

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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House Bill 2713

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Special Committee to Study Guardianship Laws

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Room 140
Main Capitol Building
Harrisburg, Pennsylvania

Wednesday, July 31, 1996 - 10:00 a.m.

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BEFORE:

Honorable Chris Wogan, Majority Chairman
Honorable Scot Chadwick
Honorable Dan Clark
Honorable Timothy Hennessey
Honorable Michael Horsey
Honorable Steve Maitland

Honorable Thomas Caltagirone, Minority Chairman
Honorable Lisa Boscola
Honorable Gaynor Cawley
Honorable Kathy Manderino

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ALSO PRESENT:

Judy Sedesse
Committee Administrative Assistant

Brian Preski, Esquire
Chief Counsel for Committee

William Andring
Minority Counsel for Committee

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1 CHAIRMAN WOGAN: Good morning,
2 everyone. I want to welcome everyone to the
3 Special Committee to Study Guardianship Laws.
4 My name is Representative Chris Wogan. I
5 represent a district from Philadelphia County.
6 I am the Chairman of the Special Committee. I
7 would like to start by having all of my
8 colleagues and staff introduce themselves,
9 starting to my far right.

10 REP. MAITLAND: I am Representative
11 Steve Maitland from the 91st District in the
12 Gettysburg area of Adams County.

13 REP. CHADWICK: Representative Scot
14 Chadwick from the 110th District. I represent
15 portions of Bradford and Susquehanna Counties.

16 REP. CLARK: Representative Dan Clark.
17 I am from the 82nd Legislative District and I
18 represent parts of, or all of, four counties:
19 Snyder, Mifflin, Juniata and Perry.

20 REP. HENNESSEY: I am Representative
21 Tim Hennessey. I represent the 26th District,
22 which is north West Chester County down in the
23 southeastern part of the state.

24 MR. ANDRING: I am William Andring. I
25 am Democratic Counsel for the Committee.

1 REP. CALTAGIRONE: Tom Caltagirone, the
2 Democratic Chairman for the House Judiciary.

3 MR. PRESKI: Brian Preski, Chief
4 Counsel to the Committee.

5 CHAIRMAN WOGAN: All right. Thank you,
6 gentlemen.

7 Our first witness today, our first
8 person testifying, because you are surely not a
9 witness, will be Representative Gaynor Cawley,
10 who actually was the prime sponsor of the
11 resolution which really prodded the Speaker into
12 appointing the members of this Special
13 Committee. I wish to welcome Representative
14 Cawley. Nice to have you with us here today.

15 REP. CAWLEY: Thank you, Chris. I have
16 a prepared statement of which has been
17 distributed to everyone. If anyone else needs
18 copies, we would be glad to supply them to them.

19 I would like to thank Chairman Wogan,
20 Chairman Caltagirone and Members of the Special
21 Committee to Study Guardianship Laws for
22 affording me the opportunity to offer opening
23 remarks today pursuant to House Resolution 377
24 of which I was the prime sponsor.

25 As you are aware, the Joint State

1 Government Commission presented a report to the
2 General Assembly this past May. The report
3 recommended changes to the guardianship laws of
4 the Commonwealth.

5 On June the 17th, 1996, Representative
6 Don Snyder introduced House Bill 2713 of which
7 16 members co-sponsored. Representative
8 Snyder's bill amends the Title 20 statutes
9 regarding guardianship and power of attorney
10 laws.

11 On May the 2nd, 1996, I was contacted
12 by Judge Frank Eagen, and later by Attorney John
13 McGee of Lackawanna County, asking that I take
14 the necessary steps to amend the existing laws
15 regarding guardianship and power of attorney
16 laws.

17 I then, along with Representative Tom
18 Tighe of Luzerne County, introduced House
19 Resolution 377 on May the 14th, 1996; this
20 resolution was passed a week later, I believe it
21 was on May the 21st.

22 As you know, the resolution directed
23 the House Judiciary Committee to conduct
24 hearings and propose legislation strengthening
25 guardianship laws relating to incapacitated

1 persons.

2 At that time, I was unaware that the
3 Subcommittee of the Joint State Government
4 Commission was just completing their report.
5 Both Representatives Tom Gannon, who, as you
6 know, is the Chairman of the Judiciary
7 Committee, and Don Snyder advised me of this
8 fact.

9 On July the 11th of this year, I sent
10 Representative Wogan a letter asking that he and
11 other members of the Special Committee to Study
12 Guardianship Laws review Judge Eagen's and
13 Attorney McGee's proposed changes.

14 Today, you will hear from both Judge
15 Eagen and Attorney McGee. I am very grateful
16 for their willingness to come to Harrisburg to
17 testify and I would also like to sincerely thank
18 the Committee for allowing them to offer their
19 expertise on this most important matter.

20 I know that the District Attorney of
21 Lackwanna County, Michael Barrasse, also
22 supports tightening the laws governing powers of
23 attorney and guardianships and I will contact
24 him today and ask that he forward his
25 recommendations to this Committee as soon as

1 possible.

2 In closing, I thank the Committee for
3 their interest in this matter and I would
4 recommend that the Committee contact Attorney
5 General Corbett and Auditor General Hafer for
6 their input, if you have not already done so.

7 As a footnote, I want to remind you
8 that I have attached a Scranton Times article
9 dated May the 28th, 1996, regarding powers of
10 attorney for your review.

11 That's the end of my opening remarks,
12 Mr. Chairman. But, basically, you will see in
13 the article, in the Scranton Times article that
14 I supplied to all of you, some statements from
15 Judge Walsh, some statements from other
16 attorneys up in Lackawanna County.

17 And the goal, the reason why I
18 introduced House Resolution 377 is that --
19 persons with knowledge and expertise in this
20 area, and we have some problems with
21 guardianship laws up in Lackawanna County, and I
22 know there have been some problems in Allegheny
23 and some other areas in the state -- hopefully,
24 we can put together the recommendations in
25 unison with the report that was submitted, which

1 is a fine report, and then Don Snyder, as we
2 know, drafted this bill up. I would hope that
3 some of the recommendations by Attorney McGee
4 and Judge Eagen can be drafted as amendments and
5 we can make Representative Don Snyder's bill,
6 which is a fine bill, but we can make the bill
7 better. And I appreciate, again, you inviting
8 me to give opening remarks this morning.

9 CHAIRMAN WOGAN: Thank you,
10 Representative Cawley. Since you are the
11 catylist here, I invite you to join us up here.
12 And we have got some seats near Chairman
13 Caltagirone. Thank you. And you may
14 participate as an ex officio member of the
15 Committee.

16 REP. CAWLEY: Thanks very much.

17 CHAIRMAN WOGAN: Our next witness
18 scheduled is John Lombard, who is a member of
19 the Advisory Committee on Decedents' Estates Law
20 which is part, I believe, of the Joint State
21 Government Commission.

22 MR. LOMBARD: Good morning, Mr.
23 Chairman and Members of the Committee. On
24 behalf of the Subcommittee of the Joint State
25 Government Commission studying the question of

1 guardianship and durable powers of attorney, I
2 am pleased to be able to appear before you and
3 provide you with some background on the
4 recommendations that we have made to date which
5 are in the nature of recommendations to amend
6 the guardianship law and in one respect the
7 durable power statute. I would like to refer to
8 my prepared remarks in my introductory remarks
9 and then make some personal comments, if that is
10 appropriate with the Committee.

11 The proposed amendments that have been
12 incorporated in Representative Snyder's bill,
13 Bill 2713, are recommended by our subcommittee
14 which is a subcommittee of the Joint State
15 Government's Commission Advisory Committee on
16 Decedents' Estates Laws. An identical bill has
17 been introduced in the Senate. Our subcommittee
18 was appointed in January of 1995 and asked to
19 conduct a review of both Chapter 55 (the
20 Incapacitated Person's Chapter) of Title 20, and
21 also Chapter 56 (the Powers of Attorney
22 Statute).

23 By way of background, the Advisory
24 Committee is composed of lawyers, judges from
25 across the state and is chaired by William McC.

1 Houston of Pittsburgh. The Advisory Committee,
2 which was formed in 1945, assists the
3 legislative task force. This task force is
4 chaired by Senator Greenleef and is composed of
5 the following members of the General Assembly:
6 Representative Clark, Michael Gruitza, Michael
7 Hanna, Robert Reber, Donald Snyder (the sponsor
8 of the bill), Senators Roy Afflerbach and
9 Charles Lemmond, Tim Shaffer and Hardy Williams.
10 Our Advisory Committee makes its recommendations
11 to the task force; if the recommendations are
12 approved, legislation implementing those
13 recommendations is introduced and that's
14 precisely the process that has taken place with
15 respect to House Bill 2713.

16 Our Subcommittee on Guardianships and
17 Powers of Attorney decided to begin its work
18 with the review of Chapter 55 (Guardianships);
19 and hence, that is why you have the first
20 recommendation on guardianships, but we are not
21 finished. This study presented the subcommittee
22 with an opportunity to revisit Chapter 55, which
23 was amended in 1992, without much input from the
24 Advisory Committee.

25 The subcommittee has begun its review

1 of Chapter 56 and anticipates concluding its
2 work by the fall of this year. The full
3 Advisory Committee will meet in December and it
4 is our hope to have a recommendation with
5 respect to changes in the legislation in the
6 Power of Attorney area for the full Advisory
7 Committee's action at that meeting. There is,
8 however, one proposed amendment in 2713 and that
9 would grant the Orphans' Court mandatory
10 jurisdiction over attorneys in fact.

11 The proposed amendments to Chapter 55
12 recommended by the subcommittee, were approved
13 by the full Advisory Committee, the Task Force
14 on Decedents' Estates Laws authorized the
15 introduction of legislation incorporating those
16 amendments at its May 13th, 1996 meeting.

17 I will just briefly summarize the
18 highlights of the proposed amendments. My
19 written remarks contain, as the report does, the
20 details of those specific amendments.

21 First, we suggest that the amendment to
22 5511(a):

23 -- Require that the notice of petition
24 and incapacity hearing be given to all sui juris
25 intestate heirs.

1 (At present, it is restricted to only
2 those who are residents of the Commonwealth as
3 mandatory parties to be notified.)

4 -- Provide that if the court is
5 satisfied that the alleged incapacitated person
6 could not understand and participate in the
7 incapacity hearing, then the alleged
8 incapacitated person would not be required to be
9 present at the hearing.

10 -- Provide that the court, when
11 considering the appointment of a guardian, shall
12 give preference to the nominee, including the
13 testamentary nominee, of a parent of or an
14 unmarried incapacitated person.

15 (Something that is of major concern to
16 families who have adult incapacitated persons.)

17 -- Provide more flexibility to the
18 court in order to allow the court the
19 opportunity to make the appointment of a plenary
20 guardian when it appears that is what the person
21 needs.

22 -- To remove a potential gap in time
23 from the date of an emergency order appointing
24 an emergency guardian of the person or estate or
25 any extention of that order expires until such

1 time as the permanent guardian is appointed.

2 (The law, as presently drafted, has a
3 gap where the person may not be served because
4 the court was unable to continue, according to
5 the statute, the appointment of that emergency
6 guardian.)

7 -- Provide that if there is no contest
8 as to the capacity of the alleged person, then
9 the petitioner may establish incapacity by a
10 sworn statement from qualified individuals.

11 -- Remove the mandatory annual
12 reporting requirement for guardians and place
13 with the court the discretion to require such
14 report (including the timing of such reports).

15 -- Clarify the reporting requirements
16 of the guardian of the estate.

17 -- Allow a guardian with court approval
18 to enter into a lease for longer than a
19 five-year term.

20 (That is a, basically investment,
21 cosmetic change.)

22 -- Permit the guardian to file an
23 account with the court at any time without the
24 prior authorization of the court.

25 -- And finally, to grant the Orphans'

1 Court mandatory jurisdiction over the
2 administration of guardian support agencies.

3 The act, as amended in 1992, encourages
4 the creation of these guardianship support
5 agencies which are to assist in the guardianship
6 process throughout the Commonwealth; however,
7 there was nothing in the law that gave any clear
8 jurisdiction to the Orphans' Court to supervise
9 the activities of those agencies looking at them
10 as a whole. Certainly, they could supervise
11 them in the individual appointments

12 -- Finally, the proposed amendment
13 relating to powers of attorney and that is the
14 granting of the Orphans' Court mandatory
15 jurisdiction over attorneys in fact.

16 So this summarizes the contents of
17 House Bill 2713. However, it is our objective,
18 and we are working, as we speak, on the
19 recommendations that we hope to have finalized
20 and available with respect to amendments in the
21 power of attorney area by early, in 1997.

22 And if I may indulge the Committee, I
23 would like to make a few observations as
24 personal observations and not as Chair of the
25 Subcommittee. These observations come from 36

1 years of practicing law in this field, they come
2 from my service as Chairman of the Probate
3 Section of the Philadelphia Bar Association and
4 also as the Chair of the Real Property Probate
5 and Trust Law Section of the American Bar
6 Association some five years ago and also as an
7 advisor to the Uniform Commissioners on the
8 Uniform State Laws including the Uniform Rights
9 of the Terminally Ill Act, the Uniform Statutory
10 Bill of Power of Attorney Act and the Uniform
11 Probate Code, generally, over the years.

12 First -- and I have said this before
13 publicly -- the system works. It doesn't work
14 perfectly, but, for the most part, it works
15 perfectly and it works perfectly because there
16 are thousands and thousands of dedicated
17 individual family members out there in the
18 communities who are willing to assume the role,
19 the difficult role, of serving as guardians for
20 their incapacitated relatives, often parents.

21 The system worked before the 1992
22 amendments and the system continues to work with
23 the 1992 amendments. Although, we feel, as we
24 have indicated in House Bill 2713, there are
25 certain improvements that can be made and the

1 thread that runs through that series of
2 improvements is discretion on the part of the
3 court. Not to have a legislative straightjacket
4 in specific requirements, but allow the court to
5 fashion what is needed in the specific case.

6 Pennsylvania consists of 67 counties.
7 We have read some of the reports of the
8 incidents that have brought this hearing about
9 this morning in Lackawanna County and some of
10 those press reports also indicate comments from
11 judges in other smaller counties which indicate
12 that their problem is finding guardians to
13 serve, not necessarily the mismanagement of the
14 affairs of the incapacitated person.

15 So it is important, in my view, that in
16 crafting the system --

17 And I might say, with the 1992
18 amendment, if you compare our statute with the
19 Uniform -- I have it over at my chair -- the
20 Uniform Protected Proceedings Act developed by
21 the Uniform Commissioners, our requirements are
22 much more fulsome, rigid and protective, but we
23 have a statute that does it. However, if the
24 system is made too difficult -- we are already
25 having trouble attracting people to fill the

1 needs -- then the ability to find people to
2 serve as guardians will become more difficult
3 and the system will be burdened even further
4 than it is.

5 Now, clearly, we have heard cases of
6 the rotten apples. There are rotten apples, but
7 the rotten apples, fortunately, are few and far
8 between. And I would hope that the legislation
9 that we draw does not necessarily put the whole
10 system in a straightjacket. Because as either
11 Judge Eagen or Judge Walsh is reported to have
12 said in the reported newspaper account, we can't
13 legislate -- I am paraphrasing, I realize -- but
14 we can't legislate goodness. There will be
15 persons who will steal, but they are few and far
16 between. When it happens, it can be severe.

17 But there is a solution to that problem
18 and the solution is in the statute. The
19 solution is the bonding of the fiduciary. Our
20 statute, the incapacitated person statute,
21 refers back to, I believe it is 5122, as to the
22 requirements for bonding. And the court should
23 fix bond, according to the statute, in each
24 case, unless it finds for cause shown that
25 bonding should be excused.

1 And, of course, the exclusive bond was
2 one of the things also touched on in one of the
3 Lackawanna County reports from the Judge in the
4 smaller county, where he said, you know, I have
5 trouble finding people, they are good people,
6 and I don't think that a bond is required; but,
7 that's a conscious decision to excuse bond. The
8 statute encourages bonding. And then there is a
9 whole, whole section in the code that gives the
10 bonding company the supervisory responsibility
11 over that person in requiring information
12 because the surety is the one that is on the
13 hook.

14 So that there is, in the present
15 Pennsylvania law, adequate means by which in the
16 Guardianship Law -- I am not speaking with
17 powers of attorney, we will be active further
18 recommendations on that story -- but in the
19 guardianship area, we have the safeguards if the
20 courts use the bonding device. That, in my
21 view, is required.

22 Thank you for your attention and we
23 would welcome any thoughts that the Committee
24 has as to what we, as the Joint State Government
25 Commission Subcommittee on Powers of Attorney

1 and Guardianship things that we can do to be
2 responsive to anything that comes from these
3 hearings or other deliberations. We will be
4 meeting next month, again, and we will be
5 meeting formally in October at which time we
6 hope to formulate our formal recommendations on
7 powers of attorney. Thank you, Mr. Chairman.

8 CHAIRMAN WOGAN: Thank you, Mr.
9 Lombard. With your indulgence, I would like to
10 open up for questions at this point. But before
11 I do that, I want to recognize several members
12 who have shown up since we began.
13 Representative Kathy Manderino from Philadelphia
14 County is at my far left, Representative Mike
15 Horsey is on my far right, and Representative
16 Lisa Boscola is to my rear.

17 Are there any questions for Mr. Lombard
18 from any Members in the Committee or staff?

19 Okay. Representative Clark is
20 recognized.

21 REP. CLARK: Thank you, Chairman Wogan.

22 I, like yourself, have some experience
23 in guardianship, being a practicing attorney,
24 and I found the system to work very well. We
25 use the bonding requirements, we use corporate

1 fiduciaries when the situation arises. And I
2 found that the 1992 amendments may have caused
3 pressure on fiduciaries that didn't exist in the
4 past and may not totally be necessary. And my
5 concern with passing that were the filings with
6 the courts on a yearly basis and some of the
7 costs and expenses that that was imposing upon
8 fiduciaries. But I think you are going to
9 address that in your amendments or in Don
10 Snyder's bill to certain degrees.

11 My concern for and then the reason that
12 I am here today is not so much the guardianship
13 aspect but the power of attorney aspect, because
14 I produce a lot of power of attorneys. I am a
15 power of attorney myself for my brother who is
16 working for a corporation in Mexico and I handle
17 whatever needs to be done for him in the United
18 States.

19 I would like to ask you one question on
20 the Orphans' Court mandatory jurisdiction over
21 attorneys in fact and what that entails and
22 where that is headed and what we are looking to
23 do with that, if you have any information on
24 that?

25 MR. LOMBARD: Well, I think,

1 Representative Clark, as a practical matter, the
2 Orphans' Court has, in the recent past (and I
3 went through, last night, the Fiduciary Reporter
4 for the last two years or so) I think the
5 Orphans' Court has assumed jurisdiction in those
6 cases where there was some dispute about a power
7 of attorney or the accountability of an attorney
8 in fact. The statute wasn't totally clear that
9 that was the right place to go. And I think
10 what this focuses on is making it clear that the
11 agent is a fiduciary, an agent is a fiduciary,
12 so the agent serving under Chapter 56 is a
13 fiduciary and as such is accountable where
14 fiduciaries are normally accountable in this
15 Commonwealth and that is the Orphans' Court. So
16 it is just designed to make that point clear.

17 REP. CLARK: Okay. So, currently, if
18 one of the sons is the power of attorney for the
19 mother and another sibling or son, daughter,
20 believes that there has been some mismanagement,
21 she can go to an attorney, allege that in a
22 petition and bring this matter before the court?

23 MR. LOMBARD: Absolutely, absolutely.
24 But before the question was: do they go to the
25 Common Pleas civil side or do they go to the

1 Orphans' Court division now? There are only
2 separate Orphans' Court Divisions, I believe in
3 20 of the 67 counties. So, in many respects, it
4 isn't important in those other 47 counties, but
5 they would be sitting as in Orphans' Court.

6 REP. CLARK: Thank you. I have no
7 further questions.

8 CHAIRMAN WOGAN: Thank you,
9 Representative Clark.

10 Representative Hennessey is recognized
11 next.

12 REP. HENNESSEY: Thank you, Mr.
13 Chairman.

14 Mr. Lombard, I heard you testify a
15 number of times about the requirement for the
16 bond. In preparing for the hearing today, and I
17 sent some of these materials out, I don't know
18 whether or not it was from the materials I got
19 back or the comments I received back from some
20 practicing attorneys in the field, but someone
21 had suggested that we would allow for the bond
22 requirements to be waived, much like I think it
23 was pretty well standard in preparing wills
24 where we allow the bond for an executor of the
25 estate to be waived.

1 Is it your suggestion that the bonds be
2 generally required and the waiver of a bond be
3 only in extreme cases, or, would you take a more
4 flexible approach and say the bonds could be
5 waived almost at will?

6 MR. LOMBARD: I think that,
7 Representative Hennessey, is really a question
8 for the court to decide in each individual case.

9 The way the statute reads (and it is
10 5122, I believe) first of all, the corporate
11 fiduciary is excused from bond, but the
12 individual is expected to post a bond as fixed
13 by the court, unless (and these are the words of
14 the statute) for cause shown, bonds should be
15 excused.

16 Now, if there is a good reason, if it
17 is a family circumstance where all the family is
18 in agreement, I think the court should have the
19 discretion (as it does now) of saying the bond
20 is not required in this specific case. On the
21 other hand, if it is a large estate that can
22 afford a bond premium and there is a large
23 amount of money involved and non-family members
24 acting as guardians, then I think it is totally
25 appropriate in that type of case to require a

1 bond, as the statute does.

2 REP. HENNESSEY: So, in your situation,
3 you would expect that the bonds would be posted
4 most of the time and that they would be excused
5 only in the exceptional cases?

6 MR. LOMBARD: I don't know whether it
7 would be exceptional, but I think that, by and
8 large, in the non-family situation, in the
9 non-family situation there would be a bond.
10 Where you are, where the court has no one to
11 appoint but someone who is not related to the
12 individual being declared incapacitated, then in
13 those instances, I think clearly a bond is
14 appropriate.

15 REP. HENNESSEY: Thank you.

16 Thank you, Mr. Chairman.

17 CHAIRMAN WOGAN: Thank you, Mr.
18 Lombard. We appreciate you sharing your
19 perspective with us this morning.

20 MR. LOMBARD: Thank you very much.
21 And, as I have indicated, we welcome any
22 suggestions to the Advisory Committee
23 Subcommittee what this group might have. Thank
24 you very much for having us this morning.

25 CHAIRMAN WOGAN: All right. Next on

1 our schedule is the Honorable Frank P. Eagen,
2 the 45th Judicial District, which I guess is
3 centered in Scranton. And I believe with him is
4 Kim Giombetti -- please correct me if my
5 pronunciation was not correct --

6 MS. GIOMBETTI: That is fine.

7 JUDGE EAGEN: That is very good.

8 CHAIRMAN WOGAN: -- who is from the
9 Lackawanna County Agency on Aging.

10 MS. GIOMBETTI: That's correct.

11 CHAIRMAN WOGAN: Good morning.

12 JUDGE EAGEN: Good morning. First of
13 all, I want to thank the Committee for this
14 opportunity to address you and commend you for
15 the response that you have shown to this problem
16 that we have.

17 I have had an opportunity to review the
18 proposed law and I thought I would just give you
19 a little background as to my experience in the
20 judicial system and my reasons for wanting to
21 address you and give you, firsthand, some of the
22 practical problems that we have had with the
23 system. The cases -- I think I have distributed
24 them to you -- one is an opinion, the other is a
25 grand jury presentment which shows, in detail,

1 some of the practical problems that we have had
2 with criminal activities in this area.

3 My own experience in the system began
4 as a district justice in 1982 and as a judge
5 beginning in 1988. Since that time, I think I
6 have conservatively presided over and
7 administered more than approximately 70,000
8 cases, ranging from adoption to zoning and first
9 degree murder cases to parking tickets and
10 nothing is more disturbing to me than to find
11 criminal activity around children and our senior
12 citizens. And I have had the experience of
13 having to preside over cases where criminal
14 activity was alleged in decedents' estates,
15 guardianships and, most recently, powers of
16 attorney, which I noticed by your previous
17 speaker was of some concern to you.

18 Our problem in Lackawanna County began
19 in February and March of 1996 and as a result of
20 those problems with guardianships, I addressed
21 some letters to Representative Cawley beginning
22 in May and June of this year indicating some
23 suggestions that I had. And I am going to limit
24 it to the two suggestions or two areas that I
25 suggested to Gaynor Cawley regarding the law.

1 And those would be that we require the
2 Auditor General to audit the guardianships filed
3 in the State of Pennsylvania and also the powers
4 of attorney on either a random audit basis, or,
5 depending upon the numbers, a full audit. This
6 would require us also to have the powers of
7 attorney filed with the Register of Wills Office
8 or the Clerk of Courts Office for the Orphans'
9 Court.

10 Right now, powers of attorney are not
11 necessarily filed in any, any office except for
12 the Recorder of Deeds if there is going to be a
13 transfer of property.

14 We suggest this because I believe that
15 an audit by the Auditor General's Office would
16 act as a strong deterrent to any wrongdoing in
17 this area, either in the guardianships or the
18 powers of attorney.

19 First of all with the guardianship, the
20 guardianship itself is already filed in the
21 court with the Orphans' Court Division under
22 Register of Wills where it is filed by law. The
23 Auditor General would then come in and conduct
24 either a random audit or a complete audit,
25 depending upon the numbers involved.

1 The powers of attorney, we would
2 request that the powers of attorney, by law, be
3 filed first in the Register of Wills Office and
4 that a bank or financial institution would not
5 recognize the power of attorney unless it was
6 first filed in the Register of Wills Office;
7 then, if it were filed in the Register of Wills
8 Office, that would give the Auditor General's
9 Office an opportunity to find a single location
10 where these powers of attorney were located and
11 then the Auditor General could conduct the
12 appropriate audit.

13 We do this, not to micromanage people's
14 lives, as I understand your concerns about
15 wanting to have too much governmental intrusion;
16 however, I think there is a significant enough
17 problem out there to warrant this because of the
18 fact that there has been some of this wrongdoing
19 with powers of attorney, guardianships and
20 decedents' estates.

21 I know from my own experience, I have
22 an opportunity every year to go out and speak to
23 senior citizens' groups and this year in our
24 area one of the big concerns that we have is the
25 senior citizens are reluctant to go to our Area

1 Agency on the Aging because their feeling is
2 that there has been some wrongdoing here and
3 that the agency and the laws aren't thorough
4 enough to prevent these problems from happening.

5 And the last area of statistics that I
6 could obtain indicate that in 1994, there were
7 2,581 guardianships filed in the State of
8 Pennsylvania. In that year, there were 122,898
9 criminal cases filed in this state. I think we
10 spend hundreds of millions of dollars in the
11 criminal area for prisons, public defenders,
12 prosecution, rehabilitation. I don't think it
13 is a significant amount of money to look to
14 spend on behalf of incapacitated people
15 throughout the Commonwealth to help preserve
16 their estates.

17 I brought along two examples, which I
18 think are a lot easier to talk in terms of what
19 really happens out there in the real world. One
20 is a grand jury presentment handed down, a
21 matter of public record, indicating how an
22 individual who was working for one of the
23 attorneys in question here was asked to do some
24 things which appeared to be improper and she
25 notified the Attorney General's Office and they

1 then turned the matter over to the Federal
2 Bureau of Investigation and an investigation was
3 conducted, and was ongoing, and there have been
4 some arrests made.

5 It indicates in there that they were
6 fortunate that this employee knew that something
7 was wrong and went to the state authorities.
8 Without that employee's cooperation, this would
9 have never been brought to light.

10 And also I have attached a recent
11 opinion that I have had dealing with a woman who
12 gave a power of attorney to the ex-husband of
13 her granddaughter and he proceeded to deplete
14 her account from \$23,740 down to \$2.39 and
15 that's a criminal charge that is now pending in
16 our area.

17 So these are two examples of where I
18 believe we need to do something in the areas of
19 guardianships and powers of attorney. The law
20 as presented with its procedural and its
21 substantive sections is state-of-the-art. I
22 don't think anyone in this country could come up
23 with a better law dealing with an every day need
24 of beginning a guardianship and the appropriate
25 ways of monitoring it. However, there has to be

1 some way of auditing these accounts to find out
2 exactly what is going on in terms of collecting
3 the assets and in terms of being able to explain
4 to the court how these assets have been either
5 generating interest or how they have been
6 expended.

7 If a guardian is appointed and a
8 guardian goes out and comes back to the court
9 with his report and says there is only three
10 bank accounts, there could very well be five.
11 We have to have some mechanism and I believe the
12 Auditor General's Office has the ability,
13 through Social Security numbers and through the
14 Banking Department here in the state, to track
15 down, to make sure that these reports, by the
16 guardians, are accurate and that we are getting
17 a full picture of what the assets and
18 expenditures are for these individuals.

19 I have a few other remarks, but I think
20 they are just general in nature and I will ask
21 if Kim would like to say a few words or if you
22 have any?

23 MS. GIOMBETTI: As I was introduced
24 before, I have been working as a Solicitor for
25 the Area Agency on Aging in Lackawanna County

1 since 1993 and I am sure this Committee is well
2 aware of the problems we have had in the last
3 six to eight months regarding some gross
4 financial exploitation by some of our guardians
5 in Lackawanna County.

6 I was present during the previous
7 speaker and I just wanted to touch on one issue
8 that was brought up.

9 In my capacity as Solicitor, it is my
10 job to bring these petitions to the court for
11 guardianship. And in many cases when the Area
12 Agency on Aging is involved, these are
13 individuals with no family, limited resources
14 and limited ability to obtain counsel.

15 In our capacity, we attempt to find
16 someone to serve in that guardianship,
17 especially through guardianship of the estate.
18 We don't have as much problem finding
19 guardianship of the person. We have an agency
20 that is called Serving Seniors in Lackawanna
21 County that does an excellent job at that.

22 As far as locating and getting someone
23 to agree to be guardian of the estate, my
24 experience has not been that people find that
25 the reporting requirements are excessive and do

1 not wish to serve in that capacity because of
2 that. My experience has been that the
3 guardianship of the estate law, as it is
4 delineated in the statute, is not specific
5 enough for individuals concerned with being
6 guardian of the estate.

7 Most of the problems in dealing with
8 either attorneys in the community, banking
9 institutions, financial planners, is that their
10 role and their obligations are not delineated by
11 the law. They come into this and they, they
12 really don't know where to begin and what is
13 required of them. And many of them are very
14 reluctant to take on this position because they
15 do not know exactly what is required. We try to
16 give them a little bit of direction in that and
17 put them in touch with some agencies who would
18 be able to assist them in that. But that is the
19 problem I have been coming in contact with, not
20 the reporting requirements.

21 No one has raised a comment to me in
22 the negative regarding they would not wish to
23 file these annual reports.

24 One of the great concerns of the Area
25 Agency on Aging and looking at the proposed

1 amendments to the guardianship law is the
2 removal of the reporting requirements. The only
3 reason that these gross abuses were discovered,
4 which as your presentment will tell you, one of
5 them to the tune of a hundred and ninety-six
6 thousand dollars, was because of the reporting
7 requirement.

8 Now, that wasn't done through an audit
9 or anything of that nature, but was done because
10 an employee who was asked to do something that
11 she interpreted as improper brought it to
12 someone's attention.

13 Without those reporting requirements,
14 we would have absolutely no way of determining
15 what is happening once these guardianships go
16 into place. As it is, at this moment, once the
17 Area Agency on Aging puts a guardian in place,
18 we lose control of that situation and we are no
19 longer given any access or any authority to do
20 any investigation or to make sure that these
21 guardianships are properly maintained and
22 properly handled. The only thing we have to go
23 on, in any regard, is the yearly reports.

24 In our position, we would like to see
25 the reports more often. I mean, at this stage

1 of the game, if anyone -- I agree with the
2 previous speaker, in that anyone who wants to
3 commit a criminal act is going to find a way to
4 do it, but those people who are diligent and
5 maintain these accounts as they would their own
6 would have no problem with the reporting
7 requirements as they now stand. They are not
8 that burdensome.

9 Most of them, at least on the Area
10 Agency's perspective as I speak here today, most
11 of them are, once you have the mechanism in
12 place, are pretty much standard procedure: you
13 pay the bills, you make the report, you do the
14 investment. It is not that difficult a
15 situation.

16 But if we did not have those reports
17 and we did not have a way to track what has
18 happened to that guardianship of the estate,
19 there would be no way we would have ever
20 discovered the gross problems that we have had
21 in Lackawanna County. The Area Agency on Aging
22 has a protective service obligation to the
23 community and one of those obligations is to
24 investigate financial exploitation.

25 And the only other thing I would like

1 to bring to this Committee's attention is: on
2 the powers of attorney, many times in Lackawanna
3 County, through our Protective Service Agency
4 within the Area Agency on Aging, we get reports
5 of financial exploitation on powers of attorney.
6 Unfortunately, there is no mechanism in place
7 for us to require the power of attorney to
8 submit to an audit or to provide us with an
9 audit through our investigation. We can do an
10 access to records to find out certain bank
11 account balances and try to recreate an
12 investigation using the limited access that we
13 have, but this Committee, through its hearings,
14 I think should investigate whether or not in the
15 Power of Attorney Law or whether in the
16 Protective Service Law, if that becomes
17 necessary, they consider allowing an
18 investigation to be held whenever there is a
19 report of financial exploitation through the
20 power of attorney and to give either the Auditor
21 General, the Area Agency on Aging or some other
22 agency the ability to audit those powers of
23 attorney to determine whether or not there has
24 been some financial exploitation.

25 My purpose in coming here today is to

1 give you the practical hands-on, everyday,
2 what's going on out there viewpoint to answer
3 any questions you have, especially in Lackawanna
4 County since we have had so many problems in the
5 last six months, to give you insight into maybe
6 if you have any questions on why they happened
7 that way. But I wanted to bring those two
8 points up to this Committee.

9 JUDGE EAGEN: Just one other thing and
10 that was on using the Auditor General's Office.
11 I guess it is just a rhetorical question. And
12 you would ask yourself: well, shouldn't we just
13 require each county to set up its own auditing
14 procedures? I don't know if it is cost
15 effective in each of the counties. And I think
16 with the Auditor General doing that, what you
17 would find is you would find standard uniform
18 practices and procedures throughout the state
19 rather than having 67 counties with God knows
20 how many different procedures. You would have
21 one uniform consistent practice throughout the
22 state.

23 And I don't know if I can emphasize it
24 enough: the main concern I have with the audits
25 by the Auditor General is the deterrent effect.

1 People know going into, accepting a
2 guardianship, or when a power of attorney is
3 filed either at the Register of Wills or the
4 Clerk of Courts Office, that they will get a
5 notice that this account is the subject of a
6 state audit and I think that will act as a
7 significant deterrent in this area.

8 Right now, we just don't have the
9 mechanics to do the orders.

10 CHAIRMAN WOGAN: All right. Thank you,
11 Judge Eagen and Miss Giombetti.

12 Are there any questions from any
13 Members of the Subcommittee or staff?

14 Representative Hennessey is recognized.

15 REP. HENNESSEY: Thank you, Mr.
16 Chairman.

17 Judge Eagen, in your experience --
18 well, I understand fraud can take place in
19 almost any context -- can you give the Committee
20 some idea as to whether or not your experiences
21 from the bench have indicated these kinds of
22 frauds take place more when you are dealing with
23 strangers who are appointed by the court to take
24 care of an elderly person who has no family, or,
25 you know, perhaps a single child taking advances

1 against an expectation of an estate from a
2 parent who hasn't passed away yet?

3 It would seem to me that when you have
4 children, a number of children, the children
5 perhaps can police each other and somebody would
6 notice and blow the whistle to the one child who
7 is abusing the powers and/or taking money out of
8 the bank and that kind of thing.

9 Where is the problem in your
10 experiences?

11 JUDGE EAGEN: It is a very relevant
12 question and it is a very important question
13 because, most of the time, by the time we come
14 across the issue of theft, the victim is dead.

15 And, often times, the victims, when
16 this problem is presented, are reluctant to
17 admit that they were naive or that they were
18 taken advantage of.

19 And, most of the time, my experience
20 indicates that it is a close friend of a family
21 member who has taken advantage of the
22 individual.

23 And, again, it is the problem where
24 sometimes by the time it is discovered, the
25 victim is no longer alive. It is often times a

1 son or a daughter and the mother or father does
2 not want to admit publicly that their son or
3 daughter took advantage of them, they don't want
4 to appear to be naive, they don't want to appear
5 to be over-trusting.

6 And in the criminal justice system
7 itself, we have had a significant number. This
8 case here that I gave you is indicative of the
9 kind of case that comes before us quite often
10 with these theft cases. And this is a case
11 where the victim is prepared to prosecute.
12 Often times, the victim isn't because the victim
13 doesn't want to be appear to be the kind of
14 person that was taken advantage of, usually by a
15 family member. For that reason, it is a very
16 sad, sad thing to observe.

17 REP. HENNESSEY: Thank you.

18 Thank you, Mr. Chairman.

19 CHAIRMAN WOGAN: Brian Preski, Majority
20 Counsel, is recognized.

21 MR. PRESKI: Your Honor, I have some
22 questions. What are the usual triggers to the
23 court that there is something wrong with the
24 accounting in a guardianship? I mean, what tips
25 you off to go to almost criminal statutes?

1 JUDGE EAGEN: Well, usually we can tell
2 by the amount of the fees. We can usually tell
3 the -- Often times, we will get complaints from
4 the neighbors or friends as to the care of the
5 individual. Sometimes we will see bills or
6 creditors contacting the court saying they
7 haven't been paid, yet the guardian continues to
8 receive their fee; usually things like that
9 indicate that something within the guardianship
10 needs to be addressed.

11 MR. PRESKI: Does the accounting that
12 is already required, does that indicate either a
13 balance or do they stop filing as a matter of
14 practice when they start to embezzle these
15 funds?

16 JUDGE EAGEN: No, no, they continue to
17 file. I was doing the Orphans' Court in our
18 county up until January of 1994 and I was
19 working under the '92 law and I required that
20 the individuals file every six months rather
21 than every year. And I noticed, even in these
22 files that I have had a chance to review, the 28
23 cases that are under review in our county, they
24 continue to file the reports right up until they
25 were apprehended.

1 MR. PRESKI: Okay. Then my question
2 is, Your Honor, does it, as you have offered
3 here today, make any sense for the Auditor
4 General or Attorney General to do additional
5 audits or have these reports go directly to
6 either one of those agencies if there is fraud
7 in the accounting as reported?

8 I mean, they won't be able to, from
9 what you have said, be able to discern the fact
10 that money is missing until sometimes either
11 somebody comes and says I haven't been paid or,
12 you know, there is almost an admission within
13 the report itself that there is something going
14 on.

15 JUDGE EAGEN: No, that's a fair enough
16 concern. That's the reason why I brought the
17 grand jury presentment down.

18 In the grand jury presentment, what the
19 individual was doing was he was reporting to the
20 court that his attorney's fees were X amount of
21 dollars, I believe he said 5,000 when in fact he
22 had taken, I believe, \$18,000 out.

23 Now, I get that report or the judge in
24 the Orphans' Court gets that report and simply a
25 report as to what is happening. We have no way

1 of knowing exactly how much the bank balance was
2 depleted without an audit. So, I mean, if you
3 had him telling me I took a \$5,000 fee, when in
4 reality he took 17,000, it is the Auditor
5 General who would come back after doing the
6 audit and say, well, your report indicates your
7 fee was 5,000. Where is the other 12,000? And
8 that's where you need the coverage.

9 MR. PRESKI: Doesn't either of them,
10 all now, though, Your Honor, for you to order an
11 audit at any time you desire?

12 JUDGE EAGEN: It does. It does. Our
13 practical problem is that, at the county level,
14 we don't have someone available to us to just go
15 out and conduct the audits as a part of the
16 public expense. We would then be getting
17 auditors in and charging each individual estate.

18 MR. PRESKI: Okay. Your Honor, my last
19 question is that, in the case with the grand
20 jury presentment, it is basically the theft of a
21 hundred and ninety-six thousand dollars and in
22 the Opinion and Order you gave us in Daniel
23 Moran's case, it is a \$23,000 hit, it looks
24 like, for the one subject of guardianship. In
25 those cases, were there bonding requirements for

1 either?

2 JUDGE EAGEN: In the estates, there
3 were. The guardianships, there were. In the
4 power of attorney, I don't believe there was.

5 MR. PRESKI: Okay. Then my next
6 question is, Mr. Lombard previously before you
7 said that to answer the concerns where we don't
8 have the reports coming in or where we don't
9 have mandatory filing on a monthly basis or a
10 biannual basis, that he thinks that a bonding
11 requirement, an administrative bond for all
12 guardianships and for all, I think powers of
13 attorneys, or just guardianships, you know,
14 would basically protect the public in this area,
15 I mean, what are your thoughts about that?

16 JUDGE EAGEN: I think it is a good
17 idea. I think the law already gives us the
18 ability to do that. I just would be concerned
19 as to whether or not it would be cost practical
20 in some of these estates, the marginal ones,
21 because these bonds usually require a yearly
22 fee. And I don't know if that actually stops
23 someone from stealing. I think that the audit
24 is the more effective deterrent. The bond
25 protects them financially, but, criminally, I

1 think someone who is considering
2 misappropriation of funds may think twice before
3 they do anything, knowing that they are subject
4 to audit.

5 MR. PRESKI: Okay. Then my next
6 question, Your Honor, is that with what you have
7 said, it appears that legislatively one of the
8 solutions that we could then offer is a bond, a
9 mandatory bonding requirement with either the
10 discretion for a judge below a certain level or
11 a non-mandatory bond below a certain level of
12 estates.

13 JUDGE EAGEN: That's a good idea.

14 MR. PRESKI: I think it is 25,000 now
15 in some circumstances.

16 JUDGE EAGEN: That makes sense.

17 MR. PRESKI: Would you agree with that?

18 JUDGE EAGEN: I would agree with that.

19 MR. PRESKI: And then that takes care
20 of the living people.

21 You said that, in your testimony, that
22 some of the times that you find out about this
23 fraud is, you know, at the death of the person.
24 Do you think then if we strengthen the criminal
25 sanctions against either guardians or those with

1 powers of attorneys, that that would effectively
2 deter the ongoing fraud during the course of a
3 person's life? If we put the bonding
4 requirement on, we have protected the money --

5 JUDGE EAGEN: Right.

6 MR. PRESKI: -- so that if there is
7 fraud that is discerned during the person's
8 life, they won't lose the money and we can have
9 another guardian appointed, hopefully a
10 non-fraud guardian.

11 If we find this after their death, is
12 it not better then to enhance the criminal
13 sanctions against this person rather than to
14 flood the system (which I think you have said or
15 would agree that the majority of cases do not
16 result in fraud or do not contain fraud) with
17 audits that are just ongoing, you know,
18 throughout, where the majority, they'll be
19 unfounded?

20 JUDGE EAGEN: I think if your question
21 is should we increase the criminal sanctions?

22 MR. PRESKI: Yes.

23 JUDGE EAGEN: Oh, I can't disagree with
24 you there at all. Again, that makes good common
25 sense, I believe it is appropriate and it is a

1 sensible approach to the problem.

2 MR. PRESKI: Do you think that is a
3 fair compromise for not requiring the audits?

4 JUDGE EAGEN: I think if you are
5 looking at the numbers involved and you are
6 saying to yourself we have 5500 --

7 In Lackawanna County, we have 53
8 guardianships average a year. If you are asking
9 how much money it would cost to do an audit,
10 considering the fact that there is roughly 2500
11 a year, I don't think it is that much of a
12 burden on the State Auditor General's Office to
13 conduct an audit of a decedent or a guardianship
14 or power of attorney when there really isn't, on
15 the average, that much involved, given its
16 deterrent effect.

17 And that's what I am concerned with,
18 because you can make all the criminal penalties
19 you want, you can put all the bonding
20 requirements you want, they will act as a method
21 of preserving some of the guardianship funds in
22 the event something is taken. However, our
23 problem is we want to prevent that from even
24 happening. And I think people knowing that they
25 are subject to an audit, I think that is an

1 added incentive to dispel any criminal activity.

2 MR. PRESKI: Thank you, Your Honor.

3 JUDGE EAGEN: It is not a guarantee.

4 It is certainly not a guarantee. It is just my
5 personal experience and I hope it has been
6 somewhat informative to you.

7 MR. PRESKI: Thank you, Your Honor.

8 JUDGE EAGEN: Um-hum.

9 CHAIRMAN WOGAN: The Chair recognizes
10 Counsel William Andring.

11 MR. ANDRING: Thank you, Mr. Chairman.

12 My question goes to some of the
13 recommendations being made about powers of
14 attorney and increased judicial review of that
15 entire procedure and it comes from this
16 perspective: back in 1992, the Legislature made
17 a considerable number of changes to the
18 guardianship law to make it considerably more
19 difficult to have a guardian appointed and made
20 the reporting requirements more onerous. All of
21 this was done under the pretext that this will
22 increase the protection of people for whom the
23 guardians are appointed.

24 I think the result of those changes
25 have been that, while we may have increased

1 protection for a few people, we have made the
2 requirements so onerous that many people chose
3 not to go the guardianship route, particularly
4 people with small estates, because we made it so
5 expensive and so difficult to pursue. And I
6 have had that experience myself when an elderly
7 client of a small estate comes in to speak with
8 you and you lay out the options for them versus
9 going with a guardianship and what is involved
10 there versus going with your power of attorney.
11 They ask for the power of attorney form.

12 JUDGE EAGEN: Right.

13 MR. ANDRING: Because, otherwise, their
14 estate will be eaten up in that guardianship
15 process. And the result is that we are now here
16 four years later and the considerable number of
17 the changes that have been recommended by the
18 task force are simply undoing the changes that
19 were made back in 1992, going back to the
20 previous law.

21 So my concern, if either one of you
22 could address this, is, if we provide filing
23 requirements and recording requirements for
24 powers of attorney and give people standing to
25 bring lawsuits to get accountings on power of

1 attorneys and essentially make them into almost
2 a mini-guardianship proceeding, aren't we then
3 simply going to be pushing a lot of people out
4 of powers of attorney and into a situation where
5 they go to the attorney and the attorney says,
6 well, you can do the guardianship or you can do
7 the power of attorney or you can just pick one
8 of your relatives and put their names on all of
9 your accounts and they are going to be going
10 with that route with no judicial review
11 whatsoever?

12 And that is the concern that I have:
13 the unintended consequences that you are trying
14 to protect people and, in effect, what you end
15 up doing is giving less protection to people
16 despite your good intentions.

17 JUDGE EAGEN: I will just say one thing
18 -- and I know Kim has a few thoughts on this
19 because we previously discussed it -- the
20 problem is micromanaging people's lives to the
21 point of telling them when to brush their teeth.
22 The practical problem that I have had is that,
23 you are right, when you start getting into the
24 point where you are talking about bonds, you are
25 talking about reports and a number of things and

1 it does become cost prohibitive to the smaller
2 guardianships or the smaller powers of attorney.
3 That's why I have tried to stay a little clear
4 of that area and come back and say, we need an
5 auditing procedure to keep everybody on their
6 toes. And I am not sure if that is the ultimate
7 solution, but I think we have got to look at
8 some way of checking and cross-checking what is
9 going on with these things, these guardianships
10 and powers of attorney, with the Auditor
11 General's Office, we knew where it wouldn't
12 become costly to the individuals. I don't think
13 there is that many guardianships statewide.

14 Now, powers of attorney, I don't know
15 what that has in store, once you start requiring
16 people to file them. I am only talking about
17 individual powers of attorney, not corporate
18 powers of attorney or business powers of
19 attorney. I am talking about the power of
20 attorney to go down and take Ann Polen's savings
21 out of her CD and put it in your name; that's
22 the kind of powers of attorney that I am
23 concerned with.

24 MS. GIOMBETTI: I think I can address
25 one main issue. As far as the new provisions

1 proposed for powers of attorney and new
2 safeguards to prevent abuse in those situations,
3 I would like to see them as stringent as the
4 guardianship procedures and those protections
5 are.

6 In working with this guardianship law
7 on a daily basis, I would have to tell this
8 Committee that I don't believe there is a choice
9 between whether or not you go power of attorney
10 or guardianship route. It is well-delineated in
11 the law, in the guardianship law, as a
12 petitioning and as a mechanism to determine
13 whether or not a guardianship is necessary,
14 works very well.

15 There is no, at least in my view of
16 working with that law on a daily basis, there is
17 no choice between: is there a power of attorney
18 or is there a guardianship to be pursued? You
19 are required to pursue a guardianship when the
20 person that you are concerned about is at the
21 level where they are no longer capacitated to
22 make a decision to enter in a power of attorney.
23 At that point, guardianship procedure is your
24 only option.

25 If that person is still in a state of

1 mind where they can give consent to allow
2 someone to be their power of attorney,
3 guardianship proceedings are not necessary.

4 And powers of attorney are favored in
5 the guardianship law and should be pursued. And
6 at the Area Agency on Aging in Lackawanna
7 County, we certainly do go that route. The law
8 requires the least restrictive and that is the
9 way we go.

10 But that doesn't mean that the powers
11 of attorney should be given less protection than
12 the guardianship law. You are still dealing
13 with other people and their personal health and
14 safety and their financial well-being.
15 Protections have got to be put into place. A
16 lot of those individuals, when they are
17 approaching that age where there is becoming a
18 question on whether or not they are going to be
19 able to maintain their own assets and their own
20 personal health and safety, turn over powers of
21 attorney to a relative. That does not mean they
22 give up their right to be maintained in a safe
23 fashion and to be free from financial
24 exploitation.

25 And those protections that are given to

1 people under a guardianship should also be
2 afforded to those people under a power of
3 attorney. Just because they are giving someone
4 else their rights doesn't mean that their rights
5 are no longer important in this situation.

6 I would like to see the same
7 protections given to the powers of attorney. We
8 have had many problems with powers of attorney
9 as well as with guardianships of the estate and
10 in dealing with the Area Agency on Aging and the
11 Protective Service Bureau and the District
12 Attorney's Office in these matters, there is a
13 lot of opportunity to abuse those powers. And
14 minimal reporting requirements, minimal filing
15 requirements is not too much to ask to maintain
16 the powers of attorney and maintain those people
17 with their personal health and safety and their
18 financial safety.

19 MR. ANDRING: Well, you know, if I
20 might interject here a bit. It is nice to talk
21 about protecting people, but I heard the same
22 arguments four years ago and at that time the
23 law was such that if an elderly person now
24 became mentally incapacitated and unable to
25 handle their affairs and were in a nursing home

1 and the family came to the attorney with the
2 situation, you could go to the nursing home, you
3 could get a statement from the attending
4 physician at the nursing home, you could go to
5 court and file a petition and a guardian could
6 be appointed and that was the standard
7 procedure.

8 And I heard people come in here and
9 talk about how that, that scenario, was fraught
10 with abuse and we had to change that and we had
11 to require depositions from the physicians and
12 we had to set up this court proceeding and we
13 had to haul in the incapacitated person in front
14 of the judge.

15 And the minute you explained that
16 procedure to someone, they don't want anything
17 to do with it. And so when that person is
18 sitting in your office and says I am afraid
19 three or four years down the road, I might not
20 be able to handle my affairs and you tell them,
21 well, at that time, one of your relatives can
22 petition to be appointed guardian and this is
23 what is going to happen and they are going to
24 have to spend all of this money in this
25 proceeding and, on top of that, they are going

1 to have to put you in a wheelchair and haul you
2 in in front of the judge so he can sit there and
3 ask you questions that you can't answer, people
4 were appalled at this. But it was done under
5 the guise of protecting them.

6 And I am just very afraid that we are
7 going to do the same thing with powers of
8 attorney. Under the guise of protecting people,
9 we are going to put numerous expensive
10 requirements on them and wrap it up in a court
11 process and the minute you explain to someone
12 what they are getting involved with when they
13 sign a power of attorney and you explain to
14 someone what they are potentially becoming
15 involved with if they agree to be an attorney in
16 fact, they are not going to want anything to do
17 with it. And, instead, what they are going to
18 say is, well, just put me on the account as a
19 joint tenant and put me on the deed as a joint
20 tenant and that's what you are going to get and
21 people will end up, in the long run, having even
22 less protection than what they have now under a
23 power of attorney.

24 MS. GIOMBETTI: Well, I agree with
25 everything you are saying. And I agree that if

1 even in the presence under the present law there
2 are many situations where people are in stable
3 environments, already placed in a nursing home,
4 have no assets -- or limited assets, maybe a
5 Social Security check, a Black Lung check coming
6 in once a month -- there is nothing to protect,
7 the money is all going to the nursing home, it
8 is being made use for their maintenance at that
9 nursing home, there is nothing for a
10 guardianship to do and the nursing homes are
11 coming to us and requiring that we get a
12 guardianship or they will no longer care for
13 this individual because of a liability issue.
14 They want someone in place. They no longer want
15 a family signature, they no longer want a family
16 member making decisions who does not have court
17 intervention or guardianship over that
18 individual.

19 And we have been put in that situation
20 many, many times in Lackawanna County where we
21 have got into court in a stable situation and
22 had to put guardianship proceedings into effect
23 and appoint guardians because of being either
24 required by a hospital or a nursing home in
25 order to maintain this individual.

1 And I understand what you are saying
2 because it is, one of our major frustrations is
3 is that we have, some months, so many
4 guardianships that they are very difficult to
5 maintain this amount of litigation in the
6 Orphans' Court. And many of them are not on an
7 emergency basis, many of them are not necessary,
8 these people have been maintained through a
9 family member for months or years; but, nursing
10 homes, because of liability issues and some
11 other things, have made it very clear to us that
12 they will no longer either sign on a person on a
13 family member's signature or will no longer set
14 up a REP (phonetic) program without a
15 guardianship being put into place. And we find
16 ourselves in that situation every day.

17 CHAIRMAN WOGAN: Thank you, Counselor
18 Andring.

19 Next, the prime sponsor of House
20 Resolution 377 is recognized, Representative
21 Cawley.

22 REP. CAWLEY: Thank you, Mr. Chairman.
23 Attorney Giombetti and Judge Eagen,
24 thank you for coming down to testify today.

25 Based on what was just said, and was

1 also mentioned by one of the previous persons
2 giving testimony, regarding strapping the
3 system, looking for a balance, I honestly feel
4 that the exact reason why Representative Tigue
5 and I sponsored the resolution was because we
6 have had problems, very very serious problems in
7 Pennsylvania. There is no other reason why we
8 sponsored that resolution.

9 As I mentioned in the testimony, I was
10 asked, specifically asked by Judge Eagen in
11 three letters he had sent to me in May, June and
12 July, and by Attorney McGee, to do something
13 about the existing laws in Pennsylvania. So we
14 then felt that the best persons in Harrisburg to
15 address these issues would be the Judiciary
16 Committee. That's why we had that passed.

17 So, basically, what I would like to say
18 to Judge Eagen and Attorney Giombetti and the
19 other persons in this room who have testified
20 and will testify, is, I would like to put all of
21 you in touch with someone from the Reference
22 Bureau. And those are the persons who draft up
23 amendments for us legislators. And I would like
24 to have a contact made between anyone that would
25 wish that they would like to have this done.

1 But, in particular, I would like to
2 have this done for the persons testifying from
3 Lackawanna County so that we can have amendments
4 drafted to House Bill 2713.

5 I will then make sure that the entire
6 Judiciary Committee and the Special Committee
7 receive the proposed amendments to House Bill
8 2713. And now, I think all of us, including
9 myself and the Members of the Committee, will
10 know how those amendments are drafted and going
11 to affect the bill and I think we are going to
12 have a clearer picture.

13 I am very grateful for it. This is
14 what we wanted. And thank you, Chairman Wogan.
15 We wanted this hearing, we wanted this
16 testimony, but I think it is going to be more
17 helpful to us to actually see amendments and we
18 can then have them, put them up against the bill
19 and now we are going to have a very clear
20 picture as to what the final product is going to
21 be.

22 So, again, thank you. And I will make
23 sure I follow through on what I said I am going
24 to do as far as the Reference Bureau. I would
25 like Attorney Giombetti to talk to them, and

1 Judge Eagen, Attorney McGee, and anyone else
2 that would like to, and have some amendments
3 strapped. And I know it might take a little
4 time, but I think it is going to be worth it in
5 the long run.

6 CHAIRMAN WOGAN: Thank you,
7 Representative Cawley.

8 The Chair next recognizes
9 Representative Clark.

10 REP. CLARK: Thank you, Chairman Wogan.

11 I am focusing on this power of attorney
12 situation. And, to me, the power of attorney
13 has possibly three steps as a document: one is
14 when it is prepared, number two is when it is
15 put into effect, and number three is when the
16 individual becomes incompetent, if that happens.
17 And I was wondering if we are going to look at
18 an opportunity to audit these. And I have
19 always been concerned that an accounting is not
20 an audit.

21 JUDGE EAGEN: Exactly.

22 MS. GIOMBETTI: Exactly.

23 REP. CLARK: It is a recapitulation of
24 a bankbook or a computer printout from a bank in
25 many cases. And I have always -- and I have

1 prepared those -- and I have always thought,
2 well, what is the end to this because it really
3 doesn't prove an awful lot unless you go back
4 and verify the transaction. I don't know if the
5 trustee is paying for his own oil or whether
6 this is Mary Beth's oil because I don't go back
7 and -- I guess I have an accounting background
8 -- I don't go back and look at the actual bill.

9 And I have always wondered, well, what
10 triggers a problem? And I guess when you serve
11 that on the other heirs or parties in interest,
12 (beneficiaries, remaindermen), maybe they find a
13 problem or find something that they don't like
14 and file an exception.

15 So I have always thought that an audit
16 would be more helpful as far as getting the
17 bottom line and things, always been, that at
18 least in many cases, cost prohibitive.

19 But if you require that instead of an
20 accounting, you would take that cost, offset it
21 against what the attorney charged for the
22 accounting and then maybe you are not so far off
23 there. So I don't think that is out of the
24 question.

25 And I have, when we go down through the

1 power of attorney problem, I figure possibly
2 maybe that the recording of the power of
3 attorney should be done whenever the individual
4 becomes incapacitated because you might write a
5 power of attorney for a 50-year-old person and
6 they may hold it until they are 72, put it into
7 effect, and that you wouldn't want it and they
8 would have a lot of time to change their mind.
9 Just like when you write a will, register it
10 whenever they write it.

11 So maybe you wouldn't register a power
12 of attorney when it is written and you might not
13 register it when they put it into effect; but,
14 if the person is determined to be incompetent,
15 then maybe you would register and trigger some
16 kind of audit process. So I would like your
17 comments or thoughts on that.

18 JUDGE EAGEN: Well, as it stands now,
19 when the person became incompetent with a
20 durable power of attorney, the power of attorney
21 would survive.

22 REP. CLARK: That's right.

23 JUDGE EAGEN: And the guardians of the
24 individual at that time would be able to ask the
25 person who held the power of attorney for some

1 accounting as to what he or she did with the
2 funds.

3 My concern was always that, as you say,
4 delivering the power of attorney to someone
5 prior to the declaration of incapacity or
6 incompetency, the problem of them depleting
7 assets, bank accounts of the individual for
8 their own purposes. It could --

9 REP. CLARK: But at that point then if
10 the person is still competent, he could check on
11 it himself.

12 JUDGE EAGEN: Well, the practical
13 problem like that with it, is often times what
14 we have, is we have an elderly -- I am talking
15 about these elderly individuals. As our
16 population continues to age, we have elderly
17 individuals who basically trust these people, a
18 great majority of them just simply trust them to
19 handle their everyday affairs and there has been
20 a number of cases, numerous cases where they
21 have been depleted.

22 Yes, you are right, if someone gives
23 them the power of attorney, if I give you my
24 power of attorney, then I can check on exactly
25 what you are doing. Unfortunately, what is

1 happening out there is we have people giving
2 powers of attorney (basically trust their
3 friends, relatives, children) and these people
4 have absconded with the funds in the sense that
5 they used the monies for their own purposes,
6 and, in some cases, just simply taken large
7 amounts of money from them.

8 REP. CLARK: So that if we file the
9 power of attorneys, you would prefer that you --
10 when the power of attorney is put into effect?

11 JUDGE EAGEN: When they want to use the
12 power of attorney.

13 REP. CLARK: Right, when they want to
14 use it.

15 JUDGE EAGEN: I think that the
16 safeguard you have there is that the banks would
17 be required to maintain a position where they
18 would not honor a power of attorney unless it
19 was first certified as being recorded in the
20 courthouse and then the bank would honor the
21 power of attorney knowing full well that power
22 of attorney would be audited, it could be
23 audited and accounting could be made as to
24 exactly -- or as an audit -- as to how those
25 funds were spent.

1 REP. CLARK: Then are you looking at
2 tracking the guardianship law as far as filing
3 accountings for that power of attorney?

4 JUDGE EAGEN: Yes.

5 REP. CLARK: So that there would be,
6 every year --

7 JUDGE EAGEN: Right.

8 REP. CLARK: -- a power of attorney who
9 puts it into effect every year with the filing
10 and accounting that would track the guardianship
11 law?

12 JUDGE EAGEN: Right.

13 REP. CLARK: And you still are shying
14 away from the proposition of the court. Let's
15 say you have 200 power of attorney cases, or
16 whatever, and you are still shying away from the
17 fact that you would randomly take maybe eight
18 percent or seven percent of those and order that
19 an audit be done of those accounts?

20 JUDGE EAGEN: I wouldn't have any
21 problems doing that. It is just that I know
22 from my everyday experiences that the counties
23 are reluctant to pay for a person to conduct the
24 audit.

25 REP. CLARK: And you don't believe that

1 the power of attorney should pay for that audit?

2 JUDGE EAGEN: We could audit that, but
3 then we go back to our earlier problem that it
4 then becomes burdensome between the bonds, the
5 audits, the procedural costs, the attorneys'
6 fees, to come in. People just simply -- I think
7 we are talking about an elderly population here
8 that needs some help.

9 REP. CLARK: You are talking about the
10 deepest pockets of the -- between the estates
11 (inaudible)?

12 JUDGE EAGEN: The Auditor General is, I
13 think the appropriate --

14 REP. CLARK: We will have to see what
15 she has got in her budget, in her budget this
16 past year. Thank you.

17 JUDGE EAGEN: Sure. Thank you.

18 CHAIRMAN WOGAN: Thank you,
19 Representative Clark.

20 Judge Eagen, assuming there is no
21 objection, we are going to make part of our
22 official record your Opinion and Order in the
23 case of Commonwealth versus Daniel Moran and
24 also the copy of the Grand Jury presentment that
25 you mentioned in your testimony.

1 JUDGE EAGEN: Certainly.

2 CHAIRMAN WOGAN: I want to thank both
3 of you for taking time out to testify before our
4 Special Committee this morning and I know you
5 have a busy trial schedule in Lackawanna County.
6 We especially appreciate your being here. I
7 thank you, and good morning.

8 JUDGE EAGEN: I want to thank you
9 because something I wanted to say. Often times,
10 I hear people in the editorials throughout the
11 state will say, well, maybe we should only have
12 a legislature that meets only six months a year
13 and maybe we should cut back here. And this, to
14 me, is an important indication of what a
15 responsive legislature can do. When people are
16 available, year-round, and prepared to address
17 these problems.

18 The law that you wrote in 1992 or 1993,
19 good law. We are bringing you problems not with
20 the law but just some examples of criminal
21 activity that may need some slight changes.
22 Nothing wrong with your law, just that we have
23 to take into consideration some, some criminal
24 activities and account for it.

25 But, to me, it is nice to be able to

1 come down here in July and address this problem
2 instead of waiting until October or November.
3 It is nice to know that we have a legislature
4 that is responsive. Thank you.

5 CHAIRMAN WOGAN: Thank you, Judge. We
6 will make sure the record reflects that today is
7 July 31st, 1996.

8 JUDGE EAGEN: And you are here at lunch
9 time. Thank you.

10 CHAIRMAN WOGAN: Next on our schedule
11 is John McGee, Attorney, I believe from Scranton
12 and Stroudsburg. Correct me if I am wrong?

13 MR. MCGEE: That's correct.

14 I have some written comments which I
15 have submitted to the Committee which I will
16 address first and then as a result of the other
17 speakers this morning, I would like to add some
18 things to their comments.

19 By way of background, I am an attorney
20 licensed to practice in the Commonwealth of
21 Pennsylvania with offices in Scranton and
22 Stroudsburg. My field of concentration is
23 estate planning, in which I address a number of
24 elder law issues, including the preparation of
25 power of attorney documents for elderly clients.

1 Upon being made aware of the fact that
2 the House Judiciary Committee was considering
3 legislation to reform the guardianship laws, I
4 recommended various changes in the laws dealing
5 with powers of attorney in a letter to
6 Representative Gaynor Cawley who forwarded my
7 correspondence to the House Judiciary Committee
8 for consideration. After review of my
9 recommendations, I was contacted by Brian
10 Preski, Chief Counsel to the House Judiciary
11 Committee, and I was asked to appear today
12 before you to express to you personally my
13 recommendations for legislative changes in the
14 power of attorney statutes.

15 First of all, I wish to make a
16 distinction between powers of attorney that are
17 in effect when a person is mentally
18 incapacitated as opposed to those that are in
19 effect when a person still retains the mental
20 capacity to make decisions effectively.

21 If a person has granted a power of
22 attorney to another person but still retains the
23 mental capacity to make decisions, that person
24 does not need protection or intervention on his
25 or her behalf since he or she still has the

1 power to revoke the power of attorney which has
2 been granted.

3 My concern, today, however, is
4 addressing the need for protection of the assets
5 of an individual who has granted power of
6 attorney to another individual, has then
7 subsequently become mentally incapacitated and
8 is therefore unable take further steps to
9 safeguard his or her assets. This situation can
10 arise principally in two circumstances: first in
11 the context of guardianship proceedings which
12 have been instituted but where the court
13 concludes that, despite the mental incapacity of
14 the individual, a guardian is not necessary
15 since a durable power of attorney document had
16 previously been executed; and secondly, the
17 circumstance can arise when an individual has
18 executed a power of attorney document stating
19 that the power shall become effective at some
20 future time if and when a doctor or doctors by
21 written certification state that the person has
22 become mentally incapacitated. In both of these
23 circumstances, a person designated in the power
24 of attorney document as the attorney in fact has
25 control of the assets of the mentally

1 incapacitated individual without the court
2 supervision which is accorded to those
3 individuals who are subject to the guardianship
4 statutes. It is in light of these situations
5 that I offer the following recommendations:

6 1. Upon the commencement of the period
7 in which the attorney in fact assumes control of
8 the assets of the mentally incapacitated
9 individual, the attorney in fact should be
10 required to file a petition with the appropriate
11 county court requesting the court to establish
12 the rate of compensation to which the attorney
13 in fact shall be entitled for the rendering of
14 his or her services. This requirement could be
15 waived if the mentally incapacitated individual
16 has stipulated to compensation terms in the
17 power of attorney document. The compensation is
18 infrequently set forth in the power of attorney
19 document since the nature and extent of the
20 assets and the services to be rendered in the
21 future are unknown at the time of the execution
22 of the document.

23 2. Upon the commencement of the period
24 in which the attorney in fact assumes control of
25 the assets of the mentally incapacitated

1 individual, the attorney in fact should be
2 required to post with the appropriate county
3 court an administrative bond in an amount equal
4 to the assets. This requirement could be waived
5 if the mentally incapacitated individual had so
6 designated in the power of attorney document.
7 This mandate would be similar to the laws
8 concerning the administration of the decedents'
9 estates which require the posting of an
10 administrative bond by the estate's executor
11 unless the deceased individual has waived that
12 requirement in his or her last will.

13 3. And the third recommendation I make
14 is that: on an annual basis, the attorney in
15 fact should be required to file with the
16 appropriate county court, and also with the
17 insurance underwriter which has provided the
18 administrative bond, financial reports detailing
19 the receipts and expenditures made by the
20 attorney in fact. This requirement could be
21 waived if the mentally incapacitated individual
22 had so designated in the power of attorney
23 document.

24 Now, I would like to make some
25 additional comments as a result of what I have

1 heard earlier this morning.

2 I have many elderly clients that do not
3 have relatives, they have never been married,
4 their friends have died, they don't know who to
5 turn to, who to appoint (there are no family
6 members to appoint) and so they look to someone
7 that they may have known for a short period of
8 time that pays attention to them, they really
9 don't know the extent of the trustworthiness of
10 that particular individual; and so, where the
11 individuals may not have a direct concern
12 because of the relationship, it is important
13 that the people signing the power of attorney
14 document be given the same type of protection
15 that those who would come under the guardianship
16 laws if they became mentally incapacitated.

17 Basically, the power of attorney
18 document is a contract, and as long as that
19 individual still retains capacity that person
20 should be able to protect his or herself and
21 revoke the document; but, if they become
22 mentally incapacitated, this is where we need to
23 protect them similar to the situation as we do
24 with the guardianship laws. That's why I am
25 recommending that an annual report be required

1 with the court.

2 Now, the individual signing the power
3 of attorney document could waive this
4 requirement so that you are not imposing
5 anything on the individual that the individual
6 does not want if they feel that it is not
7 necessary in their circumstances. The same
8 thing with the posting of a bond, if the
9 individual feels that the person they are
10 appointing is trustworthy and they want to take
11 the risk that no bond should be required, then
12 they are free not to do that.

13 One of the reasons why I recommend that
14 it be put into the law is to educate the legal
15 profession. Many times, you will have lawyers
16 who do not practice in this field who will have
17 a client come in and will give them a simple
18 will, a power of attorney and a living will.
19 The lawyer will give them a boiler plate
20 document. The client may not have any
21 understanding that what one thing that they
22 could do is require the filing of reports or
23 require a bond. And I think one of the things
24 that this will do, if the legislation is
25 implemented, it will force the attorney, when

1 they are dealing with the client, to sit down
2 and educate the client and say these are the
3 things that you can do to further protect
4 yourself. If the client so chooses that it is
5 not necessary, then the client has the ability
6 to waive out of that particular requirement.

7 One final comment I wanted to add with
8 respect to the proposed guardianship legislation
9 that is currently before you: I am in agreement
10 with the provisions with the exception of one,
11 and that is, it is my opinion that the annual
12 reporting requirements should still be part of
13 the legislation. The reporting requirements of
14 the guardianship in requiring that they file an
15 annual report acts as a deterrent. I think if
16 that is taken away, that deterrent is lost.

17 I thank the Committee for the
18 opportunity, particularly Gaynor Cawley, to
19 allow me to give my views this morning. I would
20 be glad to answer any questions.

21 CHAIRMAN WOGAN: Thank you, Mr. McGee.

22 Are there any questions from any
23 Members of the Committee or staff?

24 Representative Cawley is recognized.

25 REP. CAWLEY: Just a statement, Mr.

1 Chairman. Thank you. For the record. Thank
2 you, Attorney McGee, for your willingness to
3 come down here and testify.

4 And also for the record, Representative
5 Wogan and Representative Horsey, the man before
6 us today, Attorney McGee, is the man primarily
7 responsible for Triple AAA baseball being
8 brought to Scranton and that is the Triple AAA
9 foreign team of the Philadelphia Phillies, so.
10 And, believe me, he is. And he is not only, he
11 was not only good in that field, but he is a
12 very good attorney and one other --

13 CHAIRMAN WOGAN: Thank you,
14 Representative Cawley, because the Philadelphia
15 Phillies could certainly use some help and I
16 hope Scranton and Wilkes-Barre are bringing up
17 some prospects.

18 REP. CAWLEY: Well, they have me on a
19 diet right now, Mr. Chairman. They might bring
20 me back pitching.

21 But just if I could clarify something
22 with Attorney Preski. I mentioned before about
23 anyone having any ideas, and we can have them
24 drafted in the form of an amendment so that we
25 can then put it next to the bill and we will all

1 be able to understand it more clearly.

2 Attorney Preski, you had mentioned that
3 I could direct anyone wishing to have amendments
4 drafted to Attorney Preski, John, and that way
5 we now have a center person that will be able to
6 take all of this information and have amendments
7 drafted, so that is going to be very helpful to
8 the Committee.

9 Thanks very much, Mr. Chairman, and
10 again thank you for having the hearing.

11 CHAIRMAN WOGAN: Thank you,
12 Representative Cawley.

13 Next recognized will be Brian Preski,
14 Counsel to the Judiciary Committee.

15 MR. PRESKI: Mr. McGee, thank you very
16 much. My only question is that, as you sat here
17 today and you heard the proposal that we have
18 had for the bonding requirement, as a
19 practitioner, do you have any concerns about
20 that?

21 MR. MCGEE: No. I am thinking, and
22 what I am proposing, is really an education to
23 the client to say, listen, to further safeguard
24 your assets in the event you become mentally
25 incapacitated, you can require that a bond be

1 posted by the attorney in fact, is this
2 something that you want to do? If the person
3 says no, then they have been educated, they are
4 saying I want to take that risk, that's fine.
5 If you are telling them that that is to be done,
6 then it is a burden that they are willing to pay
7 for. But, again, it does two things, I think:
8 it educates the legal profession by putting it
9 in the statute and that helps them educate the
10 client, the individual.

11 MR. PRESKI: Thank you.

12 CHAIRMAN WOGAN: Thank you once again,
13 Mr. McGee.

14 I am sorry, Representative Clark is
15 recognized.

16 REP. CLARK: Attorney McGee, you
17 indicated in your testimony those two
18 circumstances where this comes up. Is it
19 appropriate for the third circumstance to come
20 up, which I said earlier where the power of
21 attorney is effective, the person is competent
22 and then through a matter of time then they
23 become incompetent?

24 MR. MCGEE: Yes, if they become
25 incompetent, one of the two things happens.

1 They either take the guardianship route because
2 there is no less restrictive alternative in
3 place. But you are right, if the power of
4 attorney document is in place, that is the time
5 in which the guardianship proceeding could be
6 bypassed but there is a need. I think we are
7 really talking about my second circumstance
8 being the same as you are saying. In other
9 words --

10 REP. CLARK: Except, except my
11 circumstance doesn't require a physician in
12 order to trigger.

13 MR. MCGEE: But what would be the
14 mechanism? You said that they would become
15 incapacitated?

16 REP. CLARK: Right.

17 MR. MCGEE: What body determines that?
18 How is it determined that that person is
19 mentally incapacitated? Is it a judicial
20 proceeding?

21 REP. CLARK: Over the ... (inaudible)
22 of a doctor.

23 MR. MCGEE: Pardon me?

24 REP. CLARK: At some point in time, the
25 power of attorney would be obligated to file a

1 certificate that that person was incompetent.

2 MR. MCGEE: Simply the age. For
3 example, that it just might be when they reach
4 80, or something like that.

5 What I am wondering is, I see the
6 circumstance that either the court makes the
7 judicial determination that the person is
8 mentally incapacitated, or, in the document
9 itself the individual has said I will if it is
10 determined by an outside party, a licensed
11 medical doctor that I am mentally incapacitated
12 then I want this to take effect. So I think
13 what we are saying is it is triggered by the
14 mental incapacity. The question is, which new
15 event determined that triggering event?

16 REP. CLARK: Then you would do away
17 with our current durable power of attorney?

18 MR. MCGEE: No, no.

19 REP. CLARK: That would still be
20 durable, but, at some point in time, there would
21 have to be a requirement that a determination of
22 incapacity/competency and what would trigger
23 this and how would we know that?

24 MR. MCGEE: In the requirement, the
25 judge would determine whether the person is

1 mentally incapacitated. If he or she makes that
2 determination, he is then required to make a
3 determination whether a guardian is the proper
4 step to take to protect the individual's assets;
5 and, if there is a less restrictive alternative,
6 if the person has put into place the power of
7 attorney, then the court will not appoint a
8 guardian but the concern there is that if the
9 judge says a guardian is not necessary because
10 there is a durable power of attorney in place,
11 the problem is if there are no reporting
12 requirements by that power of attorney, by the
13 attorney in fact, we have that window where the
14 individual is not subject to the guardianship
15 laws but does not have the protection of any
16 oversight as to what happens with that attorney
17 in fact and the problem is that if assets are
18 taken before the door is closed, we are coming
19 in the back end and finding this out.

20 REP. CLARK: As a practical matter, as
21 every person turns incompetent, I don't think
22 there is a court proceeding to adjudicate?

23 MR. MCGEE: But the power of attorney,
24 what I am saying is that if a person has an
25 attorney in fact, if they have a power of

1 attorney in place, as long as they still have
2 their mental faculties, if they are not
3 satisfied the way things are being handled, they
4 can revoke that, remove it, put someone else in
5 place. The concern is when they go over that
6 line, when they don't have their mental
7 capacity, they can no longer revoke, they can no
8 longer change things themselves, someone has to
9 petition for a guardianship to be appointed. So
10 what I am saying is that when it comes to the
11 point where there is a determination, either by
12 a doctor or by a judicial proceeding that the
13 person is mentally incapacitated, that is when,
14 if an attorney in fact takes over, that is when
15 the reporting requirements should kick in place,
16 that's when the administrative bond should be
17 required.

18 REP. CLARK: And I notice in your
19 testimony, you didn't mention the audit
20 procedure at all, is that something you are
21 opposed to?

22 MR. MCGEE: I am not opposed to it. I
23 think a random audit, the threat of random audit
24 is a significant, significant deterrent. It is
25 a question of who bears the burden? Does the

1 state as a whole bear the burden? Does the
2 individual -- Does the Commonwealth bear the
3 burden? Does the individual estate if it is a
4 small amount? That is something, something that
5 needs to be explored further. But I do favor
6 random audit.

7 REP. CLARK: You are not willing to
8 give us any advice on how you would impose that
9 cost?

10 MR. MCGEE: Not without looking at some
11 -- what the budget -- not without looking at the
12 budget. The Auditor General knows I would want
13 to look at it further, but I do think that
14 audits should be an option.

15 REP. CLARK: And my thought is that if
16 the county imposed those, that they would have a
17 a little, a little better control over that.
18 You know, if there is a problem in Luzerne
19 County, they might say we are going to start
20 auditing more of these and then you can target
21 where specific problems are bound to crop up.
22 Thank you.

23 CHAIRMAN WOGAN: Thank you,
24 Representative Clark.

25 And thank you, Mr. McGee. We

1 appreciate you taking your time out to testify
2 before our Special Committee this morning.

3 MR. MCGEE: Thank you very much.

4 CHAIRMAN WOGAN: Next on our schedule
5 is Edward P. Carey, who is the Chairman of the
6 Fiduciary Services for the Aging Committee of
7 the Real Property, Probate, Trust and Estate Law
8 Section of the Pennsylvania Bar Association.

9 Good morning, Mr. Carey.

10 MR. CAREY: Good morning. Good morning
11 to the whole Committee. And I do thank you for
12 coming here.

13 I gave you a little outline of my
14 background. I have done more guardianships than
15 anyone in history, I have practiced in more
16 counties than anyone in history. That sounds
17 impressive, but they are -- I was doing the same
18 thing over and over again, the Commonwealth was
19 required, I was Assistant Counsel for the
20 Commonwealth for 18 years. And the Vecchione
21 decision, I had nothing to do with the decision,
22 I had nothing to do with the stipulation, my
23 name is not on the stipulation, but I got stuck
24 -- as it turned out, I really liked it --
25 enforcing it. So I have practiced in 64 of the

1 67 counties in person. The other three, I had
2 done by mail, some things, in their counties.
3 So I have a great experience.

4 But you must be aware that it is a very
5 limited experience since I have never practiced
6 as a private attorney doing any guardianships
7 for ordinary citizens. My guardianships are all
8 for mentally ill, for mentally retarded people.
9 I represent the state hospitals and the state
10 centers.

11 I got involved with the Bar
12 Association, I joined the Fiduciary Services
13 Committee and eventually became Vice Chairman.
14 And then Len Cooper and I were asked (he was the
15 Chairman, he is the attorney from Philadelphia)
16 he and I were asked to sit on an Ad Hoc
17 Committee.

18 I would have to respectfully disagree
19 with Judge Eagen. I don't think the 1992 Act
20 works, I don't think it is working, I think it
21 is being ignored more than it is working, by
22 judges.

23 You have, I hope, the program that
24 Carol Gross, an attorney in Pittsburgh, and I
25 put on at the March retreat, of the section.

1 PPI credit was given for it. We did a survey
2 with 80 some questions. We were amazed. We
3 sent it out to 67 president judges and we were
4 amazed at the results, the results we got back.
5 I was amazed at the number we got back, not at
6 what their answers were. But we got back 38
7 answers from judges who were very busy. And
8 they indicate that there are things that they
9 cannot do under the act.

10 When we were working on the act, Len
11 Cooper and I were out-voted every time because
12 the group, a group of -- for lack of a better
13 word I call -- the advocates, the mental health,
14 the mental retardation advocates, and included
15 in that was the Department of Aging. The bill
16 was written in my mind by Terry Roth from the
17 Pennsylvania Association of Retarded Citizens
18 and Dave Hoffman who is Chief Counsel of Aging.

19 Why Aging was involved, I am not sure,
20 but I felt they owed something to the advocates
21 and this was a result. I talked to Allen
22 Kukovich, Representative Kukovich one time, and
23 a few days later, I was gagged so I didn't have
24 efforts really in talking to people. The
25 Commonwealth, the Administration was supporting

1 the Wit bill (phonetic) and I was not allowed to
2 speak for it.

3 So now you are hearing from Ed Carey.
4 You are not hearing from the Department of
5 Public Welfare, they take no claim in anything I
6 say. And I am not even here from the Bar
7 Association. I was asked by the Bar Association
8 to be here. But I am here.

9 There are some good things in the act,
10 things that I personally take credit for, and
11 that is the fact that the guardianships can be
12 held in the county where the facility is, they
13 can be held at the facility. And judges have
14 come to the facility. It has worked very well.

15 I must, if I met Representative
16 Kukovich, I would have to apologize. I argued
17 that judges could not handle -- the judge of the
18 small county like Warren or Venango -- could not
19 handle the number of cases that they would be
20 getting. I was completely wrong. The judge in
21 Warren comes over to Warren State Hospital and
22 once or twice a year and he did 10, 20 cases in
23 the morning, no trouble at all. Judge White
24 from Venango County came to Polk. I used to
25 arrange a tour for him, it was a very

1 educational thing for him and at the same time
2 he did all of the guardianships without any
3 trouble.

4 I always had an attorney appointed on
5 the other side. I think, you know, I agreed
6 with the advocates in that point: I think an
7 attorney should be appointed in all cases
8 because it solves a lot of problems. The Bar
9 Association does not. And I emphasized in there
10 that that is my opinion, not the Bar
11 Association's.

12 The advocates fought for that and
13 didn't get it. I am not sure why they didn't
14 get it, but they didn't get that. But what they
15 did get, some of the amendments that you are
16 doing now, some of the amendments that you are
17 considering now, would solve some of the
18 problems that have arisen since 1992.

19 The extending notice to heirs not
20 outside -- I am going into the amendments now.
21 Extending to heirs outside the Commonwealth is
22 no great problem. I always did that. We sent
23 notice to friends, relatives, anyone who was in
24 the book at the institution. I didn't care
25 whether they were next of kin. If they came and

1 visit, they were the ones that I sent notice to.
2 I didn't care whether they were in the state.
3 The expense of the Commonwealth sending another
4 letter, you know, the Commonwealth wasn't
5 worried, I wasn't worried.

6 Number two, the 5511 (a)(1) allows the
7 alleged incapacitated person not to come to the
8 hearing. I quote their Judge Bowe, who is now
9 deceased, in Schuylkill County. He told me that
10 welfare would not be promoted, which was the
11 standard, which worked. It meant if the person
12 was going to take the stand, bring them. Well,
13 I would never put an alleged incapacitated
14 person, a patient or a resident on the stand
15 (the doctors could testify, the psychologist).
16 To put the individual on the stand, I thought it
17 was very demeaning to bring them. I thought it
18 was demeaning just to have them in the room
19 talking about them. But I am not sure the
20 counsel up in the second level -- Andring, is
21 it? --

22 MR. ANDRING: Yes.

23 MR. CAREY: -- when you spoke to Judge
24 Eagen, you sounded so much like me, except I
25 have gone further. I thought that the advocates

1 in pushing the 1992 Act were protecting people
2 out of the protection that they needed. I can't
3 prove this, but I most certainly believe that
4 they wanted to destroy guardianship completely.

5 It was an evil. I remember challenging
6 them one time, some of the advocates, to walk
7 with me through the Harrisburg State Hospital
8 and if they could pick out the people that were
9 stigmatized by guardianship. That was the word
10 they always used, stigmatized. Well, if we walk
11 through it, you could see it, in indelible ink
12 on any forehead. Let me know. But they could
13 not have changed it or show me the difference
14 between the incapacitated person and
15 non-incapacitated patient. They couldn't do it.
16 And they never took me up on the challenge.

17 I didn't know. I mean, I don't know
18 them, the patient. When you bring a person to
19 -- Judge Bowes' answer was very good -- because
20 when you bring them to the hearing, and I would
21 never ask them questions, but if their attorney
22 put them on the stand and their attorney
23 insisted that they come.

24 You had all sorts of cases, you had a
25 million cases. We had one, we had a woman in a

1 wheelchair, a patient at the State Hospital, and
2 her attorney asked her some mild questions so I
3 had to cross-examine her. It was my job to
4 prove that she was incapacitated. I didn't like
5 to be put in that position, but I had to
6 cross-examine her. I cross-examined her by
7 asking her: how much income do you have? Her
8 answer was: a whole lot. How much would you
9 spend on rent? A whole lot. How much would you
10 spend on food? A whole lot. How much would you
11 spend on clothing? A whole lot. Judge
12 Dalessandro, Luzerne County, said that's it,
13 that's enough and he signed the appointment.

14 There is no -- if the person cannot
15 understand, cannot cooperate, is not going to
16 take the stand, I don't think you should bring
17 them. And I think in practice, that is what is
18 happening. I don't think the judges are
19 requiring their presence.

20 How do you decide beforehand whether
21 you are going to bring them or not? And my
22 answer is, let the attorney tell you. If the
23 attorney wants the person brought to the stand
24 -- brought to the hearing, they'll tell me and I
25 will bring them.

1 And that is the same, true now. I
2 mean, we all, that's the way we did it before
3 1992 when I was working for the state. I would
4 never bring the person to the hearing, because
5 their welfare would never be promoted. I would
6 never put them on the stand. If they wanted
7 them there, they would tell me and I would bring
8 them. Very few cases were they ever brought.

9 How do you do it if you don't have a
10 requirement that the attorney be appointed for
11 every alleged incapacitated person? I don't
12 know.

13 How does the attorney for the
14 petitioner know when to bring them?

15 And it is the same when you get to the:
16 how do you know to bring live testimony? How do
17 you know these things, whether it is going to be
18 contested or not?

19 Section 5511 (c), I have a comment
20 there. The current system of paying the
21 attorney is, it is terrible. The legislation
22 says that the county shall pay and the county
23 shall be reimbursed by the state in the next
24 fiscal year. And I give you an example. If we
25 had a hearing this month, July 1996, the

1 attorney might get paid sometime this year, the
2 county wouldn't even submit the bill to the
3 Department of Public Welfare and the statute
4 does not say that the Department of Public
5 Welfare is going to pay it. The statute just
6 says the Commonwealth. But it has been worked
7 out that Welfare pays it. The Welfare wouldn't
8 even get the bill until next July and they would
9 have to pay the county by June of 1998. The
10 counties don't like that and neither does the
11 attorney sometimes who doesn't get paid. I knew
12 one attorney who didn't get paid for a year and
13 a half.

14 Following the wishes of the parents,
15 that sounds good. Following the wishes of the
16 alleged incapacitated person if they had given,
17 named something in the power of attorney, my
18 experience with families were not very good, my
19 experiences with families were not very good.
20 And I like the fact that the amendment does have
21 an out to the judge that if there is good cause
22 not to appoint the one nominated by the family
23 or nominated by the alleged incapacitated person
24 that you do not have to follow that.

25 If you look at our booklet, we have

1 some questions. We asked the judges, what do
2 you do if you have a power of attorney and
3 someone else brings a guardianship petition? In
4 answer 42, six say they do not appoint the
5 guardian. They don't appoint a guardian, they
6 just tell the power of attorney to act. Six
7 appoint only a limited guardian of the estate.
8 Only a limited guardian of the person, three.
9 Rely on the powers of attorney to tell who
10 should be appointed, nine. Rely on the power of
11 attorney for designation of who should be
12 appointed guardian, eleven. Ignore the power of
13 attorney, ten. Ten out of, whatever. Some of
14 the judges marked two so you can't tell how many
15 answered that question. But they just ignore
16 the power of attorney.

17 The one, it is not a change, it is just
18 reworded, preferring limited over plenary. The
19 judges do not prefer limited over plenary. The
20 legislation says they are to -- the legislation
21 was, introduced a mental health concept into
22 guardianship and that is the least restrictive
23 alternative.

24 If guardianship, if you are looking for
25 a less restrictive, then you are looking at

1 power of attorney. But there is a bill in front
2 of you to make the power of attorney more
3 difficult. If the power of attorney is just as
4 difficult as guardianship, then it is not a less
5 restrictive. Then as one of the witnesses said,
6 they are going to have just joint accounts with
7 some family member and there is no protection.

8 The emergency guardian, judges are not
9 following the three-day rule and the 20-day rule
10 for guardian. Some judges are trying to. I
11 have a judge, Somerset County Judge Fike. We
12 were in the process of that I would give him the
13 order extending it to 20 days, for 20 more days,
14 and on the third day, I would call him from
15 Pittsburgh saying that the emergency still
16 existed. I would call Somerset State Hospital,
17 they would tell me the emergency still existed,
18 I would call the judge and he would sign the
19 extention for 20 days. That is a judge who was
20 trying to follow the statute.

21 Allegheny County never tried to follow
22 the statute. Allegheny County was just too
23 practical. If they appointed a guardian, an
24 emergency guardian, they appointed the emergency
25 guardian until the next hearing until the

1 permanent hearing. That may be six weeks. But
2 they can't, they couldn't put in their schedule
3 hearings before that so you appoint it. So I
4 would get rid of the three days, 20 days and the
5 guardian of the estate for 30 days and I would
6 make it from the day of the emergency guardian
7 until the time the Allegheny County Order would
8 read: you are appointed, the power of the
9 emergency guardian will stop at 10 a.m. on
10 September 5th at which time there is a hearing
11 for the permanent guardian.

12 This amendment would allow the
13 petitioner to withdraw the petition after he got
14 the emergency guardian. I find it hard to
15 justify that. My colleagues in the Bar
16 Association liked it, the fact that there is the
17 possibility of that after the emergency. I have
18 a hard time imagining a medical emergency. I
19 get guardians -- To get electroshock treatment,
20 like electroconvulsive therapy, it takes weeks.
21 You can't do it in three days, you can't do it
22 in 23 days, you can't do it in 30 days. You
23 need a permanent guardian to keep it going.

24 I had one judge who told me if I
25 amputated, he -- I asked an emergency guardian

1 (in those days, it was a temporary guardian) to
2 amputate a leg. He said you must do a permanent
3 guardianship because I don't want you coming
4 back next year to amputate the other leg.

5 The act has to be practical, live
6 witnesses. I have, as I told you in my notes, I
7 say that I used to bring the witness if there
8 were three or more from that institution. If we
9 were doing Allegheny County, I might have ten
10 patients from Mayview, ten patients from
11 Woodville, five or six from Polk, because we had
12 to do them in their home county before you made
13 the change. The legislation changed in 1992,
14 something that I pushed for and I got, that they
15 could be done in the county where the
16 institution was and that's fine.

17 But I didn't have to bring a witness,
18 but I picked out three just so that the other
19 attorney who had to be appointed by Supreme
20 Court Order, not by any legislation, they had to
21 appoint an attorney in our cases, that attorney
22 had something to do. So I would bring a
23 witness, a live witness.

24 But if there is no contest, why not an
25 affidavit? And judges are accepting affidavits.

1 First, they started out by accepting telephone
2 conferences, besides your deposition that the
3 statute allows. And then they began, fell back
4 to the old practice of just accepting an
5 affidavit. If it is not contested, they are
6 currently accepting affidavits. And I think the
7 statute, I would like to have the statute and
8 the practice agree.

9 The seven-day rule, the seven-day rule
10 is the rule that you have to notify, the
11 petitioner has to notify the court that the
12 respondent has not retained counsel. First, the
13 court would know before the petitioner because
14 they file a praecipe. I never understood why
15 the petitioner had to find out that the alleged
16 incapacitated person, the respondent, had
17 retained counsel. The judge already knew, at
18 least he should know if the praecipe was filed.

19 But you had, the law required them to
20 do it. And the attorneys are doing that, they
21 are filing them. I don't know if anyone reads
22 them. I know of no judge who changed his mind
23 at the seventh day. If the judge is going to
24 appoint an attorney, he will do it at the
25 beginning. What happens is: he is notified on

1 the seventh day that there is no attorney and he
2 decides at that point to appoint an attorney,
3 the first thing that the attorney who is
4 appointed will do is continue the hearing. I
5 mean, no attorney is going to go in without
6 doing some research.

7 But now you could use that, that
8 seven-day rule, as that is the time. When you
9 notify the judge that there is no counsel, you
10 would put in that. Therefore, I assume, or I
11 presume, that it is not contested and then you
12 would know not to bring live witnesses. If you
13 keep the seven-day rule, then, at least, and
14 this amendment was also passed, then you can go
15 ahead, the attorneys will know how to go ahead
16 and word that.

17 Reports. At our meeting, we had three
18 judges came to the meeting and talked: Judge
19 Lewis from Philadelphia, Judge Kelly from
20 Allegheny County, and Judge Cleland from McKean
21 County.

22 Judge Cleland thought that the 1992
23 statute was overkill. In a small county, he
24 knows the petitioner, he knows the attorney, he
25 knows the alleged incapacitated person and he

1 may not need reports as much as others.

2 Judge Lewis said that she needed
3 reports. They were very good. She did not know
4 the persons individually. The reports are a
5 very good idea, but Philadelphia could not
6 afford to do anything with them. They are
7 currently being filed. The alleged
8 incapacitated person's estate is being billed
9 for a filing fee. But no one is reading them in
10 many counties.

11 Allegheny County, they do have a
12 system, there is a court appointee, a court
13 employee who does read them and will call you up
14 if they are not there and she may even check the
15 arithmetic. I have had cases where the guardian
16 officers made a mistake in arithmetic and she
17 caught it and I had the report redone.

18 So it is good if you have them. But if
19 you are not going to read them, if they are not
20 going to be used for anything, all of the other
21 witnesses who want more audits and more reports,
22 the legislature has money to enable them, to
23 that to be enforced. I mean, you ask the
24 Auditor General read these reports and audit
25 them, that is going to cost money. It has to

1 come from somewhere. I heard the Chairman
2 talked about looking at their budget. It is
3 going to cost money. And right now, everything
4 that costs money, it is difficult. You have to
5 come up with the money.

6 Moving on down, if there is no annual
7 report, the guardian still should be allowed to
8 file a report in the court so that it protects
9 that person. I did file. And you can check
10 back in any case where they might be doing
11 something that is questionable -- not
12 questionable but something that some people are
13 going to disagree with. If they have a report,
14 it is there and it can be checked.

15 Jurisdiction over guardianship support
16 agencies. I specifically asked, when I talked
17 to Judge Kelly before our meeting, I asked him
18 to talk to it because the attorney who
19 represents one of the support agencies (there
20 are two in Pittsburgh) the attorney who
21 represents one said that Judge -- He had been
22 after Judge Kelly to certify them. The statute
23 says they can be certified.

24 I am not sure what that means, but
25 Judge Kelly wouldn't do it because he didn't

1 have control over the agency. He had control
2 over the guardian, the agency that was appointed
3 as guardian. In that individual case, he had
4 control. He had no control over the general
5 working of that agency. And he said -- I talked
6 to him yesterday and I told him what I was
7 saying today and he agreed that if you make the
8 agency honor it, and if we set up some rules,
9 either the legislature or the courts set up
10 rules as to what certification means and what
11 they have to do to get certification, he would
12 be in favor of it.

13 And finally, the Orphans' Court
14 jurisdiction over attorneys in fact. Most of us
15 think they always had it, but if they didn't, it
16 is good to give it to them, they are the ones
17 who should do it.

18 The other bill, that is 7197, that
19 talks about giving the right of discovery to the
20 Office of Aging, or the Office of Aging and then
21 the Auditor General. You are going to
22 discourage the use of power of attorney. The
23 great increase in power -- I don't have any
24 statistics -- but it is my belief the power of
25 attorneys have greatly increased since 1992

1 because the guardianship law has become more
2 difficult so people use the power of attorney.
3 And I have a little private practice and I work
4 when I feel like it, which is the best type of
5 practice, and as I am doing a power, I always
6 tell them: do the power of attorney now, let's
7 get it out of the way. While you are healthy
8 and know what you are doing, let's do a power of
9 attorney, let's do a health care power of
10 attorney, do the whole thing.

11 But if, if you discourage that by
12 making them subject to audits and making them
13 subject to bonding and making them subject, then
14 I don't know what the final answer will be.

15 Questions. I haven't looked at the
16 time, but I have been talking fast for me.

17 CHAIRMAN WOGAN: Thank you, Mr. Carey.
18 Representative Hennessey is recognized.

19 REP. HENNESSEY: Thank you, Mr.

20 Chairman.

21 Mr. Carey, I don't see any doctors on
22 the list of witnesses today so that perhaps you
23 are going to be as close as we can get it, given
24 your experience in dealing with the problems in
25 the mentally ill in the past.

1 I had sent the proposals out to some
2 practicing attorneys to get some ideas back as
3 far as what they thought would be the
4 recommended changes. One of them talked to me
5 what is called a delayed recognition syndrome
6 where people appear not to understand what is
7 going on, they may be present at a proceeding,
8 not appear that it is making any kind of dent,
9 and yet a day or two or three days later may
10 comprehend, meaning at that point sort out in
11 their own mind what had happened and understand
12 the process that they had been through.

13 If we simply adopt a procedure where
14 the people should not be brought into these
15 hearings, aren't those kind of people, the
16 people who have the capacity to observe and then
17 later understand what the meaning of their
18 observation was, don't they get sort of their,
19 their concerns or their rights get sort of
20 trashed by simply saying, hey, don't bring them
21 in, it is not going to help their welfare any?

22 MR. CAREY: I don't know. You have,
23 many times the people, I have seen people in
24 court who the patient enjoyed the trip out, they
25 had a grand time, it was out of the state

1 hospital or out of the mental retardation
2 center. And the other time I saw cases where
3 they would be crying, they would be completely
4 confused. Now, if -- I am not a medical person,
5 obviously -- if the medical science believes
6 there are people who can, after the fact.

7 But, remember, they have had 20 days'
8 notice of this. If within the 20 days they
9 haven't comprehended what is happening to them,
10 I mean, what is going to happen by the judge
11 signing a signature? Is that going to make them
12 suddenly? Is that the trigger?

13 REP. HENNESSEY: I guess the judge
14 signing the piece of paper, I guess the whole
15 experience of being in a courtroom with all the
16 trappings of power and authority, sometimes
17 makes some attentive to the psyche that just
18 simply reading a petition or being served with a
19 petition which they might not read would have?

20 MR. CAREY: I have never experienced
21 that. All the patients, when I brought patients
22 -- and since 1992 -- we bring them, even if it
23 was in the room at the State Hospital, we bring
24 them in and it was frightening, especially if
25 you go to court. It is really frightening on

1 the elderly, the mentally ill, the mentally
2 retarded.

3 The mentally retarded, our first cases
4 we have done in Cambria in November of 1977 and
5 we didn't know, the attorneys for the
6 Commonwealth didn't know anything about
7 guardianship. We brought all of these people
8 from Farview who were criminals, who had a
9 criminal background, and mentally retarded
10 people. The noise in the corridor outside the
11 courtroom was very strong and I remember a
12 patient from Farview telling Judge O'Kicki that
13 he has the best -- the patient had a formula to
14 grow hair on Judge O'Kicki's bald head and that
15 sort of convinced the Judge.

16 One of the things in the statute, the
17 current statute which I like, is that you do not
18 require the doctor to come for live testimony.
19 It allows anyone with experience and training in
20 this area to testify. And my experience has
21 been that the social worker, the nurse, the aide
22 know the patients better than the doctors or the
23 psychologist. The psychologist will just give
24 you the results of the test. But the aide, the
25 person who wheels them in in the wheelchair in

1 to Ebensburg or Polk, sometimes the judge would
2 ask them to stay and ask them to just give a
3 daily experience because they know the patient,
4 the resident much better than the doctors would.

5 But I don't know anything about the
6 delayed symptoms.

7 REP. HENNESSEY: Okay. In your
8 experience throughout the state, don't most of
9 the counties use a master system for having an
10 attorney appointed to hear these cases and then
11 make recommendations to the court, to the
12 judges, as opposed to having the judges actually
13 conduct the hearing?

14 MR. CAREY: After the Vecchione
15 decision was decided, the Supreme Court issued
16 Administrative Order No. 1, which allowed the
17 judges to appoint masters. Some judges did;
18 some didn't (about 50 percent didn't).

19 In that order, it said that you can,
20 that when there are masters, you appoint an
21 attorney. The judges who heard them themselves,
22 didn't appoint an attorney. They felt that that
23 was their job to protect the widows and orphans.
24 That's what the Orphans' Court judge is supposed
25 to be doing, and the incompetent, which was the

1 word at that time, so they did not appoint an
2 attorney.

3 The Supreme Court came out with a
4 second order and the second order said that in
5 any case, you appoint, you must, all the
6 Vecchione cases, you must appoint an attorney.
7 I argued in front the Supreme Court and told
8 them that they didn't have the Constitutional
9 right to do that, but they have the right to
10 make administrative orders, not substantive
11 orders. And I put that in my brief. I never
12 got to it. At the argument, they never allowed
13 me to get anywhere near that issue.

14 But the masters disappeared. I haven't
15 used a master since the early '80s, in the cases
16 in western Pennsylvania and central
17 Pennsylvania. The last, from 1980, when I went
18 to Pittsburgh, I got the 23 western counties and
19 then I got 12 more of the central counties, I
20 had 35 counties for the last 10, 15 years and we
21 never used the master; the judge heard them all.

22 Now, I don't think they are using
23 masters in private cases. Pittsburgh now,
24 Allegheny County, has created a master system,
25 but that is for commitments. I don't think they

1 use masters for guardianship.

2 REP. HENNESSEY: In my experience,
3 years' ago, the Public Defender's Office is
4 appointed as the attorney to represent the
5 alleged incompetent, is that still the practice
6 throughout the state?

7 MR. CAREY: No.

8 REP. HENNESSEY: Or was it ever the
9 practice all the way around the state?

10 MR. CAREY: It was never all around the
11 state. The case I told you up in Wilkes-Barre
12 where the woman attorney, the public defender
13 (phonetic) woman attorney did put the woman on
14 and I had to ask them questions. That she was a
15 public defender. It was either public defender
16 or Legal Services attorney that were appointed
17 at first.

18 Gradually the judges -- but some of
19 them, all ways -- appointed private attorneys.
20 And the last -- I am trying to think of any
21 county in which the public defender was
22 appointed. I don't think there was any
23 recently. Torrence (phonetic) was at
24 Westmoreland. It wasn't. It wasn't centers in
25 Washington County. It wasn't Allegheny County,

1 they were private attorneys. Venango County,
2 they use a private attorney. And Warren County
3 is a private attorney. Somerset is a private
4 attorney.

5 REP. HENNESSEY: On the competency
6 considered a petition, the initial commitment
7 proceedings were continued commitment
8 proceedings all the time in Montgomery County,
9 right? For a long time, a public defender could
10 be appointed almost as a matter of course?

11 MR. CAREY: In Allegheny County, the
12 public defender represents them at the
13 commitment hearing, but the commitment has
14 nothing to do with the guardianship.

15 REP. HENNESSEY: Right.

16 MR. CAREY: So the guardianship
17 petition, Judge Kelly, in the last ten years or
18 however many years that he has been on, has
19 changed the attorney frequently. Just give
20 different attorneys the opportunity to hear the
21 cases or the -- not hear them but to represent
22 the clients so that it's always been a private
23 attorney in western Pennsylvania.

24 REP. HENNESSEY: Okay. Thank you very
25 much, Mr. Carey.

1 Thank you, Mr. Chairman.

2 CHAIRMAN WOGAN: Thank you,
3 Representative Hennessey.

4 Representative Clark.

5 REP. CLARK: Thank you. A person
6 prepares a durable power of attorney so that
7 they don't go through any competency
8 proceedings. However, you have indicated that
9 you can still go through proceedings to
10 determine incapacity even though you have a
11 durable power of attorney. What situations
12 trigger that?

13 MR. CAREY: Never, in my cases, so you
14 are probably asking the wrong person. My cases
15 are --

16 REP. CLARK: Well, in your survey
17 Question 42 --

18 MR. CAREY: Right.

19 REP. CLARK: -- says when there is a
20 determination --

21 MR. CAREY: Right. In those cases, the
22 guardianship came up when someone in the family
23 who didn't like the power of attorney would
24 bring the petition for guardianship. The
25 petitioner for guardianship was not always the

1 guardian or the power of attorney. Also, the
2 power of attorney frequently, up until very
3 recently, dealt with fiscal matters. Now we are
4 doing health care power of attorney so that if
5 you need a guardian of the person and you had a
6 power of attorney that would fit into that
7 Question 42, I think.

8 REP. CLARK: Okay. So people who feel
9 that a power of attorney is not doing a good job
10 -- it is one of the things that we are trying to
11 get at today -- then the person who feels that
12 files an incompetency petition to bring it to a
13 head, so to speak?

14 MR. CAREY: Yes, that was one way of
15 bringing it to the head.

16 REP. CLARK: And that could result in
17 investigation and removal of the power of
18 attorney even though it is a durable power of
19 attorney?

20 MR. CAREY: Yes.

21 REP. CLARK: Thank you.

22 MR. CAREY: Or it wouldn't remove it,
23 it would override it. The guardian always has
24 power, greater power than the power of attorney,
25 attorney in fact.

1 CHAIRMAN WOGAN: Thank you,
2 Representative Clark.

3 And thank you, Mr. Carey, for sharing
4 your insights with us this morning. That
5 concludes our schedule for today. Our last
6 witness, Judge Tucker from Philadelphia County,
7 is ill and will not be able to appear before us
8 this morning. There being no further business
9 before this Special Committee, do we hear a
10 motion to adjourn?

11 REP. HORSEY: So moved.

12 CHAIRMAN WOGAN: This hearing is now at
13 a conclusion. Thank you all.

14 (Whereupon, the hearing was adjourned
15 at 12:30 p.m.)

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I hereby certify that the proceedings
are contained fully and accurately in the notes
taken by me on the within proceedings, to the
best of my ability, and that this copy is a
correct transcript of the same.

Roxy Cressler

Roxy Cressler, Reporter
Notary Public