised of that without lawyers?

Mr. DeMaria: Most of those people - most of those people, but not all - most of those people are being offered the pre-trial diversion program by the state attorney's office.

So then, if that case is nol-prosed --

Male Voice: Bennett? Bennett?

Mr. DeMaria: If that case is nol-prosed, they won't be subjected to deportation based upon this case.

Female Voice: And is this a pre-plea diversion?

Mr. DeMaria: Correct.

Male Voice: Bennett, are you still with us?

Mr. DeMaria: Hello? Hello?

Male Voice: We lost him.

Mr. DeMaria: Oh.

Male Voice: I'm sorry. Continue.

Female Voice: No. I'm done. I'm done on this.

Male Voice: How did we get to - how did we get to what Bennett suggested that there's a category of defendents who are found guilty and plead guilty without a lawyer at all? What was he referring to?

Mr. DeMaria: If you - the State Attorney's Office does not have to offer pre-trial diversion. They could do this - the judge could sign the order for no incarceration,

and then the State Attorney's Office could negotiate directly with the unrepresented.

Male Voice: Right. So that situation without an attorney --

Mr. DeMaria: Yes.

Male Voice: -- the state does a deal with the unrepresented individual.

Mr. DeMaria: Yes.

Male Voice: That results in incarceration?

Mr. DeMaria: No. They will not be incarcerated.

Male Voice: Right. That's what I'm trying to get at.

Mr. DeMaria: No. They will be on probation which is that's like a - you know, that's the other side of the coin. They cannot - once they take that plea --

Male Voice: They end up with a conviction, though -

Mr. DeMaria: Yes.

Male Voice: Without an attorney.

Mr. DeMaria: Yes.

Male Voice: And it's a conviction that goes
on their record.

Mr. DeMaria: Yes.

Male Voice: And they're now an ex-con.

Mr. DeMaria: Yes. But they cannot - but they
cannot go to jail.

Male Voice: You mean, so --

Male Voice: And your contention - Bennett's
contention is that [A-R-G-I-S-I-N-G-E-R] says that the
touchstone of right to counsel is the non-incarceration element.

Female Voice: Yep.

Mr. DeMaria: Yes.

Male Voice: Hello? Bennett?

Male Voice: What about on probation
[inaudible] and they go to jail?

Male Voice: Bennett?

Mr. Brummer: I'm back on line?

Male Voice: Yep.

Mr. Brummer: I apologize. [inaudible] link
in my cordless phone [inaudible].

Male Voice: Okay.

Male Voice: Did you want to ask a question?

Female Voice: May I? And comment on a couple
things.

Male Voice: Sure. Sure.

Female Voice: First identify yourself.

Ms. Shawna Belyer: That's fine. Shawna Belyer,
Assistant State Attorney. I just have a couple comments if
I may. And I'm certainly not going to address everything.
I'm not prepared to address everything. I just want to address
a couple things I am prepared - that I do know more about than
less about that were brought up with this. As to what Bennett
Brummer brought up --

Male Voice: Can you hear, Bennett?

Mr. Brummer: I can hear.

Male Voice: Okay.

Ms. Belyer: Okay. With the shackling issue. It did start in Miami in Juvenile Court and I'm the Chief of Litigation for the State Attorney's Office for Juvenile Court. So I was there when it was brought up. The presumption now in most of the courts - and we have four delinquency courts in Juvenile - is there has to be a motion now for a child to be unshackled. Generally they are. Sometimes there are still leg restraints. Sometimes there are still wrist restraints. There was a lot of discussion with the Department of Juvenile Justice based on the security issues in the court rooms, things like that. I know that it's being brought up on a state-wide level now. But I want this council to understand that a lot of it in that sense had been taken care of at least locally. That I believe Bennett Brummer brought up the issue of uncounseled pleas and I'm not talking about what Mr. DeMaria brought up, but in terms of the juvenile setting. And please correct me if I'm wrong. That's also - it is taking place other places in the state in juvenile courts that children are taking diversionary pleas without representation. That is a via -[part

to us something in writing that we can pour over after we leave Miami on these issues - and also to address if you can, this Domestic Violence Court issue of an order of non-incarceration, an unrepresented defendant, and then the order of non-incarceration is taken away and counsel comes back. What is that about? Why would anybody - particularly the prosecutors - why would you want that as officers of the court? Don't want people to be represented to make the process legitimate? So there has to be a reason that the office is doing that and we don't know it. We've heard Rick DeMaria's presentation. If you can give us some clue as to the legal reasoning behind that, that would be helpful.

Ms. Belyer: I will try to do that and -

Male Voice: That would be great.

Ms. Belyer: -- and if I can't, I will --

Male Voice: That's great.

Male Voice: Let us know.

Ms. Belyer: Yes. Absolutely.

Male Voice: Thank you. Elizabeth.

Ms. Elizabeth Kelley: Mr. Brummer, Elizabeth Kelley.

Mr. Brummer: Hi, there, Elizabeth.

Ms. Kelley: You ticked off a list of courts that you found to be inappropriate and one of them was the Broward County Mental Health Court.

Mr. Brummer: Yes.

Ms. Kelley: Could you specify what your problems are with that particular court?

Mr. Brummer: Yeah. We don't have direct contact with that court, but it fits the general description as far as I know of these kind of specialized courts. Let me give you some figures. Well, first let me tell you that we talked to people at Chattahoochee which is the state mental hospital in the Pan Handle.

Ms. Kelley: Uh huh.

Mr. Brummer: And they said they never saw such a torrent of people coming out of any place as they do out of Broward County. And the numbers there are interesting because - let me give you some figures 2006 and 2007 comparing Broward

getting them out of jail was to place them in a community-based facility.

Mr. Brummer: Well, I don't think that too many community-based facilities exist.

Ms. Kelley: Okay.

Mr. Brummer: Especially for poor people. If you have money, you can get mental health care and you can get drug or substance abuse treatment. But if you don't have money, unfortunately there is no - this is - I regard this as a health care system issue because there is no health care system issue - there is no health care system. The criminal justice system is [inaudible] to providing that service. And so first we find you guilty or adjudicate you in some way and then we send you off to help you in some executive way that the executive should help you in a civil situation and not through the courts.

Male Voice: Let me ask you, Bennett, if there - if it's possible, based on those numbers that you just gave us, Palm Beach County versus Broward County. Is it possible that the explanation for those numbers is that Broward County

is getting it right, and Palm Beach County is suffering from benign or otherwise - some sort of neglect in terms of that population? Indifference?

Mr. Brummer: I would think that would be more likely if people at the hospital hadn't told us that as soon as the people get there, they release them because they don't belong there.

Male Voice: Ah.

Female Voice: Interesting.

Mr. Brummer: Yeah. I think that they may get some right and there may be some increased numbers in there and I really can't account for this. I haven't studied it. And you're certainly - you've got your finger on a factor. But I don't think it's the predominant factor.

Male Voice: Anybody want to jump in?

Male Voice: If you had your druthers.

Male Voice: Speak up [inaudible].

Male Voice: If you had your druthers, would you do away with all these specialty courts?

Mr. DeMaria: From my perspective?

Male Voice: Yes.

Mr. DeMaria: Yes.

Male Voice: And what would happen to the people that have these drug problems and mental health problems? What would happen to them?

Mr. DeMaria: You know, maybe it takes this. Maybe it takes a problem becoming so obvious and undeniable that the community-based help outside of the criminal court system would be implemented, you know. And that might be what has to happen. Because otherwise, you know, it's like sure you want to see people get help, sure you - if you've got someone who's got a problem with violence, you want to see that taken care of. We love to have rehabilitation, you know. But it's really not happening effectively and it's not happening outside of having to erode what rights we have. You know, do you want to throw the baby out with the bathwater kind of thing. So, I mean, I think that it has to be the case that they just have to step to the plate and spend the money necessary. Now, is

in terms of the benefits to our clients to get as much money as we can to make the criminal justice system as good as we can to help these defendants.

Mr. Brummer: Can I respond to that?

Male Voice: Yes. Please do.

Mr. Brummer: First of all, I think we have to keep our eye on the big picture. And the big picture here is the rule of law, separation of powers, a robust judiciary as check and balance against the executive that keeps us free in a thousand ways. I don't have to - this is one small reflection of the erosion of those values. Those are the values that keep us free. If people are going to Iraq to show them how to do it, show them how we do it, this has to be a core of values they're fighting for. I think it's ironic that we're going to say that to help some of our clients, we're going to destroy - and I think that's essentially what we're doing - we're eroding the judicial function, eroding the moral authority of the courts as impartial tribunals, we're encouraging a form of judicial tyranny in allowing the courts to be issuing injunctions without

any lawyer representing the person subject to the injunction. These are civil injunctions. The people have no right to a lawyer at those hearings. They have injunctions issued against them. There is no bond. They did away with the bond that used to protect people from injunctions. Then they come up on charges later in Domestic Violence Court and there's abuse there. So it's like a complete gutting of the attitudes and values that have distinguished us from countries all over the world. And so I think this is an immensely important issue that transcends the value some mental health service sometimes to some clients. That's number one.

But number two is the service stinks. If you go to Domestic Violence Court, I would say I could devise a domestic violence court that would serve the victims and would serve the families. [inaudible] be ideological and it would be consistent with due process. And it would enhance the moral authority of the courts rather than having people afraid to call for the domestic violence problem because they know what's going to happen to them. People are really afraid and ashamed - after they call

and they see what happens to their husbands and their brothers and their children. My child hit me and I called the domestic violence people and then they did this to my family. It's incredible the destruction of family life that evolves from this do-gooder initial tyranny. So, I think that there are plusses. I think that it's always nice - I'm sure that they do good. I'm sure they intend to do good. I'm sure in some cases, you have a good result. But I'm looking at the balance that they don't want to look at. I don't believe that every - every arrest for domestic violence and every familial [inaudible] is the avoidance of a murder. And that's the lack of proportion. That's the incidence of disproportionate response of that court. We're avoiding a murder with every case. You can't have justice under those circumstances and you can't have a free country under those circumstances.

Male Voice: Thank you. Thank you, Bennett.
Thank you, Rick. We have one last question.

Female Voice: Not really a question, but the statistics that you were citing for the Palm Beach County and

Broward County and also, Rick, your statistics of the uncounseled pleas. If you have any of that data that you could send to us via email to Scott Ehlers.

Mr. Brummer: Be happy to do it. 10,000 juvenile cases upstate, we estimate, where the judges encouraged people participating to waive counsel.

Male Voice: Great. This is an ongoing endeavor for us, and so as you come across things that you think would be useful or helpful, we appreciate you forwarding them to us. And with your permission, we will likely get back to you as well with additional questions.

Mr. Brummer: Well, let me tell you what an honor and a privilege it is to work with you [inaudible] to be out there looking at this in a very conscientious and objective way. Very few people are. I think it's critical. And it's a support to us to know that we're not the only ones concerned about this. So thank you for what you're doing. I know it's a thankless job and a difficult job.

Male Voice: Well, thank you. And this has

been incredibly useful for us. So thank you both.

Mr. Brummer: Thank you. Bye-bye.

Male Voice: Thanks, Rick.

Mr. DeMaria: Thank you.

[END OF RECORDING.]

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Judge Gisele Pollack
Transcript Edits
Miami Hearing
Wednesday October 17, 2007

(changes are underlined):

Page 88, line 7, "My background is criminal", and line 16, "...attorneys and I...."

Page 90, lines 14, 15, "...brain is still significantly developing."

Page 91, lines 12,13, "...for nolle prosequing.....", and line 18, "...program and would lose their..."

Page 92, line 15, "otherwise why would...", and line 21, "court, the numbers grew..."

Page 93 lines 1,2, "...possession of marijuana over 20 grams and charges for other drug offenses."

Page 101, line 11, "...for their nolle prosequing and that agreement..."

Page 104, line 13, "...to help them get clean."

Page 123, line 5, "...it can (delete happy) happen in the..."

