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2 NEW YORK STATE MATRIMONIAL COMMISSION  
3 PUBLIC HEARING

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7 DATE: October 14, 2004  
8 9:00 A.M.

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9 PLACE: CARDOZO SCHOOL OF LAW  
10 55 Fifth Avenue  
11 New York, New York

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12 COMMISSION CHAIRWOMAN:

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13 HONORABLE SONDR A MILLER,  
14 Justice

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15 COMMISSION MEMBERS:

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17 BRIAN BARNEY, ESQ.  
18 SUSAN L. BENDER, ESQ.  
19 HELENE K. BREZINSKY, ESQ.  
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HON. DAVID F. JUNG  
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LAURENCE LOEB, M.D.

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COMMISSION MEMBERS CONTINUED:

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- KAREN DAWN McGUIRE, ESQ.
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- PATRICK O'REILLY, ESQ.
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- DAN WEITZ, ESQ.

MICHELE MALLETTE, RPR CMRS  
ALVIN A. NERLINO, CSR, RPR  
Senior Court Reporters

1 Opening Remarks

2 (Whereupon the hearing commences.)

3 JUDGE MILLER: Good morning everyone.

4 Would everyone please be seated.

5 It is now 9 o'clock and we intend to start

6 on time and keep with our time schedule.

7 First I would like to welcome our

8 speakers, our attendees, the press and others to

9 this first public hearing conducted by the

10 Matrimonial Commission.

11 On the tenth anniversary of our

12 predecessor commission to examine these issues and

13 recognizing the important strides made by that

14 commission's work, our Chief Judge, Judith Kaye, a

15 tireless crusader on behalf of the families and

16 children of this state, has acknowledged that still

17 more work can and must be done to further improve

18 the practice of matrimonial and family law in New

19 York State. Therefore, she has charged this

20 32-member statewide panel with a broad mandate:

21 We are to take a global look at the area

22 of family and matrimonial law as it is practiced in

23 this state and to look at all stakeholders, both

24 inside and outside of the system, for input and

25 guidance, think holistically and innovatively to

26 address and resolve these three main areas:

1           Opening Remarks

2           First, reducing and eliminating trauma to  
3 parties and to their children. Second, avoid  
4 unreasonable expense to the parties; and third,  
5 reducing and eliminating delays.

6           This Commission recognizes the urgency and  
7 the importance of our mission and considers its  
8 mandate a great challenge and a great opportunity.  
9 We intend and expect to recommend significant  
10 reforms, and we want to assure you that our Chief  
11 Judge has pledged to do all that she can possibly do  
12 to effectuate reasonable recommendations that will  
13 serve to improve the lives of all of those who  
14 appear before our matrimonial and family courts.

15           Now, our procedure today:

16           First of all, if you have cell phones,  
17 make sure they are turned off.

18           To those of you who have been assigned a  
19 time to speak, please be sure that you have signed  
20 in at the desk outside. As a courtesy to the other  
21 individuals scheduled to speak today, please  
22 remember that your remarks are limited strictly to  
23 ten minutes. Anyone who has written material to  
24 submit for the Commission's consideration should  
25 leave at least two copies to the Commission staff at  
26 the desk outside.

1           Opening Remarks

2           No material will be handed up to the  
3 Commission during the course of this hearing. Note  
4 that the Commission members may, at times, possibly  
5 interrupt you to ask a question or to seek  
6 clarification of a point. We will strive to keep  
7 this to a minimum as we are most interested in  
8 hearing from you about your experiences and your  
9 recommendations for improving the system.

10          Notices of future hearings and  
11 registration forms are available at the desk  
12 outside. Due to what has been an overwhelming  
13 response to today's hearing, the Commission expects  
14 to hold a second hearing in New York City in the  
15 spring of 2005; that date will be announced. Anyone  
16 who has requested to speak today but was not  
17 scheduled will be considered as having registered  
18 for the second New York City hearing and we will  
19 notify that person of that date.

20          As stated on the notice of the public  
21 hearings, the Commission cannot take testimony from  
22 any individual who has a case currently pending in  
23 New York State courts. This is necessary to  
24 protect the integrity of your pending cases and the  
25 work of this Commission. However, such individuals  
26 are welcome to submit their comments and suggestions

1           Opening Remarks

2           to the Commission at any time, and any identifying  
3           details contained therein will be redacted by the  
4           Commission staff, however, the substance of the  
5           submission will remain in tact.

6           We are now prepared to begin.

7           I think we're a little bit ahead of  
8           schedule. That's good.

9           Our first speaker is Debbie Eisenstadt.

10          Is she here? Okay.

11          Would you step up, please?

12          Would you please state your name for the  
13          record.

14          MS. EISENSTADT: My name is Debbie  
15          Eisenstadt.

16          I have been a matrimonial parallel for  
17          over seven years with experience primarily in Nassau  
18          and Suffolk. My case appeared before five Supreme  
19          Court Justices, a Special Referee, a Family Court  
20          judge, a Support Magistrate and the Appellate Court.

21          I will address some of the problems with  
22          the system which affect the litigants and present  
23          some of my recommendations.

24          1. Litigants are required to attend court  
25          appearances despite the fact that they are not privy  
26          to discussions that take place in chambers. They

1 Eisenstadt  
2 are forced to miss work, and in some instances lose  
3 their job. The Courts schedule conferences at  
4 9:30. The judge may have as many as 45 cases at  
5 the same time. The litigants are forced to waste  
6 their time and pay their attorneys to sit and wait  
7 for hours until they see the law secretary or the  
8 judge. Oftentimes they are ordered to return at  
9 2 o'clock because the Court was unable to see them  
10 at the scheduled morning conference.

11 In the Family Court, when a cases with two  
12 pro se litigants is on, they are taken first, while  
13 the attorneys, who charge their clients by the hour,  
14 must wait.

15 On two occasions, including this past  
16 September 11th, When the Court knew that neither the  
17 Judge or the law secretary would be in the  
18 courthouse until close to 11:00, conferences were  
19 scheduled for 9:30. Dozens of attorneys were  
20 unnecessarily forced to wait for hours and charge  
21 their clients for their time.

22 There are judges who direct parties and  
23 counsel to appear on the return date of a motion.  
24 The motion papers may not have been received by the  
25 Court or the opposing party, yet the parties take  
26 time off from work, pay their attorneys to sit and

1 Eisenstadt  
2 wait in the courtroom, and then go back and wait for  
3 two months or more for the decision on the motion.

4 Justice is not equal or just.  
5 Oftentimes, decisions are not based on the law and  
6 the facts but the "feelings" of the Judge. For  
7 example, two applications for pendente lite support  
8 were submitted with almost identical circumstances  
9 and cases law. One judge ordered significant  
10 support and the other minimum support. One Judge  
11 awarded counsel fees and the other did not. It's  
12 unjust that the same set of circumstances brought  
13 before two different judges results in two different  
14 rulings.

15 The law is supposed to be judged neutral.  
16 However, in a case where a husband's net income was  
17 just above the poverty level and he asked for  
18 spousal support, the Court ordered him to pay child  
19 support for two children, exceeding the statute,  
20 denied him spousal support and said he could work  
21 more overtime. In another case the wife, working  
22 part time and paying child support, asked for  
23 spousal support. Her child support for three  
24 children was reduced below the statute and her  
25 husband was directed to make certain payments on her  
26 behalf. She was not directed to work full-time,

1 Eisenstadt  
2 much less to work overtime. These are examples of  
3 gender bias in a system which purports to be gender  
4 neutral.

5 In cases of contempt many judges, despite  
6 the law, do not find contempt and merely direct the  
7 party to do what he or she was ordered to do and no  
8 counsel fees are awarded. Other judges order  
9 incarceration, should the contempt not be purged,  
10 and award counsel fees. It appears that what  
11 happens in a contempt action depends to the judge  
12 and oftentimes on the gender of the party in  
13 contempt. Justice should be equal and a party  
14 should not be made to feel that his case depends on  
15 the whim of the judge or the gender of the party but  
16 rather upon the facts and the law.

17 There are instances when an Affirmation of  
18 Emergency is submitted due to the fact that a house  
19 is in foreclosure or a party has no income and is  
20 not receiving support for the children and/or  
21 themselves. Despite the Affirmation of Emergency  
22 and proof of income of the spouse, the Judge does  
23 not order any support, but merely assigns a return  
24 date. Naturally, the opposing party appears on the  
25 return date, asks for additional time to reply, is  
26 granted that time, and then probably 60 days later,

1 Eisenstadt  
2 if not more, a decision is rendered. During all  
3 that time the impoverished party receives no relief.  
4 The system has failed the party and the children.  
5 There is no reason why child support, at least, is  
6 ordered when the application includes a pay stub  
7 delineating the payor's income. Again, it depends  
8 on which judge signed the Order to Show Cause. Some  
9 judges give most of the requested, and others none.  
10 Again, there must be uniformity in the courts and  
11 equal justice to litigants. The parties should not  
12 have the important decisions in their lives and the  
13 lives of their children dependent upon the whim of a  
14 judge.

15 Judges must abide by the statutes and  
16 Court Rules. Some examples of violations by judges  
17 include:

18 Adjourning a PC conference for two months  
19 sua sponte.

20 Accepting a Note of Issue filed nine  
21 months after it was ordered to be filed and after a  
22 motion was submitted to dismiss the case since the  
23 Note of Issue was not filed pursuant to several  
24 orders of the Court.

25 Not sanctioning attorneys and parties who  
26 fail to appear or appear late. This must be done

1 Eisenstadt

2 across the board, not giving preference to high  
3 profile attorneys.

4 Ordering an attorney to file an Note of  
5 Issue and ordering a case to trial when discovery is  
6 not complete and the case is not ready for trial.

7 Taking no action when a frivolous motion  
8 is submitted. The Judge must find the motion  
9 frivolous and hold the party accountable,  
10 sanctioning that party pursuant to NYCRR 130.

11 Not deciding a pendente lite motion in  
12 thirty days and other motions within 60 days.  
13 Judges who allow motions to languish for months -- I  
14 know of one languishing for over seven months --  
15 should be sanctioned our penalized. The litigants  
16 are suffering during those months, as are their  
17 children. Many times a timely decision on a motion  
18 is critical to the resolution of a case or the  
19 financial stability of the moving party or the  
20 children. Justice delayed is justice denied.

21 Generally, litigants have the expense and  
22 the time-consuming option of appealing, not a viable  
23 option to most litigants. Not only is the cost  
24 prohibitive, but the time which it takes to submit  
25 an appeal and get an Appellate ruling is nine months  
26 to a year. That does not help a payor spouse, who

1 Eisenstadt  
2 must maintain the pendente lite order which far  
3 exceeds his income. That does not help the payor  
4 spouse facing a contempt citation for not making all  
5 of the payments under the Order. It's well-known  
6 that the Appellate Court will say, the best remedy  
7 is a speedy trial. The wife receiving a hefty  
8 pendente lite order will do everything possible to  
9 see to it that the trial is not speedy. Where does  
10 that leave the husband who can't pay when he's  
11 ordered to pay?

12 I have just a few recommendations:

13 1. Pendente lite awards are made based  
14 upon affidavits, which usually do not contain any  
15 proof of lifestyle or purported additional income to  
16 the payor spouse. The courts often impute income  
17 to the husband based upon the wife's affidavit,  
18 which may not be truthful or accurate. A hearing  
19 should be held to determine the truth of the  
20 statements contained in an affidavit rather than  
21 relying on an affidavit devoid of any documentary  
22 proof of additional income or lifestyle. Pendente  
23 lite orders must be reviewed on a regular basis, as  
24 cases can go on for years with the same pendente  
25 lite order in place. Justice Silbermann, in a  
26 recent decision, Hashimoto v. Rosa, ordered that a

1 Eisenstadt

2 pendente lite order may be brought to the Court for  
3 review by either party within six months.

4 2. The system needs a method to hold  
5 judges accountable for unjust and delayed decisions  
6 and improper judicial conduct. We need checks and  
7 balances. There are none. There might be annual  
8 anonymous evaluations of judges. Judges would know  
9 they are being evaluated by the attorneys who appear  
10 before them and that their subsequent position in  
11 the system would be effected by the evaluations  
12 received. The appellate process of filing a  
13 complaint with the Committee on Judicial Misconduct  
14 is not the answer because an appeal is  
15 time-consuming and expensive and the Committee on  
16 Judicial Misconduct will only take action against  
17 the judge if the conduct is deemed egregious. What  
18 the committee deems egregious and the litigants deem  
19 egregious are not the same.

20 3. Courts must schedule appearances with  
21 more realistic timeframes and the number of cases on  
22 at any given time. With specific times to appear,  
23 attorneys and parties would not waltz in at their  
24 convenience and keep the opposing party and counsel  
25 waiting at the expense of the litigant.

26 4. Unless it's anticipated that

1 Eisenstadt  
2 settlement will be discussed at a conference,  
3 parties should not be instructed to appear.

4 5. Whatever can be accomplished by a  
5 conference call, should be, thus minimizing counsel  
6 fees to the litigants.

7 6. The PC order should include an  
8 agreement to remove all barriers by both parties to  
9 avoid non-cooperation by either party with respect  
10 to a religious divorce.

11 And a final recommendation:

12 Judges entering the Matrimonial Part must  
13 be experienced in matrimonial law, or at a minimum,  
14 have a law secretary experienced in matrimonial law.  
15 They should not be transferred out of a matrimonial  
16 part after two or three years and replaced by  
17 inexperienced judges.

18 This Committee must help the litigants and  
19 the attorneys who represent them to receive equal  
20 justice. In the Matrimonial Part justice is not  
21 equal and it is not just.

22 Thank you for your time.

23 JUDGE MILLER: Barbara Handschu.

24 MS. HANDSCHU: Thank you, Justice Miller,  
25 other distinguished jurors, and friends.

26 I'm the president-elect of the American

1 Handschu  
2 Academy of Matrimonial Lawyers, and in fact, three  
3 weeks from today I become president.

4 I've been president of the New York  
5 chapter, a past chair of the Family Law Section of  
6 the New York State Bar Association, I co-chair the  
7 ABA Advanced Trial Advocacy Institute. I  
8 co-chaired the Domestic Violence Committee of the  
9 Family Court Advisory and Rules Committee.

10 I've spent my professional life litigating  
11 far too many custody issues in both trials and  
12 appeals.

13 I want to focus my remarks on the area of  
14 custody, trials and appeals, and in fact the areas  
15 that, Justice Miller, you suggested, the trauma to  
16 children and how to protect children, the expense,  
17 especially looking at the cost of forensics, and the  
18 necessity for forensics and the delay in custody  
19 trials and appeals, which I think have to be  
20 expedited on both levels.

21 The voices of children sometimes are not  
22 heard. I myself represent parents, not children.  
23 However, my goal during my year of presidency of the  
24 academy is to protect the children as much as  
25 possible.

26 One of the areas that I think can help

1 Handschu  
2 through the court system, and certainly will be done  
3 through the academy, are parenting plans. There's  
4 a template for a parenting plan that has come out of  
5 the Academy, it's going to be presented in November,  
6 and I expect that it will be passed. At that point  
7 my goals during my year will be to see that every  
8 Academy fellow has disk hard copy, and ultimately  
9 that those disks and hard copies are available in  
10 courtrooms. There should be computers in  
11 courtrooms, where a litigant can sit down and look  
12 at a model parenting plan. Justice Silbermann was  
13 kind enough to share a parenting plan that I know is  
14 in the works in New York City. It should be all  
15 over this state. It really is something that  
16 parents can sit down with and think about the issues  
17 that are going to come up and how they can prevent  
18 some of the crises, such as What happens when a  
19 holiday intervenes and you suddenly are off  
20 schedule? Well, address it in advance. Don't  
21 assume you are going to go start calling lawyers  
22 back to the courts again. Those preventative  
23 things that can come with something like a parenting  
24 plan.

25 During my year we'll have a plan  
26 protecting children. That is my concern. I'm

1 Handschu  
2 very proud of what we did from "Stepping Back From  
3 Anger", we made it available to our courts. I can  
4 make offers on behalf of the New York chapter, and  
5 hopefully it will be in all courtrooms again and it  
6 will be there with a video. That's something that  
7 we can do.

8 The first speaker spoke about the  
9 appellate process. I need to focus on it too, at  
10 least briefly.

11 Custody appeals must be expedited. I  
12 smile at you, Justice Miller, I know how committed  
13 you are to it, and your department has tried very  
14 hard. It's not true of all the departments; I  
15 practice appellate law in all four departments and I  
16 can certainly tell you from experience, custody  
17 cases should be earmarked for an expedited appeal.  
18 There is no excuse that a transcript isn't ready.  
19 Well, then direct them to get them going. Changes  
20 that happen on the trial court level should be  
21 reviewed immediately in terms of an appellate stay.  
22 Children's lives are at stake.

23 All of us who watched that media frenzy  
24 where two little girls were put in a taxicab, we all  
25 look up and say that should not be happening. Get  
26 them in within weeks to argue an expedited appeal.

1 Handschu

2 They should not have records that go 50 pages and  
3 more and make it more difficult. That is an area  
4 that must be addressed.

5 Custody trials have to be expedited.

6 There has to be a better way. I have at least one  
7 solution that may not endear me with some of our  
8 Supreme Court Justices, but our family courts have  
9 started dedicating parts. There are custody parts  
10 in many of our larger family courts. Judges become  
11 more conversant with the issues, some of them have  
12 court attorneys. When a new issue, such as the  
13 UCCJEA, which many of you know is near and dear to  
14 my heart and I went through it twice until it was  
15 enacted by this state, when a new issue comes up and  
16 there's a dedicated part that knows the UCCJEA, fast  
17 decisions get made because they are conversant with  
18 it, rather than a judge who has not yet seen it and  
19 the Judge's law secretary is not familiar with it.

20 Where there are multiple matrimonial  
21 judges, there should be dedicated custody parts.  
22 It should route out as many of the cases as  
23 possible. There may be backup JHOs by a  
24 stipulation, if that is possible. Give them enough  
25 staff so they can try these cases quickly and  
26 expeditiously, day-by-day. I chaired the Family Law

1 Handschu  
2 Section, I don't remember when it was; I'm sure it's  
3 a good 15 years ago. One of my pet goals was  
4 continuous day-to-day trials in custody cases.  
5 There is nothing more frustrating to litigants, to  
6 lawyers, and moreover, to children who are sitting  
7 in the background, especially older children, than  
8 knowing something is going on and to start yesterday  
9 and not get back again until December 12th, and then  
10 come back again in January. You start, you  
11 prepare, you reprepare. Things change and they are  
12 impossible. And I know we have a rule for  
13 day-to-day trials, but the rule is not being honored  
14 and cannot be honored under crowded parts that  
15 cannot do this. A specialized part would solve it.

16 I heard the earlier recommendations for  
17 fact-finding hearings. There are probably a number  
18 of temporary custody motions that could be subject  
19 to very abbreviated hearings. Other states do it.  
20 A trial judge in the State of Texas, if this were  
21 court time right now, and it might be, is telling  
22 some litigants, you have a hearing, you have two  
23 hours, you may have one hour each; tell me who your  
24 witness or witnesses are, you must not exceed it.  
25 And they may make a determination, for instance, on  
26 a new schedule with temporary visitation that could

1 Handschu  
2 resolve a whole case right then and there. The  
3 litigants have had a chance to have a court, a judge  
4 listen to it.

5 I said I was going to address taking a  
6 hard look at forensic evaluations. Again, maybe  
7 I've been practicing too long, and with due  
8 deference to some of our mental colleagues that are  
9 here, why are forensics ordered in so many cases?  
10 Why does it often feel as if it is, by some jurists,  
11 and I'm not in any way intimating that here, a  
12 knee-jerk reaction? The law guardian says yes,  
13 there seems to be a dispute. Suddenly there's a  
14 forensic being ordered. It adds an overlay of  
15 expense, time, frustration, and probably at times  
16 provides very limited new information.

17 If there is no history of psychopathology  
18 of either parent nor a child or neither significant  
19 person in the child's life, if that's the litigant,  
20 no grand parent, and if no one's been in treatment,  
21 there is no history, there is nothing which seems to  
22 indicate that there is a serious mental health  
23 issue, why are we doing this almost as a rote  
24 response?

25 We know of too many appellate cases that  
26 indicate that mental health testimony is merely

1 Handschu

2 advisory to the Court, it is a recommendation.

3 Yes, there are times that it might be somewhat

4 helpful, but does that help outweigh the cost to

5 litigants, the clamor that I'm sure you will be

6 hearing in all cases?

7 JUDGE MILLER: I just want to advise you

8 you have one minute.

9 MS. HANDSCHU: Home studies may or may not

10 be necessary in every case. Home studies that are

11 based on professionally reliable hearsay or mental

12 health testimony based on that, wouldn't we be

13 better off if in fact rather than say the teacher

14 told me this, to listen to the teacher?

15 I can all too well remember my early days

16 when I was, what Sandy Granoff always described as a

17 "baby lawyer", and I'd walk into a courtroom and I'd

18 have a custody case, and it would be first

19 appearance, second appearance and the judge would

20 say, call your first witness. And I'd go whoa, and

21 suddenly I'd put someone on the stand or I'd

22 cross-examine someone after someone had testified,

23 and someone sitting where you are, Justice Miller,

24 would have to make a hard decision, and often would

25 make it in a quick, rapid way.

26 Something's happened in my 38 years and

1 Handschu

2 I'm not quite sure, and I certainly look to all of  
3 you to try to remedy some of this.

4 Thank you. Good luck.

5 JUDGE MILLER: Thank you very much.

6 Jody Krisiloff. Miss Krisiloff, come out  
7 here.

8 We'll go on to our next speaker, and if  
9 she arrives we'll try to fit it in.

10 Ron Tamir.

11 MR. TAMIR: Thank you for letting me  
12 speak. My name is Ron Tamir. I am not a lawyer or  
13 have any relationship to the legal profession. I  
14 have just been exposed to a situation that horrified  
15 me and I just wanted to share it with you, an  
16 unbelievable situation, that if somebody told me  
17 that it happened in some third world country I would  
18 probably say I still would be horrified, but  
19 definitely be more understanding. But it's  
20 happening here, right here in the United States, in  
21 New York.

22 It's a true story, unfortunately, about a  
23 little girl who was exposed to a divorce proceeding,  
24 unfortunately, like too many little girls are  
25 happening to, and she happens to have two brothers.

26 When she was a year old, and six years

1           Tamir  
2 later, now she's 7, it's still going on with no end  
3 in sight. That to me, by itself, is something that  
4 should not occur, and this is a bitter situation.  
5 It is very, very damaging to anybody, but in this  
6 case it has shown to be horrific consequences. She  
7 has a father that to me -- I know him for a long  
8 time -- to me he is as good a father or better than  
9 anybody here, including myself, and this father has  
10 been kept away from her for seven years, more or  
11 less. Maybe for about ten months he was allowed to  
12 see her for one hour a day under a supervised  
13 situation. I know that there are situations --  
14 sexual abuse, physical abuse -- where that is  
15 appropriate. But this father is extremely committed  
16 to his kids. He's extremely dedicated. He's a  
17 truly fine individual and it's not just my opinion.  
18 It's the opinion of two psychologists that have  
19 studied him intensively, and two psychologists that  
20 were appointed by the judicial system and were  
21 chosen to be ignored by the judicial system, which  
22 is unbelievable, and so this little girl is growing  
23 up without a father. She yearns for her father.

24           The psychologists have said that it is  
25 extremely damaging to her lifelong term and yet this  
26 little girl is growing up without a father. Why? I

1           Tamir  
2    don't know. Maybe, you know, when a judge takes  
3    payoffs or something, then we all hear about it and  
4    we are horrified. I don't know what the reason is.  
5    I don't know if it is a personal thing. I don't  
6    know if it is a vendetta. I don't know if it's a  
7    career furthering action.

8           All I know is that for seven years this  
9    little girl has been growing up without a father, a  
10   good father, that has been deemed good by  
11   professionals that were chosen by the court, and  
12   this father has been bankrupt emotionally -- I have  
13   watched it -- emotionally and financially. I think  
14   he's in debt to the tune of over \$400,000 which he  
15   doesn't have. I have no idea where he's going to  
16   get the money to pay for it. But his business is  
17   failing because he has been spending all his time  
18   trying to get his daughter back. She has been kept  
19   away from her brothers pretty much. She got two  
20   brothers that have chosen to live with the father.  
21   They are teenagers. They were more able to request  
22   that, and this judge has appointed a case manager  
23   that was caught lying in court and was -- as far as  
24   I can tell nothing had been done. Not only -- only  
25   has nothing been done, the judge is forcing that  
26   father to go back and see that case manager and pay

1 Tamir  
2 -- enormous amounts of time -- by the way, the  
3 father paid for all those psychologists -- was  
4 forced to pay and coerced to do all those things.  
5 Now he has to go back to that case manager that lied  
6 about it in court and see that guy and because he --  
7 right now he can't even see his girl at all. Zero.  
8 He has been through a couple of forensics.

9 The main point that I want to say here is  
10 that there's no reason for a divorce court that  
11 involves little kids to take six, seven years, and  
12 this thing, as far as I can see, there's no end in  
13 sight here. So you got kids growing up without good  
14 parents and this thing continues on with no -- the  
15 only people that are benefiting from it are the  
16 lawyers. I watched the lawyer driving in a Bentley  
17 and Rolls Royce to court. What's wrong with that  
18 picture?

19 JUDGE MILLER: This is indicated in your  
20 application. You indicated you had some  
21 recommendations or solutions.

22 MR. TAMIR: Yes.

23 JUDGE MILLER: Would you tell us?

24 MR. TAMIR: My recommendation, if a court  
25 procedure that is damaging to little kids -- in this  
26 case -- let me -- this is a quote. The psychologist

1 Tamir  
2 says, "The girl yearns for parental relationship --  
3 will suffer severe psychological damage if she is  
4 not allowed to continue visitation with her father.  
5 Is in danger of developing a severe personality  
6 disorder in adult life", and the father was -- in  
7 both cases stated that he's the better parent and  
8 should be awarded custody.

9 So my recommendation is when something  
10 goes on -- if a judge allows a case like this or any  
11 other case -- maybe it's the only case in the world,  
12 I don't know, but I doubt it -- but if a judge  
13 allows a case like this to go on for more than a  
14 year he should be fired. Period. There's no  
15 excuse. There's no excuse for something like this  
16 happening in this country.

17 (Applause.)

18 MR. TAMI: I don't know how you get rid of  
19 judges, but certainly they should be more  
20 accountable for -- a judge is not a psychologist.  
21 He makes recommendations. He ignores a psychologist  
22 that he appointed and chooses to run in his own  
23 direction. Somebody should say something; Hey, this  
24 is not appropriate here. Thank you.

25 (Applause.)

26 JUDGE MILLER: Jody Krisiloff, I believe

1 Krisiloff

2 you have arrived.

3 AUDIENCE MEMBER: She is on her way, your

4 Honor.

5 JUDGE MILLER: She is not here yet.

6 AUDIENCE MEMBER: On her way.

7 JUDGE MILLER: We'll go ahead. Our next

8 presenter is Nancy Erickson.

9 Maybe there is traffic today. Okay.

10 AUDIENCE MEMBER: Miss Krisiloff has

11 arrived.

12 JUDGE MILLER: Miss Krisiloff.

13 MS. KRISILOFF: Hi. Good morning.

14 JUDGE MILLER: Good morning.

15 MS. KRISILOFF: I was scheduled to speak

16 at 9:45. Hopefully, I have time left.

17 I welcome the opportunity to speak to the  
18 commission today. I'm here on behalf of litigants,  
19 matrimonial lawyers, other attorneys, medical  
20 professionals, and members of the public who are  
21 very upset with the divorce laws and the custodial  
22 review process. I would like to say at the outset  
23 that there is a tidal wave for reform and that it  
24 continues to grow.

25 Two years ago I solicited over 800  
26 signatures on petitions in support of review of the

1           Krisiloff  
2 forensic process and review of custody evaluations.  
3 That was just a brief canvassing, and I can assure  
4 you that if a survey were made today the numbers  
5 would be in the thousands.

6           So we are not just disgruntled litigants  
7 or angry about the system. We really want reform  
8 and we believe that reform can be effected and we  
9 believe it can be effected immediately, and that  
10 there are changes that can be made to the system  
11 that can reduce conflict, protracted litigation, and  
12 insure the best interests of the children's standard  
13 is upheld.

14           I know that several litigants, including  
15 myself, have recommended that litigant participation  
16 be included on the panel. The reason for this is  
17 because litigants have a special and unique position  
18 that they wish to share and believe they should be  
19 either on subcommittees or working in an advisory  
20 capacity with the commission.

21           (Applause.)

22           MS. KRISILOFF: Many of you may have  
23 presided over custody hearings, may have read  
24 forensic reports, or may even have had clients who  
25 have been in forensic evaluations, but I can tell  
26 you from personal experience that nothing compares

1           Krisiloff  
2   to the experience of actually being a participant in  
3   a forensic evaluation, or several of them. There  
4   should be limits to these evaluations and to the  
5   number of times that children and parents are forced  
6   to go through forensic evaluations. Forensic  
7   evaluations should be a last resort, not a first  
8   resort in custody disputes.

9           There needs to be consistency in how  
10   custody cases are handled by the bench. There needs  
11   to be sanctions and assessments of legal fees  
12   against frivolous litigants and their attorneys who  
13   make continuous and unwarranted motions during  
14   divorce proceedings and post divorce. If you make  
15   up enough sensational and frivolous allegations  
16   against your ex you will get a forensic or second or  
17   third one. This must stop. There needs to be  
18   strict guidelines and standards for the appointment  
19   of forensics and law guardians, and strict  
20   procedures that forensics and law guardians must  
21   follow.

22           There must be Chinese walls between  
23   forensics and law guardians. Forensics and law  
24   guardians appointed on cases should not be serving  
25   on cases together if they are in business together.  
26   They should not even be in business together while

1 Krisiloff

2 cases are pending.

3 Law guardians also do not need to take  
4 children to their appointments with forensics or  
5 picking their therapists. That is a parent's job.

6 Unfortunately, there is an ever growing  
7 perception by the public and litigants that courts  
8 routinely assign forensics to cases as a first  
9 rather than a last resort and rely too heavily on  
10 the opinions of forensics in making custody  
11 determinations.

12 There is also a perception that the best  
13 interests of the children's standard is being  
14 misused and overlooked by certain forensics to  
15 promote their own personal agendas and goals. The  
16 same forensics are routinely appointed on case after  
17 case with no database or records tracking how many  
18 cases they are assigned to in a given period, what  
19 the recommendations for custody are in those  
20 particular cases, what the outcome of those cases  
21 are, or what the fees were for the forensics in that  
22 case, including for examination and testimony.

23 There are inadequate disclosures to  
24 parties about the backgrounds of and possible  
25 conflicts of interest of forensics, about the nature  
26 of the forensic process and how it actually works,

1           Krisiloff  
2           and what the party's rights and remedies are from  
3           the outset of the proceedings.

4           Again, there are no limits to the number  
5           of forensics that parties and children can be  
6           subjected to during divorce and custody proceedings.  
7           Parties have no reject to challenge forensic and  
8           express grievances about their handling of cases.

9           Forensic misconduct or conflict of  
10          interest. Indeed, there's no grievance committee in  
11          the court, of which I am aware, that appears to  
12          seriously and accurately look into complaints about  
13          forensics or even monitor what forensics are doing.  
14          The inspector general has no power over forensics  
15          and psychologists. The state medical licensing  
16          board does not appear to be interested in  
17          disciplining forensics, even if they are licensed to  
18          practice medicine. It would appear under existing  
19          case law forensics would even argue they have quasi  
20          judicial immunity that protects them from civil  
21          liability, even in cases of fraud, negligence or  
22          reckless misconduct.

23          Now, make no mistake, I am not saying that  
24          every forensic is bad, that every law guardian is  
25          bad, or there aren't decent participants in the  
26          system, but there do seem to be patterns of abuse

1           Krisiloff  
2       and misconduct that are going unchecked and  
3       unrestrained and that are having significant impacts  
4       on custody determinations, and it seems, sadly  
5       enough, that instead of resolving matters forensics  
6       exacerbate the situation, look forward to  
7       testifying, and also create further hostilities  
8       between the parties.

9           Again, you don't really know what happens  
10       in a forensic examination. You may think you do.  
11       But many times participants are asked questions that  
12       seem to have no relevance whatsoever to the custody  
13       proceedings. An example would be asking a litigant,  
14       What temperature would you not take your child to  
15       the park in the wintertime? When the answer is, I  
16       don't know, maybe 20 degrees, maybe if the weather  
17       is sunny it would be different, or maybe if there  
18       are other children in the park, or maybe I just  
19       wouldn't take him at all, that could get translated,  
20       and has been translated into a forensic report that  
21       the mother would not even take her child to the park  
22       in the wintertime in 20 degrees; ergo, she will not  
23       allow her child to experience life.

24           (Applause.)

25           MS. KRISILOFF: How about questions about  
26       whether you're germophobic or how many times you

1           Krisiloff  
2       wipe your child's hands with hand wipes? This has  
3       happened in forensic proceedings.

4           How about situations where forensics or  
5       their appointees witness a child playing with toy  
6       soldiers and conclude from that that the child is  
7       enacting the hostilities -- the battling toy  
8       soldiers are an enactment of the parent's  
9       hostilities and specifically the mother's conflict  
10      with the father?

11          These are real examples of some of the  
12      things that go on in some forensic evaluations and  
13      from these gross generalizations. Instead of  
14      observing which parents have the ability to be  
15      primary caretaker for the children and help -- to  
16      best help the parties resolve their conflicts and  
17      work together towards the best interest of the  
18      children, the forensic reports extrapolate from  
19      questions of this nature and draw arbitrary  
20      conclusions about the parties, about the best  
21      interests of the children, and, yes, even make  
22      custody determinations that courts rely on very  
23      heavily. Why? Because there is no accountability.  
24      There is an abdication of responsibility. There is  
25      the assumption that because the person is a forensic  
26      that they are correct. This abuse has --

1 Krisiloff

2 JUDGE MILLER: One minute left.

3 MS. KRISILOFF: Yes.

4 We will be presenting the panel, if not  
5 today, at some point later today, some materials  
6 which include suggestions that have been accumulated  
7 from many hard-working, thoughtful people to attempt  
8 to make forensic reforms.

9 I have not even gotten to the subject of  
10 law guardians. I have no personal experience in  
11 that area, but there have been many horrendous  
12 experiences involving law guardians which require  
13 some attention.

14 Now, let me just quickly give you some  
15 ideas. This is such a limited time frame that it is  
16 very difficult to address all of the issues. There  
17 is so much more that can be discussed. I guess,  
18 really, the goal should be conflict resolution. I  
19 do support irreconcilable differences as a ground  
20 for a divorce. I think that cases of domestic  
21 violence and severe abuse should not fall in that  
22 category. However, I think irreconcilable  
23 differences would go one way toward resolving issues  
24 that spill over into the forensic process, but the  
25 most important thing I would also add is forensic  
26 evaluations should be a last resort not a first

1           Krisiloff  
2 resort. Law guardians are not necessary in every  
3 case. The courts can do things right now to reduce  
4 conflicts between the parties.

5           JUDGE MILLER: Miss Krisiloff, I am going  
6 to have to stop you, but we look forward to your  
7 written materials, and I am sure they will be  
8 presented up at the desk.

9           MS. KRISILOFF: May I continue for one  
10 minute, your Honor?

11          JUDGE MILLER: We are sticking to a very  
12 strict time schedule. If I give that to you I have  
13 to give that to everyone else and we do try every  
14 way we can to be completely fair, so I have to say  
15 no.

16          MS. KRISILOFF: Okay. I appreciate the  
17 time. You will be hearing from me and from other  
18 persons who are extremely concerned about the  
19 process. We are quite serious about reform. We  
20 take these reforms very seriously and we believe  
21 major improvements can be made that will reduce  
22 conflict between the parties and stop the  
23 protractive litigation, and, most importantly,  
24 prevent children from suffering as they are doing in  
25 these protracted proceedings.

26          Thank you, your Honor.

1 Koch

2 (Applause.)

3 JUDGE MILLER: Is Nancy Erickson here?

4 Nancy Erickson? Has she arrived?

5 All right, then we'll go on.

6 Mr. Matthew Koch.

7 MR. KOCH: Yes, ma'am.

8 Wow, I'm before a judge without being

9 summoned.

10 Thank you so much, ladies and gentlemen.

11 I'm not a professional speaker. It's

12 okay, I'll have my nose buried in my notes for a

13 couple of minutes. I hope that's not too offensive.

14 That's the most effective way for me to do this.

15 Thank you for this Commission and

16 especially for allowing me to speak. My name is

17 Matt Koch, I'm the divorced, noncustodial father of

18 Benjamin, he's my eight year old third grader.

19 Ben's the joy of my life and I purposely

20 live only 11 houses away from him, in a major Nassau

21 County suburb on Long Island.

22 I'm here representing myself as the

23 average, loving dad, to ask all of you folks in your

24 powers to do what you can to see that presumptive

25 joint custody becomes the law in New York State. I

26 hope in whatever little way I can to convince you

1 Koch  
2 all to support it and to institute it as a New York  
3 State law.

4 I'll be most effective in this by just  
5 coming from my heart in simple, plain talk, that's  
6 really all I can do, and just relay to you some of  
7 my personal feelings and experiences so far. I'm  
8 not going to try to be a professional and just  
9 regurgitate the mountains of literature that's  
10 already written on this subject on the Internet,  
11 where I did most of my research.

12 Ben is the most important person in my  
13 life, and like most divorced parents, contentious or  
14 not, we want what is best for our children. Some  
15 of the very well documented benefits that  
16 presumptive joint custody would provide to our kids  
17 that I want to give to my darling Ben, you know,  
18 better adjustment after the divorce. I'd never  
19 want him, I'd never want him to think that I wasn't  
20 seeing him as much as I could. There's results  
21 from studies that the kids with both parents in a  
22 joint custody situation do much better in school,  
23 later on in life. There's less criminality, less  
24 impulsive behavior, they are not as antisocial, and  
25 I really want to request your help in getting these  
26 benefits for my son, as everyone who wants these

1 Koch

2 things for their children.

3 For the rest of us grown-ups, presumed  
4 joint custody has been shown to reduce visitation  
5 interference, which I'll speak more about later, and  
6 to reduce after-the-divorce litigation.

7 Personally for me, presumed joint custody  
8 would reduce some ongoing aggravation and fear. I  
9 personally have, I'm a security agent, and I have  
10 fear of the local police driving by. You know, are  
11 they going to be stopping by my home again? I think  
12 presumed joint custody will give me a legal standing  
13 in the fathering of my beautiful boy.

14 I'd just like to try to pick it up, I'd  
15 like to tell you about a few instances where I  
16 believe presumed joint custody would have relieved a  
17 lot of the unnecessary stress.

18 Last month Ben's mom called me to say that  
19 she was concerned that he needed occupational  
20 therapy in school. The school evaluated him and  
21 they said he doesn't need it. She was convinced  
22 otherwise. She said if I got a sympathetic note --  
23 she asked me to do this -- if I got a sympathetic  
24 note from the doctor, the issue could be strongly  
25 pushed. She then, as a convenience to her, which I  
26 do when she needs me to do something, I do

1           Koch  
2 something, and as a convenience for her she asked me  
3 to take him to the general practitioner to,  
4 hopefully, further what she wanted. I personally  
5 feel that Ben was fine. I see him every two weeks,  
6 I go to the bus stop every morning. He's been at  
7 this school for four years now, it's a very good  
8 school. If they felt anything was hindering his  
9 progress, I know they would have said something way  
10 before this. I respected her concerns, though, and  
11 I went through with the visit to the GP.

12           I went to the doctor and explained our  
13 thoughts and her concerns to him. He had a great  
14 physical checkup and the doctor gave him a few  
15 cursory physical tests. This is all the doctor  
16 said to me, he'd probably been through this a couple  
17 of times, I don't want to be in the middle of this.  
18 The best thing you can do to allay these fears is to  
19 get a pediatric evaluation. So that morning I went  
20 ahead and scheduled the appointment. And when I  
21 told her about the appointment, remember, she asked  
22 me to start this, she was furious. How dare I make  
23 an appointment without her knowledge. She said the  
24 time wasn't convenient for her, she wanted evening  
25 hours, and if I could make it, so be it, but she  
26 would reschedule the appointment and let me know

1           Koch  
2    when it was so that if I could possibly go, I could  
3    go.

4           It's been now approximately one month  
5    since I took him to the GP, with no mention from her  
6    on any rescheduling of appointment. I've been  
7    through this with her on many occasions before.  
8    Anyway, with Ben's best interest in heart I kept the  
9    original appointment. It was a no-win situation  
10   for me. I don't have legal standing in taking care  
11   of my boy. I chose to insure his well-being and  
12   took him to the specialist so he could be evaluated.  
13   Ben, thank God, was found to be as fit as a fiddle.

14          I'm fearful to speak to her about this,  
15    and I don't want to get overly dramatic, you folks  
16    are very wise about this stuff, but I could almost  
17    await a summons to appear in court to explain how I,  
18    with no legal standing as a dad, had the nerve to  
19    take my son out of school and take him to the  
20    doctor's.

21          To play on with this, you could see how  
22    just a regular guy, I could be, I could be facing  
23    probably an Order of Protection. You folks are  
24    very busy and these things are issued. I could be  
25    facing an Order of Protection preventing me from  
26    seeing my son, claiming that I have inflicted some

1           Koch  
2    harm on him, preventing me from assisting and  
3    participating with him in school -- I have him in  
4    the chess club and I chaperone there -- preventing  
5    me from seeing him off every day, as I do, at the  
6    bus stop.

7           Being at her whim and largess is nonstop,  
8    it's a nonstop emotional hell for me and I haven't,  
9    I haven't seen it, thank God, affect Ben too much,  
10   but I have with what the other studies are showing  
11   also.

12          I hear about many men that give up and  
13    walk away from this legal, financial, emotional  
14    hell. I'm sure that many of our kids of all of us  
15    continue to suffer because dad just couldn't take it  
16    anymore.

17          I personally will continue to take the  
18    heat, the grief and the aggravation to insure the  
19    best interests of Ben. I truly feel that what  
20    she's worried about more is her losing control,  
21    because she has sole custody, which was the only  
22    option that New York State could award her.

23          I've had, during visitations with Benjamin  
24    she's called the police to my home, complaining  
25    about heat or air conditioning and I'm almost a cop  
26    and I know the position that these folks are in and

1 Koch

2 I welcomed them into my home, I escorted them  
3 upstairs into, into the bedroom upstairs to find Ben  
4 snug as a bug in a rug, sleeping.

5 She also found the time to submit a  
6 complaint about the cop who didn't write that pink  
7 report the way she wanted it shaded or written, I  
8 suppose, to help some sort of future issue in Family  
9 Court.

10 The last incident I wanted to tell you  
11 about, again visitation interference. Ben was with  
12 me and he wanted his bicycle from his mom's house so  
13 that he and I could get working on him riding on two  
14 wheels; he's worried that the kids on the block are  
15 starting to really tease him about not being able to  
16 ride without the training wheels.

17 I called his home, I spoke with his  
18 step-father who, thank God, he's been decent in  
19 caring for my son. He said I could come over and I  
20 said great, I'll send Ben out to pick up the bike.  
21 He said no problem. Sent Ben to go into the back  
22 of the house many many times to get the bicycle and  
23 bring it out. So I parked in the middle of the  
24 street, stayed in the car and sent Ben to the side  
25 of the house to bring his bike out. And he's got  
26 it in the back of my car in the middle of the street

1           Koch  
2       and his mom pulls up in her car. With Ben one foot  
3       away from me she, she picks up her cell phone, rolls  
4       down the window and proceeds to call 911 on the cell  
5       phone and Ben and I, calmly standing together, she's  
6       saying to the police dispatcher I'm in fear for my  
7       life with my ex-husband, get here now, and she gives  
8       her address. I'm just standing there with my  
9       little guy, mom's here (indicating).

10           I've been through this harassment from her  
11       many many times before, I know the drill. I have  
12       to wait for the police. I didn't want to give them  
13       any indication I was a bad guy, I know she's called  
14       the cops, I got to waited.

15           With Ben sitting in the car they  
16       questioned me, then they questioned Ben, who  
17       corroborated everything I said. Ben said that he  
18       wanted his bike, yada, yada, yada and just  
19       corroborated everything I just told you ladies and  
20       gentlemen.

21           So now with this going on my son has a  
22       nice mental picture of his dad talking to the police  
23       because his mom called them. That was the first  
24       time that he's ever seen that. From what started  
25       as an emergency call to the police that she's in  
26       fear of her life from me with our little guy

1 Koch  
2 present, after the police interviewed us, when it  
3 was all over she says to the lady cop, can we not  
4 put this down on paper. They said that since they  
5 were called they must file a report.

6 JUDGE MILLER: Mr. Koch, I hate to  
7 interrupt you but your time is up. So please wind  
8 up.

9 MR. KOCH: Let me close on that. Thank  
10 you. Just can I close? Thank you.

11 In closing, I implore you all to please  
12 support presumed joint custody. The mountains of  
13 literature vastly outweigh the very little against  
14 it. With sole custody continuing in my case I see  
15 increased visitation interference. Ben's getting  
16 older, he wants me for chess, he wants me for bike  
17 riding, fishing, little league. I want to be there  
18 for my boy, and the pressure of not having a legal  
19 standing is just crazy. I've never done anything.

20 JUDGE MILLER: All right. We have your  
21 position. Thank you very much.

22 MR. KOCH: Yes, ma'am. Thank you.  
23 Thank you all.

24 JUDGE MILLER: Has Nancy Erickson  
25 arrived?

26 MS. ERICKSON: Good morning. I thank you

1 Erickson  
2 the commission for inviting me here today to testify  
3 on the subject of forensic evaluations in custody  
4 cases, especially those involving domestic violence.

5 I congratulate you on starting early. My goodness.

6 I've been an attorney for over 20 years,  
7 10 as a law professor, and currently I'm a Senior  
8 Family Law Attorney at Legal Services in Brooklyn,  
9 representing low-income clients, particularly women  
10 in matrimonial and Family Court cases. I represent  
11 many battered women in custody cases.

12 I wish I had the time to give testimony on  
13 issues other than forensic evaluations. Most  
14 importantly, there is a critical, critical need for  
15 counsel for low-income clients, which could be  
16 provided by either court-ordered counsel fees from  
17 the monied spouse, if there is one, or by  
18 appointment of assigned counsel. I cannot stress  
19 this enough.

20 I would also like to urge this Commission  
21 to question the need for no-fault divorce at this  
22 time. There are other needs that are far more  
23 urgent and should be addressed prior to no-fault.  
24 My low-income clients need reforms and laws  
25 regarding attorney fees, maintenance for dependent  
26 spouses, health insurance after divorce -- it's

1 Erickson

2 extremely important -- domestic violence, custody  
3 and many other areas far more than they need  
4 no-fault. Most of them have grounds of cruelty and  
5 abandonment. No fault would just give the monied  
6 spouse another advantage over the non-monied spouse,  
7 so the playing field would be more uneven than it is  
8 now.

9 Turning to forensics, I should mention  
10 that next spring I expect to receive my master's  
11 degree in forensic psychology. Now, you're going  
12 to wonder why would a middle-aged attorney want to  
13 stay up until 2 a.m. every morning studying forensic  
14 psychology after she's been in court or the office  
15 all day.

16 The answer is that I was baffled and  
17 concerned about the number of child custody  
18 evaluators in my practice and my colleagues'  
19 practices who seemed to know little about domestic  
20 violence, DV, and often paid little attention to it  
21 when they conducted their evaluations.

22 For example, some evaluators held joint  
23 meetings of the battered woman and her batterer,  
24 which further traumatized my client, the battered  
25 woman. Some misdiagnosed battered women as having  
26 serious psychopathology, when the women were simply

1           Erickson  
2    showing symptoms of the trauma that they had  
3    suffered at the hands of their abusers.

4           The evaluators were often critical of  
5    battered women who were reluctant to agree to joint  
6    custody or unsupervised visitations to the abusers.  
7    The evaluators labeled these mothers as "unfriendly  
8    parents" and even recommended custody or joint  
9    custody to the abuser. For example, just recently  
10   a forensic recommended joint custody when the  
11   abuser-father had a criminal conviction for abusing  
12   the mother. This is one reason why, one of many  
13   reasons why a presumption of joint custody would not  
14   be beneficial in New York.

15           It has been argued that the outcomes for  
16    children when their parents have joint custody is  
17    superior to the outcomes for children when there is  
18    a traditional custody/visitation situation, but the  
19    empirical research on joint custody does not support  
20    that person's conclusions. I have read them.

21           In what other situation would the law  
22    require a crime victim to have unnecessary contact  
23    with the criminal? That's what joint custody for a  
24    battered woman does.

25           Judges often follow the recommendations of  
26    the forensics, even when based on faulty procedures

1 Erickson  
2 and faulty logic. The judges cannot be expected to  
3 be experts in the field that the expert witness is  
4 supposed to be an expert in.

5 I wanted to understand how this could  
6 happen. Custody or joint custody to an abuser is  
7 virtually never in the best interests of a child.

8 After three years of studying forensic  
9 psychology I can think of some of the reasons why.  
10 Certainly not all, I'm sure.

11 1. New York State has virtually no  
12 statutes, court rules or case law regarding  
13 forensics, and practices differ tremendously from  
14 county to county, judge to judge, court to court.

15 Secondly, court evaluators rarely have  
16 solid training in how to conduct forensic  
17 evaluations and in the dynamics of domestic violence  
18 and in the effects of domestic violence on battered  
19 women and on children.

20 Now, before I go further, I want to state  
21 loud and clear, loud and clear that I respect the  
22 mental health professionals who are conducting  
23 evaluations for our courts. They are usually  
24 well-intentioned, hard working and well-trained as  
25 clinicians in their fields: Psychology, Psychiatry  
26 and Social Work. They are also often underpaid,

1           Erickson  
2 especially if they accept government fees. I did  
3 not come here today to criticize them. Indeed,  
4 I'll soon have the training to be one of them.

5           I'm here to say they are valiantly trying  
6 to do an extremely difficult job without some of the  
7 basic tools that they need.

8           They need specific forensic training,  
9 which is virtually never included in their graduate  
10 programs. For example, the American Psychological  
11 Association, APA, has guidelines for forensic  
12 evaluators and for child custody evaluations, in  
13 addition to the broader ethics rules of government  
14 practice. The forensic evaluators need to know  
15 these and study them. I've cited these in the  
16 bibliography that I provided to the Commission.

17           Second, child custody evaluators need  
18 specific training in DV and other types of family  
19 violence. Without such training the custody  
20 evaluator is likely to hold to the same myths and  
21 biases about domestic violence and battered women  
22 held by many laypeople, including me, until I  
23 studied and practiced family law. I have to admit  
24 it. People said, you know, what would you do about  
25 battered women? Women are crazy; why don't they  
26 leave? I was very naive, very naive.

1 Erickson

2 Thirdly, Forensic psychologists,  
3 psychiatrists and social workers need specific  
4 training in the laws governing custody and  
5 visitation in New York, plus the Rules of Evidence  
6 and procedure that apply to expert witnesses  
7 generally. The APA rules for forensics make this  
8 clear. Forensics must know the law.

9 The role of an expert witness is to assist  
10 the Court, yet many custody evaluators are not  
11 conversant with New York Custody Law. New York  
12 Custody Law provides that domestic violence is the  
13 only factor, the only factor the Court is mandated  
14 by statute to consider when making a custody  
15 decision in an appropriate case.

16 If the custody evaluator does not know the  
17 law and has no expertise in domestic violence, how  
18 can the evaluator possibly assist the Court in a DV  
19 case? And we can expect that one-third to one-half  
20 of contested custody cases will involve DV.

21 The role of a forensic evaluator is a  
22 different role, a different job than the role the  
23 mental health practitioner trained for in graduate  
24 school, which is the role of a clinician, a  
25 therapist, trained to diagnose and cure patients.

26 Now, reasonable persons can differ on

1           Erickson  
2   whether the Court should use forensic evaluators at  
3   all in custody cases, and Tim Tippins and others  
4   have raised that issue. I won't answer it. But  
5   if our courts are going to use them, their role will  
6   be that of an expert witness, providing assistance  
7   to the Court for the purpose of a legal  
8   determination.

9           Therefore, the mental health professional  
10   will have to step out of the usual role and take on  
11   the role of an expert witness. The APA rules view  
12   this role as the role of a detective, with special  
13   expertise in areas of psychology relating to  
14   children and families. The Second Department, in  
15   Wissink, which is cited in my bibliography, set  
16   forth the guidelines for the kind of detective work  
17   which the Court believes would be necessary for a  
18   comprehensive child custody evaluation. Such a  
19   role would require specialized training.

20           Some of this training can be obtained in a  
21   psychology Ph.D program. For example, such courses  
22   as Developmental Psychology (child psychology),  
23   Family Violence, Ethics, Psychology of the Victims  
24   of Crimes & Disasters, Psychology of Criminal  
25   Behavior, Interviewing Methodology.

26           In my program I also did an independent

1           Erickson  
2 study on how to do child custody evaluations; in  
3 other words, the procedure.

4           JUDGE MILLER: One minute.

5           MS. ERICKSON: Okay.

6           Even though my program is in forensic  
7 psych, it offers no course in child custody  
8 evaluation. Interesting. This is unusual because  
9 most forensic psych programs are geared toward  
10 criminal cases, not civil cases.

11           My current thesis topic is the MMPI and  
12 battered women, because research shows that battered  
13 women given the MMPI test can look like they have  
14 borderline personality disorder, when they really  
15 are suffering from post-traumatic stress disorder,  
16 which was caused by the abuser. There again,  
17 interesting research.

18           In conclusion, my recommendations are:

19           Harriet Weinberger, keep up the good work.

20           The First and Second Departments should  
21 continue their training, excellent training for  
22 custody evaluators and law guardians.

23           I've shared with her the curriculum I  
24 designed to teach mental health professionals to do  
25 forensics and I know she's consulted others as well.

26           Secondly, all mental health professionals

1 Erickson  
2 should be required to register with the Appellate  
3 Division. It's not a requirement right now.

4 Thirdly, a committee should be set up to  
5 consider legislation and/or court rules on child  
6 custody evaluators.

7 The Committee should start with the  
8 basics: Should the courts be using custody  
9 evaluators at all? If so, in what cases and what  
10 should their role be? What training should be  
11 required of them? For example, sensitivity to  
12 ethnic and cultural differences in our society is  
13 extremely important.

14 Should they be rendering opinions as to  
15 which parent should have custody? That's the  
16 ultimate issue in the case. That's the issue for  
17 the judge. Or should they only be giving opinions  
18 on lower level questions, such as parenting  
19 strengths and weaknesses of each parent? This  
20 ultimate issue is hotly debated.

21 Additionally, some basic procedures need  
22 to be worked out.

23 JUDGE MILLER: I'm going to have to stop  
24 you, much as we'd like to hear it.

25 MS. ERICKSON: Can I give one example?

26 Who should be allowed to get a copy of the

1 Erickson  
2 evaluator's report? Some judges prohibit even the  
3 attorneys from getting copies of the evaluator's  
4 report.

5 JUDGE MILLER: Thank you.

6 MS. ERICKSON: Thank you.

7 JUDGE MILLER: Julie Domonkos.

8 MS. DOMONKOS: Good morning. I am Julie  
9 Domonkos. I am executive director of My Sisters'  
10 Place, which is Westchester County's leading  
11 domestic violence service and advocacy organization.  
12 I am also the Co-Chair, with Catherine Douglas, of  
13 the Lawyers Committee Against Domestic Violence, and  
14 am former Chair of the Domestic Violence Task Force  
15 of the Association of the Bar of the City of  
16 New York.

17 I would like to thank Chief Judge  
18 Judith Kaye, Justice Miller, and all the members of  
19 the matrimonial commission for taking on what is an  
20 enormous and vitally important undertaking to reform  
21 matrimonial practice in New York State. Your  
22 mandate is huge, but today I would like to focus my  
23 remarks on one prominent piece of it; we deny access  
24 to justice in matrimonial actions to poor, working  
25 poor, and middle income people. Among those  
26 litigants, domestic violence victims suffer even

1           Domonkos  
2 further barriers to receiving justice, sometimes  
3 increasing the danger that they and their children  
4 face.

5           To begin, New York State does not afford  
6 the right to counsel for poor people in matrimonial  
7 actions, as we all know. People who lack financial  
8 resources often have nowhere to turn to find  
9 competent and continuous representation to get a  
10 divorce.

11           As a creator and supervisor of legal  
12 projects dedicated to serving domestic violence  
13 victims, I can tell you that one of the greatest  
14 unmet legal needs of these women, indeed poor women,  
15 generally, is for divorce.

16           This past year at My Sisters' Place alone  
17 we turned away 295 women who needed representation  
18 in a matrimonial action. I have spoken with  
19 countless women over the years who told me they used  
20 their meager resources to pay a retainer for an  
21 attorney, who later dropped their case because they  
22 could no longer pay the fees. Just this past week I  
23 spoke repeatedly to a desperate woman in the middle  
24 of a divorce case who had gone through all her  
25 financial resources, and then dropped by a series of  
26 attorneys, and then turned down by every legal

1           Domonkos  
2    service provider she or I could think of. In the  
3    end, I had nowhere else to send her for help.  
4    Nowhere.

5           In order to avoid accepting that those  
6    litigants -- poor, low income and even middle income  
7    people -- get no justice in our courts, we have  
8    created the fiction that they can proceed pro se.  
9    We need to drop that fiction and face the facts that  
10   matrimonial practice in New York is complex and it  
11   is a rare person who can navigate the New York  
12   matrimonial system pro se, especially when it comes  
13   to financial issues and when it comes to protecting  
14   battered women and their children.

15           (Applause.)

16           MS. DOMONKOS: Legal services offices have  
17   never been able to fill the need for representation  
18   in this area. Funding of such offices has been cut  
19   dramatically over the past years. Many do not even  
20   offer matrimonial services. Others, such as the  
21   Legal Center at My Sisters' Place, win funding to  
22   matrimonial services only to find out that they were  
23   unable to hire an attorney to do the work because  
24   the funding provided was unrealistically low. Many  
25   funders will not authorize divorce work because they  
26   seem to consider divorce a frill.

1           Domonkos

2           Imagine telling a domestic violence victim  
3 that it is a frill to obtain a divorce from someone  
4 who has beaten her and raped her and terrorized her  
5 children, and that she should continue to suffer the  
6 dangers and the indignities of remaining married to  
7 him.

8           Imagine telling a domestic violence victim  
9 whose abuser has now sued her for divorce that it is  
10 a frill to have a lawyer so that she isn't forced to  
11 trade all of her financial rights in order to make  
12 sure she has custody of her children and can keep  
13 them safe.

14           We need a comprehensive plan to provide  
15 competent and continuous representation for every  
16 person of limited means who seeks matrimonial relief  
17 in our courts. We need a broad and thoughtful  
18 solution, if not a piecemeal approach. If the  
19 commission focuses only on reforms that will help  
20 monied litigants and the private bar that serves  
21 them, we will have denied justice to many and  
22 thereby denied justice to all.

23           (Applause.)

24           MS. DOMONKOS: Many reforms that the  
25 commission can make in the way private cases are  
26 handled will help address the problem of lack of

1           Domonkos  
2   representation. Especially in domestic violence  
3   practice, we see many families where there are some  
4   or even many financial resources, but the abuser  
5   controls them completely, rendering the victim, in  
6   effect, poor. Sometimes legal services offices,  
7   including My Sisters' Place, will represent these  
8   non-monied spouses.

9           The simple fact is that if the courts were  
10   more aggressive and prompt and equalizing both  
11   spouses' access to the family's finances, legal  
12   services resources could be preserved for families  
13   where there are no funds at all. This was the  
14   direction the courts were moving in when the 1994  
15   matrimonial rules were adopted. However, the spirit  
16   and often the letter of those rules have not always  
17   been followed -- frequently have not been followed.

18           The commission should adopt stringent  
19   rules requiring matrimonial courts to take steps, at  
20   the inception of an action, to give both parties  
21   fair and equal access to marital resources so that  
22   both parties can engage and maintain competent  
23   counsel. Similar prompt and effective action should  
24   be taken by the court for all pendente lite relief,  
25   especially that which makes it possible for spouses  
26   denied access to the marital resources to provide

1           Domonkos  
2   for their basic needs and those of the children in  
3   their care.

4           In short, we need to do whatever we can to  
5   streamline the process and hold litigants and  
6   lawyers responsible to it, and we should do this not  
7   to support the fiction that litigants can handle  
8   their cases pro se, but to make it easier for  
9   litigants to secure competent and continuous legal  
10   representation.

11           Those of us who work with domestic  
12   violence victims can attest that abusers regularly  
13   manipulate the justice system to continue their  
14   abuse.

15           (Applause.)

16           MS. DOMONKOS: They use tactics of delay.  
17   They refuse to provide financial information to the  
18   court, or they file false financial information.  
19   Not only is this yet another reason why domestic  
20   violence victims must have zealous attorneys and  
21   should not be forced to proceed pro se, but also  
22   indicates that judicial reform is needed so  
23   litigants who willfully delay, or fail to provide  
24   financial information, or file false information  
25   face real and meaningful sanctions.

26           (Applause.)

1           Domonkos

2           MS. DOMONKOS: It is the observation of  
3 many domestic violence advocates, including me, that  
4 the credibility afforded domestic violence victims  
5 in court, already eroded by sexist and baseless  
6 notions that people routinely fabricate allegations  
7 of abuse --

8           (Applause.)

9           MS. DOMONKOS: -- takes an additional hit  
10 when she goes to Supreme Court for a divorce.  
11 Sometimes victims are instructed, even by their own  
12 lawyers, not to raise the issue of abuse. Sometimes  
13 they are punished by the judge for raising it.  
14 Sometimes Supreme Courts often hold victims of  
15 domestic violence to a higher standard than do  
16 Family Courts in making the case for an order of  
17 protection, with justices sometimes even boasting in  
18 open court about doing so, in essence saying that  
19 they find allegations of abuse inherently dubious.  
20 Often domestic violence victims trade away their  
21 rights to marital assets and maintenance because  
22 they need to secure child custody and visitation  
23 provisions that will keep themselves and their  
24 children safe from an abusive spouse.

25           Basic safety measures that have been taken  
26 in many Family Courts to protect victims of domestic

1           Domonkos  
2       violence, such as the presence of a court officer  
3       and a separate waiting area for victims, are not  
4       available in Supreme Court. They should be.

5           There are many other important issues that  
6       I know will be addressed by others throughout the  
7       commission's hearings. I want to add a quick word on  
8       several of them.

9           First, on forensic evaluations and law  
10       guardians. I urge the commission to address serious  
11       problems with those two groups. Their roles, and  
12       the limitations of their roles should be clarified.  
13       Forensics evaluators and law guardians should only  
14       be appointed where clearly needed, and their  
15       findings and recommendations should never substitute  
16       for nor determine the judge's conclusions of fact or  
17       law. We continue to see many forensic evaluators  
18       and law guardians who lack understanding of domestic  
19       violence. Appropriate and mandatory training is not  
20       a first step but is the full answer to making sure  
21       that domestic violence victims and their children  
22       are not harmed legally or personally by the  
23       intervention of those participants in the court  
24       system.

25           I also believe the 1996 law that requires  
26       judges to consider evidence of domestic violence in

1           Domonkos  
2 all custody and visitation matters has been applied  
3 unevenly, at best, by the courts.

4           I urge the commission to review the  
5 application of this law and consider ways to  
6 strengthen its use so domestic violence victims and  
7 their children are protected by it in the way the  
8 legislature and advocates intended.

9           As the commission is aware, there is a  
10 move to adopt no-fault divorce in New York State. I  
11 am going to leave in the back, Judge Miller, as you  
12 suggested, the position paper the The Lawyers  
13 Committee Against Domestic Violence has written on  
14 this, in which we discuss how no-fault may have  
15 serious negative consequences for domestic violence  
16 victims in particular and for women in general. For  
17 example, sometimes the need to prove a ground is the  
18 only bargaining chip for a domestic violence victim  
19 or a poor woman to use in securing child custody,  
20 safe visitation arrangements, health insurance or  
21 some share of the marital finances. A standard for  
22 maintenance awards should be established before  
23 no-fault leaves mothers vulnerable to the  
24 arbitrariness of current maintenance decisions.  
25 Here it is critical to note that the same  
26 assumptions about divorced mothers achieving

1           Domonkos  
2       economic self-sufficiency applied by courts in  
3       awarding maintenance often are totally inapplicable  
4       to domestic violence victims --

5           JUDGE MILLER: One minute.

6           MS. DOMONKOS: -- whose abusers have  
7       typically prevented them from obtaining education,  
8       training or basic home and life management skills.  
9       No-fault should not be adopted without a serious  
10      review of these issues and actions taken to address  
11      these inequities. I believe, however, this  
12      Commission should not address the issue of no-fault  
13      divorce, which would require legislative change and  
14      should be handled through the legislative and  
15      political process. I recommend that you instead  
16      devote your attention to the many other serious  
17      reform needs I and others will put before you.

18           I do want to say a word on presumed joint  
19      custody since it has been raised by Mr. Koch's  
20      testimony. I would like to note that this issue has  
21      been brought before the legislature year after year  
22      and thankfully has been fought away for many, many  
23      good reasons. I sent to you -- I didn't come with  
24      it -- The Lawyers Committee Against Domestic  
25      Violence has written a position paper on this issue,  
26      which I will submit to the commission. Domestic

1           Domonkos  
2       violence victims are one of the best reasons why it  
3       should not pass. I do not believe the commission  
4       should consider this issue. That would be a  
5       terrible mistake, and I thank you for considering  
6       that point as well.

7           I do appreciate this vital initiative and  
8       I am willing to assist the commission in any way  
9       that I can, and particularly to offer to help in the  
10      challenging effort to develop a comprehensive plan  
11      to provide competent and continuous representation  
12      for every person of limited means who seeks  
13      matrimonial relief in our courts.

14           Thank you.

15           (Applause.)

16           JUDGE MILLER: We have time for another  
17      speaker before our break. Mr. Alton Abramowitz.

18           MR. ABRAMOWITZ: It's a good thing I  
19      showed up early.

20           I want to thank Justice Miller -- I know  
21      Judge Miller many years -- and members of the  
22      commission of whom I have known many years -- for  
23      giving me the opportunity to address you this  
24      morning on a topic which I, and many of my  
25      colleagues, believe goes to the very heart of  
26      matrimonial litigation in the State of New York.

1 Abramowitz

2 I'm here speaking on behalf of the  
3 American Academy of Matrimonial Lawyers New York  
4 Chapter with respect to the proposed no-fault  
5 divorce legislation that has been approved by the  
6 executive committee of the New York State Bar  
7 Association.

8 In order to put all of this into context I  
9 think I ought to tell you -- although many of you  
10 are familiar with them -- about my background and  
11 credentials. I'm currently a partner of Sheresky,  
12 Aronson & Mayefsky, LLP, a twelve attorney Manhattan  
13 law firm that dedicates its practice exclusively to  
14 the field of matrimonial law. Among the members of  
15 the commission is my partner, Allan Mayefsky, who  
16 has heard much of what I am about to say.

17 In my background is the fact for five  
18 years before entering private practice I was a  
19 poverty lawyer with a legal services project of the  
20 Legal Aid Society, Rockland County, where the  
21 majority of my cases involved representation of  
22 indigent individuals in civil proceedings in the  
23 Family Court and divorce proceedings in the Supreme  
24 Court. In addition, I am a former president of the  
25 New York Chapter of the American Academy of  
26 Matrimonial Lawyers. Until recently I was Co-Chair

1 Abramowitz  
2 of the Matrimonial Law Section of the New York  
3 County Lawyers' Association. I currently serve on  
4 the executive committee of the Family Law State Bar  
5 where I am Co-Chair of the legislation and, lastly,  
6 I am currently a member of the Matrimonial Law  
7 Committee of the Association of the Bar of the City  
8 of New York where I Co-Chaired the subcommittee on  
9 judicial issues and relations.

10 Thus, I have seen the issues involving  
11 no-fault divorce from both sides; from the side of  
12 the rich to the poor, as well as from the advantage  
13 point of an active participant in the Bar  
14 Association debates among lawyers and judges of the  
15 future family law in the State of New York that have  
16 been cloved the last three decades.

17 In the materials that I have supplied to  
18 the commission is a copy of the proposed no-fault  
19 divorce bill that has been endorsed by the Academy  
20 and which is a cornerstone of the State Bar's 2005  
21 legislative initiative. This bill is the result of  
22 the discussions and work that began in March of  
23 2002, when Harold Mayerson, the Chair of the  
24 Matrimonial Law Committee of the City Bar, and I met  
25 to discuss issues of mutual concern between his  
26 committee and the matrimonial law section of county

1 Abramowitz  
2 lawyers. Two years later with the hard work and  
3 assistance of lawyers, both young and old,  
4 experienced and inexperienced, from bar associations  
5 across the state, including the effort of Eleanor  
6 Alter, the bill that you have in front of you has  
7 become a reality.

8 It is our belief that this bill is one of  
9 the ways to reduce costs, delay and trauma to the  
10 parties in matrimonial litigation while at the same  
11 time freeing judicial resources that can be employed  
12 to other more essential and significant aspects of  
13 matrimonial litigation, the aspects that have a real  
14 impact on the lives of litigants and their children.

15 Up until 1966 a commission of adultery by  
16 one spouse was the only ground upon which an  
17 individual could obtain a divorce in the State of  
18 New York. As the law now stands the most common  
19 grounds for divorce by both parties, in addition to  
20 adultery, is for cruel and inhuman treatment and  
21 abandonment for a period of one or more years. Our  
22 present statute also contains a hybrid no-fault  
23 ground which requires the consent of both parties.

24 In order to obtain a divorce on that basis  
25 the parties must enter into a bilateral separation  
26 agreement. They must live separate and apart

1 Abramowitz  
2 pursuant to that agreement for at least a year, and  
3 then one of them must still sue for divorce at the  
4 end of the year alleging in the complaint facts that  
5 are surrounding the execution and filing of the  
6 agreement, the fact that the parties have lived  
7 separate and apart pursuant to the agreement for at  
8 least a year, and that the party prosecuting the  
9 divorce has complied with his or her obligations  
10 under the separation agreement. This leaves open  
11 the possibility that the other party may still come  
12 in and oppose the divorce by alleging, and sometimes  
13 even proving, cohabitation during a one year period  
14 or noncompliance with the agreement. Thus, even  
15 under this ground where one of the parties thinks  
16 the case is over it's not really over, and it keeps  
17 going on and on, and the risk of future litigation  
18 brings additional legal fees, the possibility one of  
19 the parties must make additional financial or  
20 custodial concessions in order to obtain a divorce,  
21 and there's concomitant expenditures of judicial  
22 resources, including the time spent by judges, the  
23 court attorneys, part clerks, court officers,  
24 etcetera, etcetera. All of this to my mind  
25 seriously undermines the confidence of the public  
26 and efficacy of our judicial system.

1 Abramowitz

2 The continued utilization and efficacy  
3 called divorce has led to the development of a  
4 myriad of problems that permeate the divorce process  
5 in the state. People who had bad marriages, but do  
6 not have grounds for divorce, and who have spouses  
7 who are unwilling to enter into a separation  
8 agreement, are unable to secure divorces in New  
9 York. Many of them flee the state and take up  
10 residency in neighboring no-fault jurisdictions,  
11 such as New Jersey and Connecticut. This favors the  
12 wealthy who can afford to relocate in order to  
13 obtain a divorce. Where there is a marriage with  
14 minor children, this favors men, who are usually the  
15 economic, more powerful spouse, while hamstringing  
16 the homemaker mother who cannot relocate her  
17 children to another jurisdiction without her  
18 spouse's or court's permission.

19 Where the parties can agree on settlement  
20 terms, but do not want to wait a year to become  
21 divorced, the current system encourages the parties  
22 to conduct nonexistent grounds for divorce where  
23 only one of the parties often times describes the  
24 party's constructive abandonment of him or her.  
25 Constructive abandonment being in most cases a  
26 sexual abandonment for a period in excess of one

1 Abramowitz  
2 year where both of the parties were fully capable of  
3 performing.

4 At the present time 35 jurisdictions  
5 recognize some form of irreconcilable differences or  
6 irreconcilable breakdown as a basis of ending a  
7 marital relationship. While six jurisdictions  
8 recognize incompatibility, and eleven jurisdictions  
9 permit living separate and apart for a specified  
10 period of time, without any form of agreement or  
11 judicial decree of separation, as basis for a  
12 divorce.

13 Put another way, New York is the only  
14 major jurisdiction in the country that still  
15 requires proof of fault in order to obtain a divorce  
16 without both parties' consent.

17 The American Law Institute in its  
18 principles of family dissolution has stated  
19 approximately half the states follow no-fault  
20 principles in awarding alimony. Considering more  
21 than half do so in allocating marital property.  
22 This majority rule is correct because the  
23 potentially valid functions of the no-fault  
24 principal are better served by tort and criminal law  
25 and attempting to serve them a fault rule risks  
26 serious distortion in the dissolution action.

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2 One possible function of a fault rule  
3 punishment of bad conduct is generally disavowed  
4 even by most fault states. It is better left to  
5 criminal law which is designed to serve it, and in  
6 doing so appropriately reaches a much narrower range  
7 of marital misconduct than do the marital misconduct  
8 of fault states.

9 The second possible function, compensation  
10 for nonfinancial losses imposed by the other  
11 spouse's battering or emotional abuse are also  
12 better left to the tort law, with the general demise  
13 of interspousal community tort remedy for spousal  
14 violence, become more and more readily available.  
15 It has been argued that fault permits the guiltless  
16 spouse to exercise his or her right to defeat a  
17 divorce action in order to gain leverage leading to  
18 a financial advantage in negotiations. However, it  
19 makes no sense to tie the abused spouse to the  
20 abuser for this purpose.

21 JUDGE MILLER: One minute.

22 MR. ABRAMOWITZ: I think I'll stop now. I  
23 think most of you have the gist of what I am saying.

24 If there are any questions I will be glad  
25 to answer them before I sit down.

26 JUDGE MILLER: Thank you very much.

1 Jacobson

2 MR. ABRAMOWITZ: Thank you.

3 (Applause.)

4 JUDGE MILLER: Is June Jacobson here?

5 Let's hear from June Jacobson and then we'll take  
6 our break.

7 MS. JACOBSON: My name is June Jacobson,  
8 I'm a licensed certified social worker and attorney  
9 working primarily as a family and divorce mediator  
10 in private practice in Manhattan for the past nine  
11 years, and I teach divorce mediation at Cardozo Law  
12 School. I am the immediate past president of the  
13 Family and Divorce Mediation Council of Greater New  
14 York and I'm on the Board of Directors of the New  
15 York State Council on Divorce Mediation, two  
16 mediation organizations dedicated, among other  
17 things, to promoting continuing education among  
18 mediators and mediator compliance with the Model  
19 Standards of Practice for Family and Divorce  
20 Mediation. I'm also a divorced parent myself.

21 I am very grateful to have the opportunity  
22 to address you today because I'm very enthusiastic  
23 about the work I do.

24 I am gratified to here from my clients, as  
25 many of my colleagues in mediation hear from theirs,  
26 comments like "I'm so glad we decided to mediate.

1           Jacobson

2   I didn't think we'd be able to do this but you've  
3   made a difficult process so much easier. You  
4   helped us stay focused on our children in a positive  
5   way. You've helped us stay focussed on the future  
6   rather than rehashing the past. We've been able to  
7   have a productive conversation for the first time in  
8   years. Thank you."

9           Mediation is a private, voluntary,  
10   informal, but structured process in which an  
11   impartial facilitator works with participants in  
12   conflict to help them change the quality of their  
13   conflict interaction from negative and destructive  
14   to positive and constructive, as the participants  
15   explore, discuss and become informed about issues  
16   and possibilities for resolution, and attempt to  
17   make decisions together based on their understanding  
18   of their own interests and needs of the other, and  
19   the realities they face together. It's a long  
20   definition. In other words, mediation is informed  
21   negotiation and decision-making facilitated by a  
22   trained third party.

23           One of the obvious benefits of mediation  
24   is that it diverts cases from the court docket. A  
25   California study of mandatory mediation of 1400  
26   disputed custody cases found that 46 percent settled

1           Jacobson  
2    within two weeks of their first mediation session.

3           But settlement rates are not the only or  
4    even the most important measure of the success of  
5    mediation.

6           Mediation is a client-driven process,  
7    instead of being driven by lawyers or the court.

8           The participants determine frequency and  
9    duration of meetings, so they are in control of how  
10   feasible it is.

11          The process is voluntary, private and  
12    confidential.

13          The process is transparent-negotiation  
14    occurs in the presence of the parties rather than  
15    between two attorneys out of the view of their  
16    clients.

17          The participants determine what issues  
18    they want to address. These will include the  
19    obvious, such as equitable distribution, child  
20    support, maintenance and a parenting schedule, but  
21    could also include their feelings about the breakup  
22    of their relationship, what kind of relationship  
23    they want to have with each other in the years  
24    ahead, what are their aspirations for their children  
25    and so on. They are negotiating their relationship,  
26    not just in terms of an agreement and divorce.

1           Jacobson

2           The couple, the people who know the most  
3 about the facts, make the decisions.

4           The parties determine what principles they  
5 want to apply in reaching their decisions, they can  
6 consider and apply the law, but they may also or  
7 instead consider what they believe will best serve  
8 their children's interests, or their own spiritual,  
9 religious or cultural values, or the history of  
10 their relationship, or their sense of fairness.

11          The parties are encouraged to consult with  
12 lawyers during or between mediation sessions, as  
13 well as with other professionals as needed, such as  
14 a real estate appraiser, an accountant, financial  
15 planner or a child mental health specialist. As  
16 with litigation, they have the full opportunity for  
17 full financial disclosure.

18          Whereas the adversarial process tends to  
19 be based on a win-lose model, mediation strives for  
20 a win-win outcome, supporting a fair result that  
21 addresses the needs of both parties and their  
22 children.

23          There is an emphasis on cooperation, but  
24 not at the expense of the parties' interests and  
25 needs, or those of the children.

26          The mediator helps the parties to look

1           Jacobson  
2   beneath their positions at their underlying  
3   concerns, and to better understand the perspective  
4   of the other.

5           A study that compared high-conflict  
6   couples randomly assigned to mediation or litigation  
7   found that in the litigation group, the more the  
8   mothers felt that they won, the more the fathers  
9   felt that they lost. A win-lose outcome. In the  
10   mediation group, however, the more the mothers felt  
11   that they won, the more the father felt that they  
12   won too. Clearly a win-win outcome.

13           The mediator has several important roles  
14   that are essential to the process:

15           The mediator creates a safe and supportive  
16   environment and facilitates the communication  
17   between the parties, and can offer feedback and  
18   education about the interaction between them.

19           The mediator raises issues that neither  
20   party may have thought of.

21           The mediator addresses the law.

22           The mediator monitors and addresses any  
23   power imbalances, and initially and on-goingly  
24   screens for domestic violence and any other barriers  
25   to the capacity to mediate on the part of the  
26   parties.

1           Jacobson

2           Research has shown that children manage  
3 divorce best when their parents are able to  
4 communicate with one another in a respectful way,  
5 and when each parent preserves his or her  
6 relationship with the children throughout and after  
7 the divorce.

8           Mediation is all about communication.  
9 Mediators model respectful communication about  
10 difficult issues and with good communication skills.

11          Mediators help to maintain the focus on  
12 the children and their needs.

13          Mediated agreements tend to be more  
14 specific about parenting plans than those negotiated  
15 by attorneys alone, and far more specific than those  
16 drafted by pro se parents.

17          Studies indicate that mediated agreements  
18 are more likely to include joint custody provisions.

19          Researchers have found that mediation  
20 leads to several substantial long-term benefits for  
21 parents and children, particularly for the  
22 relationships between children and non-residential  
23 parents, and between the parents themselves.

24          Again, comparing the study that assigned high  
25 conflict couples at random to mediation or  
26 litigation twelve years post-divorce, in the

1           Jacobson  
2 follow-up study non-residential parents who mediated  
3 were three times as likely to see their children  
4 every week than those that litigated. There were  
5 even more dramatic differences for phone contact,  
6 which is even perhaps a better measurement.  
7 Litigating parents are far more likely to drop out  
8 of their children's lives than are mediating  
9 parents. This is an extremely important and  
10 poignant factor in considering the impact of  
11 mediation on children.

12           The greater contact between  
13 non-residential parents and their children in this  
14 study did not increase parental conflict. In the  
15 mediation group, the twelve years later, the  
16 residential parent reported that the non-residential  
17 parent was significantly more likely to discuss  
18 parenting problems with the residential parent, had  
19 a greater influence on child-rearing decisions and  
20 was much more actively involved in the children's  
21 discipline and day-to-day activities.

22           Let me mention some other important points  
23 about mediation.

24           It tends to be much faster than  
25 litigation. One study found that parents settle  
26 their disputes in about half the time when assigned

1           Jacobson

2           to mediation instead of litigating.

3           It tends to be much less expensive than

4           litigation, thereby preserving assets for the

5           family.

6           It's more effective when parties enter

7           mediation before they have already started down the

8           path of litigation and become entrenched in an

9           adversarial posture with one another. So it seems

10          to make sense to encourage couples to try to mediate

11          early on.

12          If mediation fails, the parties can always

13          choose to litigate. Mediating parties who fail to

14          reach agreements are more likely to settle prior to

15          trial than non-mediating parties.

16          If the parties are able to reach at least

17          some agreements in mediation, they can significantly

18          narrow the issues for litigation, or for another

19          dispute resolution process, such as arbitration.

20          Lawyers are not always involved in

21          mediation, but when they are they can play a key

22          role in moving the process forward, such as when

23          clients are fearful of reaching agreements on their

24          own, or when they are being unrealistic in their

25          proposals.

26          Studies have found that as lawyers become

1           Jacobson

2   more familiar with mediation, they become more  
3   supportive of the process. In a recent survey of  
4   the Florida bar, a state with a long history of  
5   mediation of child custody disputes, 91 percent of  
6   the members of the Family Law Section described the  
7   effect of mediation on Family Court as positive, and  
8   only one percent saw it as negative.

9           Mediation positively influences the way  
10   lawyers represent their clients. Before mediation  
11   became widely available in California, approximately  
12   ten percent of child custody dispute filings went to  
13   trial. Today only about 1.5 percent are tried.

14          Participants are more likely to adhere to  
15   agreements reached in mediation, both because the  
16   process is more cooperative and because parties feel  
17   increased ownership over the agreements they reach  
18   on their own. And if there are modifications  
19   required, they can be mediated too.

20          Finally and very importantly, mediation  
21   participants consistently report greater  
22   satisfaction with the mediation process than  
23   litigants report with the adversarial process.  
24   Satisfaction levels with mediation range from 60 to  
25   93 percent, with men and women equally satisfied.  
26   50 to 90 percent of litigants report active

1 Jacobson

2 dissatisfaction with the adversarial process.

3 85 percent of mediating couples view the  
4 process as fair, as compared to only 20 to 30  
5 percent of those using the court system.

6 Women report that mediation is helpful to  
7 them in "standing up" to their spouses and they  
8 rated themselves more capable and knowledgeable as a  
9 result of participating in mediation.

10 JUDGE MILLER: One minute.

11 MS. JACOBSON: Thank you.

12 Not surprisingly, those who reach  
13 agreements are more satisfied with the process than  
14 are those who do not settle, but even among those  
15 who do not reach agreement, 81 percent would  
16 nevertheless recommend the process to a friend.

17 Mediation is seen as involving less  
18 pressure, protecting people's rights better, giving  
19 couples more control over decisions, and being less  
20 coercive and better for children.

21 I hope I've conveyed why I believe  
22 mediation is an important process alternative for  
23 divorcing couples. We mediators hope the court  
24 will take the lead in New York State in informing  
25 and encouraging couples about mediation, so they can  
26 make informed decisions in choosing what process

1           Jacobson  
2    they want to use for their divorce. Informed  
3    choice is a win-win possibility, for the court  
4    system and for the families involved.

5           JUDGE MILLER: We'll take our break and  
6    return here at 11:15, when our next speakers will be  
7    four speakers from the Voices of Women Organizing  
8    Project.

9           (Whereupon a recess was taken.)

10          (Proceedings resume.)

11          JUDGE MILLER: We can start now.

12          Welcome again, everyone.

13          I'm just going to say a few things because  
14    we were not all together at the beginning when we  
15    started this morning.

16          So, first of all I would just like to ask  
17    all of you who have cell phones, please, to shut  
18    them off.

19          Secondly, I would like to tell those of  
20    you who were not here at the very beginning, first  
21    of all to welcome you, speakers, attendees and the  
22    press, and to remind you that this is the very first  
23    public hearing of the Matrimonial Commission, that  
24    this Commission follows after ten years of its  
25    predecessor commission to examine some of those  
26    issues ten years ago. Based upon that, our Chief

1           Jacobson

2       Judge has mandated us to re-examine all of the  
3       issues affecting matrimonial law in the State of New  
4       York and to consider what should be done and what  
5       must be done to make our system work better, better  
6       for children and better for families.

7           She has charged a duty to the member  
8       Commission with a very important mandate, we are to  
9       look at every aspect of matrimonial practice in this  
10      State of New York and look at all of the  
11      stakeholders, inside and outside, seek all of your  
12      input and guidance and to think creatively, to think  
13      globally about how to address the most pressing  
14      issues, and they are, reducing trauma to parties and  
15      children who go through the system, avoiding  
16      unreasonable expense and reducing and eliminating  
17      delay.

18          I want you all to know how important we in  
19      this Commission believe our mandate is, how  
20      important it is that we help to improve the system.  
21      We know that this is a tremendous, tremendous job,  
22      it's a daunting challenge but it's also a marvelous  
23      opportunity for those of us who have worked for many  
24      years in the system and to know from you, from the  
25      litigants and from our friends and from those  
26      sitting out there and those that have not yet

1           Jacobson  
2    appeared at this proceeding how much trauma there  
3    has been and how many problems have to be  
4    confronted. We intend to use our very best efforts  
5    to work very hard to leave no stone unturned, to  
6    come up with recommendations, and we can assure you  
7    that our Chief Judge, who has considered the  
8    importance of family and children from the very day  
9    she was on the court as a primary consideration, she  
10   will do everything that is humanly possible in her  
11   power to effectuate any reasonable recommendations  
12   that we come up with.

13           So, let me just remind those of you who  
14    have been assigned time to speak that we have  
15    limited you to ten minutes. We've done that not  
16    because we don't know that you have much more to say  
17    than you can say in ten minutes, but we want to  
18    accommodate just as many people as we can today.

19           As you know, we have had a tremendous  
20    amount of requests to speak and we could not honor  
21    all of you, but because of the number of people who  
22    wanted to speak here today we will schedule another  
23    hearing in New York City, it will be in the spring,  
24    and those of you who have registered for this  
25    hearing and who have not been able to speak, we will  
26    consider you registered for the next hearing and we

1           Jacobson

2       will be in touch with you.

3           As you know, I will remind you, those of  
4       you who were not here this morning early, that the  
5       Commission cannot take testimony from any individual  
6       who has a case pending in the New York State courts.

7       This is necessary so that we can protect the  
8       integrity of your pending cases and the work of our  
9       Commission. However, such individuals are all  
10      welcome to submit your comments and suggestions in  
11      writing to the Commission at any time, today or any  
12      time, and any identifying details contained therein  
13      will be redacted by the Commission staff, but the  
14      substance of your submission will remain intact.

15           We are now ready to proceed.

16           Our next speaker, four speakers who are  
17      representatives of the Voices of Women Organizing  
18      Project.

19           I believe the first person will be Mary  
20      Williams.

21           MS. WILLIAMS: Good morning to the members  
22      of the Commission.

23           I'm a proud member of Voices of Women  
24      Organizing Project, known as VOW, which is an  
25      organization of survivors of domestic violence  
26      working to improve the system that battered women

1 Williams

2 turn to for safety and justice.

3 We have spoken with many survivors who  
4 feel the courts have failed to protect them and  
5 their children and have failed to hold the batterers  
6 of women accountable for their actions.

7 We have recommendations for Family Courts'  
8 handling of domestic violence cases and will submit  
9 them in writing. VOW believes that its very  
10 important that survivors have a voice in  
11 policy-making, and I am involved because I don't  
12 want other women to have to face the same obstacles  
13 that I did in my attempts to be safe.

14 The subject I'm going to talk about is the  
15 existing problems and how law guardians handle  
16 domestic violence cases.

17 Law guardians may not believe or  
18 investigate domestic violence, even when it's  
19 documented. A study that analyzed 200 custody  
20 cases where abuse was alleged found that only 50  
21 percent of these cases were investigated.

22 Allegations and evidence of abuse may be  
23 omitted from reports by law guardians.

24 Law guardians usually do not consult with  
25 domestic violence professionals involved in cases or  
26 follow up with potential witnesses of alleged abuse;

1 Williams

2 often children are not questioned about allegations  
3 of physical or sexual abuse.

4 Law guardians may not examine or credit  
5 existing documented evidence of abuse. If a mother  
6 alleges child abuse or child sexual abuse her  
7 attempts to protect that child are often dismissed  
8 or used against her to prove "parental alienation  
9 syndrome."

10 Law guardians often do not have time to  
11 develop trust with the child and thus have no basis  
12 for knowing what the child has experienced and what  
13 arrangement would best benefit the child in the  
14 future.

15 Law guardians often do not believe  
16 children when they disclose abuse or say they don't  
17 want to, or are afraid to visit a parent and do not  
18 further investigate.

19 Law guardians are not properly trained on  
20 issues of domestic violence or child psychology.

21 The assumption that a law guardian is  
22 better qualified than a parent to know what is right  
23 for a child is inherently flawed.

24 There are no clear guidelines requiring  
25 training protocol, or role definition for law  
26 guardians.

1 Williams

2 Parents who believe their cases have been  
3 mishandled and/or their children are in danger due  
4 to custody or visitation decisions have no outlet  
5 for appeal or review.

6 Repeated forensic evaluations, in one  
7 family's case where there were 23 evaluations, is a  
8 form of harassment and is extremely costly for  
9 parents. It is also emotionally damaging to the  
10 mother and the children. Some evaluators ask  
11 extremely personal and invasive questions.

12 In cases where there is unequal power  
13 based on position, for example, one parent is a  
14 lawyer, a D.A., police officer, etcetera, or income  
15 difference between the party, no efforts are made to  
16 make the procedures fair for all parties.

17 Gender bias can play a role in how parents  
18 are viewed or whether children are believed.

19 Regardless of the presence or absence from  
20 partner abuse, fathers who actively seek custody are  
21 awarded either primary or joint physical custody 70  
22 percent of the time. Batterers are twice as likely  
23 as non abusive parents to actively seek custody of  
24 their children as one way to punish or control their  
25 ex-partners.

26 Law guardians often hold mothers to higher

1 Williams  
2 standards than fathers and they may be less likely  
3 to honor girls' wishes about custody and visitation.

4 Thank you.

5 JUDGE MILLER: Maria? Lorna.

6 LORNA: First let me say thank you to you  
7 all for giving me this opportunity to talk to you.

8 Facing a batterer in court is one of  
9 domestic violence victim's greatest fears. Knowing  
10 that have you to go to court, to go into that  
11 courtroom, in the hallway where there is sometimes  
12 no police officer or guard to protect that client,  
13 sitting in the waiting room before the trial is  
14 another fear, knowing that that batterer is sitting  
15 sometimes opposite you or right in view so that he  
16 can show you justice, that he may kill you, you  
17 know, different signs. This is another fear of  
18 that woman who is going through the court to testify  
19 or whatever.

20 The fear from 9 to 5. What happens after  
21 5? Who is there with that woman to protect her?  
22 You know, to at least accompany her and make her  
23 feel a little safe.

24 Like going to the bathroom and hallways,  
25 something has to be done to try to protect that  
26 woman in that area, those areas of the bathrooms.

1 Lorna

2 And in the courtroom, again, she has to sit in the  
3 courtroom there and have this batterer in view, you  
4 know, it's very traumatizing to go to court in  
5 general to face the batterer at that time.

6 Revealing addresses to the batterer.  
7 This is happening over and over again. After a  
8 woman goes through the system, let us say for nine  
9 months or whatever, and she gets into her own  
10 apartment, and for the Court to send that address  
11 back to the batterer is traumatizing. That woman  
12 has to start all over again to find a safe place to  
13 live. It is unfair, I believe, and something must  
14 be done about this unsafe space for that woman.

15 Another thing, holding batterers  
16 accountable for the court orders, because sometimes  
17 they have this court order where they are supposed  
18 to take that child and keep that child like every  
19 weekend and sometimes they never do it. And  
20 sometimes they go to your home or, you know, violate  
21 that court order not to and they get away with it,  
22 which is unfair to that woman.

23 So this is what I wanted to say, and I  
24 thank you all.

25 JUDGE MILLER: Sharlene.

26 SHARLENE: Hello.

1           Sharlene

2           Good afternoon. My name is Sharlene and I  
3 am also a proud member of V.O.W. I am here today to  
4 discuss the psychological, financial and emotional  
5 effects on women and children when having to return  
6 to court so many times.

7           Women are dragged into court countless of  
8 times, abused by the system. They have to take off  
9 from work, lose their jobs, go into debt, become  
10 poor, depend on social services where it is hard to  
11 break free. They have fears and anxieties of seeing  
12 their perpetrator in court again. Fears that she  
13 will not be protected, getting sick right there  
14 right in the courthouse bathroom. Feelings of  
15 helplessness when her concerns are not heard. Fears  
16 of having to return to court when the case is  
17 adjourned.

18          It is this system that forces women to  
19 feel like they cannot protect their children or  
20 establish routines.

21          The children. Children are resentful when  
22 forced to visit a parent that they are afraid of.  
23 They have feelings of helplessness and confusion.  
24 School suffers, attendance suffers, grades suffer,  
25 performance suffers.

26          (Applause.)

1           Sharlene

2           SHARLENE: Our children act out, often  
3 times becoming physically, emotionally and verbally  
4 abusive. These children get ill. Young children  
5 complaining of having headaches. Our children are  
6 either hypersensitive to violence or not phased by  
7 it. The court can be insensitive and unaware  
8 regarding visitation concerning step-children.  
9 These children are abandoned. The children are  
10 afraid.

11           In conclusion, it is this system that has  
12 these mothers experiencing a diminished capacity,  
13 making them feel like they cannot make decisions for  
14 fear of how they will appear in court. This is why  
15 it is imperative that the courts realize that they  
16 facilitate the batterer to continue the patterns of  
17 abuse. The perpetrator changes the instrument, but  
18 the agenda is still the same; abuse, manipulation  
19 and control. Thank you.

20           (Applause.)

21           JUDGE MILLER: Yes.

22           MARIA: Good morning.

23           Excuse me. I, first of all, want to thank  
24 the commission for allowing V.O.W. to be present  
25 here today. I was sharing with Susan Lob, who is  
26 the founding member of V.O.W., that we have, in

1           Maria  
2 fact, have been organizing and preparing for the  
3 last three years for these ten minutes, so we are  
4 really, really experiencing our vision to hopefully  
5 impact and influence people such as yourselves who  
6 have so much power when it comes to implementing  
7 policies, and what I hope that we do here today is  
8 that when you are making these decisions that our  
9 voices be present in that room with you.

10           And having said all of that, I was asked  
11 to -- I was asked to talk about visitation, but I  
12 have a little editorial before I do that, and what I  
13 want to say before I discuss some of our concerns is  
14 that in the years that I have been working with  
15 V.O.W., and my discussions with survivors of  
16 domestic violence, and having been a survivor  
17 myself, is that I have yet to meet a survivor who  
18 didn't want to raise her children with a mother and  
19 a father.

20           (Applause.)

21           MARIA: It is such a myth and it is so  
22 wrong to believe that a mother will go as far as to  
23 alienate a child that she lovingly bore for someone  
24 whom she loved. That it just --

25           (Applause.)

26           MARIA: -- it just doesn't make sense.

1           Maria

2       We have those children because we loved our partners  
3       and because we wanted to have children. And so this  
4       is especially, you know, a shout out, if you will,  
5       to fathers' rights, and people who are doing that  
6       work, that we are not interested in alienating our  
7       children. We are only concerned when the visits  
8       don't go in the way that they were intended to go,  
9       which is to have quality -- and spend quality time  
10      with their fathers, and more important than  
11      anything, to have a relationship with their  
12      children. But that's not always how the visitations  
13      play out when they are received by batterers.

14           What is, indeed, happening is that during  
15      these visitations they are used to -- in many cases  
16      where victims are exchanging -- they are used to  
17      coercion and continue the abuse and the coercion and  
18      the fear during the exchange of the children. And  
19      let me just back up, because I don't want to leave  
20      here with saying this also -- what loving parent  
21      would realistically want an exchange of children at  
22      a local precinct?

23           (Applause.)

24           MARIA: Who? Who wants that? No one  
25      wants that. Okay. So that is really out of  
26      desperation and a last alternative to comply with

1           Maria

2   your laws and to hopefully encourage fathers to be  
3   involved in the life of their children, and that the  
4   visits turn into, in many ways, stalking to find out  
5   what mommy is doing, where she is doing it, and most  
6   importantly, who she is doing it with.

7           (Applause.)

8           MARIA: And children -- and we need to be  
9   able to come to you and tell you the visits are not  
10   going the way they should be. My child is being  
11   emotionally abused because the father is constantly  
12   asking my child about my daily activities and not at  
13   all concerned with having a relationship with the  
14   children. And so children don't want to go visit  
15   the fathers, and then there is a twofold about that.  
16   If we don't encourage to make sure that these visits  
17   happen we are then accused of alienating our  
18   children.

19          (Applause.)

20          MARIA: Okay. So these are just some of  
21   the issues that are happening.

22          Imagine having to turn over a child who is  
23   screaming, who is telling you, "I don't want to go",  
24   and hanging on to your leg, but you are forced to  
25   put that child in that car. Imagine having to turn  
26   over a child to a father -- and incidently, we know

1           Maria  
2   batterers better than anyone, and when someone says  
3   I suspect that he or she is being sexually abused --  
4   even if it is a suspicion -- imagine having to turn  
5   over your child to someone you suspect might even be  
6   capable of sexually abusing your child.

7           And I would like to say that in terms of  
8   forensic, the forensic piecemeal is not uncommon for  
9   children who are sexually abused by their fathers  
10   for the relationship to appear to be a loving one.

11           (Applause.)

12           MARIA: But I won't talk about child  
13   sexual abuse. I am sure there are other experts in  
14   here who can qualify what I just finished saying.

15           So the danger when handing over kids --  
16   the abuser uses visits to interrogate the child  
17   about mom. Has no interest in kids. He is using  
18   this to control mom.

19           This is another concern. We want to know  
20   where our children are doing these visits. We want  
21   to know who his supervising the children. We want  
22   to know who the child is spending most of that time  
23   with because what we are finding is that the fathers  
24   are not home. What was happening is that they take  
25   them over to their mom's house, or the father is  
26   working and there's really no quality time, so

1           Maria  
2    others and sometimes new partners are the ones who  
3    are supervising the children and they usually are  
4    people we never met. I think we have a right to  
5    know who is supervising our children on weekends. I  
6    think we have a right to know if they are eating, if  
7    they are being well taken care of, and I think that  
8    it is really important that we are able to come to  
9    you and say to you, He's not spending quality time  
10   with the children. The television is spending  
11   quality time with my child over the weekend.

12           (Applause.)

13           MARIA: Okay. So having said all of that,  
14    and I want to add also that there's a problem when a  
15    father doesn't use his time with children, doesn't  
16    see the children two, three, four, five, six months,  
17    and sometimes up to two years, he reappears, wants  
18    to be a father, wants to implement visitations, and  
19    we are forced to hand over a child to a man, in most  
20    cases, that hasn't seen his child in over two years.  
21    That's handing over a child, in many respects, to a  
22    stranger. And then, again, who is accused of  
23    alienating the children? We are.

24           (Applause.)

25           MARIA: All right. So here are some of  
26    the recommendations. We are also very concerned --

1           Maria

2       we know batterers better than anyone. We know they  
3       drink on the weekends. We know they do drugs on the  
4       weekends. We know they are drinking and driving  
5       with our children in the cars. But if I come to you  
6       and I tell you that I suspect that my ex-partner is  
7       drinking and driving with my children, we are  
8       alienating the children.

9           (Applause.)

10          MARIA: Not only are we now alienating the  
11       children, but we are held responsible. Now, Well,  
12       you knew that when you were married to him. Why  
13       didn't you come forward with it then?

14          Well, I didn't come forward with it then  
15       because when he drinks and when he has his drugs  
16       that's the way that I managed the violence in my  
17       home.

18          But, we are enabling batterers when we  
19       speak up and say we knew about the drugs and we knew  
20       about the alcohol. But that's how I managed the  
21       violence. I repeat.

22          JUDGE MILLER: Maria, you have one minute.

23          MARIA: Time went fast.

24          So let me get into the recommendations  
25       because that's most important to all of us.

26          In terms of visitation and

1           Maria  
2       recommendations -- with respect to the visitations  
3       we need -- we need contact information. As I said  
4       earlier, where is my children -- where are my  
5       children. Give me a phone number. Give me an  
6       address. Only allow visitation when safety is  
7       assured. Okay.

8           Listen to kids. Give women options on how  
9       visits can be done safely, and I would encourage  
10      that you, as mediators, as an option to have other  
11      family members involved in the exchange of the  
12      children as opposed to precincts and what have you.

13          So these are the recommendations with  
14      regard to the visitations. I mean, overall, in  
15      terms of recommendations and what my colleagues have  
16      said before me, V.O.W. is recommending the  
17      following:

18          The courts must send a consistent message  
19      that batterers of abuse will be held accountable and  
20      that victims will not be punished or blamed for the  
21      abuse against them.

22          Number two. All court personnel, from  
23      judges to clerks, court officers, need to be trained  
24      to understand the complex dehumanization of domestic  
25      violence and the training should include Voices of  
26      Women.

1 Maria

2 (Applause.)

3 MARIA: Three. Create an independent  
4 review panel to review complaints, and with all due  
5 respect, and watch for the pattern of bias,  
6 incomprehensible decisions of judges, lawyers, law  
7 guardians and forensic evaluators.

8 And so that's the conclusion of my  
9 presentation. I hope that when -- like I said  
10 earlier, when you, who are doing these policies,  
11 that you remember the passion in my voice, and we  
12 really want safety and justice when it comes to  
13 victims of domestic violence.

14 (Applause.)

15 JUDGE MILLER: Thank you, Maria.

16 We are running a little bit ahead of  
17 schedule. I just want to know is  
18 Judge Judy Sheindlin here yet?

19 Is Mr. DeRosa here?

20 Is Miss Duff here?

21 Yes.

22 MS. DUFF: Good afternoon. My name is  
23 Patricia Duff. I want to thank the commission for  
24 allowing me to appear today and for attempting the  
25 Herculean task of fixing a very broken system.

26 Over the last year, as more scandal and

1           Duff  
2 news of various problems with the court system had  
3 begun to emerge, the integrity of the system has  
4 come into question in the public's mind. Thankfully  
5 this has been acknowledged by the chief justice and  
6 by others in leadership positions, and it is why we  
7 are here today.

8           For some of us, however, it is through the  
9 painful and senseless difficulties of making one's  
10 own way through a marital dissolution in the New  
11 York courts that we have come to discover how ill  
12 the system is, how little justice is dispensed from  
13 our state's courts and worst of all, how these  
14 problems fail our families and our children in  
15 profound ways that have yet to be measured.

16           Unfortunately, I have a fair amount of  
17 personal experience with the New York court system,  
18 having spent nearly five years in litigation, from  
19 April 1996 until the final court order in April,  
20 2001. I have never been involved in a litigation  
21 before or since. What you may have heard or read  
22 about during this process, I don't think that's an  
23 accurate characterization of what this process was  
24 to me. My case had several of the hallmarks of many  
25 of the cases you will hear over the coming  
26 months -- protracted proceedings, guardian and

1           Duff  
2 forensic involvement, a lack of common sense  
3 approach, as it seems to me, no real attempt to help  
4 reduce conflict and help the parties settle, a lack  
5 of sensitivity of concern to DV, domestic violence  
6 issues, and the fundamental lack of due process in  
7 violation of fundamental civil rights.

8           (Applause.)

9           MS. DUFF: I am not going to go into the  
10 details of what I experienced, which was bizarre,  
11 but over the last several years I have come to know  
12 many litigants who have been involved in their own  
13 cases and have had really horrific stories, some of  
14 which you are hearing today, but over the last year  
15 litigants who are often separated by their pain and  
16 grinding aspects of the process have begun to find  
17 each other to a degree I have not seen before. Too  
18 many cannot be here today because they have live  
19 cases that are still ongoing and have been  
20 prohibited from speaking here today, and many are so  
21 fearful of retaliation that they would be reluctant  
22 to come forward.

23           One, whom I will call JT, thought she was  
24 living the American dream. She immigrated to the  
25 United States, became a medical doctor, and  
26 eventually had a baby girl from a relationship that

1           Duff  
2 did not lead to marriage. She was thrilled to be  
3 the child's primary caregiver, although she allowed  
4 the father to see the baby girl whenever the father  
5 wanted. Starting when the child was 14 months old,  
6 through a series of orders and conferences over a  
7 three year period, without a hearing or the  
8 testimony of a single witness, physical custody of  
9 the baby girl was turned over to the father so that  
10 the mother now sees her 4-year-old daughter one  
11 week, then the child goes to the father two weeks,  
12 one week back to the mother, and so on.

13           There was a law guardian and forensic  
14 psychological evaluator, one who has often been  
15 appointed in matrimonial cases. There were reports  
16 that during this process the mother exhibited anger  
17 and the mother's concerns over the child's new  
18 aberrant behavior were used against her as evidence  
19 of her anger.

20           Is it possible that the courts can allow  
21 multiple hearings and conferences on numerous issues  
22 while holding in abeyance the obvious question of  
23 who has primary responsibility for day-to-day care  
24 of the child?

25           Why is it acceptable to courts to have two  
26 parents spending their family assets and income, not

1 Duff

2 to mention the emotional stress, of several years of  
3 litigation when a swift determination of primary  
4 caregiver and custody would settle so many issues  
5 for the child and allow stability and continuity of  
6 care?

7 (Applause.)

8 MS. DUFF: Another mother, who is a  
9 financial services professional, took primary care  
10 of her daughter until the age of 5, when the father  
11 sued for custody. The parents had been split for a  
12 year. There was a guardian and forensics. The law  
13 guardian has been assigned to many cases we know of.  
14 The mother lost custody of the child despite the  
15 fact the child was doing fine in the mother's care.  
16 After winning custody and relegating the mother to  
17 alternate weekend visits, the father then further  
18 curtailed the mother's rights by filing a  
19 restraining order, declaring that the child was  
20 frightened of the mother and finally disallowing  
21 even telephone contact. I happened to see the  
22 mother with the child at a dance recital, which the  
23 mother was allowed to attend. I am no psychologist  
24 or law guardian, whose expertise is in the law,  
25 rather than child rearing or psychology, but this  
26 child exhibited only the wonderful joy of seeing her

1           Duff  
2 mother, and jumped into her arms with a wide smile.

3           (Applause.)

4           MS. DUFF: The mother is now able to see  
5 her daughter only with supervised visitation, a  
6 further action that has drained her emotionally and  
7 financially.

8           Why should this mother, who was doing fine  
9 taking primary care of her child for the first five  
10 years of the child's life, be condemned from the  
11 child's existence and forced to fight battle after  
12 exhausting battle simply to restore a small piece of  
13 the important role a mother ought to be able to  
14 have?

15          (Applause.)

16          MS. DUFF: What was so broken for this  
17 little girl that the court had to set up this  
18 elaborate parenting arrangement to fix it?

19          There are too many stories to go into in  
20 the short time allotted here, including many that  
21 involve men as their parental rights to their  
22 children are eroded out of existence.

23          (Applause.)

24          MS. DUFF: My colleague, Jody Krisiloff,  
25 and many others of us have worked very diligently  
26 over the last months to put together a document

1           Duff  
2       which we will be presenting to you later -- it is  
3       quite comprehensive -- suggestions for matrimonial  
4       reform -- focusing on forensic and guardian reform,  
5       and what we hope will be better due process with  
6       respect to standards for primary care.

7           We urge that custody be determined first  
8       and quickly at the onset of the divorce process and  
9       within 75 days of commencement of the proceedings.

10       (Applause.)

11       MS. DUFF: Custody should, absent  
12       compelling evidence of harm, be based on the  
13       children's lives as they existed before the  
14       hostilities started.

15       (Applause.)

16       MS. DUFF: The child's wishes should be  
17       heard, but they should not be seen through the prism  
18       of the law guardian or forensic.

19       (Applause.)

20       MS. DUFF: The court could hold an  
21       on-the-record examination of each party, within 45  
22       to 75 days after filing a petition for divorce, to  
23       assess which parent is the primary caretaker.  
24       Visitation issues should be worked out in  
25       consideration of the respective involvement of the  
26       parties prior to dissolution and the child's age.

1           Duff

2       Just as the American Law Institute has adopted these  
3       recommendations we hope the courts of New York will,  
4       too.

5           Unless stipulated and agreed to by the  
6       parties, the court should allow each party no more  
7       than one 15 day extension for this hearing, and only  
8       necessitated by court scheduling or medical or other  
9       family emergency. In other words, get the process  
10      moving.

11           (Applause.)

12           MS. DUFF: The court will then issue a  
13      factual finding, including a preliminary statement  
14      of which parent the court finds to be the primary  
15      caregiver, within 30 days after the court conducts  
16      the examination. The children's primary residence  
17      should not be altered pending the court's  
18      determination, but a visitation schedule appropriate  
19      to the needs and age of the children should be  
20      negotiated and discussed and adopted if the parties  
21      no longer share the same residence. Mediation and  
22      settlements may be attempted during this time frame.

23           With greater sensitivity to the role of  
24      the primary caregiver, the rest of the equation  
25      becomes much easier to resolve in many, if not most,  
26      cases. We urge a dialogue to help redefine the

1           Duff  
2   notion of joint custody -- acknowledging that both  
3   parents are important to a child's life, but that  
4   children cannot be divided in Solomonic fashion.

5           (Applause.)

6           MS. DUFF: Particularly where there is  
7   high conflict, children should have the benefit of a  
8   stable and continuous arrangement so that the  
9   primary caregiver prior to the onset of marital  
10   dissolution continues in that role.

11          (Applause.)

12          JUDGE MILLER: Miss Duff, you have one  
13   minute.

14          MS. DUFF: We hope that consideration of  
15   no-fault divorce is not considered without first  
16   working out a better system or determining what  
17   happens to the children.

18          Several days ago a group of us signed a  
19   letter requesting litigant representation on this  
20   panel. We would liken it to the notion of a  
21   consumer advocate. If you were manufacturers of  
22   automobiles, having the consumer involved in the  
23   process would be quite a natural thing. We think it  
24   is high time for litigant representation in your  
25   types of deliberations. We hope you will --

26          (Applause.)

1 Duff

2 MS. DUFF: -- seriously consider this  
3 approach. We have any number of very bright and  
4 thoughtful and deliberate people, and I think it is  
5 time that we help you move forward. Thank you.

6 (Applause.)

7 JUDGE MILLER: We're a little bit ahead.

8 Our next speaker is Judy Sheindlin.

9 MS. SHEINDLIN: Judge Miller, members of  
10 the Commission:

11 First, thank you for indulging this old  
12 retired Family Court judge and giving me a couple of  
13 minutes to air some thoughts that I've been kicking  
14 around for a long time.

15 My first suggestion to you, since I  
16 usually jump right in with both feet, is I think  
17 that we should amend the New York State statute that  
18 refers to marriage licenses in New York State.

19 It's always struck me that people, when  
20 they are getting married, especially people in their  
21 early thirties now, who have some property but not a  
22 lot but have good will, that if we had a marriage  
23 license that would mandate them to list all of their  
24 individual property and property that will never be  
25 deemed marital property at the time of their  
26 marriage, before they have this animus that

1           Sheindlin  
2   unfortunately, surrounds people who are divorcing, I  
3   think it would save judicial time, certainly, it  
4   would give people an opportunity to reflect on what  
5   they actually have at a time when they care about  
6   each other but they are looking at a license that  
7   says New York State requires us, in the interest of  
8   judicial economy, to list your condo, your car, your  
9   bank account, your interest in the family business  
10   and anything else that you believe is yours and will  
11   remain yours.

12           It's a simple thought, and I think that if  
13   adopted throughout, not only in New York State but  
14   throughout the country, would save countless hours  
15   down the road, when 52 percent of the marriages end  
16   acrimoniously, it will eliminated some of the  
17   headache.

18           My second suggestion has to do with law  
19   guardians. I know that this is probably a subject  
20   that's been gone over with you, unfortunately, I  
21   haven't been here.

22           When I was a sitting judge there were good  
23   judges and there were lousy judges and there were  
24   mediocre judges, and I remain somewhat in the system  
25   because I have children in the practice, and for  
26   years after I left the Family Court I was of counsel

1           Sheindlin  
2   to my son's law firm, practicing in California, and  
3   we went over cases practically every day. So it's  
4   not only my own vision of what I saw as I was  
5   sitting in the Family Court and supervising in  
6   Manhattan but what continues to this day. Judges  
7   abdicated their role, their judicial role in making  
8   initial, initial, initial orders, temporary orders,  
9   which very often breathe the life into a case that  
10   goes on until its termination by the simple phrase,  
11   "what is the law guardian's recommendation?" And  
12   the law guardian, many of whom are wonderful and  
13   some are marginal and quite frankly, since you know  
14   I'm an honest girl, can't make a living doing  
15   anything else, they make a recommendation. They  
16   have not spoken to a therapist, they have not spoken  
17   to a teacher, they have not spoken to anybody.  
18   They have a predisposition towards one parent or the  
19   other and the Judge, based upon that recommendation  
20   and nothing else, because they are not conducting an  
21   initial hearing, says all right, I'm going to leave  
22   temporary custody with mother. And the father will  
23   have...what's the law guardian's recommendation?  
24   We'll recommend supervised visitation. Ergo, you  
25   have the start of the case and it's adjourned. A  
26   year later you have a situation where perhaps

1 Sheindlin

2 forensics will say well, the mothers are limited.

3 But the Judge has placed himself or herself in a

4 situation where you have a status quo and the status

5 quo very often remains.

6 The judges in the Family Court are not

7 peer reviewed because most of the people who come to

8 us in the Family Court don't have a lot of money, so

9 they can't appeal. The appellate courts only see

10 those few cases where somebody can scrape up enough

11 money to appeal. Most of them go unseen and so you

12 have a combination of sometimes a mediocre or lousy

13 judge and a mediocre or a lousy law guardian making

14 decisions.

15 So what's the answer? You can't give

16 everybody brains. So what do you do? It would seem

17 to me that minimally, law guards have to have an

18 education, and that's not 24 hours. If you want to

19 be on a law guardian panel you have to have at least

20 60 hours of intensive study, none of which, ladies

21 and gentlemen, should be on tapes. All day, in

22 person, signed in.

23 Second, I would urge that the Domestic

24 Relations Law and the Family Court Act be modified

25 to find that any time a judge asks a law guardian

26 for a recommendation, and it's done thousands of

1           Sheindlin  
2       times every day, the law guardian is mandated to put  
3       on the record the basis of the recommendation. Who  
4       they've spoken to, when they spoke to that person,  
5       even at the initial stage of the proceeding, so that  
6       the Judge knows, well, I'm making a recommendation,  
7       but I'm really just tooting because I didn't speak  
8       to anybody.

9           And the final, my final recommendation,  
10       and this is I know going to be heresy.

11          Just because you like children doesn't  
12       mean you'd be a good Family Court judge any more  
13       than just because you live in a house, it makes you  
14       qualified to be a Housing Court judge. So I  
15       propose that any judge who seeks elected or  
16       appointed position in the state court in New York be  
17       required to pass a substantive test before they are  
18       even considered, considered for the court to which  
19       they aspire. Then you let the process, be it  
20       either elective or appointive, continue. But at  
21       least you would know that somebody who's hitting the  
22       ground walking in a Family Court, where they are  
23       going to be asked to make decisions from the first  
24       day they sit on the bench, they have some clue as to  
25       what they are doing.

26          The people sitting behind me, I recognize

1           Sheindlin  
2       some of the faces as Family Court practitioners, and  
3       I would suggest to you that they have to endure the  
4       frustration of appearing before judges who really  
5       have no right to rule over lives of people,  
6       especially people who don't have the capacities to  
7       appeal some of their lunatic decisions.

8           Thank you.

9           JUDGE MILLER: Our next speaker, if he's  
10       here, is Mr. DeRosa.

11          MR. DeROSA: Judge Judy, if I may, happy  
12       birthday. And in your own words, "Don't pee on my  
13       leg and tell me it's raining."

14          I come before you not as a disgruntled  
15       litigant, but as a fellow citizen and an advocate of  
16       the truth. I am the spokesperson for "The Alliance  
17       for Judicial Justice". A group of over 200  
18       litigants who feel they have been wronged by the  
19       judicial process. While my personal experience is  
20       not from the matrimonial division, 98 percent of the  
21       family members of the group are. While I did not  
22       initially want to testify before this Commission, I  
23       received over 100 phone calls, requesting me and  
24       imploing me to do so.

25          For the past two years I've been  
26       researching and investigating the judiciary, and the

1           DeRosa  
2    legal community, which has been widely reported on  
3    in all the major New York newspapers. My findings  
4    and the supporting evidence have been forwarded to  
5    the proper law enforcement authorities.

6           While the vast majority of my work has not  
7    yet been released to the public due to the ongoing  
8    investigations by these law enforcement authorities,  
9    I have made public a very small portion of my  
10   findings. Very recently I released a report on a  
11   Paul Siminovsky/Judge Garson case which clearly  
12   illustrated over 30 instances of irregularities that  
13   support apparent mail and/or wire fraud, including  
14   phantom and over-billing in the thousands of  
15   dollars. As we know, Mr. Siminovsky in the past  
16   has acted as a court-appointed fiduciary. Due to  
17   this one case being active and this one report being  
18   admitted into evidence in that litigation, copies of  
19   the report have been supplied to the Commission.

20           The background of this one case is  
21   included in my report. In 1996 this litigation was  
22   before Judge Virginia Yancey. The custody and  
23   visitation issues were settled and there was a short  
24   trial dealing solely with the financial issues.  
25   The litigation was finally decided strongly in favor  
26   of Gennady Gorelik. Gennady Gorelik's is the person

1 DeRosa  
2 referenced in the New York Times article on Tuesday.

3 The case was then assigned to Judge Gerald  
4 Garson. Judge Garson is currently under indictment  
5 in Brooklyn for bribery pertaining to his specific  
6 dealings with Paul Siminovsky. In May of 2002  
7 Gennady Gorelik's ex-wife fired her attorney, Mr.  
8 Ralph Gansell, and all of a sudden hired Mr. Paul  
9 Siminovsky as her new attorney. In June of 2002  
10 the court-appointed forensic evaluator, Dr. Marie  
11 Pastore Weinstein, who told Gennady Gorelik she was  
12 almost done with her evaluation and that she was  
13 going to recommend that the custody of the children  
14 be awarded to him. On July 15th, 2002 she wrote a  
15 letter, stating she was in the process of completing  
16 her assessment but she was going on vacation and the  
17 process would not be done until her return from her  
18 summer vacation which was to be after Labor Day  
19 2002.

20 Upon her return from vacation she then  
21 proceeded to restart her evaluation and bill for  
22 approximately 150 additional hours at \$150.00 an  
23 hour. In a letter dated October 19, 2002, and  
24 after several conversations with newly retained  
25 counsel, Paul Siminovsky, all of a sudden Dr.  
26 Weinstein states, "it has become apparent that given

1           DeRosa  
2     the complexity of the case, additional events, and  
3     the needs of the children, many more hours have been  
4     expended than originally anticipated.

5           With the appearance of Paul Siminovsky now  
6     representing Gennady Gorelik's ex-wife, and the  
7     litigation now being in front of Judge Gerald  
8     Garson, the tide seemed to conveniently turn against  
9     Gennady Gorelik.

10          My report on this divorce proceeding has  
11     apparently found Paul Siminovsky phantom billing for  
12     meetings and phone conferences which never took  
13     place, all the supporting material is in as  
14     exhibits, such as errors in crediting the proper  
15     amount from the retainer account, errors in basic  
16     addition, and also magically entering a time  
17     machine, by going back in time and billing for  
18     additional services. Case in point, his May and  
19     April statements from 2003 show the following:

20          The April statement reflects services on  
21     3/19/2003 for 20 minutes. However, the May 6, 2003  
22     statement now reflects and additional log entry for  
23     that date of 3/19/03 of e-mail for 10 minutes.

24          In the next statement, the April 29, 2003  
25     statement reflects services on 3/24/2003 for 20  
26     minutes. However, you go to the May 6th statement,

1           DeRosa  
2   he adds another 40 minutes. You combine this with  
3   a videotape of Gerald Garson telling Paul Siminovsky  
4   to bill his client, to get the money, pretty  
5   damaging. Pretty damaging.

6           Now, you say to yourself, what are these  
7   litigants supposed to do? Let's say they find this  
8   on their own and they don't have an Anthony DeRosa.  
9   Are you going to raise the question to the law  
10   guardian? Judge Judy's words: "Don't pee on my  
11   leg and tell me it's raining."

12           What I do is research and due diligence.  
13   I dot the Is and cross the ts. Everything I say is  
14   substantiated and supported by documentary proof.

15           Such conduct by anyone, especially from  
16   the legal community, is appalling and reprehensible.  
17   My conclusion in essence stated the following:

18           Although possible clerical errors, the  
19   sheer and overwhelming improprieties and  
20   irregularities, and the outright over and phantom  
21   billings would indicate otherwise. With  
22   twenty-three separate occasions of phantom billings,  
23   numerous errors in the accounting reconciliation,  
24   and lastly all of the accounting improprieties, it  
25   would be very difficult to explain the apparent  
26   over-billing, reflecting 30 separate and

1 DeRosa

2 distinctive, highly suspect procedures on the part  
3 of Paul Siminovsky in this one case alone.

4 The improprieties always favor Mr. Paul  
5 Siminovsky and he has personally signed-off on each  
6 billing statement. The analysis and documentary  
7 evidence strongly supports either mail and/or wire  
8 fraud, depending on the delivery method of the Paul  
9 Siminovsky bills.

10 As my report also states, I am currently  
11 working on a much broader investigation consisting  
12 of dozens of both Manhattan and Brooklyn  
13 court-appointed law guardians, guardian ad litem,  
14 attorneys, accountants, psychologists, psychiatrists  
15 and other fiduciaries. This larger analysis and  
16 report's initial findings show similar improprieties  
17 in dozens of cases in both Brooklyn and Manhattan.

18 I will share with you a very limited  
19 amount of the initial findings. One  
20 court-appointed guardian ignores a court order  
21 stating their predetermined hourly rate. On one  
22 day she wakes up in the morning and she bills \$200  
23 an hour. In the afternoon she bills \$250 an hour.  
24 The Court order specifically states the rate is not  
25 to exceed \$200 an hour. This one court-appointed  
26 fiduciary, I understand, is going to be presenting

1 DeRosa

2 today.

3 Another court-appointed fiduciary seems to  
4 think it's okay to bill for 30 hours of work in one  
5 day. Why? Because they don't think that some  
6 little Italian is going to go out and get everyone's  
7 bills and find out what's going on.

8 Another one chooses to be in two meetings  
9 at the same time.

10 There are plenty more improprieties going  
11 on, however, I'm going to reserve those facts until  
12 the law enforcement authorities do indeed take  
13 proper procedures and conduct and do what they have  
14 to do. Judges know better. A sitting Supreme  
15 Court jurist has a personal civil litigation  
16 successfully ruled in their favor. She returns to  
17 her courtroom months later and she appointments this  
18 attorney who represented her personally in a civil  
19 case as a court-appointed fiduciary. The  
20 appearance of impropriety? I think we go a bit  
21 beyond that.

22 When this one individual, the report that  
23 I handed out today, they wanted to pooh-pooh him,  
24 they wanted to try to discredited the findings.  
25 You can't. It's been verified, reverified, it's  
26 been in the law enforcement community for the past

1 DeRosa

2 few months. He had the courage to come and speak  
3 with me. I have dozens of these reports.

4 Kindly understand, I do not simply open  
5 the floodgates and investigate any case. I must  
6 truly believe in their cause and that they are  
7 indeed sincere. I conduct my own due diligence on  
8 the parties and the parties and must believe that  
9 they were wronged. It is also imperative for you  
10 to understand that I do not receive any compensation  
11 for what I do, except for the satisfaction of  
12 validating my fellow citizen. Life's rewards are  
13 not always monetary.

14 Patricia Duff, who from what I understand  
15 will be presenting immediately after me, is a case  
16 in point. My investigation into her litigation had  
17 generated a 100 page report, of which was presented  
18 to the proper law enforcement authorities. These  
19 findings are not yet entirely public. Some of  
20 those findings were indeed published in a New York  
21 Post story, however, all of my work on her case is  
22 not public.

23 I'm incredibly diligent, methodical and  
24 patient in disseminating my research and due  
25 diligence.

26 If this Commission serves the public, it's

1           DeRosa  
2   now our citizenry who becomes the judges over this  
3   panel's results.

4           If I may make an analogy, most of us are  
5   aware of the Tylenol scare many years ago. They  
6   had tow options. They could have rejected,  
7   repudiated and denied any responsibility for the  
8   safety concerns over its packaging of this pain  
9   reliever, or they could have admitted to the  
10   problem, informed the public and taken steps to fix  
11   the situation. Tylenol's success was contributed  
12   to by the fact that they admitted to the problem,  
13   and took responsibility for its past inaction. The  
14   public embraced their truthfulness and rewarded them  
15   with customer loyalty.

16          Ladies and gentlemen, this panel has two  
17   options. It could ignore the ground swell and  
18   intellectually insult these families by denying and  
19   ignoring the problem and pooh-poohing their  
20   outcries. Or, you could inform the public and take  
21   steps to fix the situation. We await your response.

22          No right-thinking person could reasonably  
23   conclude other than that the large portion of our  
24   citizenry have been misused by the court-appointed  
25   fiduciaries, and have been let down by the  
26   judiciary. And with respect to the latter, whether

1 DeRosa

2 one reaches that conclusion by way of centuries old  
3 law, codes of ethics and responsibility, or rather  
4 simply by notions of essential decency, fairness and  
5 justice, is utterly immaterial.

6 Indeed, what more elemental precept of  
7 humanity and civilization is there than the  
8 requirement that when one of our citizens enters the  
9 portals of our courts, he must, as he rightfully  
10 expects, and as the courts should necessarily  
11 insure, be playing on a genuinely level playing  
12 field, where every litigant is entitled to be dealt  
13 with fairly, without bias or predisposition. That  
14 means that if a litigant cannot expect this, then  
15 the very fact that every litigant is effectively  
16 being denied of the comfort and guaranty of  
17 impartiality, then the entire notion of justice has  
18 deteriorated into an abysmal farce.

19 Distilled down to the basics, isn't it our  
20 constitutional right to be treated as equals and in  
21 fairness under the law, a precept that separates the  
22 lions, the tigers, the sharks and the crocodiles?

23 What we have is not your garden variety  
24 reversible error by a trial court, but rather a  
25 total breakdown in the system, which is  
26 exponentially more egregious and destructive than

1           DeRosa  
2   the former. We could believe that this is all  
3   inadvertent if there were nothing else, but the vast  
4   numbers of litigants and their families who have  
5   been complaining of gross injustice feels  
6   differently.

7           In the recent years, we have witnessed  
8   several Supreme Court judges and court-appointed  
9   fiduciaries being indicted and convicted for bribery  
10   and corruption, confirming everyone's worst fears of  
11   injustice. Their conduct as defilers of the public  
12   trust is both offensively repugnant and morally  
13   bankrupt.

14           It is truly a shame that good and  
15   honorable lawyers and judges wind up paying the  
16   price in public confidence and credibility, at the  
17   expense of these few unethical and/or outright  
18   corrupt individuals.

19           JUDGE MILLER: You have less than a  
20   minute, sir.

21           MR. DeROSA: The Commission needs to be  
22   focusing its efforts on ridding the courts of these  
23   bad judges, and place strong oversight and  
24   accountability rules and procedures. This would  
25   certainly begin to restore the eroding public  
26   confidence and credibility back into the judicial

1 DeRosa

2 process.

3 In closing I have to say one thing.

4 These mothers, fathers and children have  
5 indeed been let down buy the judiciary. These are  
6 indeed cases of David, the mothers, fathers and  
7 children, and Goliath, the judiciary,  
8 court-appointed fiduciaries and the entire legal  
9 profession. With no apologies for the melodrama of  
10 it at all.

11 Even more loathsome and frightening as the  
12 ultimate hobgoblin suddenly sprung to life in  
13 Frankenstein fashion, with Kafa-esque events, is the  
14 unavoidable realization that the court-appointed  
15 fiduciaries get these families when they are coming,  
16 and the courts let them down when they are going.

17 In closing it is appropriate to quote from  
18 the 155 year old words of Judge Hurlbert of the  
19 Court of Appeals, for they are awe inspiring,  
20 passionately convincing, and sublimely eloquent.

21 "It is design of the law to maintain the  
22 purity and impartiality of the courts and to ensure  
23 for their decisions the respect and confidence of  
24 the community. Their judgments become precedents  
25 Which control the determination of subsequent cases;  
26 and it is important, in that respect, that their

1           DeRosa  
2        decisions be free from all bias. After securing  
3        wisdom and impartiality in their judgments, it is of  
4        great importance that the courts should be free from  
5        reapproach or the suspicion of unfairness. The  
6        party may be interested only that his particular  
7        suit should be justly determined, but the state and  
8        the community is concerned not only for that, but  
9        that the judiciary shall enjoy an elevated rank in  
10       the estimation of mankind." Oakley v. Aspinwall.

11           I thank you the Commission for allowing me  
12        to present, and I sincerely hope that prudence and  
13        sincerity, rather than denial and malice guide you  
14        in the challenge presented before you to reform the  
15        Matrimonial Courts. These families, the children  
16        and our entire citizenry are depending on you not to  
17        disappoint them.

18           JUDGE MILLER: Thank you.

19           I wanted you to make sure that this  
20        committee recognizes that there are problems in the  
21        system and that that is why we are working hard to  
22        correct them. I know you didn't hear that in the  
23        beginning, Mr. DeRosa.

24           JUDGE MILLER: Are any of our afternoon  
25        people here, like Mr. Weiner? Dr. Weintrob? Mr.  
26        Berko?

1 Preliminary Remarks

2 I think what we will do is then break. We  
3 will break for lunch and we will see you back here  
4 at 2:00. Thank you very much.

5 (LUNCHEON RECESS)

6 AFTERNOON SESSION

7 JUDGE MILLER: Good afternoon, everyone.

8 Will everyone please be seated so that we  
9 can begin?

10 First off, those of you who are with us  
11 this morning, I apologize for the third time I am  
12 going to give my welcoming remarks. I assure you  
13 they only take about a minute and a half, but I  
14 would like to take this opportunity to welcome you  
15 all here -- our speakers, attendees, press and  
16 others -- to the first public hearing conducted by  
17 the matrimonial commission. Our first public  
18 hearing. This is the tenth anniversary of our  
19 predecessor commission to examine these issues and  
20 we recognize the important strides made by that  
21 commission's work. Judge Kaye has recognized that,  
22 and she is a truly tireless crusader on behalf of  
23 the families and children of this state. From the  
24 very beginning of her role as a judge she  
25 acknowledges that there is much more that we can and  
26 must do to further improve the practice of

## 1 Preliminary Remarks

2 matrimonial and family law in New York State, and  
3 she has charged this Commission, this 32-member  
4 state-wide panel with a very broad mandate. She has  
5 urged that we look at the problem from a global  
6 point of view. Look at how matrimonial law is  
7 practiced in New York, look to all stakeholders  
8 inside and outside of the system for input and  
9 guidance, that we should think outside the box,  
10 think globally and innovatively, to address and  
11 resolve three main issues that we have before us;  
12 reducing and eliminating trauma to parties and  
13 children. That's the first priority. Avoiding  
14 unreasonable expense to the parties, reducing and  
15 eliminating delays.

16 This Commission recognizes the urgency of  
17 this problem and the importance of our mission and  
18 considers its mandate a daunting challenge and a  
19 great opportunity. We intend and expect to  
20 recommend significant reforms, and we assure you  
21 that our chief judge has pledged to do all that she  
22 can possibly do to effectuate reasonable  
23 recommendations that will serve to improve the lives  
24 of those who appear before our family and  
25 matrimonial court.

26 First of all, I am going to ask all of

## 1 Preliminary Remarks

2 you, as you have heard me ask it before, to turn off  
3 your cell phones. To those of you who have been  
4 assigned a time to speak, be sure you are signed in  
5 at the desk outside. We have limited, as a courtesy  
6 to other individuals, your opportunity to speak to  
7 ten minutes. Anyone who has written material to  
8 submit for the commission's consideration should  
9 leave at least two copies with the commission staff  
10 at this desk outside. No material will be handed up  
11 to the commission during the hearing. Note that the  
12 commission members may at times interrupt you -- so  
13 far it hasn't happened, but I think it will -- to  
14 ask a question or seek clarification of a point. We  
15 will strive to keep this to a minimum because we are  
16 really most interested in hearing from you about  
17 your experiences and your recommendations for  
18 improving the system.

19 Notices of future hearings and  
20 registration forms are available outside at the  
21 desk. Due to the overwhelming response to today's  
22 hearing, the commission expects to hold a second  
23 hearing here in New York City in the spring of 2005.  
24 That date will be announced. Anyone who requested  
25 to speak today but was not scheduled will be  
26 considered as having registered for that second New

1 Preliminary Remarks

2 York City hearing and we will notify you of the  
3 date.

4 As stated on the notice of public  
5 hearings, the commission cannot take testimony from  
6 any individual who has a case currently pending in  
7 the New York State courts. This is necessary to  
8 protect the integrity of your pending case and the  
9 work of this Commission. However, such individuals  
10 are welcome to submit their comments and suggestions  
11 in writing to the commission at anytime. Any  
12 identifying details contained therein will be  
13 redacted by commission staff, but the substance of  
14 the submission will remain intact.

15 Now, we are ready to proceed with our  
16 afternoon session and we are going to begin with  
17 Mr. Elliot Wiener and Mr. Paul Hymowitz.

18 MR. WIENER: Good afternoon. My name is  
19 Elliot Wiener. I want to thank you first for giving  
20 us the opportunity to speak to you today. I am here  
21 as the Co-Chair of the judicial disciplinary forum  
22 on mental health and family law, which is a group of  
23 lawyers, psychiatrists, psychologists and judges who  
24 have monthly meetings to discuss issues involving  
25 the interplay between law and mental health issues.  
26 The organization was founded about 15 years ago by

1           Wiener  
2     the New York Chapter of the American Academy of  
3     Matrimonial Lawyers, and we have monthly meetings,  
4     we have annual meetings. We discuss a broad range  
5     of subjects involving this interplay.

6           Our annual meetings, which are opened to  
7     the public, have invited a number of their prominent  
8     people, many in the mental health profession, one  
9     kind or other, but also attorneys to speak to us and  
10    to the public at the open meetings about subjects  
11    that are of interest. A number of members of this  
12    Commission I know are of either forums, of the forum  
13    or participants in the forum, or have spoken on the  
14    forum. Some of you are quite familiar with our  
15    work.

16          Certainly, one of the questions that we  
17    are most interested in this forum is the role of  
18    mental health professionals in the custody process  
19    and, obviously, we are well aware there have been a  
20    number of articles about the subject recently which  
21    have prompted an awful lot of interest and  
22    discussion.

23          One of the things that I think we want --  
24    the point that we want to make is, certainly there  
25    is no question that the mental health professionals  
26    have played, and will surely continue to play, the

1           Wiener  
2   important role in the process of resolving custody  
3   cases. The legal standard in this state requires  
4   it. It is required in almost all seriously  
5   contested cases that the mental health professional  
6   is appointed. I don't think there's any question  
7   that is going to happen.

8           In addition, the law in the state requires  
9   that courts investigate fully all of the facts and  
10   seek advice outside of the parties, if need be, in  
11   order to resolve custody cases. The combination of  
12   those things suggest, too, is that mental health  
13   professionals surely have a role in this system,  
14   although I would say that that is not necessarily  
15   the only model for resolving custody cases. We have  
16   a very particular model in New York which is  
17   generally now used, neutral appointments to do the  
18   mental health evaluations. One of the things that  
19   we learned in our forum, by inviting other people  
20   from other states, that is not the only way to do  
21   it. In New Jersey, apparently, we were told there  
22   are no neutral appointments. There are partisan  
23   experts for each side, sometimes even somebody from  
24   the law guardian, and there is the traditionally  
25   allocation of experts on both sides, and the court  
26   then has to resolve those disputes. That is a very

1           Wiener  
2     different model than our model which imposes  
3     enormous amounts of authority and power in the  
4     neutral evaluators.

5           I would suggest to you there are other  
6     alternative methods, which is to dispense  
7     presumptively the use of the mental health experts  
8     entirely, that the law institute restatement of the  
9     law in which the mechanism for allocating power,  
10    that is to say, time and decision-making custody  
11    cases, is based on the historical allocation of the  
12    family so that presumptively what went on in the  
13    past is what will be imposed by the court going  
14    forward and therefore the court is not involved in  
15    the question of trying to figure out what's in the  
16    child's best interests.

17          I would suggest that the LIA report is  
18    certainly worth reading, both for its model and  
19    criticism of critical analysis, really, of the model  
20    of mental health evaluations in these cases. I  
21    think that presents us with two main models; one of  
22    which really has two subsets to it, and I think that  
23    it would be important and useful for you to consider  
24    whether our neutral system is the best way to go.

25          There has certainly been questions about  
26    whether neutrality can really exist in these cases

1           Wiener

2   at all. I think maybe a good place to start would  
3   be the Rosenblitt case which is, as I am sure you  
4   all know, probably the seminal case on the question  
5   of second opinions in these situations, and the  
6   concurrent point in the Rosenblitt case really  
7   changes the notion of neutrality in these cases and  
8   suggests there are reasons not to use neutral people  
9   and points out that there are a number of instances  
10   in New York Law where the law calls upon mental  
11   health experts and does not rely on a neutral person  
12   but rather asks for at least two opinions. So  
13   there's a lot of material out there which would  
14   suggest that the notion of neutrality needs to be  
15   thought through.

16           There are, I think, also some systemic  
17   reasons or systemic challenges to the ability to  
18   challenge a male health report. If you are the  
19   losers, so to speak, in a male health evaluation --  
20   I am sure all of us have been through the situation  
21   where we quickly jump to the bottom line to the last  
22   page to see who won because that's really the first  
23   thing that we need to know. There's systemic  
24   problems with challenges to those reports. Let me  
25   just tell you about three of them briefly. One of  
26   them is that the law in this state does not require

1           Wiener

2     the attorneys for the parties -- I am not talking  
3     about the parties -- but does not require the court  
4     to give a copy of the report to the attorneys for  
5     the parties. The law says that it is sufficient for  
6     counsel to have access to the report.

7           Now, I know that in practice that's  
8     generally not true, but I also know that only a few  
9     years ago I sat outside a judge's chambers in a  
10    local court here in the metropolitan area reading a  
11    report, not being permitted to have a copy of it.  
12    It was a 30-page report single spaced and I had to  
13    sit. Now, that's silly. That's not the practice,  
14    but you might want to address that and make it clear  
15    that at least counsel is entitled to the report. I  
16    think we are all aware what problems might exist if  
17    those reports were disseminated too far.

18           Second. Currently in this state if you  
19    are the loser and you want to bring the expert into  
20    court -- to cross-examine the expert you must pay,  
21    and what I mean by that is you must pay for the  
22    expert to come into court. You may pay in other  
23    ways as well, but --

24           (Laughter.)

25           MR. WEINER: -- that rule is true  
26    regardless of the finances in the case, at least in

1           Wiener  
2 theory, and regardless of the reasoning process that  
3 resulted in that result. That recommendation, in  
4 order words, the focus is on the bottom line  
5 recommendation. If the bottom line recommendation  
6 is against you, you pay, and I think it is troubling  
7 to think that the court is not just allocating this  
8 expense on the basis of recommendations, because  
9 that really doesn't have anything to do with  
10 finances, but also because it is so centrally  
11 focused on results and not reasoning, and that's  
12 troubling because the suggestion is really that all  
13 that matters is what was the outcome and you  
14 understand that.

15           The last theory I want to identify for you  
16 is the availability of the forensic expert's raw  
17 data and notes. If one gets a copy of a report and  
18 hires somebody to review it to give you some advice  
19 on how to cross-examine and maybe even testify, it  
20 is clearly important that they also have the raw  
21 data. Many of these reports have psychological  
22 testing without psychological test data. There's  
23 nothing you can do. I recently had an experience  
24 myself where the psychological test data was very,  
25 very inconsistent with what was in the report, and  
26 if I didn't have the data I wouldn't have been able

1           Wiener

2       to point that out to the court in cross-examination.  
3       The notes are also critically important because  
4       these reports are based on information and data and  
5       the notes are really the primary data. The  
6       recitation in the report of the information that was  
7       garnered during the interview is really secondary  
8       data, and without that primary data it is very  
9       difficult to challenge a report.

10           I have to tell you I had another  
11       experience where there was a tremendous  
12       disconnection between the recommendations made and  
13       the notes that were gathered by the psychiatrist.  
14       In this case the court ultimately was convinced to  
15       reject the report entirely and go their own way  
16       because the psychiatric opinion made no sense.

17           The final point I want to make is that  
18       these cases -- the custody aspects of those cases  
19       are very difficult. They are very sophisticated.  
20       It is have important that both lawyers, judges, all  
21       three, and mental health experts, receive as much  
22       training as possible; the mental health experts, so  
23       they understand what we, as lawyers, need from them,  
24       and the lawyers and judges, so we become critical  
25       readers of these reports.

26           I want to thank you for your time.

1 Hymowitz

2 (Applause.)

3 MR. HYMOWITZ: As Co-Chair of the forum  
4 and a mental health professional who performs  
5 custody evaluations --

6 JUDGE MILLER: Mr. Hymowitz. By the way,  
7 we didn't announce you.

8 MR. HYMOWITZ: Right.

9 -- performs custody evaluations in  
10 Supreme and Family Courts, I wanted to speak briefly  
11 in support of forensics, with a particular emphasis  
12 on their scientific status, which has been a key  
13 area where they have been challenged of late. I  
14 feel there needs to be a clear distinction made  
15 between the methodology that we offer as experts in  
16 contrast to the call for findings based on research  
17 evidence. And though we all see the need for such  
18 broader studies, particularly outcome research, the  
19 essence of the forensic craft, and it is craft as  
20 well as science, is in the systematic collection of  
21 observations and data with its reliance on multiple  
22 method sources of such data, history, behavioral  
23 observations, psyche testing and so on, leading to  
24 converging evidence. The reliance on this  
25 systematic collation of data is our best check  
26 against our own biases.

1 Hymowitz

2 It is thus the personalized study of a  
3 given family that provides the empirical basis for  
4 our findings, not the more generalized research data  
5 that may inform us in a more general and ultimately  
6 rather abstract way. Thus it is the melding of the  
7 particular family situation with general guidelines  
8 wherein the science and indeed the art of the  
9 evaluation coincide. For example, there is some  
10 converging research evidence that children benefit  
11 from having a relationship with both their parents  
12 on a frequent and continuing basis, in contrast to  
13 the earlier assumption, most notably in the  
14 Goldstein, Freud and Solnit works, that the  
15 protection of the primary parent-child bond was  
16 central. Such an assumption also presumably guided  
17 the Burgess decision in favor of more permissive  
18 relocation policy in California. The current  
19 overriding belief that fostering the child's  
20 relationship with both parents should be paramount,  
21 it is an example of a still tentative but  
22 nevertheless compelling research finding that  
23 appropriately informs our forensic work as well as  
24 our public policy. It does so in providing a  
25 general guideline, which however still must be  
26 subordinated to a situation in a given family, and

1 Hymowitz

2 this is where the expert will continue to be needed,

3 I would argue.

4 As the questions facing the court become

5 even more specific, research data is often even less

6 applicable. For example, our forum has studied the

7 recent controversy about overnight visitation in

8 very young children in considerable detail. We

9 spent quite a bit of time on this, and despite the

10 extensive back and forth commentary between experts

11 who found overnights to be detrimental for the

12 infant in a high conflict family and other scholars

13 who have found the opposite, the controversy remains

14 and the expert is still left needing to evaluate a

15 particular child in a particular family.

16 Our forensic results certainly ought to be

17 opened to the adversarial process with allowance

18 made for obtaining and inspecting all the raw data,

19 using other experts if so indicated. However, the

20 benefit safeguard against the over-zealous,

21 value-laden or just inaccurate report is for legal

22 professionals to be as informed as possible about

23 the parameters and appropriate scope of the forensic

24 report.

25 Finally, just a few words about our

26 organizational concerns, that efforts at reform long

1           Hymowitz  
2    overdue not sweep away the positive collaborative  
3    work that does go on between mental health and legal  
4    professionals when it comes to protecting children.  
5    For one thing, the fate of divorcing families in  
6    New York has not been entirely static, and  
7    innovative approaches such as collaborative law,  
8    custodial arrangements involving spheres of  
9    decision-making and time-sharing schedules, as well  
10   as post-custody designation of mental health  
11   professionals as parent-coordinators, are now being  
12   utilized. Calls for greater regulation and standard  
13   for law guardians and forensics have also been  
14   positive initiatives. As for custody evaluations  
15   themselves, the lively debate about their efficacy,  
16   sparked in part by the series of articles by Tim  
17   Tippins, but perhaps also by the LIA report, have  
18   accelerated calls for future reforms. But despite  
19   the need for increased oversight and parameters  
20   concerning the forensic expert, some of which could  
21   even be borrowed from some of the things that are  
22   done in Family Court, we at the forum continue to  
23   advocate for the indispensability of the child  
24   custody evaluation, when judiciously used and  
25   critically reviewed.  
26           Thank you very much.

1           Weintrob

2           (Applause.)

3           JUDGE MILLER: We will now hear from

4   Dr. Alex Weintrob.

5           MR. WEINTROB: Good afternoon. Thank you

6   for allowing me the opportunity to speak to you.

7           I'm a child adolescent psychiatrist who

8   has practiced for almost 40 years, and I have

9   intermittently been appointed by the court as a

10   neutral evaluator. My experience also comes from

11   being a part of the forum that was just mentioned as

12   well as a national colloquium of judges and

13   matrimonial attorneys and child psychiatrists that

14   have addressed these issues for a number of years

15   and actually, at the court we say to put together a

16   book that was a compilation of some of our thoughts

17   which we are rewriting.

18           I will comment upon a number of issues and

19   offer some bold recommendations. Those include,

20   number one, that as a child psychiatrist and child

21   advocate, my primary concern, as is yours, is

22   related to the trauma to children, as well as to

23   their families, of custody, visitation and

24   relocation disputes. There is no question that

25   these disputes often -- more or less -- are

26   accurately described as battles -- leave many

1           Weintrob

2   children with varying degrees of wounds and scars.

3   Both social science research and the clinical

4   experience of child mental health professionals

5   demonstrate the extremely adverse effects upon

6   children of protracted high-conflict divorce and

7   custody disputes. Thus, it is essential that the

8   courts, together with attorneys and mental health

9   professionals, work toward a system that will,

10   number one, minimize the number of cases that have

11   gone in litigation, and, number two, find

12   alternative ways of dealing with those that do end

13   up in litigation.

14           In this regard, attempts must be made to

15   educate parents about the emotional and financial

16   price that children and their parents pay when they

17   embark upon the ship of litigation. I believe that

18   the P.E.A.C.E. program should be supported and

19   expanded into all the court systems. I believe we

20   must offer families alternatives to contested

21   divorces. I believe that the commission should

22   examine the collaborative divorce process,

23   alternative dispute resolution, and even mandated

24   mediation.

25           In brief, any process that will lead to a

26   greater likelihood that parents will work out their

1           Weintrob  
2 differences without resort to litigation should be  
3 very seriously considered.

4           While there are some who have said, Well,  
5 we should wait and see how these things turn out, we  
6 shouldn't push that much; I don't believe that we  
7 can quit. I think we know that the system, despite  
8 its great benefits, also has flaws and we should  
9 look for other ways.

10          In regard to the issue of delay; while I  
11 applaud the dramatic reduction in the time taken for  
12 resolution of contested divorces -- according to  
13 Justice Lippman from over two years to less than one  
14 year -- one year in the child's life could feel like  
15 forever, particularly when that child is being  
16 exposed to increasing levels of animosity between  
17 the parents.

18          In regard to the appointment of forensic  
19 experts, I believe it might be helpful if judges in  
20 their orders were a little bit more specific or  
21 specific as possible about the issues they wish the  
22 evaluator to address. On the other side, I believe  
23 that mental health professionals need to better  
24 inform the courts what you can reasonably expect of  
25 us. For example, we should inform the court what  
26 issues we can address with a high level of

1           Weintrob  
2    reliability, what we can offer with a lower level of  
3    reliability, and what has little or no validity.

4           JUDGE MILLER: Can I interrupt you for a  
5    minute, Doctor?

6           Mr. Weiner raised the question, is there  
7    such a thing as a neutral evaluator. Can you tell  
8    us?

9           MR. WEINTROB: Well, one commentator has  
10   said there's myth of impartiality. I don't think it  
11   is black or white. I think there are relative  
12   degrees. I mean, when I am asked, I say, Well, you  
13   know, I have definite bias. I have a bias toward  
14   minimal trauma to children. I have a bias toward  
15   children having two parents as much as possible.  
16   Does that make me a father's person or mother's  
17   person? I could call both. I do think that there  
18   is some level of neutrality, but we all have to  
19   hopefully, as mental health professionals, examine  
20   our bias, look at our cases. We have lousy outcome  
21   cases. We have no good outcome cases. But maybe we  
22   have to look at ourselves. How often have we made a  
23   recommendation this way or that? I don't think it  
24   is a satisfactory answer to your question, but I  
25   think it is relative and there is some degree of  
26   neutrality.

1           Weintrob

2           JUDGE MILLER: Thank you.

3           MR. WEINTROB: The question of whether a  
4 forensic expert should offer recommendations  
5 regarding the ultimate issue of custody, that has  
6 recently re-emerged with one matrimonial attorney  
7 suggesting since there's no science at what we do we  
8 certainly should not offer an ultimate opinion and  
9 ultimate issue. I believe that this issue is not so  
10 simple and that the commission should examine the  
11 pros and cons of the expert addressing the ultimate  
12 issue.

13           Additionally, I am hopeful that the  
14 commission will address the issue of disclosure on  
15 the part of forensic examiners and offer us some  
16 guidelines. In my opinion, while it is appropriate  
17 and even necessary for experts to lean toward the  
18 side of disclosure -- disclosing more rather than  
19 less -- I believe some limits can and should be  
20 established. It appears there are increasing  
21 numbers of allegations of non-disclosure, also known  
22 as bias, toward one party or against another party.  
23 Some of these seem to be somewhat more relevant,  
24 some less relevant, and I have to remind people that  
25 often disclosure has not been made not because we  
26 are trying to withhold something, but because we

1           Weintrob

2 haven't thought of it as relevant. We haven't even  
3 thought of it.

4           In regard to the issue of qualifications  
5 of forensic experts, I am hopeful the experts will  
6 examine the California model of training and  
7 credentialing. While I am not recommending  
8 embracing this model, I believe it is important to  
9 at least consider qualifications. In my opinion, an  
10 expert should have training -- and by the way, this  
11 addresses your comment -- the more training we have  
12 doesn't remove bias, but the more we know -- for  
13 example, what Dr. Hymowitz said, there's literature  
14 supporting infant visitation and literature against  
15 infant visitation. We need to know both. That's  
16 how we minimize our bias.

17           I believe experts should have familiarity  
18 with issues of divorce, the more important social  
19 science literature regarding custody, visitation and  
20 relocation issues, the use and misuse of  
21 psychological testing, recognition of the  
22 possibility of bias, and how to -- more importantly,  
23 how not to interview children.

24           I would like to comment briefly upon the  
25 apparent movement to challenge the conclusions of  
26 forensic experts as lacking in any, quote,

1           Weintrob  
2       scientific basis. First, I welcome the challenge.  
3       I was appreciative of Tim Tippins' articles because  
4       hopefully they will lead to forensic evaluators  
5       examining the basis of their methodology and the  
6       reliability or validity of our conclusions, or the  
7       lack thereof. In view of the likelihood that  
8       sometime in the future our evaluations may be  
9       subjected to a Frye or Daubert standard, it is  
10      essential that we inject a greater degree of  
11      scientific method into our court-ordered mental  
12      health evaluations. I am appreciative none of you  
13      has asked me how.

14           (Laughter.)

15           JUDGE MILLER: That was the next question.

16           MR. WEINTROB: Related to psychological  
17      testing, I hope the commission will address the  
18      entire issue of the use and misuse of such testing  
19      in forensic evaluations. It is essential the judges  
20      become aware of the significant limitations of such  
21      testing as well as the benefits it can offer.

22           There's a recent book review in the  
23      New York Times which the author was a psychologist,  
24      I believe, suggesting that it was close to  
25      malpractice to use psychological testing in custody  
26      disputes. I won't agree with that position.

1           Weintrob

2           Two last things. I have considerable  
3 concern, as do you, in regard to the fact that the  
4 cost of the forensic evaluation is prohibitive to  
5 most people, with the result that those without  
6 funds are thus deprived of such evaluations when  
7 they are indicated. This may lead some couples to  
8 accept arrangements that aren't in their children's  
9 interest. Expansion of a program that is in New  
10 York County -- I forget the name of the woman who  
11 runs it, I am sorry -- in which matrimonial  
12 attorneys offer pro bono to couples who are involved  
13 in getting divorced with children -- I think the  
14 mental health professional can add a leg to that  
15 program offering their own pro bono services to  
16 people who might otherwise not be able to use them.  
17 It is brief. It doesn't take time.

18           Lastly, I am hopeful the commission will  
19 examine the media attention given to custody  
20 disputes, particularly high-profile and celebrity  
21 cases. Such attention is rarely in the interest of  
22 children who are already being over-exposed to their  
23 parents' difficulties and now have their peers  
24 saying, Gee, what is that all about? I heard your  
25 father was using this or that.

26           In any case, thank you very much for your

1           Weintrob  
2       attention to my comments. I added some extra ones  
3       that I submitted. Thank you.

4           (Applause.)

5           JUDGE MILLER: Mr. Ed Berko.

6           MR. BERKO: Thank you for this opportunity  
7       to address the Commission, I consider it a great  
8       honor and privilege to have been selected. I'm sure  
9       there are a lot of people in New York State that  
10      would like to meet with you and have an opportunity  
11      to speak with you.

12          I'll start by saying I'm not an expert on  
13      anything. I'm not an attorney, I'm not a forensic,  
14      I'm not a medical expert. I know nothing, next to  
15      nothing about the judicial system, aside from the  
16      fact what we learn when we're taught in school and  
17      social studies as students.

18          At a high level, I think it makes sense  
19      for me to give you a little bit of an idea of my  
20      background and why I thought it was important to  
21      come here. First, I'm 47 years old, I'm a father  
22      of one daughter. I was trained and educated at the  
23      Naval Academy at Annapolis for four years, I served  
24      on active duty for nine years on destroyers around  
25      the world, Persian Gulf, Middle East, etcetera.

26          While I was at the academy I met my

1           Berko  
2 childhood sweetheart, I was 18, she was 16, we got  
3 married.

4           After I left the service I pursued an MBA  
5 at Wharton in finance; she attended law school,  
6 she's a lawyer. We were married 13 years, we have  
7 one daughter.

8           Shortly after she turned age five, or  
9 before, actually, we had a second pregnancy which  
10 was not healthy, it was terminated, and for the next  
11 couple of years we tried to conceive for a third  
12 time, unsuccessfully.

13           We went through a lot of emotional stress.  
14 We never spoke about divorce, and one night when I  
15 came home my ex-wife was there with a temporary  
16 Order of Protection, a locksmith and two policemen,  
17 and I was given five minutes to pack an overnight  
18 bag and check out of our home of ten years. Was  
19 given no access to our daughter; I was in a state of  
20 shock. And I think a number of parents, fathers and  
21 daughters, have been in similar situations.

22           Once I sort of settled down I wasn't too  
23 worried about things, I thought, okay, there's due  
24 process, there is going to be a judge, maybe experts  
25 appointed. And as I went more and more through the  
26 process I became more and more concerned. I don't

1           Berko  
2 think it's necessary to go into all of the  
3 specifics, but at a high level my concerns, I guess,  
4 as somebody who's been through this, is first there  
5 is no due process. And I think this makes it, as  
6 the two former speakers have indicated, highly,  
7 highly detrimental to the children, and highly  
8 detrimental to marriage and its consequential effect  
9 on the social fabric.

10           You get into the position, if one parent  
11 wants out, whoever throws the first blow gets a  
12 significant advantage. I've noticed that the sort  
13 of allegations of sexual abuse, domestic violence,  
14 bizarre behavior and things of that sort of thing  
15 are being used increasingly to get the first shot in  
16 on custody, and tied to custody, of course, is  
17 significant monetary issues as well.

18           So my first concern is due process. I  
19 did not get a hearing, there was no presumption of  
20 innocence, there were no rules of law, there were no  
21 rules of testimony, there were no rules of perjury.

22           Secondly, I have to say I've only been  
23 here for the last two speakers and they seemed to be  
24 criticizing your role in the process. My personal  
25 observation, despite everything that went wrong, is  
26 that the process itself is okay. I could see that,

1           Berko  
2    as expensive as it is, all the bases were covered;  
3    there was a judge, there was a guardian ad litem  
4    appointed, there was a child therapist appointed,  
5    there was a forensic psychiatrist appointed, I was  
6    ordered to have a therapy and my ex-wife had a  
7    therapy. So there were six therapists, in fact  
8    there was a seventh, to supervise; I was a patient  
9    for a period of over a year. So we had a  
10   supervised social worker.

11           I found myself in a position of being  
12   abused, of all these false allegations, no due  
13   process, a presumption of guilt, and then I had to  
14   pay for them. I had to pay for the guardian ad  
15   litem, I had to pay for my therapist, the child's  
16   therapist, the social worker and one other, slips my  
17   mind. Basically I think I had to pay for my ex's  
18   therapist.

19           So I think the issue is, my second point  
20   is there must be an enforcement of the professional  
21   and ethical guidelines, whatever those are. I  
22   think, as I look at what was documented, what was  
23   interviewed, what was written down and what wasn't,  
24   it seemed very skewed to me.

25           If something was more neutral and offset  
26   an allegation, the out-of-bounds line was painted on

1           Berko  
2   the side and it just didn't get into the data. I  
3   tried some letters, I had affidavits, I had  
4   witnesses, I had character references. None of them  
5   got in. I asked for written reports of the  
6   guardian ad litem, the child therapist; they were  
7   not forthcoming. The only written report that was  
8   submitted was from the forensic. That was a report,  
9   just as an aside to give you a little bit of a  
10   flavor of how these things typically go, one-third  
11   of the report was based on his interview of the  
12   child-care provider who had provided child-care to  
13   our daughter for a period of about two and a half  
14   years. The problem was the child-care provider was  
15   coerced and threatened because she had illegal  
16   relatives in this country and she was threatened  
17   with having immigration authorities contacted to  
18   have them deported. So she gave a coerced and  
19   biased and untrue interview to the forensic, which  
20   was documented at face value, there was no effort  
21   made to refute or corroborate any of the  
22   allegations. Two days later she resigned and she  
23   came and told me what happened.

24           The Temporary Order of Protection was put  
25   in place to prevent me from speaking to her, so I  
26   took a great risk of risking a felony by even

1           Berko  
2 speaking to her, and she provided affidavits, was  
3 willing to meet with everyone, the guardian ad  
4 litem, the forensic, etcetera; no one met with her.  
5 So there was no effort made to correct something  
6 that was obviously out of skew.

7           The third point I'd like to make is I  
8 think there has to be greater clarity on what the  
9 guidelines are. I know there are guidelines in  
10 place. I'm not the expert. I've tried to look at  
11 them; they seem to be diffuse. What are the  
12 professional guidelines for each of the experts that  
13 are appointed? They should be in writing, they  
14 should be clear; and I think the fourth point is  
15 they have to be enforced, and to the extent they are  
16 not, there has to be a chilling effect on some of  
17 these appointees to make sure the system is right.  
18 And I think there has to be written documentation  
19 from all of these individuals, not just from one, so  
20 no one person can be sort of held accountable to  
21 what wasn't done, who wasn't contacted and who was  
22 contacted.

23           Subsequent to settling, and I have to say  
24 I settled for a variety of reasons, I had all the  
25 financial burden on me plus I had to spend hundreds  
26 of thousands of dollars in legal fees. You could

1           Berko  
2    see the outcome was basically not going to have a  
3    just effect, everything was skewed one way. I felt  
4    it was in my daughter's best interests to settle.  
5    Moved forward constructively to sort of put all this  
6    behind us. The problem is, when you settle, it's  
7    really not settled, they keep coming back at you  
8    with these same things to try to either get  
9    concessions on something or, or additional money.  
10   And when you've settled, you get yourself into a  
11   position where you're basically held as you settled,  
12   so what are you complaining about? You put yourself  
13   in this position. You basically accepted an offer  
14   that you couldn't refuse because of the due process  
15   and rules of law and testimony that weren't done up  
16   front.

17           That is all I have to say, I'll keep it  
18    brief. And if you have any questions, I'd be happy  
19    to answer them, and again, I thank you very much for  
20    your time.

21           JUDGE MILLER: Our next speaker is senator  
22    Tom Duane of the New York State Senate.

23           Helen Nemes? Not here.

24           Brian Zimmerman?

25           Catherine Douglas?

26           MS. DOUGLAS: Thank you, Judge Miller.

1           Douglass

2   Thank you, all the members of the Commission for  
3   this opportunity to speak today.

4           I'm Katherine Douglass, the Executive  
5   Director of In Motion, a nonprofit organization that  
6   is in its 12th year of providing free legal services  
7   to low income women residing in New York City in the  
8   areas of matrimonial, family and immigration law.

9           Most of our clients suffer from domestic  
10   violence, many are immigrants isolated by language  
11   or cultural barriers. Last year In Motion helped  
12   over 3,000 women.

13           This Commission's mandate is broad and  
14   important. I am aware that the issue of no fault  
15   divorce has once again surfaced. Our association  
16   has already stated our position. The pros and cons  
17   will be weighed in many other forums in the months  
18   to come. I suggest that given the number and  
19   complexity of other issues before this Commission,  
20   it need not and should not add the issue of no fault  
21   to its platter.

22           I urge you instead to focus on those parts  
23   of the system, the most disadvantaged poor and  
24   middle-class people, who have truly not had access  
25   to justice because they cannot afford to pay for  
26   lawyers to represent them in divorce cases. This

1           Douglass

2       Commission must find innovative solutions to protect  
3       all the rights of litigants in matrimonial actions.

4           Because of the enormous need for free  
5       representation, we hear daily from women who do not  
6       know their rights and options. In many instances  
7       women are proceeding without lawyers in court and  
8       ending up with interim or final orders that far too  
9       often do not afford them with what they are legally  
10      entitled to. When they call us they are coping  
11      with situations they desperately want to change.  
12      Women who have no lawyers tell us that they felt  
13      rushed and pressured by judges or their court  
14      attorneys into settling issues before they  
15      understood their options and without anyone  
16      explaining the implications of entering into a  
17      settlement agreement.

18           Many litigants do not know the difference  
19      between a judge urging or recommending a party to  
20      consider a settlement and a judge formally ordering  
21      the litigant to do just that.

22           They believe they have no choice but to  
23      accept what a judge recommends.

24           Custody and visitation issues are  
25      particularly problematic. Domestic violence  
26      victims report that they are routinely urged to

1           Douglass

2   accept clearly inappropriate joint custody  
3   arrangements with their batterers or to agree to  
4   unsupervised visitation even when they express  
5   well-founded concerns for their children's safety.

6           Most judges, their staff, court personnel  
7   and the vast majority of litigants agree that  
8   ideally, both parties to a matrimonial action should  
9   be represented by lawyers who know the law, who know  
10   how the legal system works and who can advocate  
11   forcefully and effectively for their clients.

12           So, what can and should be changed so that  
13   we can approach that ideal?

14           First, where there are financial resources  
15   in a marriage, aggressive steps must be taken to  
16   insure that the matrimonial assets are used to the  
17   fullest extent to give both parties access to  
18   representation. That means the judge must  
19   routinely order that the non-monied spouse's  
20   attorney's fees to be paid by the spouse with  
21   effective control of the resources. We need a  
22   system that permits an unrepresented party to file a  
23   request for attorneys fees in advance of hiring any  
24   attorney. Otherwise, she is in a Catch-22  
25   situation, she cannot get an order for attorneys  
26   fees because they cannot afford to hire a lawyer to

1           Douglass

2       file the requisite motion and supporting affidavit.

3           These fees must be ordered in an amount

4       sufficient to allow members of a private firm to

5       take these cases. Those rare cases when payment of

6       attorneys fees is now ordered, the amount is

7       generally inadequate to cover the time needed to

8       take the case to conclusion, and judges must monitor

9       compliance with their orders and promptly hold

10      parties in contempt when they have not paid. As we

11      know, there's nothing like the prospect of real jail

12      time or a stiff financial penalty to get action.

13           I, therefore, urge this Commission to

14      devise and implement a simple and straightforward

15      way for the Court to advise every non-monied spouse

16      at the commencement of every matrimonial action

17      where there are financial resources of the marriage

18      that she or he, if that's the case, can request and

19      that the Court will then order the monied spouse to

20      pay their attorney's fees. And judges need to be

21      open and willing to order additional fees to be

22      paid, if necessary, until the case concludes. This

23      will decrease the number of requests for withdrawals

24      from representation by attorneys who are not being

25      paid for their services and insure that the monied

26      spouse cannot simply draw out the case until the

1           Douglass

2   other spouse has no choice but to settle.

3           Where there are not sufficient marital  
4   assets to pay for attorney representation for both  
5   spouses and where custody or the need for a  
6   protective order is at issue in the divorce action,  
7   court-appointed attorneys must be made available to  
8   parties without resources.

9           Judges in the Family Court advise  
10   litigants of their right to an 18B attorney in cases  
11   involving custody and orders of protection and  
12   appoint these lawyers routinely, but it is the rare  
13   judge in the Supreme Court that even considers this  
14   to be an option. Yet the right to counsel is the  
15   same. Appointments of counsel in matrimonial cases  
16   involving contested custody and/or protective orders  
17   must become a normal practice. This will require a  
18   reallocation and/or an increase of resources within  
19   the court system. It may involve the creation of a  
20   new institutional provider along the lines of the  
21   Children's Law Center, which has benefitted both the  
22   courts and families where issues involving the  
23   welfare of children are litigated in Family Court.

24           I recognize that in the short run there  
25   will still be matrimonial litigants who proceed in  
26   court without lawyers. It is important, therefore,

1           Douglass  
2   to select and train judges who have the temperament  
3   and skills to deal with people in crisis. A  
4   focused system of judicial training and mentoring  
5   must teach all matrimonial judges to give  
6   unrepresented litigants time to ask questions and to  
7   think through the decisions they make. Judges must  
8   be clear that a litigant can choose, that she need  
9   not take a recommended settlement, that the case can  
10  go to trial, with all that entails.

11           The courts must give such litigants access  
12  to simple written explanatory materials and to  
13  translators, if they are not fluent in English.

14           Unless time is of the essence in order to  
15  protect either someone's personal safety or assets  
16  that will otherwise be lost, I strongly urge the  
17  courts to give pro se litigants time to consider  
18  their options and to consult with the people they  
19  trust. Judges should not accept any proposed  
20  settlement on the spot. The practice should be  
21  rather to schedule a return date within a reasonably  
22  short period of one or more weeks, at which any  
23  final settlement may be accepted. And because we  
24  hear from so many women who say they were not  
25  informed or unduly punished, or confused and  
26  mistakenly agreed to something that now appears in a

1           Douglass  
2    final order, we ask this Commission to require that  
3    all settlement discussions in cases where there is a  
4    pro se litigant be held on the record. This will  
5    benefit both judges and litigants.

6           There are many other issues relating to  
7    lack of counsel for your consideration and action.  
8    In the remaining few minutes I have I will highlight  
9    a few briefly.

10          First, the time frame for obtaining  
11    interim relief poses a significant and special  
12    problem for people with limited resources.  
13    Litigants routinely wait now for many months before  
14    obtaining orders for temporary support or  
15    maintenance. The consequences are drastic. They  
16    are forced to apply for government benefits, they  
17    cannot pay the rent or the mortgage and find  
18    themselves evicted from their homes.

19          Second, there is a significant problem  
20    with what is informally known as "sewer service",  
21    situations where false affidavits of service are  
22    filed with the court. At least twice a week a  
23    women calls In Motion saying she never received  
24    notice of a divorce action and now has discovered  
25    that a final divorce decree was entered against her,  
26    possibly years ago. This imposes a significant

1           Douglass  
2   burden on her as she attempts to prove that no  
3   service was effectuated upon court personnel and  
4   judges are forced to reopen and reconsider these  
5   cases. We suggest implementing a system of mailing  
6   notice at the initial stage of every matrimonial  
7   action to the named respondents at the addresses  
8   indicated in the petition. A computer-generated  
9   postcard with the name of the parties and the case,  
10   the court and the case number with information about  
11   how to obtain a copy of the petition would be  
12   sufficient. The cost of this safeguard would be  
13   greatly outweighed by the benefits to those who now  
14   are being defrauded and will be balanced by a  
15   sizeable savings of court resources, parties'  
16   resources and the resources of legal services  
17   agencies by avoiding the need for reopening and  
18   reconsidering these cases.

19           Third, I support the testimony of others  
20   who highlight the urgent need for clear and uniform  
21   standards for when and how law guardians and  
22   forensic experts are used in matrimonial cases,  
23   their respective roles must be defined, clear  
24   guidance is needed regarding who has legitimate  
25   access to and what weight must be given to their  
26   reports by judges.

1 Douglass

2 My staff and I would be pleased to make  
3 ourselves available to address further with members  
4 of the Commission or the Court any of the issues  
5 I've raised today or any other issues for which our  
6 experiences would prove helpful.

7 JUDGE MILLER: Would you be available for  
8 the very limited purpose of assisting in the  
9 drafting of counsel fee applications?

10 MS. DOUGLASS: Of a sample counsel fee  
11 application? Absolutely. Yes, we would.

12 JUDGE MILLER: And a second question.  
13 This is a tough one.

14 Have you any theory as to where the money  
15 would come from to supply the assigned counsel that  
16 is so desperately needed?

17 MS. DOUGLASS: I know it's been a big  
18 challenge for the existing Assigned Counsel Program,  
19 much less an expansion of it or a reallocation of  
20 it, so I have not got an answer to that question,  
21 and I think we all need to work together.

22 JUDGE MILLER: A "what if".  
23 Thank you very much.

24 MS. NEMES: I understand my name was  
25 called. I am Helen Nemes.

26 JUDGE MILLER: Very good, Miss Nemes.

1 Nemes

2 Speak into the microphone.

3 MS. NEMES: Hi. I would like to -- I am  
4 not use to microphones. Excuse me.

5 I would like to thank you for inviting me  
6 to participate in the court reform process. As a  
7 social worker in a high school and a mother, I value  
8 children's hopes, ideals and frustrations. Divorce  
9 is a difficult time for children under the best of  
10 circumstances. Let's work together to make it  
11 easier for our children to get through this process.  
12 Let's restore faith in our children for the court  
13 system and their parents. Working with adolescents  
14 for the last 14 years has taught me to listen to  
15 their dreams for a secure and stable environment,  
16 and to hope for a change for a better tomorrow.

17 I hope this will be the beginning of a  
18 long partnership between the court system and  
19 citizens. I trust that from now on there will be  
20 justice and compassion for the children of New York  
21 State. They deserve our best efforts to ameliorate  
22 their suffering.

23 I hope the following example will  
24 demonstrate what is wrong with the system. This  
25 will be followed by some comments about what I  
26 believe we can do to promote a more child-friendly

1 Nemes

2 environment.

3 A mother was the primary caregiver until  
4 the dissolution of the marriage began. Prior to the  
5 dissolution and during the court proceedings, the  
6 mother witnessed the alienation and brainwashing of  
7 her three adolescent children. She was unable to  
8 get the husband out of the house. She had told her  
9 attorney, and it was in the court papers, that the  
10 ex-husband grabbed the mother hard until her upper  
11 arms were black-and-blue.

12 Once the court proceedings began, the  
13 youngest, a 13-year-old girl was taken from school  
14 while waiting to be picked up as usual by the  
15 primary caregiver, her mother. The guardian was  
16 contacted repeatedly, but there was no response.  
17 The mother sensed something was wrong when, in  
18 court, the guardian ignored, and then said something  
19 was wrong with her for being concerned about the  
20 daughter she had not seen for well over a month.  
21 Meanwhile, the mother saw the guardian engaged in  
22 conversation with the ex-husband repeatedly.  
23 Thereafter, the mother barely saw the daughter for  
24 well over a year.

25 The mother asked for a psychological  
26 evaluation. There was a sense something was very

1           Nemes  
2       wrong with the system. A forensic psychological  
3       evaluation was done. The psychologist was told by  
4       the mother that she had not seen her daughter for  
5       about a month prior to the evaluation. The mother  
6       emphasized the alienation and suffering that her  
7       children were going through. The mother brought  
8       letters from her children written prior to the  
9       marital dissolution. One letter in particular was  
10      written by the daughter in fifth grade stating that  
11      she respected the mother as a role model.

12           She brought documents from teachers,  
13      therapists and neighbors about her being a primary  
14      caregiver. The mother requested immediate therapy  
15      for mother and children. There was no professional  
16      response. In fact, the psychological report did not  
17      mention the alienation. The mother sensed again  
18      that something was very wrong. The mother told this  
19      to the attorney.

20           The mother got an independent psychologist  
21      to evaluate the report. Her belief that something  
22      was wrong was confirmed again.

23           Fast forward to January 24, 2004, at a  
24      meeting this woman had with her ex-attorney and the  
25      director of the Coalition for Family Justice. The  
26      ex-attorney described in detail how the judge, in

1           Nemes  
2 his chamber, excoriated her and threatened to take  
3 her to a disciplinary committee after she sent him a  
4 letter. This letter was attached to a letter from  
5 the mother which described how the daughter looked  
6 sad and anxious during the brief occasional times  
7 that she saw the daughter. The letter from the  
8 attorney to the judge asked for family therapy,  
9 summer camp, home visit by a social worker and to be  
10 with the daughter more than the occasional brief  
11 visits.

12           The attorney stated that the attorney from  
13 the other side and the guardian were ex-parte in the  
14 judge's chambers when she walked in.

15           The daughter was kept hostage with the  
16 court's blessing.

17           Finally, after almost two years of  
18 suffering for the children, the mother was pressured  
19 to sign a stipulation for, quote, joint custody with  
20 the knowledge that her children were under great  
21 psychological duress during the court proceedings.

22           The above was described to an attorney who  
23 was assigned by OCA on March 10, 2004, in the  
24 presence of the Director of the Coalition. On a  
25 copy of a court transcript that this attorney gave  
26 to the mother, it was written that the guardian

1           Nemes  
2       "feels mom is nuts." The attorney also stated there  
3       was no random assignment to this case. It was hoped  
4       that there would be an acknowledgment of the  
5       wrongdoing by the courts. In order for there to be  
6       reform there must be an admission that something is  
7       wrong.

8           I am hopeful, however, that OCA and all in  
9       New York State who want a better tomorrow for our  
10      children will listen to the past suffering of the  
11      children in order to make positive changes.

12          I would like to end with a quote from  
13      Mr. Hynes, DA, and some recommendations. In an  
14      article in the New York Times of September 21, 2004,  
15      Mr. Hynes, district attorney, states, "It is all  
16      about greed. The fact that the subject matter of  
17      the greed was mothers and children makes it worse."

18          Following are some recommendations.  
19      Children should be with the primary caregiver prior  
20      to hostility. The burden of proof should be on the  
21      one who wants to make a change in the status quo.

22          Children like to see both parents involved  
23      in their well-being. Utmost care should be made to  
24      lessen hostilities so that parents communicate for  
25      the benefit of the children.

26          Accountability for law guardians.

1 Nemes  
2 Training in child development. Due process to  
3 parents in custody cases. Avoid the perception of  
4 cronyism and connections. Random assignment of  
5 court cases, regulation of forensics. Reports  
6 should be focus on past interaction with child and  
7 primary caregiver. Redress and review of cases.

8 In conclusion, it is common knowledge who  
9 the people in this court system were. To this day  
10 the children do not spend Mother's Day and Passover  
11 sedars with their mother. This case was mine.

12 I hope in the future to prevent this  
13 psychological damage for children. We need to work  
14 together to make it better for children in the court  
15 system. Thank you.

16 (Applause.)

17 JUDGE MILLER: We now have Senator Duane.  
18 Mr. Brian Zimmerman.

19 MR. ZIMMERMAN: Distinguished members of  
20 the commission, as the representative of the  
21 assigned counsel law guardian panel of the Second  
22 Department, I thank you for this opportunity to  
23 speak to you this afternoon.

24 My name is Brian Zimmerman. I am the  
25 co-president of the Kings County Family Court  
26 Assigned Counsel Association, as well as being a

1           Zimmerman

2 certified law guardian in the First Department.

3           In Kings, Queens and Richmond Counties, it  
4 is the assigned counsel panel of the Appellate  
5 Division, Second Department, who are the only  
6 attorneys eligible for law guardian assignments in  
7 matrimonial matters in Supreme Court. In some  
8 Family Courts in those counties the role is shared  
9 with the Children's Law Center.

10           The role of the law guardian in the  
11 Second Department is set forth in the law guardian  
12 administrative handbook which governs all law  
13 guardians in both family and Supreme Court. It  
14 requires every law guardian to follow the state law  
15 guardian adversary committee definition of the role  
16 of the law guardian. It is worth reciting part of  
17 that definition here. "The law guardian is the  
18 attorney for the child." In other types of  
19 proceedings, those being nondelinquency, "It is the  
20 responsibility of the law guardian to diligently  
21 advocate for the child's position in the  
22 litigation."

23           In ascertaining that position the law  
24 guardian must consult with and advise the child to  
25 the extent and manner consistent with the child's  
26 capacities. If the child is capable of a knowing,

1           Zimmerman  
2       voluntary and considered judgment, the law guardian  
3       should be directed by the wishes of the child, even  
4       if the law guardian believes that what the child  
5       wants is not in the child's best interests.

6       However, when the law guardian is convinced that the  
7       child lacks the capacity for knowing, voluntarily  
8       and considered judgment or that following the  
9       child's wishes is likely to result in a risk of  
10      physical or emotional harm to the child, the law  
11      guardian would be justified in taking a position  
12      that is contrary to the child's wishes. In those  
13      circumstances the law guardian would report the  
14      child's articulated wishes to the court, if the  
15      child wants the law guardian to do so,  
16      notwithstanding the law guardian's position.  
17      Moreover, the law guardian must follow certain  
18      protocols, including but not limited to the  
19      following:

20           The law guardian should always act in a  
21      manner consistent with proper legal practice and  
22      should not assume the role of a social worker,  
23      psychologist or advocate for one of the parties, an  
24      obvious frustration often times for the aggrieved  
25      spouse.

26           Law guardians must maintain

1           Zimmerman  
2   confidentiality with the child, unless the child  
3   authorizes disclosure and the child understands the  
4   implications of disclosure, and must not present  
5   reports containing facts not part of the record, or  
6   speak to parties outside the presence of their  
7   counsel or without express permission.

8           Finally, and most importantly, children,  
9   especially in highly contested proceedings, need a  
10   law guardian to be assigned to help them through a  
11   tremendously difficult process where parents often  
12   become so wrapped in the litigation that they lose  
13   often unintentionally their ability to be objective  
14   and see or appreciate what their child is expressing  
15   or wants. They need an advocate to speak up for  
16   them. They need an adviser -- and that is one of  
17   the roles of a lawyer, is to explain for them -- to  
18   explain in child appropriate language the process in  
19   a manner that the parents are unlikely to do. They  
20   need to access services where appropriate to help  
21   the child. They need to speak with important people  
22   to the child, such as teachers, to discern how the  
23   child is doing. They may need to bring motions to  
24   court on behalf of the child to achieve a result or  
25   negotiate with counsel to secure peace of mind for  
26   the child in terms of visitation schedules or not

1           Zimmerman  
2   having the parent speak to the children of the  
3   litigation, an all too common problem.

4           As I will outline later, the law guardians  
5   in the Second Department are uniquely qualified,  
6   well-trained and rigorously screened for purposes of  
7   doing this important work on behalf of the children  
8   of New York City.

9           Let me first note the incredible  
10   dedication and quality of our practitioners which  
11   may not be known to this Commission. The assigned  
12   counsel panel consists of experienced attorneys who  
13   have left senior positions at the Juvenile Rights  
14   Division, the Administration for Children's  
15   Services, and other similar organizations to join  
16   the panel. The average attorney in Kings County,  
17   where there are approximately 100 attorneys, is  
18   approximately 18 years of litigation experience, and  
19   greater than 9 years of participation on the panel.  
20   Of those attorneys greater than 40 percent have been  
21   supervisors or senior staff at institutional  
22   providers, union plans, foster care agencies, or  
23   matrimonial law firms. 40 percent are women and  
24   greater than 20 percent are minority. Some members  
25   have social work or related backgrounds. These  
26   numbers are reflective, we believe, of the panels

1           Zimmerman

2   citywide.

3           Once on the panel, most remain active on  
4   the panel throughout their legal careers. That  
5   provides children with the increased opportunity to  
6   have continuity of representation in lengthy  
7   proceedings or should the parties have to come back  
8   to court in future years to litigate new issues.

9           As members of the assigned counsel panel  
10   we are required to take assignments for indigent  
11   litigants in Family Court, and are thus involved on  
12   a daily basis in handling cases involving both  
13   adults and children in such areas as custody,  
14   guardianship, and visitation, paternity, child abuse  
15   and neglect, support proceedings, orders of  
16   protections and juvenile delinquency.

17           Many of our attorneys also represent  
18   adults in matrimonial proceedings as well. As such,  
19   our attorneys understand the nuances and strategies  
20   often employed in matrimonial litigation. The depth  
21   and breadth of our knowledge makes the Second  
22   Department panel uniquely qualified to represent  
23   children as law guardians in matrimonial matters, as  
24   we have represented on a daily basis plaintiffs and  
25   defendants in the many issues that arise in a  
26   contested matrimonial proceeding, which --

1           Zimmerman

2           JUDGE MILLER: Mr. Zimmerman, will I upset  
3 your train of thought if I ask a question?

4           MR. ZIMMERMAN: No, since I am prepared.

5           JUDGE MILLER: There has been a great deal  
6 said about law guardians here today. Is it ever  
7 appropriate in the rules of the Appellate Division,  
8 Second Department, for a law guardian to recommend  
9 to the judge what is in the best interest of the  
10 child?

11          MR. ZIMMERMAN: I would suggest, that  
12 based upon what I cited as essentially the rule of  
13 the Second Department is, that if there is the risk  
14 of emotional harm, and that you fall within that  
15 category, that you would still be, in essence,  
16 required to articulate the child's wishes with their  
17 permission and in essence you are allowing for  
18 perhaps the court to know what the best interests  
19 are, but I think that, you know, with a two year  
20 old, that's obviously a different issue.

21          JUDGE MILLER: A two year old, that's all  
22 you could do.

23          MR. ZIMMERMAN: Right. Exactly.

24          JUDGE MILLER: Thank you.

25          MR. ZIMMERMAN: -- the many issues that  
26 arise in a contested matrimonial proceeding, which

1           Zimmerman  
2 of course, is where a law guardian is most likely to  
3 be assigned.

4           Our varied experience in Family Court  
5 allows us to effectively understand the cultural and  
6 developmental need of the children we represent.  
7 Simply put, there is not really an issue that we  
8 have not seen in one way or another.

9           It is worth noting that because of the  
10 nature of the practices our attorneys have, that  
11 being law guardians and attorneys for the indigent  
12 in Family Court as well as privately retained in  
13 matrimonial matters, that compensation we receive  
14 for our assignments as law guardians in Supreme  
15 Court matters should not be a cause for concern for  
16 this Commission.

17           First, we are only appointed after a court  
18 has evaluated the matter and determined it cannot be  
19 resolved without a law guardian being assigned. In  
20 general, we are not even told of the appointment in  
21 advance. We merely receive the order in the mail.  
22 Many of our assignments are paid for by the state,  
23 and when the court determines that the parties  
24 should pay rather than the tax payer, the rates set  
25 by the court are determined by the financial  
26 disclosure forms of the parties, not by the desired

1           Zimmerman

2   hourly rate of the attorney or law guardian.

3           Most law guardians are assigned at rates  
4   not significantly greater than the state rate of \$75  
5   per hour, and certainly not more than any attorney  
6   on the case. We are governed by Rule 36 and the  
7   disclosure requirements contained therein, including  
8   detailed billing. Moreover, one will quickly learn  
9   that most law guardians do not even get paid for all  
10   the work they perform on their cases. In a sense,  
11   since most of the panel's work is devoted to those  
12   who are indigent, which children are considered in  
13   practice to be, our work on behalf of children in  
14   the face of warring parents is to protect the child  
15   through the process, assist them to have a voice in  
16   the process and advocate their wishes. It is rarely  
17   lucrative to be a law guardian, but it is essential  
18   for many of the children to have a voice. That we  
19   should be properly compensated is a judicial  
20   determination.

21           Now, I want to talk a bit about training.

22   In addition to the --

23           JUDGE MILLER: You have one minute left.

24           MR. ZIMMERMAN: In addition to any  
25   trainings that we attend on our own, the Appellate  
26   Division provided in the calendar year 2003 over 100

1           Zimmerman  
2   hours of training free of charge to attorneys on the  
3   assigned counsel panels on issues related to all  
4   aspects of our practice, such as child development,  
5   special education issues for children, the use of  
6   mental health experts in custody proceedings, the  
7   propriety of law guardian reports in custody  
8   proceedings, support cases, the interface of orders  
9   of protection in Criminal and Family Court  
10   proceedings, willfulness proceedings, and appellate  
11   practice, to name just a few.

12           Many of these trainings were mandatory,  
13   and the failure to attend the mandatory trainings  
14   results in the attorney not being recertified.  
15   These mandatory sessions occur in the evening. Many  
16   sessions are also held at lunchtimes. The speakers  
17   at the trainings included Judge Martin Karopkin,  
18   Judge Judith Gische, Judge Jeffrey Sunshine,  
19   Judge Clark Richardson, Judge Edwina Richardson,  
20   Judge Joseph Lauria, to name a few.

21           I think it is also important, since my  
22   time is limited, that the commission should know  
23   that we are subject to a recertification process  
24   each and every year, which means that our names go  
25   back to the Supreme Court judges and the Family  
26   Court judges who are asked to review the attorneys

1           Zimmerman  
2     for competence, advocacy skills, knowledge of law,  
3     and various areas of professionalism. Any attorney  
4     who is rated poorly by the bench will be relieved  
5     of their privilege of being a law guardian in  
6     matrimonial matters.

7           Additionally, the panel administrators  
8     fully investigate each and every complaint made by  
9     any litigant, no matter how little or big it is, and  
10    corrective action is to be taken.

11          Now, these briefs, I just wanted to  
12    comment as a personal --

13          JUDGE MILLER: I think I have to cut you  
14    off.

15          (Applause.)

16          JUDGE MILLER: I am not finished. There  
17    are some cases where there are no funds for private  
18    pay but the parties are not 18B eligible. Would  
19    your members accept some pro bono or reduced rate  
20    assignments in matrimonial cases?

21          MR. ZIMMERMAN: The answer to that is in  
22    the First Department those of us do already accept  
23    some cases pro bono and are not paid for those  
24    cases. In the Second Department, if you are  
25    suggesting that there are cases where the parents  
26    cannot afford to pay for a law guardian, my position

1           Zimmerman  
2       on that would be that the child is the one who is  
3       entitled to counsel, who is indigent, and that the  
4       court, pursuant to the Judicial Law, is free to  
5       assign law guardians at the state rate of \$75, if  
6       they make a determination that the parties can pay  
7       for that.

8           JUDGE MILLER: Thank you.

9           MR. ZIMMERMAN: Any other questions?

10          AUDIENCE MEMBER: \$75 is more than what a  
11       doctor makes in a hospital. Is that not enough from  
12       them?

13          JUDGE MILLER: We can't take questions.

14          The senator has arrived. I understand  
15       Senator Duane is here.

16          I'm sorry, I understand I can't be heard  
17       in the back. Is that right? No?

18          SEN. DUANE: Good afternoon.

19          Thank you for providing me with the  
20       opportunity to come before you today.

21          My name is Thomas K. Duane and I am a New  
22       York State Senator representing the 29th Senate  
23       District, which includes parts of Manhattan. I'm  
24       also the only openly gay person in the New York  
25       State Senate.

26          I would like to thank Matrimonial

1 Duane  
2 Commission for holding these hearings. I strongly  
3 believe that New York State's matrimonial and family  
4 law is broken and needs to be fixed. These problems  
5 caused by the present laws negatively impact all New  
6 York State families from all backgrounds and  
7 experiences. They effect the rich as well as the  
8 poor. I see time and time again the devastating  
9 impact these laws have on the lesbian, gay, bisexual  
10 and transgendered community. It has been  
11 heartbreaking, and during the course of my public  
12 service career I have advocated strongly for those  
13 most impacted by the system.

14 I am the legislative author of the first  
15 bill in the New York State Legislature which  
16 clarifies that civil marriage for same-sex couples  
17 is legal in New York, and on March 3rd of this year,  
18 I held the first ever Legislative public forum on  
19 the issue. This summer I released a comprehensive  
20 report on the legal and social issues surrounding  
21 civil marriage recognition for New York's same-sex  
22 couples -- a copy of which I have attached to this  
23 testimony, and I can make it available to all of the  
24 members of the Commission.

25 I will briefly outline the reasons why  
26 civil-marriage recognition for same-sex couples is

1 Duane  
2 important and specifically now focus on the  
3 custodial nightmare which faces the LGBT community  
4 in Family Court. But the bottom line is this: For  
5 far too long New York's courts and the Legislature  
6 have stuck their heads in the sand and have failed  
7 to admit that there are thousands of committed,  
8 loving same-sex couples who have children and  
9 families. Like it or not, we in the LGBT community  
10 are here and we are not going away. And, like any  
11 other New Yorkers, sometimes our families have  
12 troubles, troubles which need the guidance and  
13 intervention of the courts. It is painful enough  
14 to go through Family Court without facing the  
15 additional hurdles LGBT families are forced to  
16 endure.

17 And all because New York State refuses to  
18 recognize the civil marriages of same-sex couples.

19 There is nothing in New York State law,  
20 either in statute or common law, which states  
21 same-sex civil marriages are void or voidable.  
22 Article 2 of the Domestic Relations Law outlines  
23 what marriages will be considered void or voidable  
24 Basically, both parties must be the age of consent,  
25 have the capacity to consent, cannot be related by  
26 blood to one another and not already currently

1 Duane  
2 married to another. That is it. Nowhere in the  
3 Domestic Relations Law does it mandate that marriage  
4 must be between a gentleman -- I'm sorry, a  
5 gentleman, for sure, but a genetic man and a genetic  
6 female.

7 The courts are more or less silent on the  
8 issue as well, with only a few lower court cases  
9 dealing with those of transgendered experience.  
10 The courts have also ruled, as early as 1908, that  
11 marriage in New York is not designed for  
12 procreation, but rather, "a desire for support and  
13 companionship".

14 So it makes no sense as to why New York  
15 officials continue to insist that civil marriage in  
16 New York is denied to same-sex couples. There are  
17 some opponents that point to gender-specific terms  
18 related to solemnization of marriage in the Domestic  
19 Relations Law but these terms are inconsistent; One  
20 case easily find the gender-neutral term of "spouse"  
21 in the law just as easily as finding "husband" or  
22 "wife". Quite frankly, the Domestic Relations Law  
23 is a mixed bag of terms.

24 It seems terribly unjust that scores of  
25 loving, same-sex couples are denied the right of  
26 civil marriage simply because the Domestic Relations

1 Duane

2 Law is sloppy in its terminology. This is why in  
3 2000 I was the first legislator in New York to  
4 introduce what I would call cleanup legislation  
5 which would once and for all clean up the language  
6 of the Domestic Relations Law and clarify the right  
7 of same-sex couples to legally marry in New York.

8 New York law needs such clarification,  
9 especially for the families of New York same-sex  
10 couples and the issue of custody. Law is designed  
11 to bring uniformity and consistency. But the  
12 glaring omission in New York law now guarantees that  
13 children and the families of same-sex couples will  
14 suffer.

15 Because New York does not recognize the  
16 civil marriages of same-sex couples, courts in New  
17 York are left with the issue of custody. What  
18 happens when the custodial parent of a child dies,  
19 leaving that child's fate up to the courts when  
20 there's already a loving, surviving noncustodial  
21 spouse? Currently, if that surviving spouse did not  
22 go through the costly and expensive process of  
23 second-parent adoption there's no guarantee that a  
24 court will grant him or her custody.

25 This is a glaring inequity between  
26 same-sex couples and their heterosexual

1           Duane  
2 counterparts. Imagine a heterosexual couple who,  
3 due to infertility problems, utilize donor sperm to  
4 have a child. If the wife subsequently dies, no one  
5 would expect the husband and father of the child to  
6 defend his right for custody of the child in court.  
7 This shocks the conscience. But, Inexplicably, the  
8 surviving spouse in a same-sex relationship who is  
9 faced with a similar tragic experience, is forced to  
10 spend the time, energy and effort in court, fighting  
11 to keep her son or daughter, with no guarantee of  
12 success. What a terrible situation. Not only is  
13 the woman grieving over the loss of her spouse, but  
14 also faces the possibility of losing her child.

15           How is this just? And it could all be  
16 avoided if only the State recognized the civil  
17 marriages of same-sex couples. There are countless  
18 other instances where the stability of the family  
19 unit is jeopardized and usurped in the New York  
20 courts simply because of the same-sex marriage ban.

21           And I now know of case of a couple who  
22 together had a child and then had another child.  
23 The nonbiological mother adopted the first child,  
24 was in the process of adopting the second child when  
25 the relationship broke up. And she risks, the  
26 nonbiological parent risks losing everything,

1 Duane  
2 including being able to see her younger daughter,  
3 because even though the adoption process was  
4 underway before they broke up, it wasn't completed.  
5 It's a disgrace.

6 And many couples, many nonbiological  
7 parents settle for just the minimal contact with  
8 their child because they can't afford the expense of  
9 going through court and because they fear even if  
10 they did they might lose everything. It's wrong.  
11 Again, if a child were conceived because the man,  
12 the husband had something wrong with his sperm,  
13 there would be no question about who the father was  
14 in that case. And yet it's not, it's not equal for  
15 same-sex couples, and that is absolutely and totally  
16 unconscionable and wrong.

17 The purpose of this Commission, or one of  
18 them, is to streamline the Family Courts and make  
19 the process easier and less painful for all  
20 involved. There is nothing simpler to ease the  
21 burden of the courts than for New York to stop  
22 discriminating against same-sex couples. When it  
23 comes to same-sex couples and the right to civil  
24 marriage, New York does not need commissions or  
25 studies, it simply needs to do the right thing.

26 In closing, I would also be remiss if I

1 Duane  
2 did not mention the terrible financial burdens  
3 families face when in Family Court. Ofttimes the  
4 nonbreadwinner of the family is forced to defend him  
5 or herself against the breadwinner of the family.  
6 By the time it is over the family's resources are  
7 depleted, given to lawyers, guardians, investigators  
8 and the like. And how does this help the child?  
9 The process needs serious streamlining in order to  
10 guarantee justice while at the same time not  
11 bankrupting the family.

12 The other final issue which just occurs to  
13 me, because of the impetus towards unifying the  
14 court system, the one thing that I wanted to make  
15 sure of is that if that does happen it's preserved,  
16 is the ability for people to go into Family Court  
17 without having to pay. Because you can go into  
18 Family Court and it's a fee-free, and yet the law is  
19 silent on it, although I've been told that although  
20 the proposed unification law is silent on that, I  
21 have been told that there wouldn't be a charge for  
22 someone to go into a Family Court. I just want to  
23 make sure that if you make recommendations,  
24 particularly around unification, that you preserve  
25 the ability for anyone to go into Family Court  
26 without having to pay to do that.

1 Duane

2 JUDGE MILLER: Senator, we have had a lot  
3 of discussions here today about another inequity,  
4 and that is the problem of nonmonied parties who are  
5 involved in divorce in the Supreme Court, and they  
6 can't afford counsel. And there is a desperate  
7 need for people going through these proceedings,  
8 particularly where there are children, particularly  
9 where there's domestic violence and other issues, we  
10 are going to need money to fund this kind of real  
11 need.

12 What's your feeling about how this can be  
13 approached with the Legislature, with a palpable  
14 chance of success?

15 SEN. DUANE: First, let me say you have an  
16 ally.

17 Secondly, we can hope and pray that a  
18 legislator that doesn't have much money is put into  
19 this position, then, all of a sudden you'll see some  
20 money.

21 But finally, I think a tremendous amount  
22 of attention is being paid to what this Commission  
23 is doing and I think you've seen the outpouring of  
24 interest in it, and so I think that a tremendous  
25 tool that I would, and I and some of my colleagues  
26 who are also on the team, so to speak, would be to

1 Duane  
2 have the strongest possible language in support for  
3 making sure that the dollars are available so that  
4 every family is insured equality before the Court.

5 Thank you.

6 JUDGE MILLER: Thank you.

7 Next, Carol Sherman.

8 MS. SHERMAN: Good afternoon.

9 Thank you very very much for giving me  
10 this opportunity to address the distinguished panel.

11 I am Carol Sherman and I am the Executive  
12 Director of the Children's Law Center. Some of you  
13 know of the Children's Law Center. We are a "Not  
14 For Profit" law Firm funded by the New York State  
15 Office of Court Administration and appointed by the  
16 judges to represent children as law guardians in  
17 custody, visitation, domestic violence, guardianship  
18 and related proceedings.

19 We are law guardians in both Bronx and  
20 Brooklyn family courts and in the integrated  
21 domestic violence parts in Bronx, Queens and Staten  
22 Island.

23 We started in December of 1997 in Brooklyn  
24 Family Court. Our Bronx office opened in May of  
25 2002. And I thank Judge Aaron, who was very  
26 helpful and influential. And then this past

1           Sherman  
2       December we opened an office in Queens, in Queens  
3       and Staten Island domestic violence parts.

4           As the Matrimonial Commission looks toward  
5       alternative ways to provide law guardian  
6       representation in these matters, we at the  
7       Children's Law Center are an example of both a  
8       successful and effective institutional provider for  
9       law guardian representation.

10          The advantages to such a program include a  
11       multidisciplinary approach to the representation of  
12       children. We have on our staff both lawyers and  
13       social workers who work together as a team in  
14       providing representation to children. We also  
15       provide comprehensive training to our lawyers and  
16       social workers. There is close and ongoing  
17       supervision of the law guardians and the social  
18       workers, direct accountability for the quality of  
19       the representation provided and direct  
20       accountability on the physical issues. And  
21       certainly, in cases where parties could pay, and we  
22       don't do those cases right now, there could be  
23       uniformity in rates and fees as well as physical  
24       accountability.

25          I have not been here for very long but I  
26       certainly have gathered that there have been a lot

1           Sherman  
2 of comments about law guardians before this panel.  
3 So, I would be happy to answer any questions you  
4 have and put aside my prepared remarks, or I can go  
5 ahead and give those remarks.

6           JUDGE MILLER: Why don't you go ahead with  
7 your remarks and then we can fill in with some  
8 questions?

9           MS. SHERMAN: Okay. That would be fine.  
10          I should say that I have represented  
11 children all of my professional life. I have never  
12 represented an adult.

13          At the Children's Law Center, as I said,  
14 we represent children in custody, visitation and  
15 domestic violence proceedings. It is important  
16 that a law guardian be appointed, certainly, in  
17 cases where there is a contested proceeding.

18          The law guardian plays the role of  
19 providing the child with a voice in the proceeding,  
20 can shield the child from highly contested  
21 proceedings and try to work with the parties in  
22 dealing with their animosity and hostility.

23          The law guardian also can assist the  
24 parties in understanding the needs and wishes of the  
25 child and in assisting the parents in separating  
26 their own feelings of anger and betrayal from those

1           Sherman  
2 of the children.

3           In addition, at the Children's Law Center  
4 we assist the families in arranging for services and  
5 referring them for services. The law guardian also  
6 plays a significant role in settlement negotiations  
7 and is active in all aspects of the proceeding.

8           One of the most important aspects of law  
9 guardian representation is interviewing the child.  
10 It is important for the law guardian to be aware in  
11 interviewing the child that one must be sensitive  
12 not only to the child's chronological age but the  
13 developmental issues and the developmental age of  
14 the client. We often see our clients many times,  
15 we see them throughout the proceeding. We often  
16 have them brought to our office by both parents many  
17 times throughout the proceeding.

18           We are very sensitive to not having our  
19 clients choose. A child should not have to choose  
20 between the two parents. We don't ask our clients  
21 who it is that they want to live with. That's not  
22 an appropriate question.

23           If a law guardian does a very thorough  
24 interview and talks to the child about all the  
25 aspects of his family life, his school life, his  
26 social life, talks to the child about his memories,

1           Sherman  
2    his contacts or experiences with his parents and  
3    really has a very thorough understanding, one  
4    doesn't have to ask a child who it is that the child  
5    wants to live with. And we always assure our  
6    clients that they do not have to choose. That's  
7    the Judge's job, a judge is the one who is going to  
8    make that determination, not them. Most children  
9    are very relieved to hear that. They often will  
10   come into our office having been prepared by a  
11   parent, now you have to tell the law guardian who it  
12   is that you want to live with. We try very hard to  
13   relieve them of that anxiety early on.

14           We are also very cognizant that children  
15   often come in having been coached, if not  
16   manipulated, by a parent. Asking a child indirect  
17   questions, getting the child beyond the initial  
18   statements, and as I said, developing into that  
19   child's past will often - -

20           JUDGE MILLER: In that area, is it  
21   effective to have the guardian advocating the  
22   child's position in the case where the child is  
23   being influenced by a parent and you know it?

24           MS. SHERMAN: And you know it?

25           JUDGE MILLER: Yes. Do you still advocate  
26   the child's position?

1 Sherman

2 MS. SHERMAN: There are different kinds of  
3 being influenced by a parent. Some children, after  
4 you develop a relationship with them, will tell you  
5 yes, my parent told me to say that. Some children  
6 will come into the office and I want to live with my  
7 mother, I never want to see my father, breathe a  
8 sigh of relief, they've done their job and now you  
9 can do the interview. Okay? I don't view that  
10 statement, particularly, as, as the statement of  
11 their wishes.

12 If a child is influenced but truly  
13 believes what the child says, then that is something  
14 that, yes, you would have to inform the Court. You  
15 might also recommend that the child be in therapy.  
16 You might recommend that the child and the parent be  
17 in some type of therapeutic visitation; the child  
18 and the parent against whom they are being alienated  
19 together be in some sort of therapeutic visitation.

20 Most of the time with children you can get  
21 beyond -- many cases, not all -- you can get beyond  
22 the influence of the parent. I always tell a  
23 story, I interviewed a five year-old little girl,  
24 and one of the questions I was asking was, what  
25 games do you play with your daddy; what games do you  
26 play with your mommy? I don't know what answer I'm

1 Sherman

2 gonna get. She said, well, I've been playing this  
3 game with my mommy and it is really boring. I said,  
4 what game is that? She said, well, I'm me and she's  
5 you -- meaning me -- and she asks me question after  
6 question and then I have to answer her.

7 Now, I didn't expect an answer, but that  
8 was part of an interview in which I really tried  
9 very hard to explore the aspects of her life. We  
10 then got beyond that as to what her mommy talked to  
11 her about and we were able to talk about her  
12 feelings and her experiences with her father. But,  
13 in cases where children truly believe what the  
14 parent has said in terms of the other parent being a  
15 bad person or being harmful, then one has to accept  
16 that and deal with the child in more of a  
17 therapeutic kind of relationship.

18 JUDGE MILLER: I have a number of  
19 questions for you.

20 MS. SHERMAN: Okay.

21 JUDGE MILLER: In what type of custody  
22 dispute would you not need a law guardian, if any?

23 UNIDENTIFIED VOICE: Can't hear you.

24 JUDGE MILLER: Sorry about that.

25 Can you hear me now?

26 UNIDENTIFIED VOICE: No.

1 Sherman

2 JUDGE MILLER: Can you all hear me now?

3 UNIDENTIFIED VOICE: A little better.

4 JUDGE MILLER: In what type of custody  
5 dispute would you not need a law guardian, if any?

6 MS. SHERMAN: Okay.

7 I would think that if the parties came  
8 in -- and these are contested, should I assume?

9 JUDGE MILLER: Yes.

10 MS. SHERMAN: Okay. So we're not dealing  
11 with uncontested. Okay.

12 I think it's better to have a law  
13 guardian. I am a law guardian. I think it's better  
14 to have a law guardian. But if your resources are  
15 such that you can't have a law guardian in the case,  
16 if there are no issues of domestic violence, and  
17 that's a very important issue that certainly we deal  
18 with a lot and I'm very sensitive to, but assume  
19 there's no issue of domestic violence, there's no  
20 issue of substance abuse, there's no issue of child  
21 protective issues by any of the parties and you have  
22 a child that's preverbal. That might be a case  
23 where you would necessarily need a law guardian.

24 The problem is usually when people are in  
25 a contested proceeding they are throwing allegations  
26 around and they are accusing each other of not being

1           Sherman  
2    good parents or of even being neglectful or abusive  
3    or even violent. So in a contested proceeding I  
4    think it's difficult.

5           JUDGE MILLER: Would the Court ever be  
6    better informed, or in certain cases be better  
7    informed by a home study, with the party doing the  
8    home study subject to cross-examination? Like a  
9    probationer?

10          MS. SHERMAN: In Family part, either ACS  
11    or probation, does do a home study in almost -- at  
12    least in the city, in almost every case. So there  
13    is usually a description of the home, who lives  
14    there, there's an SCR clearance, which would be a  
15    statement as to whether the parties had ever been  
16    reported for child abuse or neglect and whether any  
17    of those cases were indicated or unfounded.

18          So, actually, in Family Court there are  
19    those studies. And in matrimonials there are not.

20          JUDGE MILLER: If there are thorough  
21    studies, why is it necessary to have a law guardian?

22          MS. SHERMAN: Okay. The study tells you  
23    what the home looks like, who lives there and  
24    whether they've been involved in neglect or abuse.  
25    The law guardian plays a totally different role.  
26    The law guardian is a lawyer. The study is

1           Sherman  
2     conducted by a case worker. Not necessarily a  
3     social worker, a case worker. The law guardian is  
4     a lawyer. The law guardian will act as a lawyer,  
5     will interview the client, interview the parties,  
6     with permission of counsel, do a complete  
7     investigation. We talk to schools, we talk to  
8     day-care centers, we get hospital records, we speak  
9     with doctors, we speak with therapists, social  
10    service providers who may be involved with the  
11    family, filing necessary motions or argue in terms  
12    of temporary orders as to visitation.

13           JUDGE MILLER: The problem is, if your  
14    role is really limited or directed, according to the  
15    rules, to represent the child's wishes and the child  
16    is very clear that the child wishes to go with  
17    parent (A) or parent (B), why do you need all of the  
18    other investigation, and what is the purpose of it?

19           MS. SHERMAN: Okay. In a case where the  
20    child is of sufficient age and gives you a clear  
21    direction as to his or her wishes, then you, as the  
22    law guardian, would prepare a case. Just like any  
23    other lawyer, you'd be doing an investigation, like  
24    any other lawyer, to substantiate or to support your  
25    case. And certainly, lawyers do investigations all  
26    the time, both looking at the strengths of their

1 Sherman

2 case and the weaknesses of their case.

3 If there are problems that your client has  
4 as the child, then I as the law guardian, if my  
5 client is not going to school, then that's a  
6 weakness in my case and my client has a problem.  
7 I'm going to address that. I may refer the child  
8 to one of my social workers to deal with school  
9 issues.

10 If my client needs to be in therapy, then  
11 I will assist my client in therapy. I can still  
12 advocate for my client's wishes, but I want to make  
13 sure that my client has all the services that that  
14 client needs so that that client is appropriately  
15 cared for in the home that that client is asking to  
16 be in.

17 JUDGE MILLER: Now the question is, you  
18 have a law guardian, who would not only represent  
19 the child's wishes but is also advocating for things  
20 that are in the child's interest, such as health  
21 care, school, etcetera, but the Court has also  
22 appointed a forensic. Is that overlapped, or what  
23 is the role of the forensic as compared to the law  
24 guardian, and is it appropriate to have both?

25 MS. SHERMAN: Okay. The forensic is not  
26 an advocate. The law guardian is an

1           Sherman  
2   attorney/advocate. The forensic and the law  
3   guardian may take different positions. The  
4   forensic may advocate that it's in the child's best  
5   interest to be with the parent that the child  
6   doesn't wish to be with.

7           The forensic, as I would think, would take  
8   a pure best interest approach and say, based on my  
9   expertise as a psychiatrist, psychiatrist or  
10   psychologist, it's my position that for these  
11   reasons the child should be with this person. I,  
12   as the law guardian, may or may not support that.  
13   We play different roles. And certainly if the  
14   forensic is saying that the child should be with  
15   someone my client doesn't wish to be with, because  
16   of the weaknesses that I've just pointed out, it's  
17   even more important for me to put in the services  
18   with my client.

19           JUDGE MILLER: Is it your view that there  
20   should be a forensic in every case?

21           MS. SHERMAN: Not necessarily in every  
22   case.

23           JUDGE MILLER: When should there be a  
24   forensic?

25           MS. SHERMAN: I think there should be a  
26   forensic in most contested cases. I think there

1           Sherman  
2    are some contested cases, and maybe they are more of  
3    what -- I think they would be more prevalent in  
4    Family Court -- when the issues are not so much  
5    mental health issues or psychological issues, they  
6    are more situational issues; they are issues dealing  
7    with where the children live, the kind of housing.

8           If the parent has an abuse problem and  
9    that's proven through drug testing, it may not mean  
10   necessarily -- people may want to go to trial but it  
11   doesn't necessarily mean you need a forensic.

12          If there is evidence that one of the  
13   parents abuses drugs, I don't know that you  
14   necessarily need a forensic, you put in evidence  
15   that that parent is abusing drugs.

16          Most cases would need a forensic, it is  
17   very helpful.

18          JUDGE MILLER: Thank you.

19          MS. SHERMAN: Thank you. I've used up my  
20   time, I assume.

21          JUDGE MILLER: Is there anything further  
22   you wanted to tell us?

23          MS. SHERMAN: The only thing we did not  
24   talk much about is the issue of domestic violence.  
25   And we represent many children whose families are  
26   plagued by domestic violence, especially in the

1           Sherman  
2     integrated domestic violence parts. And it is very  
3     important for the law guardian to be aware of the  
4     impact of domestic violence on children.

5           In my experience, a child always knows if  
6     there is domestic violence in the home. The parent  
7     may say the child wasn't there, the child was  
8     sleeping, the child didn't see. The child always  
9     knows. The child knows when there's domestic  
10    violence behind a closed door; children will say I  
11    could hear it, I wanted to help, usually my mother.  
12    Children will feel guilty, they will tell you they  
13    feel sad, they will tell you they feel mad. They  
14    feel the tension in the home; they see the bruises  
15    on the parent. They are not fooled. Children  
16    always know when there's domestic violence.

17           Now, sometimes when we interview victims  
18    of domestic violence they are ashamed, they are  
19    reluctant to tell us about the domestic violence.  
20    Part of what I said, one of the most important  
21    things of being a law guardian is doing interviews,  
22    where one can listen to what people have to say, be  
23    sensitive to what they have to say and then try and  
24    use that information in a way to effectively  
25    represent the child.

26           JUDGE MILLER: I have a question. We

1           Sherman  
2    have some information on this. What is the training  
3    of the law guardian, in your service?

4           MS. SHERMAN: We, provide, first of all,  
5    individual training. We're not an enormously big  
6    organization, so we hire people basically one at a  
7    time. We spend a lot of time going through  
8    interviewing of children, interviewing of the  
9    parties. We also go over with each of our lawyers  
10   the relevant law in the area. We give them a small  
11   number of cases to begin with, the supervisor goes  
12   over their cases in the beginning, goes into court  
13   with them, with the new lawyers in the beginning.  
14   Usually, before a lawyer goes into court, a new  
15   lawyer will prepare something in writing about their  
16   case. The supervisor will go over that, and if more  
17   information has to be gathered, we will do that.

18           I also teach a seminar at Brooklyn Law  
19    School and the new lawyers will attend the seminar  
20    that I teach as well on substantive areas of law.

21           So it's very much a one-to-one kind of  
22    training that we give our new lawyers and very close  
23    monitoring, especially in the beginning.

24           JUDGE MILLER: And as I recall, your fees,  
25    the lawyers in your organizations are paid through  
26    the Office of Court Administration.

1 Sherman

2 MS. SHERMAN: Right. We are totally  
3 funded by the Office of Court Administration.

4 JUDGE MILLER: In your experience, when  
5 you advocate for the child's wishes or the child's  
6 interests, in your experience, does the judge, by  
7 and large, listen to you and grant your  
8 applications?

9 MS. SHERMAN: Well, I think the judge  
10 listens. Okay. And in most cases I have to say the  
11 judge would be in agreement, but there certainly are  
12 cases where judges are not in agreement and make  
13 orders that are not what we advocated.

14 If we are concerned that the child would  
15 be in danger we can go to the Appellate Division,  
16 which we have done, but assuming that it's an issue  
17 of the judge has made a different determination,  
18 then the judge has made a different determination.  
19 But, certainly, in my experience judges certainly do  
20 listen to what we --

21 JUDGE MILLER: In your experience, does it  
22 not serve the child to be sent to therapy?

23 MS. SHERMAN: I am sorry, when?

24 JUDGE MILLER: When is it not appropriate?

25 When would you advocate that the child not  
26 be sent into therapy, if ever?

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2 MS. SHERMAN: Oh, well, not every child  
3 needs to be in therapy. Some children can benefit  
4 from therapy. Some children request therapy. Some  
5 children are comfortable with therapy, and certainly  
6 some children are in situations where they need to  
7 be in this therapy. There are other children who at  
8 this point in their life they seem to be coping with  
9 the situation. They have very supportive parents.  
10 They have other people in their lives to whom they  
11 turn to for support and therapy may not be necessary  
12 at this time, so we do not recommend therapy in  
13 every single case.

14 JUDGE MILLER: If a parent doesn't want a  
15 child to go to therapy or have any further  
16 evaluations but you feel it is advisable, you would  
17 propose that the child go to therapy, is that right?

18 MS. SHERMAN: Yes. We would propose that  
19 the child go to therapy.

20 Realistically, if the parent in a custody  
21 case -- if the parent refuses to take the child for  
22 therapy, and it is still our position based on  
23 either the wishes or the interests of our client  
24 that that child be with that parent, it would not  
25 necessarily be our position that then custody should  
26 go to the other parent. So we certainly would

1 Sherman

2 request that there be such an order. Whether that  
3 order is enforceable or not would depend on the  
4 case.

5 JUDGE MILLER: Your law guardians only  
6 represent children in Family Court, is that right?

7 MS. SHERMAN: No, we represent children in  
8 the integrated domestic violence parts.

9 JUDGE MILLER: But not in the Supreme  
10 Court.

11 MS. SHERMAN: We have done some Supreme  
12 Court work in Brooklyn when we have been on a Family  
13 Court case for many years and the case then goes to  
14 the Supreme Court we will follow it. That's a very  
15 small number.

16 JUDGE MILLER: Is it your opinion that  
17 there should be such a program in the Supreme Court  
18 just as there is in Family Court if there are  
19 custody issues?

20 MS. SHERMAN: I think that certainly it  
21 would benefit the children in the Supreme Court, and  
22 I think it may be a way to respond to some of the  
23 issues that are raised in terms of law guardian  
24 representation.

25 JUDGE MILLER: All of which requires more  
26 money. Have you any theory about how we can find

1 Sherman

2 it?

3 MS. SHERMAN: Well, the only thing, there  
4 is nothing to say there couldn't be a program such  
5 as the Children's Law Center where fees would be  
6 collected, and I think that up in the Fourth  
7 Department, in some cases there are programs like  
8 The Children's Law Center where fees are collected  
9 under Tracy Hamilton Hayes, the law guardian and  
10 director up there. There could be a program such as  
11 The Children's Law Center and OCA could set a  
12 uniform rate and then fees could be collected from  
13 the parties. I am not proposing that people who are  
14 wealthy they have to get free law guardian service,  
15 but it still could be done under an institutional  
16 provider.

17 JUDGE MILLER: Thank you very much.

18 MS. SHERMAN: Thank you.

19 (Applause.)

20 JUDGE MILLER: The next speaker is  
21 Mr. Stempel.

22 MR. STEMPEL: Good afternoon,  
23 Justice Miller. It's always a pleasure to see you,  
24 and good afternoon to all the distinguished members  
25 of this panel.

26 As the Chair of the New York State Bar

1           Stempel  
2       Association Family Law Section, I am here to report  
3       to you today that our members across the state are  
4       working very hard to recommend and implement,  
5       together with this Commission, new avenues of  
6       expediting and, whenever possible, amicably  
7       resolving these cases.

8           This morning I know you heard from my  
9       Co-chair, Alton Abramowitz, who discussed with you  
10      today the proposals and the bill that we have for  
11      no-fault legislation.

12          Under the able stewardship of my  
13      predecessor, Mr. Brian Barney, the State Bar  
14      Association has worked very hard in order to try to  
15      pass this legislation. We have now received the  
16      approval of our executive committee and are actively  
17      seeking a sponsor for this bill. It is important to  
18      understand why this is so important. The members of  
19      our Bar Association who do this for a living  
20      everyday understand the importance of trying to  
21      resolve these cases quickly and, if possible,  
22      amicably. We believe that this no-fault bill will  
23      reduce the cost of the litigation and will help free  
24      up valuable judicial resources.

25          I also wish to report to the commission  
26      today the efforts of many of our members who are now

1           Stempel  
2     undertaking the task of collaborative law. This is  
3     a new and growing phenomenon in the legal system.

4           JUDGE MILLER: Will you explain that to  
5     all of us, please?

6           MR. STEMPEL: Certainly, your Honor.

7           The essence of collaborative law is the  
8     shared belief of the participants that it is in the  
9     best interests of the parties and their families to  
10    commit themselves to resolving their differences  
11    with a minimal of conflict. It is in its most basic  
12    form the opposite of litigation. The attorneys who  
13    undertake the collaborative law agreement with their  
14    parties agree in the context of the children, which  
15    is have important, and I will quote from such an  
16    agreement, That settlement discussions should never  
17    take place in the presence or in the hearing of the  
18    children, and the parties acknowledge that  
19    inappropriate communications regarding the  
20    dissolution can be harmful to the children.

21          The parties and each of the attorneys who  
22    signs such a collaborative agreement agree that they  
23    will attempt to settle a case, and any of the  
24    settlement negotiation notes and documents produced,  
25    with the exception of a statement of net worth,  
26    cannot be introduced in evidence should the case not

1           Stempel

2 settle.

3           The parties agree that basically their  
4 settlement negotiations will be privileged, will be  
5 confidential. They will have the assistance of an  
6 able matrimonial attorney -- many of our colleagues  
7 do this -- and they will try to resolve the case  
8 without the necessity of costly and acrimonious  
9 litigation. Most importantly, the attorneys and the  
10 clients in that process are united in interest. Why  
11 is that? They are united in interest because if the  
12 case does not settle through the collaborative law  
13 procedure the attorneys can then not represent those  
14 parties in any litigation, so the attorneys will, of  
15 course, make a best effort to do so, and this is a  
16 growing phenomena. There are thirty-five attorneys  
17 today in Syracuse who are attending collaborative  
18 law training. I spoke to a colleague of mine in  
19 Buffalo yesterday, Mr. Jerry Davidson, a former  
20 Chair of the section -- recently had over seventy  
21 attorneys -- and we are going to do all that we can  
22 to promote and educate other attorneys in this field  
23 to try to reduce the litigation and the acrimony.

24           Also, I wish to report to this Commission  
25 that over the summer we had our summer meeting and  
26 it dealt with the issue of same sex marriages. Soon

1           Stempel  
2   to be released will be a report from the Bar  
3   Association -- the general Bar Association -- not  
4   the family law section -- making recommendations in  
5   a task force report on the issue of same sex  
6   marriages. Our section is in the process of trying  
7   to get a handle and address these have important  
8   issues which we see, and these new challenges to the  
9   court system. Our colleagues recognize the very  
10   difficult nature of those cases.

11           As I look around to the commission and,  
12   certainly yourself, your Honor, we all worked on  
13   these cases and some of these custody cases are so  
14   very difficult, and we have all had the experience,  
15   try as we might, that there were going to be these  
16   cases that despite our best efforts, despite the  
17   court's best efforts, they are not going to settle,  
18   and there are numerous reasons for this. But we are  
19   going to have those cases where there is going to be  
20   protracted litigation, where there are going to be  
21   five appeals, where they just are not going to end  
22   the case and then at the eleventh hour, when all  
23   seems lost, they will file bankruptcy and protract  
24   litigation further. With that in mind, I have  
25   several most respectful recommendations to address  
26   that element of the practice where settlement just

1           Stempel

2       cannot be achieved.

3           The first recommendation is that whenever  
4       possible the courts try to issue prompt decisions on  
5       motions. When I say "whenever possible" is not out  
6       of any simplicity, but just in recognition of the  
7       case flow that the trial courts handle. It is  
8       important when we wait months for a decision -- the  
9       cases do not improve with age and it becomes more  
10      difficult. By the same token, which is have  
11      important for the litigants and for the court and  
12      the whole system, is for the enforcement of those  
13      orders. That is have important. It is very  
14      difficult when we obtain pendente lite orders and  
15      then the mortgages are not paid and the house goes  
16      into foreclosure, and say what you will, the focus  
17      of the case changes.

18           Also, in the context of enforcing orders,  
19      the Second Department issued a great decision,  
20      Miceli, several years ago, and that decision stated  
21      that, in the context of a matrimonial case, failure  
22      to disclose the appropriate remedies not in order of  
23      preclusion, because the person seeking the equitable  
24      distribution has the burden of proof to preclude  
25      them from the documents, does not help them, and in  
26      this Second Department case, Miceli, which the court

1           Stempel  
2   said the better remedy is to deem true the other  
3   party's allegations concerning the intimate assets,  
4   that rule should be enforced, should be perhaps  
5   promulgated in the recommendations of this  
6   Commission.

7           We all work under a time table to try to  
8   get these cases done. The experts that are here  
9   work very hard, but if they don't have the documents  
10   you cannot come to the evaluation. To really  
11   toughen and strengthen the production of those  
12   documents, and if you don't then we will deem the  
13   other allegations true -- let's move on -- I believe  
14   will greatly cut down costs and distance of those  
15   cases.

16           And the last recommendation is one that is  
17   certainly not novel, but I think should receive  
18   greater scrutiny and perhaps revitalization and that  
19   is the use of JHO's and referees. Certain counties,  
20   especially here in New York, they have a superb  
21   referee group, and that when you come in for a date  
22   certain on a trial, whether or not the judge has  
23   cases engaged, you will try the case on that day or  
24   shortly thereafter. In other counties the  
25   experience is not quite the same, and we all, all of  
26   us that have great experience in this field, we may

1           Stempel

2    look at a case and say it's three days. I know many  
3    times judges when they say to the attorneys, How  
4    many days do you think it is, counsel; they say,  
5    Three days. They make it six just from past  
6    experience. But what happens when a case really  
7    goes on over a contested custody case and the trial  
8    court gets backed up because they are really trying  
9    to take testimony, other cases back up. We should  
10   have a system whereby we use JHO's and referees more  
11   frequently so that if the assigned judge who has the  
12   case is backed up and cannot try the case that that  
13   case can still go out for trial, that everyone is  
14   ready, and we can move that case.

15           You talk of funding. It is always  
16   appropriate to have a great idea, but how do we pay  
17   for those ideas? Feedback I have gotten from my  
18   clients and other practitioners in the field is --  
19   the attorneys are whatever per hour. They are  
20   experts. If they were to say the JHO is \$1,000 a  
21   day, just pick a day, in 90 percent of those cases  
22   the parties would be willing to pay that in order to  
23   move the case through rather than have a delay of  
24   several months with all of the occasions --  
25   litigation and enforcement that will go with that.

26           So in conclusion -- I know you had a long

1           Stempel  
2   day today -- I will be short -- I just wish to  
3   emphasize to the commission that the members of the  
4   State Bar Association will work very closely with  
5   you. You have my personal assurances that we will  
6   support you and be actively involved in this  
7   process.

8           Thank you very much.

9           JUDGE MILLER: Thank you very much.

10          Harriet Holtzman.

11          MS. HOLTZMAN: Good afternoon. Thank you  
12   for the opportunity to be here.

13          As everyone whoever had any connection  
14   with divorce knows there are only two things  
15   divorcing couples fight about, money and children.  
16   As we focus on the horror stories of the worst  
17   cases, we tend to forget about the good news, and  
18   there was good news. Most divorcing couples  
19   assisted by their attorneys, and often by mental  
20   health professionals as well, find a reasonable way  
21   to divide their marital property, reallocate their  
22   combined family income through maintenance and child  
23   support, and participate in the lives of their  
24   children, all without setting foot in the courtroom.

25          Another large group of divorcing couples  
26   commence litigation and, with the additional

1 Holtzman  
2 assistance of judges and court personnel, come to  
3 resolve these same issues long before trial becomes  
4 necessary. And even where trial does become  
5 necessary, it is a small fraction of trials that  
6 proceed for weeks and months without end.

7 As we look at ways to improve the process  
8 for everyone, we often forget about the needs of the  
9 majority of litigants, those whose cases do not make  
10 headlines, and do not give rise to juicy anecdotes.  
11 I would like to focus on them.

12 For almost 20 years I have represented  
13 members of Local 32B-J who are facing divorce.  
14 People of moderate means, they are fortunate in  
15 having their legal services provided by a prepaid  
16 legal services plan. Although these union members  
17 are spared the anxiety of allocating scarce funds to  
18 pay their own legal fees, they are as concerned  
19 about the cost of litigation as anyone else. They  
20 still confront the need to pay legal fees for their  
21 spouses, not to mention their share of related costs  
22 of law guardians, mental health professionals,  
23 appraisers and other experts.

24 For families of moderate means like 32B-J  
25 families, the cost of litigation, especially where  
26 custody issues are involved, can be onerous.

1 Holtzman

2 Anything lawyers and courts can do to minimize these  
3 costs will be an important contribution to the lives  
4 of those families and those like them throughout the  
5 state. None of these families can afford to add  
6 expensive litigation to the unavoidable stresses,  
7 economic and otherwise, which accompany the breakup  
8 of a marriage.

9 Saving money by saving time. The best way  
10 to reduce costs in matrimonial or any other  
11 litigation is to save attorney time. Some cost  
12 reduction is the responsibility of the parties to  
13 the divorce action themselves. Parties have a great  
14 deal of input into the conduct of their cases. They  
15 should make their wishes known. By court rule,  
16 parties must receive bills at least every 60 days.  
17 They should exercise their right to review and  
18 discuss their bills, remembering that they cannot be  
19 charged for the time spent doing so.

20 Attorneys can, and should, make every  
21 effort to get to the point in their papers and  
22 counter quantity with quality.

23 Attorneys and judges together must find  
24 ways to reduce costly hours spent waiting in the  
25 courtroom for a conference or an oral argument on a  
26 motion. It would certainly help to extend the

1 Holtzman  
2 practice of scheduling cases for specific time  
3 slots, as already done in some courtrooms, to all  
4 courtrooms, by court rule. Attorneys who  
5 chronically ignore the schedule and show up late,  
6 should be sanctioned from the bench without the need  
7 for the attorney left waiting to spend yet more  
8 attorney time making a motion seeking that result.

9 Litigants, who must by court rule appear  
10 at the preliminary conference, should only appear at  
11 subsequent compliance conferences, if they wish to.  
12 For the litigants who work, requesting a day off for  
13 every conference is a financial burden that can even  
14 jeopardize continued employment.

15 Mechanisms for enforcing existing court  
16 rules more strictly would save time as well. The  
17 statement of net worth, required to be exchanged no  
18 later than ten days before the preliminary  
19 conference can, if properly prepared, provide most  
20 of the financial information necessary to resolve  
21 the financial issues in an average matrimonial case,  
22 particularly where both parties are salaried and  
23 have no exotic assets. But just because a document  
24 is called a statement of net worth, and follows the  
25 format of a statement of net worth, does not make it  
26 a statement of net worth that complies with the

1 Holtzman

2 court rule.

3 I have received statements of net worth  
4 with dream list expenses having no relationship to  
5 reality, since the expenses listed by one party far  
6 exceed both parties' combined net income and there  
7 is no debt building up month by month to account for  
8 the excess expenses. More often than not, I receive  
9 statements of net worth with no supporting  
10 information; no pay stubs, no tax returns, no W-2,  
11 and in short, no back up of any kind.

12 The preliminary conference rules already  
13 in place clearly mandate financial documents to be  
14 produced at the preliminary conference. Please make  
15 it happen.

16 The amount of attorney time that would be  
17 saved if the existing rules were more strictly  
18 enforced and the required financial documents were  
19 actually produced in advance of the preliminary  
20 conference would translate into enormous savings for  
21 the litigants. Perhaps an additional court rule  
22 providing a presumption of attorney fees to the  
23 party forced to make a motion to compel the  
24 production of documents already required by court  
25 rule 202.16(f) would help attorneys coax documents  
26 out of unwilling clients and punish attorneys who

1 Holtzman

2 simply don't bother to seek them.

3 Law guardians, forensics and other

4 experts. In the best of all possible worlds, law

5 guardians and mental health experts would be

6 routinely appointed in contested custody cases.

7 Their services, well performed, can only be helpful.

8 The voice of children old enough to have a

9 meaningful discussion with the law guardian should

10 certainly be heard. The process of forensic

11 evaluation itself, as well as the insight of an

12 objective mental health professional into family

13 dynamics and, where applicable, serious health

14 issues, sheds light helpful to the ultimate decision

15 maker, not to mention often contributing to the

16 always preferable agreement of the parties.

17 Unfortunately, we do not live in the best

18 of all possible worlds. We live in a tight economy

19 with very limited public resources. As a result,

20 law guardians, forensics and other experts should be

21 used in those cases where their expertise can most

22 assist the decision maker. The cost of these

23 services must be considered in light of the

24 financial resources of each family. Settle or pay

25 the experts is a threat that should never be made or

26 implied to end the case.

1 Holtzman

2 Discovery in contested custody cases. For  
3 sometime now there has been an ongoing discussion  
4 about the desirability of extending the practice of  
5 having discovery in contested custody cases,  
6 prevalent in the upstate counties. I understand  
7 that many upstate practitioners find such discovery  
8 helpful in resolving custody cases by agreement at  
9 the earlier stage of litigation. I wish there were  
10 a way to try the procedure for some experimental  
11 time period here. Absent that unlikely possibility,  
12 however, I feel I must register my opposition to  
13 more discovery.

14 The financial burden on average litigants  
15 of increased depositions and other discovery where  
16 such discovery was previously impermissible worries  
17 me. Once such discovery is permitted, won't it have  
18 to be conducted in every case, just to be on the  
19 safe side? While depositions of expert witnesses in  
20 extremely contested custody cases may help settle  
21 some of them, it should not come at the cost of  
22 increased legal expenses in the majority of custody  
23 cases.

24 Finally, grounds for divorce. While we  
25 all understand that changing the grounds for divorce  
26 is a task reserved to the legislature, I would feel

1 Holtzman  
2 remiss in my duty to the clients if I did not  
3 mention the enormous help in reducing the time spent  
4 in matrimonial cases, and the expense that time  
5 brings with it, if New York would only adopt a  
6 divorce ground like New Jersey's, based on the fact  
7 of the parties living separate and apart for a  
8 specified time period.

9 In addition, the lack of no-fault divorce  
10 in New York, except by a separation agreement  
11 followed by a year's wait, deprives many people who  
12 have long lived apart from an uncooperative spouse  
13 of the possibility of divorcing at all. You would  
14 be surprised to learn how many people left marriages  
15 where there was no cruelty, just no love and  
16 affection, only to find themselves with no grounds  
17 for divorce. This unfair result is particularly  
18 hard on workers who look forward to receiving their  
19 hard earned pensions only to discover that they will  
20 receive a reduced monthly amount, absent a divorce  
21 or a waiver signed by an estranged spouse, merely  
22 because they remain legally married.

23 I look forward to a day when I will no  
24 longer have to tell a woman who long ago left her  
25 husband because the marriage was unhappy, not  
26 hostile or violent, that her only recourse is to

1 Holtzman

2 move to New Jersey. Thank you.

3 JUDGE MILLER: Miss Holtzman, before you  
4 leave us, in your opinion should a law guardian and  
5 forensic be appointed in all cases; except for the  
6 cost, but would it be advisable to have a law  
7 guardian, a forensic in every case if we could  
8 afford it?

9 MS. HOLTZMAN: I would appoint one in  
10 every case where the judge felt it would be helpful  
11 in making a decision.

12 JUDGE MILLER: In other words, it is up to  
13 the judge.

14 MS. HOLTZMAN: I would leave it up to the  
15 judge.

16 JUDGE MILLER: Thank you very much.

17 (Applause.)

18 JUDGE MILLER: Maria Arias.

19 MS. ARIAS: Good afternoon. Thank you  
20 very much for this opportunity to address you today.

21 I'm a law professor at the City University  
22 of New York. I've been teaching and practicing in  
23 the Battered Woman's Rights clinical program there  
24 since it began in August of 1990. Since that time  
25 the clinic has had a special commitment to provide  
26 services, specifically for low income immigrant

1           Arias  
2   battered women, and that's the population which my  
3   remarks this afternoon will focus on.

4           Specifically the particular needs and  
5   issues that this population faces in regards to  
6   negotiating family and court matters regarding  
7   orders of protection, custody, visitation and  
8   matrimonial proceedings.

9           I think this population is particularly  
10  vulnerable on account of the lack of their financial  
11  resources, their status as either victims or  
12  survivors of intimate-partner violence and also  
13  their lack of legal status in this country.

14          My experience with these women over the  
15  past 14 years in my work in the clinic has been that  
16  frequently the experiences that these women share  
17  with our organization is that the legal system  
18  results, their participation in the legal system  
19  winds up resulting in their revictimization as they  
20  try to use the very forums that are supposed to be  
21  designated to assist and remedy the legal problems  
22  that they are facing.

23          I think one of the overarching issues that  
24  this population faces, especially in negotiating  
25  family law issues, is the lack of understanding  
26  that, both in the Family Court and the Supreme

1           Arias  
2       Court, as has been my experiences, is the  
3       understanding of how the immigration issues that  
4       this population faces overlaps with the issues that  
5       the courts are trying to address with regards to the  
6       family law matters that are before the court.

7           Frequently, many perpetrators of domestic  
8       violence threaten their partners, and one of the  
9       frequent threats that we hear is that you're going  
10      to be deported and you're going to be deported  
11      because you don't have status in this country, you  
12      can't go to the courts, because if you go to the  
13      courts the courts are going to make sure that you  
14      get deported. And they are also told that they are  
15      going to lose custody of their children. This  
16      winds up in this population not accessing courts and  
17      forums where they could assert legal rights that  
18      they have in this country.

19          Ironically, part of the issue around this  
20      is that part of the reason why these women don't  
21      have their legal status is because their U.S.  
22      citizen and permanent U.S. husbands are not  
23      providing them with the assistance that normally  
24      would be provided by such spouses to help them to  
25      get their immigration status.

26          Under the immigration laws of this country

1           Arias  
2   a person married to a U.S. citizen or a legal  
3   permanent resident is able to adjust their status as  
4   a family relative and can get legal status to remain  
5   legally in this country.

6           This issue around deportability gets  
7   reinforced in a variety of forums and, you know,  
8   it's a really unfortunate thing that this occurs and  
9   it winds up getting repeated in a variety of forums.  
10   And one of the things that we try to educate our  
11   clients on in the population we're working with is  
12   really it's the Department of U.S. Citizen and  
13   Immigration Services that has the authority to be  
14   making the determination about who's deportable, and  
15   in many of these situations these are women who are  
16   potentially eligible for services so that they can  
17   get legal status here.

18           There have been recent legislation under  
19   the Violence Against Women Act, both in 1994 and in  
20   2000, that make these women eligible for relief.  
21   Unfortunately, there's very few people that are  
22   educated in both the Family and Supreme Court that  
23   are able to inform this population of these  
24   services, so that they can access these services.

25           I feel that what these women need is  
26   really adequately trained attorneys who can help put

1           Arias  
2    forth their legal claims and help them to assert  
3    their rights that they have within this country.

4           I also think that we really need to have  
5    training and education of the court personnel, to  
6    make sure that the court understands these issues  
7    and is not continuing to perpetuate false  
8    allegations and myths that are being put forth by  
9    the abusers.

10          I wanted to say that one of the things  
11    that we see, especially in Queens County where I'm  
12    practicing, is that many of these women are forced  
13    to move forward in their cases without assistance of  
14    counsel. Partly because there's not that many  
15    legal services programs available to provide  
16    services for them, partly because there's limitation  
17    around funding to serve this particular population,  
18    so they are forced to navigate a very foreign  
19    system, and frequently they are also women that do  
20    not speak the language and so they have multiple  
21    issues in terms of being able to understand the  
22    forums in which they are in, so that they can assert  
23    their rights.

24          One other thing that I want to raise,  
25    which is something I've encountered personally in  
26    terms of my experience in Queens County in the

1           Arias  
2   Family Court, is that on numerous occasions there  
3   have been judges who have refused to provide  
4   assigned counsel to battered immigrant women because  
5   they are not able to provide the documentation that  
6   the Court is requiring about their financial  
7   situations. And these are issues regarding, you  
8   know, the Court wants a W-2, wants income tax  
9   returns, and this is a population that is frequently  
10   working as undocumented workers and so they are  
11   either getting paid, they are frequently getting  
12   paid in cash and don't have this type of  
13   documentation. And even when they provide credible  
14   evidence and sometimes even are able to get an  
15   employer to write a letter on their behalf, document  
16   that this is the income they have and frequently  
17   this is income that is, would make them eligible.  
18   I recently had a denial of a woman who's income was  
19   \$150.00 a week for herself and her daughter. Her  
20   daughter was public assistance eligible, was on  
21   public assistance and the judge denied having her  
22   portion of the law guardian fees be paid through the  
23   18B program because the Judge said she didn't  
24   provide the adequate financial information. And I  
25   feel that this is a way of sort of punishing these  
26   women.

1 Arias

2 And I just wanted to repeat, the reason  
3 why these women don't have a proper authorization to  
4 work is because they haven't, their spouses haven't  
5 assisted them. So it's important for the Court to  
6 be able to understand how these two things are  
7 overlapping each other.

8 I believe that you've heard a lot of  
9 testimony today in terms of the different problems  
10 with issues about law guardians, forensics, and I  
11 think that in terms of when we're talking about  
12 immigrant women these problems are exacerbated, they  
13 are exacerbated by the fact that frequently the law  
14 guardians, as well as the forensic experts, don't  
15 have the cultural competence to understand the  
16 particular ethnic and cultural issues that are  
17 relevant to this particular community.

18 Additionally, there's many issues about  
19 language capabilities, and the two most frequent  
20 problems that I see with this in terms of the use of  
21 forensic experts is, you either get a forensic  
22 expert who believes that you shouldn't use an  
23 interpreter, so even if a woman has very limited  
24 English proficiency, she may speak a little bit of  
25 English but not sufficiently to get through the  
26 in-depth interview that it takes to have a forensic

1           Arias  
2   interview with a forensic psychologist, but the  
3   forensic believes that having an interpreter is  
4   going to interfere, so they will go forward and do  
5   the interview but they are not really able to gather  
6   the necessary information in order to make the type  
7   of assessment and document the information they need  
8   to document; or, on the other hand, you have experts  
9   that say that they are going to use an interpreter  
10   and, unfortunately, you have interpreters that are  
11   not really sufficiently versed in, not just being  
12   able to interpret the language, but to understand  
13   sort of the culture of what's the information that's  
14   being gathered through forensic that's being  
15   documented? So, it's like this multitude of  
16   problems that present themselves.

17           My personal experience is also that  
18   there's a lot, there's not that many forensic  
19   experts that are multilingual. I have some  
20   forensic experts that speak Spanish, but other than  
21   Spanish there's very few other languages in which  
22   I'm able to meet the needs of the clients I'm  
23   serving, and I'm serving the needs of clients from a  
24   variety of ethnic backgrounds, so there is a variety  
25   of ethnic backgrounds that I'm meeting.

26           I want to say something with regards to

1           Arias  
2   the work I was doing and where there was a law  
3   guardian appointed in the case and the law guardian,  
4   on our second appearance in court, said that he  
5   wasn't able to interview the child because the child  
6   only spoke Spanish. The child was five years old  
7   and was at home. And I talked to him about whether  
8   he could maybe use an interpreter and he said, well,  
9   no, I can't speak to her, she doesn't speak English  
10   and I don't speak Spanish, so I can't speak to her.  
11   And then I represented this in court, and it was  
12   accepted by the Court; so I feel it was like a  
13   double problem in terms of the Court condoning that  
14   type of behavior.

15           That's just one example in terms of the  
16   law guardian issues.

17           And lastly, I do want to talk about the  
18   need in terms of interpretation and translation.

19           My experience in Queens is that there are  
20   court staff that interpret in the Spanish language  
21   and in French and Creole, but there's about 35  
22   different languages that I myself have worked with  
23   in the 14 years that I've been at CUNY Law School.  
24   The Court tries to get per diems but frequently the  
25   way a woman gets through the court system, in either  
26   the Family Court or the Supreme Court, is through a

1           Arias  
2 family member or somebody she knows who she brings  
3 to the court. And that is not an adequate way for  
4 a person to be able to get through the proceeding in  
5 the Supreme Court or the Family Court.

6           I want to say that in terms of Supreme  
7 Court, I think it's even more difficult for a  
8 foreign pro se immigrant woman to negotiate. The  
9 Family Court at least is supposed to be a little bit  
10 more user friendly and is supposed to be a forum  
11 specifically for pro se litigants. But in the  
12 Supreme Court, if you don't have an attorney it's  
13 going to be very difficult to get through, and my  
14 experience is it's very difficult to get appointed  
15 counsel in matters that have you before the Supreme  
16 Court, so frequently women wind up defaulting and a  
17 decision winds up getting entered, and they don't  
18 really get an opportunity to assert their rights.

19           JUDGE MILLER: I have a question for you.

20           MS. ARIAS: Yes?

21           JUDGE MILLER: Could your group deduce an  
22 information sheet, possibly of different languages,  
23 a checklist for court personnel, so that they could  
24 present, could present to immigrants who do not have  
25 green cards, or make literature available to that  
26 effect? In other words, to have people in the

1           Arias  
2 courthouse who would have this information, in  
3 different languages, and present it to the  
4 population, to at least give them some idea how to  
5 navigate the system?

6           MS. ARIAS: Right. There's actually, I  
7 think maybe in three or four different languages  
8 there's a few short brochures that try to help  
9 people navigate, I think at least an Order of  
10 Protection. Not other parts of the proceeding, but  
11 in the Family Court the Order of Protection part.

12          JUDGE MILLER: The problem you point out  
13 about a lack of legal representation for indigent  
14 persons in matrimonial cases is not only a problem  
15 in Queens, it's a problem throughout the state.

16          Do you personally or does your  
17 organization have any recommendation for correcting  
18 this problem?

19          MS. ARIAS: Maybe mandatory pro bono for,  
20 you know, getting counsel, getting private attorneys  
21 to have to take cases. I know that in Queens I've  
22 worked with the Bar Association in Queens and they  
23 do take divorces, but they will only take  
24 uncontested matters.

25          The other issue is that I do think that  
26 there's a number of clients, for example, that I

1           Arias  
2   wind up representing in my organization who, where  
3   the husbands actually have assets, it's just that  
4   our client doesn't have access to it. And if there  
5   could be proceedings that could make those assets  
6   more readily available, these women would have some  
7   financial recourse so that they could use that in  
8   order to represent themselves.

9           JUDGE MILLER: Counsel?

10          MS. ARIAS: Yes?

11          JUDGE MILLER: Do you have an opinion as  
12   to whether a forensic evaluator could be trained to  
13   be sensitive to cultural issues?

14          MS. ARIAS: Yes. I believe, I mean I'm a  
15   very open-minded person and I believe that all of us  
16   are able to be trained and educated and learn about  
17   new and different issues.

18          JUDGE MILLER: How would you go about  
19   training?

20          MS. ARIAS: Well, I think that there's a  
21   number of organizations, for example, my  
22   organization works with a number of community-based  
23   organizations, with the Asian community, with  
24   Latinos, and we have personnel from those  
25   organizations, they come to our organization and do  
26   training in our classrooms, we educate our students

1           Arias  
2   on how to work with those clients. We sometimes  
3   partner together on the representation of a client  
4   and we have a community-based person from our  
5   client's cultural background that will work with us  
6   around the representation, and through that we  
7   ourselves are getting educated and learning more  
8   about how to serve that particular culture.

9           I think that the one thing that I would  
10   say about that is that it's not a quick fix.  
11   Frequently when I get asked to do training around  
12   cultural competence, it's like can you come and do  
13   15 minutes, you know, during the lunch hour of the  
14   court personnel's lunch break, and it's one shot and  
15   then, you know, I don't get in there again, and it's  
16   a much more complex thing, and I think we all have  
17   to have a certain level of sensitivity of willing to  
18   be able to work on it, it's not something you can  
19   learn in 15 minutes.

20           JUDGE MILLER: Thank you very much.

21           And our last speaker, Jo Ann Douglas.

22           MS. DOUGLAS: Hello.

23           I'd like to thank you for the opportunity  
24   to speak today. And I must tell you, I've heard  
25   every speaker today and every single person has  
26   raised really compelling points and has been highly

1 Douglas

2 articulate and they are all very very hard acts to  
3 follow, but nonetheless, I'd like to try.

4 I'd like to use my time to discuss the  
5 issues relative to the law guardian practice that I  
6 believe are the most important issues.

7 The first is the compelling need for law  
8 guardians in hotly contested custody and visitation  
9 matters.

10 The second would be the role of the law  
11 guardian, and the need for statewide protocols  
12 defining that role in a uniform way.

13 The third is training for law guardians  
14 that is consistent throughout the state, including  
15 "advanced" training for special issues, such as drug  
16 addicted parents or special needs children, or  
17 domestic violence, or the immigrant population, to  
18 which I was just enlightened.

19 The first step in reviewing our practices  
20 in the field of parenting litigation should be the  
21 recognition that the single most important focus  
22 must be on the children, on their rights, their  
23 needs, their safety, their comforts, their wishes,  
24 and thus, their best interests.

25 Parents' rights and responsibilities are  
26 of paramount concern to the court but should have no

1 Douglas  
2 more than equal standing to the court's independent  
3 review and consideration of the children themselves.  
4 In order to better understand the children's plight  
5 and have access to their position, we have  
6 legislation to permit the children representation,  
7 and we have evolved to where we often favor the use  
8 of such representation, especially in contentious  
9 situations. Far too frequently, well-intended  
10 parents are so embroiled in the litigation that  
11 their otherwise keen awareness of and sensitive to  
12 their children's welfare is clouded by the  
13 overwhelming anger and resentment that has been  
14 engendered for the other parent, or even by the  
15 other parent, it doesn't matter. Parents who would  
16 never think of harming their children suddenly lose  
17 sight of the children's fragility, and are focused  
18 on their own battles, drawing the children in at  
19 every turn. This applies to BOTH parents, in fact,  
20 though often one's judgment becomes more impaired as  
21 a negative perception of her or his own plight in  
22 the litigation takes over. In these, and not all,  
23 circumstances the Court does well to appoint a law  
24 guardian, and what might better be called Children's  
25 Counsel or Child Advocate. In fact, the very use  
26 of the word "guardian" may actually be misleading to

1 Douglas  
2 some litigants, causing a belief that the lawyer  
3 actually assumes a parental role of sorts; this is  
4 surely not the case. Having recently returned from  
5 a nationwide conference on child advocacy, I have  
6 learned we are unique in using this particular term  
7 for a child's lawyer and advocate.

8 The children's lawyer has become and  
9 should remain a key element in ascertaining the  
10 rights, needs, comfort and wishes of the child,  
11 wholly separate and apart from the other horrific  
12 events surrounding the divorce. However, this is  
13 not to say the child's lawyer is to determine how  
14 those elements are resolved, nor is she to advise  
15 the Court as to the client's best interests. In  
16 fact, it is uniquely the Court's obligation to  
17 assess and rule on best interests. Instead, the  
18 law guardian is there to do no more than what the  
19 parents' counsel do, advise and advocate.

20 One of the problems that I believe this  
21 esteemed commission will encounter is there is no  
22 continuity within our state or among our  
23 departments, counties, or even judges, as to exactly  
24 how the law guardian should function, what the role  
25 really is, and what anyone's expectations should be.

26 And I might point out that expectations

1 Douglas  
2 are very very important, and that the trauma, that  
3 one of your principle issues on this commission as  
4 to the trauma of families would be greatly reduced  
5 if they had expectations of this process and of the  
6 personnel in the process.

7 While the New York State Bar Association  
8 has been very active in devising the oft-cited  
9 standards for law guardian representation, a recent  
10 article about law guardians in the State Bar journal  
11 summer issue crystallizes the need for standards, as  
12 it reflects the disparate practices upstate to  
13 downstate. When two letters to the editor  
14 responded to the article, pointing out ethical  
15 considerations that it seemed to ignore, the  
16 author's response was "there are unwritten rules of  
17 practice within New York State, depending in part on  
18 the regions in which one practices in." This, I  
19 submit to you, is unacceptable, certainly, in the  
20 representation of children, and basically in all of  
21 matrimonial litigation.

22 As to the role, my colleague and friend,  
23 Brian Zimmerman, read to you from the Chief Judge's  
24 task force's definition of "law guardian", and I  
25 would like to remind you that "when the law guardian  
26 is convinced that either the child lacks the

1 Douglas  
2 capacity for knowing, voluntary and considered  
3 judgment, or that following the child's wishes is  
4 likely to result in a risk of physical or emotional  
5 harm to the child, the law guardian would be  
6 justified in taking a position that is contrary to  
7 the child's wishes."

8 The questions relative to the role should  
9 be answered from this one protocol.

10 Is the role pure advisor/advocate, as the  
11 parents' attorney? ABSOLUTELY.

12 Is there an element of best interests to  
13 be assessed by the law guardian? NOT IF THE CHILD  
14 IS CAPABLE OF KNOWING, VOLUNTARY AND CONSIDERED  
15 JUDGMENT.

16 Does the law guardian have an obligation  
17 to inform the Court of information that would  
18 enhance a position that is contrary to the client's  
19 position? Again, NOT IF THE CHILD IS CAPABLE OF  
20 KNOWING, VOLUNTARY AND CONSIDERED JUDGMENT.

21 My somewhat educated guess is that the  
22 hearings in Albany, Buffalo and maybe even White  
23 Plains will turn up some very different views on  
24 this. And this is one difference among law  
25 guardians that must be codified into a cohesive set  
26 of rules and parameters for the practice. The

1 Douglas  
2 lawyers should know what to expect, the judges  
3 should know what to expect, law guardians should  
4 know what to expect, and most important, the  
5 parties, including the child, should know what to  
6 expect.

7 Law guardians should actively participate  
8 in and even prosecute all facets of their client's  
9 rights in the litigation, including the right to a  
10 peaceable and peaceful environment, access and  
11 decision making. However, at the same time, law  
12 guardians, as any other attorney, must assess the  
13 nature and viability of the client's position and  
14 determine whether advocating it will be helpful or  
15 harmful to the client's overall position. The  
16 decision is to be made with the client, of course.

17 I imagine you've heard today, I don't have  
18 to imagine, that some believe that the law guardian  
19 is too powerful, and I agree that should not be the  
20 case. The law guardian is important but should not  
21 be viewed any differently than any other lawyer in  
22 the case. The law guardian has an important role,  
23 but it's only part of the equation. The law  
24 guardian, coming into the matter at the outset with  
25 complete neutrality, as between the parents, will no  
26 doubt acquire information, make tactical judgments,

1 Douglas  
2 attempt negotiations, work with and advise the  
3 client, and develop a position on behalf of the  
4 client that may be consistent with one parent more  
5 so than with the other. While the law guardian may  
6 have a birds eye view of many of the circumstances  
7 of the family and the parenting, and may even make a  
8 personal, private assessment and form an opinion, as  
9 parents' lawyers do, it is simply not his job to  
10 convey that to the Court or to advocate it in the  
11 litigation. The First Department, consistent with  
12 the Advisory Committee, has promulgated standards  
13 that require the law guardian to advocate for the  
14 child's position unless his judgment is impaired by  
15 virtue of age, influence, or other factors. In  
16 either case, the child's position must be disclosed,  
17 absent direction from the child to the contrary.

18 There is, however, one factor worth  
19 noting. While there is an expectation that the law  
20 guardian may not advocate the position he or she has  
21 come to believe is the most appropriate. The mere  
22 fact that the law guardian, pursuant to the rules,  
23 declines to advocate the child's position is a  
24 pretty clear signal as to what the law guardian  
25 believes. Following statewide definition on this  
26 issue will be enormously helpful to the courts, to

1 Douglas  
2 the lawyers, to the litigants and to the law  
3 guardian.

4 Law guardians must be trained to handle  
5 the various cases to which they are appointed,  
6 whether they include allegations of domestic  
7 violence, child abuse, drug abuse, mental illness,  
8 religious differences, cultural differences, or  
9 special circumstances that permeate custody  
10 litigation. The training, too, must be consistent  
11 throughout the state, both in terms of the  
12 requirement for and the content of that training.  
13 The different standards in the four departments  
14 should be molded into a cohesive, single expectation  
15 of quality services by all appointed counsel, and  
16 standards for making and accepting appointments in  
17 paid and unpaid matters should be statewide, not  
18 based on venue or parents' resources.

19 The last issue I wanted to discuss, it's  
20 not the last in importance, certainly, it is my  
21 sincere belief that those attorneys who accept to  
22 serve as law guardian should be mandated to serve as  
23 pro bono or publicly-funded law guardians as well.  
24 This, of course, becomes more difficult if the law  
25 guardians have full litigation practices and appear  
26 as law guardians only occasionally. There may

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2 simply not be enough room in their practices for the  
3 paid cases and the 18B or pro bono cases on top of  
4 that.

5 One of the most important messages I would  
6 like to convey to you today is that it is the right  
7 of ALL children, not just the children of wealthy  
8 parents, to have competent counsel. While the  
9 children of the wealthy will have the most highly  
10 compensated and trained law guardians appointed for  
11 them, the children of the poor surely deserve  
12 quality representation as much as, if not more than,  
13 children of the wealthy, particularly because it is  
14 sometimes so easy to "fix" certain problems with  
15 money, while the needs of the poor may require  
16 greater skill, imagination and insight. On a  
17 statewide basis, law guardian certification should  
18 include the commitment of representation to all  
19 children as assigned by the Court, and I would urge  
20 that a reasonable ratio of unpaid cases to highly  
21 paid cases be set up. In fact, I might point out  
22 that this could be a very useful tool as a  
23 modification to the Part 36: rule, the "cap"  
24 currently in place could be credited by the  
25 calculation of the attorney's regular rate of pro  
26 bono time, or minimally paid time which would be

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2 deducted from the law guardian's total approved  
3 compensation under the rule. Regardless of whether  
4 this system of encouraging the best most renowned  
5 attorneys to represent the poor is used, or one  
6 where there is simply a mandate to take a certain  
7 number of unpaid or lesser paid cases, or a  
8 combination, it is the unique opportunity of this  
9 Commission to effectuate some system to ensure that  
10 the parents who can pay for "the best" are not the  
11 only ones who receive the best.

12 JUDGE MILLER: I have a few questions for  
13 you, and some of these have been asked of other of  
14 our speakers and we wanted to know your point of  
15 view.

16 If the child is not competent to advise  
17 the law guardian as to his or her wishes, why have a  
18 law guardian? Why not a guardian ad litem, or why  
19 not rely on the forensic?

20 MS. DOUGLAS: You know, certainly in the  
21 First Department there are some judges who only  
22 appoint law guardians, whether it's for a six-month  
23 old or a 16 year old. And I've been in that  
24 position in both situations, and other than the  
25 verbal communication with the child, a lot of the  
26 work is the same. The investigation that any

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2 lawyer does for a client is the same, the interviews  
3 that you conduct, the third-party consultations and  
4 so forth, they are all the same. And sometimes  
5 children can communicate. Though I'm not a mental  
6 health professional, children --

7 JUDGE MILLER: Why not a guardian ad  
8 litem?

9 MS. DOUGLAS: A guardian ad litem would be  
10 fine, except some judges do not want their court  
11 appointees to testify or prepare reports, they want  
12 them to participate in the litigation. Some judges  
13 permit their guardian ad litem to participate in the  
14 litigation and at trial. Sometimes the roles are  
15 very very close, your Honor.

16 JUDGE MILLER: And your view is it should  
17 be uniform throughout the state?

18 MS. DOUGLAS: It would be nice.

19 JUDGE MILLER: Another question.

20 If you feel, as the law guardian, that the  
21 child, your child is being brainwashed, do you still  
22 advocate what that child says he wants, or do you  
23 substitute your judgment?

24 MS. DOUGLAS: I would have to say it  
25 depends on the circumstances. If the brainwashing  
26 is really contrary to what I see the reality to be,

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2 I would first of all discuss it with the client, if  
3 the client is old enough, and I would try to  
4 understand where the client's position conveyed to  
5 me is coming from. After that, if I feel I really  
6 cannot advocate that position, I would get the  
7 client's permission to convey his or her position to  
8 the Court, and then in the First Department, again,  
9 there's no uniformity. The First Department says  
10 that the lawyer, the law guardian does not advocate  
11 the child's position. It's unclear, frankly,  
12 whether the law guardian advocates a different  
13 position or just twiddles his thumbs. Which I  
14 don't believe is appropriate. There's a person  
15 there who can be very helpful in offering evidence  
16 to the Court and eliciting testimony from all of the  
17 witnesses.

18 JUDGE MILLER: The rules are not clear.

19 MS. DOUGLAS: And they are certainly not  
20 uniform.

21 JUDGE MILLER: One last question.

22 Should a law guardian have an ex parte  
23 access to a forensic in a custody case?

24 MS. DOUGLAS: There was a time when this  
25 happened all the time, and everybody knew about it  
26 and nobody seemed to object. Now it is no longer

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2 the case.

3 I think there are very rare circumstances  
4 where, in my experience, upon written consent of  
5 counsel about a particular issue I have had  
6 permission to discuss with the forensic that the  
7 issue exists to insure that the forensic is able to  
8 visit the issue. I can understand a concern about  
9 one lawyer have access to the forensic and not the  
10 other. My only concern is that my client doesn't  
11 have the same capacity for articulating to the  
12 forensic what the parents can articulate. My  
13 client is also not prepared for the forensic  
14 evaluation the way I believe many litigants are  
15 prepared by their law firms.

16 JUDGE MILLER: Thank you very much.

17 That will conclude the first public  
18 hearing of this Commission, and before we do so I  
19 want to first of all thank the presenters, who I  
20 think all of you were articulate and informative and  
21 most helpful, with very important testimony.

22 I want to thank the audience, who were  
23 courteous and obviously who were genuinely  
24 interested in all that which transpired. And for  
25 the Commission, I know I can speak, that this has  
26 been an enlightening and important public hearing,

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2 and we look forward to hearing much more from all of  
3 you. Thank you.

4 (Whereupon the public hearing was

5 concluded.)

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