

1 COMMONWEALTH OF PENNSYLVANIA
2 SPECIAL COMMITTEE ON SENATE ADDRESS

3 In re: Examining Attorney General Kathleen Kane's ability to
4 perform the duties of her office with a suspended law
5 license.

6 * * * * *

7 VOLUME II - Pages 50-111

8 Stenographic report of hearing held
9 in Hearing Room 1, North Office Building,
10 Capitol Complex, Harrisburg, PA

11 Tuesday
12 November 17, 2015
13 10:00 a.m.

14 SEN. JOHN GORDNER, CHAIRMAN

15 MEMBERS OF SPECIAL COMMITTEE ON SENATE ADDRESS

16 Sen. Lisa Baker Sen. Sean Wiley
17 Sen. Art Haywood Sen. Gene Yaw
18 Sen. Judy Schwank Sen. Joe Scarnati, ex officio

19 Also Present:

20 Joshua Funk, Esquire, Majority Counsel
21 Shannon Sargent, Esquire, Minority Counsel

22
23
24 Reported by:
25 Ann-Marie P. Sweeney
Chief Official Reporter

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1 CHAIRMAN GORDNER: Good morning. I'd like to call
2 the November 17 hearing of the Special Committee on Senate
3 Address to order. We have our panel upfront -- or our Members
4 upfront. We have a panel of constitutional experts and legal
5 ethics experts here with us today. We have Bruce Antkowiak,
6 Robert Davis, and Beth Weisser, and we thank you each for
7 being with us. I will ask you if you will stand to be sworn
8 in.

9
10 (Whereupon, Mr. BRUCE ANTKOWIAK, Mr. ROBERT
11 DAVIS, and Ms. BETH WEISSER, were
12 duly sworn.)

13 CHAIRMAN GORDNER: Thank you. You may be seated.
14 We're going to operate this hearing as a panel.
15 We will give you each 10 minutes in order to provide some
16 introductory comments. And I'm going to sort of lay some
17 ground rules out here in a moment. If you can try to stick
18 within your 10 minutes, we've got a lot of questions up here.
19 We have another hour then. This is planning to be over around
20 11:30. So we will ask each of the Members if they have two or
21 three questions in round one. I'm actually going to go in
22 reverse order of the list that I went at the last hearing. So
23 Senator Art Haywood will be first this time. And, again, if
24 you can stay to two or three questions for the first round,
25 and then we'll have a second round of questions.

The hearing today is to continue this committee's

1 charge to determine if an individual with a suspended law
2 license can perform the duties of the Attorney General.
3 Testimony about the general abilities of an attorney with a
4 suspended law license is appropriate as to what he or she can
5 and cannot do in a law office setting. Further, testimony may
6 include an analysis of any applicable constitutional and
7 statutory provisions that impose duties upon the Attorney
8 General, as well as those that require her to make certain
9 decisions or take certain actions that would require her to
10 have an active law license. To state the question another
11 way, what duties may not be undertaken without constituting
12 the unlawful practice of law? Testimony should not include
13 anything that does not seek to answer these questions and may
14 not include any discussion on the Attorney General's other
15 legal and criminal matters.

16 So with that, we're going to start with Bruce
17 Antkowiak. You may begin. You have 10 minutes. Thank you.
18 Make sure that you press the button and the green light is on.

19 MR. ANTKOWIAK: I think it is. Thank you,
20 Senator.

21 As this Senate considers this most serious matter,
22 I hope to give you a very brief perspective on what it is that
23 the Pennsylvania system of regulating lawyers seeks to do as a
24 general matter, and then to hopefully see how that may relate
25 to the very serious issue before you.

1 Lawyers are regulated in Pennsylvania much as many
2 other professions are, but in a very different way. The grant
3 of a law license is the grant of a privilege, a privilege that
4 is earned by individuals who have successfully completed a
5 series of tasks set forth by their own profession, and they
6 are continually under the scrutiny of that profession as they
7 perform that privilege that they are granted. It is an
8 exclusive privilege. We do not allow anyone, no matter how
9 learned they may be, to practice law. Only those who have
10 received the license, the privilege from the profession, are
11 granted that tremendous privilege and, indeed, responsibility.

12 By granting that privilege, the Supreme Court of
13 Pennsylvania, through the Disciplinary Board, is acting not to
14 simply benefit lawyers by giving us a monopoly over the
15 practice of law. The purpose of it is to protect the public.
16 The purpose of the grant of the law license is to give an
17 assurance to the public that the individual to whom they go
18 for legal advice is competent to do that and is operating
19 under a set of regulations that will ensure that their conduct
20 will meet the high standards of the profession.

21 The assurances the profession gives come, in fact,
22 in three different forms. The first form is that the
23 individual has gone through a course of education and training
24 that is rigorous and proscribed, and that they have
25 successfully completed that. The second assurance is that

1 beyond simply their qualifications by way of education, they
2 have been investigated both for their intellectual and moral
3 fitness to receive and hold the privilege of practicing law.

4 But once the profession grants those two
5 assurances, it doesn't walk away. It tells the public, it
6 assures the public, that it will be there to oversee the
7 responsible actions of the individual who has been granted
8 that privilege. And if they do not live up to the standards
9 of the profession, that they will, in fact, be sanctioned. If
10 the profession has not given the public that assurance, or
11 having given it, withdraws that assurance, the public is then
12 at risk from accepting the advice, counsel, advocacy--all of
13 the various things that a lawyer can do--from a person who has
14 not received that level of assurance from the profession
15 itself.

16 Now, the other panel members here will talk more
17 specifically about the disciplinary process and how it works
18 and what restrictions are on an attorney who has been
19 suspended, but from a perspective of looking at the provision
20 of the Pennsylvania Constitution, Article IV, Section 5, that
21 speaks of the Attorney General being a member of the Bar of
22 the Commonwealth of Pennsylvania, the legislative history that
23 I was able to find is very interesting, to me. It comes from
24 the 1977 debates, particularly in the House, on the resolution
25 that would become the constitutional amendment.

1 In that debate, there seemed to be no question but
2 that the Attorney General of Pennsylvania had to be a
3 practicing lawyer. The debate focused on whether or not that
4 person was simply the lawyer for the Governor, as they had
5 been prior to the amendment, where the Governor would simply
6 appoint the Attorney General, or whether the Attorney General
7 should be not simply the lawyer for the Governor but also the
8 lawyer for the people of Pennsylvania.

9 The people who argued against the elected Attorney
10 General had to answer the argument made by their opponents
11 that an appointed Attorney General would be compromised in
12 their legal opinions, because after all, they are appointed at
13 the pleasure of the Governor. They answered that argument by
14 saying, no, they won't be compromised, because after all, the
15 ethics of their profession will require them to render
16 independent judgment even if the Governor doesn't like what
17 the opinion may be. The answer that was given back to them
18 was, they will be even in a greater position to exercise
19 independent judgment as a lawyer if they were elected and now
20 also have as their client the people of Pennsylvania.

21 At one point in that House debate, there was a
22 question about membership in the Bar of Pennsylvania. A
23 Representative named Davies asked the question of the sponsor
24 of the bill, whether or not it was necessary for the person to
25 be a member of the Pennsylvania Bar. But they said, listen,

1 I'm not suggesting that any other profession could perform
2 this function. What I am suggesting is, what if you had a
3 person who was admitted to the United States Supreme Court Bar
4 and who practiced in Delaware? Could they not perform the
5 function of the Pennsylvania Attorney General? And
6 Representative Doyle, who was the sponsor of the resolution,
7 responded by saying that we certainly all agree that the
8 person needs to be learned in the law and that membership in
9 the Bar of Pennsylvania is a shorthand version of that.

10 He pointed out that under the old system, where
11 the Governor appointed, there was no requirement that the
12 Attorney General be a lawyer, and he called that a strange
13 quirk in the existing Pennsylvania law. Everyone agreed that
14 the question of whether the person should be a member of the
15 Bar of Pennsylvania was rooted in the fact that they would
16 also then be subject to the disciplinary rules of
17 Pennsylvania, that this was an additional assurance for the
18 people as to the efficacy of that person's service as Attorney
19 General.

20 The ultimate resolution, of course, was to pass
21 the constitutional amendment as we have it now. And we have,
22 concurrently with that, a Commonwealth Attorneys Act which
23 lists the duties of the Attorney General, which I know that my
24 fellow panel members will also address.

25 CHAIRMAN GORDNER: Thank you very much.

1 Mr. Davis.

2 MR. DAVIS: Good morning. I'm glad to be here,
3 and I hope I am helpful.

4 CHAIRMAN GORDNER: Is your mike on, sir?

5 MR. DAVIS: No, it is not. Is it now?

6 CHAIRMAN GORDNER: Okay, thank you.

7 MR. DAVIS: Good morning again. I hope I can be
8 helpful.

9 I think one of the obvious focuses, because I was
10 told so, of the inquiry that you're bringing to the
11 particularly difficult constitutional issue is the meaning of
12 Rule 217 of the Pennsylvania Rules of Disciplinary
13 Enforcement. That is a rule that specifically deals with
14 circumstances in which lawyers' licenses have been removed for
15 some reason. Could be disciplinary. It could be on an
16 interim basis, as in this circumstance. It could be for
17 something as mundane as missing a payment for your law
18 license, or not taking continuing legal education. You can
19 lose your license. The Rule 217 was brought broadly to cover
20 all of those circumstances.

21 Now, one thing that it was not brought to do, I
22 just noticed this this morning, and I suspected so, the
23 footnote to Rule 217(j)--and by the way, I have copies of the
24 rule that I'm actually looking at here--says as follows:
25 "Subdivision (j) is addressed only to the special circumstance

1 of formally admitted attorneys engaging in law-related
2 activities and should not be read more broadly to define the
3 permissible activities that may be conducted by a paralegal,
4 law clerk, investigator, etc. who is not a formerly admitted
5 attorney. Subdivision (j) is also not intended to establish a
6 standard for what constitutes the unauthorized practice of
7 law."

8 So I submit to you if you want a conclusive
9 definition, 217 will be helpful to you, very helpful to you,
10 but I do not think conclusive. But I will talk about 217,
11 because I think it will be helpful.

12 Rule 217, as Mr. Antkowiak just said, is a result
13 of the Supreme Court's assertion of its specific
14 constitutional authority under its constitutional article over
15 lawyers and lawyering, and lawyer licenses. I think the order
16 in the Attorney General's case, the interim suspension order,
17 is telling in that regard. It says she will be suspended. It
18 says she will be responsible under Rule 217(j), just as any
19 other suspended attorney, but we are not saying what the
20 effect is on her post as an Attorney General. Why did they do
21 that? Well, not to create problems for you folks. The reason
22 they did that is because they had respect for the
23 constitutional makeup of this government. They realized there
24 was an official out there who was in that position under a
25 separate constitutional article and who was elected by the

1 people. And I think, frankly, when you read the Supreme
2 Court's order, that's what they wanted to emphasize, that they
3 were going as far as they thought they could constitutionally
4 and were properly handing off the question of the propriety of
5 the Attorney General being in office to others.

6 It is possible for, under the rules, for the
7 Supreme Court itself or the disciplinary counsel of the
8 Supreme Court, the board there, to bring enforcement actions.
9 We have not seen that. I think my comments need to be heard
10 and understood in that regard.

11 And I'm skipping through this because I don't want
12 to take more than my 10 minutes. Rule 217 is there to do some
13 specific things. As I noted, it has come into effect because
14 of a variety of circumstances under which lawyers lose their
15 licenses. It exists in order to make sure that the
16 appropriate public notices are given generally to the public,
17 and specifically to persons, clients, opposing parties, whose
18 own legal matters may be impacted by that suspension or
19 disbarment; a notice provision to establish which actions
20 formerly admitted lawyers are able to perform. These are
21 called law-related activities under Rule 217; very
22 specifically outlined and specifically described
23 circumstances.

24 And according to my memory, and again, I think
25 this is problematic to some degree, the specific time and

1 place restrictions in Rule 217 that I'll talk about a little
2 bit more are the result, from my experience on Disciplinary
3 Board, from circumstances in which lawyers who were suspended
4 created what I call sham practices. That is, they stepped
5 back, maybe brought in a young attorney, had the young
6 attorney sit in that office and practice law, and meanwhile
7 sat in the back and really were the one running the office.
8 That is the genesis of some of these rules. And frankly, I
9 think that history may caution, certainly cautions me, and
10 perhaps should you in terms of the application of those
11 sections specifically in this circumstance.

12 Let me get over to the rule itself. The important
13 part of Rule 217 is 217(j). As I indicated, I think it's
14 problematic, because it focuses on the duty of suspended
15 lawyers to comply with the suspension order while still
16 allowing -- and one of the goals was to allow lawyers to
17 engage, in certain circumstances, to engage in law-related
18 activities. Why? Because when they come back for
19 reinstatement, it's a really good thing that they have kept
20 current in the law. That's one of the things you need to be
21 as a lawyer. And they wanted to allow that, but wanted to
22 also properly monitor that.

23 One of the things that is obvious here, what is
24 the practice of law? It is not an easy question. I suggest
25 to you there is statute that defines the practice of law

1 that's helpful. There are cases. One of the things that I
2 have seen in my practice when counseling people on whether or
3 not what they're doing is engaging in the practice of law is
4 the fact that the definition of the practice of law is pretty
5 vague. The phrase that I see most often is vague but very
6 broad: Application of law and legal concepts to specific
7 facts and circumstances. Is that helpful? Well, it is, in a
8 lot of ways. But a list of what can and cannot be done, both
9 in the practice of law statute and also in 217, I think is
10 helpful to you, and I'm going to go through those for you this
11 morning.

12 I think the best conclusion of the cases, if you
13 read the unauthorized practice cases, is to some degree they
14 take the broad definition and they sort of know it when they
15 see it. A practical application in the particular
16 circumstance. Rule 217 then begins to try to outline what
17 lawyers who have been suspended ought to do, can and cannot
18 do. It begins, as many rules do, by a general statement that
19 a suspended attorney may engage in law-related activities
20 unless otherwise prohibited under Rule 217(j). (J)(2), that
21 part of the provision--and again, I will provide you, I think
22 it's already in the record here, but I will provide you again
23 with the actual printout of that--describes the only allowed
24 law-related activities. These are the things lawyers can do
25 under supervision: legal research, preparatory activity in

1 cases, general case background work, assembly of data and
2 drafting of various pleadings and documents for later approval
3 and, if appropriate, signature by licensed attorney, direct
4 communication with a law firm's client or third-parties, as
5 carefully limited, again, by a section further down, (j)(3),
6 and going to court, depositions, other discovery activities,
7 and to meetings concerning matters not in current litigation
8 but only in support of lawyers who are properly licensed in
9 that firm or organization. Again, these are helpful, but I
10 don't think, in my view, dispositive.

11 (J)(3), subsection (j)(3) of 217, allows direct
12 communications with clients or third parties, but limited only
13 to "ministerial matters such as scheduling, billing, updates,
14 confirmation of receipt or sending of correspondence and
15 messages." On each of those occasions, a suspended attorney
16 must--that is carrying out these appropriate activities, these
17 allowed activities--must disclose their exact status and
18 identify the supervising lawyer for whom they are acting.

19 Section (j)(4) lists specific prohibitions of
20 activities which may be problematic here, as I've indicated,
21 and they are designed to forbid situations of practice that
22 have been abused by suspended attorneys in the past. And to
23 make sure that the -- to reach the other goals, as I indicated
24 in the beginning of this talk.

25 What does the list say? There can be no

1 performance of a law-related activity for a firm,
2 organization, or lawyer if the former attorney was associated
3 with it on or after the date on which the acts which resulted
4 in the suspension occurred. I note, again, government
5 agencies and offices are generally considered organizations or
6 firms in many circumstances in which the Rules of Professional
7 Conduct and the Rules of Disciplinary Enforcement are
8 interpreted.

9 Another rule, subsection of the rule, directly
10 attributable to past cases of the sham law office, there can
11 be no provision of law-related activities from any office not
12 staffed by a supervising lawyer who is a full-time lawyer.
13 There can be no law-related activity performed for any client
14 who in the past was represented by the suspended attorney. I
15 suspect we can also get a firm idea from government attorneys
16 and others as to who the Attorney General's client or clients
17 may be and what she does or does not do. I think that because
18 of this, and some of these other provisions, that is critical.
19 Further, none of the attorneys -- excuse me, activities of the
20 attorney may allow the suspended attorney to hold him or
21 herself out as a lawyer or a person who has similar authority
22 or power.

23 Again, next, and there are 10 of these very
24 specifically listed, as you will see. There can be no contact
25 with clients in person or by phone or by writing except as

1 allowed by section (j)(3), which I have suggested or discussed
2 earlier.

3 (vi) No "rendering legal consultation or advice to
4 a client." Pretty obvious, but there it is listed
5 specifically.

6 (vii) No appearing on "behalf of a client before
7 any judicial officer, arbitrator, mediator, court, public
8 agency, referee, magistrate, hearing officer or any other
9 adjudicated person or body."

10 (viii) There can be no appearance for a client at
11 a deposition or other discovery matter. And, of course, we
12 understand they could accompany another lawyer, but no
13 individual appearance.

14 (ix) No "negotiating or transacting in any matter
15 for or on behalf of a client with third parties or having any
16 contact with third parties regarding such a negotiation or
17 transaction." Pretty broad.

18 (x) No "receiving, disbursing or otherwise
19 handling client funds."

20 Sections (j)(5) and (6) provide for filing of
21 reports by the supervising attorney. That supervising
22 attorney is made specifically responsible under the rule,
23 equally with the suspended attorney, for full compliance with
24 all of the provisions of Rule 217(j). A very substantial and
25 difficult, in some circumstances, obligation by the

1 supervising attorney. That's Rule 217.

2 In my view, only a few moments' thought are
3 necessary to see that the provisions of 217, calculated to
4 apply to attorneys in traditional practice situations and who
5 are clearly under the full constitutional exclusive authority
6 of the Supreme Court, do not easily or smoothly apply to the
7 situation you now face. I know that you have looked for
8 analogies. I've looked for analogies. I can't think of any.

9 Finally, please allow me to observe, humbly, after
10 conversation with your counsel, with others actually on this
11 panel today, that you've been wise to listen to those persons,
12 scholars, legal and constitutional historians, who have an
13 idea of the public policy and the societal goals that prompted
14 the removal authority under which you now claim to operate.
15 That is, what was it that the public reasonably demanded of
16 its public officers, and what it would leave to the judicial
17 system or some other coordinate office or some other
18 coordinate branch of government to sort out. In my humble
19 view, this morning, that should be your guiding star. Thank
20 you.

21 CHAIRMAN GORDNER: Thank you, Mr. Davis.

22 Ms. Weisser.

23 MS. WEISSER: Good morning, Senator Gordner,
24 ladies and gentlemen of the committee. Thank you for the
25 opportunity to present to you this morning.

1 My name is Beth Weisser. I'm partner in the
2 Philadelphia office of Fox Rothschild, where one of my areas
3 of expertise includes legal ethics and professional guidance
4 for attorneys, including the representation of attorneys in
5 disciplinary proceedings and the representation of applicants
6 in hearings before the Pennsylvania Board of Law Examiners.

7 I think the committee's inquiry requires an
8 analysis of the intersection of three sets of rules that are
9 relevant to the legal profession, which have been touched on
10 by my colleagues on the panel today. Those include the Rules
11 of Disciplinary Enforcement, the Pennsylvania Rules of
12 Professional Conduct for Attorneys, and also, but to a lesser
13 degree, I think the rules for the Board of Law Examiners in
14 Pennsylvania. The Board of Law Examiners publishes the Bar
15 Admission Rules governing the initial admission of lawyers
16 into the Bar in the Commonwealth of Pennsylvania. Most
17 attorneys will gain admission through Rule 203 of the Board of
18 Law Examiners Rules, which requires a satisfactory completion
19 of the Bar examination, as administered by the Board of Law
20 Examiners, and also the absence of prior conduct which, in the
21 opinion of the Board of Law Examiners, is incompatible with
22 the characteristics that the Board would expect to see from a
23 member of the Bar of the Commonwealth of Pennsylvania. So,
24 from the very get-go, there is an academic, scholarly
25 requirement, as well as a character and fitness evaluation.

1 Once licensed, the Rules of Disciplinary
2 Enforcement and the Rules of Professional Conduct guide the
3 ethical practice of attorneys within the Commonwealth. An
4 attorney who has been suspended from the practice of law,
5 either after going through a disciplinary hearing, agreeing to
6 a petition in support of discipline on consent, or an attorney
7 who has been the subject of an emergency temporary suspension
8 under Disciplinary Rule 208(f), is required to take specific
9 steps to disengage from the practice of law immediately after
10 the order of suspension becomes effective. Specifically, an
11 attorney has to immediately cease and desist from using all
12 forms of communication that would imply, either explicitly or
13 implicitly, an ability to practice law in the State courts in
14 the Commonwealth of Pennsylvania. This includes things such
15 as Web sites, business cards, letterhead, LinkedIn profiles,
16 all of those things must immediately be addressed to remove
17 any reference to an ability to practice law or to convey the
18 actual status of the suspended attorney. That's a provision
19 in Rule 217 which Mr. Davis spoke about. You will hear about,
20 throughout this hearing, 217(d)(2).

21 In certain cases, including but not limited to
22 disbarment, suspension for more than one year, or suspension
23 under Disciplinary Rule 208(f), there are additional steps
24 that an attorney must take in order to disengage from the
25 practice of law, such as resigning fiduciary positions,

1 closing IOLTA accounts, which are attorney trust accounts, and
2 disbursing or otherwise transferring client or fiduciary
3 funds. Additionally, 10 days after the effective date of an
4 order of suspension or disbarment under the disciplinary
5 rules, an attorney is required to file a verified statement
6 under Pennsylvania Rule 217(e). That verified statement goes
7 to the Office of Disciplinary Counsel and demonstrates how the
8 attorney has complied with some of the provisions that I just
9 mentioned to you. The attorney is also required to notify
10 other jurisdictions where he or she may be admitted, and to
11 attach copies of the correspondence notifying those
12 jurisdictions or notifying any other individual or agency who
13 might expect them to be acting in a professional capacity of
14 their current status.

15 I was going to discuss in terms of, you know, what
16 a suspended attorney may or may not do under Rule 217, but I
17 think Mr. Davis has sufficiently addresses that, so I will
18 skip over that part, but, of course, we're all happy to field
19 questions on that when we get to the question-and-answer
20 session, because I think that's probably very central to the
21 committee's inquiry. I do want to also repeat something Mr.
22 Davis did touch on, though, in terms of a supervising
23 attorney. A formerly admitted attorney must file a notice of
24 engagement of a supervising attorney with the Disciplinary
25 Board. The notice has to do three things specifically:

1 identify the supervising attorney, who has to be a member in
2 good standing of the Bar of the Commonwealth of Pennsylvania;
3 certify that the formerly admitted attorney has been employed;
4 and further certify that the formerly admitted attorney's
5 activities will be closely monitored for compliance with the
6 requirements of Rule 217 that Mr. Davis discussed, and that
7 we'll discuss going forward. 217(j)(6) specifies that the
8 supervising attorney, as well as the formerly admitted
9 attorney, can both be subject to discipline under the Rules of
10 Disciplinary Enforcement for failure to comply with these
11 requirements.

12 I also want to touch briefly on a couple of the
13 Rules of Professional Conduct that I think could be relevant
14 to the committee's inquiry. Rule of Professional Conduct
15 8.4(c) states that it's professional misconduct for a lawyer
16 to "engage in conduct involving dishonesty, fraud, deceit or
17 misrepresentation." Comment (4) to Rule 8.4 specifically
18 addresses lawyers holding public office and says that "lawyers
19 holding public office assume legal responsibilities going
20 beyond those of other citizens. A lawyer's abuse of public
21 office can suggest an inability to fulfill the professional
22 role of lawyers."

23 8.3 talks about another attorney's obligation to
24 report the professional misconduct of someone else. 8.3(a)
25 states that "A lawyer who knows that another lawyer has

1 committed a violation of the Rules of Professional Conduct
2 that raises a substantial question as to that lawyer's
3 honesty, trustworthiness or fitness as a lawyer in other
4 respects, shall inform the appropriate professional
5 authority." This is a very fact-specific inquiry, as you
6 might imagine. It frequently turns on what constitutes a
7 substantial question as to an attorney's honesty,
8 trustworthiness, or fitness.

9 Finally, two other rules that I think are
10 relevant: 7.5 talks about firm names and letterheads. It
11 says "A lawyer shall not use a firm name, letterhead or other
12 professional designation that violates Rule 7.1" of the Rules
13 of Professional Conduct. 7.1 says that a lawyer shall not
14 make a false or misleading communication about the lawyer or
15 the lawyer services. "A communication is false or misleading
16 if it contains a material misrepresentation of fact or a law,
17 or omits a fact necessary to make the statement considered as
18 whole not materially misleading."

19 Again, I think the intersection of these Rules of
20 Professional Conduct as well as the Rules of Disciplinary
21 Enforcement and certain provisions of the Board of Law
22 Examiners Rules to a lesser extent guide the committee's
23 inquiry today, and I'm happy to answer any questions, along
24 with my colleagues, that you may have. Thank you.

25 CHAIRMAN GORDNER: Thank you for the panel's

1 testimony. You've given some good background information as
2 to the constitutional provision that established an elected
3 Attorney General, as well as the general rules of Rule 217 as
4 it affects a lawyer who has a suspended law license. So thank
5 you for that.

6 We are now going to have Senators ask some
7 questions, so it will be the interesting part of being nimble
8 and responsive, if you can. I am going to go in reverse order
9 from how we conducted the hearing a week ago, so I'm going to
10 ask a question or two and then call on Senator Haywood,
11 followed by Senator Yaw. I would ask, again, the Senators if
12 they could limit their initial round of questionings to two or
13 three so that everybody gets a shot during round one, and then
14 we'll certainly come back for round two.

15 I just asked you briefly a minute or two before
16 you started if you had seen the memo that was completed by the
17 four Deputy Attorneys General and submitted to Kathleen Kane
18 on, I believe, October 22, which was, I believe, a day before
19 her law license suspension began. There is a 30-day period,
20 but it was, I believe, her law license suspension actually
21 began on October 23. So this memo was circulated by the four
22 Deputy Attorneys General the day beforehand. It was released
23 by Kathleen Kane on Friday. We did post it to our Web site
24 yesterday. So I'm just going to read the part at the end, and
25 basically they went through some background information and

1 then said, "Process During Suspension." And if you could
2 listen to it and give your opinion as to it, I would
3 appreciate it. So again, four assistant Deputy Attorneys
4 General and "Process During Suspension," and this is to
5 Kathleen Kane.

6 "Recognizing your role as Attorney General, but
7 the fact that your license is suspended, you should be
8 informed of all actions that will be taken by the office as
9 you normally would. However the ultimate decision on legal
10 matters must lie with the First Deputy. The types of decision
11 that should ultimately be decided by the First Deputy should
12 include:"--and he lists, or they list, six items--

13 "[1)] a decision on whether to bring a civil or
14 criminal action;

15 [2)] decision on whether to settle civil actions;

16 [3)] decisions on whether to offer or accept a
17 plea bargain;

18 [4)] any decision involving the grand juries;

19 [5)] decisions on whether to join amicus briefs,
20 and

21 [6)] decisions on whether to use particular
22 defenses in the cases the office is defending."

23 That was the opinion of the four Deputy Attorneys
24 General that, with her having a suspended law license, that
25 all of those matters - decisions on whether to bring a civil

1 or criminal action, decision on whether to settle civil
2 actions, decisions on whether to offer or accept a plea
3 bargain, any decision involving the grand juries, decisions on
4 whether to join amicus briefs, and decisions on whether to use
5 particular defenses in the cases that the office is defending
6 - should not be made by a lawyer with a suspended license but
7 should be made by the First Deputy. Could you give me some
8 feedback in regard to that?

9 MR. ANTKOWIAK: I'll begin simply by saying I
10 think that is a quite appropriate list. I think there are
11 other matters too that would be within the purview of the
12 Office of the Attorney General. The Commonwealth Attorneys
13 Act talks about, besides a number of those matters which
14 relate to the function of the Attorney General as the chief
15 law enforcement officer and top prosecutor in the State, the
16 Attorney General also simply advises government agencies,
17 helps government agencies form legal policies. All of those
18 matters, I think, are also functions that fit within the scope
19 of what an attorney licensed to practice law in Pennsylvania
20 is authorized to do. So I certainly think the list that they
21 have given is appropriate. I think that list could have also
22 been extended.

23 CHAIRMAN GORDNER: Any other comments from the
24 panel?

25 MS. WEISSER: I concur as well. I do not believe

1 that a person with a suspended law license would be permitted,
2 under Rule 217, to engage in any of those enumerated
3 activities. I think at a very basic level, doing any of those
4 things would violate 217(j)(4) - certain provisions including
5 performing law-related activity for a client that the
6 suspended attorney formerly represented, because in this case
7 the client as the Commonwealth was certainly the client at the
8 time the activities giving rise to the suspension occurred.
9 And, also, performing any law-related activity within the
10 office. I mean, I think it's -- that certainly at a very
11 specific and granular level, I think those activities would be
12 prohibited. But I think performing any law-related activity,
13 not even getting down to those specifics within the office
14 where the formerly admitted attorney was associated when the
15 events giving rise to the suspension took place would be
16 permitted -- would be prohibited, excuse me.

17 CHAIRMAN GORDNER: Thank you.

18 Senator Haywood, followed by Senator Yaw.

19 SENATOR HAYWOOD: Thank you very much, and thank
20 you to the panel.

21 My question at this point is, if the formerly
22 admitted attorney is the Attorney General, and the supervising
23 attorney is the First Deputy, is there anything unethical or
24 unlawful with the delegation of the six functions that were
25 just described to the First Deputy?

1 MR. DAVIS: The supervising lawyer is obligated to
2 enforce all of the provisions of 217(j). One of them clearly
3 is the one that I indicated, at least in terms of its history,
4 is a little bit difficulty of complete application to this
5 situation. That is, you're in a situation in which -- and the
6 definition, again, application of law and legal concepts to
7 specific facts and circumstances will happen. It has been
8 delegated to the First Deputy. That is being done in an
9 office for clients that were previously served. A direct
10 application of those rules would suggest that that would not
11 be appropriate because of the place, and because of the,
12 quote, "clients."

13 The reason I, hopefully, made a point in that
14 regard is, you have to understand the history of those
15 particular rules. Nobody's being fooled about what the
16 situation is here. Nobody's being fooled about the status of
17 the Attorney General to practice law. And that was the
18 reason, the motivating reason, in own in my history and my
19 recollection, for those particular provisions of 217(j).
20 Straight reading, the answer would be it should not occur.

21 CHAIRMAN GORDNER: Senator Yaw, followed by
22 Senator Schwank.

23 SENATOR YAW: Thank you, Mr. Chairman. I have a
24 question. I don't care who answers this, a very general
25 question. Without a valid license to practice law, does an

1 elected person qualify to be sworn in as the Attorney General
2 of Pennsylvania?

3 MR. ANTKOWIAK: The Constitution says that to be
4 eligible for the office, the person has to be a member of the
5 Bar of the Supreme Court of Pennsylvania. Again, looking at
6 the legislative history of it, at least to the extent that I
7 was able to find any, and there may be others, but it was
8 clear to everyone that the person who would attain that office
9 and hold that office would have to be a practicing member of
10 the Bar of Pennsylvania, that that was a core function that
11 had to be performed, and that there was that in conjunction
12 with the Commonwealth Attorneys Act, which so specifically
13 lists the duties of the Attorney General, and each of those
14 duties is clearly one to be performed by a practicing lawyer.
15 It would appear to me that that was the intent of the
16 constitutional provision, that the individual be so -- be an
17 active member of the Bar.

18 MS. WEISSER: I agree in terms of the intent, as
19 well as just sort of commonsense understanding, I would agree
20 with what was just said. I think there's an argument that
21 could be made that an individual with a suspended law license
22 is still a, quote, "member of the Bar." Not an active member,
23 not a member in good standing. But I think there's a couple
24 of things that would influence that argument.

25 First, there's a distinction between, and the

1 Rules of Disciplinary Enforcement make a distinction between
2 an attorney who has been disbarred and suspended, and the
3 understanding would be that someone who has been disbarred is
4 no longer a member of the Bar of the Commonwealth of
5 Pennsylvania. And the rules repeatedly distinguish between
6 someone who's been disbarred, someone who's been suspended,
7 someone who's been administratively suspended for failure to
8 pay a registration fee or take their continuing legal
9 education courses. So on a very basic level, I think there's
10 that distinction.

11 The Board of Law Examiners Rule 201 also talks
12 about obtaining a certificate of good standing, which is
13 something that lawyers are required to obtain from
14 jurisdictions where they are admitted. If I'm seeking
15 admission in another jurisdiction on a temporary basis or
16 another court on a pro hac vice basis for a specific case and
17 required to submit a certificate of good standing from the
18 Commonwealth of Pennsylvania, that Board of Law Examiners rule
19 says specifically that a certificate of good standing shall
20 not be issued to a member of the Bar of the Commonwealth who
21 currently is the subject of a petition for emergency interim
22 suspension under Enforcement Rule 208(f). So that rule refers
23 to a member of the Bar of the Commonwealth who is the subject
24 of a suspension under that specific Rule of Disciplinary
25 Enforcement. So I think there is an argument that that person

1 is still a member of the Bar, albeit not in good standing.

2 SENATOR YAW: Well, we've heard testimony from
3 district attorneys who fall under the same, I think,
4 Commonwealth Attorneys Act, and their duties are listed.
5 Every district attorney that was here said that, you know,
6 they have to, in their opinion, they had to be a member of the
7 Bar in order to do their jobs.

8 I guess my follow-up question, I have a lot of
9 questions, but a follow-up to this is, is it your opinion that
10 it's implied that the person has to be a member in good
11 standing and be able to go to court and be able to give legal
12 advice?

13 MS. WEISSER: It is my opinion, yes.

14 SENATOR YAW: That it is implied?

15 MS. WEISSER: Yes.

16 SENATOR YAW: That you have to be a member in good
17 standing?

18 MS. WEISSER: Yes. In good standing. Yes.

19 MR. ANTKOWIAK: Yes, that is, I think, a clear
20 implication of the history of this provision. Again, in all
21 respects, when this was debated in 1977, 1978, the question
22 was not whether the Attorney General should be an active
23 member of the Bar. The only debate was, whose lawyer are
24 they? Are they just the Governor's, or the Governor's plus
25 the people of Pennsylvania? That was the debate. The

1 underlying issue about whether or not a person who could not
2 perform the function of an attorney in Pennsylvania could hold
3 that job was not a matter that anyone discussed.

4 SENATOR YAW: Thank you.

5 CHAIRMAN GORDNER: Senator Schwank, followed by
6 Senator Baker.

7 SENATOR SCHWANK: Thank you, Senator, and thank
8 you to the panel.

9 I'd like to go back to the Constitution, to
10 Article 6, Section 7, which is the removal of officers and,
11 perhaps, Mr. Antkowiak, you could answer this for me. At the
12 end of Section 7 it talks about removal of elected officers.
13 Now, it does not mention Attorney General. However, it does,
14 and I'd ask you about that, but it does talk about the action
15 that we're taking here, and it talks about reasonable cause.
16 What is meant by reasonable cause?

17 MR. ANTKOWIAK: There is, to my knowledge, only
18 one precedent under this particular section, and that goes
19 back to the latter part of the 19th century. And in that
20 case, I believe it was the State Treasurer and the Auditor
21 General were subject to a criminal investigation on fraudulent
22 activities and the Governor had addressed the Senate with the
23 issue of their removal. I think in that case, the Senate, I
24 believe properly, decided not to act because the underlying
25 basis for their removal were those matters that could properly

1 be addressed and would be properly addressed by way of
2 impeachment. If the grounds for the removal are impeachment
3 and you disregard the impeachment process otherwise in the
4 Constitution, you render that section of the Constitution a
5 nullity, which you should not do.

6 On the other hand, if you decide that any removal
7 for any reason should be by way of impeachment, you would
8 render this section a nullity because this section does call
9 for the removal of officers on reasonable cause. The best
10 definition that you could probably glean from the scant
11 history of this is that reasonable cause is something other
12 than an impeachable offense and would constitute some reason
13 why, serious enough that the individual cannot carry out the
14 functions of their position, and that a compelling need is
15 then presented for action by the Senate in this extraordinary
16 way.

17 Now, insofar as the fact that the Attorney General
18 is not listed among the officers exempted by this section --
19 again, this section was -- has been in the Constitution since
20 the latter part of the 19th century. The amendment calling
21 for the election of the Attorney General, much more recent
22 vintage, 1980. One, a good lawyerlike argument would be that
23 if you were going to amend the Constitution in 1980 to
24 establish a new position of the Attorney General as an elected
25 official, and you wanted to exempt them from this form of

1 action under Section 7, you would have done that at the same
2 time. By not doing that, by letting Section 7 remain as it
3 is, without amending it to add the Attorney General along with
4 the Lieutenant Governor and judges, et cetera, your action may
5 be constituted as one that would not exempt the Office of
6 Attorney General from the reach of this section. Although
7 there is certainly no case law on that point, this is a matter
8 upon which feet have not tread at this point.

9 SENATOR SCHWANK: So it's your opinion then that
10 had -- when the office was established at the time, that
11 language would have been added had the authors not intended
12 for this section to apply to the Attorney General's Office?
13 Is that what you're saying?

14 MR. ANTKOWIAK: It would be -- it's a matter of
15 construction of statutes, construction of constitutional
16 principles. That if there has been an amendment and it does
17 not reach a certain matter, you may assume that the authors
18 did not intend to reach that matter, unless there is some
19 other context in which you would change that. But the default
20 interpretation would be, you knew how to amend the
21 Constitution to create the elected Attorney General. You
22 could have done the same thing to add the Attorney General's
23 Office to this list in Section 7. You did not.

24 SENATOR SCHWANK: Thank you.

25 CHAIRMAN GORDNER: Senator Baker, followed by

1 Senator Wiley.

2 SENATOR BAKER: Good morning. The powers and
3 duties of the Commonwealth Attorneys Act grants the Attorney
4 General specifically, not the office, certain responsibility.
5 So, I guess my question, in your opinion, are the core duties
6 and responsibilities of an Attorney General acting as our
7 chief law enforcement officer - law enforcement, criminal
8 justice, consumer protection - are they properly and
9 effectively served by an Attorney General without a law
10 license? And my second part is, if she has delegated all of
11 her responsibilities, can she serve as the chief law
12 enforcement officer?

13 MR. DAVIS: As I suggested in my brief talk, I
14 think a clear, thorough investigation of what the core duties
15 are, whether they are as the chief lawyer or chief something
16 else, chief administrator, chief law enforcement officer, et
17 cetera, I think a careful list of those would need to be made
18 before you could ask whether or not the core duties can be
19 performed. I think. And I don't know them. And I don't know
20 them. But I suggest you should.

21 As for whether or not she can serve, that's your
22 question. To rule Rule 217, as I said, doesn't answer that,
23 and I don't think, as Professor Antkowiak said, I don't think
24 the cases are a whole lot of help. I wish we could be more
25 help, but, you know, you're making law here.

1 MS. WEISSER: I think an examination of the
2 fundamental duties of the Attorney General as enumerated in
3 the Commonwealth Attorneys Act, if you compare them side by
4 side with the activities that a formerly admitted attorney is
5 not permitted to do under Rule 217. So if you look at what
6 they're obligated to do under the Commonwealth Attorneys Act,
7 and you match them up with what they're not permitted to do
8 under Rule 217, I don't think you can marry those things up.
9 I think some of the, if not all of the, obligations under the
10 Commonwealth Attorneys Act falls squarely within the
11 activities that a formerly admitted attorney is not permitted
12 to do.

13 For example, just by way of example only, to
14 "represent the Commonwealth and all Commonwealth agencies and
15 upon request, the [Department of] Auditor General [and] State
16 Treasury and the Public Utility Commission in any action
17 brought by or against the Commonwealth or its agencies..."
18 one of the enumerated duties under the Commonwealth Attorneys
19 Act. If you compare that with under 217, a formerly admitted
20 attorney is not permitted to appear "on behalf of a client in
21 any hearing or proceeding or before any judicial officer,
22 arbitrator, mediator, court, public agency..." et cetera, et
23 cetera. So, on one hand, the Attorney General is called upon
24 to represent the Commonwealth and Commonwealth agencies in any
25 of these actions, and on the other hand, they're not permitted

1 to appear as a formerly admitted attorney before any of these
2 bodies. I think there's just a fundamental inability to marry
3 those concepts.

4 SENATOR BAKER: Follow-up question. Ms. Weisser,
5 you talked in brief about what you're permitted to do when
6 you're a formerly admitted attorney, and you raised the
7 question about the use of any communication including
8 letterhead and title. Is it your opinion that with Attorney
9 General Kane using the existing Attorney General letterhead
10 and her current title, is that a violation of what's
11 permissible?

12 MS. WEISSER: I do think that's problematic. I
13 think one of the, under 217(d)(2), one of the things that an
14 attorney must do to immediately disengage from the practice of
15 law is to cease and desist using any forms of communication
16 that would imply their ability, explicitly or implicitly, to
17 continue practicing law in the State courts of Pennsylvania.
18 Letterhead is frequently discussed in terms of counseling
19 clients. Letterhead, business cards, LinkedIn profiles.
20 Without some sort of explicit notation, you know, perhaps on
21 the letterhead, you know, an asterisk of some sort explaining,
22 you know, the current status or, you know, that the individual
23 is subject to an order of temporary suspension under Rule 208.
24 I think continuing to use it without that type of explanation
25 is inconsistent with the intent of the Rules of Disciplinary

1 Enforcement.

2 SENATOR BAKER: Thank you.

3 CHAIRMAN GORDNER: Senator Wiley.

4 SENATOR WILEY: Thank you, Mr. Chairman.

5 Thank you for your testimony today. I truly
6 appreciate the input and the feedback and specifically the
7 answers to the questions from this particular committee. I
8 have two very brief questions, one of which is, the Attorney
9 General has challenged the jurisdiction of this committee. In
10 her professional opinion, we do not have the jurisdiction to
11 take action in any way. Do you agree or disagree with her
12 opinion? And I'd like to hear from each one of you, if I
13 could.

14 MR. DAVIS: Let me make the easy answer, before
15 Professor Antkowiak gives you a more thorough one. The
16 Supreme Court is not the place. The Supreme Court thought
17 somebody did, but it wasn't them. That's the easy part of the
18 question.

19 SENATOR WILEY: Could you repeat that one more
20 time?

21 MR. DAVIS: The Supreme Court thought it did not
22 have jurisdiction, and the specific wording of its order was
23 very, very careful, and it seemed to me that it thought
24 another branch of government had jurisdiction, either
25 currently or, perhaps, prospectively in the future. And they,

1 to my view, suggested someone did. So, I don't want to use
2 the word tossup. It's either the House or the Senate,
3 perhaps, that they had in mind.

4 SENATOR WILEY: So you're saying we got lucky?

5 MR. DAVIS: Well, I don't know. Depends on how
6 the coin comes down. You get to decide, in a way, the way the
7 coin comes down.

8 MR. ANTKOWIAK: Senator, Section 7 has to have
9 some meaning. It can't be read out of the Constitution of
10 Pennsylvania. Now, again, whether or not the question of
11 jurisdiction is inextricably bound up with the question of
12 whether or not there is reasonable cause for a removal I think
13 fuses the issue of the substance of whether or not a removal
14 is appropriate with the question of jurisdiction. But under
15 Section 7, there is a clear constitutional procedure that the
16 Governor may invoke that is different from impeachment. Each
17 of those provisions have to be given due and appropriate
18 weight. And the problem is, of course, that the last time
19 this was invoked was way over 100 years ago, and there is
20 simply very little precedent, not just in the courts,
21 anywhere, to decide whether or not the scope of this is broad
22 enough to include the inquiry that is currently ongoing.

23 But it is certainly a matter of proper inquiry for
24 the Senate, at this point, given the fact that, while this
25 provision may have lain dormant for a number of years or

1 decades, it is now being raised for your consideration.

2 SENATOR WILEY: Excuse me, in your opinion, does
3 it -- should it -- does it have to be invoked by the Governor?

4 MR. ANTKOWIAK: Well, the provision here is,
5 "shall be removed by the Governor for reasonable cause, after
6 due notice and full hearing, on the address of two-thirds of
7 the Senate." This anticipates that the Governor and the
8 Senate will be acting in some capacity in this regard. It's
9 obviously one of those separation of powers issues that the
10 Constitution drafters did not want to commit the full
11 authority to either party but looked at this as a shared
12 exercise of authority, under the appropriate circumstances.

13 MS. WEISSER: Yes, I would agree. Nothing really
14 else to add to that.

15 SENATOR WILEY: Okay. One more question. Is
16 there a more appropriate place in our law to look for more
17 direction as to what the Attorney General may do while subject
18 to a suspended license?

19 MS. WEISSER: I don't think there's any more
20 appropriate place other than the various bodies of law and
21 rules of procedure that we've been discussing today: The
22 Commonwealth Attorneys Act, the Rules of Disciplinary
23 Enforcement, specifically those regarding formerly admitted
24 attorneys, and even more specifically those under orders of
25 emergency suspension under Rule 208 of the Rules of

1 Disciplinary Enforcement. It's not clear-cut, but like I
2 said, the intersection of that statute, those rules, as well
3 as the Rules of Professional Conduct, I don't see anywhere
4 else that we would look for additional guidance.

5 SENATOR WILEY: Okay. Thank you, again, for your
6 testimony.

7 CHAIRMAN GORDNER: Senator Scarnati.

8 SENATOR SCARNATI: Thank you, Mr. Chairman.

9 Good morning. Mr. Davis, in your initial opening
10 remarks, you first raised the issue of supervising attorney.

11 MR. DAVIS: Yes, sir.

12 SENATOR SCARNATI: Do you know, or does the panel
13 know, that the First Deputy is the supervising attorney?

14 MR. DAVIS: That was not part of the homework
15 assigned to me by this committee. I do not know.

16 SENATOR SCARNATI: But there--

17 MR. DAVIS: It would be interesting to know
18 whether that is in place as well.

19 SENATOR SCARNATI: But there seems to be some
20 assumptions, at least through questions, that the First Deputy
21 is acting as a supervising attorney, but we do not really know
22 that?

23 MR. DAVIS: I don't know that. I think that would
24 be a great question for this committee to ask somebody who
25 does know.

1 MS. WEISSER: I don't know that either, and the
2 only thing I would say is that that is not -- there's formal
3 notice of the engagement of a supervising attorney is required
4 to be filed with the Disciplinary Board and Chief Disciplinary
5 Counsel. So it's not as though I can say causally, oh, okay,
6 you know, Mary is going to be my supervising attorney, and we
7 come to an agreement to it. It's a formal notice that needs
8 to be signed by the supervising attorney and usually agreed to
9 and acknowledged by the supervisee. But I don't know whether
10 or not that has been formally effectuated.

11 MR. DAVIS: All it takes is a phone call over to
12 the Disciplinary Board office. It's public. They'll tell
13 you.

14 SENATOR SCARNATI: And a follow-up question for
15 you, Ms. Weisser. Under Rule 217(e), you spoke about notice.

16 MS. WEISSER: Yes.

17 SENATOR SCARNATI: Has the Attorney General
18 complied with that rule?

19 MS. WEISSER: I also don't know that. But that is
20 a verified statement under 217(e). That's also required to be
21 filed with the same entity, showing compliance with the other
22 provisions of the rule. I don't know if that's been
23 accomplished.

24 SENATOR SCARNATI: And one more, if I could, Mr.
25 Chairman. Bruce, you spoke to licensing. Ours is a

1 government not of people but of laws. So barbers are
2 licensed, doctors are licensed, tavern owners are licensed.

3 MR. ANTKOWIAK: Absolutely.

4 SENATOR SCARNATI: Drivers are licensed.

5 MR. ANTKOWIAK: Yes.

6 SENATOR SCARNATI: Do we have two different
7 classes of licenses? If you lose your barber's license, you
8 can't practice barbering. If you lose your doctor's license,
9 you can't continue to see patients. And I would assume that
10 we have one set of licensing, or am I missing another set, for
11 attorneys?

12 MR. ANTKOWIAK: No, Senator, you're not. The
13 licensing of attorneys is an extraordinarily serious matter.
14 And as I said, it's more than just judging that a person has
15 the technical ability to do a task. It goes beyond that. It
16 goes, as Ms. Weisser was saying before, the vetting of a
17 person to get a law license doesn't just require looking to
18 see whether they passed a course of study at an ABA-accredited
19 law school. They have to submit themselves to a, both an
20 intellectual and a moral fitness test, and that testing is
21 ongoing throughout the course of their licensure. And it is
22 that way because it is a privilege granted to people to hold
23 the license of an attorney, exclusive of other people who may
24 be able to give wonderful legal advice, but they're not
25 allowed to do that under the Commonwealth of Pennsylvania

1 because they do not hold that license. And for that reason, I
2 have always looked upon the licensing of attorneys as a far
3 more serious matter than any of the other very serious
4 professions which you've listed in your examples.

5 SENATOR SCARNATI: Thank you.

6 CHAIRMAN GORDNER: I'm going to ask a couple of
7 questions, and we'll go around to round two.

8 Just so you know, this committee provided a
9 subpoena duces tecum to Kathleen Kane, and we asked for a
10 number of documents from her. We did get a response on
11 Friday, this past Friday, from her. One of the questions was
12 asking her to provide "Any and all communications from the
13 Attorney General to the employees of the Office of Attorney
14 General related to the suspension of the Attorney General's
15 law license." Okay. So we asked her to provide any
16 communications related to the suspension of the Attorney
17 General's law license to any employees. Her response was that
18 "No document exists."

19 Also, I want to add that this committee requested
20 from the Office of Disciplinary Counsel any documents that or
21 statements that were provided to the board pursuant to 217(e).
22 They provided a number of documents, none of which was a
23 delegation -- oh, actually, they didn't provide any document
24 that Kathleen Kane has submitted under 217(e) in regard to any
25 of the delegation of responsibilities or any statements.

1 With the knowledge of those two things, can you
2 give an opinion as to where she is in regard to the
3 obligations of Rule 217?

4 MR. DAVIS: If she has a supervising attorney, she
5 has to follow the rule, and that is submit the appropriate
6 form, as properly certified and signed, et cetera. If you are
7 saying that she has not done that, then that is a problem.
8 That is a problem. She's not abiding by the rule. But, you
9 know, there's other aspects of this rule to which she
10 apparently is not strictly abiding.

11 I don't want to get terribly esoteric. That's Mr.
12 Antkowiak's job.

13 CHAIRMAN GORDNER: I'm just asking you to answer
14 to the best of your ability.

15 MR. DAVIES: Wonder whether there's a motivation,
16 again, in terms of separation of powers, to the extent to
17 which she believes that somehow that works into her obligation
18 concerning the appointment of a first assistant under the law
19 and constitutional provisions that apply to her. You know,
20 and I'm not going to try to read her mind on that. If you
21 just read the rule straight, if she has a supervising
22 attorney, she should tell the Office of Disciplinary Counsel,
23 she should tell the Disciplinary Board. Straight
24 interpretation, yes, she should.

25 CHAIRMAN GORDNER: Beth, do you have any thoughts

1 on that?

2 MS. WEISSER: I would agree. Well, not knowing
3 whether or not she has formally engaged a supervising
4 attorney, I wouldn't say it's accurate to say that she's in
5 violation of the portion of the rule that requires her to file
6 a notice of engagement of supervising attorney. But once that
7 supervising attorney has been identified, if she's going to
8 proceed as Rule 217 requires, the notice of engagement must be
9 filed. I think the failure to file the verified statement
10 under 217(e) is a -- she is not compliance with the
11 requirements of Rule 217, and that verified statement is
12 designed and intended to show the Disciplinary Board that the
13 formerly admitted attorney has complied with the other
14 provisions of 217 in terms of notifying other jurisdictions,
15 notifying clients, ceasing to use forms of communication that
16 imply an ability to continue to practice law, et cetera.

17 That verified statement is basically the formerly
18 admitted attorney saying here's what I've done. Let me show
19 you how I have complied with the requirements of Rule 217.
20 Here's the letter that I sent to New Jersey, where I may or
21 may not be admitted. Here's the letter that I sent to any
22 courts where I may be admitted notifying them that I have been
23 suspended. Here's my current LinkedIn profile. As you can
24 see, it doesn't make any reference to me being an attorney.
25 It's an opportunity for the formerly admitted attorney to

1 demonstrate their compliance with the rule. And again, that
2 is supposed to be within 10 days of the effective date of the
3 order of suspension.

4 CHAIRMAN GORDNER: Okay. And I might add that she
5 did provide a statement indicating that she has notified
6 dozens, and multiple dozens, of entities that her license is
7 suspended. So she did file that document with the
8 Disciplinary Counsel, and there are dozens and dozens of
9 entities and DAs and departments that she provided the notice
10 that her license is suspended. So just for the record, I want
11 to make sure that that is clear.

12 I guess one more question, and then I'll move on
13 to Members for the second round, since I'm on my second round.
14 And again, this is the tricky part, I guess, of 217. You talk
15 about supervisory attorney. If I'm correct, 217 does not
16 allow you to continue to be in the same firm?

17 MR. DAVIS: (Indicating in the affirmative.)

18 CHAIRMAN GORDNER: Or agency? And I guess I need
19 to emphasize the second part, firm or agency, or not?

20 MR. DAVIS: I think you must read it broadly. You
21 should not be -- well, let's look at the exact language.

22 MS. WEISSER: Yes. It's "performing any
23 law-related activity for a law firm, organization or lawyer if
24 the formerly admitted attorney was associated with that law
25 firm, organization or lawyer on or after the date on which the

1 acts which resulted in the disbarment or suspension
2 occurred...."

3 MR. DAVIS: And organization, as I said, across
4 the application of all the rules concerning attorney
5 discipline and licensing, isn't just a law firm. It goes
6 broadly, and there are some circumstances in which
7 governmental entities are considered to be organizations.

8 CHAIRMAN GORDNER: Okay. Thank you.

9 Senator Haywood.

10 SENATOR HAYWOOD: Thank you. Thank you for the
11 second round opportunity.

12 We've spent quite a bit of time on the question of
13 what's the practice of law, and it's entirely possible that
14 the Attorney General has completely abandoned the practice of
15 law and may not even need a supervisory attorney if she's not
16 engaged in the practice of law. So I just want to go briefly
17 on the assumption that the full list of what the deputy has
18 said should not be performed by the Attorney General, that
19 that's been agreed to. I have a list of about 14 items from
20 the Commonwealth Attorneys Act which talks about what the
21 Attorney General should do -- shall do. Many of them, I
22 think, require a law license. And let's just say that she's
23 agreed not do any of those things. So all these questions
24 about what's practice or not practice of law, just for a
25 moment let's say is irrelevant for this conversation, if she

1 in fact agreed not to do any of those prohibited activities.

2 That leads, to me, the question that I think was
3 asked but not completely answered by Senator Baker. She had a
4 two-part question, and I think the first part was answered.
5 The second part, if I recall, and I hope I'm not putting words
6 in her mouth. If I am, I apologize, but I thought the second
7 part of her question was what duties of the Attorney General
8 may not be delegated? If that wasn't her question, that's
9 mine, and I apologize. So my question is, what duties of the
10 Attorney General may not be delegated to the First Deputy or
11 -- let's just say the First Deputy. Thank you.

12 MR. ANTKOWIAK: Senator, I don't know that there
13 are any specific duties that you could say an Attorney General
14 could not delegate. I served for a number years in the U.S.
15 Attorney's Office in Pittsburgh, and if the United States
16 Attorney himself or herself would have a conflict of interest
17 in a particular case for some reason, they would absolutely
18 delegate all of their duties with respect to the supervision
19 of that case to someone else in the office, or to the Attorney
20 General's Office in Washington. So I don't know that there is
21 any specific limit on what an Attorney General could not
22 delegate under an appropriate circumstance.

23 The larger question would be if the -- if a person
24 in the position of an Attorney General's Office is unable to
25 perform any of the functions of the office, or at least all of

1 those functions for which a licensed attorney must practice,
2 is that something that would constitute reasonable cause under
3 Section 7? That will ultimately be a question that you will
4 have to address.

5 SENATOR HAYWOOD: Right. And I'm very clear about
6 the question that we have. Could we get the other two
7 panelists to address the question that I have?

8 MS. WEISSER: I can't say that I am particularly
9 knowledgeable one way or the other in terms of what
10 responsibilities or obligations can be delegated within the
11 Office of the Attorney General. It's not something that's
12 contemplated by the disciplinary rules, and my area of
13 practice, I don't think, suits me to discuss what is
14 permissible in that regard.

15 MR. DAVIS: This is a tough question. I'm trying
16 to think of some analogy, for example, disability, temporary
17 disability. If the functions were delegated at the time when
18 the Attorney General had that authority, clearly had that
19 authority and the license, I think that creates a situation.
20 I think that's properly, again, switches the focus to what
21 else does the Attorney General do from here on out? And is
22 that enough? And I think that, again, as the professor said,
23 I think that's the question that you are facing. Find out
24 what it is. Is it enough? Is that enough to constitute
25 reasonable cause?

1 SENATOR HAYWOOD: Thank you.

2 CHAIRMAN GORDNER: Senator Yaw, followed by
3 Senator Schwank.

4 SENATOR YAW: Thank you, Mr. Chairman.

5 I want to follow up on that a little bit, because
6 I think that we've been assuming that the Attorney General can
7 delegate everything, and I'm not so sure that that's true. I
8 have kind of in my mind that all the powers emanate from the
9 Attorney General position, and if the Attorney General
10 position is not a valid legal position, so to speak, then how
11 can things be delegated from it?

12 Now, and here's where if you look at the
13 Commonwealth Attorneys Act, under Section 202, it specifically
14 mentions when the First Deputy takes over, and that's when
15 there's a vacancy in office. Under Section 207 of the
16 Commonwealth Attorneys Act, this is really interesting
17 language. And the reason -- it says "[t]he Attorney General
18 shall serve as a member of the Board of Pardons and he, or his
19 designated deputy, shall serve as a member of Joint Committee
20 on Documents, the Hazardous Substances Transportation
21 Board..." and a list of other things. So it specifically says
22 -- these are two statutory provisions that specifically talk
23 about when the First Deputy or a designee can take over.

24 Now, I'm not saying that the Attorney General
25 can't ask people for help. Like, for example, Ms. Weisser, if

1 somebody asked you for a legal opinion, I'm sure you're going
2 to have staff or paralegals or associate attorneys are going
3 to do a lot of research for you.

4 MS. WEISSER: Um-hum.

5 SENATOR YAW: But the bottom line is, what you
6 sign is yours, and you take responsibility for it.

7 MS. WEISSER: Absolutely.

8 SENATOR YAW: And there's a distinction throughout
9 the Commonwealth Attorneys Act between "the" Attorney General
10 and the Office of Attorney General, and virtually all of the
11 dealings with like the Governor and everything it talks about
12 "the" Attorney General. So if "the" Attorney General can no
13 longer function in that position, I don't see how
14 responsibility can be designated to a deputy to do that.

15 It would be no different, Ms. Weisser, if you were
16 asked for an opinion, you were asked for an opinion, you had
17 your license suspended, then you can't give advice to somebody
18 who had contracted with you to get that advice. I mean,
19 that's the kind of distinction I see in the Commonwealth
20 Attorneys Act. There are specific areas where the deputy is
21 mentioned, and otherwise, I get the opinion, or at least it's
22 my feeling and interpretation of this, is that if the power
23 doesn't emanate out of the Attorney General, I'm not sure that
24 there is any implied authority to go to all the deputies.

25 Do you want to comment on that? I mean, I've read

1 this stuff and I have a serious question about it.

2 MR. ANTKOWIAK: Senator, that creates a very
3 serious consequence. And I'm not saying you're wrong about
4 this. I'm not.

5 SENATOR YAW: I agree, it does create a very
6 serious consequence.

7 MR. ANTKOWIAK: I'm not. Because I can easily and
8 readily imagine litigants against the Office of Attorney
9 General raising that very point and saying that in the absence
10 of an Attorney General who is capable of carrying out the
11 functions of that office, that the entire office of the
12 Attorney General's actions are essentially a nullity. Now, I
13 would wonder whether the Supreme Court of Pennsylvania would
14 uphold that, or whether or not they would say that the
15 intention of this was not to debilitate completely the Office
16 of the Attorney General to function in an instance like this.

17 But the question you ask is a serious one, and
18 it's one that I've thought about and that other people have
19 thought about: To what extent does this negate much of the
20 actions of those people who are acting in the person of the
21 Attorney General in all of their functions as deputies? I do
22 recognize there is that distinction in a number of the
23 functions in the Commonwealth Attorneys Act, where there is
24 the distinction that you point out. This is an area in which
25 I know of no legal precedent whatsoever to help a court guide

1 in this area. I would think one of the countervailing issues
2 would be the fear that by the position of the Attorney General
3 being compromised in whatever way, does that necessarily mean
4 that the entire function of that wing of government cannot go
5 forward with devastating consequences for the people in whose
6 name that function is to be performed?

7 SENATOR YAW: I agree, and that's why I asked the
8 question. But we had a district attorney sit here earlier,
9 whenever, last week, or I forget when the last hearing was,
10 who said that actually there were -- that defense counsel were
11 filing motions based on that argument. And the flip side of
12 it is if they don't do that, they're going to be accused of
13 being ineffective counsel in the long run.

14 MR. ANTKOWIAK: That's correct.

15 SENATOR YAW: So, I mean, the problem snowballs.

16 MR. ANTKOWIAK: The problem snowballs, and the
17 difficulty is the absence of precedent to be able to
18 effectively analyze that problem, because this is certainly a
19 matter on which no one could say, well, this has been readily
20 decided 10 or 15 years ago. It has not been.

21 SENATOR YAW: Thank you.

22 Thank you, Mr. Chairman.

23 CHAIRMAN GORDNER: Senator Schwank, followed by
24 Senator Baker.

25 SENATOR SCHWANK: Thank you.

1 I want to start a line of questioning that relates
2 somewhat to what Senator Yaw was saying, and help me with this
3 distinction. And it also goes back to a suspension of license
4 versus no license, or being disbarred, I guess you would say.
5 If I look at the Supreme Court order correctly, it says that
6 the license is suspended, which to me means it's held in
7 abeyance, not that it is lost or revoked. Am I correct in
8 thinking that, or incorrect?

9 MS. WEISSER: I think that's a fair distinction.
10 I think that's why the Rules of Disciplinary Enforcement will
11 separately address and distinguish between a formerly admitted
12 attorney who has been disbarred, who has been suspended, who
13 has been administratively suspended, who has been suspended
14 under an emergency suspension order under 208. All of them
15 fall under the rubric of formerly admitted attorneys, and all
16 are required to comply with 217 in that regard. But the rules
17 do make a distinction.

18 MR. DAVIS: I would point out the rule that says
19 temporary suspension. That clearly is a very, very unique
20 status. Very, very unique status.

21 MS. WEISSER: And I would add also that the rules
22 provide a process for reinstatement for an attorney who has
23 been suspended or who has been administratively suspended.
24 The process is different for each of those. It's more onerous
25 and burdensome for an attorney who has been suspended as a

1 result of a disciplinary violation. But there is a process.
2 You can petition for reinstatement. The Office of
3 Disciplinary Counsel has an opportunity to evaluate your
4 petition and determine whether or not they see an impediment
5 to you being reinstated. I mean, that's the flip side of a
6 suspension. There is an opportunity to petition for
7 reinstatement.

8 SENATOR SCHWANK: And would those same provisions
9 apply to the Attorney General's Office? The Attorney General
10 itself?

11 MS. WEISSER: I don't see why not. The rules for
12 reinstatement make no distinction between an Attorney General.

13 SENATOR SCHWANK: I think that's helpful in
14 determining the kind of actions that we take here is to
15 understand exactly what has happened -- what the Supreme Court
16 has done, and what that means for functioning of the office.

17 Getting back, Professor, to the questions that I
18 had asked you prior, and we talked about, you know, reasonable
19 cause, and the fact in that case that goes back 100 years ago,
20 that impeachment was the appropriate procedure to take. Is
21 that the appropriate procedure that should be taken in this
22 case, perhaps?

23 MR. ANTKOWIAK: With all due respect, I'm not
24 going there, Senator.

25 SENATOR SCHWANK: Okay. Okay. I had to ask

1 though. Thank you.

2 MR. ANTKOWIAK: That's why they pay you the big
3 money. This is a very, very difficult problem that you face.
4 I empathize with you on that. The limited precedent here is
5 that if you had misbehavior in office, as it was construed
6 back then, and the charges back then were all based upon what
7 was the underlying criminal conduct of the alleged Auditor
8 General and Treasurer at the time. The Senate needed to give
9 due regard to the impeachment process and to defer to that.
10 And I believe on balance they did that appropriately.

11 Where impeachment would not be the appropriate
12 venue, however, for another reason for removal, where that
13 would not be an impeachable offense or impeachable conduct,
14 then the question is does that conduct fall within this
15 alternative section of the Constitution? And again, the point
16 is both of those sections need to be given life and viability.
17 They need to be both placed in their proper context. Neither
18 should be disregarded in favor of the other.

19 SENATOR SCHWANK: Thank you.

20 CHAIRMAN GORDNER: Senator Baker, followed by
21 Senator Wiley.

22 SENATOR BAKER: Thank you.

23 Mr. Antkowiak, I'd like to follow up on Senator
24 Schwank's questions. On November 6, we received a letter from
25 Attorney General Kane on letterhead from the Office of

1 Attorney General with no delineation or notation addressed to
2 the Special Committee questioning the legal authority of the
3 existence of this commission and of this committee. And in
4 it, she specifically questions the specific exclusion of high
5 ranking officials to the direct action of the Governor because
6 it was not contemplated that we would have an elected Attorney
7 General, and that surely it would have been included in such
8 categories and been treated separately. So it is her belief
9 that we're moving the position of Attorney General from the
10 power of the Governor is not valid and not appropriate. Could
11 you respond or offer an opinion on that analysis of the role
12 and function of our committee?

13 MR. ANTKOWIAK: Well, again, the difficulty with
14 that position is simply a juxtaposition of the two provisions
15 of the Constitution that are at issue here. Section 7 has
16 been on the books of the Constitution for well over a hundred
17 years. It lists a number of officials who are exempt from the
18 address and removal process.

19 In 1980, when the constitutional amendment
20 creating the elected Attorney General went into effect, the --
21 a reasoned constitutional interpretation of that is that if a
22 different status was conceived of for the position of elected
23 Attorney General, it would have been just as easy at that time
24 to have included that position within Section 7. And as it
25 was not and there was no action taken to amend Section 7 in

1 that regard, then Section 7 continues to mean what it says, to
2 exempt the specific people who are exempted, and to leave
3 unexempted the rest.

4 SENATOR BAKER: As I looked at this, the
5 distinction between appointed and elected officers is one that
6 relates to the source of their authority. So those who are
7 appointed may be removed at the pleasure or power of those who
8 appointed. Those who are elected, on the address of
9 two-thirds of the Senate and by the Governor. So it would be
10 your belief that that would fit into that particular category?

11 MR. ANTKOWIAK: Yeah.

12 SENATOR BAKER: Thank you.

13 CHAIRMAN GORDNER: Senator Wiley.

14 SENATOR WILEY: Thank you, Mr. Chairman.

15 Can anyone give an opinion on whether temporary
16 suspension equals reasonable cause?

17 MR. DAVIS: I'll answer that this way: No, I
18 won't. I think you can see it's a very difficult challenge.
19 You've heard me suggest that you need to learn a little bit
20 more about what the Attorney General does and doesn't do.
21 Whether, to use perhaps a phrase, it would be helpful had she
22 been mortally wounded by the suspension, with due regard to
23 that fact that it's temporary, due regard to the genesis of
24 the problem, but other than that, I cannot give you the help,
25 perhaps, by answering your question for you. You are pioneers

1 in this regard.

2 (Pause and laughter.)

3 SENATOR WILEY: I had to ask the question.

4 MR. ANTKOWIAK: Well, let me just add that, again,
5 is it the question that someone has been -- suffered a
6 temporary suspension, is that the reasonable cause? Or is it
7 more appropriate to look at the impact of that suspension and
8 what that does to the capacity of the individual to perform
9 the constitutional and statutory functions that are inherent
10 in the position that they hold, is that the issue? Beyond
11 simply the formal attribution of a suspension, to what extent
12 does that cause them to be incapable of performing the
13 function on behalf of the people that they are to perform?

14 SENATOR WILEY: And that's a great point,
15 Professor. One of the things that I've heard a lot today --
16 and first of all, thank you for your testimony, again. It's
17 been incredibly helpful for me personally. But we've heard a
18 lot of assumptions, and we're making a lot of assumptions that
19 these things are happening because we just don't know. So
20 until we find out exactly, Mr. Davis, to your point, the
21 duties that are being performed by the Attorney General and
22 the duties that have been delegated, it's going to be very
23 difficult for us to make that determination. But as I see it,
24 and some of the testimony that you provided today, we don't
25 know what work she's doing. We don't know if she has a

1 supervisory attorney or whether she even needs one. And, you
2 know, she could be doing strictly administrative work and not
3 -- I know that there's a question on the definition of
4 practicing law, but that comes into question. And I think
5 that it's the task and charge of this committee to really come
6 to that determination.

7 You've been incredibly helpful in that effort in
8 providing us with some testimony. But thank you, again, for
9 your testimony.

10 And thank you, Mr. Chairman.

11 CHAIRMAN GORDNER: Thank you. And actually, to
12 that regard, I will go ahead and announce that we will be
13 having probably our last hearing tomorrow, Wednesday, November
14 18, at 1 p.m. We will be having it in this hearing room. We
15 will have four testifiers at that time. They will be Bruce
16 Beemer, who is the First Deputy Attorney General with the
17 Attorney General's Office; James Donahue III, the Executive
18 Deputy Attorney General for Public Protection Division; Robert
19 Mulle, Executive Deputy Attorney General, Civil Law Division;
20 and Lawrence Cherba, Executive Deputy Attorney General under
21 the Criminal Law Division. So we will have those four Deputy
22 Attorneys General here at 1 o'clock in order to answer some of
23 those questions.

24 I want to thank the three of you. Again, this is
25 a panel made up of three attorneys and three nonattorneys, but

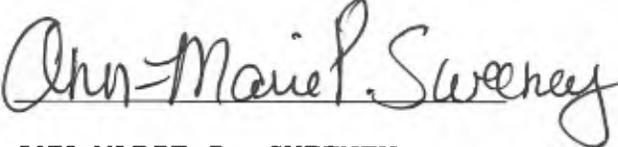
1 to all of us, the information, both from a constitutional
2 background and from an ethics and practice in law background,
3 I think have been tremendously helpful. And we thank you for
4 being here today.

5 At this point, the hearing will be in recess to
6 the call of the Chair.

7 (Whereupon, the proceedings were concluded at
8 11:40 a.m.)

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1 I hereby certify that the proceedings and evidence are
2 contained fully and accurately in the notes taken by me during
3 the hearing of the within cause, and that this is a true and
4 correct transcript of the same.

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