

NEW YORK STATE MATRIMONIAL COMMISSION
PUBLIC HEARING

DATE: April 21, 2005

PLACE: Erie County Hall
92 Franklin Street
Buffalo, NY 14202

COMMISSION CHAIRWOMAN:

HONORABLE SONDR A MILLER

COMMISSION MEMBERS:

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MARCIA M. RAINS
Sr. Court Reporter

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2 (9:04 a.m. proceedings commenced.)

3 HON. SONDRRA MILLER: Good morning. I know
4 there will be many more joining us, but I want to
5 thank all of you who are here and that's all of
6 the -- particularly the litigants, the experts,
7 the staff of this absolutely magnificent courtroom
8 and building, and I certainly must take this
9 opportunity to thank my Commissioners, who have
10 traveled from far away, by plane, by train, by
11 car, not by foot, but they have come in. All of
12 you, all of us who are here are dealing, as we
13 know, with a very complex and very important and
14 very difficult, difficult issues, and I want to
15 thank all of you for your efforts and your
16 attention and your interest, because all of us
17 together are going to try to make this system a
18 much better one than it is.

19
20 This is the tenth anniversary of our
21 predecessor commission which has been mandated to
22 examine the issues and recognize the important
23 strides made based on that commission's work.
24 Chief Judge Judith Kaye, who is, as we know, a
25 tireless crusader on behalf of the families and

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2 children of this state, acknowledges that still
3 more can and must be done to further improve the
4 practice of matrimonial and family law in New York
5 State. She has charged us, this 32-member
6 statewide panel, with a very broad mandate. We
7 are to take a global look at the area of family
8 and matrimonial law as it is practiced in New
9 York, to look at all the stakeholders inside and
10 outside of the system for input and guidance. We
11 are to think globally, holistically and
12 innovatively to address and resolve these three
13 main issues:

14 Reducing and eliminating trauma to parties,
15 and, most important, their children.

16 Avoiding unreasonable expense to the parties;
17 and reducing and eliminating delays.

18 This commission recognizes the urgency and
19 importance of our mission and considers its
20 mandate a great challenge and a great opportunity.
21 We intend and expect to recommend significant
22 reforms, and we can assure you that our Chief
23 Judge has pledged to do all that she can do to
24 effectuate reasonable recommendations that will
25 serve to improve the lives of those who appear

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2 before our matrimonial and family court.

3 To those of you who have been assigned a time
4 to speak, please be sure that you have signed in
5 at the desk outside. As a courtesy to the other
6 individuals scheduled to speak today please
7 remember that your remarks are limited to ten
8 minutes, and we must keep you to that time
9 schedule. Anyone who has written material to
10 submit for the Commission's consideration should
11 leave at least two copies with the Commission
12 staff at the sign-in table. No material will be
13 handed up to the Commission during the course of
14 this hearing.

15 Note that I, on behalf of the members of the
16 Commission, may at times interrupt you to ask a
17 question or seek clarification of a point. I will
18 strive to keep this to a minimum, as we are most
19 interested in hearing from you about your
20 experiences and your recommendations for improving
21 the system.

22 Hearing notices and registration forms are
23 available at the desk outside, should you be
24 interested in attending our fifth public hearing
25 scheduled for May 9th, 2005, at the New York

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2 County Lawyers Association in New York City.
3 As stated on the notice of the public
4 hearing, the Commission cannot take testimony from
5 any individual who has a case currently pending in
6 the New York State courts. This is necessary to
7 protect the integrity of pending cases and the
8 work of the Commission. However, such individuals
9 are encouraged to submit their comments and their
10 suggestions in writing to the Commission no later
11 than June 30th. Any identifying details contained
12 therein will be redacted by Commission staff,
13 however, the substance of the submission will
14 remain intact.

15 Before we begin I ask that you turn off all
16 cell phones, pagers and other devices and that you
17 refrain from interrupting speakers with comments
18 or applause, as we are on a very tight schedule
19 and do not want to deny any speaker their full
20 allotment of time.

21 We are ready to begin our hearing.

22 I understand that Miss Lisa --

23 Lorraine Engl? Thank you.

24 LORRAINE ENGL: Okay. First of all, is that
25 too loud? You'll have to excuse me everyone, I'm

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2 suffering from a sinus infection. My ears are
3 blocked, so I'm not entirely sure how loud I'm
4 really speaking.

5 I'd like to tell you that my partner, who
6 will be speaking directly after me, is going to
7 start out with a quote by attorney Sanford J.
8 Berger. I would like to begin with the folklore
9 "What" doesn't kill you makes you stronger".
10 While this may be true for life-threatening
11 illnesses, global disasters and financial crises,
12 it is definitely not the case for families going
13 through a divorce, especially if it becomes
14 hostile. Although the legal system must
15 concentrate on matrimonial laws when addressing
16 divorce, it cannot turn a blind eye to the
17 emotional and traumatic aftermath suffered by all
18 involved when the divorce becomes unfriendly. As
19 professionals, we understand the turmoil that
20 follows divorce. Therefore, it is important that
21 we seek to address the process of divorce with
22 more sensitivity to the emotional component.
23 Mediation, collaborative law and counseling should
24 be the first option offered to couples that have
25 made the decision to divorce. Regrettably, this

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2 option is not usually discussed, obliging the
3 parties to assume adversarial positions that have
4 long-lasting consequences between the partners, as
5 well as parents and their children. In fact, when
6 one first mentions to a family member, a friend,
7 or a relative that they are considering divorce
8 the typical first response is "get a good lawyer",
9 one who will protect you.

10 Without ever mentioning what needs to be
11 protected, the message is very clear. Everyone
12 involved realizes that they are in for a fight.
13 Not only to protect their financial future and
14 assets, but to protect their status as a parent.
15 An antagonistic atmosphere is created when one
16 party hires an attorney who tells him or her
17 something like, "Do not talk to your spouse, let
18 me handle it, that's what you've hired me for."
19 Letters are sent, complete with demands and
20 sometimes allegations, and communication between
21 the spouses usually ends with phrases like "talk
22 to my lawyer". Since it's not unusual for
23 families to continue to live together in their
24 marital home, the lack of communication breeds
25 more frustration, resentment and anger, all

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2 contributing to an already fragile environment.
3 The hostility between parents is not lost on the
4 children. In fact, more often than not they are
5 held emotional hostage in an environment that
6 supports discord and mistrust. Phrases like, "You
7 tell your mother," or "you tell your father,"
8 become commonplace, and the children become their
9 parents respective messengers. The children begin
10 to act to their parents in the same way, manner
11 their parents react to one another, and they also
12 absorb the context of the messages that they carry
13 back and forth between their parents.

14 As a way of removing themselves from their
15 parents' disagreements they often turn to their
16 legal representative or Law Guardian in much the
17 same way as their parents rely on their respective
18 attorneys. Thus, the phrase, "I'll talk to my
19 lawyer," becomes a part of the child's daily
20 conversation when they believe they're caught in
21 the middle and just want to end this process. The
22 resentment each parent feels from a sense of
23 disempowerment soon becomes a part of the
24 children's emotional makeup. The settlement
25 outcome of the divorce, instead of emotional

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2 healing and adjustment, becomes the focus of the
3 litigants' lives. All energy is devoted to
4 winning the divorce, and it is not uncommon for
5 each party to adopt an attitude of winning at any
6 cost. While financial considerations are always a
7 concern, children are often viewed as the big
8 prize; therefore, custody, visitation and access
9 issues become battlegrounds for winning the
10 marital war. When this occurs, the emotional toll
11 on the children is immeasurable, like planting a
12 malignant seed that grows, overtakes, and finally
13 destroys relationships. As a psychologist, unlike
14 the attorneys, my role does not end when the
15 divorce is final. Therefore, I have seen
16 firsthand the damage done to families, children,
17 parents, and grandparents, when divorce becomes a
18 war.

19 When there is not a collaborative approach to
20 the divorce process, the parties assume an
21 adversarial posture. This antagonistic attitude
22 affects the children, who are often put in the
23 position of choosing one parent over another.
24 Without help and guidance this pattern of good
25 parent versus bad parent extends for many years

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2 and sometimes a lifetime. As an example, I have
3 had the unfortunate experience of trying to
4 reconcile a daughter with her father after a
5 particularly hostile divorce. This poor child was
6 forced to endure the breakup of her family, but
7 through the adversarial process, lost the
8 emotional connection to her father as well. Be
9 assured, this was not -- this did not occur
10 because her father was unfit, abusive, or
11 uncaring, but because she was forced to take
12 sides. As a 12-year old girl she was given the
13 power by the legal system to decide not only where
14 she wanted to live, but with whom she wanted
15 contact. Since she was not cognitively
16 sophisticated to sort through her feelings, she
17 simply reacted to her immediate anger of her
18 family breaking up. This meant she had to blame
19 someone, and since her father left the house, she
20 blamed him for the divorce, not realizing that she
21 was dictating her future relationship with her
22 father in the most destructive of manner.

23 Conversely, another child, also 12, was faced
24 with her parents ending their marriage. Her
25 parents were advised by their respective attorneys

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2 to seek counseling to help them work through their
3 feelings and then mediate their differences rather
4 than becoming adversaries. With this approach the
5 parties were able to maintain a dignified and
6 respectful attitude towards each other, and both
7 were able to adjust to becoming divorced people,
8 not divorced enemies. In the process, their child
9 was given the opportunity to communicate her
10 fears, feelings and needs to both her parents,
11 thereby maintaining her connection to both, as
12 well as her sense of self with each parent. Of
13 course, every divorce is unique and should not be
14 approached as such. Therefore, not all divorces
15 should be forced to assume a confrontational
16 posture when a collaborative approach would be
17 more beneficial. In order for this to occur, it
18 is imperative that the laws, as well as the legal
19 community, accept the divorce process does not end
20 with the legal decision, rather the parties are
21 left to face a very difficult and separate future.
22 To help people emotionally navigate this difficult
23 time it is necessary to direct the spouses to
24 continue to communicate with each other, as well
25 as with their respective attorneys. Family

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2 divorce counseling should be considered an
3 essential part of the process to help the parties
4 repair, heal, and establish new routines and
5 schedules that are dictated by two separate
6 households. It is my belief that couples who are
7 capable of compromise and negotiation should be
8 given the opportunity and option to do so through
9 mediation and collaborative law. Perhaps the new
10 rule of thumb should be "talk, talk again, then
11 mediate before litigate." Thank you.

12 HON. SONDR A MILLER: Thank you very much.

13 Dr. Warren Keller.

14 WARREN KELLER: Good morning. Dr. Engl began
15 with a folklore, let me begin with a quote. "In
16 all that is decent, in all that is just, the
17 framers of our Constitution could never have
18 intended that the enjoyment of life meant that if
19 divorce came, it was to be attended by throwing
20 the two unfortunates and their children into a
21 judicial arena with lawyers as their seconds and
22 have them tear and verbally slash at each other in
23 a trial by emotional conflict that may go on in
24 perpetuity. We have been humane enough to outlaw
25 cockfights, dogfights and bullfights; and yet we

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2 do nothing about the barbarism of divorce fighting
3 and trying to find ways to end it. We concern
4 ourselves with cruelty to animals, and rightfully
5 so, but we're unconcerned about the force and
6 intentionally perpetrated cruelty inflicted upon
7 the emotionally distressed involved in divorce.
8 We abhor police beating confessions out of alleged
9 criminals, and yet we cheer and encourage lawyers
10 to emotionally beat up and abuse two innocent
11 people and their children because their marriage
12 has floundered. Somewhere along the line our
13 sense of values, decency, humanism and justice
14 went off track.

15 This is a quote that some of you may know by
16 attorney Sanford J. Berger from a writ that was
17 submitted to the Supreme Court of the United
18 States of America on behalf of a client that was
19 requesting protection from cruel and unusual
20 punishment as guaranteed by the 8th Amendment of
21 the United States Constitution. The quote is
22 included in the preface to Dr. Richard Gardner's
23 1989 book entitled Family Evaluation and Child
24 Custody Mediation Arbitration and Litigation.
25 Little has changed since that time in the manner

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2 in which marriages are terminated and the way in
3 which the resolution of custodial and access
4 issues occur within the adversarial approach of
5 the legal system. Despite other states that
6 support, encourage and even mandate mediation, New
7 York State continues to harbor some of the most
8 archaic matrimonial laws and methods to terminate
9 marriages and resolve questions of just how two
10 divorcing parents will continue to share their
11 caretaking responsibilities of their children and
12 renegotiate their relationship so that they can
13 become successful business partners. Business
14 partners in the business of raising their children
15 successfully. The adversarial approach to
16 divorce, especially with respect to questions of
17 access and custody, terrorizes families, impairs
18 relationships, and has deleterious effects on both
19 parent-child relationships as well as the
20 relationships between former spouses.

21 The recovery of emotional functioning after
22 divorce parallels the recovery of functioning
23 after a closed head injury. It takes from three
24 to five years to recovery emotional functioning
25 after divorce, ten years if there's prolonged

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2 litigation, and the same three to five years to
3 recover from a closed head injury.

4 Dr. Robert Emery, a psychologist and prolific
5 researcher in the area of divorce and its impact
6 on children and families, has described that the
7 primary emotion experienced by divorcing couples
8 is that of grief. Grief over the multiple losses
9 that are being sustained, with grief being
10 characterized by an intertwining of three other
11 emotions, love, sadness and anger. When this
12 unresolved, love, sadness, anger and grief
13 motivates a divorced parent to repeatedly return
14 to the legal adversarial system instead of
15 mediating, the recovery of emotional functioning
16 after divorce may never occur for parents, as well
17 as for children.

18 The famous anthropologist Dr. Margaret Mead
19 was once asked to comment on the marriage vows
20 "til death do us part". She responded that the
21 terminology was all well and good in its day, when
22 the average life expectancy was 36 years, but now
23 that people are living to be a hundred years old,
24 the likelihood of changing spouses, changing
25 partners, changing confidants was quite high, and

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2 we can expect to see that increase. And divorce
3 is much more commonplace in today's society merely
4 because people live longer. 50 percent of
5 children born to today's baby boom parents can be
6 expected to experience divorce. Nearly 34 percent
7 of children being born in the US are now being
8 born outside of marriage, which is believed to be
9 one of the reasons why we're seeing some slight
10 declines in the divorce rate. Divorce is
11 commonplace. The termination of relationships is
12 commonplace. Divorce needs to be deregulated as
13 we deregulate other industries. New York State
14 needs to adopt a no fault divorce law, one that
15 will assist individuals who are terminating
16 relationships, to extricate themselves from the
17 adversarial approach to divorce that has been well
18 demonstrated to cause both emotional as well as
19 financial harm.

20 I've been involved with families that have
21 been attempting to divorce yet have been
22 unsuccessful after three years, nearly \$300,000
23 being spent on fees, and still have not been able
24 to resolve matters of divorce or custody. There's
25 little hope for recovery of emotional functioning

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2 after a trauma of this magnitude.

3 The adverse impact of litigation and child
4 custody matters is well documented in the child
5 psychology literature. Dr. Robert Emery has
6 completed some of the most instrumental research
7 investigating the effects of litigation versus
8 mediation in contested cases of child custody. In
9 controlled studies, where families were randomly
10 assigned to argue either litigation or mediation
11 we find lasting positive effects of mediation as
12 long as 12 years after custody and access disputes
13 were settled.

14 Families were enrolled in research after they
15 were unable to successfully resolve their disputes
16 and had come to the point where they were actually
17 willing to allow a total stranger, a judge, to
18 tell them what to do with their own children.

19 Families enrolled in mediation, who took
20 control of their own destiny and resolved their
21 disputes in the course of mediation, with the
22 mediation lasting on average five hours, expressed
23 greater contentment and were happier that they did
24 what they did up to 12 years later. Both parents
25 were more involved with their children's lives

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2 than the parents who litigated. And among parents
3 who mediated, children were far more likely to
4 spend time with the nonresidential parent.

5 A few other facts that we found in this
6 research. 28 percent of nonresidential parents
7 who mediated saw their children at least once a
8 week 12 years later, compared to nine percent who
9 litigated.

10 Among the litigation group 36 percent of
11 nonresidential parents had not seen their children
12 the last year, compared with only 16 percent of
13 nonresidential parents who mediated. Mediation
14 clearly increased contact with both parents.

15 Among families who mediated, fully 59 percent
16 of nonresidential parents talked to their children
17 weekly or more often compared to 14 percent of
18 nonresidential parents who litigated. This
19 increased contact didn't seem to cause increased
20 conflict between the parents who mediated. They
21 actually reported less conflict.

22 HON. SONDR A MILLER: Doctor, could you tell
23 us where those statistics come from?

24 DR. WARREN KELLER: This is coming from a
25 longitudinal study by Dr. Robert Emery out of the

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2 University of Virginia, Charlottesville. And if
3 the Commission would like those resources, those
4 references, I can provide it.

5 LAURENCE LOEB: Yes. Yes.

6 DR. WARREN KELLER: In comparison with the
7 families who went to court among families who
8 mediated, the residential parent said that the
9 nonresidential parent discussed problems with them
10 more and participated more in the child's
11 discipline, more in their grooming, religious
12 training, errands, special events, church and
13 school functions, recreational activities,
14 holidays, as well as vacations. Even 12 years
15 later, parents who had mediated had more positive
16 things to say about their expartners than parents
17 who litigated.

18 HON. SONDR A MILLER: Just one minute please.
19 One minute left.

20 DR. WARREN KELLER: Okay. There's a few more
21 pos -- they're all positives. There's no
22 negatives.

23 This Commission has heard previous testimony
24 suggesting that the use of custody evaluations in
25 divorce and child custody litigation is overused

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2 and often does not provide information that's
3 beneficial in resolving custody disputes. While
4 custody evaluations are clearly not therapeutic,
5 they can be done in a therapeutic manner and often
6 within the course of the nonadversarial custody
7 evaluation a custody and access schedule is agreed
8 upon which empowers parents and frees them from
9 the deleterious effects of prolonged litigation.
10 Given the very powerful findings on the positive
11 impact of mediation in resolving child custodial
12 matters I would urge the Commission to consider
13 mandated mediation as an alternative and an
14 adjunct to the current methods of resolving
15 custodial disputes.

16 HON. SONDR A MILLER: Thank you very much.

17 DR. WARREN KELLER: Thank you.

18 HON. SONDR A MILLER: Miss Lisa Bell.

19 LISA BELL: Good morning. I would like to
20 thank you for allowing me to share my views and my
21 ideas as well.

22 My name is Lisa Bell, and I am a domestic
23 violence survivor and have spent almost \$20,000 in
24 lawyer fees.

25 I was married to my ex-husband for ten years.

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2 The abuse started mostly after my son was born.
3 My ex had put me down verbally. As the years went
4 on, it got worse. He would always say I was the
5 one with the problem and I had to fix it. Then
6 the physical and sexual abuse had started. I
7 didn't want people to know, and I would hibernate
8 in my home and not talk to family or friends on
9 the phone. An incident would happen and then it
10 would be okay for awhile. But, as the years
11 passed, it got worse. My self-esteem and
12 confidence were gone. Finally, I called the
13 police one day when my ex at the time attacked me
14 physically and sexually. Our son was with my
15 parents at their home. I didn't want him to
16 witness what was going on. Seven police and a dog
17 surrounded my home and my husband would not let
18 the police in. After awhile the police warned my
19 ex several times before they had to pepper spray
20 him. This was the start of my new life.

21 I had received a three-year protective order
22 and also received a one-year protective order
23 which included my son.

24 For a divorce, you need a lawyer. But,
25 basically, you need to get a pit bull. If you get

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2 an honest, fair lawyer, the truth doesn't work.
3 Lies do. My ex tried to say that a time share my
4 parents owned was his. The judge asked my father
5 to bring in the title. My father had to prove the
6 time share was his own. When we came back to the
7 court the next time my ex didn't ask for the time
8 share. It was clear that he lied, but the judge
9 did not hold him accountable for claiming
10 something that was obviously not his own.

11 My ex and I had owned a home. I asked to
12 have it sold. It was summer and the perfect time
13 to sell it. My ex would not agree. We had to go
14 to court three times. First time the judge -- for
15 the judge to say sell it. The second time for the
16 judge to have my ex sign the papers to sell the
17 house and to have the listing price go down
18 \$10,000 per my husband's request from what the
19 realtor had suggested. The third time for the
20 judge to have me become receiver for my ex because
21 some -- someone put an offer in for the asking
22 price and my husband refused. He said he wanted
23 more money. That was a delay tactic that was
24 brought about by my ex and his attorney. This
25 wasted a lot of time and money. This whole

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2 process lasted from August until May of the
3 following year.

4 In the beginning there was a Law Guardian
5 assigned for my son. The whole time he
6 represented my son he never attempted to meet with
7 my son. However, he did have his office social
8 worker meet with my son on two different
9 occasions. The first time we met at her office.
10 She met with us individually. The second time she
11 came to my home, which I thought was wonderful,
12 because coming to the home is much easier on the
13 child. When the children are in their own
14 surroundings they are more relaxed and willing to
15 talk. My son didn't understand what the purpose
16 of a Law Guardian was. I had to explain that this
17 person was someone for him to see because of the
18 divorce and to make sure his feelings were
19 represented in the court. The Law Guardian should
20 speak to anyone who lives with the child. If the
21 Law -- if the Law Guardian is there for the child,
22 then they should try to learn everything about the
23 child and talk to people living in each house.
24 For example, my son and I live with my parents to
25 provide a safer and more stable environment.

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2 Unfortunately, it's hard for my son to say
3 anything to -- it was hard for my son to say
4 anything to the Law Guardian because he learned
5 from his father that if he says anything to the
6 Law Guardian it gets back to his father, and then
7 my ex gets angry and yells at our son for
8 tattling.

9 At one point in the beginning of the divorce
10 the Law Guardian approached me and made a comment
11 to me about my ex-husband being in a depressed
12 state. When he said this, I was confused, why he
13 would bring the subject to my attention. After
14 all, I was the victim and my husband, my
15 ex-husband, was the abuser. I knew my ex would
16 not care about my state of mind, so why should I
17 be informed about his after all that he had done
18 to me.

19 HON. SONDR A MILLER: I'm just going to ask
20 you, interrupt for a minute. How old was your son
21 during the case?

22 LISA BELL: My son was six when -- when this
23 all had started.

24 HON. SONDR A MILLER: Thank you.

25 LISA BELL: Uh. Okay. My ex-husband's

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2 so-called depression did not stop him from getting
3 married within a few days after the judge had
4 allowed him to get married during all the divorce
5 proceedings.

6 We ended up going to Supreme Family Court for
7 further proceedings and that judge appointed a new
8 Law Guardian because the first Law Guardian could
9 not go to Supreme Court level. As with the first
10 social worker, my son met with this Law Guardian
11 two times as well. Neither time was more than 15
12 minutes. It was suggested by the second Law
13 Guardian that my son be dropped off by me at the
14 end of the driveway where my ex was living.
15 Clearly the Law Guardian did not go to the homes
16 of where this was to be done. His parents' home,
17 where he lived at the time, could fit at least ten
18 cars in length and has an incline of 50 degrees.
19 The other driveway is a long way from the road.
20 This is unacceptable for a person to even suggest
21 without seeing anything. And in the winter months
22 there is always a lot of snow and ice and could be
23 a problem with my son carrying his suitcase, toys,
24 et cetera. Also, if a protective order is or was
25 issued, then the dropoff or pickup should be in a

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2 public, well lighted area.

3 The judge stated that once the protective
4 order was over that I, not my parents, would have
5 to take my son to the specific meeting place. I
6 dread that day I have to do this. You should not
7 force the victim to see the abuser. The abuser
8 should make other arrangements. It's not the
9 victim's fault.

10 After being passed from one judge to another,
11 finally some decisions were being made. Part way
12 through the divorce the judge allowed my ex to
13 remarry, even though we had unfinished issues, for
14 example, visitation, money, furniture, et cetera.
15 In my opinion I saw this as a way for my abuser to
16 still have control over me. He knew he would
17 still have to face -- he knew we would still have
18 to face each other to get other issues resolved.

19 And the longer that took meant that he was still
20 able to be a controlling factor of my life.

21 HON. SONDRRA MILLER: Miss Bell, you have one
22 minute left. One minute.

23 LISA BELL: Okay. But in the meantime he was
24 able to still be a controlling factor in my life.
25 I am still plagued by the abuse that prevented me

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2 from moving on into another phase of my life.

3 For abuse cases the abuser should be
4 penalized by paying both lawyer fees, especially
5 when they keep delaying and appealing and
6 appealing the judge's decision. They should also
7 be expected to pick up and drop off the child or
8 children. As an abused person I have been
9 punished enough. And in my opinion paying for
10 attorney's fees for something my ex caused and
11 also going out of my way to pick up or drop off my
12 son in my case would not be fair to me. These
13 actions, fees, pickup, dropoff can -- can vary
14 from each individual case.

15 Being the victim, I felt I had no rights. It
16 was made to -- I was made to be near him at all
17 the court proceedings and also potentially have to
18 be near him or confront him during pickup and
19 dropoff times. A protective order is great on
20 paper, but doesn't necessarily protect the victim.
21 The courts make you go through too many steps, too
22 many years, almost three years for me, of red tape
23 and emotional stress before the divorce can be
24 finalized and even more time for other decisions.
25 The laws should actually vary depending upon the

1 Matrimonial Commission Hearing
2 reason of the divorce being sought. For example,
3 at most it should be only six months to a year for
4 an abuse case and one and one and a half years for
5 other reasons. Also, you should only be assigned
6 one judge and one Law Guardian during the entire
7 process. This would prevent the attorneys from
8 having to repeat the entire situation again and
9 again. The longer the process -- proceedings
10 take, the more stress that it puts on the parties;
11 and, if there are children involved, more
12 emotional stress is put on them.

13 Solution:

14 There needs to be consistency for children.
15 Visitation schedules should be set in the first
16 month of the divorce proceedings. This would
17 include everything from weekends, holidays,
18 birthdays, summer schedules, and the children know
19 what to expect. This will help to decrease some
20 of the children's anxiety levels.

21 Financial obligations like child support,
22 spousal support, should be resolved within six
23 months of divorce proceedings. And garnishing of
24 wages should be mandatory, not optional.

25 HON. SONDR A MILLER: Thank you very much for

1 Matrimonial Commission Hearing
2 your important comments. I have to cut you short.

3 LISA BELL: Thank you. Thank you for
4 listening to this.

5 HON. SONDRRA MILLER: Yes. Miss Ashcraft.

6 SARA STOUT ASHCRAFT: Thank you for having me
7 here today. I am sure most of you don't know who
8 I am. I'm a partner at Ashcraft, Franklin, Young
9 in Rochester. I'm a matrimonial/family law
10 practitioner. I am right now the Monroe County
11 Bar Association's representative to the New York
12 State Bar Association House of Delegates. I am
13 cochair of the Matrimonial and Family Committee of
14 the Women's Bar Association, State of New York. I
15 am a trustee of the Monroe County Bar Association
16 and a member of the Family Law Section Council
17 there. And as of June 1st of this year I will be
18 President Elect of the Greater Rochester
19 Association for Women Attorneys.

20 What I want to talk about is a very practical
21 thing. People who do know me know I'm a very
22 practical person. I want to talk about automatic
23 temporary restraining orders. They're sometimes
24 called automatic stays in matrimonial actions.

25 What -- what this does is exactly what it

1 Matrimonial Commission Hearing
2 says. It maintains the status quo in divorce
3 proceedings. Uh, these are orders issued by the
4 Court. The Court itself -- there's no motion or
5 Order to Show Cause put in to issue this, and they
6 are issued upon, in the 7th Judicial District upon
7 the filing of a Request for Judicial Intervention.
8 These orders tempor -- they maintain the parties
9 -- restrain the parties from transferring assets
10 pending the Court's decision. With the limited
11 usual course of business exception. They restrain
12 the parties from incurring debt or encumbering
13 property, except with the usual course of business
14 exceptions, which includes, by the way, attorney's
15 fees. Uh, they also protect insurance coverage.
16 They require that the parties maintain whatever
17 they have insurance wise. They restrain the
18 parties from removing the other party or children
19 from health insurance coverage, and they maintain
20 property and other existing insurance policies,
21 that is, insurance policies that have cash value.
22 These orders also help maintain parental contact
23 with the children. They help assist the children
24 in having contact with both parties, and they also
25 keep the children within the Court's jurisdiction.

1 Matrimonial Commission Hearing

2 They also address the residence, and it permits
3 both parties continue using the primary residence
4 unless there be some court order such as an Order
5 of Protection that would --

6 HON. SONDR A MILLER: Is -- is there -- I was
7 just going to ask you, are there exceptions to
8 that stay where there are problems in the
9 household?

10 SARA STOUT ASHCRAFT: Yes.

11 HON. SONDR A MILLER: Domestic violence?

12 SARA STOUT ASHCRAFT: Yes, there are. Or in
13 the unusual case where there might be an exclusive
14 use and occupancy order that comes out.

15 The -- as I say, the exceptions are the usual
16 course of business type of spending to maintain,
17 pay your bills, and so forth, attorney's fees, and
18 prior contradictory orders in regard to the
19 children or the residence. As I said earlier,
20 these orders are issued by the Court sua spontae
21 upon the filing of the Request for Judicial
22 Intervention. Right now, as far as I can
23 determine, these orders are only used in two areas
24 of the state, in the 7th Judicial District, Monroe
25 County, and the contiguous counties in the 7th

1 Matrimonial Commission Hearing
2 Judicial District, and in Erie County. In the
3 package I submitted to the Matrimonial Commission
4 I included the orders that are used in, uh, the
5 7th Judicial District and in Erie County. They
6 are fairly similar. They do cover these items I
7 talked about. I will tell you there is one
8 difference that I believe is an important
9 difference in that the order that's currently used
10 in the 7th Judicial District prohibits the parties
11 from removing the children from the county that
12 the action is pending in. Uh, in the one from
13 Erie County says permanent removal from New York.
14 Uh, because, as we all know, this litigation
15 sometimes continues, probably -- perhaps the
16 permanent removal is better than no removal at
17 all. That means people often couldn't visit
18 relatives or go out of -- out of state to -- to
19 visit a grandparent. And I know that I have
20 talked to several attorneys who said you know it
21 would be better if it said permanent.

22 The advantages of having these automatic
23 temporary restraining orders is that they do not
24 require filing a motion or an Order to Show Cause.
25 This saves time, obviously. You got to get a

1 Matrimonial Commission Hearing
2 motion date, you got to put it in, you got to get
3 the judge to sign an Order to Show Cause. And
4 during that time money could be disappearing.
5 Anybody that's worked in -- with matrimonial cases
6 have been told numerous times my husband or my
7 wife says she's gonna clean out the accounts. If
8 they do clean out the accounts, they're in
9 contempt of court once this order issues. And
10 that's -- I many times have my clients say to me,
11 well, I can't do that or he can't do that because
12 there's an order that says he can't. And it's
13 usually sufficient to remind them that there is an
14 order, and they can't be doing that.

15 It also saves money, because, as we all know,
16 it costs \$45 to file a motion or an Order to Show
17 Cause. It helps maintain the status quo. It
18 protects the parties' important rights in regard
19 to children and property. And, again, it provides
20 -- provides a basis for a contempt proceeding if
21 it's violated. I would urge that this be adopted
22 over the state. I really, after talking with a
23 number of matrimonial attorneys, can think of no
24 real down side to it. We hope everything
25 maintains. Otherwise, we know if things are gone

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2 it's hard to get them back.

3 That's all I have to say. If you have any
4 questions, I'd be very happy to try to answer
5 them.

6 HON. SONDRRA MILLER: Thank you very much.

7 SARA STOUT ASHCRAFT: Thank you.

8 HON. SONDRRA MILLER: We're next going to hear
9 from Mr. Rupert. Mr. McCallam is going to read a
10 statement for him. Thank you. And we will hold
11 questions in this regard 'til after we've
12 completed the morning session.

13 MR. McCALLAM: Thank you for allowing me to
14 read Mr. Rupert's remarks. I'll start with Mr.
15 Rupert. These comments are his based on his
16 second marriage, and he was 52 years of age when
17 he got married.

18 To fully understand my recommendations that I
19 put forth at the end of this statement I need to
20 explain just how I came to the conclusion that the
21 divorce laws must be changed to protect the public
22 from abuse and unscrupulous lawyers and judges
23 that decide cases based upon expedience and
24 justice -- where justice is compromised. Excuse
25 me a minute.

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2 I bear witness today both as a victim of the
3 present system and a proponent for reforms such as
4 no fault. In my case, all three branches of the
5 judicial -- judic -- judiciary heard my case,
6 Monroe County Supreme Court, Fourth Department
7 Appellate court and the New York State Court of
8 Appeals. If I was not innocent of what I was
9 convicted of and stripped of my entire's life
10 work, I would not expose myself to this panel or
11 waste yours or my time.

12 I was involved in a marriage -- thank you.

13 I was involved in a marriage of nine years
14 duration. Both parties had substantial jobs at
15 the time and were able to take care of themselves.
16 My spouse was not employed during our nine-year
17 marriage. There was an antenuptial agreement
18 signed the night before the wedding at an
19 attorney's office that was duly executed to
20 conform to the statute. In the nuptial agreement
21 both parties' prior assets were detailed and
22 included in the agreement.

23 In September of 1991 I was away in Canada for
24 ten days and came -- and came home to find my
25 entire 3,200 square foot home vacant, without one

1 Matrimonial Commission Hearing
2 piece of furniture remaining. Even the light
3 fixtures were removed.

4 Shortly thereafter, I was served with a
5 Verified Complaint which contained vile
6 allegations of all kinds which had no basis in
7 fact. Subsequently, I tried in vain to clear my
8 name, which resulted in my first mistake. This
9 litigation cost me in excess of 1.5 million
10 dollars. The legal fees were in excess of
11 \$400,000, and I ended up in Bankruptcy Court, lost
12 a lifetime of hard work and my retirement. I am
13 now living on Social Security and the income from
14 driving a school bus.

15 I do not come to the legal system as a
16 novice. My business career involved owning Rupert
17 and Lutz Insurance Agency in Rochester, New York.
18 We specialized in providing benefit packages for
19 professional groups such as the Bar Association,
20 dental groups, and other associations. Therefore,
21 I was heavily involved with lawyers and judges all
22 of my business career. In fact, I was a permanent
23 member of the Monroe County Bar Association
24 Insurance Committee.

25 My belief then was that the system was fair

1 Matrimonial Commission Hearing
2 and just and that I would eventually be cleared of
3 all allegations. All my life and my upbringing
4 involved honest dealings and that right eventually
5 will win over wrong. I was incorrect. I no
6 longer have any faith the public can receive
7 justice in divorce courts. Judicial imperialism
8 prevailed with unscrupulous lawyers feeding upon
9 the emotions and the public for their benefits. I
10 also believe that there is a gender bias involved
11 which became a major factor in my case.

12 I was warned by a Supreme Court judge who
13 heard my case prior to their rendering their
14 decisions that I better settle or that they will
15 hurt me. There's nothing more than -- this is
16 nothing more than legalized extortion by the
17 judge. I refer to this type of justice as "bully
18 justice". For it is nothing more than Mafia
19 tactics disguised in judicial robes of justice.

20 Last I knew, we in this country were said to
21 be innocent until proven guilty. This does not
22 apply in the divorce court. These two judges made
23 certain that I was punished to the maximum,
24 without regard to the evidence or credibility.

25 My case was unusual -- unusual in that along

1 Matrimonial Commission Hearing
2 with the antenuptial there were two other
3 unrelated documents. Both of these documents were
4 handwritten, unsigned, and undated. The case law
5 was clear in that my counsel felt that only the
6 antenuptial agreement would survive the appeal
7 process. My case was bifurcated to narrow the
8 focus. These two documents were in no way related
9 to the duly executed antenuptial formal agreement.
10 In fact, in several areas they were at odds with
11 the formal document.

12 Since a trial judge cobbled these two
13 documents to the antenuptial agreement, this
14 decision was appealed to the Appellate Court that
15 confirmed that the cobbled agreement could be
16 enforced.

17 Step two, the economic trial took place, at
18 which time I was found guilty. The award was in
19 excess of \$800,000, excluding interest and legal
20 fees. This led me to the Bankruptcy Court and to
21 my demise. My attorney at the time felt that --
22 that instead of appealing the decision to the
23 Appellate Court to correct the obvious errors,
24 that we should take -- we should take leave to the
25 Court of Appeals. Based upon the issue of law,

1 Matrimonial Commission Hearing
2 the leave was granted. The case was heard and
3 decided on procedural grounds based upon
4 promisorial estoppel. The issue of law was never
5 reached. We then discovered we could not go back
6 to the Appellate Court and correct the errors of
7 the economic trial. This error, as you can
8 imagine, is now the subject of further litigation.
9 I was exposed to the following by the opposing
10 attorney, trial judge, and -- and then my spouse.

11 My spouse, as previously stated, stole
12 \$100,000 worth of contents -- contents from our
13 home. She forged the Department of Motor Vehicle
14 title on my vehicle. She also forged a \$10,350
15 IRS check and stole and charged on my credit card
16 over \$40,000 in one week. Also, we discovered
17 that my domicile had been wiretapped for a period
18 of three years. We discovered this after the
19 first trial had concluded. We -- we petitioned
20 the trial court judge for a new trial based upon
21 this discovery. Our motion to obtain a new trial
22 was denied.

23 The two Supreme Court judges, as previously
24 stated, threatened me with an adverse decision if
25 I did not settle this litigation on their terms.

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2 Because I was innocent, I defied their wishes for
3 settlement, proceeded to trial.

4 The opposing counsel, as previously stated,
5 used the guise of the Verified Complaint to make
6 allegations on my behavior that I believe colored
7 the decision in my case.

8 Furthermore, the opposing counsel used
9 expletives and unacceptable behavior at the trial.
10 I was appalled that the trial judges allowed this
11 behavior in their courts. The opposing counsel
12 had a reputation in Monroe County divorce court
13 for such tactics.

14 HON. SONDRRA MILLER: Just one minute left,
15 Mr. McCallam.

16 MR. McCALLAM: Well, uh, in that case I guess
17 I should go right to the recommendations.

18 Number one, I believe that the awarding of
19 nine percent interest on marital litigation cases
20 must be changed. I was informed prior to the
21 second trial by the trial judge that he was going
22 to award interest at nine percent if this case
23 could not be settled. At this point it became
24 clear to me that the trial judge in his decision
25 was going to punitively punish me for the lengthy

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2 litigation. This, regardless of who was
3 responsible for the lengthy delay.

4 Two, the parties' assets prior to marriage
5 should not be reachable for distribution at any
6 time. These represent -- this -- these represent
7 the parties' prior life and should not be made
8 available for distribution, such as assets
9 occurred -- uh, uh, assets accrued during the
10 marriage.

11 My entire 35 years of records and 1040 tax
12 returns were stolen from my home. They were
13 requested to be returned time and time again.
14 Affidavits were given that the opposing party did
15 not have them. There was no way to reconstruct my
16 prior assets base -- base without this -- without
17 access to my files. During the stage two of the
18 trial some of these records appeared. Objections
19 were made to exclude these stolen records, but the
20 trial judge allowed these records and documents to
21 be put into evidence, which proved critical in my
22 trial. I was made to attempt to -- I was made to
23 attempt to prove my innocence without -- without
24 having access to these records and documents
25 during the discovery period of this litigation.

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2 Thank you for taking the time to listen.

3 HON. SONDR A MILLER: Thank you very much.

4 Miss Linda Chodos.

5 LINDA CHODOS: Good morning. Several months
6 ago I accompanied my elderly aunt to the Emergency
7 Room of a local hospital. She was placed on the
8 traditional gurney bed with only a thin curtain
9 between her and the person a few gurneys -- or the
10 next gurney away. That person turned out to be a
11 17-year old high school student who was brought to
12 the hospital after overdosing on some strong
13 medications. I didn't mean to eavesdrop on his
14 life, but there was only a thin piece of cloth
15 between us, and I became an unwitting witness to
16 his life.

17 I'm sharing this information with you today
18 because it drove home to me once again how
19 destructive and self-defeating our adversarial
20 legal system can be to the innocent and helpless
21 bystanders in our lives, our children. We need to
22 ask ourselves this question. What, as members of
23 the bench and Bar, can we do to prevent the
24 children of divorce from becoming the unintended
25 victims of collateral damage?

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2 I heard the doctor interviewing the boy in
3 the next bed. He asked, "Did you do this to
4 yourself?" The boy said, "Yes." The doctor
5 asked, "Have you done that to yourself before?"
6 The boy answered again, "Yes." The doctor asked,
7 "Why?" The boy said, "So I will know I'm alive."

8 They went on to talk about the overdose. The
9 boy denied wanting to die. The doctor remained
10 matter of fact and nonjudgmental throughout, and
11 the boy opened up his heart. He told the doctor
12 he could not talk with his parents because of the
13 anger between them. They were divorced and rarely
14 spoke to each other. They clearly did not speak
15 with the boy. They were stuck in their own
16 matrimonial muck. It was a sad story, but, as you
17 know, not a rare one. That boy may not be able to
18 tell his story, but I can. And I am telling his
19 story to you today in the hope that it will
20 somehow impact the future practice of matrimonial
21 law.

22 I'm an attorney with a practice in
23 collaborative law and mediation. About half of my
24 practice is in that. And I also serve as
25 Co-chairperson of the Erie County Bar

1 Matrimonial Commission Hearing
2 Association's Alternative Dispute Resolution
3 Committee. With the assistance of our very
4 dedicated committee members I'm a very strong
5 advocate for the establishment of substantive ADR
6 programs within the court system.

7 No doubt, this body has heard much about the
8 benefits of mediation and collaboration, as it's
9 gathered testimony from lawyers, social workers
10 and end users of services around the state. The
11 body of outcome based research comparing cases
12 that were mediated as against those that were
13 litigated, as Dr. Keller told you earlier, is
14 still sparse. However, those studies have been --
15 that have been published consistently demonstrate
16 that when the alternative process of mediation is
17 used, settlement rates are increased, joint or
18 shared parenting arrangements are the norm,
19 expenses to the parties and to the judicial system
20 are lessened and compliance with settlements is
21 higher. These results are not surprising.

22 What may be surprising, however, are results
23 that show that mediated divorce agreements do not
24 necessarily result in payments of higher rates of
25 child support, nor do they result in the primary

1 Matrimonial Commission Hearing
2 parent receiving a greater share in the equitable
3 distribution of marital property, nor, contrary to
4 the thinking of some critics of mediated
5 agreements, do these settlements disenfranchise
6 the lower wage-earning spouse.

7 What then is the advantage to the parties of
8 mediated or collaboratively reached settlements?
9 The answer lies in the data regarding compliance
10 and self-reported satisfaction. Satisfaction
11 levels are significantly higher for parties that
12 make their own settlement decisions. Higher
13 satisfaction levels lead parties to remain
14 committed to an agreement they themselves are
15 responsible for making. Data suggests that
16 parties who directly participate in the settlement
17 process are more likely to go beyond their
18 original financial commitments by willingly and
19 voluntarily assuming responsibility for additional
20 nonessential child-related expenses, including a
21 greater willingness to finance, at least in part,
22 the children's college education.

23 The common element in the reporting of higher
24 levels of satisfaction with the process seems
25 inextricably related to the experience of being

1 Matrimonial Commission Hearing
2 heard or having been listened to. Ironically,
3 nothing in the black letter law can provide this
4 experience to parties in conflict, yet it's
5 critical that parties feel they have been heard
6 and understood in order to instill the belief that
7 justice has been well served.

8 The traditional understanding of the justice
9 system as a place where truth wins out in the
10 crucible of adversarial interrogation entirely
11 ignores the concept of parties' satisfaction. A
12 contest structured as win-lose can, at best, only
13 succeed 50 percent of the time. These are poor
14 odds, when for the best interest of the children
15 the parties need to preserve a satisfactory
16 relationship in the future. It is time for us to
17 reevaluate the processes by which we can foster a
18 sense of justice in the public. It's time for us
19 to be more creative and expansive. It's time for
20 us to encourage the judicial system to provide
21 incentives to the parties to take control of their
22 own lives.

23 It's hoped that this Commission has been
24 convinced by the testimony before it that creative
25 alternatives such as mediation and collaborative

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2 law should be encouraged by the courts, by the
3 Bar, and by the State Legislature.

4 In Buffalo we have a small practice group of
5 trained collaborative lawyers. There are eight
6 attorneys in our group, seven of whom have had
7 mediation training, and at least five of whom have
8 a regular mediation practice. Recently we were
9 heartened after we presented a program introducing
10 collaborative law to the Matrimonial and Family
11 Law Committees of the Bar, when approximately 30
12 to 35 attorneys indicated they would be willing to
13 make a commitment to attend a collaborative law
14 training program and possibly to join our practice
15 group. The matrimonial bar in Buffalo has, until
16 now, not shown very great enthusiasm for either
17 mediation or collaborative law, because Buffalo is
18 a tradition-bound community that changes only
19 slowly.

20 As one of the few practitioners in our area
21 who's been able to work as a collaborative lawyer,
22 I wish to share a little of my personal experience
23 in this practice with the Commission.

24 I find collaborative law the most rewarding
25 part of my practice for the following reasons:

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2 Collaborative practice enables me to combine the
3 skills I apply in mediation, that is,
4 communication techniques, to target the parties'
5 underlying needs and interest, with the unique
6 perspective I have as a matrimonial lawyer to
7 counsel, advise and problem solve with my client.
8 It also permits me the unique opportunity to work
9 closely and towards the same end as the other
10 attorney in the case.

11 This model allows me to fulfill my role as
12 the parties' attorney in the true sense of
13 "counselor at law". As a collaborative lawyer I'm
14 truly an advocate for the best interest of my
15 client. This involves focusing my client and
16 myself on the reality that for my client to
17 achieve the best possible outcome he or she must
18 keep in mind what's best for the whole. It is, in
19 effect, a systems approach, wherein the system is
20 the nuclear extended family, or, in the case where
21 the parties have no children, the system may be
22 the relationship itself, which has been allowed to
23 come to a constructive end with appropriate
24 closure.

25 It is never best for family with children --

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2 families with children to have parents that hold
3 deep animosity toward each other, one they carry
4 far into the future. It's never best for young
5 children to live with the constant tension and
6 fear of showing preference for one parent over the
7 other, to be forced to second-guess the impact of
8 their acts of affection towards one parent on the
9 other parent. It is never best for grown children
10 to feel compelled to plan their own family events
11 so as to keep the parents apart or otherwise
12 pacified. Unfortunately, these kinds of dilemmas
13 are commonplace fallout for the children of
14 divorced parents.

15 It's always best for children to observe
16 their parents acting with respect toward each
17 other. It is always best for children to feel
18 free to express their affection for one parent in
19 front of the other parent. And it is always best
20 for the children to be children and the parents to
21 be the parents and caretakers and to keep the
22 roles clear and unambiguous.

23 HON. SONDR A MILLER: Miss Chodos, one minute
24 please.

25 LINDA CHODOS: These goals are rarely

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2 achieved following a traditional contested divorce
3 without a lot of time having passed and behavior
4 modification having been accomplished. In
5 contrast, parties to mediation and collaborative
6 law most often complete the process having learned
7 new and more effective communication skills, and,
8 more importantly, they can walk away with a
9 feeling of self respect and independence because
10 they've been able to work their way through
11 adversity while maintaining an attitude of mutual
12 respect towards the other party.

13 Not all matrimonial cases are appropriate for
14 the alternative processes of mediation and
15 collaborative law. For those cases that cannot
16 use these models the matrimonial attorneys can
17 still be encouraged to shift their perspective.
18 They can learn not to give into a client's need
19 for revenge and instead provide a cool head for
20 the client, to assist them in developing realistic
21 expectations, to appeal to the client's higher
22 sense of justice, and to work towards empowering
23 the client toward positive personal growth.

24 In closing, I ask this Commission to support
25 the more humane method of achieving matrimonial

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2 equity in divorce matters and for the sake of us
3 all, to discourage the adversarial climate that
4 leaves our children isolated and crying out for
5 help while lying on a cold gurney in the Emergency
6 Room. I thank you for your time.

7 HON. SONDR A MILLER: Thank you very much.

8 Mr. Antinore.

9 MARK ANTINORE: I would like to thank the
10 Commission for taking the time to address such
11 important issues to our families. I appreciate
12 the opportunity to express my thoughts and
13 opinions. It is my hope that I can contribute to
14 changes in matrimonial litigation.

15 I've come here today to share my story and
16 hopefully shed some light on the challenges and
17 frustrations facing fathers in New York State.
18 There is a significant imbalance in the way in
19 which fathers are being treated within our courts.
20 It is time for a change.

21 In years past it was common and widely
22 accepted for fathers to be disassociated from the
23 daily rituals of child rearing. We were not
24 involved in the nurturing or the psychological
25 development of our children. Most -- mostly we

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2 were wage earners and disciplinarians. I would
3 submit to you that this is not the case today. In
4 our modern world fathers are increasingly involved
5 in guiding their children towards adulthood. It
6 is crucial that our legal system encourage and
7 support this ever increasing role taken on by
8 fathers. I don't think that most would argue that
9 our society has developed a confusing double
10 standard. In one respect we are expected to be
11 equal partners in raising our children, yet, when
12 facing the judge, we become second class citizens.
13 This is clearly unfair and unacceptable.

14 In many custody cases mothers are
15 automatically looked upon as the default parent.
16 This must change. Fathers need the help of
17 lawmakers and judges to gain equal footing in the
18 court system. It is wrong to assume that a
19 mother's automatically the best choice simply
20 because she gave birth to the child. My point is
21 not to diminish the significance of the miracle of
22 birth. My point is to emphasize that the father
23 is as important in the grand scheme of things.
24 Each parent is equally important to the
25 development of the child. Our legal practices

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2 must reflect this equality.

3 I know that my story is not unique. I am
4 amongst thousands of people who have been affected
5 by divorce. However, mine is a voice that must be
6 heard. Hopefully by sharing my story the future
7 will be brighter for my children and others in
8 matters of divorce.

9 I was served with divorce papers in the
10 spring of 2002. It was the beginning of a three
11 year tailspin. Within a few weeks of the papers
12 being served I was placed under a court-directed
13 Order of Protection that my wife was awarded in
14 Family Court. I went two weeks without any
15 contact with my children. They were only six and
16 four years old at the time. Until then I had
17 never been away from my children for more than a
18 workday. I was devastated, to say the least.
19 When I was finally granted visitation with my
20 sons, my oldest boy asked me where I had been. As
21 one might imagine, this broke my heart. The
22 Family Court issue of the Order of Protection was
23 moved to the divorce action in the Supreme Court.
24 At the first matrimonial screening part a Law
25 Guardian was appointed and negotiations began.

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2 Both my former wife and I met with the Law
3 Guardian separately and then individually each of
4 us with the children. I brought forth substantial
5 evidence to support my position. I offered names
6 of people who could validate my claims. The Law
7 Guardian interviewed no one, no teachers, daycare
8 professionals, or other family members. At the
9 last matrimonial screening part he stated that it
10 would be in the best interest of the children to
11 be placed in the care of their mother. I was
12 astonished, to say the least. In my heart I knew
13 this was fundamentally wrong and I could not in
14 good conscious walk away being comfortable with
15 this opinion. I could not agree to the
16 arrangement that I was being offered. My children
17 are the greatest joy in my life, and I wanted to
18 have as much time with them as possible. The
19 standard one evening a week and every other
20 weekend for parenting time were not acceptable. I
21 was not willing to be a part-time Dad. Despite
22 insurmountable odds, I decided to place my fate in
23 the hands of a Supreme Court Justice. I believed
24 that if my story was heard I could maintain my
25 status as a parent. From the first day to today

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2 all I ever wanted was equality. I recognize the
3 importance of both parents. It is sad that our
4 courts and judges don't understand this is a
5 fundamental right of a parent. I lost custody of
6 my children and that is sad and unfortunate. I am
7 a good father. My children deserve more.

8 The matrimonial screening part is an area
9 where changes need to be made. Much of the
10 negotiations go on without either party present.
11 How can this be productive? Even though the
12 parties communicate with counsel, no one
13 understands the intricacies of our lives as well
14 as we do. Instead of being part of the process,
15 both litigants sit haplessly waiting in the halls
16 of the courthouse. It leaves you feeling
17 inadequate and insignificant. With the exception
18 of the most difficult cases, the litigants should
19 play an active role in the matrimonial screening.

20 An area of concern in custody cases is the
21 appointment of Law Guardians. Although I
22 sincerely recognize the importance of an advocate
23 for the welfare of the children, I do not
24 necessarily agree that a Law Guardian is the best
25 choice for this task. A judge relies heavily on

1 Matrimonial Commission Hearing
2 the opinion of the Law Guardian in determining
3 custody issues. This is a huge responsibility for
4 one person to shoulder. I realize that in order
5 to be a Law Guardian one must attain specialized
6 certifications. This is not enough. I believe
7 their training is inadequate. According to the
8 Law Guardian Program Administrative Handbook, 2004
9 Winter Revision, produced by the Fourth Appellate
10 Division, a Law Guardian is only required to
11 attend one continuing legal education program
12 sponsored by the Law Guardian program biannually
13 in order to remain certified as a Law Guardian.

14 I don't feel a Law Guardian is equipped to
15 render an opinion in matters of child welfare
16 solely on their training as a lawyer. Without the
17 proper training in psychology I believe the Law
18 Guardian is at a distinct disadvantage. From the
19 research I have done I do not see where Law
20 Guardians are specifically trained to have
21 specialized skills in respect to interviewing
22 children. Children pose different needs when
23 being interviewed. Law Guardians' training should
24 reflect this.

25 An argument could be made that this training

1 Matrimonial Commission Hearing
2 is unnecessary, due to the fact that professionals
3 in the field of psychology are accessible to the
4 Court. This argument would hold water if the
5 psychological evaluator was given the same status
6 as the Law Guardian, but we all know this is not
7 true. The bottom line is that if the Law Guardian
8 says the children belong with one parent over the
9 other, despite the recommendations of the
10 court-appointed custodial evaluator, the judge is
11 going to lean towards the opinion of the Law
12 Guardian. It should also be mandatory that the
13 Law Guardian interview persons close to the family
14 that is involved with the custody dispute. Except
15 for the most extreme cases I don't believe an
16 accurate picture is painted by simply interviewing
17 parents and the children. This is especially true
18 in the case of younger children.

19 It is my belief that I was punished and made
20 an example of simply because I chose to take my
21 case to trial. I believe then, as I do now, that
22 I had no choice but to seek the help of the
23 courts. I was made out to be the uncooperative
24 and uncompromising person in this case. Even
25 after the court-appointed evaluator -- custodial

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2 evaluator stated in his report to the Court that I
3 was an above average father and that I was more
4 capable of being an excellent role model for my
5 children. A person should not be punished simply
6 because they exercise their right to seek a trial.

7 Sadly, the ones who suffer the most from this
8 are the children. They are the innocent victims
9 in all the fury of separation. One must remember
10 that the children are neutral parties in such
11 unfortunate circumstances. They love both parents
12 equally. It is easy to lose sight of the fact
13 that even though Mom and Dad may not be able to
14 get along anymore it does not diminish the fact
15 that the children want and, more importantly, need
16 to have a meaningful and consistent relationship
17 with both parents. Too often the visitation
18 awarded a father is inadequate and, quite frankly,
19 insulting. It inhibits the fostering of a quality
20 relationship between fathers and their children.
21 Incidentally, I would like to ask the panel -- ask
22 that the panel do whatever they can to encourage
23 the abolishment of the term visitation. To be
24 honest with all of you, this label disgusts me. I
25 am not a visitor, I am a parent. I contributed in

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2 bringing two astonishing children to life. I have
3 been there for them since they drew their first
4 breath. If they bleed, I bleed. If they hurt, I
5 hurt. I believe I am more than just a visitor.

6 Our society chastises men who walk out on
7 their families, and I believe that that is
8 justifiable. However, I can relate to the man who
9 simply disappears. The process of becoming
10 divorced is so debilitating and emotionally
11 draining it is no wonder people just give up. I
12 thought you might like to know that yesterday I
13 had a conversation with a coworker who was also
14 divorced. I shared with him what I am doing here
15 today. He said to me, "Why waste your time?
16 Nobody cares about us. Just as long as you keep
17 on paying, they'll leave you alone." Well, I am
18 still here because I believe change is possible.
19 I have to believe that more can be done to give
20 both parents equal time with their children. I am
21 encouraged that this panel is taking the time to
22 consider changes. Hopefully things will improve.

23 HON. SONDR A MILLER: Thank you very much.

24 MARK ANTINORE: Thank you.

25 HON. SONDR A MILLER: Mr. Edward Orlando.

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2 EDWARD ORLANDO: Good morning. My name is

3 Edward Orlando. I'm the Director of the Juvenile

4 Rights Division -- the Juvenile Justice Division,

5 I'm sorry, of the Legal Aid Society in Rochester,

6 New York. Uh, that is my job title. What I do

7 every day is practice in Family Court in Monroe

8 County, serving as a Law Guardian to children in

9 juvenile delinquency, PINS and custody matters.

10 Uh, I'm also a member of the Advisory Committee of

11 the Fourth Department Appellate Division's Law

12 Guardian program.

13 The Legal Aid Society in Rochester, unlike

14 most Legal Aid Societies, does not have a criminal

15 defense component to it. It solely handles civil

16 matters with low -- having to do with low and, uh,

17 lower middle class income people.

18 The civil division has, as part of its

19 components, a domestic violence program, a

20 domestic relations program, and a limited means

21 program. Every day, in every capacity, that

22 division deals with matrimonial law. My Juvenile

23 Justice Division contracts with the Office of

24 Court Administration to supply Law Guardian

25 services.

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2 There are a number of issues I just want to
3 address today, having reviewed what this
4 Committee's heard on its web site. Uh, one thing
5 I need that we -- I believe that we need to
6 recognize is that if we are going to make divorce,
7 separation, and child custody a legal issue, which
8 we have, we've decided that our courts are gonna
9 do this, we must also address access to justice
10 for people who don't have the means to hire
11 attorneys. Quite frankly, we've made a decision
12 in this society, the law -- that legal
13 representation will be a commodity. It's going to
14 be a commodity that people can afford will get and
15 they'll buy, and people who cannot afford will go
16 without.

17 Last year the civil division of the Legal Aid
18 Society in Rochester handled approximately 180
19 divorces, I'm told. I also know, from talking to
20 our intake workers, that we turned away at least
21 that many. Those people we couldn't help. It's
22 not that we couldn't help them because
23 economically they didn't -- they weren't eligible
24 for our services. We couldn't help them because
25 services such as ours, services for civil legal

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2 services are small, they're underfunded, and,
3 frankly, understaffed.

4 Our funding in our civil division comes
5 through a patchwork of funders: The United Way,
6 IOLA grants, some governmental grants. These
7 monies are not reliable. In any given year, in
8 any other year they change. They fluctuate.
9 There's more, there's less.

10 We've tried to meet some of the needs by
11 utilizing a limited means panel -- I'm sorry,
12 limited means program. In that program an
13 attorney will handle a divorce for a person, I
14 think the eligibility standards are 300 percent of
15 the federal poverty guidelines; and, if chosen,
16 the attorney will handle that on a sliding scale
17 fee. Quite frankly, at the front end there's too
18 much of a demand for that attorney to be handling
19 as many cases as come through our door. So some
20 are just -- have to be culled out. They're culled
21 out because of, uh, could be very complicated
22 issues that can't be addressed. They're culled
23 out because there's, frankly, just no time to have
24 a better case load.

25 At the back end, you know all the good faith

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2 of the world of -- of a party who is lower middle
3 class income -- well, let me put it to you this
4 way. Lower middle class incomes are very
5 volatile. A party can come in with all the good
6 faith in the world that they're gonna pay their
7 fees, but the cost of housing goes up, and the
8 cost of food goes up, the cost of transportation
9 goes up, and eventually, as the litigation goes
10 on, those fees, more than likely, will not be
11 collected. Limited means programs don't really
12 meet this either. I think this Commission needs
13 to turn its attention to access of justice, if in
14 fact, it feels that reforms to the matrimonial
15 law, the -- an encompassing matrimonial law will
16 in somehow come in fruition.

17 I want to suggest also that you look, at uh,
18 no fault grounds for parties who might be able to
19 stipulate to that. I know no fault is
20 controversial. Certainly the no fault law that
21 would allow a batterer to walk or to -- allow a
22 domestic violence victim to walk out on a batterer
23 is also the same no fault law that's going to
24 allow somebody to walk out on a spouse because
25 there's a trophy spouse across the street.

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2 However, if parties are agreeable, without
3 the use of the required Separation Agreement, I
4 think -- and -- and it's my understanding that the
5 people who are part of the civil division believe
6 that this state ought to offer those types of no
7 grounds divorces. They feel they're less
8 complicated and will create more expeditious.

9 I want to suggest to you an experiment that
10 we've had in Monroe County in Family Court. And I
11 want to suggest to you that that could be a
12 blueprint for Supreme Court also. Cases in Family
13 Court are driven by time lines. Some of them are
14 statutorily required. Others are just given
15 statutory preference like child protective
16 proceedings. Therefore, custody matters fall by
17 the wayside. They're the last class of cases a
18 judge needs to look at. What we did to address
19 that issue in Family Court in Monroe County was
20 create dedicated parts that were presided over by
21 referees to deal with questions of custody. The
22 questions of custody are highly volatile. They're
23 the questions that drag in children. They're the
24 issues that probably make people more fearful in a
25 divorce action than anything else.

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2 These questions, this issue of custody needs
3 to be divorced from the other gamesmanship that
4 goes on in divorce actions. The negotiation over
5 money, over pensions, over maintenance. Frankly,
6 in Family Court we don't have any of this
7 gamesmanship. I'm not naive enough to think that
8 people don't go out in the hallway and talk about
9 it. But, quite frankly, when the rubber meets the
10 road and they're in the custody part the only
11 issue to be dealt with is the best interests of
12 the child, without anything else, uh, impinging on
13 that. I would suggest to you that dedicated
14 custody parts in Supreme Court would go a long
15 ways to reducing the trauma of the parties and
16 their children in making determinations about
17 that.

18 In the Fourth Department -- and, frankly, I'm
19 not sure if this is the practice in other
20 departments -- there's two delivery systems for
21 Law Guardian representation. One is the panel,
22 which exists in every department; and one is a
23 contract that the Office of Court Administration
24 has with the Legal Aid Society.

25 On the Supreme Court side, when a Supreme

1 Matrimonial Commission Hearing
2 Court Judge is required to -- or feels necessary
3 to appoint a Law Guardian in a case, the Appellate
4 Division has directed them to appoint a Law
5 Guardian from the panel. At the very least that
6 -- that overcomes an initial threshold issue
7 regarding certification, their eligibility, and
8 their training. Most people seem to me to have a
9 misunderstanding of what a Law Guardian does and
10 how a Law Guardian does it. The standard in the
11 Fourth Department is pretty well laid out, and I
12 just quote it to you. When the child is capable
13 of a knowing, voluntary and considered judgment,
14 the Law Guardian in a custody case should be
15 directed by the wishes of the child, even if the
16 Law Guardian feels that what the child wants is
17 not in the best interests. The Law Guardian's
18 advocacy should be directed toward achieving the
19 goals the child has identified. This is much the
20 standard throughout the state. The other three
21 departments follow this also. However, only when
22 a Law Guardian is convinced that following the
23 child's wishes is likely to result in a risk of
24 harm would the Law Guardian be justified in taking
25 a position that would reduce the risk of harm,

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2 even though that position is contrary to the
3 child's wishes. You can see by that standard that
4 there's a presumption, and that presumption is
5 that a Law Guardian -- that, frankly, I'm going to
6 represent what my client wants me to represent.
7 I'm gonna take my marching orders from my client.
8 That what I say in court and what I'm going to try
9 to achieve in court is going to be directed by
10 what my client wants. But it is naive to think
11 that I would walk into an interview with a client
12 and say what do you want, and -- and the client
13 tells me X and I'm going to walk out and go
14 advocate that in court. And I think what people
15 forget is there's a second part to a Law
16 Guardian's responsibility to their client, much
17 the same as there is a second part to any
18 attorney's representation of the client, which is
19 the counseling portion of that.

20 My clients, more often than not, are anxious
21 to talk to me. Not to tell me what they want.
22 They're anxious to talk to me to ask me what's
23 happening? What's going on? What is this
24 process? What happens in a court? Who's the
25 judge? Who's gonna make the decision? How is he

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2 going to make the decision -- he or she going to
3 make the decision? They're -- they are full of
4 questions, much more so than before I even get to
5 what my agenda may be. I think you cannot look at
6 a Law Guardian's representation in a vacuum. That
7 it's not something that we merely -- that we bring
8 merely our client's -- our client's desires to the
9 court.
10 HON. SONDR A MILLER: Mr. Orlando --
11 EDWARD ORLANDO: Yeah.
12 HON. SONDR A MILLER: -- if you are assigned
13 to represent an infant --
14 EDWARD ORLANDO: Mm-hmm.
15 HON. SONDR A MILLER: -- a small child --
16 EDWARD ORLANDO: Yes.
17 HON. SONDR A MILLER: -- a child under three
18 years old --
19 EDWARD ORLANDO: Yes.
20 HON. SONDR A MILLER: -- four years old --
21 EDWARD ORLANDO: Yes.
22 HON. SONDR A MILLER: -- what do you do?
23 EDWARD ORLANDO: What do you do? You have to
24 substitute judgment in that type of situation.
25 Uh, I'm not really of the belief that if a child

1 Matrimonial Commission Hearing
2 is under the age of three years old they
3 necessarily need a Law Guardian in a litigation.
4 Uh, I believe they clearly do if there's a special
5 need, some psycho pathology identified in the
6 case, perhaps some deviant behavior or behavioral
7 disorder. But assuming that the representation is
8 made to me, uh, or, I'm sorry, that I am assigned
9 to an infant, even that being taken aside, uh,
10 what I need to do is, with the agreement of the
11 attorneys, interview the individual parents
12 themselves. Plus, I'm going to do a lot deeper
13 investigation. Frankly, at three years old there
14 aren't a lot of places to go for a child. There
15 may be a pre care -- there may be a daycare
16 center, pediatrics, maybe friends or babysitters,
17 but that's what I would do is pursue those lines.

18 HON. SONDR A MILLER: Thank you. I believe
19 you're really almost through with your time.

20 Would you wind up please.

21 EDWARD ORLANDO: Sure. I just -- I will just
22 address one other issue. I noted from your
23 website there seems to have been some complaint
24 about, uh, an overuse of forensics in custody
25 actions. I can tell you that's, frankly, not the

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2 experience that I've had in Family Court up in
3 Rochester, and I believe that that's for the
4 following reason: That the justified forensics
5 uh, the referees who reside over the court really
6 put the parties to task to justify why forensics
7 are going to be done. They must be able to
8 identify some issue that the forensics will
9 address. Attorneys, I think -- well, I think the
10 referees are really suspicious that forensics are
11 often used as fishing expeditions, and, frankly,
12 won't let that be done.

13 HON. SONDR A MILLER: Have you submitted a
14 written statement, Mr. Orlando?

15 EDWARD ORLANDO: No, I have not, but I'll put
16 one together and be happy to submit it.

17 HON. SONDR A MILLER: We'd like that.

18 EDWARD ORLANDO: Yes.

19 HON. SONDR A MILLER: Thank you very much.

20 EDWARD ORLANDO: Thank you.

21 HON. SONDR A MILLER: Thank you. Our next and
22 last speaker before a short recess is Laura Grube.

23 LAURA GRUBE: Good morning. Uh, my name is
24 Laura Grube, and I am a licensed clinical social
25 worker, and for the last eight years I've been the

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2 coordinator of the counseling and advocacy program
3 at Child and Family Services Haven House here in
4 Buffalo, which is a shelter and program for
5 battered women and children.

6 Our shelter serves over 300 battered women
7 and children every year. The outreach component
8 works with about 1800 battered women through
9 individual counseling, support groups and advocacy
10 with police and courts. 4,000 calls are taken
11 through the Haven House hotline every year.

12 We asked our clients about their experiences
13 with divorce, and this is what they told us.

14 When a victim begins the process of
15 separation from her abuser, the danger to her
16 increases. We spent a lot of time with our
17 clients developing safety plans at this time.
18 However, we also find that sometimes half of our
19 counseling session is focused on our client's
20 fears and negative experiences with the court
21 system. When people ask why does she stay in an
22 abusive relationship, one of the main reasons is
23 the ponderous, expensive, difficult process of
24 obtaining a divorce in New York. Our victims say
25 that their experiences are discounted. We know

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2 that most domestic violence never gets reported to
3 the police. Many of our clients feel that the
4 abuse that they experience at the hands of their
5 husband is largely invisible in Supreme Court,
6 with the exception of our integrated domestic
7 violence court, I must say. And that the fact of
8 domestic violence has virtually no influence on
9 the process or outcomes. In fact, being a victim
10 of domestic violence makes it harder to get a
11 divorce, rather than easier. Victims often tell
12 us that no one seems to care about the terror and
13 chaos that has been generated in a home by the
14 abuser. It's felt to be irrelevant to the divorce
15 process. When, for the victim, it's at the center
16 of every decision that she makes.

17 Divorce can be a very disempowering process.
18 Victims generally feel disempowered and silenced
19 by the legal system. They generally only get to
20 speak with their attorney, who then goes behind
21 closed doors to speak with her husband's attorney
22 and a referee. She doesn't know how her life is
23 being shaped because she's not present. She
24 rarely gets to speak directly with the judge, the
25 person who is perceived to be dispensing justice.

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2 Often, there is never any formal acknowledgment of
3 the domestic violence. She feels that she has no
4 voice, replicating the powerlessness that she felt
5 living with the abuser.

6 Divorce can be a dangerous process. Many
7 times victims initiate divorce when the abuse
8 starts to directly threaten the children. So even
9 though there may be safety issues, often both
10 parties are advised by their attorneys not to
11 leave the marital residence. This forces a victim
12 to stay. She won't leave her children behind with
13 somebody who is violent. And if she leaves with
14 the children, it is seen as actively interfering
15 with the children's relationship with the father.
16 If she does leave for safety reasons, but does not
17 take her children, she is seen as abandoning the
18 family and runs the risk of losing custody
19 completely. It's a no win situation for the
20 victim. Additionally, many court buildings are
21 not set up to provide safe waiting areas for
22 victims when they must be present for hearings, or
23 to assist with safe exiting from the buildings.

24 So we see that the legal system can become
25 another tactic of abuse. We hear time and again

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2 that once a divorce has been initiated a victim's
3 abuser discovers new ways to harass her through
4 the legal system and prevent her from getting
5 free.

6 The fact that he may be the one working at
7 the better paying job and can pay a lawyer means
8 that he can fight her on grounds for divorce, he
9 can change his mind repeatedly about custody and
10 visitation issues, he can generate more
11 court-ordered evaluations. He can refuse to
12 disclose financial information. He can feign
13 illness and get adjournments. He can proceed pro
14 se, then decide he wants an attorney. He can
15 change attorneys, file motions, and so on. And in
16 the protection of due process years, and years,
17 and years literally go by, which leads to
18 financial ruin. Many women can't afford an
19 attorney and are denied full access to the legal
20 system because of this. Or, they may pay an
21 attorney and become bankrupt through that process.
22 Or they may agree to a less than fair settlement
23 because they can't afford to keep paying an
24 attorney. Or the abuser uses this opportunity to
25 run up their debt and keep her financially

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2 crippled. Or the abuser just doesn't pay child
3 support. There did not appear to be significant
4 or timely consequences in Supreme Court for this
5 abuse of the system. Some women have a hard time
6 holding down a job due to these multiple court
7 dates, and this is yet another way in which the
8 abuser wears her down financially and
9 psychologically and the Court becomes an unwitting
10 ally in domestic abuse.

11 Safety and protective orders are different --
12 are difficult to acquire in Supreme Court. Access
13 is very difficult, unlike Family Court and our
14 criminal courts. Judges do not seem inclined to
15 issue orders of protection, especially ex-parte.
16 Lawyers often discourage their own clients for
17 asking from Orders of Protection, calling the
18 police, or filing violations of the protection
19 orders because this may prolong and complicate the
20 negotiations.

21 Also, because Orders of Protection from
22 Supreme Court are not formatted in the same manner
23 as the orders from other courts, they can be at
24 times difficult for some police to interpret,
25 making them harder to enforce.

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2 This all occurs during a period of time in
3 which a victim is at high risk for violent
4 assault.

5 Regarding custody and visitation, most of our
6 clients cannot understand how a husband can be
7 considered a fit parent when he assaulted her and
8 debased her in front of their children. These
9 forms of abuse do not appear to be taken into
10 serious consideration during custody decisions.
11 Joint custody, which is encouraged in all but the
12 most extreme circumstances, require that she work
13 with her ex-husband on key issues regarding the
14 children. However, one of the hallmarks of
15 domestic violence is that the abuser disregards
16 his victim's wishes and enforces his will.

17 This dynamic continues and can even escalate
18 after the divorce, with her continuing to
19 relinquish her wishes in attempts to diminish the
20 conflict. So often victims feel that their
21 partner's primary interest in seeing the children
22 is so that he can have access to her during
23 visitation exchanges and through the children.
24 The abusers are often unreliable, uncooperative
25 and use the children to continue to hurt their

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2 mother. Many incidents occur during visitation
3 exchanges, but they are often ignored.

4 So despite legislation that requires Supreme
5 and Family Court to consider the effects of
6 domestic violence and a child's best interest,
7 it's often not clear how the domestic violence has
8 figured into the custody determination. Sometimes
9 it's not even mentioned in the final decree.
10 Again, the violence is hidden.

11 A lack of knowledge about the dynamics of
12 domestic violence. Some Law Guardians and
13 evaluations involved in custody and matrimonial
14 cases have very little understanding about the
15 process of victimization, the long-term effects of
16 abuse on an individual, and the characteristics of
17 an abusive personality. When our victims speak
18 with Law Guardians or forensic evaluators, they
19 may present as very anxious, depressed, fearful,
20 and angry. While the abuser, which is typical of
21 abusers in general, may appear very calm and self
22 confident. Advocates at Haven House find that
23 some of these key people are not able to ferret
24 out the dynamics behind these self-presentations,
25 and instead made critical decisions regarding

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2 custody and visitation based on the abuser's
3 manipulative self-presentation and survivors of
4 abuse are often labeled dysfunctional.
5 Victims' attempts to get law guardians and
6 forensic experts to understand the abuse and to
7 obtain protection for her children can often be
8 held against her. The victim is seen as
9 unsupportive of the child's relationship with the
10 father. When a victim finds herself in conflict
11 with a Law Guardian, or feels a Law Guardian to be
12 biased against her, there is no recourse, no
13 knowledge of who these people are accountable to.
14 There do not appear to be any procedures in place
15 to review Law Guardians, nor do there appear to be
16 any standards or protocols that every Law Guardian
17 or evaluator is expected to follow.
18 My last point here is, uh, about access to
19 the legal system. And -- and it's been said
20 before. Women without financial resources have an
21 enormously difficult time obtaining legal
22 representation. For these women who live in
23 poverty they're only able to access the very
24 strained volunteer lawyer system. And here in
25 Erie County, due to funding crises, Neighborhood

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2 Legal Services is extremely limited in their
3 ability to represent victims in divorces. So many
4 women do not qualify for these attorneys, so they
5 can't get a divorce, simply because they can't pay
6 for an attorney. And this leaves them vulnerable
7 to continued contact and abuse by her husband due
8 to their ongoing legal relationship.

9 So, in summary, survivors tell us that the
10 process of obtaining a divorce in New York can be
11 devastating and often present significant risks
12 and obstacles to victims of domestic violence and
13 their children, and this is one reason why some
14 women cannot leave their abusive husbands.

15 So our recommendations on behalf of victims
16 of domestic violence: Where there is proven
17 domestic violence it should be presumed that
18 anyone who has been violent will not obtain
19 custody or unsupervised access to children.

20 Domestic violence should be acknowledged in
21 the final judgment and must be factored into
22 recognized -- and recognized in custody visitation
23 decisions.

24 Victims should have better access to
25 obtaining Orders of Protection from Supreme Court,

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2 including temporary orders of removal of the
3 abusive party from the marital residence.

4 And we must allow the parties to physically
5 separate without legal repercussions for
6 everyone's safety. There have to be time limits
7 with consequences for failing to honor child
8 support orders, requests for information, et
9 cetera, and support orders must have better
10 enforcement mechanisms. When there are
11 allegations of domestic violence we must use
12 forensic evaluators and Law Guardians who can
13 verify that they have received intensive training,
14 not just a couple of hours, in domestic violence
15 and can then include an explicit domestic violence
16 evaluation in their recommendations to the Court.

17 And the role and protocols for Law Guardians
18 must be made clear to parents, with some means of
19 redress if they feel that Law Guardians are not
20 fulfilling their role or are showing bias.

21 There must be guidelines that somehow
22 expedites this process and presents -- and
23 prevents the abuser from deliberately dragging it
24 out.

25 We need to give litigants more direct

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2 involvement with the process. Our survivors tell
3 us that they just want to be heard and have their
4 experience publicly acknowledged in a court of
5 law.

6 And, lastly, but not least, we need more
7 funding for qualified attorneys for poor and low
8 income victims of domestic violence. Thank you.

9 HON. SONDR A MILLER: Thank you very much. We
10 will take a very brief recess. Five minute
11 recess. Thank you very much.

12 (10:41 a.m. recess.)

13 (11:00 a.m. proceedings recommenced.)

14 HON. SONDR A MILLER: All right. Thank you
15 very much. Our next presenter is Mr. Oliver
16 Bickel.

17 OLIVER BICKEL: Good morning. Justice Miller
18 and distinguished Commission members, it is a
19 privilege to appear before you today. My name is
20 Oliver Bickel. I am an attorney and a school
21 psychologist from Plattsburg, New York, admitted
22 to practice since 1992. I have legal experience
23 as an Assistant District Attorney, family law
24 attorney, and Law Guardian. Currently my
25 full-time occupation is as a tenured and state

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2 certified school psychologist. I additionally
3 hold a Master's Degree in political science from
4 Binghamton University, which includes a
5 specialization in public policy analysis and
6 administration. I am also a never-married,
7 nonresident biological father, who was blessed to
8 share not only a strong parental relationship with
9 my now 11-year old son, but also a healthy,
10 co-parental relationship with my son's mother and
11 stepfather.

12 When I returned to graduate school in 1998 to
13 pursue course work leading to certification as a
14 school psychologist, I began a literature review
15 which addressed the questions of, one, why so many
16 nonresident parents have substantively disengaged
17 from their parental responsibilities, and, two,
18 what have been the consequences to children of
19 this epidemic?

20 For the last seven years I have spent
21 countless hours researching and reflecting upon
22 this profoundly complex cultural phenomenon and
23 have submitted for your review an excerpt from my
24 Master's thesis proposal which summarizes the
25 results of my literature review on these

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2 questions.

3 Since your predecessor Commission of ten
4 years ago, the empirical literature has clarified
5 two points which have important implications for
6 the future evolution of family law. First, there
7 now exists a strong consensus that the social
8 capital of nonresident parents, their time,
9 nurturance, love, and guidance, is of significant
10 importance to fostering healthy child
11 developmental trajectory. Without the consistent
12 benefit of the social capital of the nonresident
13 parent, and often and, importantly, the
14 nonresident parent's extended family, the
15 literature shows that children are at risk for a
16 whole series of serious developmental disfunctions
17 ranging from early onset reading and cognitive
18 delays up to and including juvenile delinquency,
19 adult criminality, educational failure and labor
20 force failure.

21 Second, there has also developed a consensus
22 that this amazing cultural icon of the past few
23 decades, the callously indifferent dead beat Dad,
24 is, in fact, much more of a myth than a reality.
25 Significant empirical evidence now supports the

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2 view that the firm majority of underengaged
3 nonresident parents are best described as being
4 involuntarily absent or disenfranchised from their
5 children's lives. Sadly, there is a psychological
6 component to this phenomenon, which suggests a
7 widespread underreporting by nonresident parents
8 of internalizing mental health challenges, such as
9 depression and anxiety.

10 The implications of these findings to the
11 judiciary are profound. Together they indicate
12 that during the developmental years of what now
13 constitutes New York family law, we have been
14 unable, as a society, to appropriately appreciate
15 and accommodate some very powerful dynamics.
16 Consequently, the law now exerts far too many
17 negative influences upon nontraditional family
18 functioning. Fortunately, there is an increasing
19 public recognition of these problems, and,
20 consequently, corrective and dynamic state level
21 policy proposals are beginning to emerge.

22 An excellent example of this process of
23 social entrepreneurship is occurring in our small
24 sister state of New Hampshire, where two state
25 commissions related to matrimonial law have

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2 recently released final reports.

3 In finding that there must -- in finding
4 that, quote, there must be a rethinking of the
5 absolute costs of the adversarial process, end
6 quote, which will require, quote, a significant
7 cultural change in the way we approach divorce,
8 end quote.

9 The New Hampshire Task Force on family law
10 has provided a comprehensive set of policy
11 recommendations intended to shift primary Family
12 Court dispute resolution modalities away from an
13 adversarial ontology.

14 Commission members, the clearest thing that
15 the research tells us is that the adversarial
16 process is the lynchpin for the creation of
17 trauma. Therefore, you cannot follow New
18 Hampshire's lead soon enough, nor boldly enough.

19 Of equal and, perhaps, greater importance,
20 the report of the New Hampshire Commission on
21 Child Support has provided a much needed critique
22 of the philosophical underpinnings and,
23 consequently, dysfunctional policy outputs of many
24 contemporary child support laws. Their Commission
25 has issued a series of recommendations intended to

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2 both remove the significant adversarial incentives
3 enmeshed in current law and produce outcomes that
4 realistically create the opportunity for two
5 viable parenting households.

6 In reviewing the minutes from your New York,
7 Albany and White Plains hearings, it is my fear
8 that New York's Commission is less prepared to
9 appreciate and address similar critical
10 shortcomings in our child support law. This would
11 be a serious miscalculation, for the powerful
12 adversarial incentives built into the Child
13 Support Standards Act would seriously undercut, if
14 not render entirely moot, even the most ambitious
15 nonadversarial initiatives introduced into custody
16 and visitation practice. Consequently, I have
17 provided copies of the New Hampshire report as
18 part of my written submission, and I encourage you
19 to give this important analysis the serious
20 consideration it deserves.

21 Finally, just as the rights of women to a
22 fair opportunity in the work world has
23 necessitated decades of effort to effectuate
24 reasonable cultural change, similarly challenging
25 will be the process of affording many fathers a

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2 more equal opportunity to share in both the
3 traditional and nontraditional rearing of their
4 children. I, therefore, encourage New York's
5 judiciary to recommend that the executive and
6 legislative branches cooperate in the creation of
7 a state institutional body charged with fostering
8 and facilitating this complex and challenging
9 process of cultural change. Of note, this would
10 not be a novel endeavor, but would instead follow
11 a trend that is emerging among some of our
12 nation's largest state governments.

13 In closing, there is a hopeful, realistic and
14 positive vision for the future of family law
15 emerging in our country. To the extent that
16 policy initiatives, like those in New Hampshire,
17 appreciate and appropriately accommodate the vast
18 amounts of empirical evidence amassed over the
19 preceding three decades, they hold the potential
20 to invigorate the field of family law with an
21 optimism that says, yes, American judicial systems
22 can routinely create not only nontraditional
23 families with substantial -- with substan --
24 substantially enhanced developmental environments
25 for their children, but also cost significant and

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2 lasting reductions in the levels of trauma

3 currently being suffered by all parties.

4 Your Honor, and distinguished cultural

5 leaders of the New York Matrimonial Commission, as

6 the most politically unencumbered branch of our

7 government you are in the strongest contemporary

8 position to provide the bold visionary leadership

9 that is so desperately called for today. In the

10 name of our state's children I cannot encourage

11 you enough to seize upon this historic

12 opportunity. Thank you.

13 HON. SONDR A MILLER: Thank you very much.

14 OLIVER BICKEL: Thank you.

15 HON. SONDR A MILLER: Our next speaker, Mr.

16 Stephen Brackin.

17 STEPHEN BRACKIN: It's Dr. Stephen Brackin.

18 And -- and I normally don't like to, uh, read a

19 script, but this is a time-pressured situation, so

20 I'm just going to read my thing.

21 I -- I'm Dr. Stephen Howell Brackin. I have

22 a PhD in mathematics from Penn State. My research

23 applies a branch of mathematics that few people

24 know about, to software reliability and security

25 problems that few people know about. That's part

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2 of my story.

3 I married thinking I was entering a mutually
4 beneficial partnership between two self-sufficient
5 professionals who both wanted a child. I had some
6 reservations about our different attitudes toward
7 money, but she made promises that reassured me,
8 particularly that our separate finances would
9 remain our separate finances. I agreed to pay
10 almost everything, except the debts she brought
11 into our marriage and luxuries she bought for
12 herself. This would have been generous in
13 reverse. I kept every promise I ever made. I was
14 always a loving father, and I was a loving husband
15 to the woman I thought I married.

16 I had some good research ideas, published
17 several papers, won a government grant, won my
18 company's award for excellence, and was rewarded
19 with stock options.

20 I then made about 2.2 million during the
21 Internet bubble. My wife filed for divorce,
22 though, after I refused to give her \$250,000 for a
23 custom-designed house for herself. Meanwhile, the
24 bubble burst, I lost my job, and my company's
25 purchaser went bankrupt.

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2 And here's a proposal for the law. Make
3 prenuptial agreements mandatory. Make all
4 significant promises legally binding. Resolve all
5 significant financial issues before each marriage.

6 Rather than trying to create laws that handle
7 every possible marriage situation, have the state
8 require that each couple make their own contract,
9 with both parties advised by counsel. Accepting
10 this proposal would reduce the number of marriages
11 by, say, a third, but also reduce the number of
12 divorces by, say, two-thirds. A couple who can't
13 negotiate a prenuptial agreement together can't
14 negotiate a life together.

15 I fought the divorce hard because my
16 "Parenting Apart" class emphasized that New York
17 called for equitable rather than equal
18 distribution of assets. I thought equitable meant
19 just. My lawyer never told me otherwise. I went
20 to court proposing to give my wife 15 percent of
21 my earnings, a generous estimate of what she had
22 helped me earn. Ha!

23 Law proposal: Produce a pamphlet summarizing
24 the main points of New York's divorce law and
25 distribute this pamphlet to every couple that

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2 doesn't have a prenuptial agreement. Update this
3 pamphlet as needed. Lawyers say that ignorance of
4 the law is no excuse, but it's practically
5 universal among nonlawyers.

6 My daughter, then an articulate 12-year old,
7 has always been close to me. She requested,
8 through her Law Guardian, that her custody be
9 divided as equally as possible between her
10 parents. My wife accepted a stipulation to that
11 effect. And I agreed to pay half of my daughter's
12 expenses, not -- expenses, not specific to time
13 she spent with either parent.

14 But my divorce trial was a nightmare.
15 Provably false accu -- accusations against me were
16 left unchallenged, and my provably true testimony
17 wasn't believed because lawyers hadn't prepared
18 evidence or ignored evidence under their hands,
19 literally.

20 The judge made decisions about the timing and
21 significance of my research ideas based on
22 misunderstandings of an hour's worth of
23 technological testimony.

24 The Court Reporter turned some of my techno
25 -- technological testimony into garbage.

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2 The Court even questioned whether I was
3 looking for a job, since my e-mail and web-based
4 applications, including one for a government
5 research grant that indirectly led to my new job,
6 weren't admissible as evidence.

7 Law proposal: Make every rule affecting
8 equitable distribution independent of
9 technological issues that are beyond a typical
10 judge's knowledge or time available to learn.

11 It's almost impossible to explain graduate
12 level mathematics to a student who knows little,
13 assumes that you're lying, refuses to answer
14 questions, and holds your life in his hands.

15 Videotape trials to give both sides the
16 opportunity to correct transcript errors. Allow
17 written testimony. Update the laws on documenting
18 job searches to refer -- reflect current
19 technological and social realities. I mean nobody
20 sends rejection letters anymore.

21 The court ordered that I pay my now ex-wife's
22 support as if I had zero percent rather than fifty
23 percent custody. It calculated child support
24 based on imputed income from, quote, marital
25 assets, unquote, that, by its order, would soon be

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2 in her hands as much as mine. It made these
3 orders even though I was unemployed, with a narrow
4 specialty, and couldn't leave Ithaca, New York,
5 because of shared custody. It took me almost two
6 years to find a job.

7 The Court ordered my ex-wife to provide my
8 daughter's health insurance through her job, not
9 knowing that she no longer had the job. I have
10 since been forced to pay the full cost of my
11 daughter's health insurance, even while I was
12 unemployed, in addition to child support and all
13 my other child-related costs. The Court said
14 nothing about college, and my ex-wife has refused
15 to make any commitments.

16 Now I'm unemployed again, paying child
17 support to a woman with assets from divorce and
18 inheritance possibly exceeding my own, who has no
19 more custody of the child than I do. I'm paying
20 an additional 19 percent of my child support
21 payment for the child's health insurance,
22 thousands more in other costs, and college looms.

23 I'm -- I'm told that it would take months and
24 thousands of dollars to go back to court and have
25 my child support obligation changed. The only

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2 good news is that this time I have some good job
3 prospects.

4 Law Proposal: Make 50/50 custody the
5 standard and preferred allocation. There is
6 growing evidence that the main thing separating
7 children who do well after divorce from those who
8 do badly is active involvement by the father.

9 Collect child support money as a flat tax on
10 income for both parents, distribute it in
11 proportion to custody, and restrict its spending
12 to the sole benefit of the child. This would
13 prevent double billing and make the personal costs
14 to parents of meeting their child support
15 obligations independent of custody.

16 Require each parent to document claimed child
17 benefit expenditures with the other parent.

18 Compute any imputed income on assets at the
19 same rate for both parents.

20 Require that custody decisions consider
21 college and health insurance costs.

22 And, finally, a lawyer now tells me that I
23 probably can't sue my former divorce lawyer for
24 malpractice because nothing she did could have
25 made any significant difference in the outcome.

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2 Another lawyer has told me that New York
3 courts seemingly give two-thirds of the, quote,
4 marital assets, unquote, to a spouse who earns
5 virtually all of these assets, which in my case
6 would have made a difference of over \$200,000. I
7 don't know which of these inconsistent pieces of
8 advice is correct.

9 Law Proposal: Identify bringing divorce
10 litigation in cases where it can't have a
11 significant effect on the outcome as legal
12 malpractice and allow quadruple damages.

13 Prohibit questions that can't have a
14 significant effect from even being raised in
15 court.

16 And as final comment let's not be coy. The
17 asset-sharing obligations in New York's divorce
18 law would never be tolerated for nonsexual
19 relationships. One lawyer told me that law
20 recognizes sex as having, quote, economic value,
21 unquote, when the low income, typically female,
22 spouse gives it to the high income, typically
23 male, spouse, but not vice versa. He used this to
24 justify what New York's law had done to me. New
25 York's divorce and custody law is about forcing

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2 men to pay women for sex and babies. It treats a
3 loving father like a bad joke. Alabama's 1955 law
4 was evil in its racism. New York's 2005 law is
5 evil in its sexism.

6 Anyone who expects payment for sex is a
7 prostitute, whether they have ten thousand tricks
8 or one, whether the sex is a back alley quicky or
9 a, quote, romantic, unquote, evening that fools
10 the trick into feeling loved, and whether the
11 payment is in cash, goods, services or, quote,
12 equitable distribution, unquote, obligations.

13 Anyone who forces someone else to pay for sex
14 is a pimp, whether they use a switchblade or a law
15 degree.

16 Sex researcher Virginia Johnson, of Masters
17 and Johnson fame, once said sex had gone from
18 being something that a man did to a woman, to
19 something he did for a woman, to something he did
20 with a woman. That's healthy and romantic. The
21 same should be true for marriage, but New York is
22 still in the "for a woman" stage.

23 Finally, see the pictures of my wonderful
24 daughter? She's worth whatever this state has
25 done to me. But I should never have had to suffer

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2 so much just for the privilege of becoming and
3 staying the father who's loved her since he first
4 saw her on the ultrasound.

5 And this is me and the kid.

6 And this is the kid and an alligator.

7 And this is the kid's all A report card with
8 an overload of honors courses.

9 So my daughter is doing very well, and I
10 think I can claim a big part of that, because I'm
11 a very involved, very active father.

12 HON. SONDR A MILLER: Thank you.

13 STEPHEN BRACKIN: Questions?

14 HON. SONDR A MILLER: Mr. Hoak, Junior. Mr.
15 Hoak? Is he here?

16 DONALD HOAK: Yeah, I'm right here. I'm
17 having technical difficulties.

18 I'm going to have to, your Honor, hope that
19 this laptop stays on, or otherwise I'm just gonna
20 have to wing it.

21 Well, ladies and gentlemen of the Commission,
22 I'm here before you this day to disclose my
23 experiences first as a child of abuse, both verbal
24 and physical, also as a witness of domestic
25 violence of both parents. This should be the

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2 particular interest to this Commission. I am not
3 only a child of abuse, but also a child of your
4 Family Court system.

5 I am, by all accounts, the first generational
6 child coming from this antiquated system. For
7 over 30 years I have been looking to point a
8 finger or place blame.

9 To start with, I was born to a mother less
10 than two weeks over 17 and residing in Rensselaer
11 County and a father who was 19, attending college,
12 whose family is very well known in Erie County.

13 As you can well imagine at this point, this
14 relationship was short-lived. Being forced to
15 marry by parents of these two, because this was
16 the right thing to do at the time. We have come
17 to find out this idea is very much outdated.
18 However, in a custody dispute that was taken place
19 in Rensselaer County, my biological father had to
20 drive 5.5 hours each way just to entertain what
21 was nothing more than a waste of gas and his time.

22 Adjournments and an overzealous protection of
23 myself by my mother's family, who was very
24 prominent and influential within Rensselaer
25 County. After -- after approximately three years

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2 of trying to visit with his son and continuing in
3 a very negative relationship with my mother, three
4 years of trying, only seeing his son in brief
5 passing of a couple hours here and there. My
6 mother started to talk of marriage to another man.
7 Within this relationship she approached my father
8 with that this individual should take over legal
9 rights of myself and he should be -- put me up for
10 adoption. How is that a five-year old child could
11 be treat -- thrust into a relationship with an
12 individual I both neither knew or liked.

13 In the course of this relationship I was
14 required to call this abusive individual Dad. If
15 I forgot or purposely did not call him father, I
16 would be beaten with a belt and told that I need
17 to pay him respect. This was the beginning of a
18 very abusive relationship in all perspectives.
19 This abuse perpetuated into abusive language. In
20 particular, ten years I responded to the call of A
21 hole and I left out some letters in that, ma'am.
22 My name wasn't Don, Donny, or even Donald. It
23 became A hole. A day doesn't go by in which I
24 don't relive some part of this abusive person. I
25 was beaten as if I was an adult on almost a daily

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2 basis. Of course, there was the birth of
3 siblings, a brother, and a sister, who are seven
4 and eight years younger than myself. I was the
5 main caregiver to these children, changing
6 diapers, feeding and baby-sitting, while this
7 individual sat on the couch, drank himself into a
8 drunken stupor. My mother, the financial provider
9 and career-oriented woman in all perspectives
10 could not or possibly understand the lengths this
11 individual now called Dad, all the time would go
12 to thrust his personal will upon myself. I was
13 punished every day, confined to my room until such
14 time that the babies needed to be attended to.

15 The two siblings witnessed these abusive
16 behaviors and would sit there and cry to this
17 alleged Daddy to stop beating me. Cries of
18 "Daddy, stop beating Donny, you are hurting him
19 real bad," this would not lessen these beatings.
20 It would continue until his hands hurt, or the
21 belt had welted up my back or behind. These
22 beatings continued. I was 16 years of age. Can
23 you imagine, 16 -- being 16 years of age and being
24 required to drop your pants so your father can
25 beat you?

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2 However, in any abusive relationship there
3 comes a time when you grow up and you quite simply
4 say no more. I had reached puberty and sprouted
5 basically to the person before you today, six foot
6 three, and then 219 pounds.

7 The day came out -- the day came when out of
8 a closed room, hiding behind a door came a man who
9 now was beating me with fists and still requiring
10 me to remove my pants so he could whip me. This
11 was the beginning of a true horror story. I ran
12 away, lived in the woods and friends' houses for
13 three weeks. In the meantime, my mother's family
14 was worried sick and not understanding of events.
15 Why? Because these three weeks gave this
16 individual ample time to perfect his lies.

17 I returned to my grandmother, who in all
18 titles of responsibility was my mother. As I very
19 often did, I lived in between her household and
20 that of the abuser's. I cried to priests, doctors
21 and families at what -- what was occurring. To no
22 avail. I was ignored and left unprotected. I was
23 forced to return back to the household and
24 required to talk with an individual I hated right
25 to the bone. This conversation did not go well,

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2 and I was dragged out of my room by the head of my
3 hair and was ordered to talk with him and my
4 mother as to what was bothering me. This was the
5 last straw in the violence column. I now backed
6 up no more with peer brute force. I had one
7 individual on my back biting and scratching me,
8 while the other held my hands. While I tried to
9 escape, if it had not been for my brother opening
10 up the door for me and telling me to run, I may
11 have never survived this day. I kicked my mother
12 off me and removed his hands from mine by force,
13 then bolted for the door. Now I went directly to
14 my grandmother with the marks and bruises that
15 couldn't be hidden from the confining me to my
16 room. Needless to say that it was handled
17 internally by the family. This individual never
18 again put his hands on me. However, less than
19 five months later, I returned home after football
20 practice, with a car load of my teammates, to find
21 six police cars in front of my residence, and the
22 questions coming from them, "Why are the cops at
23 your house, Don?" My response, "I have absolutely
24 no idea." They left, and I entered the house.
25 Upon entering, I was told to leave, and I see

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2 these police officers questioning my alleged
3 Daddy. I was told to go to my grandmother's house
4 and family would inform me of what was occurring.

5 Upon entering my grandmother's house I have
6 never felt such an emotional imbalance as I had
7 this day. I was sat down, the back of the table,
8 around crying relatives, oh, my God, what did this
9 guy do? Kill someone? No, Don, it is much worse
10 than that. My mother and sister were required to
11 leave the room. I was informed that my father, my
12 alleged father, had been molesting my little
13 sister. The graphic details was disclosed to me
14 and described in my sister's words, left no doubt
15 in my mind that she was molested. My mother filed
16 for an immediate divorce, and the litigation
17 process now was started.

18 First he plea bargained out the crime to a
19 simple six weekends in jail. This was his
20 punishment. For this? Then was allowed to drag
21 the divorce proceedings on for over nine years.
22 This was his punishment for these years of abusing
23 us and my siblings. While I am not the law, but I
24 know the travesties when I hear one. I now enter
25 the service, graduating on a Friday and leaving

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2 that Saturday morning. I knew what staying in the
3 area would afford me, trouble, violence, and
4 drugs.

5 What I have not told the Commission yet is
6 that those football players dropping me off had
7 fathers on the police force. And even though the
8 record was sealed, it did little to squash the
9 rumors going through the schools.

10 What had happened, these events caused me to
11 be suspended six times, thrown out of seven out of
12 12 football games for fighting. In all regards a
13 fight on the street at least once a day. I would
14 not have anyone talking negative or derogatory
15 towards what was left of my family for a second
16 time.

17 During this period I thought a lot of my real
18 father. The wrestler, the school teacher, the
19 grandson of the very same individual who helped
20 build this great city. I remembered his smile,
21 his voice, how he would look down upon me while I
22 was in the playpen. I remember my grandmother's
23 house to the T; dog's names; most importantly, my
24 loving grandmother and grandfather who had always
25 kept in contact with me through the mail and

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2 cards.

3 After a few years of not hearing from her or
4 knowing what was happening with my grandparents I
5 picked up a phone, called her from Georgia. A man
6 answered the line. I asked -- asked if Maria was
7 there. Response, "Who is this? Don?" Answer,
8 "Yes. Who is this?" "Well, this is your father,
9 Don." There was a long pause on the phone, and I
10 asked how my grandparents were. "Your grandfather
11 died a few years ago, and your grandmother is
12 doing just fine." I was very saddened, for no one
13 ever notified me of the death of a man. I
14 remember sitting in his lap and smelling the
15 tobacco of his pipe. Sad, very sad. But to the
16 positive, my true father made arrangements to come
17 to see me while I was serving in Georgia.

18 Very good first meeting in almost every
19 perspective. I got to meet with my two brothers
20 and a sister, which, by the way, both now serve
21 over in the Middle East. I was left sad in the
22 fact that I had other siblings I knew little about
23 or had the opportunity to be active in their
24 lives.

25 However, for the first meeting in almost 20

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2 years I was not prepared for the other side of the
3 story. I couldn't overcome the burning question
4 of why a father would leave his son. In all
5 words, forgotten about. It was clear that -- that
6 I was going to need much time to think about these
7 truths. I did not speak with my father for quite
8 a few years. I could not cope with someone who
9 had signed away legal rights to me, talking
10 negatively about my mother. But, then again, had
11 realized there was more to it than what I believed
12 to be the truth.

13 Who I had been pointing the finger at and
14 trying to place blame had not been the case after
15 20 years. I now started resenting my mother for
16 making it so difficult for my father to see his
17 son. After a rather lengthy time period only
18 communicating what I still to this day perceive to
19 be my mother, my grandmother, in her always
20 influential way, got me to sit down with my
21 mother. As I now 23, and my mother being young
22 40, we went to a bar and got drunk together in the
23 true Irish fashion. I got a letter. She wrote me
24 a most sincere apology anyone could ever receive.
25 We discussed that I, in all likelihood would

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2 always see her as only an older sister, than a
3 mother, and if she was going to apologize, to
4 please do so in insuring that she would do
5 everything possible to protect other children from
6 the harms that befell us.

7 So that left a true father. It wasn't until
8 just recently, hearing testimony, did I finally
9 put a finger as to who was to blame. This is
10 quite simply the truth. In all perspectives this
11 individual's true parent, the Family Court system
12 of the State of New York, your true responsible
13 party to these events. I want to make sure and
14 express as a witness of abuse and victims, and a
15 victim to it both gender, both genders of a
16 relationship, that violence is violence. Focusing
17 on the gender only leaves victims believing that
18 you are looking to relieve this responsibility of
19 a parent first to the child, and then to the
20 continuing to remaining in the unhealthy
21 relationship to all.

22 First, if any parent ignores a child's cries
23 for help and uses them as a weapon in the Family
24 Court matter, should and ask to be deemed
25 immediately unfit. You won't -- you want to

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2 control the domestic violence. It begins with
3 children. Education. Awareness. Most
4 importantly, a healthy role model. And I would
5 like to thank you for listening to my heartaches
6 in growing up, and I hope each and every one of
7 you make the right decisions in submitting your
8 testimony and your decisions to Judge Judith Kaye.

9 HON. SONDRRA MILLER: Thank you very much. We
10 will certainly try to do that.

11 Any questions?

12 Just a minute. Would you come back, please?
13 Mr. Hoak, there are some questions for you.

14 DONALD HOAK: Yes, ma'am.

15 HON. SONDRRA MILLER: First of all, was there
16 a custody fight between your biological mother and
17 father?

18 DONALD HOAK: Not to per say, in over the
19 years, it took three years, and anybody that's
20 been involved in the Family Court process knows
21 adjournment after adjournment usually occurs, and
22 traveling 5.5 miles in each direction always leads
23 to a certain degree of conflict within schedules.

24 HON. SONDRRA MILLER: What did your biological
25 father do during the abuse of your stepfather?

1 Matrimonial Commission Hearing

2 DONALD HOAK: He was completely unaware of
3 it, ma'am.

4 HON. SONDRRA MILLER: He never knew?

5 DONALD HOAK: No, ma'am.

6 HON. SONDRRA MILLER: He never knew.

7 Was there any Law Guardian ever assigned by
8 the Court to help you --

9 DONALD HOAK: Not until -- I was 17 years old
10 when it actually came to a head, and, in
11 particular, at that age all I wanted to do was put
12 it behind me and serve my country.

13 HON. SONDRRA MILLER: Okay. Thank you.

14 Robert Demerath. Dr. Robert Demerath.

15 ROBERT DEMERATH: It's still morning. Good
16 morning.

17 My name is Dr. Bob Demerath. I'm a licensed
18 psychologist. Today I would like to thank the
19 Western New York courts, Department of Social
20 Services, lawyers, parents, and children, as well
21 as the Fourth Department, for giving me the
22 privilege of providing more than 900
23 court-appointed assessments in Western New York.

24 In turn, I have -- I am here today to offer
25 support in accomplishing your three goals:

1 Matrimonial Commission Hearing
2 Limiting cost, minimizing delays, and reducing
3 trauma to the adults and particularly the children
4 we serve that have custody and visitation
5 disputes.

6 To help accomplish these goals I suggest the
7 committee accept a proactive cooperative
8 relationship with the private sector.

9 In review of your records you will discover
10 that errors in planning squandered opportunities
11 to keep costs down for forensic assessments and
12 services. For example, less than six years ago
13 the state's efforts to lower cost not only
14 resulted in passing over more financial burden
15 onto the consumer, but it ultimately increased the
16 state's own fiscal responsibility and lowered the
17 quality of services. More specifically, in the
18 past years my involvement with the state has been
19 reduced from providing more than one-third or
20 about one-third of the entire fiscal budget for
21 experts within the Fourth Department to serving
22 only 16 cases annually.

23 That is representing a decrease of 70
24 percent. This came in part as a result of fiscal,
25 political and policy changes reflecting concerns

1 Matrimonial Commission Hearing
2 that the state should not cover the entire cost of
3 custody and visitation evaluations. Because of
4 what appears to be a lack of collaborative efforts
5 with the private sector, the state's new policies
6 and procedures led to confusion, more expense to
7 the consumer and ultimately the state.

8 The changes pushed experts to accept an added
9 cost of collecting fees from three or more
10 entities while maintaining an unreasonable cap for
11 services. If parties faulted on their portion of
12 fees, psychologists continuing services took the
13 risk of having to donate more than 83 percent of
14 their time, making them run in the red. This put
15 too much of a burden on the business of forensic
16 assessments or in our efforts to care for our
17 clients. In my own practice, as a result of
18 decreases in the Fourth Department cases that I
19 received, I did less work, and I made more money.
20 This was, of course, at the consumer's cost, as
21 more clients emerged for second opinions due to
22 first order experts cutting corners to remain in
23 the black. The change resulted in a wider divide
24 between two classes of consumers, those that paid
25 out-of-pocket eventually paid higher fees. They

1 Matrimonial Commission Hearing
2 often received better clinical attention to their
3 issues. The underserved would receive poor
4 quality assessments. They were given a choice to
5 accept these consultations as they were or to pay
6 yet another expert to recover. Problems emerged
7 and things again were changed. Parents now pay
8 for services not covered by the Fourth Department.
9 And, by the way, you can't say health insurance
10 will cover it when this isn't health insurance
11 coverage. This is not mental health services.
12 This is forensic services, folks. Their health
13 insurance are not supposed to cover it.

14 However, now the Fourth Department pays as
15 much for the children's part of an evaluation
16 today as they had once paid for the entire report
17 less than eight years ago. Because we, the
18 private sector, and those of you in government did
19 not have the foresight to work together and did
20 not plan together to promote more efficient
21 positive changes, the increased cost was passed
22 directly again on to the consumer.

23 In contrast, by a joint effort between local
24 county Department of Social Services Office of
25 Counsel, two Family Court judges now in the

1 Matrimonial Commission Hearing
2 Supreme Court, as well as help from many others,
3 including attorneys, Law Guardians, and my office,
4 we had micro success in reducing costs to western
5 New York County governments without sacrificing
6 quality.

7 Because of our shared efforts I was happy
8 alone to donate well over 510 billable hours per
9 year to the government agencies. Folks, that's 12
10 weeks of work, 40 hours a week. And yet without
11 solidifying these earlier efforts, and without
12 making the necessary adjustments in the process,
13 fiscal savings are now dwindling and the quality
14 of services will not continue in the future.

15 Between the 19 years of professional services
16 within clinics and private practice in this area
17 that I have provided, I have learned and proven
18 that we can turn the tide for the better by
19 creating private sector operated satellites.
20 Advanced satellites will become catalysts for
21 reducing costs, freeing up the Court's time in an
22 effort to minimize delays, and they will provide a
23 way to help reduce the stress on the families.

24 Before discussing these satellites let me say I
25 agree that forensic services are mere tools for

1 Matrimonial Commission Hearing
2 the Court. Naturally, experts will disagree. We
3 disagree about everything. I believe, however,
4 that on a case-by-case basis judges alone should
5 be given the latitude to pick their tools,
6 deciding to receive or not receive an opinion,
7 recognizing an opinion is not a fact. They,
8 alone, should ultimately decide whether or not we
9 provide opinions or not. The key in accomplishing
10 your goals, however, is developing a consistent
11 process between the courts and clinicians. In
12 turn, this will help shape better cost-effective
13 forensic services.

14 Satellites receiving an assurance of
15 referrals will reduce average costs of complete
16 custodial evaluations, including expert testimony,
17 by no less than 25 percent and as much as 50
18 percent. Each satellite will provide peer
19 reviewed assessments. Each satellite will provide
20 to the Court a PDF file of the entire file. First
21 and second opinion experts' testimony would be
22 available either at reduced costs or free of
23 charge. Screening systems will be developed to
24 triage referrals to satellites. Satellites will
25 work together to offer mutually agreed services by

1 Matrimonial Commission Hearing
2 experts fitting the needs of a specific case.
3 Experts will come from a pool of forensic
4 psychologists, social workers and psychiatrists,
5 and nobody needs to be left out. Satellites will
6 provide education, training about assessment
7 services, second opinions, and forensic treatment
8 services. Coordination between courts and
9 forensic services will improve quality. Such
10 coordination will provide everyone with equitable,
11 reliable, prompt services. Private satellites
12 will become resources for costs and goal-directed
13 forensic therapies, including parent coordination,
14 therapeutic visitation, visitation coaching,
15 reducing the strain on families' emotional
16 resources, particularly for those that could not
17 otherwise afford it.

18 In the most difficult cases when we added, in
19 my own practice, visitation coaches and parent
20 coordination to the Court's support, we will
21 rapidly reduce trauma to family members when we do
22 that. You can ask Judge Townsend, Judge Rosa,
23 Judge Mix, Judge Dillon, you know them name, and
24 name, and name, you can ask all of them whether or
25 not it works. It has worked. This technique is

1 Matrimonial Commission Hearing
2 less expensive than the therapy alone, and it
3 quickly frees the Court from micromanaging the
4 issues between families. It provides for the
5 families a quick, rapid response instead of
6 waiting for delays to get on the calendar.
7 Existing efforts for parent coordination services
8 that you already engaged in in Manhattan and
9 Monroe County should be looked at closely.

10 We have a unique opportunity to advance this
11 service and be the forerunners in
12 interdisciplinary methods. We do not have to
13 duplicate the nine states that have already placed
14 clinicians on the bench, which I do not
15 necessarily agree on. I don't agree upon it at
16 all. Uh, I believe there is a better
17 interdisciplinary way to work together for greater
18 success in helping the public deal with the pain
19 of divorce. However, separately the courts and
20 the forensic service community cannot make the
21 necessary changes needed to accomplish our goals.

22 As much as clinicians need the Court's guidance
23 and full support, the Court needs a process that
24 will help them grasp the opportunity to
25 progressively move forward in a public -- for the

1 Matrimonial Commission Hearing
2 public to benefit fully from the quality of
3 forensic services that are out there. We already
4 have the quality of judges, lawyers, experts, and
5 the will of parents and children in place and I am
6 convinced in working together we will succeed in
7 limiting the costs, minimizing delays, and
8 reducing the emotional trauma to the people we
9 serve, particularly the children.

10 Finally, I want to thank you for allowing me
11 to share my thoughts today. Thank you.

12 HON. SONDR A MILLER: Thank you very much,
13 Doctor.

14 We have with us a presenter which is supposed
15 to speak this afternoon, but we can hear from him
16 right now, and that's Dr. Raymond Havlicek.

17 Is he here?

18 RAYMOND HAVLICEK: Yes, I'm here.

19 HON. SONDR A MILLER: Doctor?

20 RAYMOND HAVLICEK: Did you want to call me
21 now?

22 HON. SONDR A MILLER: Yes, we'd like to call
23 you now.

24 RAYMOND HAVLICEK: Oh, my goodness! Okay.

25 HON. SONDR A MILLER: Well, we're sure you're

1 Matrimonial Commission Hearing

2 prepared.

3 RAYMOND HAVLICEK: Thank you. Uh, I am sort
4 of prepared. I was expecting 1:30 this afternoon,
5 but I'm sure this will -- will do. I have some
6 prepared notes that I've provided outside, so
7 perhaps they'll be circulated. I'd just like to
8 read a brief preamble -- preamble to my remarks.

9 The family, broken or intact, is the
10 incubator from which our society's next generation
11 of good and bad derives. Effective co-parenting,
12 when possible, is the foundation upon which
13 divorced families thrive. I very, very strongly
14 believe that and have always been a very strong
15 advocate of that.

16 The families' protection and advancement
17 becomes a sacred social trust when parents are no
18 longer able to preserve their family's functional
19 integrity which if not sufficiently restored will
20 surely compromise their children's capacities to
21 reach their full human potential.

22 Irrespective of families's ability to pay,
23 our state's children, caught in the middle of
24 their parent's legal conflicts regarding custody
25 and other related issues, deserve the best

1 Matrimonial Commission Hearing
2 possible assessment and intervention services.

3 Our state should provide the needed funding
4 to uniformly provide for these assessments and
5 interventions described in my presentation.

6 Our adversarial legal system, while
7 delivering justice, may be unintentionally
8 intensifying the suffering of the state's children
9 caught in the middle and may be needlessly
10 intensifying their parents' struggle to win by not
11 adequately addressing their needs for adequate and
12 appropriate assessment and intervention.

13 So, having said that, I just -- I'll tell you
14 a little bit about myself. I'm -- I am a licensed
15 psychologist in New York State. I have 37 years
16 of experience in mental health. I started in 1968
17 as a permanently certified school psychologist in
18 the state. In 1975 I was licensed as a
19 psychologist. So I've been around for a long
20 time. And, uh, feel it a little bit in my back
21 occasionally, frankly, but, uh, uh, uh, I've been
22 very deeply involved in -- in -- in working with
23 families of high -- high conflict and divorce and
24 all that goes along with that for many, many, many
25 years, and I have done many assessments. I've

1 Matrimonial Commission Hearing
2 never counted them, but there's many that I've
3 done.

4 Uh, I'm a Diplomate in clinical psychology, a
5 Fellow of the American Academy of Clinical
6 Psychology. I've been an assistant professor of
7 psychology. I have been very involved. I won't
8 bore you with all of it, but one of the things I'm
9 most proud about right now is that I'm a founding
10 member of the Parent Coordinators Association of
11 New York State. Uh, which is a great group of --
12 of forensic psychologists and social workers, uh,
13 that I've had the privilege of working with since
14 last summer, uh, to try to form an association
15 that will further this new and wonderful concept,
16 intervention called parent coordination. Parent
17 coordination is a nonpsychotherapeutic tactic
18 that's designed around the concept of mediation,
19 better communication, education, in order to give
20 warring parties the opportunity to try hard to
21 reduce the stress and come to some conclusions
22 that might reach their goals.

23 One of the feelings that I have in -- in
24 dealing with forensics is I believe the process
25 distorts how people react. So psychologists who

1 Matrimonial Commission Hearing
2 are expected or forensic experts who are expected
3 to come to certain kinds of conclusions about
4 people and make recommendations to, uh, courts,
5 uh, have to deal with the fact that the system
6 itself is affecting the way people respond to our
7 tests and our interviews and -- and our inquiries
8 to make a best interest type of recommendation to
9 the courts. And this is really very difficult for
10 us, because you have to try to take the parties
11 out of the litigation that they're in the middle
12 of and the distorting effect that that litigation
13 has on them, realizing that the conflict and
14 stress that they're having may actually even limit
15 their ability to understand their options in the
16 court system and what's in the best interests of
17 their children. Try to take them out of that and
18 subject them to a procedure that enables them to
19 mediate their -- their differences, uh, in a
20 manner that brings civility, that brings about a
21 reduction in stress and possibly even a -- a some
22 sort of a conclusion to, uh -- to their -- to
23 their problems with each other, in terms of the
24 legal system that is. Uh, this is a -- a
25 wonderful technique that is being used throughout

1 Matrimonial Commission Hearing
2 the country. It is being used in California, in
3 Colorado, and, uh, there's a group of us that are
4 really quite determined to try to establish
5 standards, uh, for, uh, this procedure.

6 HON. SONDRRA MILLER: Can you explain this
7 procedure to us, Doctor? Can you explain the
8 procedure?

9 ROBERT HAVLICEK: Yes. The -- the procedure,
10 really involves primarily mediation; a well
11 trained, experienced professional. Could be an
12 attorney, could be a psychologist, could be a
13 social worker, would meet with the parties and try
14 to develop an understanding of what they're
15 fighting about, what -- what are the issues that
16 they're tormented about and they believe they just
17 have to have a success in custody in order to
18 resolve those issues. And what the, uh, parent
19 coordinator does is try to calmly and civilly try
20 to work out a form of parenting, uh, that the
21 parties previously agreed on or was ordered by a
22 court to -- to explain to them that if the
23 fighting is temporarily at least put aside, and
24 the parties try to reach compromises on parenting,
25 and decision-making and the issues that are

1 Matrimonial Commission Hearing
2 important for the children, that it might be
3 possible to improve the way the parties function
4 with one another, to possibly even to the point
5 where the litigation itself may very well not even
6 be necessary. Uh, my own --

7 HON. SONDRRA MILLER: At what stage of the
8 process does this begin?

9 ROBERT HAVLICEK: We've -- we feel very
10 strongly that it should begin after the judgment,
11 so we believe that the -- although I strongly
12 believe, outside of parenting coordination, that
13 other efforts should be recommended by courts to
14 give them a cooling off period, to give them the
15 opportunity to calm down and to try to work
16 reasonably with a professional that can talk some
17 sense to them and educate them about their
18 children, and their children's needs. Parent
19 coordination, the way I conceptualize it, and I
20 believe the way this group that I'm working with,
21 Parent Coordination Association of New York State,
22 uh, conceptualizes it as a post judgment
23 procedure. So that we want to know what the
24 forensic experts in the case, or the parties, or
25 the judge, has decided upon custody and the

1 Matrimonial Commission Hearing
2 disposition of parenting. How parenting will be
3 actually implemented. We want to know about that.
4 So in this way we don't have to argue with the
5 parties about the most contentious issues, but
6 rather, instead, bring to the parties the idea of
7 this predetermined parenting plan and then help or
8 assist the parties to implement that -- that plan
9 through a process of mediation and parenting at
10 all times. I've -- this is my own personal
11 belief, I don't know that everyone else agrees
12 with me, but I believe that we have a -- an actual
13 obligation to try very hard to teach parties that
14 there could be a right answer, there could be a
15 wrong answer, but the thing that's really the
16 worse thing at all is the conflict itself in terms
17 of what it does to the children, the psychological
18 damage that it does to the children, and, of
19 course, as well as parties.

20 So, at any rate, uh, parent coordination is a
21 post judgment issue, as far as I'm concerned. I
22 -- I do believe, and I wrote in my document that I
23 provided to the Commission, uh, my belief that
24 cooling off periods before judgment could be done
25 privately without affecting or impacting the due

1 Matrimonial Commission Hearing
2 process rights of the litigants because it could
3 be kept confidential so it would not go into the
4 court record, to give them every single
5 opportunity to work with experienced, qualified,
6 motivated, passionate, indeed, professionals who
7 could teach civility, problem solving,
8 co-parenting, mediation, compromise, all of the
9 skills that go into other divorced families that
10 are functioning appropriately. Divorced families
11 that are functioning appropriately have those
12 skills, and they seem to do just fine with them.
13 It's that small percentage of the very high
14 conflict ones that don't have those skills that we
15 would like to try to affect.

16 HON. SONDR A MILLER: Would -- why wouldn't
17 you want that process to begin at the inception,
18 when the divorce is first commenced?

19 ROBERT HAVLICEK: Well, truthfully, your
20 Honor, I would like it to happen, but there is a
21 feeling -- I'm being very truthful now, there's a
22 feeling in our group that -- that it's bet -- we
23 believe that we should seek the direction of the
24 Court first, or the parties, directing us as to
25 the -- the issue of perhaps custody, the issue of

1 Matrimonial Commission Hearing
2 what the parenting plan could be. That is a
3 conservative position that many of the members of
4 my association have. There are others that
5 believe we should try to use these same procedures
6 prejudgment, but the -- I suppose the belief is --
7 is that -- that we would -- we would feel safer
8 and more secure if the forensic psychologist that
9 made the recommendations to the courts gave us a
10 plan, the judge orders the plan, the parties agree
11 -- or the parties agree to the plan, then we work
12 on it. My -- I'm sorry.

13 HON. SONDRRA MILLER: Of course, we hear about
14 all of the trauma and hostility and, uh,
15 intensification of the anger that goes on during
16 the process itself. Uh, so that the question
17 really is wouldn't it be helpful to have this kind
18 of approach directed to the parties before they
19 went through all of the aggravation of the
20 process.

21 ROBERT HAVLICEK: There's no question, your
22 Honor, that I do agree with that. I'm just
23 telling you that there's a very conservative view
24 that we need direction from the Court at this
25 point. Parent coordination, as practiced in other

1 Matrimonial Commission Hearing
2 states, does have the prejudgment aspect that
3 you're referring to, and I'm sure it's -- it's
4 fine. I see really no problem with it. But,
5 there's -- it's a conservative -- this is a very
6 new thing, and I think that the feeling of the
7 group -- of the approximately 20 or 25 individuals
8 that I'm working with, Judge Ross is -- is aware
9 that we're working on this -- uh, the feeling of
10 the group is that we should really not expand our
11 horizons beyond the security of -- of the
12 conservative position in trying to implement it.
13 As much as I believe, very, very firmly, that we
14 should try to make prejudgment intervention so
15 courts might want to do that in a way that doesn't
16 limit the -- the due process rights of the
17 litigants. And, your Honor, even in thinking
18 about that, in the jet plane in coming here I had
19 a little bit of an insight that I wonder, uh, when
20 -- when -- when you think about the legal concept
21 of due process, does that also imply the fact that
22 the parents, who are going through this stressful
23 process may not be able to fully appreciate their
24 options in the system, which may limit their
25 ability to really fully understand and appreciate

1 Matrimonial Commission Hearing
2 their due process rights. Which is an argument, I
3 would say, in favor of a calming down period and
4 in favor of intervention to enable the parties to
5 work helpfully with one another to try to calm
6 down and think about it. There's almost always a
7 solution. There's almost always a solution. But,
8 of course, the parties don't -- one or both
9 parties may not want to opt for that -- that
10 solution, wanting to win. I hope that that
11 explains it. I just would like to make a few
12 other remarks if I might, your Honor.

13 HON. SONDRRA MILLER: Please go on.

14 ROBERT HAVLICEK: This issue of parent
15 coordination, case management, therapeutic
16 intervention for problematic visitation, things
17 I've written about that are on my website, if any
18 of you want to read about it, uh, are very
19 important issues. They offer real pos --
20 possibilities to help these families that are
21 going through the distress and turmoil to solve
22 their problems in -- in various different ways.
23 It has very strong implications for forensic
24 evaluation, something that I feel very, very
25 strongly about. I believe forensic evaluations

1 Matrimonial Commission Hearing
2 need to be improved. I believe that we can do a
3 better job, a much better job. One --

4 HON. SONDR A MILLER: How? How?

5 ROBERT HAVLICEK: Okay. First of all, I
6 believe that people who practice forensic
7 evaluations should be parent coordinators or at
8 least case managers or intervenors who know how to
9 work with families who are in the thick of it. So
10 if we don't have that gut level experience and
11 knowledge about how these people operate outside
12 of the forensic environment, we're probably not
13 going to do as good a job in drafting our reports
14 and putting our reports together. And, also,
15 we're not going to do as good a job in terms of
16 recommending specific interventions that might be
17 of assistance to the -- to the parents and the
18 children. So I -- I very strongly believe that
19 people who practice forensic psychology should
20 also have a lot of background in doing family
21 therapy and a lot of background in working with
22 couples who are going through divorce.

23 In addition, I believe very strongly that
24 forensic experts need peer review. I believe that
25 -- that -- that five years of experience doing

1 Matrimonial Commission Hearing
2 forensic reports is, to me, barely enough. I -- I
3 have been doing this for -- I don't even know how
4 many years, 20 years, 15 years, I don't know what
5 it's been, but my own feeling is that I'm still
6 learning. And one of the wonderful things about
7 this Parent Coordinators Association of New York,
8 that's forming now, is the fact that there is a
9 peer review process going on. We sit down, we
10 talk about our cases, then we ask for criticism.
11 Of course, that's happening in the context of
12 parent coordination, not forensics, but I think it
13 really should happen in both. And if we were
14 required to do peer review, to submit our reports
15 to other professionals who have more than five
16 years of experience, say, I think that would be --
17 enrich the process tremendously, in addition to
18 the other recommendation that I made.
19 Third one, I would say, is continuing
20 education. That I believe that it's -- the -- the
21 -- the responsibility of the forensic psychologist
22 has to shoulder is so important that unless we are
23 taking continuing education in domestic violence,
24 in substance abuse, in our own particular chosen
25 field, psychology, perhaps, that we're just not

1 Matrimonial Commission Hearing

2 going to be able to render the type of quality

3 reports that our clients and courts deserve.

4 HON. SONDRRA MILLER: Is it your position that

5 the forensic should give an opinion to the Court

6 as to the ultimate issue in the case of the

7 child's custody?

8 ROBERT HAVLICEK: Your Honor, I've always

9 read the order. If the order says to me to

10 provide a recommendation for custody, I just

11 obediently follow the order. That is my thought

12 on it. Whatever the judge wants is what I'll do.

13 Probably it -- my own belief is that it's probably

14 best that we don't. That I believe that we,

15 psychologists, and -- and, uh, uh, social workers,

16 uh, and other forensic experts, are very good at

17 doing things like testing, interviewing, uh,

18 talking to other professionals, obtaining lots of

19 information, uh, that can be used by the various

20 justices to reach their decisions. In my

21 experience I feel that when I finish one of my

22 reports, which are, by the way, extremely lengthy,

23 I'm frequently criticized for making them too

24 long, which to me is a compliment, they're a

25 hundred pages, they're 200 pages easily in length,

1 Matrimonial Commission Hearing
2 uh, I feel very strongly that the children deserve
3 that the expert provide the best and
4 state-of-the-art information to the justice system
5 so that the judge can be as informed as possible.
6 I -- I don't know what else to say about that, but
7 I believe that we really have a -- an obligation
8 to improve ourselves, to constantly learn, submit
9 ourselves to peer review, take continuing
10 education, uh, and, uh, also get our hands
11 involved in treatment.

12 HON. SONDRRA MILLER: Any questions from the
13 panel? Thank you very much.

14 ROBERT HAVLICEK: Thank you very much your
15 Honor. Thank you all.

16 HON. SONDRRA MILLER: Yes, we are breaking a
17 little bit early because we have had some changes
18 in our morning schedule. So please be back here.
19 We will reconvene at 1:30 p.m.. Thank you very
20 much.

21 (12:02 p.m. recess.)

22 (1:33 p.m. proceedings recommenced.)

23 HON. SONDRRA MILLER: I would just ask
24 everyone to turn off your cell phones. I'm about
25 to do that myself. I don't want to have any

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2 interruptions. And our very first speaker is the
3 Honorable Janice Rosa, Supreme Court Supervising
4 Judge.

5 HON. JANICE ROSA: Justice Miller, esteemed
6 members of the Commission, fellow colleagues,
7 thank you for the opportunity today to address
8 you. As Judge Miller said, I'm Judge Rosa, and
9 I've worn several hats over my 30-plus year
10 professional career. For the first 18 years I was
11 a card-carrying dyed-in-the-wool matrimonial
12 attorney and a member of the New York Academy of
13 Matrimonial Lawyers.

14 Nine years -- for nine years thereafter I had
15 the privilege of being on the Family Court bench
16 here in Erie County. And in that capacity, under
17 the leadership of Judge Townsend, now our
18 Administrative Judge, we created and implemented a
19 best practice model in the abuse and neglect arena
20 under the model court program.

21 Under the auspices of Judge Kaye's permanent
22 Judicial Commission on Justice For Children we
23 worked on improved, more efficient case management
24 of abuse and neglect cases. And it was in that
25 capacity that I went from distrustful to

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2 empassioned about the effects of mediation on
3 family disputes.

4 I've been on the Supreme Court bench for the
5 past two and a half years, and I've had the honor
6 to act as Supervising Judge for matrimonial
7 matters in the eight western counties of the
8 Eighth Judicial District. And, yes, that means I
9 get all the complaint letters, thankfully few and
10 far between, in this district.

11 Currently I'm presiding over Erie's Expedited
12 Matrimonial Part, which is a gatekeeper for all of
13 the contested matrimonial cases filed in our
14 county. We have reached about 17 to 18 hundred
15 cases a year, a number that's actually higher than
16 some of New York's Burroughs. Together with my
17 Law Clerk, and several referees, we conference all
18 cases. I hear and determine all the motions, and
19 we advance the cases from the early stages to
20 either settlement or referral to matrimonial trial
21 parts.

22 In the overwhelming majority of those cases,
23 70 or more percent each year, the matter is
24 settled in our part, and over 80 percent of all
25 the cases in our county are resolved within one

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2 year. I think commendable statistics.

3 What follows in my remarks is a potpourri, a
4 wish list, if you will, of matters large and
5 small, substantive and procedural, for the
6 Commission to consider. They come from my past
7 history and current experiences.

8 I hope the Commission will find these remarks
9 in tune with its stated mission to find ways to
10 reduce or eliminate trauma, expense and delay to
11 parents and children.

12 On the mundane level of the procedural I'll
13 only highlight a few points that I have in my
14 already prepared remarks that I've left with the
15 Commission.

16 I think the best way to save money in
17 matrimonial matters is to save attorney's time.
18 In this region of the state incomes are modest,
19 many jobs are downsized or lost, and what seems
20 like a growing number of divorcing couples are
21 facing not only divorce, but also unemployment or
22 bankruptcy.

23 I will highlight just a few of the thoughts I
24 had. One was to implement the recommendations
25 made by Justice Silberman in 2000 for an automatic

1 Matrimonial Commission Hearing
2 restraining order issued at the time of the filing
3 of the RJI. I've attached a copy of that to my
4 prepared remarks. It was created by one of my
5 predecessors as a pilot, with input from our Bar,
6 and it stuck. It has spread, and without even any
7 active promulgation, to several other counties.
8 Removing this order might result, I fear, in a
9 revolt by the practicing Bar, because it restrains
10 the dissipation of assets, or arbitrary custody
11 changes, and eliminates the need for many motions.
12 Its usefulness is in what it reduces, attorney
13 time, thus costs. Despite some enforcement
14 limitations, its deterrent effect cannot be
15 overstated. I would also suggest some rule
16 changes in terms of fast tracking relocation
17 trials, with time lines such as exist for other
18 kinds of cases in Family Court, and for custody
19 appeals, where Appellate Courts could implement
20 some of the accelerated preferences that, for
21 instance, our Fourth Department, under the
22 guidance of Judge Pigott, provides for our abuse
23 and neglect cases in this department.
24 For contempt I would consider aligning the
25 statutory powers available to Supreme Court

1 Matrimonial Commission Hearing
2 justices to the swifter, more time sensitive
3 powers now available to Family Court judges in the
4 enforcement of support obligations, expanding it
5 to pendente lite and post-judgment relief. The
6 current Judiciary Law restrictions act as
7 impediment to swift enforcement of Supreme Court
8 divorce litigation.

9 With respect to the Note of Issue, I would
10 question how useful it is as a -- as a filing
11 requirement, and if there's a better way to get
12 around it, since if we follow the rules as
13 envisioned by the matrimonial rules, a divorce
14 case is judge-driven in its case management, and
15 we should be setting it and determining when it's
16 trial ready.

17 Judges handling matrimonial cases should be
18 invested in the cases. That's tough. There's a
19 large burnout. I don't speak out of school. I
20 think everybody knows it has a lot of
21 difficulties, as domestic violence criminal parts,
22 or as our integrated domestic violence parts have.
23 It comes with -- the specialty comes with a
24 certain trauma.

25 I would suggest that we expect all of our

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2 judges handling divorces cases to have training in
3 domestic violence, matrimonial case management,
4 case law, as well as opportunities for state of
5 the art training for professionals that exist
6 around the country.

7 I would suggest greater assistance for
8 referees and JHOs.

9 With substantive issues I will comment that I
10 think with equitable distribution it might be
11 interesting to consider the power to order, where
12 the grounds for divorce are not in contest, an
13 advance on equitable distribution to permit a
14 disadvantaged party to stay the course against a
15 monied spouse. Nonmonied spouses need counsel
16 fees, to be sure, but they also need economic
17 independence, particularly in domestic violence
18 cases.

19 With respect to fault and grounds, it is
20 beyond the time, I believe, for a true no fault
21 divorce statute in this state. As you know, sadly
22 we are the last state of 50 to take this step.
23 Thousands, perhaps millions of dollars could be
24 saved in not litigating grounds. Even our
25 conversion divorce statute is not a no fault easy

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2 route to divorce. It's not uncommon for a
3 defendant to use that litigation to seek
4 modification of the agreement's terms or to
5 attempt to do so, again increasing costs for all.

6 While I have heard, as have you, that grounds
7 is the only bargaining chip available for DV
8 victims, I have, in fact, in my practice on the
9 bench, more often seen the reverse. Isn't the
10 domestic violence victim actually the one trying
11 to escape the assaulter? All too often I witness
12 a clever, nonphysically violent offender, often a
13 successful business person, who can use economic,
14 emotional and psychological power and control
15 techniques over his victim to extract a price for
16 her freedom. It is just another battlefield for
17 the woman seeking to escape an unequal
18 relationship, I think a debasing hurdle to jump
19 before assets can be distributed. It is nothing
20 less than financial blackmail in my courtroom.

21 Is it any surprise then that a national study
22 has revealed that the homicide and suicide rates
23 for women were reduced in those jurisdictions
24 where no fault divorce was a possibility and was
25 in place?

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2 Under those facts an argument could be made
3 that New York's present fault-based statute is
4 unhealthy for domestic violence victims, and I
5 would most strongly urge the Commission to push
6 for legislative change in that regard.

7 For attorneys under our present system I see
8 access to justice in the divorce court denied to
9 the poor, the working poor, and the low and middle
10 income families, and particularly the moneyless
11 victims of domestic violence, where there's
12 virtually no opportunity for legal counsel.

13 I have no fiscal solutions to suggest, but
14 perhaps New York could give attorneys who are Part
15 36 participants relief from the current monetary
16 cap provisions for those matrimonial cases they
17 take pro bono or reduced in fee.

18 For Law Guardians the overwhelming number of
19 Law Guardian appointments in this region are for
20 state pay appointments, with rates set by statute.
21 There simply are not the excesses that have
22 resounded in the downstate press. Those numbers
23 that we hear, are quite frankly, incomprehensible.
24 Most of the vouchers I sign are under \$1,000, and
25 many Law Guardians provide unpaid services

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2 afterwards.

3 In those private pay situations and in my
4 present capacity in the expedited part, I suspect
5 I appoint more of those in this department than
6 most other judges, but even those appointments are
7 nearly always under \$5,000, and most are in the
8 two to \$3,000 range total.

9 Again, the numbers mentioned in other reports
10 to this Commission must be considered in the
11 context of the whole, not to minimize the need to
12 address them, I urge the Commission to tailor its
13 responses to recognize the sheer overwhelming
14 number of appointments that do work and that are
15 modest in scope and pay.

16 I recognize that the appointment of a Law
17 Guardian in the case raises the ambivalence and
18 uneasiness of the specialized matrimonial Bar. I
19 was one of them, and I recognize that. We often
20 had good client control and good case management,
21 and we didn't want another person to come in as a
22 factor in the negotiations and in the progress of
23 the case. But after a dozen years on the bench, I
24 believe the appointment of a Law Guardian is
25 appropriate in many, if not most, of those cases

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2 involving custody.

3 Law Guardians have acted as whistleblowers
4 for parents who may both be engaged in drug
5 addiction behavior and not interested in telling
6 the Court. Often it will be the Law Guardian,
7 particularly with young children, who can champion
8 them when no adult will do so in the courtroom.

9 With respect to mental health reports, as
10 with Law Guardian appointments in this region,
11 perhaps most of the state, the average cost of a
12 custodial evaluation by a psychologist or
13 psychiatrist is at or around \$3,000, sometimes
14 more if testimony is taken. I've reviewed a
15 national study that noted that nationally the
16 average cost for such experts is \$3,000 per case.
17 Even these most modest amounts are prohibitive in
18 cases, and, frankly, we do without them then.

19 While excesses must exist, I urge the Commission
20 to enact rules that exist for the majority around
21 the state, with only a small percentage that need
22 to be addressed.

23 I wholeheartedly endorse the notion of
24 credentialing and training rules similar to those
25 in those states whose experience provides us with

1 Matrimonial Commission Hearing
2 a handy source for adoption. As with parent
3 education programs, we should be able to set up
4 the parameters for what judges do and do not
5 accept as appropriate work for what's presented to
6 us. I think evaluators need more training on the
7 effects of domestic violence and the legal aspects
8 of what we have to use in making a custody
9 determination.

10 Now I will tread onto what may be sacrosanct
11 waters and declare that I am comfortable with
12 considering recommendations from custodial
13 evaluators. I know this isn't an impeachable
14 offense, though it maybe unpopular. Why do I say
15 this? For several reasons.

16 Over 30 years I've reviewed hundreds or more
17 reports, I've been through many trials of them,
18 and I have to say that I've been impressed with
19 their unique frame of reference that they bring
20 when making a suggestion or when they give their
21 reasons behind their choices. I learn from them,
22 and I become a better judge.

23 Just because there isn't hard scientific data
24 to support a professional's experience doesn't
25 make the experience wrong or incorrect or

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2 discredited. What makes it wrong is a slavish,
3 lock-step adoption of the recommendations. When I
4 try a case I always ask a parent what their
5 suggestion is, what recommendations they have, and
6 they have opinion to give. I accept it, and I
7 give it certain weight. Similarly, I should be
8 able to receive the suggestions from a
9 professional in this area and give it what weight
10 I will, depending on the reasoning behind it.

11 I would suggest to the Commission that it is
12 in the credentialing of evaluators that we begin
13 to eliminate some of the shoddy workmanship and
14 unreliable results. I think it's rather demeaning
15 that a judge cannot be trusted to sift fact from
16 unsupportable suggestions on the bench in a
17 report.

18 I must say that however strong the argument
19 against forensic recommendations is made, and it's
20 certainly a northeast origin, it has not, to my
21 knowledge, been embraced as the accepted position
22 of the mental health profession. It's an ongoing
23 discussion in a cross-professional organization
24 such as the AFCC. I would suggest to the
25 Commission that we make no broad sweeping changes

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2 until dialog ends and all sides have been heard.
3 I think it's premature.

4 One highly experienced matrimonial judge and
5 former AFCC President spoke at last year's
6 conference for all of us -- for many of us when he
7 commented that he was in a matrimonial case
8 routinely expected to consider evaluations and
9 appraisals of businesses, houses, and tangible
10 assets such as good will and the like. In all of
11 the parts of the matrimonial case he was expected
12 to consider the expert's opinion, and he was not
13 expected to take the raw data and observations and
14 form his own conclusion of the value of a
15 business.

16 I would add that here in our wonderland of
17 New York, where we routinely place hypothetical
18 values on professional licenses of every kind and
19 dimension, that we are expected to accept the
20 dollar figures of the economic experts, indeed, we
21 are prohibited from interjecting our own
22 conclusions. I cannot think of any more
23 speculative area than that which has been spawned
24 in professional licenses, yet we accept those
25 amounts without deviation therefrom, almost

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2 lockstep. Surely judges should be able to
3 consider the opinions of someone with professional
4 experience in the field of children. It is the
5 weight to be given that opinion that is ours to
6 determine. We do that every day. Let's keep our
7 common sense.

8 In my closing comments I'll endorse the
9 comments that you heard on every place that you've
10 sat: Mediation and other ADR forms are -- are
11 techniques whose time has arrived. Once again we
12 have the benefit of lagging behind initiatives and
13 other locations, but by so doing we're able to
14 gather the best of the best and incorporate them
15 into court rules.

16 This win-win model of resolving cases serves,
17 I think, the Commission -- the mission of the
18 Commission. It reduces trauma, reduces expenses,
19 reduces delays. Mediation not only changes the
20 litigants, it alters the players, the attorneys,
21 and the way they do business, and to the better.

22 Litigation is structured, stifling,
23 intimidating, and by its nature and intent it does
24 not allow for a free flow of ideas. It's
25 controlled, measured and restrictive. It's a

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2 rarified place, the courtroom, where only the
3 judges and a handful of lawyers feel comfortable.

4 I come to you with a true confession about
5 mediation. Someone once referred to me years ago
6 as "hesitant" about taking it on, but it was
7 actually much uglier than that. I was silently,
8 covertly, resisting bringing it into my permanency
9 part in Family Court. I told my supervising judge
10 that it was really better suited to other parts
11 than mine. And why didn't I want it? You all
12 know the reasons. It's not what the legal process
13 does, we can do this just as good ourselves, and
14 the court is a part of mediation, so why would we
15 adopt it?

16 Finally, however, it was at my doorstep, and
17 I made a decision to accept it. But the decision
18 to embrace it took the stories of a few cases, the
19 requests of a few brave attorneys to ask for it,
20 and then to see for myself the results that
21 occurred. When I embraced permanency mediation,
22 and then shamelessly pushed others to try it, we
23 had finally put the adversarial process into a
24 field of integrity and respect. By insisting on
25 respect for all the players in the system

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2 unexpected and powerful changes were possible in
3 our court. Extraordinary results occurred, and I
4 was overwhelmed with the changes to people through
5 the power of a mediated settlement.

6 I think there's two classes of lawsuits.
7 One, for example, the personal injury case is like
8 a snapshot, and I tell this to my litigants all
9 the time, it's like a snapshot of a completed
10 event in the past. The parties' actions are
11 frozen, then sliced and dissected later in a
12 lawsuit. Our adversarial system seems to suit
13 this class of case rather well.

14 The second class is a matrimonial action.
15 It's much more like a docudrama, unfolding before
16 your eyes. Some days it feels more like a season
17 of "Survivor" or the opposite of "Who Wants to be
18 a Millionaire". It's not one event. It's a
19 dynamic, moving, family relationship, messy,
20 changeable, taxing and challenging. This class of
21 case cries out for a more respectful approach than
22 the way we presently have to offer by shoehorning
23 those kinds of cases into our strictly adversarial
24 process. It can be done with little resources,
25 more a change in attitude and emphasis.

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2 I urge the Commission to consider the
3 wonderful recommendations that have been made in
4 Judge Ann Pfau's Comprehensive Civil Justice
5 Program: Study and Recommendation. She has
6 gathered the best of the best practices around the
7 state, and I think that she's ready to move on
8 with that.

9 In Erie County we were part of that. We're
10 in the developing stage already of
11 institutionalizing child custody mediation in our
12 divorce cases, and we've had a healthy use of
13 mediation for years in our Family Court custody
14 and permanency parts. We've embarked on an
15 exciting chapter. There's no turning back. The
16 Commission can assist us and other counties by
17 recommending reforms to embrace these alternatives
18 statewide by court rule and then supporting with
19 whatever additional resources they have for the
20 courts.

21 In conclusion, there's a truth I know. In
22 our professional lives we may do different work,
23 we may do equally exciting work, but I do know
24 that we will never do better work than what we do
25 for the life of a child and his family. I really

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2 thank the Commission for its commitment to that
3 child's well-being and this opportunity to address
4 you all today. Thank you.

5 HON. SONDR A MILLER: Thank you. Judge,
6 please, would you wait? We have a few questions
7 for you.

8 What ancillary assistance could be useful in
9 your part?

10 HON. JANICE ROSA: Additional use of trained,
11 dedicated, interested court attorney -- attorneys
12 referees, who I suggested that in some of my
13 prepared remarks might even be given the power to
14 hear and determine what might be essentially Small
15 Claims Court kinds of issues, division of
16 furniture and furnishings, for instance.

17 HON. SONDR A MILLER: Any suggestion --

18 HON. JANICE ROSA: Social workers would be
19 another big part, because I think having a social
20 worker helps us eliminate the use of a lot of Law
21 Guardian and mental health evaluations.

22 HON. SONDR A MILLER: Any suggestions do you
23 have to decrease discovery-related motion
24 practice?

25 HON. JANICE ROSA: Our best antidote to that,

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2 I think, is Erie County is very aggressive
3 rescheduling, which, frankly, has been possible
4 because we make an active use of referees. We,
5 after preliminary conference, usually have only a
6 four to six week window before we have people come
7 back, and we are monitoring the identification,
8 classification and exchange of information; and if
9 there is a problem, we become very aggressive with
10 it. I would say this county, this district, it is
11 rare to have discovery motions. In the two and a
12 half years I think I've seen two, because we are
13 very aggressive in those conferences. If we think
14 there's any difficulty in exchange, we have people
15 right back in front of us.

16 HON. SONDRRA MILLER: What is your policy in
17 regard to the assignment of Law Guardians? In
18 what kinds of cases?

19 HON. JANICE ROSA: I -- as I said, I think
20 I've gone now to a point where I think Law
21 Guardians are appropriate in most cases. We don't
22 have a guardian ad litem practice upstate. I know
23 that's done downstate. I think the vulnerable
24 children need a Law Guardian at least as much as
25 those who can enunciate a desire, because it is

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2 those who can tell me, and I've had it happen,
3 that both these parents are using drugs. Uh,
4 there's -- there's problems with criminal activity
5 in the house, and no one's interested in telling
6 the Court, and they want to just sweep it under
7 the carpet. I have empowered people to file
8 neglect cases. If I didn't have a Law Guardian, I
9 never would have known that.

10 HON. SONDRRA MILLER: So you would appoint a
11 Law Guardian even if it was an infant, for that?

12 HON. JANICE ROSA: Particularly an infant.
13 Now, I will say this, if I had what appears to be
14 appropriate individuals, normal Mom, normal Dad,
15 normal -- normal dysfunctionists in a family, and
16 apparently two loving parents, the use of a Law
17 Guardian is -- is limited. Uh, they're not gonna
18 tell me very much.

19 HON. SONDRRA MILLER: Do you believe
20 matrimonial matters should be bifurcated, like
21 in -- for example, first grounds should be dealt
22 with and then custody and assets? In that order?

23 HON. JANICE ROSA: Frankly, in that order
24 seems to be the way, uh, the emotions of the
25 parties fall into place. Uh, I try very hard to

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2 have us multiple track cases. It's very common
3 that I will get a hot custody case coming into me,
4 and I will resolve that, but I find it takes a
5 large amount of direct eyeballing from
6 intervention from the Court to get the attorneys
7 and their clients focused on the finances so that
8 at least we can be having parallel tracks. When
9 the custody resolves, we do that. I've taken,
10 over the past couple of years to encourage
11 parenting plan agreements. I can put that piece
12 together and get it signed and sealed with the
13 same effect of a -- of a Property Settlement
14 Agreement. People relax, they can solve the
15 property settlement pieces, so oftentimes I'll
16 have two agreements that get incorporated into the
17 Judgment of Divorce, and I found that very
18 effective. The Law Guardians have liked that.
19 They also get out of the case faster. And we
20 don't have it malingering so long that the custody
21 they thought was resolved falls apart at the time
22 you get to the hard part of the finances.

23 HON. SONDRRA MILLER: About how many fault
24 cases were tried in the 8th District in the past
25 year, do you know?

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2 HON. JANICE ROSA: I don't have the specific
3 numbers, but Judge Peradotto has become our
4 empress of fault divorces. I think she said she
5 had tried at least seven in the last year, which I
6 would say probably, you know, we might be running
7 12 to 18. They usually don't go to trial, because
8 they're for an economic positioning.

9 HON. SONDRRA MILLER: Thank you again very
10 much for your help.

11 HON. JANICE ROSA: Thank you.

12 HON. SONDRRA MILLER: Miss Linda Henderson.

13 LINDA HENDERSON: Hello. First of all, I'd
14 like to thank the members of the committee for
15 giving me the opportunity to speak with you today.
16 I am not a professional in any field, okay?
17 Instead, my only experience is from that of a
18 second wife's perspective.

19 Until four years ago I had no idea what
20 Family Court was or what it was like to be a part
21 of it. I guess you could say I was naive to what
22 the rest of the world was dealing with, because,
23 you see, it didn't pertain to me.

24 I had no idea how much this new experience
25 would change my way of thinking.

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2 During the last four years I have stood by my
3 husband's side and watched him helplessly fight
4 for the ability to see his daughter. He has
5 always paid child support, provided insurance, and
6 gone above and beyond what the court order stated.
7 He simply wants to spend more time with his
8 daughter and has become totally frustrated by the
9 court system when they continuously do nothing to
10 help him achieve this.

11 He has a standard visitation schedule of
12 every other weekend, however, he has only seen his
13 daughter for 16 days last year and two days this
14 year so far. We have filed countless visitation
15 violations throughout the years and basically gone
16 from standard visitation to every other Saturday
17 for a few hours currently.

18 It seems the more he fights to see his
19 daughter, the more -- the more he fights to see
20 his daughter, the more he has taken away from him.

21 I don't understand how spending a few hours a
22 month is enough time for everyone to have a
23 meaningful relationship.

24 I don't understand how the courts can sit
25 back and treat him as if he has done something

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2 wrong by wanting to spend more time with his
3 daughter.

4 My husband has gone through court-ordered
5 counseling, along with his daughter and her
6 mother. Basically the counselor told him that he
7 needed to be the better parent, and in his report
8 to the Court stated that the mother does not
9 encourage the visits. She has openly criticized
10 him in his daughter's presence and done nothing to
11 encourage the father-daughter relationship, yet
12 the courts don't seem to recognize this or see the
13 importance of it.

14 I remember walking into the local Family
15 Court building for the first time and seeing
16 several posters in the waiting room promoting
17 fathers to support their children and become more
18 of an influence in their children's lives. In
19 this generation I believe fathers are trying to do
20 just that. But what happens to these same fathers
21 who are used to being a part of their children's
22 lives to simply have them ripped away through
23 divorce or separation? They then just become mere
24 visitors and sometimes nothing more than a wallet
25 in their children's lives. I know there are some

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2 parents who don't care and don't pay child
3 support, but all fathers should not be classified
4 dead beat and treated as such. Divorce has
5 increasingly become a free for all using whatever
6 means necessary to ensure the winner-take-all
7 mentality. Children are not property and should
8 not be used as bargaining chips. Since 93 percent
9 of custody is awarded to the mother, I believe
10 that shared equal parenting would eliminate the
11 need for the winner-loser status in custody
12 issues. Both parents would be considered equal
13 and share the responsibilities of raising their
14 children. Most custodial parents feel they hold
15 all the power, because they have physical custody
16 and use that against the noncustodial parent by
17 refusing visitation and such. There is nothing
18 done to the custodial parent for not encouraging
19 visitation or interfering with it. They are
20 basically given a slap on the wrist and told not
21 to do that again. Until they are held accountable
22 for their actions they will continue to do this
23 because no one will do anything about it. It is a
24 proven fact that children with both parents do
25 better academically, socially and psychologically.

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2 So how is it in the best interests of the child to
3 only have the influence of one parent in their
4 lives?

5 My husband and I do not want to see his
6 daughter become another statistic on what could
7 happen to a child by not having both parents in
8 their lives. The major concern from custodial
9 parents and those who don't support shared
10 parenting is what happens to child support. Isn't
11 it the responsibility of both parents to support
12 their children financially? Has money become more
13 than -- excuse me. Has money become more
14 important than our children having a loving
15 relationship from both parents?

16 In lots of cases fathers are living in
17 poverty and can't survive on what is left after
18 paying child support payments. What if they
19 eventually have another family they need to help
20 support? The Court is basically saying that the
21 first child is the only thing that is important
22 and the rest of your family doesn't matter. They
23 are forced to take second jobs, but what kind of
24 time does that leave for spending time with their
25 other children?

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2 What if the mother makes more money than that
3 father, yet her income is not figured into the
4 equation? Or what happens if the mother refuses
5 to work and collects state assistance for most of
6 the child's life, while the father works to help
7 support his child? What kind of example does that
8 set for our children? They too will learn how
9 easy it is to let someone else support you instead
10 of becoming a responsible adult. This should not
11 be about money, but instead giving our children
12 the love and support they deserve to become
13 independent successful adults.

14 Another concern I have is how parental
15 alienation is not really recognized by many courts
16 or counselors but continues to happen on a daily
17 basis. Children learn by example. If a custodial
18 parent continuously makes bad comments about the
19 other parent in the presence of their children, it
20 will eventually reflect the way the child feels
21 about the other parent.

22 I have heard comments made such as your
23 father doesn't love you any more, he has another
24 child that he spends all his money on, your
25 stepfather is your real father now. Imagine what

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2 goes through a child's mind hearing these comments
3 on a daily basis. How can a parent be so
4 vindictive that they can turn their own child
5 against the other parent? Children should not be
6 brought into the middle of this and forced to
7 choose one parent over the other. The only people
8 this ultimately hurts are the children, and more
9 needs to be learned about the devastating effects
10 this has on the child before the damage is
11 irreversible. This definitely takes a toll on its
12 family. It is hard enough for an adult to
13 understand how to cope with this difficult
14 situation, but how do you explain it to a
15 two-and-a-half-year old?

16 Our daughter loves her sister very much and
17 does not understand why she doesn't get to see
18 her. She always asks about her sister, tells her
19 how much she loves and misses her, excuse me, and
20 it breaks my heart when she cries after she
21 leaves. Holidays and family affairs are quite not
22 the same when you feel a part of your family is
23 missing. Every scheduled weekend seems to turn
24 into a drama, wondering what is going to happen
25 next. It becomes stressful and frustrating. I

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2 can understand why people think it is sometimes
3 easier to give up than to go through the
4 continuous heartbreak knowing the current system
5 is stacked against you.

6 New York, along with 12 other states,
7 currently do not have statutory language promoting
8 shared parenting. However, 21 states recognize
9 that it is important for children to have frequent
10 and continuing contact with both parents.

11 In addition, five states promote equal shared
12 custody through maximizing the time spent with
13 both parents. Some states have language that
14 suggests that custody be based on whoever is going
15 to encourage and facilitate a relationship with
16 the other parent. I believe now is the time for
17 New York to do something to help our families,
18 that is the reason why I'm here today, and I
19 commend Chief Judge Judith Kaye for holding these
20 hearings and recognizing that there are some
21 problems with our current system.

22 I hope that the information gathered from
23 these meetings will help make a difference so
24 other families do not have to go through what my
25 family has gone through. Thank you.

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2 HON. SONDRRA MILLER: Thank you very much.

3 Miss Lisa Cagney, please.

4 LISA CAGNEY: Good afternoon. I appreciate

5 being here today. I didn't expect to be here.

6 Uh, I didn't -- I've never attended something like

7 this.

8 I am a mental health therapist in Olean, New

9 York. I work for the Parent Education Program.

10 We service four counties in the southern tier,

11 Chautauqua, Allegany, Cattaraugus and then Wyoming

12 County. Uh, I'm currently a coordinator and a

13 facilitator for a family alternative resolution

14 program. This program provides an intensive

15 four-hour long class for parents and all that are

16 disputing custody and visitation agreements. I am

17 presenting how our educational class, with parents

18 that are appropriate, attending together, as

19 opposed to separately, address the concerns of

20 this hearing, which are limiting costs, minimizing

21 delays to the court system, and reducing trauma to

22 all the parties involved. Our program aids

23 limiting cost to individuals and to the Court.

24 Presently our program costs the court, the state

25 and the county zero dollars. It also reduces the

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2 cost for the Assigned Counsel program and also for
3 the Law Guardian program. It reduces the cost for
4 individuals who hire their own counsel. And the
5 psychological costs that it reduces, well, are
6 priceless.

7 It also minimizes delays, because the classes
8 can be attended if the parents are able to come
9 together before second appearances in Family Court
10 or prior to another matrimonial conference.

11 Trauma is reduced for all the parties
12 involved, the parents, and the children,
13 grandparents, neighbors, aunts, uncles, teachers,
14 anyone involved with the family.

15 Our staffs show for the past year and a half
16 that 85 percent of the participants communicate
17 satisfaction after attending the class and go back
18 to court with an agreement and a cooperative
19 parenting plan after attending the class together.

20 I will address the fact that domestic
21 violence issues need to be recognized, but not
22 only be the only contributing factor in regulating
23 programs and attendance policies for programs such
24 as ours.

25 I am hoping that this Commission may explore

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2 the benefits of parents attending the classes
3 together, have influence on up and coming
4 regulations, so that nonviolent parents are not
5 excluded from obtaining the maximum benefits from
6 programs such as ours. And I also hope that our
7 program can continue to aid the Court in limiting
8 costs, minimizing delays, and helping to reduce
9 trauma for all the people involved. Thank you.

10 HON. SONDRRA MILLER: Thank you very much.

11 Is Mr. Brian Kolb here?

12 Miss Anne Downey?

13 Not yet.

14 Is she here? Good.

15 ANNE DOWNEY: Good afternoon. I would like
16 to thank the members of the committee for their
17 efforts in examining important issues related to
18 matrimonial law in New York State. My comments
19 pertain to the issue of no fault divorce
20 legislation that some are proposing for our state.

21 I believe that New York's passage of no fault
22 divorce legislation would be harmful to the people
23 of this state for a number of reasons. First, no
24 fault divorce gives leverage to a spouse who wants
25 to leave the marriage. The spouse who wants to

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2 preserve the marriage is left powerless to prevent
3 its dissolution and has no recourse. This is not
4 an uncommon problem, as statistics indicate that
5 four out of five divorces are unilateral. Under a
6 no fault divorce system the spouse seeking the
7 divorce is able to terminate the marriage even
8 though the other spouse has done no wrong. Unlike
9 the situation under contract law generally, no
10 fault divorce rewards the defaulting party, rather
11 than the innocent party.

12 Second, when we pass a law to make something
13 legal, we give tacit approval to that thing. For
14 example, after Roe versus Wade changed the law of
15 abortion in our nation many people in our society
16 have come to regard abortion as a common and
17 unremarkable event. To the point where currently
18 in America statistics indicate that every three
19 out of five pregnancies among black women end in
20 abortion. If New York State adopts no fault
21 divorce legislation, our state will be sending the
22 message to the people of this state that divorce
23 is no big deal. Indeed, in other states that have
24 adopted no fault, studies show that the
25 elimination of fault from marital dissolution has

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2 led to an increase in divorce rates, perhaps as
3 much as 25 percent. At a time when our nation
4 ought to be working hard to preserve marriage,
5 adopting no fault divorce in this state will send
6 the wrong message.

7 Third, no fault divorce turns marriage into
8 an insignificant relationship, it cheapens
9 marriage. The institution of marriage becomes
10 little more than a temporary relationship, one
11 that is easily undone. Marriage becomes less
12 binding than the average business deal. One
13 national spokeswoman, a woman who has been forced
14 through a no fault divorce in the state of Ohio,
15 had these comments: No fault divorce makes people
16 think that a marriage just breaks. It makes
17 people think they have no responsibility for
18 repairing or working on their marriage. It's the
19 idea that if you decide your marriage isn't
20 working, or if it's not giving you the
21 satisfaction you expected, it's the normal thing,
22 it's almost the brave or heroic thing, to move
23 along. You can just try again with somebody else.

24 Fourth, a number of other states that have
25 allowed no fault divorce are now rethinking the

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2 beauty, quote, unquote, of the no fault system and
3 are considering ways to slow down the divorce
4 stampede. The devastating effects of the no fault
5 system in other states has led to a growing
6 support for restricting access to no fault
7 divorce. A 2003 poll indicated that 49 percent of
8 those surveyed said divorce should be harder to
9 obtain, only 26 percent said it should be easier.
10 Other states are considering and some have
11 implemented no fault divorce reform measures such
12 as covenant marriage, longer waiting periods, pre
13 divorce classes, and premarital counseling. In
14 several states we find even that legislation has
15 been introduced to re -- restore the fault
16 component of divorce. So much for the resounding
17 success of our society's --
18 HON. SONDRRA MILLER: Would you be kind enough
19 to tell us what study your statistics are derived
20 from?
21 ANNE DOWNEY: Quite a few. I do have the
22 backup material here. It would take me a few
23 minutes to piece through for each footnoted item.
24 HON. SONDRRA MILLER: Have you submitted your
25 backup material?

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2 ANNE DOWNEY: Uh, I have submitted a copy of
3 my remarks. I did not submit my backup. I would
4 be happy to do that.

5 HON. SONDRRA MILLER: Thank you.

6 ANNE DOWNEY: All right. After today would I
7 simply mail that to the Commission at the New York
8 City address?

9 WENDY DEER: White Plains.

10 ANNE DOWNEY: White Plains? Okay. Thank
11 you.

12 Fifth, no fault divorce is often tied into
13 the notion that a divorce is justified because of
14 irreconcilable differences. Such a system is
15 inherently flawed, because every marriage involves
16 irreconcilable differences. The question is not
17 whether a marriage involves irreconcilable
18 differences. The question is whether our society
19 is going to teach couples how to live together in
20 a long-lasting marriage despite the differences.

21 Six, no fault divorce ignores the fact that
22 all marriages go through seasons. Seasons of
23 marriage can change over time. If we were to look
24 out the window right now and see a person on the
25 ledge getting ready to jump, we would recognize

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2 that that person is probably currently
3 experiencing depression, and that with help that
4 person might get better, and we would encourage
5 that person to get down off the ledge. But under
6 the no fault divorce system a spouse can exit a
7 marriage rather quickly, even if that marriage
8 might have hope, with help. One writer noted that
9 in Connecticut a no fault divorce is routinely
10 granted 90 days after one spouse files the papers
11 and typically costs about \$250. And he suggested
12 that perhaps it is easier to get a divorce in
13 Connecticut than to break a cell phone contract.

14 Finally, our modern laws that propose to
15 tinker with the institution of marriage and to
16 facilitate divorce undermine a proven system that
17 has served as the foundation on which our society
18 is built. For thousands of years civilizations
19 and religions around the world have recognized
20 marriage as a unique relationship crucial to the
21 well-being of society. Through strong marriage
22 laws and by restricting divorce, societies have
23 strengthened the basic building block of society,
24 which is the family. The family is the primary
25 institution through which children are raised,

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2 nurtured and educated, and marriage is the
3 cornerstone of the family. Yet in our, quote,
4 enlightened, modern view do we think we know
5 better than the earlier societies? But if we look
6 at the experience of the other states that have
7 embraced no fault, we see that they are reaping
8 the results of their experiment, broken families,
9 children impacted by revolving-door marriages in a
10 nation where many individuals no longer understand
11 what it takes to sustain a long-term marriage.

12 In conclusion, I urge the members of the
13 committee to do all within your power to
14 strengthen marriage in New York State and to work
15 against implementing the failed experiment called
16 no fault divorce. Thank you.

17 HON. SONDR A MILLER: Thank you very much.

18 Mr. Brian Kolb. Assemblyman.

19 BRIAN KOLB: Good afternoon everyone. My
20 name is Assemblyman Brian Kolb, and I represent
21 the 129th Assembly District in New York State. It
22 is the combination of the Finger Lakes, the
23 central New York region. I did not prepare
24 written remarks today, but I would be more than
25 willing to submit some additional written comments

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2 to the Commission later on.

3 A couple things. First of all, I wanted to
4 address you from a person that has experienced
5 life, uh, in the matrimonial court system, if you
6 will, and this dates back to, uh, 1990, 1991, and
7 share a couple personal experiences in -- in my
8 view of custody and visitation. And, quite
9 frankly, uh, why I've been -- why I'm here today
10 in talking about, uh, my children, and what
11 happens sometimes in the court system, and that
12 the interests of the children aren't looked out
13 for.

14 Uh, I can tell you today that I enjoy a very
15 great relationship with my three children and my
16 former spouse. It took a long time to get here,
17 uh, but what happens is that when you get involved
18 in divorce proceedings that can be acrimonious at
19 times, it's a very, very difficult process for
20 everyone involved.

21 And in my particular case what I -- I felt in
22 terms of talking from the heart to me is more
23 important in trying to make speeches. And
24 certainly what happened to myself and my former
25 spouse and my children, you know, is a very

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2 difficult experience and something that I would
3 not like to see other families go through.

4 Uh, when even just using some of the
5 terminology that's used in -- in our courts and in
6 the legal system when we talk about myself as a
7 parent and that I'm going to visit my children,
8 instead of having shared parenting time. Uh, some
9 of the nomenclature is a great example of the
10 preconceived notions that the court systems look
11 at, and the lawyers, and the judges, in terms of
12 not necessarily, uh, what really is in the best
13 interests of -- of the children.

14 My matrimonial or divorce agreement was very
15 specific in terms of the time I was supposed to
16 spend with my children, uh, how much money I was
17 supposed to pay in terms of support, uh, and all
18 of that, there was very specific, but there was
19 really no mechanism in place to ensure that after
20 we've gone through the Court system, uh, that my
21 time with my children was to be encouraged, and
22 that to try to take into consideration that there
23 could be legitimate, shall we say hostile feelings
24 as a result of going through a divorce proceeding,
25 which was in the case of mine. And that's why,

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2 you know, I'm passionate about speaking to you
3 about this, as painfully I lost a lot of
4 opportunity to spend time with my children at a
5 time that they needed me. And as two adult
6 parents, we were having our difficulties, and in
7 spite of all that I -- I felt still, uh, I was
8 almost looked upon as the, uh -- the evil person
9 when it came to the court system, and because
10 nothing was more important to me than my children.
11 And so, uh, one of the things I wanted to mention
12 to you is that I've actually just recently
13 introduced legislation that I am amending that I
14 would like this Commission to at least take a look
15 at, uh, as far as reference information and that's
16 bill number A6670, and one of the things that I
17 want to emphasize is that this isn't about, uh,
18 men or women in a matrimonial proceeding, this is
19 about parents. And this is not about having ill
20 feelings about the system. It's just experiences
21 that I went through, uh, that, quite frankly, even
22 today my children still talk about that they're
23 very disappointed that there wasn't a mechanism in
24 place to try and remove some of the hostility, uh,
25 out of -- out of the opportunities for me not only

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2 to spend time with them, but to share in their
3 life. I couldn't find out, uh, couldn't get
4 copies of their report cards. Uh, I was not, when
5 I dealt with the school system, it was a school I
6 graduated from, they all knew me. They knew I
7 wasn't a violent person, or there was no issues of
8 abuse, or anything like that. It was like, uh,
9 you know, I was not allowed to share in my
10 children's life in school, to follow up to see if,
11 you know, what was going on, were they doing their
12 homework, how were they coming with their grades?
13 I wasn't even allowed to find out from a health
14 perspective if they were doing okay, either
15 physically or mentally. And to me, uh, our whole
16 court system, at least it was ten years ago for
17 sure, uh, looked at me as -- as because, I think
18 there's a normal supposition that the Mom is the
19 better person and -- and if she's got custody then
20 my rights as a parent become secondary. And all
21 I'm saying is I'm not looking for you to, uh, to
22 look at joint custody issues from the standpoint
23 of having that as the mantra, I'm just looking at
24 the type of nomenclature that were used in terms
25 of looking at this as a shared parenting

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2 responsibility, that I have just as much of an
3 equal interest in my child's development as the
4 mother is, and I know this goes both ways, uh, I
5 can even talk to you from, uh, constituents that
6 have contacted me, uh, when they're dealing with
7 child support orders, and all of that, that there
8 is not a, what I call balanced view when dealing
9 with what's in the best interests of the children.

10 And all I'm really trying to emphasize is
11 that I'm just interested in what's in the best
12 interests of the children. Uh, my children are
13 all in their twenties now, but I'm looking forward
14 to see if there's anything I can do to help those
15 families that, uh, will go through this
16 experience, which is unfortunate, uh, in New York
17 State. Uh, and I know it's a short period of
18 time, so I'm trying to throw some bullet points
19 out to you as well.

20 Uh, when we were dealing with the actual
21 child support situation, the income and al -- what
22 was put in law, uh, was in terms of income and how
23 it was to be determined in terms of my obligations
24 in terms of paying child support. Again, I have
25 no problems if you got the financial means and,

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2 again, what's in the best interests of the
3 children, uh, but it was calculated on gross
4 income, and, uh, not my net disposable income. As
5 you know, in New York State, the federal
6 government takes a fair share of your gross income
7 in terms of taxes. Uh, and, quite frankly, uh, I
8 had a temporary order in terms of my payment
9 obligations just for basic food, living and
10 subsistence. And my combined obligations in my
11 child support and maintenance support I was
12 actually paying out more money than I made. And I
13 know that sounds kind of crazy, but it actually
14 happened. Uh, my divorce attorney, who was -- had
15 spent over 20 years in the business said Brian
16 this is the worst judicial ruling I've seen in all
17 my time in the courts. That didn't -- that didn't
18 help. Again, I'm not here to complain, I'm just
19 saying there's problems there, and I'm not alone.
20 And -- and hopefully that you'll look at some of
21 these situations as real life, uh, uh, situations.

22 In my bill specifically we're trying to
23 address many of these areas that tries to bring in
24 third parties to not necessarily arbitrate, but to
25 certainly take a look at the family situation,

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2 talk to the mother, talk to the father, talk to

3 the children, but someone that shall we say --

4 HON. SONDR A MILLER: Assemblyman, excuse me

5 for interrupting --

6 BRIAN KOLB: Sorry.

7 HON. SONDR A MILLER: -- but could you tell us

8 specifically what your bill provides?

9 BRIAN KOLB: Well, uh, let me, uh, if I can

10 just summarize it, because I know I'm on a time

11 limit. I apologize.

12 HON. SONDR A MILLER: Right.

13 BRIAN KOLB: In essence, I'll give you the

14 summary of the provisions, which basically that in

15 cases of child custody the Court's paramount

16 concern is always the best interests of the child.

17 Shared parenting where both parents share as

18 equally as possible in the legal responsibility,

19 living experience, and physical care of the child

20 has been found to be in the child's best interest.

21 Where the relationship between the parent and

22 children is free from domestic abuse, violence,

23 neglect and other harmful circumstances, shared

24 parenting is beneficial to both parents and

25 children.

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2 And this legislation seeks to encourage
3 courts and interested parties to work towards the
4 goal of shared parenting whenever practical and
5 when in the best interest of the child.

6 And what I will do, because there's a lot of
7 provisions in the bill that deal with some of the
8 points I was just talking about, uh, that I will
9 supply a printed version of the bill and some
10 additional comments. And I'm sorry for not
11 bringing this to you in person in terms of final
12 bill version, because it's being amended as we
13 speak, because we're trying to, uh, take
14 everybody's consideration in terms of what prior
15 objections would be to changing the law.

16 HON. SONDR A MILLER: We appreciate that.
17 Thank you very much, Assemblyman.

18 BRIAN KOLB: Okay. Is there anything else
19 that you wanted me to add?

20 HON. SONDR A MILLER: Thank you.

21 BRIAN KOLB: Okay. Thank you very much for
22 your attention.

23 HON. SONDR A MILLER: Mr. Robert Elardo.

24 ROBERT ELARDO: Good afternoon. I'm Bob
25 Elardo, and I'm the managing attorney for the Erie

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2 County Bar Association Volunteer Lawyers Project,
3 and I wanted to talk to you today briefly about
4 two subjects. Uh, the first one is the one that
5 I'm gonna spend most of my time with, and it has
6 to do with unequal treatment of litigants in
7 Supreme Court, uh, as compared to if the same
8 litigants were in Family Court or Surrogate's
9 Court. And it's the subject of an article that I
10 wrote for the Fordham Urban Law Journal in 2002
11 that was for a special edition of that journal
12 that dealt with access to justice issues that came
13 out of a conference that Judge Juanita Bay Newton
14 convened on access to justice issues. And I've
15 submitted several copies of the article, uh, for
16 you to see some of the more details. So I'll be
17 kind of brief.

18 First, as you may know, the Family Court Act,
19 sections 261 and 262, set up a system for
20 litigants, low income litigants to get assigned
21 counsel, which is paid for, uh, by the county.
22 And section 261, in fact, says that the types of
23 cases involved, child custody, visitation,
24 termination of parental rights, and several
25 others, are so fundamental that there's a

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2 constitutional right to counsel in such
3 proceedings. That was -- that, uh, statute was
4 enacted in 1975, and two years later the
5 Surrogate's Court Procedure Act was amended, uh,
6 to include those same protections in Surrogate's
7 Court. And there was a recognition that, uh,
8 there was an inequity, a problem that needed to be
9 resolved. In fact, the sponsor of the bill in the
10 Senate, Senator Pizzoni, wrote, "Inexplicably, the
11 statute" -- referring to the Family Court Act,
12 261, 262 -- "failed to recognize that in
13 proceedings such as adoption proceedings and some
14 proceedings for termination of parental rights,
15 the Surrogate's Court has concurrent jurisdiction
16 with the Family Court, and it did not extend the
17 right to counsel to such proceedings in that
18 court. As a conforming, if not constitutionally
19 required change, this bill affects the necessary
20 conforming amendments to include Surrogate's
21 Court."

22 Unfortunately, there's no statewide clear
23 rule about Supreme Court. And although many
24 people, uh, including myself, would say that the
25 Supreme Court can exercise all of the powers that

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2 the Family Court or Surrogate's Court has, uh,
3 it's not the way that it happens in practice. In
4 preparing for this article, with the assistance of
5 Judge Newton's staff, a survey was sent out to
6 representatives of the courts in all 62 counties
7 and 39 -- excuse me, 36 of them actually
8 responded, and we found that in 29 of the counties
9 they said there was no mechanism in place for
10 assigned counsel, uh, for family law litigants in
11 Supreme Court. In three of them they said that
12 there was -- there was a system in place. In
13 four, including Erie County, uh, it really depends
14 upon factors, whether you're having a chance to
15 get an assigned counsel if you're in Supreme
16 Court. And that's really been the experience for
17 legal services programs around the state. That --
18 that there's not much hope. Sometimes you can get
19 it, sometimes you can't. There are two reported
20 cases on this issue, one an opinion by Justice
21 Pine in *Borkowski versus Borkowski* from 1977
22 Steuben County, a very excellent decision where
23 she says the Supreme Court can exercise any of the
24 powers of the Family Court, and she went on to
25 assign counsel, uh, uh, to a low income defendant

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2 in a divorce case, not for the divorce, but just
3 for the custody issue in the divorce case.
4 Uh, however, in 19 -- late '90s, a legal
5 services program in Long Island brought a series
6 of -- of cases, series of motions requesting
7 assigned counsel at 11 different cases, uh, where
8 the low income person was facing custody issues,
9 and in five of them the counsel was appointed,
10 three of them the case was transferred to Family
11 Court, which is one way the courts handle this
12 issue. Uh, a couple of others it was found to be
13 moot for different reasons. But the only
14 published opinion was uh McGee versus McGee by
15 Justice Oliver in 1999, and in that decision,
16 although he said that there was the right, the
17 power to appoint, he went on to say that it was --
18 it was an inappropriate case to -- to do so,
19 and -- but the decision, if you read it, really
20 makes it seem like, uh, that particular judge
21 would never find a case that was appropriate to --
22 to, uh, appoint counsel. And this is a problem
23 that is especially important when the low income
24 litigant is the defendant or respondent in Supreme
25 Court, they have no choice of forum. And

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2 especially if the monied spouse has hired an
3 attorney, made the decision to go to Supreme
4 Court, the -- the low income litigant ends up
5 there and has often little or no chance of getting
6 the assistance of an attorney through the assigned
7 counsel system.

8 Uh, and what I would ask this Commission to
9 -- to look at is the possibility of a clear
10 statewide rule, which says what I believe the law
11 is, that the Supreme Court has the power to make
12 the appointments under the authority of 261 and
13 262 of the Family Court act or section 407 of the
14 Surrogate's Court Procedure Act.

15 HON. SONDRRA MILLER: Thank you very much.

16 ROBERT ELARDO: You're welcome.

17 The second point I just wanted to address
18 real quickly is -- has to do with divorces. Uh,
19 there are -- I'm in a program where we get lawyers
20 to -- like Pat O'Reilly to -- to volunteer as --
21 as pro bono attorneys taking cases for our low
22 income clients, and we have increasingly higher
23 demand and are less able to meet that need in the
24 divorce area. Other programs like Neighborhood
25 Legal Services and Legal Aid are -- because of

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2 funding cuts are able to take fewer and fewer
3 clients. And what I would really urge the
4 Commission to -- to seriously consider is a very
5 sim -- much simplified system of divorce for
6 simple divorces. And by that I mean ones where
7 there are no minor children or the issues of
8 custody, visitation and support are already
9 covered by orders, existing orders, and where
10 there are no valuable assets that the Court needs
11 to be involved in, no houses, no pensions, no
12 other valuable assets, perhaps, uh, some threshold
13 amount of -- of total assets, uh, so that our
14 clients that we're seeing that we're having to
15 turn away today that we can't help them get a
16 divorce have a way to -- to get the case through
17 the courts to -- to be able to get the divorce and
18 go on with their lives. Thank you.

19 HON. SONDR A MILLER: Thank you very much.

20 Miss Sharon Nosenchuck.

21 SHARON NOSENCHUCK: Good afternoon. My name
22 is Sharon Nosenchuck, and I am a staff attorney at
23 Neighborhood Legal Services. I'm also a member of
24 the Erie County Bar Association's Matrimonial
25 Committee.

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2 At Neighborhood Legal Services I represent
3 clients, low income clients in Family Court
4 matters and in Supreme Court divorces.
5 Neighborhood Legal Services is the largest
6 provider of civil legal assistance to low income
7 clients in Erie, Genesee, Niagara, Orleans and
8 Wyoming counties. I am based at our agency's
9 offices here in Buffalo and deal with clients from
10 Erie County.

11 I would like to thank Chief Judge Kaye, all
12 the members of the Matrimonial Commission, for
13 undertaking the challenging task of reforming
14 matrimonial practice in New York State.

15 Today I would like to focus my remarks on an
16 area of concern that is very important to the
17 citizens of this area and to New York State as a
18 whole, the denial of the access of justice in
19 matrimonial actions to the poor, the working
20 class, and the middle income.

21 In addition, domestic violence victims, also
22 socioeconomic strata, are often very victimized by
23 our complex matrimonial system.

24 As you know, in New York State there's no
25 right to counsel for litigants in divorces.

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2 Theoretically, those who cannot afford competent
3 representation in matrimonial matters can proceed
4 pro se, or, if they are eligible, obtain
5 representation for free through a legal services
6 or Legal Aid office.

7 Due to the complexity of our matrimonial
8 system in New York State it is very difficult, if
9 not impossible, to represent yourself in divorce
10 and appear pro se. Although there is a packet
11 available from the court system for those who want
12 an uncontested divorce, if the papers in the
13 process are not prepared and followed correctly,
14 the papers are rejected by the Court.
15 Inexperienced attorneys have a hard time preparing
16 these documents in a manner acceptable to the
17 courts. For a layperson it is almost impossible.

18 In contested divorces it is even harder for a
19 layperson to appear pro se. While in Family Court
20 the Court prepares the petitions and orders for
21 litigants or makes forms available to them, in
22 divorces in Supreme Court the parties themselves
23 are responsible for document preparation. Without
24 the help of an attorney a pro se litigant can get
25 lost in the complex procedures of matrimonial

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2 matters.

3 In legal services offices throughout the
4 state the demand for divorce representation far
5 exceeds the resources available.

6 For example, in the last year, with very
7 limited intake, Neighborhood Legal Services in
8 Erie County had more than 1000 requests for
9 divorce representation. We were only able to
10 approximately represent 250 divorce clients. Over
11 the last several weeks we have experimented with a
12 new more open intake system. Preliminary
13 indications show that the actual demand for
14 divorces through our office in Erie County
15 approaches two to 3,000 requests per year. This
16 demand for representation occurs at the same time
17 when recent funding cuts severely limit the amount
18 of divorce clients that we can represent this
19 year.

20 Due to these funding cuts we cannot even
21 provide representation to the same amount of
22 divorce clients that we represented last year.
23 This year we will not even be able to approach the
24 250 divorces that we did for clients in 2004.

25 The challenge is daunting. Realistically

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2 Neighborhood Legal Services, the Legal Aid Bureau
3 of Buffalo and Volunteer Lawyers Project may never
4 be able to fulfill the overwhelming need for
5 divorces in Erie County. In real dollars funding
6 over the past several years for legal services for
7 the poor has decreased dramatically. The major
8 funding at Neighborhood Legal Services for divorce
9 representation of clients has been provided by
10 funding from the legal services corporation and
11 through grants under the Violence Against Women
12 Act. However, as our Violence Against Women's Act
13 grant was not renewed for this year, and we have
14 been unable to replace this funding, we have been
15 forced to severely cut back on our divorce
16 representation.

17 Over the years our agency has focused our
18 divorce representation on victims of domestic
19 violence. Our experience tells us that victims
20 should not have to concede on important financial
21 and custodial issues because they do not have the
22 resources to fight their abusers in court.

23 However, regrettably, the number of victims
24 that we can serve is severely limited by the
25 funding cuts we have experienced. The citizens of

1 Matrimonial Commission Hearing
2 New York State need a comprehensive plan to
3 provide competent and continuous representation
4 for every person in New York State who seeks
5 matrimonial relief in our courts, regardless of
6 their financial circumstances.

7 All people, regardless of their financial
8 circumstances, should have access to the judicial
9 system and to getting a divorce.

10 All the citizens of New York State, whether
11 rich or poor, deserve justice. We also request
12 that the Matrimonial Commission make
13 recommendations to streamline the present system
14 to make it easier for middle income people and the
15 working poor to be able to obtain divorces without
16 representation.

17 Our funding only allows us to represent a
18 small percentage of the poorest of the poor. Many
19 litigants who are not eligible for our services
20 and cannot afford private counsel might be able to
21 navigate the court system pro se, particularly in
22 simple or uncontested cases, if there was a
23 streamlined system in place.

24 The need for more funding for legal services
25 is particularly urgent in domestic violence cases.

1 Matrimonial Commission Hearing
2 Domestic violence victims need zealous and able
3 advocates to represent them in court.

4 Often an abuser will use the courts to
5 continue the abuse of the victim, sometimes
6 serving many motions and delaying a case so that a
7 matter that should be taken care of quickly ends
8 up being taken care of over a number of years.

9 For example, in a recent case where our
10 office represented a domestic violence victim in a
11 divorce in Supreme Court one of the issues that
12 was set down for trial was whether or not the
13 victim would receive the services of a Support
14 Collection Unit to aid her in collecting her child
15 support.

16 Other examples of the way in which the court
17 system impacted adversely on victims includes the
18 following: Many times abusers will use the system
19 to threaten the victims with the loss of their
20 children. While some Law Guardians are
21 outstanding in their sensitivity to domestic
22 violence issues that affect children and families,
23 this is not consistent across the board.
24 Sometimes Law Guardians who do not have much if
25 any training on the issue of domestic violence,

1 Matrimonial Commission Hearing
2 become allied with the abuser. These Law
3 Guardians have a hard time understanding the
4 concerns of the victim. Consistent training on
5 domestic violence issues needs to be provided to
6 Law Guardians so that all Law Guardians can be
7 sensitive to the issues affecting families
8 impacted by domestic violence.

9 In addition, often in Supreme Court judges
10 and their confidential law clerks, rather than
11 having sympathy for victims of domestic violence
12 believe that the victim is crying wolf in order to
13 make the abuser look bad, rather than realizing
14 that this is -- that this particular litigant is a
15 victim of domestic violence.

16 As some members of this Commission are aware,
17 many times domestic violence victims are afraid of
18 letting anyone else know of the abuse that is
19 going on in their homes. They are afraid of
20 telling anyone else what is going on.

21 Often victims have not contacted the police
22 in the past, afraid that if they did so, their
23 abuser would kill them or attempt to take their
24 children away from them.

25 Thus, many times when a domestic violence

1 Matrimonial Commission Hearing
2 victim enters the judicial system she does not
3 have any independent proof of the abuse that she
4 has suffered. In Supreme Court, unless a victim
5 has independent proof of abuse, such as police
6 reports, domestic incident reports, or medical
7 records, she is often not believed. This can
8 affect the nature and outcome of preliminary
9 pretrial conferences as well as the actual trial
10 itself.

11 In addition, judicial reform is needed so
12 that litigants who willfully delay in order to
13 stretch the length of a court proceeding are
14 punished with meaningful sanctions.

15 Also, often, when a victim has a family
16 offense matter, a custody matter, and a child
17 support matter in Family Court, the abuser will
18 commence a matrimonial action in Supreme Court,
19 knowing that the Supreme Court is commonly less
20 sympathetic toward domestic violence victims.

21 This also has the effect of moving a
22 proceeding from a forum where assigned counsel is
23 available to Supreme Court, where there is no
24 access for assigned counsel.

25 The Supreme Court often holds victims of

1 Matrimonial Commission Hearing
2 domestic violence to a higher standard than the
3 Family Court in making the case for an Order of
4 Protection. This is because often the Supreme
5 Court believes that a litigant will claim domestic
6 violence to have the other party removed from the
7 home.

8 However, hesitancy of the Supreme Court
9 judges to issue Orders of Protection and the
10 procedural and logistical difficulties in
11 obtaining these orders in the context of a divorce
12 action often compromises victim's safety.

13 I would ask this Matrimonial Commission not
14 to support the concept of presumed joint custody.
15 Many times, even in cases of domestic violence,
16 courts will seek to encourage when imposed joint
17 custody arrangements in order to settle a case.

18 Joint custody should be awarded only in cases
19 where the parties can agree to it.

20 Without a true agreement joint custodial
21 arrangements are often doomed to failure.

22 Under the current system victims often will
23 agree to joint custody not because it is right for
24 them or for their children, but out of fear, fear
25 of losing custody completely, fear of angering the

1 Matrimonial Commission Hearing
2 judge or the Confidential Law Clerk, fear of
3 losing economically, and fear of not having the
4 resources to continue litigation.

5 In conclusion, I would ask this Commission to
6 support increased funding for divorce
7 representation by existing legal services
8 providers. I would also ask this Commission to
9 consider the needs of the poor, the near poor, the
10 working and the middle class New Yorkers, and
11 streamline the system to allow more opportunity
12 for pro se access to matrimonial matters. To
13 allow pro se access in appropriate cases.

14 In addition, I would ask the Commission to
15 consider the impact of the current system upon
16 victims of domestic violence. Specifically, I
17 would ask this Commission to review the subject of
18 training for law guardians, and ask that all law
19 guardians receive a significant amount of training
20 regarding domestic violence issues. We need to
21 assist domestic violence victims in freeing
22 themselves from their abusers and not letting
23 their abusers continue their abuse by the court
24 system.

25 I thank the Commission for allowing me to

1 Matrimonial Commission Hearing
2 appear before you today and thank you for giving
3 me the opportunity to address these important
4 topics regarding matrimonial litigation in the
5 State of New York. Thank you.

6 HON. SONDRRA MILLER: Thank you, Miss
7 Nosenchuck.

8 Is there anyone in the audience who has
9 provided us with an application to speak?
10 Scheduled to speak? Nobody. We will take a recess.

11 (2:46 p.m. recess.)

12 (3:18 p.m. proceedings recommenced.)

13 HON. SONDRRA MILLER: All right. Miss Donna
14 Durbin.

15 DONNA DURBIN: Good afternoon. My name is
16 Donna Durbin. I'm the program director for Monroe
17 County Center for Dispute Settlement. Uh, I'm
18 also a mediator. I've been a mediator since 1980.
19 I came here today because I wanted to explain a
20 little bit about what we do. We have a custody
21 and visitation mediation program in Family Court.
22 We also have a similar program in Supreme Court.
23 The program was started 12 years ago. It was one
24 of the pilots in New York State. It is funded
25 through UCS. The process of mediation as the

1 Matrimonial Commission Hearing
2 couples are referred directly from court to a
3 satellite office that's in the courthouse, and
4 they hear about the process, they find out that
5 it's a voluntary process, which sometimes is a
6 little difficult when the judges just suggested
7 that they go.

8 HON. SONDR A MILLER: I'm going to just
9 interrupt for a minute.

10 DONNA DURBIN: Sure.

11 HON. SONDR A MILLER: What stage is it
12 referred?

13 DONNA DURBIN: Usually first appearance, but
14 any point in time. I've gotten a case in the
15 middle of a trial.

16 The couple is referred from the judge to the
17 satellite office, uh, an attorney for Dispute
18 Center employer meets them there, explains the
19 process, finds out some information when they're
20 available and if they're willing to mediate. They
21 schedule their first mediation session for seven
22 to ten days from that. Uh, couples meet in
23 mediation somewhere between one and three times,
24 two is pretty -- two sessions is pretty normal.
25 The sessions last about two hours. Uh, the

1 Matrimonial Commission Hearing
2 process is a confidential one, so what we hope for
3 is an agreement between the parents as to how they
4 want to do their custody and visitation
5 arrangements. Uh, if they reach an agreement,
6 that agreement is forwarded to the Court, and the
7 judge would review that agreement and he or she
8 would sign off and the agreement would then be
9 signed into order. So the agreement that they
10 have developed in mediation becomes their court
11 order.

12 In the event that they don't reach an
13 agreement, the judge will get a letter that says
14 mediation was attempted and no agreement was
15 reached. They would hear no details of what was
16 said in mediation, and the reason for that is we
17 don't want to interfere with the court process if
18 it's not going to be an agreement.

19 I will tell you that most of the people who
20 come in to us do not believe an agreement is
21 possible. They believe that they have argued and
22 fought and that nothing is going to come of it.
23 But they don't have to be back in court for four
24 weeks, so what the heck. Excuse me. I'm very
25 nervous. I'm not usually talking in front of

1 Matrimonial Commission Hearing
2 people who are highly intelligent, more
3 intelligent than me. Uh, the mediation process,
4 they don't meet at court. They don't mediate in a
5 courthouse. We have an office that's close to the
6 court, and they meet a similar time that is
7 convenient to them. We also have evening
8 appointments.

9 HON. SONDRRA MILLER: How do you screen out
10 domestic violence cases?

11 DONNA DURBIN: After the initial session
12 where they've met together with a case manager,
13 the case manager would then call the parties
14 separately at home and ask questions. We have an
15 eight-page process that we use for screening out
16 cases that are not appropriate for mediation.

17 Uh, I know I'm forgetting something about the
18 process. Uh, what I do want to say is that the
19 court pays for this program. It is fully funded
20 both in Family Court and Supreme Court. The court
21 pays for the program 'cause it saves a lot of
22 time. Uh, obviously a judge does not have two
23 hours to meet with one couple to discuss its
24 custody and visitation concerns. We can meet up
25 to six, eight hours over a course of time, and,

1 Matrimonial Commission Hearing
2 you know, where there's no urgency for that. But
3 it saves a lot of time. It also saves money in
4 Public Defender fees, Law Guardians. Uh, it also
5 shortens the amount of time that a case is in
6 court. The mediation process, even if they need
7 to meet more than one time, can be completed in
8 three to four weeks.

9 Also, a number of judges will set it down for
10 two things, a mediation and possibly a Law
11 Guardian report so that if mediation is not
12 successful there's been no time that has gotten
13 lost.

14 Now I know that the court pays for this
15 program because of the money savings and the time
16 savings. That's not why we do it. I do this work
17 because I know that if you give parents an
18 opportunity to talk, they're more likely to be
19 able to come up with an agreement that's going to
20 be comfortable to them and in the best interests
21 of their children. Uh, to them at the beginning
22 of the process that sounds odd, because we're
23 talking about people who very often don't agree on
24 the color of the sky. Uh, but what I learned as a
25 custody and visitation mediation trainer, and I

1 Matrimonial Commission Hearing
2 tell people this at their very beginning of the
3 training, is that a successful mediator helps
4 people go -- helps parents move from their
5 relationship issues to their parenting issues,
6 and, believe it or not, if you're successful, most
7 people, even though they're arguing, maybe even
8 hate each other, don't disagree on how to parent
9 their children. Excuse me.

10 The reason I came today is that I want all
11 parents in New York State to have the opportunity
12 to mediate. I said it's a voluntary process, and
13 I do mean that. People don't have to come to
14 mediation. They don't have to tell me why they
15 don't want to come, but I think that everybody
16 needs to know about it, both in Family Court and
17 Supreme Court. They need to know that it's an
18 option that's available to them, and I think it
19 needs to be available to them at little or no
20 cost. As I said, most people don't believe that
21 the mediation process will be successful, but
22 statistics show over the 12-year period of time
23 that 70 to 90 percent of couples are able to reach
24 an agreement.

25 HON. SONDR A MILLER: Are the lawyers involved

1 Matrimonial Commission Hearing

2 in the mediation if they have lawyers?

3 DONNA DURBIN: Uh, usually because it's a
4 multi-session situation, the attorneys don't come.

5 I will be honest with you, when we started the
6 program, we allowed attorneys coming mostly
7 because they were curious, but most of the
8 attorneys don't come. They do review the
9 paperwork before it goes to the judge. Even if
10 the parties sign an agreement at our office, it is
11 not a contract. It is not binding in any way
12 until it's signed off by a Family Court judge. I
13 should say also referees. In Monroe County we
14 have judges and referees who refer cases to the
15 program.

16 I also want to say that there aren't any
17 losers in this program, really. Uh, the courts
18 have been extremely supportive because of what
19 we're doing for them. Attorneys realize that
20 whether John is returned at 6:00 o'clock or 7:00
21 o'clock on Sunday night is no -- it's not a matter
22 of law. And they know that a mediator can stop
23 and talk to people and ask them not just about
24 residence and decision making, but holidays,
25 birthdays, how would you like to see vacation

1 Matrimonial Commission Hearing
2 time, do you have questions about transportation?
3 Now, remember, a mediator is not someone who is
4 going to make a recommendation, tell people what
5 to do. Most mediators don't even make
6 suggestions. They help people along, keep them
7 focused on what they're there for, and that's to
8 talk about parenting issues.

9 I started this where even though I've been a
10 mediator for, uh, 25 years, I started when I was
11 four -- somebody was doing the math -- uh, I have
12 to be honest and tell you that custody and
13 visitation mediation is the most rewarding work I
14 have ever done. I am both an administrator and a
15 mediator. Uh, I've probably mediated hundreds of
16 cases, probably close to 500 cases, uh, but it --
17 to see people come into the office with the fire
18 in their eyes, sit across from each other in the
19 waiting room looking like they want to kill each
20 other, and see them after two mediation sessions
21 walking out talking about Billie's report card, is
22 very rewarding. I also know these are people who
23 are going to have a relationship with each other,
24 whether they like it or not, for the rest of their
25 lives. Everybody knows what a custody trial will

1 Matrimonial Commission Hearing
2 do to people. Any Supreme Court judge will tell
3 someone that no one will be happy. At the end of
4 the trial there will be no happiness.

5 HON. SONDRRA MILLER: Where did you get your
6 training 25 years ago?

7 DONNA DURBIN: I did my college internship
8 Center for Dispute Settlement, fell in love with
9 mediation. I was on my way to being an
10 arbitration attorney and I fell in love with
11 community mediation. The centers provide a
12 significant amount of training. Custody and
13 visitation is considered a specialty, uh, so there
14 is a lot of training that goes into that. Believe
15 it or not, most of the people who mediate are
16 volunteers. They don't get money at all to
17 mediate.

18 The last thing I want to tell you is a little
19 story. Uh, one of the mediations I did, it went
20 quite a few sessions, was between a divorced
21 couple. Uh, I had an intern who put it
22 beautifully, she said, oh, I got it, first their
23 marriage failed and now their divorce is failing.
24 And we -- after a third or fourth session they
25 both reported to me separately that their daughter

1 Matrimonial Commission Hearing
2 told them -- she was twelve -- that she didn't
3 know what this mediation stuff was, but she hoped
4 that they never stopped going, because last night
5 you talked to each other on the phone without
6 screaming for the first time in three years. That
7 to me was my reward. Thank you.

8 HON. SONDR A MILLER: Thank you very much.
9 Susan Taylor.

10 SUSAN TAYLOR: Good afternoon. I'm here
11 actually representing Patricia Potts, who is an
12 attorney who's actually at an ADR seminar in San
13 Francisco. I will be reading from her previously
14 submitted comments, except instead of the 45
15 minute comments that she submitted, I'll be
16 keeping it to the ten minutes. So, these -- these
17 are her words, not mine. I'm also a nonpracticing
18 attorney. I'm pursuing a Master's right now in
19 civil litigation and dispute resolution at Osgoode
20 Hall Law School in Toronto, so she thought I would
21 be a good voice for her.

22 Thank you for the opportunity to present
23 comments to you today. I would like to recommend
24 to the Commission that every matrimonial case
25 coming into court be considered for mediation as

1 Matrimonial Commission Hearing
2 an integrated and routine option at all stages in
3 the life of the case. This procedural change
4 necessitates a change in court culture to support
5 mediation as an alternative process in which it is
6 possible to fully resolve dispute and as a process
7 acceptable to clients, attorneys and judges.

8 Although I am currently cochair of the ADR
9 committee of the Bar Association of Erie County
10 and a member of the New York State Bar Association
11 ADR committee, my comments today represent my
12 personal enthusiasm for and my personal
13 understanding of mediation. I am a nonpracticing
14 attorney and am active as a volunteer mediator for
15 custody visitation cases referred from Family
16 Court to our local dispute settlement center, but
17 I have also experienced a litigated divorce and
18 litigated custody dispute and am in a position to
19 discern mediation as a useful alternative for many
20 situations.

21 I earn my living as the President of a
22 manufacturing business in which I use the
23 principles of mediation almost daily with
24 customers and employees, vendors and regulators.

25 While many earlier speakers have already

1 Matrimonial Commission Hearing
2 effectively explained the mediation process and
3 eloquently addressed many advantages of mediation
4 and incorporating in mediation program as case
5 management option, I would like to -- I'd like to
6 add my understanding of the value available to the
7 courts and to attorneys and to families and to
8 include two key points on program design.

9 Tolstoy's Anna Karenina begins "Happy
10 families are all alike, every unhappy family is
11 unhappy in its own way." Today's family varies
12 greatly and a variety of processes and procedures
13 are needed to address the problems that bring them
14 to court. Family law and policy generally address
15 needs of traditional families, as though each
16 family unit were similar. But today parents with
17 widely diverse cultural backgrounds, nonmarried
18 parents who never thought of themselves as
19 families, and other nontraditional families are
20 looking to the Court for resolution of their
21 disputes. One of mediations most valuable
22 attributes is its unique ability to resolve
23 disputes in which obstacles such as personality,
24 ego and ill will between entrenched people are
25 heightened. Mediation has been shown to be one of

1 Matrimonial Commission Hearing
2 the rare methods capable of overcoming human
3 emotion or obstinacy, those characteristics that
4 stand in the way of a resolution of conflict.
5 Mediation can reconcile some of the most
6 conscientious disputes generated by a range of
7 economic, religious, psychological, emotional,
8 demographic and cultural forces. It addresses the
9 many intangibles involved, including trust,
10 respect, goodwill, effectiveness, satisfaction and
11 cooperation, intangibles which cannot be precisely
12 accounted for in the law nor fully appreciated in
13 adversarial dispute resolution.

14 Court and its mediation has value to courts
15 and to the judges. Incorporating mediation as an
16 option in case management enhances the strategic
17 use of judicial resources. New programs are
18 desperately needed as case loads and requests to
19 modify previous orders rapidly increase. Today
20 more families are facing more serious issues.
21 Today cases are increasingly complex. Today
22 orders and referrals to ancillary services are
23 also increasing. With there all and shrinking
24 resources courts must be equipped to handle
25 situations that may not be well suited for

1 Matrimonial Commission Hearing
2 resolution in a formal adversarial process.

3 Diverse families with little education, low
4 incomes, and often no legal representation need
5 programs which can focus on their children, focus
6 on their children's developmental stages, and
7 focus on the emotional consequences of divorce.

8 The written report which Pat submitted contains
9 footnotes and references to a report out of the
10 state of California. Uh, her -- her comments
11 detail the successes and shortcomings of one
12 program that was studied over the course of 30
13 months. They reported reduction in trial rates,
14 reduction in disposition times, reduction in
15 litigation costs, and, of course, reduction in
16 court work loads. That same program also reported
17 high satisfaction from both the attorneys and the
18 litigants with the process. Court and its
19 mediation has value to the clients. When
20 litigating a matrimonial case it's not possible to
21 predict with any assurance how a particular
22 problem or issue will be resolved under the law.

23 Variables such as income, ages of children,
24 education, even abilities of the litigants create
25 a wide possibility of outcomes. Still, divorcing

1 Matrimonial Commission Hearing
2 litigants, already in conflict on their way to
3 court have already created their own incomplete
4 and distorted picture of what is a fair, just and
5 right outcome. And from those positions the
6 eventual outcome, which is likely to be somewhere
7 in the middle, will always feel unfair,
8 inequitable, and unworkable, which only escalates
9 the number of matters which then need additional
10 judicial attention.

11 The process is protracted, expensive, and
12 stressful. It promotes mistrust, gamesmanship,
13 and misunderstanding. Mediation suits the types
14 of family conflict in court because the focus is
15 on finding workable solutions and cutting losses,
16 rather than on placing blame and proving
17 liability.

18 There is an opportunity to preserve the
19 relationship at some level by reducing acrimony
20 and providing an opportunity for direct
21 communication between the parties.

22 The surveys of the California program,
23 interestingly enough, also indicated fewer post
24 disposition compliance problems and fewer new
25 proceedings brought between parties who mediated

1 Matrimonial Commission Hearing

2 their own resolutions.

3 Court and its mediation, of course, has value
4 to children. After a litigated divorce the
5 adversaries, still out to win at all costs,
6 emotional and financial, must then begin a new
7 parental relationship with their children. The
8 conflict arising from these contradictory roles
9 causes harm to the family and harm to the
10 children. Reducing parental conflict reduces its
11 negative effects on children. Throughout a
12 divorce mediation the focus is on resolution,
13 rather than blame, to minimize conflict and to
14 help the children. Throughout mediation of
15 custody and visitation, parents, who possess the
16 best knowledge, really, of what's best for their
17 children, can generate options truly in their best
18 interests. Throughout any mediation process the
19 parents learn skills which are useful in reducing
20 future conflict.

21 And, of course, there is value to the
22 attorneys. Lawyers who collaborate more, who save
23 litigation for the cases that truly merit that
24 approach, gain respect and have a much different
25 quality of life than those who battle incessantly.

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2 Once familiar with representing clients in
3 mediation, a lawyer can recognize that cooperation
4 is not the same as capitulation. In mediation he
5 or she can zealously represent their client's
6 interests, not their client's positions.

7 The shift from adversary to problem solver
8 can be equally lucrative, less stressful and more
9 consistent with clients real needs.

10 In designing programs the basis for a
11 successful mediation program can be found in the
12 answer to the question "Under what circumstances
13 does mediation provide benefits to the client and
14 to the courts to save time, save money, and
15 increase satisfaction?"

16 In the written comments which Pat has
17 submitted to you previously she outlines a list of
18 factors which need to be considered in program
19 design and with regards to the client's personal
20 needs.

21 In closing, it's clear that increasing case
22 loads and diminishing resources are pressuring our
23 courts and our families, so new and effective
24 programs are necessary to carry out the missions
25 of the court and provide solutions to families

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2 that don't harm family members. I, Pat and I, are
3 among many professionals who are looking forward
4 to the opportunity to work with you to
5 meaningfully integrate a mediation program into
6 the courts case management procedures. Again,
7 thank you for this opportunity.

8 HON. SONDRRA MILLER: Thank you very much.

9 Amy Schwartz.

10 AMY SCHWARTZ: I submitted written testimony,
11 so I will be presenting from that as well today.

12 Good afternoon Judge Miller and esteemed
13 members of the Matrimonial Commission. My name is
14 Amy Schwartz, and I'm the Coordinator of the
15 Domestic Violence Legal Program at the Greater
16 Upstate Law Project and the Public Interest Law
17 Office of Rochester affectionately known as GULP/
18 PILOR.

19 As a support center for civil legal services,
20 GULP/PILOR provides research and training, acts as
21 an informational clearinghouse, and provides
22 litigation backup to local programs. As an
23 advocacy organization, we engage in legislative
24 and administrative advocacy on behalf of legal
25 services programs and the clients they serve. As

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2 a Not-For-Profit law firm, we provide legal
3 assistance to those in need and undertake impact
4 litigation in order to protect and defend the
5 rights of poor and disenfranchised New Yorkers.

6 Thank you for the invitation to speak here
7 today. While there are many issues that I could
8 address, I will, instead, focus my testimony on
9 one area of paramount concern, access to counsel.

10 As we are all aware, in the pivotal 1975 case
11 In the matter of Rhonda Smiley, the highest court
12 in New York State held that litigants in
13 matrimonial actions do not have a constitutional
14 right to counsel or to assigned counsel in divorce
15 cases. The Court further enunciated that while a
16 court has the discretion to appoint counsel in
17 some appropriate cases under the CPLR, absent
18 statutory authority, the Court does not have the
19 authority to order these counsel be compensated
20 using public monies. The Smiley court did
21 indicate that while the Bar is obligated to
22 respond to indigent's needs for matrimonial
23 counsel, the proper course for addressing this
24 problem resides with the New York State
25 Legislature, as they will need to budget the funds

1 Matrimonial Commission Hearing
2 necessary to provide compensation for counsel.
3 The Smiley decision has remained, in essence, the
4 law of the land, and our Legislature has failed to
5 address the charge given it to -- given to it by
6 the Court of Appeals nearly 30 years ago.

7 What has the result been? In New York we
8 have an inconsistent, unreliable piecemeal
9 approach to solving this problem that has resulted
10 in the disenfranchisement of many of our most
11 vulnerable citizens. Poor, working poor and
12 persons of limited means are often denied access
13 to justice and relief in these courts. Amongst
14 those litigants, victims of domestic violence, who
15 may need dissolution most of all, face even
16 greater challenges and obstacles.

17 One of the most invaluable services an
18 attorney can provide to a domestic violence client
19 is to help her obtain a divorce from the person
20 who physically has assaulted, emotionally abused,
21 controlled or even raped her. A divorce and the
22 associated relief can provide a woman who is
23 battered with some semblance of closure and an
24 opportunity for a fresh start and a new life. It
25 has the possibility of severing the financial

1 Matrimonial Commission Hearing
2 interrelationship with the batterer that likely
3 served as a tool of abuse, control and
4 manipulation. Issues of custody and visitation
5 can be settled with clear and concise orders or
6 agreements that define safer parameters of
7 visitation and decision making on behalf of the
8 children. A victim and her children may even be
9 able to obtain an Order of Protection that can
10 respond to the family's safety concerns and have
11 this order remain in effect until the youngest
12 child turns 18 years of age.

13 However, because of the lack of access to
14 counsel individuals with limited or no financial
15 resources often have nowhere to turn to find
16 representation that is free or affordable, as well
17 as competent. Retainer fees are expensive, and
18 for many poor and working poor saving for this is
19 an unreachable goal. Clients with some means
20 might be able to hobble together a retainer fee
21 for a private attorney from savings, wages,
22 generous family members or friends, but will often
23 struggle to pay the hourly rates once the retainer
24 is all too quickly eaten up by litigation costs.
25 In domestic violence situations retainers might be

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2 particularly high or exhausted particularly
3 quickly because litigation is often so complex,
4 protracted and contentious. These cases are often
5 fraught with delay tactics and financial abuses.
6 There may be the need for greater discovery and
7 enforcement of interim orders and may include a
8 full-blown custody battle. Studies indicate that
9 batterers seek custody more frequently than
10 nonbattering fathers, and, more disturbingly, are
11 as likely as nonbattering fathers to prevail.
12 Abusive fathers may also be unwilling to settle
13 with anything less than joint custody where such a
14 settlement would be obviously inappropriate given
15 the history of violence and the power and control
16 dynamics at play in the relationship.

17 During my tenure at Greater Upstate Law
18 Project in other legal services I've received
19 countless calls from desperate clients, as well as
20 domestic violence program staff seeking
21 representation or referrals, often on the eve of
22 trial, where the attorney of record is threatening
23 to drop or has indeed dropped a client's case
24 because she's no longer able to pay mounting legal
25 fees. Recently I received a call about a young

1 Matrimonial Commission Hearing
2 woman who owed her attorney over \$50,000 in
3 outstanding legal fees, and with the attorney's
4 interest rate set at over 18 percent, this woman
5 will be struggling to pay down this crippling debt
6 for many, many years. This client sought private
7 counsel because she was turned away both from the
8 legal services organization and the Volunteer
9 Lawyers program in her community.

10 While the courts have the authority to level
11 the playing field by ordering attorney's fees to
12 the nonmonied spouse, there's no guarantees under
13 the current system that this will occur. Rather
14 than grant an award of fees during the pendency of
15 the action, some courts may determine that the
16 question of fees is best addressed at trial, where
17 the finances of the parties will be fully examined
18 and the Court can better assess which party can
19 share the greater burden of the litigation
20 expenses. As a result, unless the client's
21 counsel is sufficiently well-heeled, as they say,
22 to carry over and absorb the costs of litigation
23 until a possible final fee award is made, the
24 absence of interim fees may limit or even preclude
25 an economically dependent client from obtaining

1 Matrimonial Commission Hearing
2 zealous and effective representation. In other
3 cases, neither party has adequate resources to
4 cover their own, much less the other's litigation
5 expenses and such an order may be determined
6 inappropriate. Even in cases where fees are
7 indeed ordered, the amount will also be at the
8 Court's discretion and may not cover the entire
9 sum sought. Not surprisingly, private attorneys
10 well aware of these realities are hesitant or
11 unwilling to become involved in a case without
12 payment of a retainer or without more than mere
13 hope that fees will be granted at all.

14 Victims of domestic violence are particularly
15 vulnerable to this dilemma. Preventing a victim
16 from obtaining or pursuing economic stability and
17 independence serves as a compelling tool of power
18 and control wielded by her abuser. The abuser
19 often wields strict control over property, and a
20 victim may not be titled on assets like vehicles,
21 the marital residence, bank accounts and credit
22 cards, and her partner may have actively engaged
23 in running up debt, hiding assets, or even
24 liquidating them.

25 I saw numerable clients who had no idea what

1 Matrimonial Commission Hearing
2 the family's financial picture truly was, because
3 throughout the marriage they were not allowed to
4 retrieve or even open the mail. Mail was often
5 diverted to their abuser's offices or to a P.O.
6 Box. Joint returns were signed under duress. And
7 if questions were asked, retaliation was quick to
8 ensue.

9 When a divorce action commences, a victim in
10 that situation is already at a distinct
11 disadvantage because she may not be aware of or
12 even have ready access to these funds.

13 Where the victim is the nonmonied spouse the
14 abuser's financial advantages make it possible for
15 him to hire more experienced and skilled attorneys
16 -- skilled attorneys, as well as ability to spend
17 more on depositions, experts, discovery, and
18 trials. In short, the abuser is able to utilize
19 the court as a tool to pressure, manipulate and
20 intimidate a battered woman into settling a case
21 on terms that may be detrimental to herself and
22 her children simply because she's unable to
23 marshal the funds necessary to pay for an
24 attorney, much less a long and complicated trial.
25 To remedy these concerns it is imperative that

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2 this Commission recommend the adoption of clear
3 rules or guidelines to the courts that will
4 standardize and expedite pendente lite relief of
5 interim counsel fees and other relief that will
6 give both parties fair access to marital
7 resources.

8 With regard to other services that are
9 available, a few communities have created
10 wonderful modest or limited means services that
11 allow litigants with some resources to secure
12 continuous and affordable representation.
13 However, while these programs are wonderful, they
14 are only available to a lucky few who qualify.
15 They're not available in every community, and,
16 those that do exist, often cannot serve all the
17 needy applicants who come to them for assistance.

18 Pro bono projects have also been set up in
19 some counties to deal with the growing recognition
20 that the lack of access to counsel in divorce is a
21 severe problem worthy of coordinated community
22 response. New York has a strong tradition of pro
23 bono service, and I applaud these wonderful
24 volunteer legal projects for their commitment, but
25 the sad truth is, that like the limited means

1 Matrimonial Commission Hearing
2 projects, these resources are similarly scarce as
3 compared with the overwhelming need.

4 These pro bono programs struggle with long
5 waiting lists, not enough volunteer attorneys, and
6 some attorneys who are too inexperienced or unable
7 to accept cases that will be extremely lengthy,
8 highly contentious and complicated, such as
9 domestic violence cases. In order to solve their
10 own representation crisis I understand that
11 Westchester, like other communities, has even gone
12 so far as to consider mandated matrimonial
13 practitioners to take cases pro bono. While I'm
14 not advocating this particular solution, I do
15 believe that it serves to highlight the serious
16 nature of the problem in one desperate community.

17 To alleviate the enormous demand for services
18 some pro bono projects now offer pro se divorce
19 clinics. This is a creative solution that may
20 offer relief to some litigants in matters that are
21 uncontested or where there's no -- there are no
22 children and few assets.

23 HON. SONDRRA MILLER: I'm just gonna ask you
24 to please wind up.

25 AMY SCHWARTZ: Okay.

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2 HON. SONDRRA MILLER: It's past your time.

3 AMY SCHWARTZ: The remainder of my comments

4 will be contained in my written materials, but I

5 do want to highlight one final issue that I

6 haven't covered yet, which is the need for funding

7 for civil legal services. Any discussion of

8 access to counsel has to include the obvious and

9 crucial issue of funding for legal services. As

10 you may be aware, the pots of money that are

11 available to civil legal services have been

12 eroding. In my materials I cover some of the

13 different core legal services funding as well as

14 changes in funding and how that's affected some of

15 the civil legal services as well. I would advise

16 that the -- that the Matrimonial Commission

17 include in their recommendations to Chief Judge

18 Kaye the establishment of a statewide permanent

19 stable funding source for the provision of civil

20 legal assistance throughout the state. Thank you.

21 HON. SONDRRA MILLER: Thank you very much.

22 Joan Quinn.

23 JOAN QUINN: Good afternoon Justice Miller

24 and members of the Commission. Please excuse me,

25 I'm just going to read from my notes because I'm

1 Matrimonial Commission Hearing
2 not used to speaking in public.

3 Okay. Thank you for allowing me the
4 opportunity to speak this afternoon. I expect the
5 recommendations made by this Matrimonial
6 Commission will improve the treatment of the
7 citizens in this state as much as the Milonas
8 Rules of 1993 did after the last Matrimonial
9 Commission was held.

10 My name is Joan Quinn, and I live in the Town
11 of Parma and have been a clerical employee in the
12 Hilton Central School District for 27 years. I am
13 here today because I feel a moral responsibility
14 to speak for the law-abiding citizens of this
15 state, and, in particular, for spouses who are in
16 long-term marriages. You see, in April 1993, four
17 months before my 25th wedding anniversary, my
18 husband shocked me with the news that he no longer
19 knew how he felt about our relationship. This was
20 the direct result of his having been involved in
21 an extramarital relationship for several months
22 with a 27-year old woman whom he had met at work.
23 This is certainly a very old story and happens
24 countless times in this state every year.
25 Needless to say, I was shocked and devastated by

1 Matrimonial Commission Hearing
2 this news, and to my disappointment we did end up
3 getting a divorce after a lengthy legal process
4 initiated by my husband, the monied spouse.
5 However -- however, during my process the law
6 provided me with legal protection. I was very
7 thankful that when the members of the Legislature
8 updated the divorce statutes in the 1980s that
9 they were thoughtful visionaries and had a clear
10 understanding of how to write the divorce laws so
11 that the rights of every citizen in the state were
12 protected. They created statutes that addressed
13 the needs of the citizens for a simple no-fault
14 divorce, as well as for allowing for a system of
15 due process for innocent spouses who had no other
16 means to protect themselves. I will be forever
17 grateful to that legislative body because the
18 statutes they created surely saved me from
19 nonrecoverable financial loss.

20 Creating new laws that make it easier to
21 divorce will not improve the divorce process in
22 this state. New York already has a -- a process
23 established for married couples to proceed to a no
24 fault divorce that is fair, and it should not be
25 added to or changed. A legal separation can be

1 Matrimonial Commission Hearing
2 created without the intervention of the courts,
3 saving the couple and taxpayers money, and it
4 allows the couple the ability to separate
5 economically as soon as the paperwork is filed
6 with the County Clerk. The only restriction is
7 the inability to remarry during the year of
8 separation. Certainly this is not an unreasonable
9 cooling off period. The state has and should
10 always have an interest in preserving marriage, as
11 marriage provides the basic support structure of a
12 healthy society. Divorce is a major contributor
13 to the state's high poverty rate, high welfare
14 costs, more than 40.6 billion in Medicaid expenses
15 yearly, and to the high cost of educating children
16 who have behavioral problems due to divorce.

17 A change to create a no fault divorce that
18 eliminates the rights of due process for innocent
19 spouses will certainly result in an increase in
20 the divorce rate and that will create a much
21 heavier burden on every person in the state as we
22 are forced to deal with the increase in negative
23 impact that divorce will place on our social
24 support programs. Can New York State afford a
25 higher divorce rate? No. And I don't even want

1 Matrimonial Commission Hearing
2 to think about the impact on children in the state
3 if we make it easier to divorce. For in a divorce
4 they are the ones who pay the heaviest price,
5 regardless of their age.

6 So if we keep the laws and the no fault
7 statutes the same, how do we fix some of the
8 problems? First, I suggest you add to the Milonas
9 Rules clearly defined financial sanctions against
10 attorneys who waste the Court's time and client's
11 money filing frivolous divorce complaints.
12 Secondly, require every -- require every attorney
13 to distribute information such as the New York
14 State Bar Association's brochure titled "Divorce
15 and Separation in New York State" to any
16 individual who has scheduled an appointment to
17 talk about getting a divorce. It should also be
18 made clear to the potential client that they
19 should read the information prior to the scheduled
20 meeting and every attorney should be required to
21 ask each client to provide him or her with a
22 written, credible and verifiable evidence of fault
23 before signing any Verified Complaint against
24 their client spouse. Making sure that everyone
25 understands the laws and the consequences for

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2 using the court inappropriately would help to keep
3 attorneys from filing unnecessary divorce actions
4 and keep them focused on working with clients to
5 create the appropriate written documentation that
6 serves the need of both spouses and any children
7 involved.

8 The Divorce and Separation in New York State
9 brochure clearly defines, in simple terms, what
10 the appropriate court action should be based on
11 individual circumstances. As a civil contract,
12 marriage creates an economic partnership, and the
13 process to break a marriage contract should be
14 given the same legal respect that is given to a
15 business contract or a partnership. That is why
16 we already have the best law -- divorce law in the
17 United States. For our laws serve the best
18 interests of all individuals who live in this
19 state, that certainly was the intent of the
20 Legislature in the 1980s, and it is still
21 important in 2005.

22 Additionally, for the last 27 years I have
23 worked in positions that provide direct support to
24 teachers and students. I observe on a daily basis
25 the negative effects that divorce can have on a

1 Matrimonial Commission Hearing
2 child. Every child deserves to be loved and
3 nurtured by their mother and their father, and
4 when one of them is missing from their daily lives
5 it leaves a very large void.

6 I've had the opportunity to read some of the
7 testimony from the prior hearings of this
8 Matrimonial Commission, and it is clear to me that
9 this Commission needs to concentrate on the major
10 issues affecting children. I still can't believe
11 what I -- what I have read about forensics, how
12 could that process be so unregulated and lacking
13 in standards? Perhaps Miller rules should be
14 established that clearly define guidelines for the
15 use of forensics in custody cases. Whatever
16 decisions are made with regards to child custody
17 issues, this Matrimonial Commission should be
18 recommending programs that help to strengthen
19 marriage and families, not to make them easier to
20 destroy. That is what would be in the best
21 interests of all individuals who live in this
22 state. Thank you again for the opportunity to
23 testify before this Commission today.

24 HON. SONDRRA MILLER: Thank you.

25 Mr. Steven Sugarman.

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2 STEVEN SUGARMAN: Good afternoon. I'm Steve
3 Sugarman. I've been a lawyer for about 20 years,
4 and for the past 16 years have been a matrimonial
5 lawyer here in Erie County and Niagara County.
6 Uh, about 11 years ago I was about to change
7 careers until I actually took a mediation training
8 which changed my paradigm and my view of how cases
9 should be handled. I still litigate about 25
10 percent of my cases, the rest is mediation and
11 collaborative law.

12 I presently am the chairman of the
13 Matrimonial and Family Law Committee of the Bar
14 Association of Erie County, although I'm not
15 speaking today in that capacity at all, just
16 speaking the -- my own thoughts today.

17 I wanted to describe or give you my view of
18 the problems with the system, uh, and I think if
19 you -- if you view it as the process -- if you
20 look at the process itself, starting from the
21 beginning, and I just wanted to trace it, so bear
22 with me for a second, people first hire lawyers in
23 a matrimonial matter out of fear, uh, based on,
24 you know, their reputation who's going to be the
25 toughest and who is going to put up the best

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2 fight. Lawyers then draft a summons which we have
3 to -- which we have to draft. It pits one parent
4 against the other, uh, mother against father,
5 right in the summons, plaintiff versus defendant.
6 Uh, it's then personally served, often at the
7 person's workplace, embarrassing them, not always,
8 uh, and, in the summons itself cruel and inhuman
9 treatment is stated. If I got a summons like that
10 and I didn't know anything about the law, I would
11 be appalled and very angry. I would go out and
12 hire my own lawyer who has a reputation for being
13 tough. Uh, in any event, as the process goes
14 forward, the motions are already -- will get --
15 get at a higher and higher peak, and, uh, the
16 lawyers, as we are, you know, paid to go into the
17 adversarial system, uh, and be adversarial,
18 continue, uh, actions which exacerbate the
19 situation. Umm, some lawyers with overbroad
20 discovery requests, with nasty letters back and
21 forth, it just -- it just goes like a runaway
22 freight train, and, uh, when we get to court the
23 clients are totally disenfranchised. They're
24 sitting out in the hallway, they're not part of
25 the negotiation process, uh, they are powerless,

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2 and they're scared, and the lawyers go behind
3 closed doors, and they negotiate for about 45
4 minutes, and it's adjourned, and some progress is
5 made, but then they come -- they have to come back
6 several weeks later, and, uh, this goes on for
7 many pretrial conferences in a very inefficient
8 manner, and in the end, a case is settled and a
9 good settlement, and you'll hear most matrimonial
10 lawyers say this is the settlement where, and
11 excuse the expression, both people walk away
12 feeling that they have been screwed. Both people.
13 Uh, and I cannot think of a -- of a system that's
14 worse for handling divorces and children and
15 families in crisis than the system we have now.
16 Uh, I don't have, uh -- I know that that's why you
17 are formed, to -- to try to address some of the
18 problems with the system. With what I just said,
19 I can suggest a couple of changes. One, and just
20 to think a little bigger here, change the summons.
21 How about a -- instead of a Summons, some type of
22 a Petition to Dissolve the Marriage. Instead of
23 husband versus wife, a petition in -- In Re the
24 Dissolution of the Marriage Between Husband and
25 Wife, or something like that, because, believe it

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2 or not, that takes out -- as you can see, I think,
3 that this takes on a tone and sets a tone for the
4 whole case. Uh, also, and I know the state is
5 working on this, having some no fault grounds, but
6 whether or not there are no fault grounds, the
7 grounds don't have to be set forth, I don't think,
8 in the petition, in the initial paper itself, to
9 stir up the pot.

10 The preliminary conference, why not get the
11 clients involved more? I know that the Milonas
12 rules had something in there about the client
13 should be involved more right in the conferences
14 themselves, but right away the -- the courts kind
15 of like didn't practice that. And the clients are
16 still out -- outside, not part of the process.
17 Include the clients. I know emotions are tough to
18 handle at times for the -- for the courts, but
19 include the clients and have more four-way
20 settlement conferences right at the court.
21 Required by the court. So there is a better way.
22 And, as I said, I'm a mediator, and I believe that
23 mediation, just from experience, I see the client
24 satisfaction, I see that when people come in
25 they're afraid, just like at the beginning of any

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2 crisis, but instead of going to, uh, going to
3 certain lawyers they come to me, and hopefully the
4 lawyers out there that will support the process,
5 uh, and will support collaborative problem
6 solving. And there are more and more lawyers like
7 that out there, but they'll come to me and I'll
8 educate them about the process and we will engage
9 in a process where there is fully informed
10 decision making. I teach the people. And if
11 you're trained correctly, and if you have the
12 substantive expertise, which I believe you should
13 have, if you're in an area like this, you teach
14 the parties about the law, making sure that they
15 understand what the law says generally, make sure
16 there's full financial disclosure, 236-B
17 affidavits, exchange of financials, and encourage
18 attorneys on the outside to coach as their
19 negotiation coaches why don't you do this
20 discovery or that discovery. Nothing wrong with
21 that. You can't ever have too much information.
22 I have experts at the table, if the clients want
23 it, to evaluate a degree, or a business, bring
24 them in there, get all the facts out on the table
25 in a neutral way, help facilitate their

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2 discussions, and I personally then require
3 attorney review if they're gonna use me as a
4 mediator with respect to the final product.

5 But, in any event, the people that leave are
6 just so much more, uh. I'm not saying that
7 they're best friends, or that they love each other
8 at all. Sometimes they do. Sometimes they leave
9 holding hands, to tell you the truth, but the
10 great majority of the time they at least leave
11 with a parenting relationship, uh, that -- that
12 will, you know, serve them for the future and
13 serve the children. Uh, this is -- this is due to
14 the character of mediation which is being involved
15 in the process, uh, instead of a bystander, uh,
16 and feeling like you're making decisions about
17 your own life instead of other people making them
18 for you.

19 Uh, I know I'm running out of time, I was
20 also going to suggest a couple of other changes
21 that the Commission think about. One would be,
22 uh, some type of a confidentiality statute or a --
23 a -- a privilege statute. I know Massachusetts
24 has such a statute where mediators and
25 collaborative lawyers would be protected by that

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2 statute in the same way lawyers and clients are
3 protected. Right now we protect confidentiality
4 by contract only.

5 Secondly, and this has to do with
6 collaborative law. With respect to the
7 disciplinary rules, expanding on what zealous
8 representation means in the disciplinary rules, so
9 that zealous representation could mean zealously
10 representing your client's interest to look for a
11 win-win solution.

12 Uh, with respect to the third -- another
13 suggestion I would have would be to have a
14 mandatory, and this is probably the most
15 controversial but it's already been adopted by at
16 least 16 states, having a mandatory mediation
17 model in our state before you file the RJI,
18 unless, you know, there could be some kind of a
19 screening for domestic violence or a really clear
20 power imbalance, having a mandatory referral to
21 mediation, I suppose, or collaborative law before
22 you file the RJI absent extraordinary
23 circumstances. Uh, and, uh, I think that if that
24 is done you could learn from the model of these
25 other states. Some of the states I don't like

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2 what I've seen, because they basically put into
3 effect what they call mediation, but it's
4 basically what we call neutral evaluation, where
5 people go in front of a court-appointed person who
6 is basically an arm twisting evaluative kind of a
7 person who gets them to settle, and that's not
8 what mediation is about, or gets them not to
9 settle, I don't know how successful that is. In
10 any event, you don't get the same client
11 satisfaction that you do in the normal mediation
12 process. So, if you study other states and look
13 at their models, look what has worked best for
14 them not only in terms of settlement rates, but in
15 terms of client and user satisfaction, returns to
16 court, as this program promoted a situation where
17 people who have gone through the mediation process
18 go back to court a lot less than those people that
19 went through the litigation process because of the
20 way that they resolve their -- their divorce. And
21 making sure that anybody that would be on this, a
22 panel of mediators would be competent, that's very
23 important that we have training requirements, and
24 I know that Dan Weitz has been working on a
25 program in Erie County and he's very concerned

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2 about that, and I'm sure that any program that you
3 put in place in this state would reach for that
4 very high competency level for anybody on that
5 panel. That's very important, otherwise med --
6 there are some horror stories about mediation, and
7 I submit that's with people that are not competent
8 to be mediators, but unfortunately right now we
9 don't have any kind of regulation. So some type
10 of certification program for mediators is a must
11 in New York State. Uh, so, I'll just -- I know
12 I've spoken quite a bit here, and I think that is
13 -- I think I will, as my wife said, if I find
14 myself babbling, I should just stop, so I will
15 stop here.

16 HON. SONDR A MILLER: Thank you very much.

17 STEVEN SUGARMAN: Thank you very much for
18 your attention.

19 HON. SONDR A MILLER: Thank you.

20 Suzanne Brunsting.

21 SUZANNE BRUNSTING: Thank you for the
22 opportunity to address this Matrimonial
23 Commission. My name is Sue Brunsting. As a
24 collaborative lawyer and a settlement advocate I
25 help couples divorce intelligently and creatively,

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2 considerate of one another and of their children.
3 I'm speaking on behalf of the Association of
4 Collaborative Family Law Attorneys in Rochester,
5 81 members strong, and with the supportive
6 collaborative groups in Ithaca, Bath, Syracuse,
7 Rockland and Westchester counties and New York
8 City.

9 The collaborative process, as you may already
10 have heard in some of your other speakers, was
11 originated by Stu Webb, a family law attorney in
12 1990. The idea has grown rapidly, and
13 collaborative law is now known as an alternative
14 dispute resolution model around the world.

15 The American Bar Association, the Association
16 of Family and Conciliation Courts, and the
17 American Academy of Matrimonial Lawyers have all
18 offered workshops and continuing education to
19 introduce the process to the family bar.

20 The public has a right to know that
21 collaborative options are available when they
22 decide to divorce. In collaborative law each
23 spouse is represented by specially trained legal
24 counsel throughout the negotiation of a Separation
25 Agreement and divorce agreement. But the sole

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2 purpose of the limited retainer that is signed
3 with that attorney is to reach an agreement that
4 meets the legitimate needs of the couple,
5 respectful of their children's needs to the
6 maximum degree possible.

7 When clients choose the collaborative
8 process, they and their attorneys are making an
9 absolute commitment not to use the courts
10 adversarial. Both clients, both attorneys sign a
11 participation agreement, and that is a contract
12 that is very clear that this is being done for
13 settlement purposes only. In the event that one
14 of the clients chooses to litigate, both attorneys
15 and their firms must withdraw. With that written
16 commitment to adhere to respectful, good faith
17 negotiations, including full and complete early
18 disclosure and attention to the client's
19 legitimate needs, all of the efforts of the
20 clients and the attorneys are focused on reaching
21 a lasting, durable agreement for the clients.

22 The withdrawal provision is what makes this
23 process so powerful.

24 When the decision making efforts get
25 difficult, and they always do, this is divorce,

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2 after all, the divorcing couple has the incentive
3 to stay at the table and work hard to resolve
4 their issues, rather than running away. In
5 supporting clients through this divorce with
6 integrity, with respectful consideration and
7 paying attention to their emotional and ongoing
8 relationship needs, the attorneys are finding that
9 their clients are growing emotionally, and they
10 are developing incredibly creative agreements,
11 specially tailored for their own families.

12 As they work together, I have watched these
13 clients improve their communication skills and
14 learn to problem solve together. When we're
15 preparing the Separation Agreement at the end, and
16 there's a special provision for how they're going
17 to resolve their disputes in the future, they
18 always laugh at the possibility that they could go
19 to court. They have opted out of the court
20 system. They have been successful, and they do
21 not plan on coming to court in the future to
22 resolve any issues that might come up. When the
23 only agenda is settlement, and when the attorneys
24 are treating everyone respectfully and truly
25 listening to them, clients calm down. They begin

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2 to see how the future might look for their family
3 as they restructure. Collaborative attorneys are
4 challenged to provide that safe environment for
5 the clients, so that first they identify their
6 broad goals. If you can tell me what a good
7 divorce looks like, maybe we can help guide you
8 toward it.

9 We have them develop parenting philosophies,
10 and when they come back to the table and they talk
11 about how they envision their children grown up,
12 if they've done their job to the best -- the best
13 of their ability, they agree on 99 percent of what
14 they're talking about.

15 We also have the clients then gather all of
16 the information they need to make full and
17 complete decisions. All of the information,
18 relationship, emotional, legal, financial
19 information that is voluntarily disclosed, after
20 they have all of that information, that's when
21 they start to develop options for settlement. We
22 tell people it goes in slow motion at first, if
23 they're doing this right, it goes very quickly at
24 the end. We're finding that it takes the clients
25 between two and six months, start to finish.

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2 HON. SONDR A MILLER: Do you ever have an
3 agreement where there's a collaborative law
4 agreement in regard to custody only? Not the
5 other issues involved in the divorce.

6 SUZANNE BRUNSTING: I haven't had that
7 happen, but I have had post matrimonial
8 negotiations dealing with single issues, where the
9 clients have litigated in the past, they don't
10 want to litigate now, and they opt to come into
11 the collaborative table. We -- we try not to
12 isolate issues, though, we try to have them
13 develop a working relationship for all of their
14 issues so that they can be resolved.

15 Resolving marital issues requires
16 businesslike attention and a full knowledge of the
17 legal framework. It doesn't have to be
18 adversarial. Just as a couple faces other
19 decisions, their -- together, whether they have
20 children, where they're going to live, uh, how
21 they're gonna take care of their financial
22 circumstances while they're married, the
23 negotiation of a Separation Agreement can just be
24 seen as a extension of their responsibility.

25 How can attorneys best help them hear one

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2 another, craft a solution acceptable to both of
3 them? How can their attorneys guide them so that
4 they do as little damage as possible to their
5 children and their future parenting relationship?

6 What is turning litigators into collaborative
7 attorneys is years of knowing that there has to be
8 a better way to help clients resolve their issues
9 so that those clients can work together in the
10 future, raise their children to be whole and
11 healthy and not feel the need to return to court
12 and litigate repeatedly.

13 We all have horror stories of families turned
14 into hamburger by the litigation process. And I
15 have watched children from birth through young
16 adulthood ruined with their parents fighting over
17 them. I used to have annuity files, those clients
18 we were sure would be back. My assistant had this
19 super secret filing place where she put the files
20 when she knew those folks would be returning, and
21 they did. Attorneys who are neither trained nor
22 are experienced in collaborative law often claim
23 that this can't work, that people are too
24 vindictive, angry, vengeful, to sit down and work
25 together, and that is simply not true in the

1 Matrimonial Commission Hearing
2 majority of cases. Are clients angry and hurt and
3 anxious? Of course. Skilled collaborative
4 attorneys model civil problem solving behavior for
5 their clients. We tell them that those feelings
6 of fear and anxiety are normal but it's their
7 higher functioning self who chooses collaborative
8 law. And if they retain us as collaborative
9 lawyers, we're going to give them the best
10 possible collaborative law they can get.

11 We structure the process, they make the
12 decisions, we structure the pace of the
13 negotiations and help them find an agreement that
14 works best for their own families.

15 Now here comes the disclaimer. The
16 collaborative process is not appropriate for
17 everyone. It takes four functioning individuals
18 at the table. Significant impairment of one of
19 the parties makes this almost impossible. And by
20 impairment I mean mental illness, drug or alcohol
21 abuse, serious domestic violence, something that
22 makes it so that they can't participate fully at
23 the table. There is still a need for the court
24 system and for litigation, but we liken it to the
25 medical model, we still need surgeons and

1 Matrimonial Commission Hearing
2 emergency rooms, but we don't go there first, and
3 we don't go there if something less invasive will
4 make us healthy.

5 When we were introducing collaborative law to
6 the judges in Monroe County, Judge Lunn said,
7 "Ahh, Sue, I get it, you're going to take the 80
8 percent of the nice people and leave us with the
9 20 percent who are truly dysfunctional."

10 HON. SONDRRA MILLER: Ha ha.

11 SUZANNE BRUNSTING: And I said, your Honor,
12 you're absolutely right, but then you're going to
13 have all of the power and resources of the court
14 to focus on the 20 percent of the folks who really
15 need your help.

16 I asked clients to complete an evaluation
17 when their agreement is signed, and I'd like to
18 share with you four clients' comments. They are
19 eloquent, thoughtful and honest to the point.

20 The first was a five-year marriage, one young
21 child, a four-month collaborative process start to
22 finish. "If you can try to put aside the
23 emotional part of your separation or divorce and
24 think 100 percent about what is best for your
25 children and you, this process works. Your

1 Matrimonial Commission Hearing
2 thoughts and concerns will be addressed but in a
3 human way, not with hostility. The process
4 continues even when you leave the board room or
5 office. We are working together still for the
6 best interest of our son."

7 27-year marriage, two children,
8 five-and-a-half-month collaborative process,
9 "Collaborative law seems like the ideal process
10 for our situation and our personalities,
11 nonconfrontational, nonaccusatory, based on mutual
12 respect for the best interest of the kids. We
13 chose it together once we read about the
14 information forwarded to us by Sue. It made sense
15 for us, and we felt confident we could carry out
16 the process cooperatively. We liked the idea of
17 having individual attorneys to consult with yet
18 who were committed to an open collaborative
19 decision-making process among the four of us."

20 15-year marriage, one child, 12 -- 12-month
21 process, but they took a six-month time out to see
22 about reconciliation, and then came back to the
23 table. "I thought the process sounded like the
24 best of both worlds, you have individual counsel
25 but you don't go to court. Instead, you work

1 Matrimonial Commission Hearing
2 together to come up with resolutions. We did not
3 want to go to court, and we wanted the process to
4 be amicable, especially considering our daughter
5 and the effects of the divorce on her.
6 Collaborative law is a process that at the end
7 allows both parties to feel a fair resolution was
8 agreed upon, and which lays the foundation and the
9 groundwork for a positive relationship between
10 parties where children are involved.

11 "And a 27-year marriage, two children,
12 five-and-a-half-month process. "This is an ideal
13 model for couples who have -- want to remain on
14 respectful terms with each other but yet who have
15 made the decision to separate or divorce. It
16 permits the couple to resolve all of the many
17 financial and custodial issues while honoring each
18 person's dignity. It's not the way to get the
19 best deal for one's own private self. It's a way
20 to work through the painful process with a minimum
21 of further damage." We'd like to ask that -- can
22 we ask for three -- I have three -- if we have
23 three requests of the Matrimonial Commission, the
24 first is for information to be made available to
25 the public about the process choices when they

1 Matrimonial Commission Hearing
2 first come to the court, when they first come to
3 your web site, when they first file a petition
4 with the court, uh, so that they understand they
5 have choices for mediation to collaborative law to
6 traditional representation, that should be a
7 relatively simple problem to solve.

8 The second is that we'd like to identify
9 cases that have been resolved through the
10 collaborative process. So that the courts and we
11 will know how many of these cases are being
12 resolved this way. It might be just a check box
13 on the final form that is submitted.

14 And then finally we would like an opportunity
15 to provide collaborative law education to the
16 judges so that they understand clearly what this
17 is and so that if a separation agreement is
18 challenged in the courts, the judges will see fit
19 to uphold those contractual provisions that make
20 this process so powerful.

21 HON. SONDR A MILLER: Thank you very much.

22 SUZANNE BRUNSTING: Thank you.

23 HON. SONDR A MILLER: Miss Suzanne Tomkins.

24 SUZANNE TOMKINS: Good afternoon. The end of
25 a very long day, I'm sure.

1 Matrimonial Commission Hearing

2 Thank you for the opportunity to address you
3 today. My name is Suzanne Tomkins. I am an
4 attorney and an Associate Clinical Professor of
5 Law at the State University of Buffalo School of
6 Law where I have been the Director of the Family
7 Violence Clinic since 1992. And I see one of my
8 law students, my research assistant, actually,
9 sitting front and center, Amanda Warner. That was
10 a surprise.

11 The clinic supervises students representing
12 clients in civil and criminal court settings. It
13 also serves as a resource for counties in Western
14 New York, providing research assistance with
15 policy development and trainings. I have also
16 been a trained mediator since 1994 and mediate
17 both private cases and as a volunteer for the
18 Dispute Settlement Center. I have also taught a
19 mediation course and have provided training on
20 both mediation and domestic violence in national
21 and international forums.

22 According to the ABA Commission on Domestic
23 Violence, by the most conservative estimate, each
24 year one million women experience nonfatal
25 violence by intimates. 90 to 95 percent of

1 Matrimonial Commission Hearing
2 domestic violence victims are women. Much of
3 female violence is committed in self-defense and
4 inflicts less injury than male violence. 70
5 percent of intimate homicide victims are female.
6 Today I would like to address my areas of
7 expertise as they relate to matrimonial practice
8 in New York State. My work in the clinic provides
9 me an opportunity to engage in domestic violence
10 work in over ten counties. I am well aware of the
11 lack of legal resources in many of the rural
12 counties. Counties such as Genesee, Orleans,
13 Allegany, Wyoming, Cattaraugus and Livingston, and
14 I would include Chautauqua, which I did not in my
15 written comments, where it is not a matter of a
16 long wait list, it is simply not a possibility due
17 to funding cuts for civil legal service agencies.
18 There is no access for indigent and low income
19 victims of domestic violence, people who are
20 desperately attempting to escape the abuse for
21 themselves and their children. They may be able
22 to go to court and obtain an Order of Protection,
23 but when confronted with the reality of trying to
24 leave their marriage it is simply impossible. For
25 domestic violence victims it is not a luxury, it

1 Matrimonial Commission Hearing
2 is a necessity. As the Commission considers the
3 information presented, I urge you to consider the
4 needs of those who are not represented here today.
5 Families torn apart by abuse need more than Orders
6 of Protection and short term shelter. They need
7 to have access to legal resources including
8 experienced attorneys well versed in domestic
9 violence law to assist them in divorce and related
10 proceedings. Without the provision of these basic
11 services we are condemning women and children to a
12 life of violence in their homes. Safety in one's
13 home should not be a luxury afforded by only those
14 with access to wealth.

15 The second topic I would like to address is
16 domestic violence in the context of mediation.
17 Although domestic violence may occur at any point
18 in a relationship, generally the frequency and
19 severity of the violence escalate over time. It
20 is commonly believed that the risk and amount of
21 violence increase when a relationship ends. When
22 victims take action to end the relationship, the
23 abuser may use violence or intimidation to keep
24 her from leaving or seeking assistance. For this
25 reason, extra caution should be exercised at every

1 Matrimonial Commission Hearing
2 stage of separation and divorce proceedings. It
3 is the legal system's responsibility to provide
4 trained professionals able to respond to the level
5 of danger posed by these cases.

6 Most people would agree with the statement
7 that domestic violence is not an appropriate topic
8 for mediation, as the power imbalance inherent in
9 domestic violence makes it dangerous for the
10 victim to protect her own interests. A mediator
11 would never attempt to mediate violence between
12 individuals. However, it is also important not to
13 engage individuals in mediation if there is abuse
14 in their relationship. In other words, even if
15 the topic being mediated is custody or visitation
16 and not verbal, emotional or physical abuse, it is
17 still not appropriate nor is it safe to engage in
18 mediation. Because we know so many individuals
19 are abused, it is essential that individuals be
20 screened for the presence of domestic violence and
21 that procedures be in place to ensure the safety
22 of the parties, the mediator, and the screener, if
23 it is revealed.

24 The prevalence of domestic violence along
25 with the many reasons why individuals may not

1 Matrimonial Commission Hearing
2 reveal their abuse means that these cases are
3 being referred to mediation. In a survey of
4 court-mandated mediation nearly 50 percent of
5 participants reported domestic violence or abuse.
6 When a preliminary screening tool was implemented,
7 less than five percent of those cases were
8 excluded. This is in research done by Rodney John
9 in "Mediation and Domestic Violence".

10 HON. SONDR A MILLER: Where was that please?

11 SUZANNE TOMKINS: It's Rodney John.
12 "Mediation and Domestic Violence" is the name of
13 the report. This research points out not just the
14 difficulty in creating an effective tool, but also
15 the importance and need for ongoing research.

16 A group in Western New York was convened and
17 has been meeting for over a year to develop a
18 screening tool and training for use by the courts
19 and agencies that receive court-referred cases.
20 The group is comprised of mediators from the
21 court, the private sector and agencies. In
22 addition, the group includes the director of Haven
23 House, a domestic violence shelter in Erie County,
24 representatives from the New York State Office for
25 the Prevention of Domestic Violence, the New York

1 Matrimonial Commission Hearing
2 State Coalition on Domestic Violence and the
3 Office of Court Administration Office of Dispute
4 Resolution and UB Law School.

5 I would like to briefly explain the screening
6 tool that the group I mentioned above is
7 developing. Many states that mandate mediation
8 have implemented a domestic violence screening
9 tool. The New York Model Code on Domestic
10 Violence and Family Violence describes the duty of
11 mediators to screen for domestic violence. After
12 researching various policies and much discussion,
13 our group decided to adopt a screening procedure
14 based on a model currently used in Michigan
15 courts. It was created by a group similar to
16 composition to those in New York and has been in
17 place for several years.

18 It is my recommendation to this Commission
19 that a similar tool be adopted in courts
20 throughout New York. It is important that this
21 screening process incorporate the following:

22 The same mediation tool should be
23 administered to both parties irrespective of sex.

24 Parties should be asked if they wish to
25 mediate and why.

1 Matrimonial Commission Hearing
2 Questions that will expose coercion and
3 intimidation as well as overt cases of physical
4 violence should be included.

5 The screener should inquire about calls to
6 the police and the reason for those calls.

7 The screener should determine whether either
8 party has threatened the children and inquire
9 whether factors are present that can exac --
10 exacerbate domestic violence or compromise the
11 parties' ability to mediate, such as drug or
12 alcohol use or mental illness.

13 Engage in a multi-tiered approach to
14 screening that includes monitoring at each point
15 in the process.

16 And we recommend a minimum of a two-day
17 training that should be provided at every level
18 throughout the court system.

19 In conclusion, I urge the Commission to
20 consider this information as you go forward in
21 implementing any changes in matrimonial
22 proceedings in New York. We are very fortunate in
23 New York to have the commitment and leadership of
24 Justice Kaye, who has implemented many initiatives
25 to address the legal needs of those whose lives

1 Matrimonial Commission Hearing
2 are impacted by domestic violence. I am confident
3 that this Commission will further these efforts.
4 Thank you again for this opportunity.

5 HON. SONDR A MILLER: Thank you.

6 Miss Jan Kurth.

7 JAN KURTH: Good afternoon. My name is Jan
8 Kurth, and I'm just recovering from a little
9 laryngitis, so please bear with me. I'm a
10 noncustodial mother, a CASA-trained volunteer
11 currently inactive due to time and employment
12 constraints, a past member of the Battered Mothers
13 Custody Conference that was organized out of a
14 meeting held at Sienna College last year. By
15 profession, I'm an urban planner and grant writer
16 with an undergraduate degree from Vassar College
17 and Masters from SUNY Buffalo. Among the projects
18 I am currently working on is a HUD Continuum of
19 Care application for transitional housing that
20 would serve homeless domestic violence victims and
21 their children. I am currently living in
22 Chautauqua County, which is just to the south of
23 Erie County, for those of you who are not too
24 confident in your geography.

25 While I could discuss many aspects of the

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2 divorce process, I will limit my comments to the
3 training of custody evaluators, the rise of joint
4 custody and sole father custody and the problems
5 that these raise for mothers and children, and the
6 lack of accountability for various ethics
7 violations.

8 Under Poor Training for Custody Evaluators.
9 Custody evaluators often have dubious
10 training, as many parents have found out in New
11 York State. In Chautauqua County one private
12 evaluator -- evaluator was able to set up practice
13 with nothing but a background in pastoral
14 counseling. This often leads to professional and
15 ethical problems, as in at least one documented
16 case this same evaluator declined to contact one
17 of the parents, in this case the mother, or seek
18 any information from this parent -- from this
19 parent before making a custody recommendation.
20 Nevertheless, the judge in this case admitted this
21 report into evidence and cited it in his final
22 decision.

23 In addition to the general inadequacies of
24 custody evaluators, there is often little training
25 in domestic violence. Nationally, just four

1 Matrimonial Commission Hearing
2 percent of mental health providers are estimated
3 to have had sufficient DV training. As a result,
4 evaluators are too frequently taken in by unproven
5 and dangerous psychological theories, such as
6 Richard Gardner's Parental Alienation Syndrome,
7 PAS, and its many spinoffs. This theory asserts
8 that in cases where a child shows fear or
9 reluctance around one parent, typically assumed to
10 be the father, it is generally instigated by or
11 the fault of the other parent, typically assumed
12 to be the mother. In what are purported to be
13 "severe" cases it is recommended that custody be
14 transferred from the so-called "alienating" parent
15 to the so-called "victim" parent. While this
16 theory sometimes gives lip service to domestic
17 violence or child abuse as a cause for the
18 children's behavior, this very real possibility is
19 seldom explored and in practice. In addition,
20 there's tremendous gender bias in how the theory
21 is applied. Women are often accused of PAS, but
22 there are very few cases, if any, where a mother
23 has successfully charged PAS against the father.
24 In addition, PAS theory does not acknowledge that
25 estranging tactics are very much a part of the

1 Matrimonial Commission Hearing
2 modus operandi of the abuser. In other words,
3 estrangement tactics are not so much a discrete
4 psychological syndrome suddenly arising in mothers
5 at the time of the divorce, as a common response
6 of the abusive personality. Again, in Chautauqua
7 County, one mother lost custody despite the fact
8 that the court-appointed evaluator determined that
9 the father displayed, quote, alienating type
10 behavior and had attempted to obstruct contact.
11 Apparently this kind of behavior was only
12 unacceptable in mothers, as the same evaluator,
13 speaking at a Fathers Rights summit, spoke at some
14 length on the harms associated with "maternal
15 gatekeeping", end quote, which is apparently
16 another term for blaming mothers who allegedly
17 restrict the children's access to their fathers,
18 even if there are concerns related to domestic
19 violence or child abuse. The presentation made no
20 acknowledgment of the fact that "gatekeeping" can
21 be a normal, healthy, and, indeed, expected
22 behavior for mothers or parents in general,
23 sometimes called taking responsibility for one's
24 children and keeping them from harm's way. And,
25 of course, there was no acknowledgment, especially

1 Matrimonial Commission Hearing
2 in this setting, that fathers, especially abusive
3 fathers, can be guilty of blocking access to the
4 children or attempting to alienate the children
5 from the mother, especially as more fathers gain
6 custody.

7 And then regarding the problems regarding
8 joint custody and father custody.

9 As some speakers have mentioned earlier, it
10 is not uncommon for a father with a history of
11 domestic violence or abuse to gain joint custody
12 or even sole custody. According to several
13 studies, fathers, even abusive fathers, are
14 successful in some 70 percent of contested child
15 custody cases. The results can be tragic.
16 Earlier this year in Orange County a seven-year
17 old girl was allegedly stabbed to death by her
18 father, who had sole custody. The father had
19 gained custody despite two Orders of Protection
20 against him by two different women for domestic
21 violence, one was the girl's mother, and many
22 illegal drug issues. More recently, a three-year
23 old Buffalo child was murdered by a father with
24 sole custody. While it is reprehensible that any
25 parent would murder his or her own child, it is

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2 especially repugnant that a child would have been
3 ordered into the care of such a parent by the
4 courts, especially with clear warning signs.

5 Even in cases where the abuser is not granted
6 full custody there can be problems. Two years ago
7 during a visitation exchange in Chautauqua County
8 a woman was kidnapped by the father of her
9 children, driven across state lines and assaulted.
10 In this case, she had an Order of Protection, but
11 was apparently still required to facilitate
12 visitation. Last year, a Chautauqua County mother
13 was unsuccessful in her attempts to gain sole
14 custody of her minor daughter, despite the fact
15 that the child's birth father was a registered sex
16 offender who had served jail time for molesting an
17 older stepdaughter. As a result of her fears,
18 this woman ultimately returned to her battering
19 partner, a trend which is certainly worrisome. In
20 another case, a custodial mother in Chautauqua
21 County was told she must continue to allow the
22 father to visit their preschool-aged child, even
23 while an active sexual abuse charge was being
24 investigated. Appointing the mother or current
25 girlfriend of an alleged abuser to serve as a

1 Matrimonial Commission Hearing
2 monitor appears to be a common practice, though of
3 dubious value to the safety of the child, given
4 the enabling behavior and denial common to those
5 who choose to live with and support these
6 individuals.

7 These are not isolated incidents. Domestic
8 violence agencies in Chautauqua County, such as
9 the Agnes Home, have all reported an alarming
10 number of clients who have faced custodial
11 challenges and even lost custody to an abuser.
12 Some have lost due to a poor understanding of
13 domestic violence on the part of judges and the
14 courts. Especially the myth that "women do it
15 too" and in the same numbers. As a result, our
16 courts have sometimes condemned both parents for
17 domestic violence behavior, even if the woman just
18 got out of Intensive Care and the man has a few
19 scratches. These assumptions tend to ignore the
20 severity of the violence, the psychological
21 aspects of domestic violence, and the need for the
22 abuser to control or terrorize the victim.

23 One person, who used to administer a program
24 for battering men, reported to me that one client
25 in the program had threatened to kill his ex

1 Matrimonial Commission Hearing
2 within the program. The same man had been granted
3 custody of their young daughter by the courts.
4 Once mothers lose custody, there appears to
5 be very different standards applied to visitation.
6 One Chautauqua County mother was told, after
7 complaining of numerous visitation violations,
8 that she was responsible for enforcing her own
9 visitation agreement, despite the father's
10 hostility. On the other hand, custodial mothers
11 are frequently told by our courts that they must
12 rearrange their schedules and make the appropriate
13 arrangements so that the children can visit the
14 father in jail, even when he is in jail for a
15 violent crime like assault. This, too, seems to
16 be very common in Chautauqua County. And if they
17 fail to comply, they can be accused of alienating
18 behavior. This is despite the fact that there is
19 no evidence that jail visitations are of any
20 benefit to children. A recent New York Times
21 article on the subject raised the specter of
22 whether all this mandated prison visitation
23 didn't, in fact, normalize the prison experience
24 for at-risk young people. In fact, one of the
25 biggest risk factors for becoming a criminal is

1 Matrimonial Commission Hearing
2 not having a single mother, as is sometimes
3 asserted, but having a parent or other close
4 relative who exhibits antisocial behavior or has
5 been incarcerated.

6 On the question of professional ethics.

7 There's often little recourse for parents who
8 experienced breaches in professional ethics. It
9 is often the word of the parent against the
10 professional and any complaint tends to be
11 dismissed as sour grapes on the part of the losing
12 parent. In some cases it is not clear where one
13 would complain or how. In the case of the
14 evaluator who was not a licensed psychologist but
15 a pastoral counselor, what professional board
16 would apply?

17 In another case, a Chautauqua County attorney
18 actually admitted during a pretrial conference
19 that he had spoken to the child in question, a
20 clear breach of professional ethics. The mother
21 had suspected this was true, as some time before,
22 the child had repeated -- had been repeating
23 disparaging comments about the mother, followed by
24 the mantra, "Daddy's lawyer says so". Yet no one
25 within the court felt compelled to pick up on the

1 Matrimonial Commission Hearing
2 matter. It would have been the responsibility of
3 the wronged parent, who often has no credibility
4 in these matters unless he or she is able to join
5 in with other parents with the same or similar
6 complaints.

7 In terms of reform, I think several
8 initiatives need to be pursued.

9 One, comprehensive training for all court
10 personnel, especially in matters related to
11 domestic violence and child abuse.

12 Two, a presumption that perpetrators of
13 domestic violence and child abuse not be granted
14 custody when there's a nonperpetrator parent.

15 Three, that jail visitation needs to be at
16 the full discretion of the nonoffender custodial
17 parent or caregiver.

18 And, four, that clear lines of authority and
19 accountability exist for obvious ethics
20 violations, thus relieving some of the burden
21 placed on parents.

22 Thank you for this opportunity.

23 HON. SONDR A MILLER: Thank you very much. I
24 think that is our last presenter. Is there anyone
25 in the audience who is supposed to be speaking

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2 with us? I want to thank you all again for your
3 interest, for your attendance and your assistance.

4 Good afternoon.

5 (4:41 p.m. recess.)

6 (4:43 p.m. proceedings resumed.)

7 HON. SONDR A MILLER: Elizabeth Hendy, I
8 think.

9 ELIZABETH HENDY: Yes.

10 HON. SONDR A MILLER: Thank you. We were
11 about to give up, but you're on time.

12 ELIZABETH HENDY: Yes. I'm so sorry. Never
13 try to get your instructions on how to get to the
14 Erie County Courthouse by going to either Map
15 Quest or Yahoo maps, you end up being almost late.

16 My name is Elizabeth Hendy, and to give you
17 an idea of where I'm coming from, I'm an attorney
18 with Legal Assistance in the Finger Lakes which is
19 a division of Legal Assistance in Western New
20 York. We are a civil legal services office which
21 provides civil services to the low income
22 community. We serve mainly a rural area,
23 Rochester is included in our service territory,
24 although it's not an area that I'm specifically
25 assigned to. All of the other counties that we

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2 serve are rural.

3 Part of what I've come here to speak about is
4 the issues that I see affecting the clients who
5 come to my office, the clients whom we,
6 unfortunately, must turn away either because we
7 simply do not have the resources to serve them, or
8 because although they really would still be
9 considered low income, they're not low income
10 enough to qualify for legal assistance. To give
11 you an idea of how low income that has to be, a
12 single mother who has one child, whose income is
13 over \$24,000 a year is not going to qualify for
14 our services.

15 Uh, even if she is within those income
16 limits, because of limited funding, there's a very
17 good chance that we will not be able to provide
18 her with assistance; or, if we can provide
19 assistance, it would be through one of our pro se
20 divorce clinics, which provide a very limited type
21 of assistance. Uh, I am the administrator for pro
22 se divorce clinic programs for low income people
23 in a four-county region, and I get a good view
24 through that program of what low income people are
25 facing when they go through the court system

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2 trying to get a divorce. I see the problems that
3 they face, I see things that keep them from
4 getting access to justice, and I also realize that
5 a lot of people that I don't even see, because
6 they make more than these low income limits, but
7 still really not enough money to cough up the
8 minimum \$1500 retainer that a private attorney
9 will need, often much more than that if they have
10 any fear that they're going to get caught in a
11 custody battle or a case that's going to actually
12 be contested. So accessing legal services is very
13 difficult for them, and accessing the court is
14 also very difficult. Now, legal assistance, there
15 are ways to do that, but we're also concerned
16 about things that keep clients or our nonclients
17 even worse from being able to get into the court
18 when they really need help.

19 CPLR 1101, which provides poor person status,
20 since 1999 that has permitted us to sign an
21 attorney's waiver to get clients into the court
22 where they waiver of court fees without having to
23 go through a formal motion process. But that's
24 not going to cover clients who we are not actually
25 representing, and, more importantly, it doesn't

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2 cover everything. To start with, it doesn't cover
3 the cost of a transcript. So, if a case becomes
4 contested, perhaps even heads out, goes in front
5 of the matrimonial referee, eventually settles, we
6 put our stipulation on the record, we need a
7 transcript, it's gonna cost \$100 or more, it's not
8 covered by the certification.

9 Uh, it is covered by a poor person's order,
10 if somebody has acquired their order by making a
11 formal motion, but it is not covered by our
12 certification. Most of the judges that I practice
13 in front of have been good about streamlining it
14 so that we can get this order in order to have the
15 transcripts paid for, but I've always had a
16 question about why that isn't included among the
17 covered services.

18 Uh, something uh, even that order is not
19 going to cover a lot of fees that get thrown at
20 parties in these proceedings. Uh, forensic fees
21 or fees for the psychologist or custody
22 evaluations are not covered by a poor person's
23 order. It doesn't cover Law Guardian fees, and
24 that's one that I see my clients get bit by a lot.
25 Uh, I'll provide an example of that. Last year I

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2 had a client who was supposed to have a very
3 simple divorce. She had a custody order and a
4 support order that were less than a year old from
5 the Family Court. They had really no property to
6 speak of. It should have been a very simple
7 divorce. She was a domestic violence victim, as
8 most of my clients that I provide full services to
9 are, because we do have limited services and
10 that's what we focus on. Her husband decided that
11 he was going to try and make this his opportunity
12 to go back in, redo the custody and the child
13 support and everything that had been done in
14 Family Court less than a year before. He did not
15 allege a change of circumstances. He did not have
16 a change of circumstances. But, nevertheless, the
17 matrimonial referee that we ended up in front of
18 decided that that didn't matter, this was Supreme
19 Court, that had been Family Court, the Family
20 Court order was treated more or less as if it had
21 been a temporary order, and suddenly we were in
22 the middle of a contested custody visitation
23 trial. Not only that, but there was an order made
24 that a Law Guardian was going to be appointed and
25 that both of the parents would have to deposit a

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2 thousand dollars to pay for that Law Guardian.
3 These actually were both relatively low income
4 people. My client was probably at about \$15,000 a
5 year with two kids, that is not only her income
6 from her job, that's also the child support that
7 she was receiving. So at \$15,000 a year she was
8 told that she had to cough up a thousand dollars
9 to pay for her share of the Law Guardian. Not
10 only that, she was told that if they didn't do it
11 within the 60 days that she had, that she would be
12 considered to be in contempt of court. After that
13 court appearance I spent a long time explaining to
14 a client who was in tears, and quite rightfully
15 so, that we would be able to do something about
16 this, but that's not what I should have had to
17 spend my time on is dealing with a battle over how
18 to pay a Law Guardian that we really shouldn't
19 have needed. It's not a unique problem in terms
20 of where fees for these other things are going to
21 come from.

22 A colleague had written to me just last
23 December, because she needed to get the paperwork
24 to make a motion to have the other party forced to
25 pay a larger share for the forensics. Uh, she

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2 wrote to me that she had a violation modification
3 case for a case that involved domestic violence in
4 a child with mental health issues. The Court
5 directed forensics with a psychologist. Our
6 county Health Department is one of the ones that
7 had been cited as being deficient in the Wisson
8 case so they were an option for us. My client
9 makes 15,000, Dad makes almost a hundred thousand.
10 The forensic evaluation cost \$4,000 and my client
11 was ordered to pay for half of that. The report
12 turned out to be very much in her favor, it was
13 very good, they wanted him to testify, however,
14 she had no way to come up with the fees, and she
15 was stuck with an order that was telling her that
16 she had to pay half of that fee, despite the fact
17 that she had a very high income husband on the
18 other side of the case. And as this advocate
19 wrote to me, can you please give me a motion
20 that's going to let me seek an order that will
21 make the other party pay more for this, I expect
22 that I'm never going to get it with this judge,
23 but I have to make the effort anyway, this isn't a
24 unique situation. I deal with situations like
25 this all the time. Other low income attorneys who

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2 serve low income clients also complain constantly
3 that they come up with this -- with this problem,
4 when clients come to our office we try and keep
5 their divorces simple so that we won't spend a lot
6 of time on it, and so that they don't get dragged
7 into these battles with lots of extra fees on it
8 in Supreme Court. The Supreme Court just is not a
9 friendly court for low income people in many ways.
10 We try and tell them go to Family Court first, get
11 yourself a custody order, get your child support
12 done in this court, for a lot of reasons this is
13 going to help you out. You will probably get your
14 child support coming in faster that way. If you
15 do need a Law Guardian and you're low income, in
16 Family Court you're not going to have to pay for
17 it. We know it's going to be a real problem if we
18 have to do this in Supreme Court instead.

19 My solution to this would be that for many
20 people the support and the custody and the things
21 that really effect children ought to be handled by
22 the Family Courts, and once there is a Family
23 Court order unless there is a substantial change
24 of circumstances it should be clear that the
25 Supreme Court in the divorce shouldn't meddle

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2 around with those orders that have already been
3 issued for the children. It's going to get the
4 support coming in faster. It's going to give them
5 better access to the system. We also need to do
6 something so that they don't get frozen out of the
7 court system. If they are the defendant in a
8 divorce action, they may find that if they haven't
9 gotten themselves into Family Court first to get
10 themselves the support order, they may end up
11 waiting a long time, actually, before they start
12 getting support for their children. And if they
13 try to go to Family Court, unless the Social
14 Services attorney is doing it on their behalf
15 because they're so low income that they're
16 actually on public assistance, they will not be
17 able to go into Family Court, they will be thrown
18 out because of the jurisdictional issues. Same
19 thing with their custody. They often do end up
20 being trapped, sometimes I think it's just the way
21 it turns out, often I know that there other --
22 there's other spouse's attorney has advised them
23 to do this because they know this is what's going
24 to happen. They know that it will permit them to
25 drag matters out.

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2 Uh, one solution for this would be if we

3 could reach a point where we set up a matrimonial

4 division in the family courts that if Supreme

5 Court doesn't have jurisdiction over this, if the

6 family courts could deal with this, and if

7 matrimonials were taken out of the Supreme Court,

8 it could be a good thing for a lot of families.

9 It could help prevent them from being cut off from

10 access to the system. I know that if it's a

11 problem even for the clients that I'm

12 representing, that I see them having more

13 difficult time reaching justice, reaching access

14 to the courts, I know that those people who aren't

15 even able to access our office are just having

16 that much more difficult of a time. Uh, even

17 getting the other party ordered to pay attorney's

18 fees is a very difficult thing. Uh, it ought to

19 be easier to access the court. Sometimes we put

20 them in a do-it-yourself program and we help them,

21 because we know there's income on the other side,

22 we help them to file a motion to have the other

23 spouse ordered to pay their attorney's fees, but

24 what if this is someone who can't even access our

25 office? They don't qualify for some reason, God

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2 forbid we have a conflict of interest and that
3 happens a lot. We're a small community. We may
4 have served both spouses at some point in the past
5 for housing or something else, and we -- we may
6 not be able to help them for that reason. There
7 are a lot of people that we have to turn away and
8 we can't help. How are they going to know how to
9 do what they need to do in order to file that
10 motion, to have their spouse ordered to pay the
11 fees so that they can get a attorney? And you
12 better believe those private attorneys cannot
13 afford to take the risk to agree to represent them
14 when they don't have any money in hand, they don't
15 yet know whether if they make a motion for counsel
16 fees it's going to be granted, they don't know
17 whether they're gonna get stuck holding the bag,
18 putting in a hundred hours worth of service and
19 not getting paid. So they will not take these
20 clients without the money up front. Even
21 sometimes where there's a very high income spouse
22 on the other side they're taking a risk there,
23 because what if everybody decides to withdraw the
24 divorce two months later after they put in a lot
25 of work on it? Well, they're not getting their

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2 fees then either. It's a very risky thing for
3 them to do that, and there should be some
4 procedure that makes it easier for a pro se person
5 to get into court and ask to have their spouse to
6 be ordered to pay counsel fees on their behalf,
7 especially now that everybody is required to have
8 their retainer agreement filed with the court
9 system, you know what they paid for their own
10 attorney, is it really logical that we can see
11 that they plunked down \$5,000 to pay for their own
12 counsel, but that their spouse is having to
13 traipse into the preliminary conferences and
14 everything else without representation, time and
15 time again. And this is what I see happening to
16 these people, when we try and help them out
17 through the pro se clinics because we have nothing
18 else available for them, and I have to keep
19 sending them into court to do this on their own,
20 or when they come to us kind of in the middle and
21 they've already been to a preliminary conference
22 on their own before they get to us, and I realize
23 that there's such a disparity in incomes here, and
24 it ought to be quite apparent, but here they are
25 still with nobody being ordered to pay attorney's

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2 fees, or to provide counsel for them, and there
3 ought to be a way to solve that problem.

4 Another issue that I did want to address is
5 some of the failures that we've had from the
6 Milonas rules in terms of time compliance. Uh,
7 cases, once the RJI is filed, I find that they
8 move through our courts pretty quickly now. In
9 fact, sometimes quicker than anybody's ready for.
10 If this may be a case that where the parties have
11 gone in and filed quite quickly after a big
12 argument and they really haven't had time to think
13 about where their finances are, or what they need
14 to do about something else, and sometimes those
15 preliminary conferences end up coming up much
16 faster than anybody is actually ready for them.

17 On the other hand, I have cases that have
18 been out there for years, because until that RJI
19 does get filed, there isn't much that you can do
20 without filing motions to actually get the case
21 moving forward.

22 As an example, in one of my cases my client
23 was served in January 2002, the complaint was
24 answered in March 2002. Attorneys exchanged
25 negotiations and letters and stuff for a few

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2 months after that, but as of June 2004 -- or June
3 2002, that is the very last that I have heard from
4 plaintiff's attorney. Uh, his retainer got used
5 up, or for whatever other reason, perhaps he
6 wasn't communicating with his attorney, but after
7 that date my letters to the attorney were no
8 longer being responded to. My phone calls were
9 not being returned. In 2004 I sent out a notice
10 to resume prosecution. There was no response.
11 But this case is still formally pending, uh, if it
12 were a default situation and somebody had
13 defaulted in the divorce and it weren't submitted
14 to -- into court to proceed on to judgment within
15 one year there would be a presumption under the
16 CPLR that that case is presumed dismissed unless
17 you get special permission from the court to go
18 forward at a later date and provide good excuses
19 for why it took so long. There aren't any
20 presumptions like that when a case is started, it
21 becomes a contested case, and then just nobody
22 ever files that RJI. Uh, I'm -- I'm quite stuck
23 at the moment because I -- my client has never had
24 an escrow account, when she came to me she was
25 very low income, but my financial information for

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2 her at this point is three years old, so I can't
3 even get past the -- the filing fees to get this
4 case to move forward by filing a motion or by
5 filing the poor person certification because I
6 can't in good conscience file a poor person
7 certification for a person when my financial
8 information for them is three years old. So I
9 have no way to get myself into court. It would
10 cost \$140 for the RJI and the motion fees to apply
11 to have this case dismissed at this point and to
12 have it cleared from the books. It's not a unique
13 case. I've also had clients who are defendants in
14 divorce actions come to me through our pro se
15 divorce clinics who are in similar situations.
16 They actually were with it enough that able to
17 send a letter or a Notice of Appearance or
18 something that got their cases treating as a
19 contested case. But then it stalled and they want
20 it to go forward and they want to go forward with
21 their lives. They actually move out of state,
22 their lives go on, it's not convenient for them to
23 continue defending this action, but technically
24 these actions are still on the books. Uh, if I'm
25 the attorney, I'm still the attorney of record, we

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2 don't really have any teeth in those rules that
3 say that you have to file your RJI within a
4 certain amount of time, and there really ought --
5 I'm not saying that if you don't file it within
6 the strict deadlines that are under our current
7 statutes that your case ought to be dismissed, but
8 I think if a year has gone by and you haven't
9 filed the RJI, and it just -- the case is making
10 no progress, and it's just sitting there, I think
11 there ought to be an automatic dismissal. I don't
12 think there ought to be a requirement that
13 somebody has to file more filing fees and actually
14 make a motion to the Court in order to get that
15 case disposed of, when it gives all appearances of
16 having been abandoned. And that -- that covers
17 the basic points that I wanted to -- to make
18 today. And I thank you very much for giving me
19 the time to speak.

20 HON. SONDRRA MILLER: Thank you very much.

21 Do you have a question? Do you have a
22 question?

23 Just a minute please.

24 Under the poor person's order is it not true
25 that you can file an RJI without a fee?

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2 ELIZABETH HENDY: Yes, if there's a poor
3 person's order you can. In the particular case
4 that I'm speaking of, uh, there wasn't a poor
5 person's order because we were a defendant, a
6 certification hadn't been done at that point,
7 there was nothing that we had to do to go into
8 court, and although at one point in time I might
9 have been comfortable having filed a poor person
10 certification, I'm not at this point, particularly
11 because I know that my client got a different job.
12 I know that.

13 HON. SONDR A MILLER: Oh.

14 ELIZABETH HENDY: That things like that
15 changed and so I no longer.

16 HON. SONDR A MILLER: Different story.

17 ELIZABETH HENDY: And, quite honestly, my
18 client has not really been good about keeping in
19 touch with me either. If she were updating her
20 financial information with me I might -- to some
21 degree this is my problem, because I am the
22 attorney in perpetuity, and I may still have this
23 case when I retire 30 years from now.

24 HON. SONDR A MILLER: I understand that.
25 Okay.

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2 ELIZABETH HENDY: But still it often happens
3 to parties where they don't want this to happen to
4 it, and, you know, this particular couple, this
5 could very well turn around and bite them in the
6 future. I mean my client was planning on moving
7 out of state. Her husband wasn't real committed
8 to New York State either. They could find
9 themselves in some other state finally wanting to
10 file divorce there and having the complication
11 that they still have a technically pending action
12 back in New York State.

13 HON. SONDRRA MILLER: Thank you very much.

14 ELIZABETH HENDY: Thank you.

15 HON. SONDRRA MILLER: I think that surely
16 concludes our afternoon. Thank you.

17 (5:03 p.m. recess.)

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