

NEW YORK STATE MATRIMONIAL COMMISSION  
PUBLIC HEARING

DATE: April 21, 2005

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

COMMISSION CHAIRWOMAN:

HONORABLE SONDR A MILLER

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MARCIA M. RAINS  
Sr. Court Reporter

1 Matrimonial Commission Hearing

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

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

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

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

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

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

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

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2           before our matrimonial and family court.

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

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

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

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

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

21          We are ready to begin our hearing.

22          I understand that Miss Lisa --

23          Lorraine Engl? Thank you.

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

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

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

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

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

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

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



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

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

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

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

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

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

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

13          Dr. Warren Keller.

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

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

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

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

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

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

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

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

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

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



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2           after a trauma of this magnitude.

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

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

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

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

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

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

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

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

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

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

5           LAURENCE LOEB: Yes. Yes.

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

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

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

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

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

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

17           DR. WARREN KELLER: Thank you.

18           HON. SONDR A MILLER: Miss Lisa Bell.

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

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

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

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

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

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

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

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

1           Matrimonial Commission Hearing

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

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

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

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

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

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

24          HON. SONDR A MILLER: Thank you.

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



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

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

1 Matrimonial Commission Hearing

2 public, well lighted area.

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

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

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

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

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

1           Matrimonial Commission Hearing  
2           from moving on into another phase of my life.

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

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

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

13          Solution:

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

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

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

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

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

5           HON. SONDRRA MILLER: Yes. Miss Ashcraft.

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

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

25          What -- what this does is exactly what it

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

1 Matrimonial Commission Hearing

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

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

10 SARA STOUT ASHCRAFT: Yes.

11 HON. SONDR A MILLER: Domestic violence?

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

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

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

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



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

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

1 Matrimonial Commission Hearing

2 it's hard to get them back.

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

6 HON. SONDRRA MILLER: Thank you very much.

7 SARA STOUT ASHCRAFT: Thank you.

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

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

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

1           Matrimonial Commission Hearing

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

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

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

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

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

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

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

25          My belief then was that the system was fair

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

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

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

25          My case was unusual -- unusual in that along

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

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

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

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

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

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

1           Matrimonial Commission Hearing

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

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

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

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

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

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



1           Matrimonial Commission Hearing  
2           litigation. This, regardless of who was  
3           responsible for the lengthy delay.

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

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

1 Matrimonial Commission Hearing

2 Thank you for taking the time to listen.

3 HON. SONDRRA MILLER: Thank you very much.

4 Miss Linda Chodos.

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

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

1           Matrimonial Commission Hearing

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

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

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

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

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

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

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

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

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

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

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

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

1           Matrimonial Commission Hearing  
2           law should be encouraged by the courts, by the  
3           Bar, and by the State Legislature.

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

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

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

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

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

25           It is never best for family with children --



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

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

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

25                LINDA CHODOS: These goals are rarely

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

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

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

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

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

8           Mr. Antinore.

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

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

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

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

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

1           Matrimonial Commission Hearing

2           must reflect this equality.

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

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

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

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

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

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

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

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

25                An argument could be made that this training



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

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

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

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

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

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

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

24          MARK ANTINORE: Thank you.

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

1 Matrimonial Commission Hearing

2 EDWARD ORLANDO: Good morning. My name is

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

4 Rights Division -- the Juvenile Justice Division,

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

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

7 every day is practice in Family Court in Monroe

8 County, serving as a Law Guardian to children in

9 juvenile delinquency, PINS and custody matters.

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

11 the Fourth Department Appellate Division's Law

12 Guardian program.

13 The Legal Aid Society in Rochester, unlike

14 most Legal Aid Societies, does not have a criminal

15 defense component to it. It solely handles civil

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

17 lower middle class income people.

18 The civil division has, as part of its

19 components, a domestic violence program, a

20 domestic relations program, and a limited means

21 program. Every day, in every capacity, that

22 division deals with matrimonial law. My Juvenile

23 Justice Division contracts with the Office of

24 Court Administration to supply Law Guardian

25 services.

1 Matrimonial Commission Hearing

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

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

1           Matrimonial Commission Hearing

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

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

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

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

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

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

1 Matrimonial Commission Hearing

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

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



1 Matrimonial Commission Hearing

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

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

25 On the Supreme Court side, when a Supreme

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

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

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

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

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

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

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

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

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

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

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

18          EDWARD ORLANDO: Yes.

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

20          EDWARD ORLANDO: Thank you.

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

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

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

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

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

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

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

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



1           Matrimonial Commission Hearing

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

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

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

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

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

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

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

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

1           Matrimonial Commission Hearing

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

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

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

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

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

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

1           Matrimonial Commission Hearing  
2           custody and visitation based on the abuser's  
3           manipulative self-presentation and survivors of  
4           abuse are often labeled dysfunctional.

5           Victims' attempts to get law guardians and  
6           forensic experts to understand the abuse and to  
7           obtain protection for her children can often be  
8           held against her. The victim is seen as  
9           unsupportive of the child's relationship with the  
10          father. When a victim finds herself in conflict  
11          with a Law Guardian, or feels a Law Guardian to be  
12          biased against her, there is no recourse, no  
13          knowledge of who these people are accountable to.  
14          There do not appear to be any procedures in place  
15          to review Law Guardians, nor do there appear to be  
16          any standards or protocols that every Law Guardian  
17          or evaluator is expected to follow.

18          My last point here is, uh, about access to  
19          the legal system. And -- and it's been said  
20          before. Women without financial resources have an  
21          enormously difficult time obtaining legal  
22          representation. For these women who live in  
23          poverty they're only able to access the very  
24          strained volunteer lawyer system. And here in  
25          Erie County, due to funding crises, Neighborhood

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

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

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

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

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

1           Matrimonial Commission Hearing  
2           including temporary orders of removal of the  
3           abusive party from the marital residence.

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

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

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

25          We need to give litigants more direct



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

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

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

12          (10:41 a.m. recess.)

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

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

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

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

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

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

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2           questions.

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

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

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

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

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

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2           recently released final reports.

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

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

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

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

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

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

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

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

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

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2           lasting reductions in the levels of trauma  
3           currently being suffered by all parties.

4           Your Honor, and distinguished cultural  
5           leaders of the New York Matrimonial Commission, as  
6           the most politically unencumbered branch of our  
7           government you are in the strongest contemporary  
8           position to provide the bold visionary leadership  
9           that is so desperately called for today. In the  
10          name of our state's children I cannot encourage  
11          you enough to seize upon this historic  
12          opportunity. Thank you.

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

14          OLIVER BICKEL: Thank you.

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

17          STEPHEN BRACKIN: It's Dr. Stephen Brackin.  
18          And -- and I normally don't like to, uh, read a  
19          script, but this is a time-pressured situation, so  
20          I'm just going to read my thing.

21          I -- I'm Dr. Stephen Howell Brackin. I have  
22          a PhD in mathematics from Penn State. My research  
23          applies a branch of mathematics that few people  
24          know about, to software reliability and security  
25          problems that few people know about. That's part



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2           of my story.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

5           And this is me and the kid.

6           And this is the kid and an alligator.

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

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

12          HON. SONDR A MILLER: Thank you.

13          STEPHEN BRACKIN: Questions?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



1           Matrimonial Commission Hearing  
2           cards.  
3           After a few years of not hearing from her or  
4           knowing what was happening with my grandparents I  
5           picked up a phone, called her from Georgia. A man  
6           answered the line. I asked -- asked if Maria was  
7           there. Response, "Who is this? Don?" Answer,  
8           "Yes. Who is this?" "Well, this is your father,  
9           Don." There was a long pause on the phone, and I  
10          asked how my grandparents were. "Your grandfather  
11          died a few years ago, and your grandmother is  
12          doing just fine." I was very saddened, for no one  
13          ever notified me of the death of a man. I  
14          remember sitting in his lap and smelling the  
15          tobacco of his pipe. Sad, very sad. But to the  
16          positive, my true father made arrangements to come  
17          to see me while I was serving in Georgia.  
18          Very good first meeting in almost every  
19          perspective. I got to meet with my two brothers  
20          and a sister, which, by the way, both now serve  
21          over in the Middle East. I was left sad in the  
22          fact that I had other siblings I knew little about  
23          or had the opportunity to be active in their  
24          lives.  
25          However, for the first meeting in almost 20

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

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

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

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

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

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

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

11          Any questions?

12          Just a minute. Would you come back, please?

13          Mr. Hoak, there are some questions for you.

14          DONALD HOAK: Yes, ma'am.

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

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

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

1 Matrimonial Commission Hearing

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

4 HON. SONDRRA MILLER: He never knew?

5 DONALD HOAK: No, ma'am.

6 HON. SONDRRA MILLER: He never knew.

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

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

13 HON. SONDRRA MILLER: Okay. Thank you.

14 Robert Demerath. Dr. Robert Demerath.

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17          Is he here?

18          RAYMOND HAVLICEK: Yes, I'm here.

19          HON. SONDR A MILLER: Doctor?

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

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

24          RAYMOND HAVLICEK: Oh, my goodness! Okay.

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

1 Matrimonial Commission Hearing

2 prepared.

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

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

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

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

1           Matrimonial Commission Hearing  
2 possible assessment and intervention services.

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13           HON. SONDRRA MILLER: Please go on.

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



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

4           HON. SONDR A MILLER: How? How?

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

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

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

1 Matrimonial Commission Hearing

2 going to be able to render the type of quality

3 reports that our clients and courts deserve.

4 HON. SONDRRA MILLER: Is it your position that

5 the forensic should give an opinion to the Court

6 as to the ultimate issue in the case of the

7 child's custody?

8 ROBERT HAVLICEK: Your Honor, I've always

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

10 provide a recommendation for custody, I just

11 obediently follow the order. That is my thought

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

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

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

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

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

17 doing things like testing, interviewing, uh,

18 talking to other professionals, obtaining lots of

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

20 justices to reach their decisions. In my

21 experience I feel that when I finish one of my

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

23 I'm frequently criticized for making them too

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

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

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

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

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

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

21          (12:02 p.m. recess.)

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

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

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

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

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

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

1           Matrimonial Commission Hearing  
2           empassioned about the effects of mediation on  
3           family disputes.

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

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

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

1           Matrimonial Commission Hearing

2           year. I think commendable statistics.

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

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

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

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

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

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



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

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

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

25           I would suggest that we expect all of our

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

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

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

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

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

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

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

1           Matrimonial Commission Hearing

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

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

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

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

1           Matrimonial Commission Hearing

2 afterwards.

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

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

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

1           Matrimonial Commission Hearing

2           involving custody.

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17          HON. SONDR A MILLER: Any suggestion --

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

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

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

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

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

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

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

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

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

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

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



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

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

1 Matrimonial Commission Hearing

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

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

11 HON. JANICE ROSA: Thank you.

12 HON. SONDR A MILLER: Miss Linda Henderson.

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

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

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

1           Matrimonial Commission Hearing

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

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

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

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

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

1           Matrimonial Commission Hearing  
2           wrong by wanting to spend more time with his  
3           daughter.

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

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

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

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

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

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

1           Matrimonial Commission Hearing

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

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

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

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

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



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

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

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

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

1 Matrimonial Commission Hearing

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

3 Miss Lisa Cagney, please.

4 LISA CAGNEY: Good afternoon. I appreciate

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

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

7 this.

8 I am a mental health therapist in Olean, New

9 York. I work for the Parent Education Program.

10 We service four counties in the southern tier,

11 Chautauqua, Allegany, Cattaraugus and then Wyoming

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

13 facilitator for a family alternative resolution

14 program. This program provides an intensive

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

16 disputing custody and visitation agreements. I am

17 presenting how our educational class, with parents

18 that are appropriate, attending together, as

19 opposed to separately, address the concerns of

20 this hearing, which are limiting costs, minimizing

21 delays to the court system, and reducing trauma to

22 all the parties involved. Our program aids

23 limiting cost to individuals and to the Court.

24 Presently our program costs the court, the state

25 and the county zero dollars. It also reduces the

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

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

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

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

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

25          I am hoping that this Commission may explore

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

10          HON. SONDRRA MILLER: Thank you very much.

11          Is Mr. Brian Kolb here?

12          Miss Anne Downey?

13          Not yet.

14          Is she here? Good.

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

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

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

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

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

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

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

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

1 Matrimonial Commission Hearing

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

5 HON. SONDRRA MILLER: Thank you.

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

9 WENDY DEER: White Plains.

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

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

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



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

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

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

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

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

18          Mr. Brian Kolb. Assemblyman.

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

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2           to the Commission later on.

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

4 HON. SONDRÁ MILLER: Assemblyman, excuse me

5 for interrupting --

6 BRIAN KOLB: Sorry.

7 HON. SONDRÁ MILLER: -- but could you tell us

8 specifically what your bill provides?

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

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

11 limit. I apologize.

12 HON. SONDRÁ MILLER: Right.

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

14 summary of the provisions, which basically that in

15 cases of child custody the Court's paramount

16 concern is always the best interests of the child.

17 Shared parenting where both parents share as

18 equally as possible in the legal responsibility,

19 living experience, and physical care of the child

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

21 Where the relationship between the parent and

22 children is free from domestic abuse, violence,

23 neglect and other harmful circumstances, shared

24 parenting is beneficial to both parents and

25 children.

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

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

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

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

20 HON. SONDRÁ MILLER: Thank you.

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

23 HON. SONDRÁ MILLER: Mr. Robert Elardo.

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

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

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

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

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

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

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

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

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

15          HON. SONDRRA MILLER: Thank you very much.

16          ROBERT ELARDO: You're welcome.

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

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

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

20           Miss Sharon Nosenchuck.

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



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

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

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

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

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

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

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

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

1 Matrimonial Commission Hearing

2 matters.

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

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

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

25 The challenge is daunting. Realistically

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

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

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

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

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

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

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

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

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

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

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

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

24          Sometimes Law Guardians who do not have much if  
25          any training on the issue of domestic violence,

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

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

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

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

25          Thus, many times when a domestic violence

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

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

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

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

25          The Supreme Court often holds victims of



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

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

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

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

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

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

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

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

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

25          I thank the Commission for allowing me to

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

6           HON. SONDR A MILLER: Thank you, Miss  
7           Nosenchuck.

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

11          (2:46 p.m. recess.)

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

13          HON. SONDR A MILLER: All right. Miss Donna  
14          Durbin.

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

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

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

10          DONNA DURBIN: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25           HON. SONDR A MILLER: Are the lawyers involved



1 Matrimonial Commission Hearing

2 in the mediation if they have lawyers?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25          While many earlier speakers have already

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

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

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

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

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

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

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

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



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

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

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

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

1           Matrimonial Commission Hearing

2           their own resolutions.

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

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

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

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

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

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

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

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

8           HON. SONDRRA MILLER: Thank you very much.

9           Amy Schwartz.

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

25          I saw numerable clients who had no idea what

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

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

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

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

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

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

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

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

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

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

25          AMY SCHWARTZ: Okay.

1 Matrimonial Commission Hearing

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

3 AMY SCHWARTZ: The remainder of my comments

4 will be contained in my written materials, but I

5 do want to highlight one final issue that I

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

7 for civil legal services. Any discussion of

8 access to counsel has to include the obvious and

9 crucial issue of funding for legal services. As

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

11 available to civil legal services have been

12 eroding. In my materials I cover some of the

13 different core legal services funding as well as

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

15 the civil legal services as well. I would advise

16 that the -- that the Matrimonial Commission

17 include in their recommendations to Chief Judge

18 Kaye the establishment of a statewide permanent

19 stable funding source for the provision of civil

20 legal assistance throughout the state. Thank you.

21 HON. SONDRRA MILLER: Thank you very much.

22 Joan Quinn.

23 JOAN QUINN: Good afternoon Justice Miller

24 and members of the Commission. Please excuse me,

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

24                HON. SONDRRA MILLER: Thank you.

25                Mr. Steven Sugarman.

1 Matrimonial Commission Hearing

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

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

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

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

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

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

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



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

1           Matrimonial Commission Hearing

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

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

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

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

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

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

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

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

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

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

19           HON. SONDR A MILLER: Thank you.

20           Suzanne Brunsting.

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

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

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

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

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

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

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

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

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

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

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



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

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

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

1 Matrimonial Commission Hearing

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

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

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

25 How can attorneys best help them hear one

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

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

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

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

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

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

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

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

10          HON. SONDRRA MILLER: Ha ha.

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

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

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

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

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

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

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

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

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

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

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

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

22          SUZANNE BRUNSTING: Thank you.

23          HON. SONDR A MILLER: Miss Suzanne Tomkins.

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



1           Matrimonial Commission Hearing

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

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

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

1           Matrimonial Commission Hearing  
2           domestic violence victims are women. Much of  
3           female violence is committed in self-defense and  
4           inflicts less injury than male violence. 70  
5           percent of intimate homicide victims are female.

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

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

15          The second topic I would like to address is  
16          domestic violence in the context of mediation.  
17          Although domestic violence may occur at any point  
18          in a relationship, generally the frequency and  
19          severity of the violence escalate over time. It  
20          is commonly believed that the risk and amount of  
21          violence increase when a relationship ends. When  
22          victims take action to end the relationship, the  
23          abuser may use violence or intimidation to keep  
24          her from leaving or seeking assistance. For this  
25          reason, extra caution should be exercised at every

1           Matrimonial Commission Hearing  
2           stage of separation and divorce proceedings. It  
3           is the legal system's responsibility to provide  
4           trained professionals able to respond to the level  
5           of danger posed by these cases.

6           Most people would agree with the statement  
7           that domestic violence is not an appropriate topic  
8           for mediation, as the power imbalance inherent in  
9           domestic violence makes it dangerous for the  
10          victim to protect her own interests. A mediator  
11          would never attempt to mediate violence between  
12          individuals. However, it is also important not to  
13          engage individuals in mediation if there is abuse  
14          in their relationship. In other words, even if  
15          the topic being mediated is custody or visitation  
16          and not verbal, emotional or physical abuse, it is  
17          still not appropriate nor is it safe to engage in  
18          mediation. Because we know so many individuals  
19          are abused, it is essential that individuals be  
20          screened for the presence of domestic violence and  
21          that procedures be in place to ensure the safety  
22          of the parties, the mediator, and the screener, if  
23          it is revealed.

24          The prevalence of domestic violence along  
25          with the many reasons why individuals may not

1           Matrimonial Commission Hearing  
2           reveal their abuse means that these cases are  
3           being referred to mediation. In a survey of  
4           court-mandated mediation nearly 50 percent of  
5           participants reported domestic violence or abuse.  
6           When a preliminary screening tool was implemented,  
7           less than five percent of those cases were  
8           excluded. This is in research done by Rodney John  
9           in "Mediation and Domestic Violence".

10          HON. SONDR A MILLER: Where was that please?

11          SUZANNE TOMKINS: It's Rodney John.  
12          "Mediation and Domestic Violence" is the name of  
13          the report. This research points out not just the  
14          difficulty in creating an effective tool, but also  
15          the importance and need for ongoing research.

16          A group in Western New York was convened and  
17          has been meeting for over a year to develop a  
18          screening tool and training for use by the courts  
19          and agencies that receive court-referred cases.  
20          The group is comprised of mediators from the  
21          court, the private sector and agencies. In  
22          addition, the group includes the director of Haven  
23          House, a domestic violence shelter in Erie County,  
24          representatives from the New York State Office for  
25          the Prevention of Domestic Violence, the New York

1           Matrimonial Commission Hearing  
2           State Coalition on Domestic Violence and the  
3           Office of Court Administration Office of Dispute  
4           Resolution and UB Law School.

5           I would like to briefly explain the screening  
6           tool that the group I mentioned above is  
7           developing. Many states that mandate mediation  
8           have implemented a domestic violence screening  
9           tool. The New York Model Code on Domestic  
10          Violence and Family Violence describes the duty of  
11          mediators to screen for domestic violence. After  
12          researching various policies and much discussion,  
13          our group decided to adopt a screening procedure  
14          based on a model currently used in Michigan  
15          courts. It was created by a group similar to  
16          composition to those in New York and has been in  
17          place for several years.

18          It is my recommendation to this Commission  
19          that a similar tool be adopted in courts  
20          throughout New York. It is important that this  
21          screening process incorporate the following:

22                 The same mediation tool should be  
23                 administered to both parties irrespective of sex.

24                 Parties should be asked if they wish to  
25                 mediate and why.

1           Matrimonial Commission Hearing  
2           Questions that will expose coercion and  
3           intimidation as well as overt cases of physical  
4           violence should be included.

5           The screener should inquire about calls to  
6           the police and the reason for those calls.

7           The screener should determine whether either  
8           party has threatened the children and inquire  
9           whether factors are present that can exac --  
10          exacerbate domestic violence or compromise the  
11          parties' ability to mediate, such as drug or  
12          alcohol use or mental illness.

13          Engage in a multi-tiered approach to  
14          screening that includes monitoring at each point  
15          in the process.

16          And we recommend a minimum of a two-day  
17          training that should be provided at every level  
18          throughout the court system.

19          In conclusion, I urge the Commission to  
20          consider this information as you go forward in  
21          implementing any changes in matrimonial  
22          proceedings in New York. We are very fortunate in  
23          New York to have the commitment and leadership of  
24          Justice Kaye, who has implemented many initiatives  
25          to address the legal needs of those whose lives

1           Matrimonial Commission Hearing  
2           are impacted by domestic violence. I am confident  
3           that this Commission will further these efforts.  
4           Thank you again for this opportunity.

5           HON. SONDR A MILLER: Thank you.

6           Miss Jan Kurth.

7           JAN KURTH: Good afternoon. My name is Jan  
8           Kurth, and I'm just recovering from a little  
9           laryngitis, so please bear with me. I'm a  
10          noncustodial mother, a CASA-trained volunteer  
11          currently inactive due to time and employment  
12          constraints, a past member of the Battered Mothers  
13          Custody Conference that was organized out of a  
14          meeting held at Sienna College last year. By  
15          profession, I'm an urban planner and grant writer  
16          with an undergraduate degree from Vassar College  
17          and Masters from SUNY Buffalo. Among the projects  
18          I am currently working on is a HUD Continuum of  
19          Care application for transitional housing that  
20          would serve homeless domestic violence victims and  
21          their children. I am currently living in  
22          Chautauqua County, which is just to the south of  
23          Erie County, for those of you who are not too  
24          confident in your geography.

25          While I could discuss many aspects of the



1           Matrimonial Commission Hearing  
2           divorce process, I will limit my comments to the  
3           training of custody evaluators, the rise of joint  
4           custody and sole father custody and the problems  
5           that these raise for mothers and children, and the  
6           lack of accountability for various ethics  
7           violations.

8           Under Poor Training for Custody Evaluators.  
9           Custody evaluators often have dubious  
10          training, as many parents have found out in New  
11          York State. In Chautauqua County one private  
12          evaluator -- evaluator was able to set up practice  
13          with nothing but a background in pastoral  
14          counseling. This often leads to professional and  
15          ethical problems, as in at least one documented  
16          case this same evaluator declined to contact one  
17          of the parents, in this case the mother, or seek  
18          any information from this parent -- from this  
19          parent before making a custody recommendation.  
20          Nevertheless, the judge in this case admitted this  
21          report into evidence and cited it in his final  
22          decision.

23          In addition to the general inadequacies of  
24          custody evaluators, there is often little training  
25          in domestic violence. Nationally, just four

1           Matrimonial Commission Hearing  
2           percent of mental health providers are estimated  
3           to have had sufficient DV training. As a result,  
4           evaluators are too frequently taken in by unproven  
5           and dangerous psychological theories, such as  
6           Richard Gardner's Parental Alienation Syndrome,  
7           PAS, and its many spinoffs. This theory asserts  
8           that in cases where a child shows fear or  
9           reluctance around one parent, typically assumed to  
10          be the father, it is generally instigated by or  
11          the fault of the other parent, typically assumed  
12          to be the mother. In what are purported to be  
13          "severe" cases it is recommended that custody be  
14          transferred from the so-called "alienating" parent  
15          to the so-called "victim" parent. While this  
16          theory sometimes gives lip service to domestic  
17          violence or child abuse as a cause for the  
18          children's behavior, this very real possibility is  
19          seldom explored and in practice. In addition,  
20          there's tremendous gender bias in how the theory  
21          is applied. Women are often accused of PAS, but  
22          there are very few cases, if any, where a mother  
23          has successfully charged PAS against the father.  
24          In addition, PAS theory does not acknowledge that  
25          estranging tactics are very much a part of the

1           Matrimonial Commission Hearing  
2           modus operandi of the abuser. In other words,  
3           estrangement tactics are not so much a discrete  
4           psychological syndrome suddenly arising in mothers  
5           at the time of the divorce, as a common response  
6           of the abusive personality. Again, in Chautauqua  
7           County, one mother lost custody despite the fact  
8           that the court-appointed evaluator determined that  
9           the father displayed, quote, alienating type  
10          behavior and had attempted to obstruct contact.  
11          Apparently this kind of behavior was only  
12          unacceptable in mothers, as the same evaluator,  
13          speaking at a Fathers Rights summit, spoke at some  
14          length on the harms associated with "maternal  
15          gatekeeping", end quote, which is apparently  
16          another term for blaming mothers who allegedly  
17          restrict the children's access to their fathers,  
18          even if there are concerns related to domestic  
19          violence or child abuse. The presentation made no  
20          acknowledgment of the fact that "gatekeeping" can  
21          be a normal, healthy, and, indeed, expected  
22          behavior for mothers or parents in general,  
23          sometimes called taking responsibility for one's  
24          children and keeping them from harm's way. And,  
25          of course, there was no acknowledgment, especially

1           Matrimonial Commission Hearing  
2           in this setting, that fathers, especially abusive  
3           fathers, can be guilty of blocking access to the  
4           children or attempting to alienate the children  
5           from the mother, especially as more fathers gain  
6           custody.

7           And then regarding the problems regarding  
8           joint custody and father custody.

9           As some speakers have mentioned earlier, it  
10          is not uncommon for a father with a history of  
11          domestic violence or abuse to gain joint custody  
12          or even sole custody. According to several  
13          studies, fathers, even abusive fathers, are  
14          successful in some 70 percent of contested child  
15          custody cases. The results can be tragic.  
16          Earlier this year in Orange County a seven-year  
17          old girl was allegedly stabbed to death by her  
18          father, who had sole custody. The father had  
19          gained custody despite two Orders of Protection  
20          against him by two different women for domestic  
21          violence, one was the girl's mother, and many  
22          illegal drug issues. More recently, a three-year  
23          old Buffalo child was murdered by a father with  
24          sole custody. While it is reprehensible that any  
25          parent would murder his or her own child, it is

1           Matrimonial Commission Hearing  
2 especially repugnant that a child would have been  
3 ordered into the care of such a parent by the  
4 courts, especially with clear warning signs.

5           Even in cases where the abuser is not granted  
6 full custody there can be problems. Two years ago  
7 during a visitation exchange in Chautauqua County  
8 a woman was kidnapped by the father of her  
9 children, driven across state lines and assaulted.  
10 In this case, she had an Order of Protection, but  
11 was apparently still required to facilitate  
12 visitation. Last year, a Chautauqua County mother  
13 was unsuccessful in her attempts to gain sole  
14 custody of her minor daughter, despite the fact  
15 that the child's birth father was a registered sex  
16 offender who had served jail time for molesting an  
17 older stepdaughter. As a result of her fears,  
18 this woman ultimately returned to her battering  
19 partner, a trend which is certainly worrisome. In  
20 another case, a custodial mother in Chautauqua  
21 County was told she must continue to allow the  
22 father to visit their preschool-aged child, even  
23 while an active sexual abuse charge was being  
24 investigated. Appointing the mother or current  
25 girlfriend of an alleged abuser to serve as a

1           Matrimonial Commission Hearing  
2           monitor appears to be a common practice, though of  
3           dubious value to the safety of the child, given  
4           the enabling behavior and denial common to those  
5           who choose to live with and support these  
6           individuals.

7           These are not isolated incidents. Domestic  
8           violence agencies in Chautauqua County, such as  
9           the Agnes Home, have all reported an alarming  
10          number of clients who have faced custodial  
11          challenges and even lost custody to an abuser.  
12          Some have lost due to a poor understanding of  
13          domestic violence on the part of judges and the  
14          courts. Especially the myth that "women do it  
15          too" and in the same numbers. As a result, our  
16          courts have sometimes condemned both parents for  
17          domestic violence behavior, even if the woman just  
18          got out of Intensive Care and the man has a few  
19          scratches. These assumptions tend to ignore the  
20          severity of the violence, the psychological  
21          aspects of domestic violence, and the need for the  
22          abuser to control or terrorize the victim.

23          One person, who used to administer a program  
24          for battering men, reported to me that one client  
25          in the program had threatened to kill his ex

1           Matrimonial Commission Hearing  
2           within the program. The same man had been granted  
3           custody of their young daughter by the courts.  
4           Once mothers lose custody, there appears to  
5           be very different standards applied to visitation.  
6           One Chautauqua County mother was told, after  
7           complaining of numerous visitation violations,  
8           that she was responsible for enforcing her own  
9           visitation agreement, despite the father's  
10          hostility. On the other hand, custodial mothers  
11          are frequently told by our courts that they must  
12          rearrange their schedules and make the appropriate  
13          arrangements so that the children can visit the  
14          father in jail, even when he is in jail for a  
15          violent crime like assault. This, too, seems to  
16          be very common in Chautauqua County. And if they  
17          fail to comply, they can be accused of alienating  
18          behavior. This is despite the fact that there is  
19          no evidence that jail visitations are of any  
20          benefit to children. A recent New York Times  
21          article on the subject raised the specter of  
22          whether all this mandated prison visitation  
23          didn't, in fact, normalize the prison experience  
24          for at-risk young people. In fact, one of the  
25          biggest risk factors for becoming a criminal is

1           Matrimonial Commission Hearing  
2           not having a single mother, as is sometimes  
3           asserted, but having a parent or other close  
4           relative who exhibits antisocial behavior or has  
5           been incarcerated.

6           On the question of professional ethics.

7           There's often little recourse for parents who  
8           experienced breaches in professional ethics. It  
9           is often the word of the parent against the  
10          professional and any complaint tends to be  
11          dismissed as sour grapes on the part of the losing  
12          parent. In some cases it is not clear where one  
13          would complain or how. In the case of the  
14          evaluator who was not a licensed psychologist but  
15          a pastoral counselor, what professional board  
16          would apply?

17          In another case, a Chautauqua County attorney  
18          actually admitted during a pretrial conference  
19          that he had spoken to the child in question, a  
20          clear breach of professional ethics. The mother  
21          had suspected this was true, as some time before,  
22          the child had repeated -- had been repeating  
23          disparaging comments about the mother, followed by  
24          the mantra, "Daddy's lawyer says so". Yet no one  
25          within the court felt compelled to pick up on the



1           Matrimonial Commission Hearing  
2           matter. It would have been the responsibility of  
3           the wronged parent, who often has no credibility  
4           in these matters unless he or she is able to join  
5           in with other parents with the same or similar  
6           complaints.

7           In terms of reform, I think several  
8           initiatives need to be pursued.

9           One, comprehensive training for all court  
10          personnel, especially in matters related to  
11          domestic violence and child abuse.

12          Two, a presumption that perpetrators of  
13          domestic violence and child abuse not be granted  
14          custody when there's a nonperpetrator parent.

15          Three, that jail visitation needs to be at  
16          the full discretion of the nonoffender custodial  
17          parent or caregiver.

18          And, four, that clear lines of authority and  
19          accountability exist for obvious ethics  
20          violations, thus relieving some of the burden  
21          placed on parents.

22          Thank you for this opportunity.

23          HON. SONDR A MILLER: Thank you very much. I  
24          think that is our last presenter. Is there anyone  
25          in the audience who is supposed to be speaking

1           Matrimonial Commission Hearing  
2           with us? I want to thank you all again for your  
3           interest, for your attendance and your assistance.

4           Good afternoon.

5           (4:41 p.m. recess.)

6           (4:43 p.m. proceedings resumed.)

7           HON. SONDR A MILLER: Elizabeth Hendy, I  
8           think.

9           ELIZABETH HENDY: Yes.

10          HON. SONDR A MILLER: Thank you. We were  
11          about to give up, but you're on time.

12          ELIZABETH HENDY: Yes. I'm so sorry. Never  
13          try to get your instructions on how to get to the  
14          Erie County Courthouse by going to either Map  
15          Quest or Yahoo maps, you end up being almost late.

16          My name is Elizabeth Hendy, and to give you  
17          an idea of where I'm coming from, I'm an attorney  
18          with Legal Assistance in the Finger Lakes which is  
19          a division of Legal Assistance in Western New  
20          York. We are a civil legal services office which  
21          provides civil services to the low income  
22          community. We serve mainly a rural area,  
23          Rochester is included in our service territory,  
24          although it's not an area that I'm specifically  
25          assigned to. All of the other counties that we

1           Matrimonial Commission Hearing

2           serve are rural.

3           Part of what I've come here to speak about is  
4           the issues that I see affecting the clients who  
5           come to my office, the clients whom we,  
6           unfortunately, must turn away either because we  
7           simply do not have the resources to serve them, or  
8           because although they really would still be  
9           considered low income, they're not low income  
10          enough to qualify for legal assistance. To give  
11          you an idea of how low income that has to be, a  
12          single mother who has one child, whose income is  
13          over \$24,000 a year is not going to qualify for  
14          our services.

15          Uh, even if she is within those income  
16          limits, because of limited funding, there's a very  
17          good chance that we will not be able to provide  
18          her with assistance; or, if we can provide  
19          assistance, it would be through one of our pro se  
20          divorce clinics, which provide a very limited type  
21          of assistance. Uh, I am the administrator for pro  
22          se divorce clinic programs for low income people  
23          in a four-county region, and I get a good view  
24          through that program of what low income people are  
25          facing when they go through the court system

1           Matrimonial Commission Hearing  
2           trying to get a divorce. I see the problems that  
3           they face, I see things that keep them from  
4           getting access to justice, and I also realize that  
5           a lot of people that I don't even see, because  
6           they make more than these low income limits, but  
7           still really not enough money to cough up the  
8           minimum \$1500 retainer that a private attorney  
9           will need, often much more than that if they have  
10          any fear that they're going to get caught in a  
11          custody battle or a case that's going to actually  
12          be contested. So accessing legal services is very  
13          difficult for them, and accessing the court is  
14          also very difficult. Now, legal assistance, there  
15          are ways to do that, but we're also concerned  
16          about things that keep clients or our nonclients  
17          even worse from being able to get into the court  
18          when they really need help.

19          CPLR 1101, which provides poor person status,  
20          since 1999 that has permitted us to sign an  
21          attorney's waiver to get clients into the court  
22          where they waiver of court fees without having to  
23          go through a formal motion process. But that's  
24          not going to cover clients who we are not actually  
25          representing, and, more importantly, it doesn't

1           Matrimonial Commission Hearing  
2           cover everything. To start with, it doesn't cover  
3           the cost of a transcript. So, if a case becomes  
4           contested, perhaps even heads out, goes in front  
5           of the matrimonial referee, eventually settles, we  
6           put our stipulation on the record, we need a  
7           transcript, it's gonna cost \$100 or more, it's not  
8           covered by the certification.

9           Uh, it is covered by a poor person's order,  
10          if somebody has acquired their order by making a  
11          formal motion, but it is not covered by our  
12          certification. Most of the judges that I practice  
13          in front of have been good about streamlining it  
14          so that we can get this order in order to have the  
15          transcripts paid for, but I've always had a  
16          question about why that isn't included among the  
17          covered services.

18          Uh, something uh, even that order is not  
19          going to cover a lot of fees that get thrown at  
20          parties in these proceedings. Uh, forensic fees  
21          or fees for the psychologist or custody  
22          evaluations are not covered by a poor person's  
23          order. It doesn't cover Law Guardian fees, and  
24          that's one that I see my clients get bit by a lot.  
25          Uh, I'll provide an example of that. Last year I

1           Matrimonial Commission Hearing  
2           had a client who was supposed to have a very  
3           simple divorce. She had a custody order and a  
4           support order that were less than a year old from  
5           the Family Court. They had really no property to  
6           speak of. It should have been a very simple  
7           divorce. She was a domestic violence victim, as  
8           most of my clients that I provide full services to  
9           are, because we do have limited services and  
10          that's what we focus on. Her husband decided that  
11          he was going to try and make this his opportunity  
12          to go back in, redo the custody and the child  
13          support and everything that had been done in  
14          Family Court less than a year before. He did not  
15          allege a change of circumstances. He did not have  
16          a change of circumstances. But, nevertheless, the  
17          matrimonial referee that we ended up in front of  
18          decided that that didn't matter, this was Supreme  
19          Court, that had been Family Court, the Family  
20          Court order was treated more or less as if it had  
21          been a temporary order, and suddenly we were in  
22          the middle of a contested custody visitation  
23          trial. Not only that, but there was an order made  
24          that a Law Guardian was going to be appointed and  
25          that both of the parents would have to deposit a

1           Matrimonial Commission Hearing  
2           thousand dollars to pay for that Law Guardian.  
3           These actually were both relatively low income  
4           people. My client was probably at about \$15,000 a  
5           year with two kids, that is not only her income  
6           from her job, that's also the child support that  
7           she was receiving. So at \$15,000 a year she was  
8           told that she had to cough up a thousand dollars  
9           to pay for her share of the Law Guardian. Not  
10          only that, she was told that if they didn't do it  
11          within the 60 days that she had, that she would be  
12          considered to be in contempt of court. After that  
13          court appearance I spent a long time explaining to  
14          a client who was in tears, and quite rightfully  
15          so, that we would be able to do something about  
16          this, but that's not what I should have had to  
17          spend my time on is dealing with a battle over how  
18          to pay a Law Guardian that we really shouldn't  
19          have needed. It's not a unique problem in terms  
20          of where fees for these other things are going to  
21          come from.

22          A colleague had written to me just last  
23          December, because she needed to get the paperwork  
24          to make a motion to have the other party forced to  
25          pay a larger share for the forensics. Uh, she

1           Matrimonial Commission Hearing  
2           wrote to me that she had a violation modification  
3           case for a case that involved domestic violence in  
4           a child with mental health issues. The Court  
5           directed forensics with a psychologist. Our  
6           county Health Department is one of the ones that  
7           had been cited as being deficient in the Wisson  
8           case so they were an option for us. My client  
9           makes 15,000, Dad makes almost a hundred thousand.  
10          The forensic evaluation cost \$4,000 and my client  
11          was ordered to pay for half of that. The report  
12          turned out to be very much in her favor, it was  
13          very good, they wanted him to testify, however,  
14          she had no way to come up with the fees, and she  
15          was stuck with an order that was telling her that  
16          she had to pay half of that fee, despite the fact  
17          that she had a very high income husband on the  
18          other side of the case. And as this advocate  
19          wrote to me, can you please give me a motion  
20          that's going to let me seek an order that will  
21          make the other party pay more for this, I expect  
22          that I'm never going to get it with this judge,  
23          but I have to make the effort anyway, this isn't a  
24          unique situation. I deal with situations like  
25          this all the time. Other low income attorneys who



1           Matrimonial Commission Hearing  
2           serve low income clients also complain constantly  
3           that they come up with this -- with this problem,  
4           when clients come to our office we try and keep  
5           their divorces simple so that we won't spend a lot  
6           of time on it, and so that they don't get dragged  
7           into these battles with lots of extra fees on it  
8           in Supreme Court. The Supreme Court just is not a  
9           friendly court for low income people in many ways.  
10          We try and tell them go to Family Court first, get  
11          yourself a custody order, get your child support  
12          done in this court, for a lot of reasons this is  
13          going to help you out. You will probably get your  
14          child support coming in faster that way. If you  
15          do need a Law Guardian and you're low income, in  
16          Family Court you're not going to have to pay for  
17          it. We know it's going to be a real problem if we  
18          have to do this in Supreme Court instead.

19          My solution to this would be that for many  
20          people the support and the custody and the things  
21          that really effect children ought to be handled by  
22          the Family Courts, and once there is a Family  
23          Court order unless there is a substantial change  
24          of circumstances it should be clear that the  
25          Supreme Court in the divorce shouldn't meddle

1           Matrimonial Commission Hearing  
2           around with those orders that have already been  
3           issued for the children. It's going to get the  
4           support coming in faster. It's going to give them  
5           better access to the system. We also need to do  
6           something so that they don't get frozen out of the  
7           court system. If they are the defendant in a  
8           divorce action, they may find that if they haven't  
9           gotten themselves into Family Court first to get  
10          themselves the support order, they may end up  
11          waiting a long time, actually, before they start  
12          getting support for their children. And if they  
13          try to go to Family Court, unless the Social  
14          Services attorney is doing it on their behalf  
15          because they're so low income that they're  
16          actually on public assistance, they will not be  
17          able to go into Family Court, they will be thrown  
18          out because of the jurisdictional issues. Same  
19          thing with their custody. They often do end up  
20          being trapped, sometimes I think it's just the way  
21          it turns out, often I know that there other --  
22          there's other spouse's attorney has advised them  
23          to do this because they know this is what's going  
24          to happen. They know that it will permit them to  
25          drag matters out.

1           Matrimonial Commission Hearing

2           Uh, one solution for this would be if we

3           could reach a point where we set up a matrimonial

4           division in the family courts that if Supreme

5           Court doesn't have jurisdiction over this, if the

6           family courts could deal with this, and if

7           matrimonials were taken out of the Supreme Court,

8           it could be a good thing for a lot of families.

9           It could help prevent them from being cut off from

10          access to the system. I know that if it's a

11          problem even for the clients that I'm

12          representing, that I see them having more

13          difficult time reaching justice, reaching access

14          to the courts, I know that those people who aren't

15          even able to access our office are just having

16          that much more difficult of a time. Uh, even

17          getting the other party ordered to pay attorney's

18          fees is a very difficult thing. Uh, it ought to

19          be easier to access the court. Sometimes we put

20          them in a do-it-yourself program and we help them,

21          because we know there's income on the other side,

22          we help them to file a motion to have the other

23          spouse ordered to pay their attorney's fees, but

24          what if this is someone who can't even access our

25          office? They don't qualify for some reason, God

1           Matrimonial Commission Hearing  
2           forbid we have a conflict of interest and that  
3           happens a lot. We're a small community. We may  
4           have served both spouses at some point in the past  
5           for housing or something else, and we -- we may  
6           not be able to help them for that reason. There  
7           are a lot of people that we have to turn away and  
8           we can't help. How are they going to know how to  
9           do what they need to do in order to file that  
10          motion, to have their spouse ordered to pay the  
11          fees so that they can get a attorney? And you  
12          better believe those private attorneys cannot  
13          afford to take the risk to agree to represent them  
14          when they don't have any money in hand, they don't  
15          yet know whether if they make a motion for counsel  
16          fees it's going to be granted, they don't know  
17          whether they're gonna get stuck holding the bag,  
18          putting in a hundred hours worth of service and  
19          not getting paid. So they will not take these  
20          clients without the money up front. Even  
21          sometimes where there's a very high income spouse  
22          on the other side they're taking a risk there,  
23          because what if everybody decides to withdraw the  
24          divorce two months later after they put in a lot  
25          of work on it? Well, they're not getting their

1           Matrimonial Commission Hearing  
2           fees then either. It's a very risky thing for  
3           them to do that, and there should be some  
4           procedure that makes it easier for a pro se person  
5           to get into court and ask to have their spouse to  
6           be ordered to pay counsel fees on their behalf,  
7           especially now that everybody is required to have  
8           their retainer agreement filed with the court  
9           system, you know what they paid for their own  
10          attorney, is it really logical that we can see  
11          that they plunked down \$5,000 to pay for their own  
12          counsel, but that their spouse is having to  
13          traipse into the preliminary conferences and  
14          everything else without representation, time and  
15          time again. And this is what I see happening to  
16          these people, when we try and help them out  
17          through the pro se clinics because we have nothing  
18          else available for them, and I have to keep  
19          sending them into court to do this on their own,  
20          or when they come to us kind of in the middle and  
21          they've already been to a preliminary conference  
22          on their own before they get to us, and I realize  
23          that there's such a disparity in incomes here, and  
24          it ought to be quite apparent, but here they are  
25          still with nobody being ordered to pay attorney's

1           Matrimonial Commission Hearing  
2           fees, or to provide counsel for them, and there  
3           ought to be a way to solve that problem.

4           Another issue that I did want to address is  
5           some of the failures that we've had from the  
6           Milonas rules in terms of time compliance. Uh,  
7           cases, once the RJI is filed, I find that they  
8           move through our courts pretty quickly now. In  
9           fact, sometimes quicker than anybody's ready for.  
10          If this may be a case that where the parties have  
11          gone in and filed quite quickly after a big  
12          argument and they really haven't had time to think  
13          about where their finances are, or what they need  
14          to do about something else, and sometimes those  
15          preliminary conferences end up coming up much  
16          faster than anybody is actually ready for them.

17          On the other hand, I have cases that have  
18          been out there for years, because until that RJI  
19          does get filed, there isn't much that you can do  
20          without filing motions to actually get the case  
21          moving forward.

22          As an example, in one of my cases my client  
23          was served in January 2002, the complaint was  
24          answered in March 2002. Attorneys exchanged  
25          negotiations and letters and stuff for a few

1           Matrimonial Commission Hearing  
2           months after that, but as of June 2004 -- or June  
3           2002, that is the very last that I have heard from  
4           plaintiff's attorney. Uh, his retainer got used  
5           up, or for whatever other reason, perhaps he  
6           wasn't communicating with his attorney, but after  
7           that date my letters to the attorney were no  
8           longer being responded to. My phone calls were  
9           not being returned. In 2004 I sent out a notice  
10          to resume prosecution. There was no response.  
11          But this case is still formally pending, uh, if it  
12          were a default situation and somebody had  
13          defaulted in the divorce and it weren't submitted  
14          to -- into court to proceed on to judgment within  
15          one year there would be a presumption under the  
16          CPLR that that case is presumed dismissed unless  
17          you get special permission from the court to go  
18          forward at a later date and provide good excuses  
19          for why it took so long. There aren't any  
20          presumptions like that when a case is started, it  
21          becomes a contested case, and then just nobody  
22          ever files that RJI. Uh, I'm -- I'm quite stuck  
23          at the moment because I -- my client has never had  
24          an escrow account, when she came to me she was  
25          very low income, but my financial information for

1           Matrimonial Commission Hearing  
2           her at this point is three years old, so I can't  
3           even get past the -- the filing fees to get this  
4           case to move forward by filing a motion or by  
5           filing the poor person certification because I  
6           can't in good conscience file a poor person  
7           certification for a person when my financial  
8           information for them is three years old. So I  
9           have no way to get myself into court. It would  
10          cost \$140 for the RJI and the motion fees to apply  
11          to have this case dismissed at this point and to  
12          have it cleared from the books. It's not a unique  
13          case. I've also had clients who are defendants in  
14          divorce actions come to me through our pro se  
15          divorce clinics who are in similar situations.  
16          They actually were with it enough that able to  
17          send a letter or a Notice of Appearance or  
18          something that got their cases treating as a  
19          contested case. But then it stalled and they want  
20          it to go forward and they want to go forward with  
21          their lives. They actually move out of state,  
22          their lives go on, it's not convenient for them to  
23          continue defending this action, but technically  
24          these actions are still on the books. Uh, if I'm  
25          the attorney, I'm still the attorney of record, we



1           Matrimonial Commission Hearing  
2           don't really have any teeth in those rules that  
3           say that you have to file your RJI within a  
4           certain amount of time, and there really ought --  
5           I'm not saying that if you don't file it within  
6           the strict deadlines that are under our current  
7           statutes that your case ought to be dismissed, but  
8           I think if a year has gone by and you haven't  
9           filed the RJI, and it just -- the case is making  
10          no progress, and it's just sitting there, I think  
11          there ought to be an automatic dismissal. I don't  
12          think there ought to be a requirement that  
13          somebody has to file more filing fees and actually  
14          make a motion to the Court in order to get that  
15          case disposed of, when it gives all appearances of  
16          having been abandoned. And that -- that covers  
17          the basic points that I wanted to -- to make  
18          today. And I thank you very much for giving me  
19          the time to speak.

20           HON. SONDRRA MILLER: Thank you very much.

21           Do you have a question? Do you have a  
22          question?

23           Just a minute please.

24           Under the poor person's order is it not true  
25          that you can file an RJI without a fee?

1 Matrimonial Commission Hearing

2 ELIZABETH HENDY: Yes, if there's a poor  
3 person's order you can. In the particular case  
4 that I'm speaking of, uh, there wasn't a poor  
5 person's order because we were a defendant, a  
6 certification hadn't been done at that point,  
7 there was nothing that we had to do to go into  
8 court, and although at one point in time I might  
9 have been comfortable having filed a poor person  
10 certification, I'm not at this point, particularly  
11 because I know that my client got a different job.  
12 I know that.

13 HON. SONDR A MILLER: Oh.

14 ELIZABETH HENDY: That things like that  
15 changed and so I no longer.

16 HON. SONDR A MILLER: Different story.

17 ELIZABETH HENDY: And, quite honestly, my  
18 client has not really been good about keeping in  
19 touch with me either. If she were updating her  
20 financial information with me I might -- to some  
21 degree this is my problem, because I am the  
22 attorney in perpetuity, and I may still have this  
23 case when I retire 30 years from now.

24 HON. SONDR A MILLER: I understand that.  
25 Okay.

1 Matrimonial Commission Hearing

2 ELIZABETH HENDY: But still it often happens  
3 to parties where they don't want this to happen to  
4 it, and, you know, this particular couple, this  
5 could very well turn around and bite them in the  
6 future. I mean my client was planning on moving  
7 out of state. Her husband wasn't real committed  
8 to New York State either. They could find  
9 themselves in some other state finally wanting to  
10 file divorce there and having the complication  
11 that they still have a technically pending action  
12 back in New York State.

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

14 ELIZABETH HENDY: Thank you.

15 HON. SONDR A MILLER: I think that surely  
16 concludes our afternoon. Thank you.

17 (5:03 p.m. recess.)

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