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2 NEW YORK STATE MATRIMONIAL COMMISSION
3 PUBLIC HEARING

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6

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

8

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

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COMMISSION CHAIRWOMAN:

12

HONORABLE SONDR A MILLER,
13 Justice

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HELENE K. BREZINSKY, ESQ.
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MICHELE MALLETTE, RPR CMRS
ALVIN A. NERLINO, CSR, RPR
Senior Court Reporters

1 Opening Remarks

2 (Whereupon the hearing commences.)

3 JUDGE MILLER: Good morning everyone.

4 Would everyone please be seated.

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

6 on time and keep with our time schedule.

7 First I would like to welcome our

8 speakers, our attendees, the press and others to

9 this first public hearing conducted by the

10 Matrimonial Commission.

11 On the tenth anniversary of our

12 predecessor commission to examine these issues and

13 recognizing the important strides made by that

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

15 tireless crusader on behalf of the families and

16 children of this state, has acknowledged that still

17 more work can and must be done to further improve

18 the practice of matrimonial and family law in New

19 York State. Therefore, she has charged this

20 32-member statewide panel with a broad mandate:

21 We are to take a global look at the area

22 of family and matrimonial law as it is practiced in

23 this state and to look at all stakeholders, both

24 inside and outside of the system, for input and

25 guidance, think holistically and innovatively to

26 address and resolve these three main areas:

1 Opening Remarks

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

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

15 Now, our procedure today:

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

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

1 Opening Remarks

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

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

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

1 Opening Remarks

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

6 We are now prepared to begin.

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

9 Our first speaker is Debbie Eisenstadt.

10 Is she here? Okay.

11 Would you step up, please?

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

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

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

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

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

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

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

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

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

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

4 Justice is not equal or just.

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

15 The law is supposed to be judged neutral.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 I have just a few recommendations:

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

1 Eisenstadt

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

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

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

26 4. Unless it's anticipated that

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

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

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

11 And a final recommendation:

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

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

22 Thank you for your time.

23 JUDGE MILLER: Barbara Handschu.

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

26 I'm the president-elect of the American

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

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

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

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

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

26 One of the areas that I think can help

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

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

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

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

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

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

1 Handschu

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

5 Custody trials have to be expedited.

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

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

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

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

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

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

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

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

1 Handschu

2 advisory to the Court, it is a recommendation.

3 Yes, there are times that it might be somewhat

4 helpful, but does that help outweigh the cost to

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

6 hearing in all cases?

7 JUDGE MILLER: I just want to advise you

8 you have one minute.

9 MS. HANDSCHU: Home studies may or may not

10 be necessary in every case. Home studies that are

11 based on professionally reliable hearsay or mental

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

13 better off if in fact rather than say the teacher

14 told me this, to listen to the teacher?

15 I can all too well remember my early days

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

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

18 have a custody case, and it would be first

19 appearance, second appearance and the judge would

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

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

22 cross-examine someone after someone had testified,

23 and someone sitting where you are, Justice Miller,

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

25 make it in a quick, rapid way.

26 Something's happened in my 38 years and

1 Handschu

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

4 Thank you. Good luck.

5 JUDGE MILLER: Thank you very much.

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

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

10 Ron Tamir.

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

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

26 When she was a year old, and six years

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

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

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

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

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

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

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

22 MR. TAMIR: Yes.

23 JUDGE MILLER: Would you tell us?

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

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

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

17 (Applause.)

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

25 (Applause.)

26 JUDGE MILLER: Jody Krisiloff, I believe

1 Krisiloff

2 you have arrived.

3 AUDIENCE MEMBER: She is on her way, your

4 Honor.

5 JUDGE MILLER: She is not here yet.

6 AUDIENCE MEMBER: On her way.

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

8 presenter is Nancy Erickson.

9 Maybe there is traffic today. Okay.

10 AUDIENCE MEMBER: Miss Krisiloff has

11 arrived.

12 JUDGE MILLER: Miss Krisiloff.

13 MS. KRISILOFF: Hi. Good morning.

14 JUDGE MILLER: Good morning.

15 MS. KRISILOFF: I was scheduled to speak

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

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

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

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

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

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

21 (Applause.)

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

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

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

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

1 Krisiloff

2 cases are pending.

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

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

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

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

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

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

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

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

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

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

24 (Applause.)

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

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

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

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

1 Krisiloff

2 JUDGE MILLER: One minute left.

3 MS. KRISILOFF: Yes.

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

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

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

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

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

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

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

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

26 Thank you, your Honor.

1 Koch

2 (Applause.)

3 JUDGE MILLER: Is Nancy Erickson here?

4 Nancy Erickson? Has she arrived?

5 All right, then we'll go on.

6 Mr. Matthew Koch.

7 MR. KOCH: Yes, ma'am.

8 Wow, I'm before a judge without being

9 summoned.

10 Thank you so much, ladies and gentlemen.

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

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

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

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

15 Thank you for this Commission and

16 especially for allowing me to speak. My name is

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

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

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

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

21 County suburb on Long Island.

22 I'm here representing myself as the

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

24 powers to do what you can to see that presumptive

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

26 hope in whatever little way I can to convince you

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

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

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

1 Koch

2 things for their children.

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

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

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

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

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

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

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

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

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

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

1 Koch

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

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

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

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

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

1 Koch

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 JUDGE MILLER: Has Nancy Erickson
25 arrived?

26 MS. ERICKSON: Good morning. I thank you

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

5 I congratulate you on starting early. My goodness.

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

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

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

1 Erickson

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Erickson

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

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

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

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

26 Now, reasonable persons can differ on

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

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

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

26 In my program I also did an independent

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

4 JUDGE MILLER: One minute.

5 MS. ERICKSON: Okay.

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

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

18 In conclusion, my recommendations are:

19 Harriet Weinberger, keep up the good work.

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

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

26 Secondly, all mental health professionals

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

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

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

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

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

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

25 MS. ERICKSON: Can I give one example?

26 Who should be allowed to get a copy of the

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

5 JUDGE MILLER: Thank you.

6 MS. ERICKSON: Thank you.

7 JUDGE MILLER: Julie Domonkos.

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

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

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

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

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

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

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

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

15 (Applause.)

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

1 Domonkos

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

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

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

23 (Applause.)

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

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

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

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

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

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

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

15 (Applause.)

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

26 (Applause.)

1 Domonkos

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

8 (Applause.)

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

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

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

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

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

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

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

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

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

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

5 JUDGE MILLER: One minute.

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

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

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

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

14 Thank you.

15 (Applause.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Abramowitz

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

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

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

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

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

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

1 Abramowitz

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

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

21 JUDGE MILLER: One minute.

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

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

26 JUDGE MILLER: Thank you very much.

1 Jacobson

2 MR. ABRAMOWITZ: Thank you.

3 (Applause.)

4 JUDGE MILLER: Is June Jacobson here?

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

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

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

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

1 Jacobson

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

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

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

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

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

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

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

11 The process is voluntary, private and
12 confidential.

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

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

1 Jacobson

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

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

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

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

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

26 The mediator helps the parties to look

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

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

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

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

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

21 The mediator addresses the law.

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

1 Jacobson

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

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

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

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

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

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

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

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

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

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

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

1 Jacobson

2 to mediation instead of litigating.

3 It tends to be much less expensive than

4 litigation, thereby preserving assets for the

5 family.

6 It's more effective when parties enter

7 mediation before they have already started down the

8 path of litigation and become entrenched in an

9 adversarial posture with one another. So it seems

10 to make sense to encourage couples to try to mediate

11 early on.

12 If mediation fails, the parties can always

13 choose to litigate. Mediating parties who fail to

14 reach agreements are more likely to settle prior to

15 trial than non-mediating parties.

16 If the parties are able to reach at least

17 some agreements in mediation, they can significantly

18 narrow the issues for litigation, or for another

19 dispute resolution process, such as arbitration.

20 Lawyers are not always involved in

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

22 role in moving the process forward, such as when

23 clients are fearful of reaching agreements on their

24 own, or when they are being unrealistic in their

25 proposals.

26 Studies have found that as lawyers become

1 Jacobson

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

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

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

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

1 Jacobson

2 dissatisfaction with the adversarial process.

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

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

10 JUDGE MILLER: One minute.

11 MS. JACOBSON: Thank you.

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

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

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

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

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

9 (Whereupon a recess was taken.)

10 (Proceedings resume.)

11 JUDGE MILLER: We can start now.

12 Welcome again, everyone.

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

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

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

1 Jacobson

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

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

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

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

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

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

1 Jacobson

2 will be in touch with you.

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

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

15 We are now ready to proceed.

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

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

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

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

1 Williams

2 turn to for safety and justice.

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

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

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

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

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

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

1 Williams

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

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

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

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

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

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

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

1 Williams

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

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

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

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

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

26 Law guardians often hold mothers to higher

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

4 Thank you.

5 JUDGE MILLER: Maria? Lorna.

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

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

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

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

1 Lorna

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

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

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

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

25 JUDGE MILLER: Sharlene.

26 SHARLENE: Hello.

1 Sharlene

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

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

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

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

26 (Applause.)

1 Sharlene

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

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

20 (Applause.)

21 JUDGE MILLER: Yes.

22 MARIA: Good morning.

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

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

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

20 (Applause.)

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

25 (Applause.)

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

1 Maria

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

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

23 (Applause.)

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

1 Maria

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

7 (Applause.)

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

19 (Applause.)

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

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

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

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

11 (Applause.)

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

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

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

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

12 (Applause.)

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

24 (Applause.)

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

1 Maria

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

9 (Applause.)

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

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

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

22 JUDGE MILLER: Maria, you have one minute.

23 MARIA: Time went fast.

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

26 In terms of visitation and

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

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

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

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

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

1 Maria

2 (Applause.)

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

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

14 (Applause.)

15 JUDGE MILLER: Thank you, Maria.

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

19 Is Mr. DeRosa here?

20 Is Miss Duff here?

21 Yes.

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

26 Over the last year, as more scandal and

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

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

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

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

8 (Applause.)

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

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

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

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

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

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

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

7 (Applause.)

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

1 Duff

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

3 (Applause.)

4 MS. DUFF: The mother is now able to see

5 her daughter only with supervised visitation, a

6 further action that has drained her emotionally and

7 financially.

8 Why should this mother, who was doing fine

9 taking primary care of her child for the first five

10 years of the child's life, be condemned from the

11 child's existence and forced to fight battle after

12 exhausting battle simply to restore a small piece of

13 the important role a mother ought to be able to

14 have?

15 (Applause.)

16 MS. DUFF: What was so broken for this

17 little girl that the court had to set up this

18 elaborate parenting arrangement to fix it?

19 There are too many stories to go into in

20 the short time allotted here, including many that

21 involve men as their parental rights to their

22 children are eroded out of existence.

23 (Applause.)

24 MS. DUFF: My colleague, Jody Krisiloff,

25 and many others of us have worked very diligently

26 over the last months to put together a document

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

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

10 (Applause.)

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

15 (Applause.)

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

19 (Applause.)

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

1 Duff

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

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

11 (Applause.)

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

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

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

5 (Applause.)

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

11 (Applause.)

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

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

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

26 (Applause.)

1 Duff

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

6 (Applause.)

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

8 Our next speaker is Judy Sheindlin.

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

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

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

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

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

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

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

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

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

1 Sheindlin

2 forensics will say well, the mothers are limited.

3 But the Judge has placed himself or herself in a

4 situation where you have a status quo and the status

5 quo very often remains.

6 The judges in the Family Court are not

7 peer reviewed because most of the people who come to

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

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

10 those few cases where somebody can scrape up enough

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

12 have a combination of sometimes a mediocre or lousy

13 judge and a mediocre or a lousy law guardian making

14 decisions.

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

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

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

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

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

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

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

22 person, signed in.

23 Second, I would urge that the Domestic

24 Relations Law and the Family Court Act be modified

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

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

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

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

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

26 The people sitting behind me, I recognize

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

8 Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 DeRosa

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

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

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

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

1 DeRosa

2 today.

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

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

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

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

1 DeRosa

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

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

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

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

26 If this Commission serves the public, it's

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

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

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

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

1 DeRosa

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

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

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

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

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

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

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

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

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

1 DeRosa

2 process.

3 In closing I have to say one thing.

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

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

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

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

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

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

18 JUDGE MILLER: Thank you.

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

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

1 Preliminary Remarks

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

5 (LUNCHEON RECESS)

6 AFTERNOON SESSION

7 JUDGE MILLER: Good afternoon, everyone.

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

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

1 Preliminary Remarks

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

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

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

1 Preliminary Remarks

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

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

1 Preliminary Remarks

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Wiener

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

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

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

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

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

24 (Laughter.)

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

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

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

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

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

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

26 I want to thank you for your time.

1 Hymowitz

2 (Applause.)

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

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

8 MR. HYMOWITZ: Right.

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

1 Hymowitz

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

1 Hymowitz

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

3 I would argue.

4 As the questions facing the court become

5 even more specific, research data is often even less

6 applicable. For example, our forum has studied the

7 recent controversy about overnight visitation in

8 very young children in considerable detail. We

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

10 extensive back and forth commentary between experts

11 who found overnights to be detrimental for the

12 infant in a high conflict family and other scholars

13 who have found the opposite, the controversy remains

14 and the expert is still left needing to evaluate a

15 particular child in a particular family.

16 Our forensic results certainly ought to be

17 opened to the adversarial process with allowance

18 made for obtaining and inspecting all the raw data,

19 using other experts if so indicated. However, the

20 benefit safeguard against the over-zealous,

21 value-laden or just inaccurate report is for legal

22 professionals to be as informed as possible about

23 the parameters and appropriate scope of the forensic

24 report.

25 Finally, just a few words about our

26 organizational concerns, that efforts at reform long

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

1 Weintrob

2 (Applause.)

3 JUDGE MILLER: We will now hear from

4 Dr. Alex Weintrob.

5 MR. WEINTROB: Good afternoon. Thank you

6 for allowing me the opportunity to speak to you.

7 I'm a child adolescent psychiatrist who

8 has practiced for almost 40 years, and I have

9 intermittently been appointed by the court as a

10 neutral evaluator. My experience also comes from

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

12 well as a national colloquium of judges and

13 matrimonial attorneys and child psychiatrists that

14 have addressed these issues for a number of years

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

16 book that was a compilation of some of our thoughts

17 which we are rewriting.

18 I will comment upon a number of issues and

19 offer some bold recommendations. Those include,

20 number one, that as a child psychiatrist and child

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

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

23 their families, of custody, visitation and

24 relocation disputes. There is no question that

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

26 accurately described as battles -- leave many

1 Weintrob

2 children with varying degrees of wounds and scars.

3 Both social science research and the clinical

4 experience of child mental health professionals

5 demonstrate the extremely adverse effects upon

6 children of protracted high-conflict divorce and

7 custody disputes. Thus, it is essential that the

8 courts, together with attorneys and mental health

9 professionals, work toward a system that will,

10 number one, minimize the number of cases that have

11 gone in litigation, and, number two, find

12 alternative ways of dealing with those that do end

13 up in litigation.

14 In this regard, attempts must be made to

15 educate parents about the emotional and financial

16 price that children and their parents pay when they

17 embark upon the ship of litigation. I believe that

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

19 expanded into all the court systems. I believe we

20 must offer families alternatives to contested

21 divorces. I believe that the commission should

22 examine the collaborative divorce process,

23 alternative dispute resolution, and even mandated

24 mediation.

25 In brief, any process that will lead to a

26 greater likelihood that parents will work out their

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

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

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

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

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

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

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

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

1 Weintrob

2 JUDGE MILLER: Thank you.

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

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

1 Weintrob

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

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

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

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

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

14 (Laughter.)

15 JUDGE MILLER: That was the next question.

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

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

1 Weintrob

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

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

26 In any case, thank you very much for your

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

4 (Applause.)

5 JUDGE MILLER: Mr. Ed Berko.

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

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

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

26 While I was at the academy I met my

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Berko

2 see the outcome was basically not going to have a

3 just effect, everything was skewed one way. I felt

4 it was in my daughter's best interests to settle.

5 Moved forward constructively to sort of put all this

6 behind us. The problem is, when you settle, it's

7 really not settled, they keep coming back at you

8 with these same things to try to either get

9 concessions on something or, or additional money.

10 And when you've settled, you get yourself into a

11 position where you're basically held as you settled,

12 so what are you complaining about? You put yourself

13 in this position. You basically accepted an offer

14 that you couldn't refuse because of the due process

15 and rules of law and testimony that weren't done up

16 front.

17 That is all I have to say, I'll keep it

18 brief. And if you have any questions, I'd be happy

19 to answer them, and again, I thank you very much for

20 your time.

21 JUDGE MILLER: Our next speaker is senator

22 Tom Duane of the New York State Senate.

23 Helen Nemes? Not here.

24 Brian Zimmerman?

25 Catherine Douglas?

26 MS. DOUGLAS: Thank you, Judge Miller.

1 Douglass

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

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

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

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

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

1 Douglass

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

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

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

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

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

1 Douglass

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

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

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

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

1 Douglass

2 file the requisite motion and supporting affidavit.

3 These fees must be ordered in an amount

4 sufficient to allow members of a private firm to

5 take these cases. Those rare cases when payment of

6 attorneys fees is now ordered, the amount is

7 generally inadequate to cover the time needed to

8 take the case to conclusion, and judges must monitor

9 compliance with their orders and promptly hold

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

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

12 time or a stiff financial penalty to get action.

13 I, therefore, urge this Commission to

14 devise and implement a simple and straightforward

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

16 at the commencement of every matrimonial action

17 where there are financial resources of the marriage

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

19 that the Court will then order the monied spouse to

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

21 open and willing to order additional fees to be

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

23 will decrease the number of requests for withdrawals

24 from representation by attorneys who are not being

25 paid for their services and insure that the monied

26 spouse cannot simply draw out the case until the

1 Douglass

2 other spouse has no choice but to settle.

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

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

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

1 Douglass

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

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

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

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

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

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

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

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

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

1 Douglass

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

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

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

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

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

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

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

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

26 JUDGE MILLER: Very good, Miss Nemes.

1 Nemes

2 Speak into the microphone.

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

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

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

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

1 Nemes

2 environment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 Accountability for law guardians.

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

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

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

16 (Applause.)

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

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

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

1 Zimmerman

2 certified law guardian in the First Department.

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

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

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

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

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

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

26 Law guardians must maintain

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

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

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

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

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

1 Zimmerman

2 citywide.

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

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

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

1 Zimmerman

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

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

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

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

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

23 MR. ZIMMERMAN: Right. Exactly.

24 JUDGE MILLER: Thank you.

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

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

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

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

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

1 Zimmerman

2 hourly rate of the attorney or law guardian.

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

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

22 In addition to the --

23 JUDGE MILLER: You have one minute left.

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

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

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

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

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

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

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

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

15 (Applause.)

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

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

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

8 JUDGE MILLER: Thank you.

9 MR. ZIMMERMAN: Any other questions?

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

13 JUDGE MILLER: We can't take questions.

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

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

18 SEN. DUANE: Good afternoon.

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

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

26 I would like to thank Matrimonial

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

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

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

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

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

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

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

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

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

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

1 Duane

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

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

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

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

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

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

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

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

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

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

26 In closing, I would also be remiss if I

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

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

1 Duane

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

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

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

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

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

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

5 Thank you.

6 JUDGE MILLER: Thank you.

7 Next, Carol Sherman.

8 MS. SHERMAN: Good afternoon.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Sherman
2 of the children.

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

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

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

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

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

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

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

24 MS. SHERMAN: And you know it?

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

1 Sherman

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

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

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

1 Sherman

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

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

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

20 MS. SHERMAN: Okay.

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

23 UNIDENTIFIED VOICE: Can't hear you.

24 JUDGE MILLER: Sorry about that.

25 Can you hear me now?

26 UNIDENTIFIED VOICE: No.

1 Sherman

2 JUDGE MILLER: Can you all hear me now?

3 UNIDENTIFIED VOICE: A little better.

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

6 MS. SHERMAN: Okay.

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

9 JUDGE MILLER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

1 Sherman

2 case and the weaknesses of their case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 JUDGE MILLER: Thank you.

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

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

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

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

5 In my experience, a child always knows if
6 there is domestic violence in the home. The parent
7 may say the child wasn't there, the child was
8 sleeping, the child didn't see. The child always
9 knows. The child knows when there's domestic
10 violence behind a closed door; children will say I
11 could hear it, I wanted to help, usually my mother.
12 Children will feel guilty, they will tell you they
13 feel sad, they will tell you they feel mad. They
14 feel the tension in the home; they see the bruises
15 on the parent. They are not fooled. Children
16 always know when there's domestic violence.

17 Now, sometimes when we interview victims
18 of domestic violence they are ashamed, they are
19 reluctant to tell us about the domestic violence.
20 Part of what I said, one of the most important
21 things of being a law guardian is doing interviews,
22 where one can listen to what people have to say, be
23 sensitive to what they have to say and then try and
24 use that information in a way to effectively
25 represent the child.

26 JUDGE MILLER: I have a question. We

1 Sherman
2 have some information on this. What is the training
3 of the law guardian, in your service?

4 MS. SHERMAN: We, provide, first of all,
5 individual training. We're not an enormously big
6 organization, so we hire people basically one at a
7 time. We spend a lot of time going through
8 interviewing of children, interviewing of the
9 parties. We also go over with each of our lawyers
10 the relevant law in the area. We give them a small
11 number of cases to begin with, the supervisor goes
12 over their cases in the beginning, goes into court
13 with them, with the new lawyers in the beginning.
14 Usually, before a lawyer goes into court, a new
15 lawyer will prepare something in writing about their
16 case. The supervisor will go over that, and if more
17 information has to be gathered, we will do that.

18 I also teach a seminar at Brooklyn Law
19 School and the new lawyers will attend the seminar
20 that I teach as well on substantive areas of law.

21 So it's very much a one-to-one kind of
22 training that we give our new lawyers and very close
23 monitoring, especially in the beginning.

24 JUDGE MILLER: And as I recall, your fees,
25 the lawyers in your organizations are paid through
26 the Office of Court Administration.

1 Sherman

2 MS. SHERMAN: Right. We are totally
3 funded by the Office of Court Administration.

4 JUDGE MILLER: In your experience, when
5 you advocate for the child's wishes or the child's
6 interests, in your experience, does the judge, by
7 and large, listen to you and grant your
8 applications?

9 MS. SHERMAN: Well, I think the judge
10 listens. Okay. And in most cases I have to say the
11 judge would be in agreement, but there certainly are
12 cases where judges are not in agreement and make
13 orders that are not what we advocated.

14 If we are concerned that the child would
15 be in danger we can go to the Appellate Division,
16 which we have done, but assuming that it's an issue
17 of the judge has made a different determination,
18 then the judge has made a different determination.
19 But, certainly, in my experience judges certainly do
20 listen to what we --

21 JUDGE MILLER: In your experience, does it
22 not serve the child to be sent to therapy?

23 MS. SHERMAN: I am sorry, when?

24 JUDGE MILLER: When is it not appropriate?

25 When would you advocate that the child not
26 be sent into therapy, if ever?

1 Sherman

2 MS. SHERMAN: Oh, well, not every child
3 needs to be in therapy. Some children can benefit
4 from therapy. Some children request therapy. Some
5 children are comfortable with therapy, and certainly
6 some children are in situations where they need to
7 be in this therapy. There are other children who at
8 this point in their life they seem to be coping with
9 the situation. They have very supportive parents.
10 They have other people in their lives to whom they
11 turn to for support and therapy may not be necessary
12 at this time, so we do not recommend therapy in
13 every single case.

14 JUDGE MILLER: If a parent doesn't want a
15 child to go to therapy or have any further
16 evaluations but you feel it is advisable, you would
17 propose that the child go to therapy, is that right?

18 MS. SHERMAN: Yes. We would propose that
19 the child go to therapy.

20 Realistically, if the parent in a custody
21 case -- if the parent refuses to take the child for
22 therapy, and it is still our position based on
23 either the wishes or the interests of our client
24 that that child be with that parent, it would not
25 necessarily be our position that then custody should
26 go to the other parent. So we certainly would

1 Sherman

2 request that there be such an order. Whether that
3 order is enforceable or not would depend on the
4 case.

5 JUDGE MILLER: Your law guardians only
6 represent children in Family Court, is that right?

7 MS. SHERMAN: No, we represent children in
8 the integrated domestic violence parts.

9 JUDGE MILLER: But not in the Supreme
10 Court.

11 MS. SHERMAN: We have done some Supreme
12 Court work in Brooklyn when we have been on a Family
13 Court case for many years and the case then goes to
14 the Supreme Court we will follow it. That's a very
15 small number.

16 JUDGE MILLER: Is it your opinion that
17 there should be such a program in the Supreme Court
18 just as there is in Family Court if there are
19 custody issues?

20 MS. SHERMAN: I think that certainly it
21 would benefit the children in the Supreme Court, and
22 I think it may be a way to respond to some of the
23 issues that are raised in terms of law guardian
24 representation.

25 JUDGE MILLER: All of which requires more
26 money. Have you any theory about how we can find

1 Sherman

2 it?

3 MS. SHERMAN: Well, the only thing, there
4 is nothing to say there couldn't be a program such
5 as the Children's Law Center where fees would be
6 collected, and I think that up in the Fourth
7 Department, in some cases there are programs like
8 The Children's Law Center where fees are collected
9 under Tracy Hamilton Hayes, the law guardian and
10 director up there. There could be a program such as
11 The Children's Law Center and OCA could set a
12 uniform rate and then fees could be collected from
13 the parties. I am not proposing that people who are
14 wealthy they have to get free law guardian service,
15 but it still could be done under an institutional
16 provider.

17 JUDGE MILLER: Thank you very much.

18 MS. SHERMAN: Thank you.

19 (Applause.)

20 JUDGE MILLER: The next speaker is
21 Mr. Stempel.

22 MR. STEMPEL: Good afternoon,
23 Justice Miller. It's always a pleasure to see you,
24 and good afternoon to all the distinguished members
25 of this panel.

26 As the Chair of the New York State Bar

1 Stempel
2 Association Family Law Section, I am here to report
3 to you today that our members across the state are
4 working very hard to recommend and implement,
5 together with this Commission, new avenues of
6 expediting and, whenever possible, amicably
7 resolving these cases.

8 This morning I know you heard from my
9 Co-chair, Alton Abramowitz, who discussed with you
10 today the proposals and the bill that we have for
11 no-fault legislation.

12 Under the able stewardship of my
13 predecessor, Mr. Brian Barney, the State Bar
14 Association has worked very hard in order to try to
15 pass this legislation. We have now received the
16 approval of our executive committee and are actively
17 seeking a sponsor for this bill. It is important to
18 understand why this is so important. The members of
19 our Bar Association who do this for a living
20 everyday understand the importance of trying to
21 resolve these cases quickly and, if possible,
22 amicably. We believe that this no-fault bill will
23 reduce the cost of the litigation and will help free
24 up valuable judicial resources.

25 I also wish to report to the commission
26 today the efforts of many of our members who are now

1 Stempel
2 undertaking the task of collaborative law. This is
3 a new and growing phenomenon in the legal system.

4 JUDGE MILLER: Will you explain that to
5 all of us, please?

6 MR. STEMPEL: Certainly, your Honor.

7 The essence of collaborative law is the
8 shared belief of the participants that it is in the
9 best interests of the parties and their families to
10 commit themselves to resolving their differences
11 with a minimal of conflict. It is in its most basic
12 form the opposite of litigation. The attorneys who
13 undertake the collaborative law agreement with their
14 parties agree in the context of the children, which
15 is have important, and I will quote from such an
16 agreement, That settlement discussions should never
17 take place in the presence or in the hearing of the
18 children, and the parties acknowledge that
19 inappropriate communications regarding the
20 dissolution can be harmful to the children.

21 The parties and each of the attorneys who
22 signs such a collaborative agreement agree that they
23 will attempt to settle a case, and any of the
24 settlement negotiation notes and documents produced,
25 with the exception of a statement of net worth,
26 cannot be introduced in evidence should the case not

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2 settle.

3 The parties agree that basically their
4 settlement negotiations will be privileged, will be
5 confidential. They will have the assistance of an
6 able matrimonial attorney -- many of our colleagues
7 do this -- and they will try to resolve the case
8 without the necessity of costly and acrimonious
9 litigation. Most importantly, the attorneys and the
10 clients in that process are united in interest. Why
11 is that? They are united in interest because if the
12 case does not settle through the collaborative law
13 procedure the attorneys can then not represent those
14 parties in any litigation, so the attorneys will, of
15 course, make a best effort to do so, and this is a
16 growing phenomena. There are thirty-five attorneys
17 today in Syracuse who are attending collaborative
18 law training. I spoke to a colleague of mine in
19 Buffalo yesterday, Mr. Jerry Davidson, a former
20 Chair of the section -- recently had over seventy
21 attorneys -- and we are going to do all that we can
22 to promote and educate other attorneys in this field
23 to try to reduce the litigation and the acrimony.

24 Also, I wish to report to this Commission
25 that over the summer we had our summer meeting and
26 it dealt with the issue of same sex marriages. Soon

1 Stempel
2 to be released will be a report from the Bar
3 Association -- the general Bar Association -- not
4 the family law section -- making recommendations in
5 a task force report on the issue of same sex
6 marriages. Our section is in the process of trying
7 to get a handle and address these have important
8 issues which we see, and these new challenges to the
9 court system. Our colleagues recognize the very
10 difficult nature of those cases.

11 As I look around to the commission and,
12 certainly yourself, your Honor, we all worked on
13 these cases and some of these custody cases are so
14 very difficult, and we have all had the experience,
15 try as we might, that there were going to be these
16 cases that despite our best efforts, despite the
17 court's best efforts, they are not going to settle,
18 and there are numerous reasons for this. But we are
19 going to have those cases where there is going to be
20 protracted litigation, where there are going to be
21 five appeals, where they just are not going to end
22 the case and then at the eleventh hour, when all
23 seems lost, they will file bankruptcy and protract
24 litigation further. With that in mind, I have
25 several most respectful recommendations to address
26 that element of the practice where settlement just

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2 cannot be achieved.

3 The first recommendation is that whenever
4 possible the courts try to issue prompt decisions on
5 motions. When I say "whenever possible" is not out
6 of any simplicity, but just in recognition of the
7 case flow that the trial courts handle. It is
8 important when we wait months for a decision -- the
9 cases do not improve with age and it becomes more
10 difficult. By the same token, which is have
11 important for the litigants and for the court and
12 the whole system, is for the enforcement of those
13 orders. That is have important. It is very
14 difficult when we obtain pendente lite orders and
15 then the mortgages are not paid and the house goes
16 into foreclosure, and say what you will, the focus
17 of the case changes.

18 Also, in the context of enforcing orders,
19 the Second Department issued a great decision,
20 Miceli, several years ago, and that decision stated
21 that, in the context of a matrimonial case, failure
22 to disclose the appropriate remedies not in order of
23 preclusion, because the person seeking the equitable
24 distribution has the burden of proof to preclude
25 them from the documents, does not help them, and in
26 this Second Department case, Miceli, which the court

1 Stempel
2 said the better remedy is to deem true the other
3 party's allegations concerning the intimate assets,
4 that rule should be enforced, should be perhaps
5 promulgated in the recommendations of this
6 Commission.

7 We all work under a time table to try to
8 get these cases done. The experts that are here
9 work very hard, but if they don't have the documents
10 you cannot come to the evaluation. To really
11 toughen and strengthen the production of those
12 documents, and if you don't then we will deem the
13 other allegations true -- let's move on -- I believe
14 will greatly cut down costs and distance of those
15 cases.

16 And the last recommendation is one that is
17 certainly not novel, but I think should receive
18 greater scrutiny and perhaps revitalization and that
19 is the use of JHO's and referees. Certain counties,
20 especially here in New York, they have a superb
21 referee group, and that when you come in for a date
22 certain on a trial, whether or not the judge has
23 cases engaged, you will try the case on that day or
24 shortly thereafter. In other counties the
25 experience is not quite the same, and we all, all of
26 us that have great experience in this field, we may

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2 look at a case and say it's three days. I know many
3 times judges when they say to the attorneys, How
4 many days do you think it is, counsel; they say,
5 Three days. They make it six just from past
6 experience. But what happens when a case really
7 goes on over a contested custody case and the trial
8 court gets backed up because they are really trying
9 to take testimony, other cases back up. We should
10 have a system whereby we use JHO's and referees more
11 frequently so that if the assigned judge who has the
12 case is backed up and cannot try the case that that
13 case can still go out for trial, that everyone is
14 ready, and we can move that case.

15 You talk of funding. It is always
16 appropriate to have a great idea, but how do we pay
17 for those ideas? Feedback I have gotten from my
18 clients and other practitioners in the field is --
19 the attorneys are whatever per hour. They are
20 experts. If they were to say the JHO is \$1,000 a
21 day, just pick a day, in 90 percent of those cases
22 the parties would be willing to pay that in order to
23 move the case through rather than have a delay of
24 several months with all of the occasions --
25 litigation and enforcement that will go with that.

26 So in conclusion -- I know you had a long

1 Stempel
2 day today -- I will be short -- I just wish to
3 emphasize to the commission that the members of the
4 State Bar Association will work very closely with
5 you. You have my personal assurances that we will
6 support you and be actively involved in this
7 process.

8 Thank you very much.

9 JUDGE MILLER: Thank you very much.

10 Harriet Holtzman.

11 MS. HOLTZMAN: Good afternoon. Thank you
12 for the opportunity to be here.

13 As everyone whoever had any connection
14 with divorce knows there are only two things
15 divorcing couples fight about, money and children.
16 As we focus on the horror stories of the worst
17 cases, we tend to forget about the good news, and
18 there was good news. Most divorcing couples
19 assisted by their attorneys, and often by mental
20 health professionals as well, find a reasonable way
21 to divide their marital property, reallocate their
22 combined family income through maintenance and child
23 support, and participate in the lives of their
24 children, all without setting foot in the courtroom.

25 Another large group of divorcing couples
26 commence litigation and, with the additional

1 Holtzman
2 assistance of judges and court personnel, come to
3 resolve these same issues long before trial becomes
4 necessary. And even where trial does become
5 necessary, it is a small fraction of trials that
6 proceed for weeks and months without end.

7 As we look at ways to improve the process
8 for everyone, we often forget about the needs of the
9 majority of litigants, those whose cases do not make
10 headlines, and do not give rise to juicy anecdotes.
11 I would like to focus on them.

12 For almost 20 years I have represented
13 members of Local 32B-J who are facing divorce.
14 People of moderate means, they are fortunate in
15 having their legal services provided by a prepaid
16 legal services plan. Although these union members
17 are spared the anxiety of allocating scarce funds to
18 pay their own legal fees, they are as concerned
19 about the cost of litigation as anyone else. They
20 still confront the need to pay legal fees for their
21 spouses, not to mention their share of related costs
22 of law guardians, mental health professionals,
23 appraisers and other experts.

24 For families of moderate means like 32B-J
25 families, the cost of litigation, especially where
26 custody issues are involved, can be onerous.

1 Holtzman

2 Anything lawyers and courts can do to minimize these
3 costs will be an important contribution to the lives
4 of those families and those like them throughout the
5 state. None of these families can afford to add
6 expensive litigation to the unavoidable stresses,
7 economic and otherwise, which accompany the breakup
8 of a marriage.

9 Saving money by saving time. The best way
10 to reduce costs in matrimonial or any other
11 litigation is to save attorney time. Some cost
12 reduction is the responsibility of the parties to
13 the divorce action themselves. Parties have a great
14 deal of input into the conduct of their cases. They
15 should make their wishes known. By court rule,
16 parties must receive bills at least every 60 days.
17 They should exercise their right to review and
18 discuss their bills, remembering that they cannot be
19 charged for the time spent doing so.

20 Attorneys can, and should, make every
21 effort to get to the point in their papers and
22 counter quantity with quality.

23 Attorneys and judges together must find
24 ways to reduce costly hours spent waiting in the
25 courtroom for a conference or an oral argument on a
26 motion. It would certainly help to extend the

1 Holtzman
2 practice of scheduling cases for specific time
3 slots, as already done in some courtrooms, to all
4 courtrooms, by court rule. Attorneys who
5 chronically ignore the schedule and show up late,
6 should be sanctioned from the bench without the need
7 for the attorney left waiting to spend yet more
8 attorney time making a motion seeking that result.

9 Litigants, who must by court rule appear
10 at the preliminary conference, should only appear at
11 subsequent compliance conferences, if they wish to.
12 For the litigants who work, requesting a day off for
13 every conference is a financial burden that can even
14 jeopardize continued employment.

15 Mechanisms for enforcing existing court
16 rules more strictly would save time as well. The
17 statement of net worth, required to be exchanged no
18 later than ten days before the preliminary
19 conference can, if properly prepared, provide most
20 of the financial information necessary to resolve
21 the financial issues in an average matrimonial case,
22 particularly where both parties are salaried and
23 have no exotic assets. But just because a document
24 is called a statement of net worth, and follows the
25 format of a statement of net worth, does not make it
26 a statement of net worth that complies with the

1 Holtzman

2 court rule.

3 I have received statements of net worth
4 with dream list expenses having no relationship to
5 reality, since the expenses listed by one party far
6 exceed both parties' combined net income and there
7 is no debt building up month by month to account for
8 the excess expenses. More often than not, I receive
9 statements of net worth with no supporting
10 information; no pay stubs, no tax returns, no W-2,
11 and in short, no back up of any kind.

12 The preliminary conference rules already
13 in place clearly mandate financial documents to be
14 produced at the preliminary conference. Please make
15 it happen.

16 The amount of attorney time that would be
17 saved if the existing rules were more strictly
18 enforced and the required financial documents were
19 actually produced in advance of the preliminary
20 conference would translate into enormous savings for
21 the litigants. Perhaps an additional court rule
22 providing a presumption of attorney fees to the
23 party forced to make a motion to compel the
24 production of documents already required by court
25 rule 202.16(f) would help attorneys coax documents
26 out of unwilling clients and punish attorneys who

1 Holtzman

2 simply don't bother to seek them.

3 Law guardians, forensics and other

4 experts. In the best of all possible worlds, law

5 guardians and mental health experts would be

6 routinely appointed in contested custody cases.

7 Their services, well performed, can only be helpful.

8 The voice of children old enough to have a

9 meaningful discussion with the law guardian should

10 certainly be heard. The process of forensic

11 evaluation itself, as well as the insight of an

12 objective mental health professional into family

13 dynamics and, where applicable, serious health

14 issues, sheds light helpful to the ultimate decision

15 maker, not to mention often contributing to the

16 always preferable agreement of the parties.

17 Unfortunately, we do not live in the best

18 of all possible worlds. We live in a tight economy

19 with very limited public resources. As a result,

20 law guardians, forensics and other experts should be

21 used in those cases where their expertise can most

22 assist the decision maker. The cost of these

23 services must be considered in light of the

24 financial resources of each family. Settle or pay

25 the experts is a threat that should never be made or

26 implied to end the case.

1 Holtzman

2 Discovery in contested custody cases. For
3 sometime now there has been an ongoing discussion
4 about the desirability of extending the practice of
5 having discovery in contested custody cases,
6 prevalent in the upstate counties. I understand
7 that many upstate practitioners find such discovery
8 helpful in resolving custody cases by agreement at
9 the earlier stage of litigation. I wish there were
10 a way to try the procedure for some experimental
11 time period here. Absent that unlikely possibility,
12 however, I feel I must register my opposition to
13 more discovery.

14 The financial burden on average litigants
15 of increased depositions and other discovery where
16 such discovery was previously impermissible worries
17 me. Once such discovery is permitted, won't it have
18 to be conducted in every case, just to be on the
19 safe side? While depositions of expert witnesses in
20 extremely contested custody cases may help settle
21 some of them, it should not come at the cost of
22 increased legal expenses in the majority of custody
23 cases.

24 Finally, grounds for divorce. While we
25 all understand that changing the grounds for divorce
26 is a task reserved to the legislature, I would feel

1 Holtzman
2 remiss in my duty to the clients if I did not
3 mention the enormous help in reducing the time spent
4 in matrimonial cases, and the expense that time
5 brings with it, if New York would only adopt a
6 divorce ground like New Jersey's, based on the fact
7 of the parties living separate and apart for a
8 specified time period.

9 In addition, the lack of no-fault divorce
10 in New York, except by a separation agreement
11 followed by a year's wait, deprives many people who
12 have long lived apart from an uncooperative spouse
13 of the possibility of divorcing at all. You would
14 be surprised to learn how many people left marriages
15 where there was no cruelty, just no love and
16 affection, only to find themselves with no grounds
17 for divorce. This unfair result is particularly
18 hard on workers who look forward to receiving their
19 hard earned pensions only to discover that they will
20 receive a reduced monthly amount, absent a divorce
21 or a waiver signed by an estranged spouse, merely
22 because they remain legally married.

23 I look forward to a day when I will no
24 longer have to tell a woman who long ago left her
25 husband because the marriage was unhappy, not
26 hostile or violent, that her only recourse is to

1 Holtzman

2 move to New Jersey. Thank you.

3 JUDGE MILLER: Miss Holtzman, before you
4 leave us, in your opinion should a law guardian and
5 forensic be appointed in all cases; except for the
6 cost, but would it be advisable to have a law
7 guardian, a forensic in every case if we could
8 afford it?

9 MS. HOLTZMAN: I would appoint one in
10 every case where the judge felt it would be helpful
11 in making a decision.

12 JUDGE MILLER: In other words, it is up to
13 the judge.

14 MS. HOLTZMAN: I would leave it up to the
15 judge.

16 JUDGE MILLER: Thank you very much.

17 (Applause.)

18 JUDGE MILLER: Maria Arias.

19 MS. ARIAS: Good afternoon. Thank you
20 very much for this opportunity to address you today.

21 I'm a law professor at the City University
22 of New York. I've been teaching and practicing in
23 the Battered Woman's Rights clinical program there
24 since it began in August of 1990. Since that time
25 the clinic has had a special commitment to provide
26 services, specifically for low income immigrant

1 Arias
2 battered women, and that's the population which my
3 remarks this afternoon will focus on.

4 Specifically the particular needs and
5 issues that this population faces in regards to
6 negotiating family and court matters regarding
7 orders of protection, custody, visitation and
8 matrimonial proceedings.

9 I think this population is particularly
10 vulnerable on account of the lack of their financial
11 resources, their status as either victims or
12 survivors of intimate-partner violence and also
13 their lack of legal status in this country.

14 My experience with these women over the
15 past 14 years in my work in the clinic has been that
16 frequently the experiences that these women share
17 with our organization is that the legal system
18 results, their participation in the legal system
19 winds up resulting in their revictimization as they
20 try to use the very forums that are supposed to be
21 designated to assist and remedy the legal problems
22 that they are facing.

23 I think one of the overarching issues that
24 this population faces, especially in negotiating
25 family law issues, is the lack of understanding
26 that, both in the Family Court and the Supreme

1 Arias
2 Court, as has been my experiences, is the
3 understanding of how the immigration issues that
4 this population faces overlaps with the issues that
5 the courts are trying to address with regards to the
6 family law matters that are before the court.

7 Frequently, many perpetrators of domestic
8 violence threaten their partners, and one of the
9 frequent threats that we hear is that you're going
10 to be deported and you're going to be deported
11 because you don't have status in this country, you
12 can't go to the courts, because if you go to the
13 courts the courts are going to make sure that you
14 get deported. And they are also told that they are
15 going to lose custody of their children. This
16 winds up in this population not accessing courts and
17 forums where they could assert legal rights that
18 they have in this country.

19 Ironically, part of the issue around this
20 is that part of the reason why these women don't
21 have their legal status is because their U.S.
22 citizen and permanent U.S. husbands are not
23 providing them with the assistance that normally
24 would be provided by such spouses to help them to
25 get their immigration status.

26 Under the immigration laws of this country

1 Arias
2 a person married to a U.S. citizen or a legal
3 permanent resident is able to adjust their status as
4 a family relative and can get legal status to remain
5 legally in this country.

6 This issue around deportability gets
7 reinforced in a variety of forums and, you know,
8 it's a really unfortunate thing that this occurs and
9 it winds up getting repeated in a variety of forums.
10 And one of the things that we try to educate our
11 clients on in the population we're working with is
12 really it's the Department of U.S. Citizen and
13 Immigration Services that has the authority to be
14 making the determination about who's deportable, and
15 in many of these situations these are women who are
16 potentially eligible for services so that they can
17 get legal status here.

18 There have been recent legislation under
19 the Violence Against Women Act, both in 1994 and in
20 2000, that make these women eligible for relief.
21 Unfortunately, there's very few people that are
22 educated in both the Family and Supreme Court that
23 are able to inform this population of these
24 services, so that they can access these services.

25 I feel that what these women need is
26 really adequately trained attorneys who can help put

1 Arias
2 forth their legal claims and help them to assert
3 their rights that they have within this country.

4 I also think that we really need to have
5 training and education of the court personnel, to
6 make sure that the court understands these issues
7 and is not continuing to perpetuate false
8 allegations and myths that are being put forth by
9 the abusers.

10 I wanted to say that one of the things
11 that we see, especially in Queens County where I'm
12 practicing, is that many of these women are forced
13 to move forward in their cases without assistance of
14 counsel. Partly because there's not that many
15 legal services programs available to provide
16 services for them, partly because there's limitation
17 around funding to serve this particular population,
18 so they are forced to navigate a very foreign
19 system, and frequently they are also women that do
20 not speak the language and so they have multiple
21 issues in terms of being able to understand the
22 forums in which they are in, so that they can assert
23 their rights.

24 One other thing that I want to raise,
25 which is something I've encountered personally in
26 terms of my experience in Queens County in the

1 Arias
2 Family Court, is that on numerous occasions there
3 have been judges who have refused to provide
4 assigned counsel to battered immigrant women because
5 they are not able to provide the documentation that
6 the Court is requiring about their financial
7 situations. And these are issues regarding, you
8 know, the Court wants a W-2, wants income tax
9 returns, and this is a population that is frequently
10 working as undocumented workers and so they are
11 either getting paid, they are frequently getting
12 paid in cash and don't have this type of
13 documentation. And even when they provide credible
14 evidence and sometimes even are able to get an
15 employer to write a letter on their behalf, document
16 that this is the income they have and frequently
17 this is income that is, would make them eligible.
18 I recently had a denial of a woman who's income was
19 \$150.00 a week for herself and her daughter. Her
20 daughter was public assistance eligible, was on
21 public assistance and the judge denied having her
22 portion of the law guardian fees be paid through the
23 18B program because the Judge said she didn't
24 provide the adequate financial information. And I
25 feel that this is a way of sort of punishing these
26 women.

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2 And I just wanted to repeat, the reason
3 why these women don't have a proper authorization to
4 work is because they haven't, their spouses haven't
5 assisted them. So it's important for the Court to
6 be able to understand how these two things are
7 overlapping each other.

8 I believe that you've heard a lot of
9 testimony today in terms of the different problems
10 with issues about law guardians, forensics, and I
11 think that in terms of when we're talking about
12 immigrant women these problems are exacerbated, they
13 are exacerbated by the fact that frequently the law
14 guardians, as well as the forensic experts, don't
15 have the cultural competence to understand the
16 particular ethnic and cultural issues that are
17 relevant to this particular community.

18 Additionally, there's many issues about
19 language capabilities, and the two most frequent
20 problems that I see with this in terms of the use of
21 forensic experts is, you either get a forensic
22 expert who believes that you shouldn't use an
23 interpreter, so even if a woman has very limited
24 English proficiency, she may speak a little bit of
25 English but not sufficiently to get through the
26 in-depth interview that it takes to have a forensic

1 Arias
2 interview with a forensic psychologist, but the
3 forensic believes that having an interpreter is
4 going to interfere, so they will go forward and do
5 the interview but they are not really able to gather
6 the necessary information in order to make the type
7 of assessment and document the information they need
8 to document; or, on the other hand, you have experts
9 that say that they are going to use an interpreter
10 and, unfortunately, you have interpreters that are
11 not really sufficiently versed in, not just being
12 able to interpret the language, but to understand
13 sort of the culture of what's the information that's
14 being gathered through forensic that's being
15 documented? So, it's like this multitude of
16 problems that present themselves.

17 My personal experience is also that
18 there's a lot, there's not that many forensic
19 experts that are multilingual. I have some
20 forensic experts that speak Spanish, but other than
21 Spanish there's very few other languages in which
22 I'm able to meet the needs of the clients I'm
23 serving, and I'm serving the needs of clients from a
24 variety of ethnic backgrounds, so there is a variety
25 of ethnic backgrounds that I'm meeting.

26 I want to say something with regards to

1 Arias
2 the work I was doing and where there was a law
3 guardian appointed in the case and the law guardian,
4 on our second appearance in court, said that he
5 wasn't able to interview the child because the child
6 only spoke Spanish. The child was five years old
7 and was at home. And I talked to him about whether
8 he could maybe use an interpreter and he said, well,
9 no, I can't speak to her, she doesn't speak English
10 and I don't speak Spanish, so I can't speak to her.
11 And then I represented this in court, and it was
12 accepted by the Court; so I feel it was like a
13 double problem in terms of the Court condoning that
14 type of behavior.

15 That's just one example in terms of the
16 law guardian issues.

17 And lastly, I do want to talk about the
18 need in terms of interpretation and translation.

19 My experience in Queens is that there are
20 court staff that interpret in the Spanish language
21 and in French and Creole, but there's about 35
22 different languages that I myself have worked with
23 in the 14 years that I've been at CUNY Law School.
24 The Court tries to get per diems but frequently the
25 way a woman gets through the court system, in either
26 the Family Court or the Supreme Court, is through a

1 Arias
2 family member or somebody she knows who she brings
3 to the court. And that is not an adequate way for
4 a person to be able to get through the proceeding in
5 the Supreme Court or the Family Court.

6 I want to say that in terms of Supreme
7 Court, I think it's even more difficult for a
8 foreign pro se immigrant woman to negotiate. The
9 Family Court at least is supposed to be a little bit
10 more user friendly and is supposed to be a forum
11 specifically for pro se litigants. But in the
12 Supreme Court, if you don't have an attorney it's
13 going to be very difficult to get through, and my
14 experience is it's very difficult to get appointed
15 counsel in matters that have you before the Supreme
16 Court, so frequently women wind up defaulting and a
17 decision winds up getting entered, and they don't
18 really get an opportunity to assert their rights.

19 JUDGE MILLER: I have a question for you.

20 MS. ARIAS: Yes?

21 JUDGE MILLER: Could your group deduce an
22 information sheet, possibly of different languages,
23 a checklist for court personnel, so that they could
24 present, could present to immigrants who do not have
25 green cards, or make literature available to that
26 effect? In other words, to have people in the

1 Arias
2 courthouse who would have this information, in
3 different languages, and present it to the
4 population, to at least give them some idea how to
5 navigate the system?

6 MS. ARIAS: Right. There's actually, I
7 think maybe in three or four different languages
8 there's a few short brochures that try to help
9 people navigate, I think at least an Order of
10 Protection. Not other parts of the proceeding, but
11 in the Family Court the Order of Protection part.

12 JUDGE MILLER: The problem you point out
13 about a lack of legal representation for indigent
14 persons in matrimonial cases is not only a problem
15 in Queens, it's a problem throughout the state.

16 Do you personally or does your
17 organization have any recommendation for correcting
18 this problem?

19 MS. ARIAS: Maybe mandatory pro bono for,
20 you know, getting counsel, getting private attorneys
21 to have to take cases. I know that in Queens I've
22 worked with the Bar Association in Queens and they
23 do take divorces, but they will only take
24 uncontested matters.

25 The other issue is that I do think that
26 there's a number of clients, for example, that I

1 Arias
2 wind up representing in my organization who, where
3 the husbands actually have assets, it's just that
4 our client doesn't have access to it. And if there
5 could be proceedings that could make those assets
6 more readily available, these women would have some
7 financial recourse so that they could use that in
8 order to represent themselves.

9 JUDGE MILLER: Counsel?

10 MS. ARIAS: Yes?

11 JUDGE MILLER: Do you have an opinion as
12 to whether a forensic evaluator could be trained to
13 be sensitive to cultural issues?

14 MS. ARIAS: Yes. I believe, I mean I'm a
15 very open-minded person and I believe that all of us
16 are able to be trained and educated and learn about
17 new and different issues.

18 JUDGE MILLER: How would you go about
19 training?

20 MS. ARIAS: Well, I think that there's a
21 number of organizations, for example, my
22 organization works with a number of community-based
23 organizations, with the Asian community, with
24 Latinos, and we have personnel from those
25 organizations, they come to our organization and do
26 training in our classrooms, we educate our students

1 Arias
2 on how to work with those clients. We sometimes
3 partner together on the representation of a client
4 and we have a community-based person from our
5 client's cultural background that will work with us
6 around the representation, and through that we
7 ourselves are getting educated and learning more
8 about how to serve that particular culture.

9 I think that the one thing that I would
10 say about that is that it's not a quick fix.
11 Frequently when I get asked to do training around
12 cultural competence, it's like can you come and do
13 15 minutes, you know, during the lunch hour of the
14 court personnel's lunch break, and it's one shot and
15 then, you know, I don't get in there again, and it's
16 a much more complex thing, and I think we all have
17 to have a certain level of sensitivity of willing to
18 be able to work on it, it's not something you can
19 learn in 15 minutes.

20 JUDGE MILLER: Thank you very much.

21 And our last speaker, Jo Ann Douglas.

22 MS. DOUGLAS: Hello.

23 I'd like to thank you for the opportunity
24 to speak today. And I must tell you, I've heard
25 every speaker today and every single person has
26 raised really compelling points and has been highly

1 Douglas

2 articulate and they are all very very hard acts to
3 follow, but nonetheless, I'd like to try.

4 I'd like to use my time to discuss the
5 issues relative to the law guardian practice that I
6 believe are the most important issues.

7 The first is the compelling need for law
8 guardians in hotly contested custody and visitation
9 matters.

10 The second would be the role of the law
11 guardian, and the need for statewide protocols
12 defining that role in a uniform way.

13 The third is training for law guardians
14 that is consistent throughout the state, including
15 "advanced" training for special issues, such as drug
16 addicted parents or special needs children, or
17 domestic violence, or the immigrant population, to
18 which I was just enlightened.

19 The first step in reviewing our practices
20 in the field of parenting litigation should be the
21 recognition that the single most important focus
22 must be on the children, on their rights, their
23 needs, their safety, their comforts, their wishes,
24 and thus, their best interests.

25 Parents' rights and responsibilities are
26 of paramount concern to the court but should have no

1 Douglas
2 more than equal standing to the court's independent
3 review and consideration of the children themselves.
4 In order to better understand the children's plight
5 and have access to their position, we have
6 legislation to permit the children representation,
7 and we have evolved to where we often favor the use
8 of such representation, especially in contentious
9 situations. Far too frequently, well-intended
10 parents are so embroiled in the litigation that
11 their otherwise keen awareness of and sensitive to
12 their children's welfare is clouded by the
13 overwhelming anger and resentment that has been
14 engendered for the other parent, or even by the
15 other parent, it doesn't matter. Parents who would
16 never think of harming their children suddenly lose
17 sight of the children's fragility, and are focused
18 on their own battles, drawing the children in at
19 every turn. This applies to BOTH parents, in fact,
20 though often one's judgment becomes more impaired as
21 a negative perception of her or his own plight in
22 the litigation takes over. In these, and not all,
23 circumstances the Court does well to appoint a law
24 guardian, and what might better be called Children's
25 Counsel or Child Advocate. In fact, the very use
26 of the word "guardian" may actually be misleading to

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2 some litigants, causing a belief that the lawyer
3 actually assumes a parental role of sorts; this is
4 surely not the case. Having recently returned from
5 a nationwide conference on child advocacy, I have
6 learned we are unique in using this particular term
7 for a child's lawyer and advocate.

8 The children's lawyer has become and
9 should remain a key element in ascertaining the
10 rights, needs, comfort and wishes of the child,
11 wholly separate and apart from the other horrific
12 events surrounding the divorce. However, this is
13 not to say the child's lawyer is to determine how
14 those elements are resolved, nor is she to advise
15 the Court as to the client's best interests. In
16 fact, it is uniquely the Court's obligation to
17 assess and rule on best interests. Instead, the
18 law guardian is there to do no more than what the
19 parents' counsel do, advise and advocate.

20 One of the problems that I believe this
21 esteemed commission will encounter is there is no
22 continuity within our state or among our
23 departments, counties, or even judges, as to exactly
24 how the law guardian should function, what the role
25 really is, and what anyone's expectations should be.

26 And I might point out that expectations

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2 are very very important, and that the trauma, that
3 one of your principle issues on this commission as
4 to the trauma of families would be greatly reduced
5 if they had expectations of this process and of the
6 personnel in the process.

7 While the New York State Bar Association
8 has been very active in devising the oft-cited
9 standards for law guardian representation, a recent
10 article about law guardians in the State Bar journal
11 summer issue crystallizes the need for standards, as
12 it reflects the disparate practices upstate to
13 downstate. When two letters to the editor
14 responded to the article, pointing out ethical
15 considerations that it seemed to ignore, the
16 author's response was "there are unwritten rules of
17 practice within New York State, depending in part on
18 the regions in which one practices in." This, I
19 submit to you, is unacceptable, certainly, in the
20 representation of children, and basically in all of
21 matrimonial litigation.

22 As to the role, my colleague and friend,
23 Brian Zimmerman, read to you from the Chief Judge's
24 task force's definition of "law guardian", and I
25 would like to remind you that "when the law guardian
26 is convinced that either the child lacks the

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2 capacity for knowing, voluntary and considered
3 judgment, or that following the child's wishes is
4 likely to result in a risk of physical or emotional
5 harm to the child, the law guardian would be
6 justified in taking a position that is contrary to
7 the child's wishes."

8 The questions relative to the role should
9 be answered from this one protocol.

10 Is the role pure advisor/advocate, as the
11 parents' attorney? ABSOLUTELY.

12 Is there an element of best interests to
13 be assessed by the law guardian? NOT IF THE CHILD
14 IS CAPABLE OF KNOWING, VOLUNTARY AND CONSIDERED
15 JUDGMENT.

16 Does the law guardian have an obligation
17 to inform the Court of information that would
18 enhance a position that is contrary to the client's
19 position? Again, NOT IF THE CHILD IS CAPABLE OF
20 KNOWING, VOLUNTARY AND CONSIDERED JUDGMENT.

21 My somewhat educated guess is that the
22 hearings in Albany, Buffalo and maybe even White
23 Plains will turn up some very different views on
24 this. And this is one difference among law
25 guardians that must be codified into a cohesive set
26 of rules and parameters for the practice. The

1 Douglas
2 lawyers should know what to expect, the judges
3 should know what to expect, law guardians should
4 know what to expect, and most important, the
5 parties, including the child, should know what to
6 expect.

7 Law guardians should actively participate
8 in and even prosecute all facets of their client's
9 rights in the litigation, including the right to a
10 peaceable and peaceful environment, access and
11 decision making. However, at the same time, law
12 guardians, as any other attorney, must assess the
13 nature and viability of the client's position and
14 determine whether advocating it will be helpful or
15 harmful to the client's overall position. The
16 decision is to be made with the client, of course.

17 I imagine you've heard today, I don't have
18 to imagine, that some believe that the law guardian
19 is too powerful, and I agree that should not be the
20 case. The law guardian is important but should not
21 be viewed any differently than any other lawyer in
22 the case. The law guardian has an important role,
23 but it's only part of the equation. The law
24 guardian, coming into the matter at the outset with
25 complete neutrality, as between the parents, will no
26 doubt acquire information, make tactical judgments,

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2 attempt negotiations, work with and advise the
3 client, and develop a position on behalf of the
4 client that may be consistent with one parent more
5 so than with the other. While the law guardian may
6 have a birds eye view of many of the circumstances
7 of the family and the parenting, and may even make a
8 personal, private assessment and form an opinion, as
9 parents' lawyers do, it is simply not his job to
10 convey that to the Court or to advocate it in the
11 litigation. The First Department, consistent with
12 the Advisory Committee, has promulgated standards
13 that require the law guardian to advocate for the
14 child's position unless his judgment is impaired by
15 virtue of age, influence, or other factors. In
16 either case, the child's position must be disclosed,
17 absent direction from the child to the contrary.

18 There is, however, one factor worth
19 noting. While there is an expectation that the law
20 guardian may not advocate the position he or she has
21 come to believe is the most appropriate. The mere
22 fact that the law guardian, pursuant to the rules,
23 declines to advocate the child's position is a
24 pretty clear signal as to what the law guardian
25 believes. Following statewide definition on this
26 issue will be enormously helpful to the courts, to

1 Douglas
2 the lawyers, to the litigants and to the law
3 guardian.

4 Law guardians must be trained to handle
5 the various cases to which they are appointed,
6 whether they include allegations of domestic
7 violence, child abuse, drug abuse, mental illness,
8 religious differences, cultural differences, or
9 special circumstances that permeate custody
10 litigation. The training, too, must be consistent
11 throughout the state, both in terms of the
12 requirement for and the content of that training.
13 The different standards in the four departments
14 should be molded into a cohesive, single expectation
15 of quality services by all appointed counsel, and
16 standards for making and accepting appointments in
17 paid and unpaid matters should be statewide, not
18 based on venue or parents' resources.

19 The last issue I wanted to discuss, it's
20 not the last in importance, certainly, it is my
21 sincere belief that those attorneys who accept to
22 serve as law guardian should be mandated to serve as
23 pro bono or publicly-funded law guardians as well.
24 This, of course, becomes more difficult if the law
25 guardians have full litigation practices and appear
26 as law guardians only occasionally. There may

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2 simply not be enough room in their practices for the
3 paid cases and the 18B or pro bono cases on top of
4 that.

5 One of the most important messages I would
6 like to convey to you today is that it is the right
7 of ALL children, not just the children of wealthy
8 parents, to have competent counsel. While the
9 children of the wealthy will have the most highly
10 compensated and trained law guardians appointed for
11 them, the children of the poor surely deserve
12 quality representation as much as, if not more than,
13 children of the wealthy, particularly because it is
14 sometimes so easy to "fix" certain problems with
15 money, while the needs of the poor may require
16 greater skill, imagination and insight. On a
17 statewide basis, law guardian certification should
18 include the commitment of representation to all
19 children as assigned by the Court, and I would urge
20 that a reasonable ratio of unpaid cases to highly
21 paid cases be set up. In fact, I might point out
22 that this could be a very useful tool as a
23 modification to the Part 36: rule, the "cap"
24 currently in place could be credited by the
25 calculation of the attorney's regular rate of pro
26 bono time, or minimally paid time which would be

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2 deducted from the law guardian's total approved
3 compensation under the rule. Regardless of whether
4 this system of encouraging the best most renowned
5 attorneys to represent the poor is used, or one
6 where there is simply a mandate to take a certain
7 number of unpaid or lesser paid cases, or a
8 combination, it is the unique opportunity of this
9 Commission to effectuate some system to ensure that
10 the parents who can pay for "the best" are not the
11 only ones who receive the best.

12 JUDGE MILLER: I have a few questions for
13 you, and some of these have been asked of other of
14 our speakers and we wanted to know your point of
15 view.

16 If the child is not competent to advise
17 the law guardian as to his or her wishes, why have a
18 law guardian? Why not a guardian ad litem, or why
19 not rely on the forensic?

20 MS. DOUGLAS: You know, certainly in the
21 First Department there are some judges who only
22 appoint law guardians, whether it's for a six-month
23 old or a 16 year old. And I've been in that
24 position in both situations, and other than the
25 verbal communication with the child, a lot of the
26 work is the same. The investigation that any

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2 lawyer does for a client is the same, the interviews
3 that you conduct, the third-party consultations and
4 so forth, they are all the same. And sometimes
5 children can communicate. Though I'm not a mental
6 health professional, children --

7 JUDGE MILLER: Why not a guardian ad
8 litem?

9 MS. DOUGLAS: A guardian ad litem would be
10 fine, except some judges do not want their court
11 appointees to testify or prepare reports, they want
12 them to participate in the litigation. Some judges
13 permit their guardian ad litem to participate in the
14 litigation and at trial. Sometimes the roles are
15 very very close, your Honor.

16 JUDGE MILLER: And your view is it should
17 be uniform throughout the state?

18 MS. DOUGLAS: It would be nice.

19 JUDGE MILLER: Another question.

20 If you feel, as the law guardian, that the
21 child, your child is being brainwashed, do you still
22 advocate what that child says he wants, or do you
23 substitute your judgment?

24 MS. DOUGLAS: I would have to say it
25 depends on the circumstances. If the brainwashing
26 is really contrary to what I see the reality to be,

1 Douglas

2 I would first of all discuss it with the client, if
3 the client is old enough, and I would try to
4 understand where the client's position conveyed to
5 me is coming from. After that, if I feel I really
6 cannot advocate that position, I would get the
7 client's permission to convey his or her position to
8 the Court, and then in the First Department, again,
9 there's no uniformity. The First Department says
10 that the lawyer, the law guardian does not advocate
11 the child's position. It's unclear, frankly,
12 whether the law guardian advocates a different
13 position or just twiddles his thumbs. Which I
14 don't believe is appropriate. There's a person
15 there who can be very helpful in offering evidence
16 to the Court and eliciting testimony from all of the
17 witnesses.

18 JUDGE MILLER: The rules are not clear.

19 MS. DOUGLAS: And they are certainly not
20 uniform.

21 JUDGE MILLER: One last question.

22 Should a law guardian have an ex parte
23 access to a forensic in a custody case?

24 MS. DOUGLAS: There was a time when this
25 happened all the time, and everybody knew about it
26 and nobody seemed to object. Now it is no longer

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2 the case.

3 I think there are very rare circumstances
4 where, in my experience, upon written consent of
5 counsel about a particular issue I have had
6 permission to discuss with the forensic that the
7 issue exists to insure that the forensic is able to
8 visit the issue. I can understand a concern about
9 one lawyer have access to the forensic and not the
10 other. My only concern is that my client doesn't
11 have the same capacity for articulating to the
12 forensic what the parents can articulate. My
13 client is also not prepared for the forensic
14 evaluation the way I believe many litigants are
15 prepared by their law firms.

16 JUDGE MILLER: Thank you very much.

17 That will conclude the first public
18 hearing of this Commission, and before we do so I
19 want to first of all thank the presenters, who I
20 think all of you were articulate and informative and
21 most helpful, with very important testimony.

22 I want to thank the audience, who were
23 courteous and obviously who were genuinely
24 interested in all that which transpired. And for
25 the Commission, I know I can speak, that this has
26 been an enlightening and important public hearing,

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2 and we look forward to hearing much more from all of
3 you. Thank you.

4 (Whereupon the public hearing was

5 concluded.)

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