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2 SUPREME COURT OF THE STATE OF NEW YORK  
3 COUNTY OF NEW YORK

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5 THE NEW YORK STATE MATRIMONIAL COMMISSION  
6 Public Hearing - New York City

6 -----X

7 100 Vesey Street  
8 New York, New York  
9 May 9, 2005

8 Before:

9 HON. SONDR A MILLER,  
10 Chairperson, and the following  
11 commission members

- 10 HON. DAMIEN J. AMODEO
- 11 SUSAN L. BENDER, ESQ.
- 12 HELENE K. BREZINSKY, ESQ.
- 13 HON. TONDRA DAWSON:
- 14 BRIAN F. DeJOSEPH, ESQ.
- 15 MICHAEL DIKMAN, ESQ.
- 16 MARCIA C. GOLDSTEIN, ESQ.
- 17 HON. Michael V. COCCOMA
- 18 ELEANOR M. DE COURSEY, ESQ.
- 19 JOHN R. JOHNSON, CPA:
- 20 JANET E. JOHNSON, ESQ.
- 21 HON. DAVID F. JUNG
- 22 CHARLOTTE CHO-LAN LEE, ESQ.
- 23 LAURENCE LOEB, MD
- 24 ALLAN MAYEF SKY, ESQ.
- 25 KAREN DAWN McGUIRE, ESQ.
- 26 PATRICK O'REILLY, ESQ.
- 27 CARLA PALUMBO, ESQ.
- 28 ROSEMONDE PIERRE-LOUIS, ESQ.
- 29 SHEILA GINSBURG-REISEL, ESQ.
- 30 LAURA RUSSELL, ESQ.
- 31 HON. ROBERT A. ROSS, ESQ.
- 32 HON. EDWARD O. SPAIN, ESQ.
- 33 HON. ROBERT A. SPOLZINO, ESQ.
- 34 DAN WEITZ, ESQ.
- 35 HARRIET WEINBERGER, ESQ.
- 36 HON. JEFFREY SUNSHINE
- 37 HOWARD B. TEICH, ESQ.

38 Michael Barfield  
39 Barbara Stroh  
40 Official Court Reporters

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2 CHAIRPERSON MILLER: Good afternoon, everyone.

3 Can you hear me? Yes?

4 First of all, I would like to welcome all of

5 you, our speakers, our attendees, the press and others to

6 this, the fourth public hearing conducted by the

7 matrimonial commission, on the 10th anniversary of a our

8 predecessor commission to examine these issues and

9 recognizing the important strides made based on that

10 commission's work.

11 Chief Judge Judith Kaye who, as we all know, is

12 a tireless crusader on behalf of the families and children

13 of this state, acknowledges that still more can and must

14 be done to further improve the practice of matrimonial and

15 family law in New York State. She has charged this

16 thirty-two member state-wide panel with a very broad and

17 important mandate. We are to take a global look at the

18 area of the family and matrimonial law as it is practiced

19 in New York. We are to look at all stake holders inside

20 and outside of the system for input and guidance. We are

21 to think globally, holistically and innovatively to

22 address and resolve three main areas; to reduce and

23 eliminate trauma to parties, and most significantly to

24 their children; we are to avoid unreasonable expense to

25 the parties; and we are to reduce and eliminate all

26 unnecessary delay.

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2           This commission recognizes the urgency and the  
3 importance of our mission and considers its mandate a  
4 great challenge and a great opportunity. We intend and we  
5 expect to recommend significant reforms. And we assure  
6 you that our chief judge has pledged to do all that she  
7 can possibly do to effectuate reasonable recommendations  
8 that will serve to improve the lives of those who appear  
9 before our matrimonial and family courts.

10           To those of you who have been assigned a time to  
11 speak, please be sure that you have signed in at the desk  
12 outside. As a courtesy to the other individuals scheduled  
13 to speak today, please remember that your remarks are  
14 limited to ten minutes. Anyone who has written material  
15 to submit for the commission's consideration should leave  
16 at least two copies with the commission's staff at the  
17 sign-in table. No material will be handed up to the  
18 commission during the course of this hearing. Note that I  
19 on behalf of the commission may at times interrupt to you  
20 ask a question or to seek clarification of the point. I  
21 will strive to keep this to a minimum as we are most  
22 interested in hearing from you about your experiences and  
23 your recommendations for improving the system.

24           As stated on the notice of the public hearings,  
25 the commission cannot take testimony from any individual  
26 who has a case currently pending in New York State courts.

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2 This is necessary in order to protect the integrity of a  
3 pending case and the work of this commission. However,  
4 such individuals are encouraged to submit their comments  
5 and suggestions in writing to the commission no later than  
6 June 30th. Any identifying details contained therein will  
7 be redacted by commission staff. However, the substance  
8 of this submission will remain intact.

9 Before we begin, I ask all of you to please turn  
10 off your cell phones, pagers and any other devices and  
11 that you refrain from interrupting speakers with comments  
12 or abuse as we are on a very tight schedule and do not  
13 want to deny any speaker their full allotment of time.

14 We are now ready to begin.

15 Mr. Efrain Rodriguez.

16 MR. RODRIGUEZ: Is this working? Can you hear  
17 me? Nobody did a sound check before we start.

18 I haven't seen a crowd like this since I was the  
19 salutatorian of PPS 106 42 years ago, so I am, like,  
20 scared.

21 Members of the commission, I am Efrain Rodriguez  
22 Jr. and I am the president of the Father's Rights  
23 Association of New York State, a non-profit group that  
24 works to keep parents and their children together after  
25 divorce and separation. What sets us apart from all other  
26 groups out there is simply this; we help the non-custodial

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2 as well as that parents' extended and blended families,  
3 and we actively assist women as well as men in trying to  
4 negotiate and understand the Family Court industry.

5 I am humbled to be standing within these walls  
6 where so many have passed through beginning their careers  
7 as lawyers and becoming some of this country's greatest  
8 leaders. I wish to begin my testimony with a question.

9 If I pay my child support then why can't I see my  
10 children? Why if I have an agreement with the child's  
11 mother and a schedule of shared parenting time, why can't  
12 I see my children? Why is it when their mother  
13 interferes, obstructs or otherwise denies me my children  
14 is there no one that any parent can go to for immediate  
15 relief?

16 As a New York City civil servant with 29 years  
17 of service to this city as a nurse, a paramedic and a  
18 police officer, I have seen all sides of this dilemma.  
19 And as divorced dad I am also one of its victims. But  
20 less about me and more about the group.

21 Nary a Friday passes after 5 p.m. where we don't  
22 get a phone call on our hotline from a distraught parent  
23 who says he went to get his children and was met with the  
24 all too common phrase, no, you are not getting your kids.  
25 This dad then calls the police who arrive on the scene and  
26 after interviewing all the parties tells that dad, sorry,

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2 there is nothing we can do for you except take a report  
3 and refer to you court. Then, he becomes the victim of  
4 what we call the trifecta of family law. He is served  
5 with an order of protection, an order of custody and  
6 support and an application for a divorce. This often  
7 times used tactics designed to give the petitioner in any  
8 divorce proceeding because now the father has to be in 3  
9 courts, the support court, the Family Court, and the  
10 divorce court, and maybe even the criminal court if that  
11 parent chooses to take the order of protection to both  
12 family and criminal, which they have a right to do, and if  
13 it is not a divorce we just throw out the divorce part.  
14 But the affect remains the same. That is having to fight  
15 a system that presumes all men are batterers until that  
16 parent is so beat down that he just takes the deal.  
17 Usually to his detriment. But he still continues to pay  
18 his child support.

19 Now, his children have a law guardian who asks  
20 for supervised visitation because the law guardian  
21 assigned to the case doesn't want to be the next Duckman  
22 and make the wrong call, errs on the side of caution. Now  
23 that parent has to pay to see his child. On top of the  
24 support he pays or the children and whether. And whether  
25 the mother shows up with the kids or not, he still has to  
26 pay. Again, he has no recourse. Who is he going to call?

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2 The law guardian?

3 He goes back into court without an attorney  
4 because he can't afford one in many cases. He has no idea  
5 how the system works, so he doesn't say anything or in  
6 many cases says what he heard somebody say on the Jerry  
7 Springer show. And then that angers the judge who has a  
8 hundred cases before them, tells them all to come back in  
9 three months, he still can't see his kids, but he is still  
10 paying the child support.

11 The courts are supposed to be user friendly,  
12 where litigants go to get help and relief for their issues  
13 in a timely manner. There is nothing timely about a  
14 situation based on lies and deceit where a person is  
15 presumed guilty until proven innocent and the falsely  
16 accused get no relief when they are exonerated of the  
17 allegations against them. But they still pay their  
18 support.

19 What I am trying to get at is this. Many  
20 parents do not mind paying the support. I pay my support.  
21 I am sure there is many other parents here who pay their  
22 support. In fact, according to New York State stats, over  
23 80% of the fathers do pay on time the full amount every  
24 month. But there is an interesting statistic that's never  
25 mentioned and that is 75% of women with child support  
26 orders don't pay. And you never hear about a deadbeat mom

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2 sweep.

3       The single thing that infuriates dads is what I  
4 asked in the beginning. If I pay, then why can't I see?  
5 We wish the commission to consider a provision in both the  
6 Family and the Domestic Relations Law as follows: That  
7 upon the finding that a parent willfully and deliberately  
8 interferes, obstructs or deceives the court and any other  
9 social service with false allegations of physical,  
10 emotional or sexual abuse which deny one parent the right  
11 to see their children, that the offending parent plainly  
12 and simply loses custody. This parent is not acting in  
13 the child's best interests. We would like to see the  
14 parents at the time of the stipulation and agreement sign  
15 that they agree to abide by this and if they fail to do so  
16 they can be found guilty of contempt of court and be given  
17 a Class D felony or what it is now a Class A misdemeanor.

18       But this law is already on the books. You look  
19 at any complaint report in any police department or you  
20 look at the bottom of the domestic incident report and  
21 there is a statement there; "false statements made here  
22 are punishable as Class A misdemeanor." Who is going to  
23 prosecute that? I personally have gone to the D.A.'s of  
24 several counties, including them in New York. I ask them  
25 what are you going to do about this? And I was told by  
26 one D.A. off the record, "Family Court is the third rail



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2 of the judicial system. You try and change it and you  
3 die. And besides, we have bigger fish to try." And that  
4 parent who hadn't seen his kids is still paying his child  
5 support.

6 We would like to ask the commission to make it a  
7 mandatory part of every divorce or custody agreement that  
8 should any parent be found to knowingly and willfully make  
9 a false statement, not only will they lose custody but  
10 they will lose any parenting time until they have attended  
11 parenting classes. We have parents who have to attend  
12 parenting classes based on an allegation. After they have  
13 done their class, after they have gone to batterers, after  
14 they have gone to AA, after they have gone to NA, 2 years  
15 down the road they still can't see their kid because,  
16 bottom line, the mother just won't let him.

17 We also ask that if you cannot see your child  
18 and it has been proven that you are willfully denied  
19 access to that child that the child support be suspended.  
20 Or that the money that you pay for the child support  
21 either be taxable or that the non-custodial parent be  
22 permitted to claim the child on their income taxes. That  
23 will take away that bitter taste of having to pay and not  
24 see.

25 The board commission, you can do this. It is  
26 called an on consent. It is done all the time in court.

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2 Parents agree, you sign. To wait for the legislature to  
3 enact this, it will never happen.

4 We have had bills before the board for years and  
5 they all get shot down. So we in the Father's Rights  
6 teach our people how to understand, navigate the system,  
7 and we ask that the panel investigate these as possible  
8 alternatives to getting around the waiting for the  
9 legislature to provide the type of relief that we seek.

10 CHAIRPERSON MILLER: Mr. Rodriguez, thank you  
11 very much. Your time is up.

12 I would like to ask you one question on behalf  
13 of the Commission.

14 You had some interesting statistics about the  
15 effect of paying child support, fathers 85% pay and  
16 mother's do not. Where did that come from?

17 MR. RODRIGUEZ: I got that from the 2000 U.S.  
18 Census from the OCSE report on support compliance in 2001.  
19 And there was another report in 1996 from the U.S. Census.  
20 And the U.S. --

21 CHAIRPERSON MILLER: It said that 85% of the  
22 fathers pay. And what percentage of mother's don't?

23 MR. RODRIGUEZ: 75. But New York State I  
24 believe it is 83% compliance with the men. And of those  
25 men who can't pay, ma'am, I just want to say, the ones who  
26 cannot pay are either indigent, incarcerated or dead.

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Thank you all.

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Happy Mother's Day to everybody.

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CHAIRPERSON MILLER: Claudia Poster.

5

MS. POSTER: Good afternoon. Thank you Chief

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Justice Kaye.

7

Can you all hear me?

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Chief justice Kaye, Justice Miller and honorable

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members of the commission, thank you for your hard work to

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understand the court's problems in determining solutions.

11

My name is Claudia Poster. I am an actuary and

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principal in one of the world's preeminent management

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consulting firms, a board member of the important

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non-profits here in the city, and a divorced mother.

15

I am here today as a former litigant and as a

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member of the Coalition for Family Justice.

17

My divorce from my attorney husband granted to

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me on the grounds of cruelty lasted ten years and involved

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5 lower court judges, a hearing officer, special master,

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forensic and psychologist, law guardian, three

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administrative judges and the Appellate Division. So I am

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glad to hear that you want to reduce delay.

23

Ten years of horror stories cannot be told in

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ten minutes, but I was asked to give the commission

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examples so I have picked a few to frame the issues and

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then suggest solutions.

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2           The matrimonial court is toxic for children and  
3 their protective parents, whether they be the father or  
4 the mother. It reminds me of the old toxic coal mines and  
5 the miner's canary whose death indicated when toxic gasses  
6 were at unsafe levels. But unlike the miner's response of  
7 alarm and action, the typical judicial response too often  
8 to evidence of toxicity like children living with  
9 dangerous, abusive parents and distraught protective  
10 parents is disdain, blaming the victims instead of a toxic  
11 court, calling them sour grapes, disgruntled, angry, crazy  
12 or, as I heard an administrative judge say, cry baby  
13 mother's.

14           Worse, the Court's victims have no recourse  
15 because the court has no effective way to correct its  
16 mistakes. Administrative judges won't intervene in  
17 individual cases. Appeals occur long after the damage is  
18 done. And many wiped out litigants can't afford an  
19 appeal. And appellate panels defer to lower Court's  
20 credibility findings because they haven't witnessed the  
21 litigants. The Court of Appeals' judge job is to make new  
22 law, not correct lower court's mistakes. And as I learned  
23 the hard way, litigants who complain risk retaliation.

24           Here is an example of the Court's inability to  
25 correct a simple but devastating mistake and then  
26 discrediting the victim.

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2           The hearing officer recommended that my son and  
3 I stay in the marital apartment and my husband receive a  
4 percentage of its "net value" after deducting the  
5 mortgage.

6           The judge affirmed that decision but failed to  
7 subtract the mortgage while calculating the settlement.  
8 Her response to our motion asking that an obvious error be  
9 corrected was the mortgage was not on the record. We then  
10 cited numerous mentions on the record of the mortgage and  
11 its amount, including by my husband, who had also in his  
12 brief used the phrase, net value after deducting the  
13 mortgage. Instead of correcting the error or explaining  
14 why the citations were not valid, the judge added insult  
15 to injury writing, "Mrs. Poster will toll the bells of  
16 injustice until she gets her way."

17           The Appellate Division also failed to correct  
18 the error with no explanation.

19           The Court's victims are also first the victims  
20 of spousal abuse, whether it be physical, sexual,  
21 substance or emotional. Non-abusers reach settlement,  
22 resisting court like they would resist a hospital for  
23 surgery when less invasive treatments are available.  
24 Willing to compromise the outcome.

25           In countless litigated cases abuser spouses have  
26 been driven to court seeking protection against a ruthless

1  
2 opponent who is willing to destroy them and their  
3 children. Instead finding jurists who lack a commitment,  
4 patience and compassion to discern the truth in a he  
5 said/she said and stand up to the ruthless abuser. In  
6 fact, in case after case side with the abuser.

7       The court seems unaware that abusers regardless  
8 of the brand of abuse are practitioners of blame and  
9 denial, manipulation and conflict creation and  
10 disassemblance. Thus the court fails to see through the  
11 often charming, calm facades and enforce the rules that  
12 would stop them from creating conflict and exploiting the  
13 court.

14       Some say the court is biased in favor of men.  
15 Others would say it is biased in favor of women. I  
16 believe that it is a bias toward power, manifested in its  
17 tolerance for lack of integrity.

18       A judge responds to a claim that opposing  
19 counsel has lied with. So what? Lawyers lie all the  
20 time. Litigants lie. Jurists violate our trust with  
21 impunity.

22       Throughout my equitable distribution trial,  
23 which lasted 3 years, the hearing officer turned a deaf  
24 ear to opposing counsel's relentless abusive tactics, such  
25 as calling me, I am sorry for this word, but it is a  
26 quote, "effing weasel", spelled out. And repeatedly

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2 signaling his client while on the stand.

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4 Monica Goetz, president of the Coalition for  
5 Family Justice, whom I hope you have all had a chance to  
6 meet and talk to, arranged a meeting with an  
7 administrative judge for my lawyer and me to discuss the  
8 conduct of the trial which she and other coalition members  
9 had witnessed. The judge promised us confidentiality,  
10 sealed the transcript of our meeting and suggested we meet  
11 confidentially with another more senior administrative  
12 judge to tell him what was going on.

12

13 He, having heard similar complaints from others,  
14 promised to take action, but almost immediately thereafter  
15 went to the Appellate Division. His job went to the first  
16 administrative judge, along with his files. And she  
17 inexplicably released my confidential letters to him which  
18 contained references to our discussion criticizing the  
19 trial judge and hearing officer still presiding over my  
20 case. She refused to acknowledge that I had been  
21 compromised.

21

22 My appellate brief described both the conduct of  
23 the trial and how our attempt to address it had backfired.  
24 We provided 25 pages of the excerpts from the 12,000 page  
25 record showing examples of the abuse and the hearing  
26 officer's indifference. The brief also cited cases in  
which rulings were dismissed because of lesser abuse.

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2           The Appellate Division ignored not only this  
3 point, but also our other eight points in a two paragraph  
4 decision rendered two and-a-half weeks after oral argument  
5 that simply deferred to the lower court's credibility  
6 findings, despite the obvious bias against me caused by  
7 the breach of confidentiality.

8           Two of the points had not even been contested by  
9 my husband.

10          The custody trial was equally crazy-making. The  
11 court-appointed forensic psychologist recommended that I  
12 have sole custody of our then 9 year-old son and  
13 explicitly rejected joint custody as "impossible." For  
14 the next 19 months the court pressured me to accept joint  
15 custody, ignored my request for custody trial, had our son  
16 interviewed by two judges, issued an order of reference  
17 for a trial with a judge who turned out to be retired, and  
18 appointed not another trial judge but rather a law  
19 guardian to negotiate joint custody.

20          Through all of this not one problem was cited  
21 about my parenting, our son's well being or his dad's  
22 access to him.

23          The judge who ultimately conducted the trial  
24 asked me at the pretrial conference, "When are you going  
25 to come to your senses?" And said that if I insisted on a  
26 trial she would order joint custody anyway and I would



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2 have to pay my husband's legal fees. She also ignored my  
3 request that the 19 month-old forensic report be updated.  
4 At trial she rejected the forensic report as stale,  
5 stopped my lawyer's cross-examination of my husband with a  
6 rhetorical, "what does alcoholism have to do with  
7 custody," and ordered joint custody against my son's  
8 wishes and best interests and the law.

9 Now, I am not against joint custody in general.  
10 I think it can be wonderful in many situations. But I am  
11 mystified as to why the court was hell bent on imposing it  
12 in my case, even at the expense of due process.

13 The court must recognize that judges are human,  
14 which means they make mistakes and are vulnerable to  
15 outside influences and that mechanisms to insure  
16 accountability, perhaps outside the court bureaucracy, are  
17 needed. We cannot rely on litigants wearing wires or  
18 calling in t.v. cameras or F.B.I. investigations of  
19 criminality. This has gotten out of control.

20 In the matrimonial court where children's lives  
21 are at stake cronyism is as dangerous as corruption.

22 In summary, the major causes of the Court's  
23 dysfunction as I experienced it are tolerance of abusive  
24 litigants, lack of judicial accountability and a culture  
25 of abuse of power.

26 Here are some discussions to address them.

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2 Abusive litigants. 1) Require that two actions  
3 take place early in every case; investigate charges of any  
4 kind of spousal abuse. And I don't mean accept  
5 allegations. I agree with Mr. Rodriguez. They can't be  
6 taken on face value but they have to be addressed right  
7 away. And determine custody.

8 2) Require litigants to make motions that are  
9 found to be meritless, quote/unquote, to pay their  
10 spouse's legal fees. This barrier to conflict creation  
11 would remove an unfair advantage of the monied, abusive  
12 spouse and lighten the Judge's workload.

13 3) Judges have to be rotated. Require the  
14 judge that takes over a case to read the file and discuss  
15 the issues with the prior judge and with the litigants and  
16 their lawyers so that they are not educated at the  
17 litigant's expense and with their spin. Again, to the  
18 detriment of the non-monied, non-abusive spouse. You can  
19 imagine my legal fees to educate five judges.

20 Accountability. 4. Let the sun shine in. Put  
21 video cameras in courtrooms to allow appellate panels to  
22 review the lower court's liability findings and to prevent  
23 court reporter errors and alterations. Require litigants  
24 and court reporters or video cameras at all conversations,  
25 not just trial proceedings.

26 And require judicial decisions to say an

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explanation.

5) Create a body of experts for matrimonial matters, preferably outside the court bureaucracy, that review allegations of mishandled cases while the case is ongoing. Especially when there is an urgent matter of child safety or financial vulnerability.

6) Remove judges' immunity from prosecution, firing and other consequences of misconduct or poor judgment.

Just 2 more.

Culture. 7. Attract and reward judges of competence and conscience who read papers and make decisions based on facts and law, not sound bites and personal agendas, and who help but not force litigants to structure settlements.

The first judge in my case was such a judge and she was very effective.

Finally, change the Court's culture to one of standards, ethics, consistently applied rules, and accountability, starting with and reinforced by terrific judges.

Thank you.

1           Berner

2           THE COURT: Please keep this to a  
3   minimum, as we are most interested in hearing from  
4   you all.

5           Mr. Adam Berner.

6           MR. BERNER: Good afternoon, members of  
7   the commission, and thank you for this opportunity  
8   to introduce myself.

9           I'm an attorney-mediator, privileged to  
10   have a restricted private practice providing  
11   either mediation or collaborative family law.

12          I'm also privileged to serve as the of  
13   the Family and Divorce Mediation Council in New  
14   York and one of the founding members of the New  
15   York Collaborative Law Group.

16          In addition, I teach divorce mediation  
17   at Cardozo School of Law, and I am certified as a  
18   mediation trainer for the Unified Court System's  
19   Office of ADR, where I often introduce the law of  
20   mediation to law students, attorneys and some  
21   judges.

22          To introduce my topic, I'm not here to  
23   talk about the benefits of mediation or  
24   collaborative law, as I believe you've already  
25   heard that message loud and clear.

26          I'm also not here to suggest that

BARBARA STROH, CSR, CRR, CMR

1                   Berner  
2   mediation is the best way for every couple to get  
3   divorced in New York State, as the last testimony  
4   comes to mind.

5           We all shudder at the thought of a  
6   doctor recommending drastic, invasive and risky  
7   treatments unless, at last, there is no  
8   alternative.

9           We would hope, before going under a  
10   knife, we would first be informed of other  
11   possible treatments, such as exercise, changing a  
12   diet, chiropractor, physical therapy, acupuncture,  
13   etc.

14           This common-sense approach to finding  
15   the best treatment is as true for legal concerns  
16   as it is for true health concerns.

17           This continuing principle is used by  
18   companies all across the country in designing  
19   conflict management system to apply to the most  
20   appropriate resolution process to each particular  
21   conflict.

22           I submit that it would be helpful for  
23   this Commission to consider themselves as conflict  
24   resolution system designers, advising the Court  
25   how to play the best role in helping families  
26   resolve their disputes.

BARBARA STROH, CSR, CRR, CMR

1                   Berner

2                   With this role in mind, it is important  
3 to understand that mediation or collaborative law,  
4 compared to the traditional legal system, is not  
5 just a different process to get a settlement but  
6 is an entirely different framework in how  
7 settlements are reached.

8                   I submit to the Commission the  
9 introductory chapter for one of the first books  
10 dealing with conflict management system design,  
11 which sets out a core principle in the field that  
12 there are three ways in which disputes can be  
13 resolved:

14                   The first is power. The second is  
15 rights or standards of fairness, which are often  
16 formulated by the law, and, lastly, the third is  
17 the resolution based on interest.

18                   By focusing on this last approach, on  
19 interests and needs, instead of using power or  
20 instead of arguing about the rights under the law,  
21 disputing parties have the opportunity to explore  
22 if the needs and interests of both sides can be  
23 achieved.

24                   This is what we refer to as a win-win  
25 resolution. This approach converts conflict into  
26 a problem-solving activity in which parties work



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1                   Berner  
2   on reaching resolution together, not against each  
3   other.

4           This is in contrast to the traditional  
5   legal framework, which presumes an inherent  
6   conflict of interest between both sides and, thus,  
7   by definition, placing the parties in an  
8   adversarial paradigm.

9           I challenge whether this paradigm is the  
10   best approach to resolve family disputes.

11           Most divorce negotiations are a result  
12   of distributive bargaining, meaning there is a  
13   fixed pie, meaning a pie of money or kids, and the  
14   more one gets, the less the other gets.

15           I would submit, more often than we  
16   think, by focusing on the interests and concerns  
17   of both sides, resolutions can be reached, meeting  
18   the needs of all family members. I know that  
19   because I see it every day.

20           I believe that for this Commission to  
21   accomplish its important task to help implement  
22   and qualitatively improve experience for divorcing  
23   families in New York State, there needs to be a  
24   realization that our system requires a paradigm  
25   shift.

26           From trial in my school to moot court in

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1                   Berner

2 law school, we lawyers are training in certain  
3 skills to argue and win the case.

4           I believe that the definition of winning  
5 in family cases needs to be responsibly redefined,  
6 in my mind. My suggestions for the framework  
7 should solve the problems, addressing the concerns  
8 and needs of both sides in all family members.

9           We need to reexamine our cultural  
10 issues. And who better to define what those are  
11 than those who have the final say in these  
12 matters? The Judge, the Court or this Commission.

13           What message are we communicating to  
14 the lawyers and to the families that we serve?  
15 Let's take a look at some language.

16           First custody and visitation: Where  
17 else do we see these terms, other than in prison?  
18 What parent wants to be a visitor with your child,  
19 and what child wants their parents to be a mere  
20 visitor in their life?

21           I can't tell you how many clients I have  
22 whose parents were divorced and, because of the  
23 divorce, lost their relationship with one parent.

24           To avoid that for their own kids, they  
25 come to mediation. In my framework clients focus  
26 on creating the best possible relationship with

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1                   Berner

2    their children, and this comes down to two topics  
3    in positive terms:

4                   Parenting time and decision making.

5    Nothing is lost by using these terms. A lot is  
6    gained.

7                   It allows parents and the lawyers to get  
8    away from the traditional terms and focus on good  
9    parenting planning.

10                  Another, looking at the caption of every  
11    divorce document, the plaintiff versus defendant.  
12    That says it all.

13                  As an attorney, I always feel ashamed  
14    when I hand clients uncontested divorce documents  
15    with the language of our captions.

16                  More importantly, this is hurtful to  
17    parents wherever they read the document. In every  
18    caption of every court document, we are doing  
19    exactly what we and every psychologist says we  
20    shouldn't be doing.

21                  In my framework I would prefer plaintiff  
22    and defendant or, better, I would use "In the  
23    matter of the marriage" or "In the matter of the  
24    divorce of" Jones and Jones, or, as in California,  
25    refer to parties as claimant and respondent.

26                  My point is that, even to the extent

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2   that mediation is not used by the Court, the Court  
3   can still adopt some lessons learned from a  
4   problem-solving framework.

5           Beyond language used by the courts, the  
6   law itself often challenges couples seeking to  
7   resolve disputes collaboratively.

8           Two examples, for now: One, that New  
9   York remains, as we know, the only State in the  
10   country that doesn't have no-fault divorce.

11          My clients are consistently frustrated,  
12   if not furious, as to what must be stated in their  
13   affidavits to get divorced.

14          A second example, dealing more with a  
15   substantial level: Some mediation clients seek to  
16   work out fairly equal parenting arrangements.

17          All of these best-intentioned parents  
18   can't understand why they're forced to structure  
19   an arrangement in which one parent pays the other  
20   child support if there is equal parenting time.

21          Why is there a need to have one primary  
22   residential parent when, in fact, there are two?  
23   Parents are able to achieve this level of  
24   cooperation, but are boxed into submitting court  
25   papers, etc., based on an adversarial framework.

26          This often causes unnecessary delay,



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1                   Berner

2 financial expense and outright pain.

3           My last comment is that if the Court is  
4 considering making available a continuum of ADR  
5 processes, please realize that timing matters.

6           As soon as practical, all efforts should  
7 be made to first explore whether the process is  
8 appropriate for a particular couple.

9           I believe that attorneys should have a  
10 professional -- should have a professional  
11 responsibility to discuss alternative processes  
12 with their clients.

13           More than that, upon the commencement of  
14 an action, I would suggest that the Court  
15 distribute informational brochures about the  
16 process, with the weird exceptions.

17           The sooner a couple tries to work these  
18 issues out collaboratively, the more likely their  
19 success will be.

20           At the outset of most collaborative  
21 divorces, each party is consumed by fear. Fear of  
22 new life, fear of losing a home or relationship,  
23 fear of losing their standard of living.

24           The combination of these fears with the  
25 dynamic of an adversarial system makes for a  
26 tragic and costly combination.

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1                   Berner

2           In an adversarial system, legitimate  
3 fears of both sides generate aggression and  
4 reactivity, not resolution.

5           Once parents are caught in an  
6 adversarial system, with all the anger it  
7 generates and all the financial and psychological  
8 investment in that anger and they drop back into a  
9 problem-solving collaborative mode, at least until  
10 they run out of money.

11          We'd be doing a great service to  
12 encourage or even mandate couples to take the  
13 opportunity to discuss an attempt at  
14 problem-solving these fears voluntarily in a safe  
15 environment.

16          As it stands today, a courthouse is just  
17 not that environment.

18          Furthermore, my experience is it  
19 possible to operate simultaneously and have a  
20 settlement framework and a collaborative one.

21          I have recently experienced this serving  
22 as mediator in a mediation pilot program now under  
23 way here in New York County.

24          It was more difficult, if not impossible  
25 for the divorcing parents I was assigned to  
26 mediate to effectively develop a parenting plan in

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1                   Berner  
2 my office while they were battling out nasty  
3 financial emotions outside of my office.

4           On both a professional and personal  
5 level, I see how difficult it is to work at the  
6 same time within these two frameworks, and I am  
7 more convinced than ever that we need to first  
8 find any opportunities for couples to work  
9 differences out collaboratively before they reach  
10 the road as adversaries, a road of no return.

11           Please be mindful that setting up a  
12 mediation program not only impacts the particular  
13 court housing the program and the families in that  
14 program but sends a message to the entire state.

15           As had been shown in other states by  
16 referring cases to quality mediation services, the  
17 Court and, therefore, this Commission has the  
18 opportunity to effectuate a cultural change in how  
19 people deal with conflict, how couples get  
20 divorced, how attorneys view mediation, and how  
21 attorneys advocate problem solving for their  
22 clients.

23           I believe from my experiences every day  
24 that divorcing couples can best serve each other  
25 and their children by working out these  
26 differences together, instead of against each

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1                   Karson

2    other.

3           I also believe that the Court can help  
4   in this same effort.

5           Good luck, and thank you for listening.

6           THE COURT: Thank you very much.

7           Mr. Scott Karson.

8           MR. KARSON: Good afternoon, Justice  
9   Mills, members of the Commission. My name is  
10   Scott Karson. I'm the president of the Suffolk  
11   County Bar Association.

12          And on behalf of our thirty-five hundred  
13   members, I would like to thank the Commission for  
14   giving us this opportunity to be heard.

15          Our presentation this afternoon will be  
16   made by two distinguished members of our  
17   matrimonial bar in Suffolk County, the treasurer  
18   of the Suffolk County Bar Association, James  
19   Winkler, and the co-chair of our matrimonial and  
20   family law committee, Janice Noto.

21          At this time I'll ask them to carry on  
22   with the presentation. Thank you.

23          MS. NOTO: Thank you.

24          Good afternoon Justice Miller,  
25   distinguished colleagues: I want to give you some  
26   background.



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1                   Noto

2           THE COURT: Speak into the mike.

3           MS. NOTO: Sorry.

4           Suffolk County has a large and  
5   vociferous and very active matrimonial and family  
6   law bar.

7           I am happy to tell you that they were  
8   very happy to share their comments on issues which  
9   you will be considering with us.

10          We sent a survey. The bar association  
11   permitted by co-chair, Justice Emily Pines and I,  
12   to survey the members and those comments of our  
13   members, by the way, the survey dealt with various  
14   issues, and I'm going to leave it to Mr. Winkler  
15   to address the responses to our survey.

16          I just wanted you to know that the  
17   Suffolk County litigators in these field are very  
18   proud to know that Justice Kaye appointed two  
19   people from amongst Suffolk County practitioners  
20   and jurists to be on your Commission, and we hope  
21   that they will be heard. We know that they are  
22   aware of your concerns.

23          Mr. Winkler will now address the results  
24   of the survey. Thank you.

25          MR. WINKLER: Thank you, Madam chairman.

26          It's interesting to sit in the audience

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1                   Winkler  
2    because I think it is sufficient to say that those  
3    of us in Suffolk County who practice in this field  
4    have somewhat different experiences perhaps than  
5    some of you sitting on the panel and some of you  
6    sitting in the audience.

7            I would urge you, please, to listen  
8    carefully to those members of your Commission who  
9    are sitting from Suffolk County. We have a very  
10   different experience in a lot of ways.

11           We did poll our membership, and we have  
12   some concerns to address. They are very specific  
13   in nature. They're not anecdotal, and we're going  
14   to limit them specifically to the findings of our  
15   committee.

16           First, we know that you're considering  
17   the use of expert witnesses, and we believe quite  
18   clearly that experts in matrimonial litigations  
19   should be regulated in terms of education,  
20   training and fees charges.

21           Forensic experts in child custody  
22   litigation should make a firm recommendation.  
23   That's our belief after polling our membership as  
24   to which parents should have custody but which  
25   should not necessarily be involved in the  
26   negotiating process.

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1           Winkler

2           In most cases we believe that forensic  
3 experts should be appointed as neutrals by the  
4 court. We perhaps share a very different  
5 experience in Suffolk County.

6           Most of our litigants are people of  
7 modest means. They fall within the middle class  
8 for the most part and boring experts are extremely  
9 expensive.

10          It is the opinion of our membership that  
11 people of modest means, people who have the same  
12 need for access to the court system should not be  
13 shut out because of the cost of expert fees.

14          With respect to fees charged by experts,  
15 the Suffolk County Bar Association recommends  
16 reasonable regulations be promulgated in routine  
17 valuation cases, specifically where enhanced  
18 earning capacity is involved and small business  
19 evaluations, so that litigants of modest means may  
20 achieve justice.

21          The association also urges the  
22 Commission to consider reasonable fee regulations  
23 by experts in custody litigation to achieve the  
24 same result.

25          However, litigants should always be free  
26 to contract or experts as neutrals without

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1           Winkler

2 regulation if they so desire.

3           The Suffolk County bar association urges  
4 the Commission not to impose mediation or other  
5 alternative dispute resolution in matrimonial  
6 cases, absent the agreement of the parties.

7           There is a significant minority of our  
8 membership that believes specifically that some  
9 form of mediation should be introduced into the  
10 court system.

11           However, it should be a voluntary  
12 process because mediation works when people are  
13 willing to be open to the mediation process and  
14 have a commitment to settle their case.

15           Based upon the input of our membership,  
16 the association imposes many non-judicial  
17 mechanisms to obtain a divorce, such as that  
18 contemplated by collaborative divorce.

19           However, the association recommends that  
20 the Commission urge the legislator to explore a  
21 no-fault ground for divorce.

22           The association acknowledges that a  
23 significant number of the respondents to the  
24 committee's questionnaire oppose a true no-fault  
25 divorce.

26           However, some alternative to the present



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1                   Winkler  
2    fault only divorce in New York should be debated  
3    so as to end the sham taking place every day in  
4    our court system, where litigants consent to  
5    divorce on the grounds of constructive abandonment  
6    and, in the process, make a mockery of truth and  
7    the judicial system itself.

8                   Although the membership of the committee  
9    was evenly divided on whether there should be a  
10   presumption of joint custody in matrimonial  
11   access, the association urges the Commission to  
12   carefully consider whether such a presumption  
13   would reduce the amount of custody litigation in  
14   New York.

15                  It may be that a parent would be less  
16   likely to go to war over custody if parenting time  
17   was the only issue in a dispute, rather than the  
18   custodial rights in general.

19                  The association urges the Commission to  
20   address the substantive issue of enhanced earning  
21   capacity in divorce actions.

22                  The membership of the association's  
23   matrimonial and Family Court committee has  
24   suggested that the legislature must address the  
25   viability of this concept in its contribution to  
26   the voluminous litigation in Suffolk County and

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1                   Winkler

2 throughout the State.

3           It has been suggested by many members of  
4 our committee that the substantive law in the  
5 State of New York is responsible for a great deal  
6 of the litigation and that we need to find a way  
7 to simplify our matrimonial substantive law so  
8 that judges can adequately address the varying  
9 concerns of the litigants, while at the same time  
10 taking some of the discretion which makes it  
11 impossible to adequately advise a litigant in the  
12 State of New York.

13           The overly complex body of case law  
14 relating to enhanced earning capacity specifically  
15 has made it impossible to advise a client with any  
16 degree of certainty as to the likely outcome of  
17 the case.

18           New York may be the only state which  
19 addresses the concept of enhanced earnings as an  
20 equitable distribution issue, and the complex  
21 issues surrounding this concept cry out for  
22 legislative intervention, and we urge this  
23 committee to make some recommendations in this  
24 regard.

25           Finally, the association urges the  
26 Commission to address the use of standardized

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1           Winkler

2 forms and procedures.

3           While this is not a particularly

4 interesting topic to discuss, the fact of the

5 matter is that in courtrooms throughout our State,

6 judges are using a variety of different forms that

7 make it impossible to adequately address with any

8 degree of certainty the multitude of pretrial

9 practices and procedures that have to be waded

10 through in order to get a day in court for our

11 litigants.

12           Uniformity of forms and procedures would

13 expedite conferences and ultimately reduce the

14 cost of litigation.

15           That's the position of the Suffolk Bar

16 Association, and thank you very much.

17           JUSTICE MILLER: Thank you. Can you

18 tell me how many responses there were to your

19 survey?

20           MR. WINKLER: There were in excess of 50

21 responses, but the survey itself was very specific

22 with regard to the issues that we've addressed.

23           THE COURT: Thank you very much.

24           MR. WINKLER: Thank you, your Honor.

25

26

1

2 CHAIRPERSON MILLER: Mr. William Frew.

3 MR. FREW: Good afternoon, Honorable Chairperson  
4 Justice Miller and members of the commission.

5 I have practiced primarily in the matrimonial  
6 area for some 30 years. I have co-chaired the matrimonial  
7 committee in the Richmond County Bar Association. It was  
8 requested I address the commission of your behalf. They  
9 only sent me, not 3. But as an aside, I am also a member  
10 of the commission to examine the solo and small  
11 practitioner's practice, who has also sent a  
12 representative, I believe.

13 CHAIRPERSON MILLER: Speak into the mic, please.

14 MR. FEW: I welcome the opportunity to address  
15 you today, express my appreciation to you all for your  
16 time and effort was. I also extend my gratitude to Chief  
17 Judge Kaye for creating the commission and presenting a  
18 forum to obtain input from all concerned prior to taking  
19 any action to effectuate changes on how the court should  
20 handle this type of litigation and the attorney/client  
21 relationship.

22 Matrimonial litigants throughout the state rely  
23 on small firms and solo practitioners for representations,  
24 and my remarks today will reflect that perspective. I  
25 trust you will find it constructive and of some assistance  
26 with your arduous task.

1

2 I acknowledge that the court rules subsequent to  
3 the Milonas Commission did help unify and standardize and  
4 resulted in expediency of finalization of cases. However,  
5 a number of areas need to be revisited.

6 The time allotted today is short. I will  
7 address some of the issues which we feel, the Richmond  
8 County Bar, should be reviewed.

9 I would also concur with what you have just  
10 heard from the Suffolk County Bar concerning experts,  
11 mediation and no-fault.

12 The Milonas Commission placed emphasis on case  
13 management and attorney/client relationship and cost.  
14 Case management in a matrimonial area as it currently  
15 exists might be referred to as a rush to judgment. It  
16 sacrifices at times the ability of an attorney to  
17 effectively provide for a client or to best manage their  
18 case.

19 The existing timelines do not allow, as should  
20 be permitted into certain cases, an opportunity for  
21 parties to adjust to an extremely emotional period. Nor  
22 do they provide for meaningful settlement discussions.  
23 The emphasis now is on immediate discovery, evaluation and  
24 valuations. This not only limits the time for the parties  
25 to adjust to the upheaval in their life but for the client  
26 to expend large sums in the initial stage for both



1

2 attorneys and experts.

3 In most case the attorney's retainer is

4 exhausted in the first few months, which creates a problem

5 I will address later.

6 As you are aware, not all cases are W-2 wage

7 earners. When a case deals with family businesses, closed

8 corporation, intricate legal estate and asset holdings,

9 enhanced earnings and professional practices, et cetera,

10 an attorney should not be held to the existing time

11 schedules. We risk a disservice to the clients and

12 possible malpractice by attempting to have the case ready

13 for trial under the existing standards and goals.

14 The court or attorneys and the parties should

15 have the ability to extend the time to properly prepare a

16 case for trial or opt out of the set timelines without

17 causing difficulty to the court with standards and goals.

18 Clients and attorneys are very cost conscious.

19 Matrimonial practitioners' time and effort should be made

20 to further streamline the process so it will benefit the

21 litigant.

22 Case processing and scheduling need to be

23 addressed. Calendars should be staggered. To have

24 everyone present in court is not efficient time

25 management. A method should also be put in place so as

26 not to tie up court time and attorneys and litigants and

1

2 attorneys.

3 Clients do not appreciate being in court and  
4 having their legal fees expended while their attorney is  
5 unable to devote time to the case. Waiting increases  
6 anxiety levels, amongst other emotions, and needless to  
7 say it is unproductive.

8 Realizing that the court cannot hear every  
9 matter at the same time, a judge's time is valuable, a  
10 staggered calendar for preliminary conferences, motions  
11 around other conferences is suggested as it will result in  
12 a time and cost savings to both the attorneys and the  
13 litigants. Preliminary conferences, although necessary,  
14 are in all too many cases not productive and not cost  
15 effective.

16 In non-complex cases or where attorneys can  
17 agree to a discovery time schedule there may not be a need  
18 for a formal conference. A preliminary conference order  
19 signed off by the attorneys and clients could be submitted  
20 to the court for review and, if acceptable, for signature.

21 Uniformity, as you heard from the Suffolk County  
22 delegation, is also suggested to make the process more  
23 effective. The use of a pro forma discovery schedule  
24 should be considered unless an attorney requests one  
25 because of special circumstances. More should be done to  
26 have uniformity of all forms, conferences and procedures

1

2 throughout the entire state.

3 The increased use of telephone conferences

4 should also be considered.

5 Clients who appreciate not having to take a day

6 off from work and expend the cost of their attorneys

7 appearing for a preliminary conference or a discovery

8 conference that in many instances is no more than a long

9 wait in the hallway or courtroom. A brief appearance

10 before the judge at a preliminary conference that instruct

11 the parties to cooperate with the attorney, attempt to

12 settle the case between themselves or the court will make

13 the decision.

14 Current court rules provide for the filing of

15 statement of net worth 10 days prior to the preliminary

16 conference together with a vast amount of other financial

17 documentation. The theory of the exchange of all the

18 documentation early on in the case is that it would be

19 beneficial. It is not realistic.

20 Usually, though, the courts do not adhere to

21 this rule as it currently exists except for the filing of

22 a net worth statement. In many instances one spouse has

23 no knowledge of the party's finances, nor access to the

24 documentation required to be exchanged within that period

25 of time. A realistic revision of these requirements

26 should be considered.

1

2           We all can concur that the child's welfare is  
3 the most important issue in a matrimonial proceeding.  
4 Private law guardians are appointed and the Court directs  
5 the parties to pay law guardian's fees, usually by  
6 ordering an initial retainer. In all too many instances  
7 the issue of a retainer or later awarded law guardian's  
8 fees are not paid by one or both parties. There is a lack  
9 of court enforcement on ordered fees, even initial  
10 retainers.

11           Private law guardians provide an invaluable  
12 service. Their receipt of payment should be enforced.  
13 Also, the non-payment of their fees might have some  
14 influence on their position.

15           In Richmond County we have a very good divorce  
16 panel. However, not all law guardians have the same  
17 experience and qualifications. An hourly rate initially  
18 set by the court should reflect the acts of the law  
19 guardian to encourage them to take these assignments.  
20 Privatization of law guardians, which has received some  
21 discussion, would lead to a reduction in the quality of  
22 representation of children. Also, the existing cap on the  
23 award for law guardians should be revised upward.

24           A client without liquid assets experiences  
25 difficulty retaining an attorney based upon the current  
26 court rules. To give an attorney a security interest for

1  
2 a retainer accumulating legal fees a client must expend  
3 significant sums for a motion providing financial  
4 documentation and verification in connection with that  
5 application and making court appearances. While the court  
6 may there be to protect the client, this process and  
7 review is very costly. It also makes it difficult for the  
8 client to obtain adequate counsel. The process of a  
9 client giving a security interest to an attorney, unique  
10 in matrimonial actions, should be done away with or  
11 greatly simplified. The protection of a client's rights  
12 should be waived against the expense and need of qualified  
13 counsel.

14 CHAIRPERSON MILLER: One minute.

15 MR. FEW: Counsel fees awards should be  
16 realistic and should be honored. The monied spouse too  
17 often uses the other spouse's position to his or her  
18 advantage.

19 Attorneys in a matrimonial action, contrary to  
20 other areas of the law, are required at times to finance  
21 their client's litigation. They are asked to continue to  
22 represent the client when there is no security for the  
23 payment of their fees or disbursements. Respectfully, the  
24 economics of the practice must be considered in this  
25 equation when providing protection of the rights of the  
26 litigants.

1

2           The unfortunate reality in matrimonial parts is  
3 all too often duly assigned judges or elected judges with  
4 little or no experience in this particular area of the law  
5 are assigned to our matrimonial parts. There is a  
6 learning curve in matrimonial practice. The judges become  
7 more sophisticated, proficient. As judges become more  
8 proficient in that area they are usually reassigned.  
9 Ideally a matrimonial part is a unique area that requires  
10 jurists with experience or training in that area. We who  
11 practice in matrimonial law could not believe our courts,  
12 or our parts, are treated the same as others.

13           Last noted is that the jury is still out on the  
14 integrated domestic violence laws, whether or not they are  
15 productive. The IDB part was created to consolidate all  
16 issues regarding the family to a single judge. One issue  
17 that needs to be reviewed is the referral of support  
18 issues out to the support magistrate which defeats the  
19 concept for which the part was created.

20           I would again like to thank you, the commission,  
21 for your time here today.

22           CHAIRPERSON MILLER: Thank you very much,  
23 Mr. Frew.

24           The next speaker is Lillian Kozak and Gloria  
25 Jacobs.

26           MS. JACOBS: Hi, Judge Miller.

1

2 Since --

3 CHAIRPERSON MILLER: I would ask you to please

4 speak into the mic.

5 MS. KOZAK I will, even though I have a very

6 loud voice, so you tell me.

7 Since I am not an attorney I should let you know

8 that I am a CPA. I am a graduate of the City College of

9 New York here of 1944 where I was admitted among other

10 women by, "it was demanded that women candidates have

11 something above 15 points higher than our male members."

12 I have been a very active member of the National

13 Organization of Women, and Gloria Jacobs, a matrimonial

14 attorney, and I have co-chaired the Domestic Relations Law

15 Task Force.

16 So after all the many years that I have spoken

17 to legislative committees and bar committees, I can't

18 imagine and I can't even remember how many, I am here

19 today for the first time with some witnesses. You will

20 see them in your mind. Because on my left is Mr. Eliot

21 Spitzer and on my right Mr. Alan Hevesi. Because all of

22 you have read recently of the terrible scandals and the

23 stress on the necessity for audits for financial

24 information, otherwise where are you going to find the

25 evidence to prove the fraud that we have all been so

26 appalled at? We have got the same reasons to be appalled

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2 in matrimonial actions.

3 And we have a law that says the court can award  
4 legal and expert fees at the beginning and during the  
5 case, but somehow or other, even though we have that in  
6 the law, that's nothing that I find the Courts has  
7 complied with because, obviously, my fees are involved.  
8 Oh, I didn't tell awe little bit about my training as an  
9 investigative person.

10 After three life times, one in the accounting  
11 field and one as a homemaker and my return to the field of  
12 accounting, I ended up as an employee of a Nassau County  
13 attorney's office where I worked in the certiorari  
14 division on real estate taxation. That's where I got my  
15 training in non-friendly auditing. You are going to hear  
16 more than you wish to hear. But it was easy to audit for  
17 the county. Because if I went out to a job and there was  
18 resistance in terms of information I was asking for, I  
19 just called my office. No arguments. The attorneys that  
20 I was sent out by issued subpoenas and I got my  
21 information.

22 So when I entered auditing for the matrimonial  
23 field, it was quite an eye opener. Because I don't blame  
24 the attorneys. They get their fees. They don't know how  
25 long the case is going to last and they are very hesitant  
26 to spread that fee to the expert as well as holding it for



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2 themselves as long as possible to be able to pursue the  
3 case.

4         So when I found that I didn't have the  
5 information I needed on a private case I very rarely got  
6 the fight from the attorney who was representing my client  
7 as well as his own. And getting entree to records is  
8 almost an impossibility. I wish for a little amusement I  
9 could tell you about one or two investigations that ended  
10 up not so humorous, unfortunately for me and the client,  
11 about what happens on the attempts to disguise and hide  
12 information that is essential to the case. Yes,  
13 Mr. Spitzer. Yes, Mr. Hevesi.

14         Okay. Even the IRS has joined me as a witness.  
15 I read in the Kiplinger tax letter, it doesn't matter if  
16 I don't have it, but I did bring it, that Congress has  
17 established an unprecedented amount to the IRS and the IRS  
18 has said they are going to use it to audit individual  
19 taxpayers where they have determined that two thirds of  
20 the tax gap is due to non-reported income in the category  
21 of individual persons, mainly in their own businesses. My  
22 field is in style. Except in the courts of the New York  
23 State. New York State remains out of fashion. They award  
24 expert fees very rarely. The process of discovery is  
25 limited or non-existent. And there are no penalties for  
26 not disclosing.

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2           So at this time I present my third witness. I  
3 am sure all of you are familiar with attorney Leonard  
4 Purescue (phon.) who in 1989 wrote in his law journal  
5 column, "I have always believed that the best way to hide  
6 a million dollars well is to hide a hundred thousand but  
7 badly." So we remain today with a statute that permits  
8 the award of legal and expert fees and a court which  
9 refuses to award such fees until the conclusion of the  
10 case.

11           The answers to the why of this statement that I  
12 have just made is really the topic of my talk.

13           There is an unwritten assumption that if you  
14 give the penniless spouse the ability to pursue her legal  
15 rights she will never settle. There is an unacknowledged  
16 but deep seated belief among judges and legislators that  
17 the assets accumulated during the marriage are really the  
18 husband's. This bias/belief ignores the concept of  
19 marital property and supports the concept that what's  
20 awarded to the wife in counsel fees, expert fees, or  
21 equitable distribution is being taken away from the  
22 husband.

23           The wife -- in reality such awards to the wife  
24 come from the marital pot to which the wife contributed  
25 and has equal rights. It is the result of this judicial  
26 bias that the playing field has not been leveled to enable

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2 the spouse deprived of her access of her own share of  
3 marital property to prosecute or to defend an action.

4 This continuing bias in the courts has been  
5 substantiated by the OCA. There have been an all --

6 CHAIRPERSON MILLER: I just want to tell you you  
7 have one minute left.

8 MS. KOZAK I had 5.

9 CHAIRPERSON MILLER: You had ten.

10 MS. KOZAK: Well, I feel very badly because I  
11 didn't mean to cut out my co-chair.

12 CHAIRPERSON MILLER: I am sorry. We would love  
13 to hear more from all of you, but we are limited.

14 MS. KOZAK If that's the case I am just going to  
15 end with my last paragraph.

16 I am sorry, Gloria. I didn't mean to do that.

17 We are suggesting that it is the duty of the OCA  
18 to control its judges and its courts and to assure  
19 litigants that New York State justice is not tainted.

20 For those of you who are women, you must  
21 remember when you were not welcomed into the bar and you  
22 had to form your own bar, when you were not welcome into  
23 law school or other professional schools. We have  
24 celebrated your success with pride. Proud of you and  
25 proud of ourselves who worked for free to put you where  
26 you are. You owe us back a legal system free of bias.

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2 Thank you.

3 CHAIRPERSON MILLER: I am going to give Miss

4 Jacobs five minutes because she hasn't had a chance.

5 MS. JACOBS: Thank you, Judge.

6 I may even be less.

7 I am co-chair of the Domestic Relations Law Task

8 Force for New York State. I am also a member of the

9 coalition for family justice and I am a retired

10 matrimonial attorney.

11 In hearing some divorce issues starting in or

12 about 1990 when Mark Green headed the Department of

13 Consumer Affairs in New York City, he began taking notice

14 of the cause coming into his office about the abuse of

15 women suffering divorce. This led to judge Milonas's

16 commission in examining lawyer's conduct in matrimonial

17 action. Three hearings were held in 1993 and they led to

18 the commission that uncovered the major courses of

19 difficulty exposed by both lawyers and clients in the

20 courts.

21 Over ten years later the OCA is now conducting

22 hearing throughout the state on these same issues.

23 What has changed so far? Nothing has changed

24 with regard to gender bias in the courts. You just heard

25 my co-chair describe the problems with legal and expert

26 fees. But there is also an epidemic infecting the court

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2 system of the state and throughout the country. It is  
3 Parental Alienation Syndrome, PAS, translated by -- by the  
4 court system into the Friendly Parent Provision. The  
5 result is when the mother tries to protect her children  
6 when she knows the father is abusing them she loses  
7 custody and custody is awarded to the abusing father.

8 This incredible concept was developed by Richard  
9 Gardner who, in his own words, believes that pedophilia is  
10 acceptable and there is nothing wrong with fathers having  
11 sex with their children. He said this is an accepted  
12 practice in many parts of the world. He then stated that  
13 if children don't want to see their fathers it is because  
14 the mother has programmed them and the mother must be  
15 punished even to the point where she should be thrown in  
16 jail until she stops her hysterical accusations.

17 Domestic Relations Law Section 240 explicitly  
18 states that domestic violence must be considered by the  
19 court in custody decisions. Just the reverse is  
20 happening, especially when there are allegations of  
21 physical or sexual abuse against a child. What could be  
22 more gender bias and unfriendly than courts who punish  
23 mothers by granting them as unfriendly parents when they  
24 try to protect their children?

25 To quote Joan Sorza (phon.), a staff attorney  
26 with the former National Center For Women and Family Law,

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2 a legal services office, and an expert in this field, when  
3 courts blame victims and fail to hold abusers accountable  
4 they reinforce abusive behavior, subvert justice,  
5 disempower the victims, teach children that abusive  
6 behavior is permissible and may even be rewarded and  
7 enforce the cycle of silence.

8 In March of this year the Appellate Division  
9 First Department reversed a Family Court decision which  
10 awarded custody to the father based solely on PAS. The  
11 appellate court stated that even if the allegations were  
12 knowingly false, that PAS is not a basis for determining  
13 custody. And it is widely acknowledged today there are  
14 lots of surveys done, even by Alan Shepherd, who is the  
15 founder of the Peace Program and a great believer in joint  
16 custody, that the majority of abusive allegations in a  
17 divorce are true.

18 This case is a start. But for real change to  
19 take place the OCA must get the message out to judges  
20 throughout the state. As in any organization, direction  
21 comes from the top. Real oversight as described by my  
22 co-chair is for us to illuminate gender bias in the court  
23 system.

24 CHAIRPERSON MILLER: One minute.

25 MS. JACOBS: For several years now the OCA has  
26 been trying to advance court reform by restructuring and

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2 merging the courts. That is all courts except Surrogates  
3 Court. The reason stated for this exception is that  
4 specialized expertise required. Certainly Family Court  
5 requires at least as much expertise. And what will happen  
6 to poor women who need quick and easy access to the court  
7 system and for orders of protection and child support and  
8 have no money to pay attorneys? No one seems to know what  
9 will happen if there is no longer a Family Court for poor  
10 women. This should not be a way to reduce court backlog.

11 The majority of calls now to hot lines and  
12 offices come from women with divorce problems. Women of  
13 all socio-economic groups require court protection for  
14 myriad problems, both economic and regarding custody. How  
15 the courts handle their needs should be a priority for the  
16 Office of Court Administration.

17 Thank you.

18 CHAIRPERSON MILLER: Thank you very much.

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1 Frazee

2 THE COURT: Evelyn Frazee.

3 JUDGE FRAZEE: Good afternoon.

4 With pleasure, distinguished members of  
5 the Commission.

6 First I want to thank all of you for  
7 undertaking a much-needed analysis of the  
8 matrimonial litigation system in New York State.

9 As I'm sure you're well aware, yours is  
10 not an easy task, but we look forward to a very  
11 insightful report and recommendations from this  
12 body, given the very distinguished people on this  
13 committee.

14 I'm here today as chair of the Parent  
15 Education Board in New York State.

16 I'm also as a Supreme Court Judge who  
17 has handled matrimonial case in my capacity as a  
18 judge.

19 I'm here to urge you to include in your  
20 report and recommendations that parent education  
21 be an integral part of any matrimonial case in  
22 which there are children under the age of 18  
23 years.

24 First of all, many of you may not be  
25 familiar with parent education, so let me briefly  
26 describe what parent education is to you.



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1                   Frazee

2                   These are classes offered to help  
3 separating or divorcing parents better understand  
4 the effects of their break of up on their  
5 children, especially the negative effects of  
6 placing their children in the middle of their  
7 conflict.

8                   Parents have a great deal of control  
9 over how their children come through the  
10 separation or divorce process, and whether they  
11 develop into healthy well-adjusted individuals.

12                  Parenting after a separation or divorce  
13 also has its own unique challenges.

14                  Parent education provides parents with  
15 information and ideas about how to make the new  
16 family situation easier and more liveable for  
17 themselves and their children.

18                  It is, as the name implies, education is  
19 not therapy or mediation.

20                  Now, why am I standing here today  
21 supporting and urging you to support parent  
22 education in New York State?

23                  53 to 62 percent of all marriages in  
24 this country end in divorce. 65 percent of  
25 divorces involve children. That means that over 1  
26 million children are affected by divorce each

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1 Frazee

2 year.

3 These statistics do not even address the  
4 number of children whose parents were never  
5 married and separated.

6 The upheavel and instability caused by  
7 the breakup of their parents does have a  
8 devastating effect on children.

9 This is exacerbated when parents are in  
10 conflict, which conflict can be fed and heightened  
11 by the litigation process.

12 Parent education offer parents  
13 information, ideas and strategies for dealing with  
14 the new family situation and focuses them on their  
15 children and their needs, which can often get lost  
16 as parents focus upon themselves and their own  
17 emotions and losses in the divorce or separation  
18 process.

19 Perhaps most important, parent education  
20 can offer parents hope that their children can  
21 have a good outcomes despite the divorce or  
22 separation and that their lives, too, can be more  
23 liveable.

24 Some people have often asked me, does  
25 parent education really make a difference? I  
26 have provided to the Commission counsel an article

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1                   Frazee  
2   written by Joe January an and others that reflects  
3   the effects of divorce on children, and it also  
4   summarizes the feedback that we've gained from the  
5   program in Rochester called Act for the Children  
6   and that information has been gained from pre  
7   preand post class surveys that are administered to  
8   the parents.

9           In summary, of those surveys we have  
10   over 95 percent satisfaction rate and in summary,  
11   though parents are reporting overwhelmingly that  
12   they found the program helpful, that they've  
13   gained an increased understanding of their  
14   children's divorced related needs and how the meat  
15   them and they are planning to put into practice  
16   the principles and skills they learned in the  
17   program.

18           A couple of typical comments by parents  
19   are:

20           One parent said, "I think all parents  
21   should be required to attend this class at the  
22   beginning of their conflicts.

23           "Mine has been going on for four years,  
24   and my daughter's father and I may not have done  
25   the things the same way had we had this class  
26   available to us years ago.

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1 Frazee

2 "I think this program should be  
3 available to everyone with children. I believe it  
4 would preevent the damage of divorce on innocent  
5 children."

6 Thank you.

7 Another parent commented, "I started out  
8 feeling very sad, but ended up with hope.  
9 Finally, I came with no particular expectations  
10 and leave with information that I think will  
11 change my life."

12 While parent education is provided to  
13 benefit children and their divorcing or separating  
14 parents, an ancillary benefit, as reported by  
15 judges, is that parents often settle a case after  
16 they have attended parent education.

17 This not only impacts the immediate  
18 case, but in many cases also means that parents do  
19 not subsequently resort to the courts to resolve  
20 their differences but are better able to  
21 communicate and come to a workable solution on  
22 their own.

23 Now, in 2001 Judge Kaye in her state of  
24 judiciary address announced the creation of the  
25 parent education and awareness program in New York  
26 State.



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1 Frazee

2 As part of that initiative, the parent  
3 education advisory board -- and it's now known as  
4 the Parent Education Board since the  
5 recommendations that the board have been adopted,  
6 and we've now been charged with the implementation  
7 of the program, that was created and an  
8 administrative order was adopted to empower judges  
9 to refer cases to parent education.

10 The mission of the program is to ensure  
11 quality parent education in New York State, that  
12 is, parent, education that is based on information  
13 that has a basis in the research; classes that are  
14 safe, because, as we know, many cases that come  
15 before the court have domestic violence involved  
16 as part of the problem of the parents in the case,  
17 and the material is presented in a nonjudgmental,  
18 balanced and professional manner.

19 The further goal is to make parent  
20 education available to parents across New York  
21 State and not just in those areas where there have  
22 been grass-roots initiatives.

23 You may learn more about the parent  
24 education board if you're interested in what we've  
25 accomplished and what we're working on through an  
26 article that I have provided to counsel.

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1 Frazee

2 Finally, after four years of hard work,  
3 study, listing to various people and revising some  
4 of our recommendations, based on that feedback, we  
5 are about to launch a parent education and  
6 awareness program within the month.

7 Once we've had some experience with it,  
8 I'll be able to -- we'll be able to figure out  
9 what's working, what needs to be changed, and  
10 maybe make some further recommendations along that  
11 line at some point.

12 At this time the most critical situation  
13 -- and I'm sure this is something you don't have  
14 any control over, but that's funding, because many  
15 of these programs have lost their funding through  
16 budget cuts over the last couple of years and that  
17 they have a patchwork of funding they've put  
18 together to make them continue.

19 That's our biggest challenge right now  
20 as we try to expand the number of programs in New  
21 York State, so that all parents have access to  
22 these programs, and they're not just in isolated  
23 areas where there have been grass-roots efforts to  
24 develop programs.

25 THE COURT: Judge Frazee, first of all,  
26 I want to thank you from all of us for your very

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1 Frazee

2 hard work. It's a remarkable job you've done,  
3 which has been a challenge.

4 Can you tell me, are you recommending  
5 mandatory parent education?

6 JUDGE FRAZEE: I'm not recommending  
7 mandatory parent education, but the way the  
8 Administrative Order is worded right now, it is  
9 totally discretionary with the judge.

10 Once we have some experience with it,  
11 I'm thinking, guessing, we may want to think about  
12 having judges be more along the line of requiring  
13 parent education, but there are some cases they  
14 have to consider where it's not appropriate to  
15 send parents to parent education; for instance, in  
16 domestic violence.

17 We've done a lot of work, as you know,  
18 as a member of the parent board working out those  
19 guidelines and what's appropriate for referral and  
20 what is not, and when I say we'll see what  
21 happens, I don't know how receptive a lot of  
22 judges will be to making parent education  
23 referrals.

24 It's an education process, and we just  
25 to have to see how that goes.

26 THE COURT: Thank you very much.

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1 Schwab

2 JUDGE FRAZEE: Thank you, and this  
3 really needs to be part of the fabric of the  
4 matrimonial process, so it's not just contingent  
5 upon Judge Kaye's agenda and her current interest  
6 in this area.

7 Thank you very much.

8 THE COURT: Harold Schwab.

9 MR. SCHWAB: Good afternoon.

10 My name is Harold Schwab. I'm a  
11 founding partner of Lester Schwab Katz & Dwyer,  
12 120 Broadway.

13 I've been trying cases for more than 45  
14 years in the personal injury field and related  
15 primarily to product liability matters.

16 Regrettably, my wife and I in the recent  
17 past also found ourselves as petitioner litigants  
18 in Family Court, Queens County in a grandparent  
19 visitation action brought against our own son in  
20 order to have visitation rights of our two  
21 grandchildren, who are now -- Rachel, age 15,  
22 Cody, now age 10, who live all of ten blocks away  
23 from us and who my wife was instrumental in the  
24 rearing of these children for reasons that will  
25 become self-evident.

26 I don't come before you with sour grapes



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1                   Schwab  
2   with regard to the end result of the visitation  
3   proceeding, since, by virtue of an agreement  
4   entered into by the parties, we were given what I  
5   understand to be the most extraordinary liberal  
6   visitation rights, far in excess of anything that  
7   any grandparent could ever expect to receive from  
8   any court.

9           I come before you to give you the  
10   benefit of the experiences we have, which I feel,  
11   as a litigant who, coincidentally, is also an  
12   attorney, justifies significant criticism and  
13   correction of both the referee system and the law  
14   guardianship system as administered at least in  
15   the Family Court, Queens County, New York.

16          By way of an abbreviated background, let  
17   me say that in the year 2001, at our behest, there  
18   was a neglect proceeding brought by Child  
19   Protective Services.

20          There was a finding of neglect of the  
21   children at that time primarily because of a  
22   continued prescription overdose of drugs by our  
23   daughter-in-law, which had resulted, among other  
24   things, in 911 calls and multiple inadequate  
25   unsuccessful attempts at rehabilitation.

26          The judge presiding at that time issued

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1                   Schwab  
2 various ameliorative orders, which were inadequate  
3 because, without a requirement of random drug  
4 testing, everyone can go back and continue on the  
5 drug OD'ing as was taking place.

6           So, my wife and I in 2002 criticized our  
7 son for letting this situation to continue, and  
8 that resulted in the children being yanked from us  
9 101 percent, so we brought a petition by way of an  
10 order to show cause.

11           So let me address now, with that as the  
12 background, the law guardian issue from this law  
13 guardian appointed by Legal Aid, and then I will  
14 discuss the referee situation.

15           This law guardian in October 2002  
16 hearing came without her file.

17           During the history of the litigation she  
18 had one interview with the granddaughter while the  
19 father was at home.

20           Therefore, the child was, obviously,  
21 kow-towed into what her answers would be, and then  
22 another conference took place at home.

23           There was no interview of the other  
24 child, no interview with the grandparents, no  
25 interview of the nannie regularly there, no  
26 interview of a close relative who live

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1 Schwab

2 approximately five or six blocks away.

3 Essentially nothing was done by the  
4 overworked, apparently, legal guardian.

5 There was a hearing held on January 22  
6 of '03, when the issue was, among other things,  
7 how do the children react to the grandparents, who  
8 have, literally, nurtured them for so long.

9 That was an issue, of course, that had  
10 to do with whether there would be interrim  
11 visitation, among other things.

12 With the father being present at  
13 Rachel's interview, the statement was made by the  
14 law guardian "...and I think that for now she is  
15 not pleased with the relationship between the  
16 parties and, as such, is not ready to see her  
17 grandparents."

18 Then the question was asked about Cody,  
19 the younger boy. "Unfortunately, I haven't spoken  
20 to Cody since the last court date. I think he has  
21 a very negative impression of his grandparents at  
22 this point as well."

23 That's wonderful to have that level of  
24 speculation with regard to the impressions of a  
25 child.

26 There were other examples of this

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1                   Schwab  
2   inadequacy of preparation, such as when an order  
3   to show cause was brought to compel forensics in  
4   all of 2003, because the referee had ordered  
5   forensics in January of 2003, and they were lodged  
6   repeatedly by the respondent.

7                   In the order to show cause hearing in  
8   2003 the guardian stated, "Oh, I agree with the  
9   respondent that the order to show cause for  
10   contempt should be dismissed. I agree with that."

11                  We should not have forensics under that  
12   circumstance, although we had not only written in  
13   our motion papers why the need was for forensics,  
14   had cried out for with these two children, given  
15   the dysfunctional family that they had been set  
16   forth in, but we had even written to the law  
17   guardian previously in that regard.

18                  Were that not enough, the issue was  
19   raised in August of 2003 as to who should pay for  
20   the forensics. The referee in January 2003 said  
21   it should be paid 50/50. Fine.

22                  In 2004 August the issue occurred again,  
23   was raised orally at that time, and the guardian,  
24   with no involvement whatsoever in analyzing the  
25   financial status of anyone, there was no inquiry  
26   as to that, made the statement that the petitioner



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1 Schwab

2 should pay for the forensics in their entirety.

3 Now, I came upon six months ago what I  
4 expect most of you who practice in this field are  
5 already aware of, a document by the State Bar  
6 Association called Law Guardian Representation  
7 Standards, November 1999.

8 It's a fantastic publication. And it  
9 says not only for custody. It says it should  
10 apply to visitation, and every standard that's  
11 given there was violated by this law guardian.

12 I say that unequivocally. Get the book,  
13 and take a look at the standards, if you're not  
14 familiar with them, one by one.

15 So, what is the solution to this  
16 situation? I would have for you a very simple  
17 solution were it my pen that could make a  
18 decision, rather than either Judge Kaye or OCA or  
19 whoever it is that makes the final decision.

20 I would fire all Legal Aid law  
21 guardians. But we need law guardians. So where  
22 do you get them from? There is a recent pro bono  
23 initiative by the State bar that was just recently  
24 passed.

25 Get the State Bar and start a pro bono  
26 initiative to get the lawyers to go out, and one

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1                   Schwab  
2 guardianship case per person on a pro bono basis.

3           I guarantee you that the trial lawyers  
4 division of the State Bar, the torts insurance and  
5 compensation law section, and others would be  
6 delighted.

7           I guarantee you that attorneys in my  
8 office would be thrilled to have one discrete case  
9 to work on and really pay attention to it.

10           The Trial Lawyers Association of New  
11 York, a plaintiffs' organization, they spent a  
12 tremendous amount of time with the 911 Victims  
13 Compensation Fund.

14           I think I could guarantee that you can  
15 get people there to work pro bono on this. Let's  
16 get some people in who are going to pay attention  
17 to these poor children.

18           I have one minute left. Then I'm going  
19 to speak with regard to refereeing very quickly,  
20 if I may.

21           What I found with regard to the referee  
22 was that there was no appreciation for authority  
23 to make immediate decisions and to enforce the  
24 discovery rules and recommendations.

25           That's a major failing that took place  
26 here. This referee was waltzing around to a

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1 Schwab

2 fairtheewell.

3 Maybe she was kow-towed because of the  
4 quality of the legal representation on each side.

5 I don't know why, but I will tell you what was  
6 required -- besides the problem of the delays.

7 You all know about the delays, and  
8 delays in a personal injury case are one thing.  
9 That's okay. Everyone will survive it pretty well  
10 unless they're 95 years of age.

11 Delays in visitation and custody cases  
12 are a tragedy because the children are going to  
13 suffer.

14 My solution, if I may, very briefly,  
15 would be there should be at least, again, in  
16 Family Court, Queens County, more attention by the  
17 judges and less delegation to referees, number 1.

18 Number 2, there should be more training  
19 of referees. I don't know what the training is  
20 for referees, but they've got to be trained more.

21 And, number 3, with regard to discovery  
22 matters, you know the Judicial Institute last  
23 month put on a program for new Civil Court judges,  
24 and acting Supreme's.

25 It was called Putting Teeth in  
26 Discovery. I don't think that the referees even

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1                   Schwab  
2    know that there's a case called Kyle versus  
3    Percondo (sic) in the Court of Appeals that says  
4    it's okay, and we should move discovery and  
5    dismiss cases if it's appropriate and, in cases  
6    that go the other way, to dismiss answers also if  
7    there's failure of discovery.

8                   Let the referees get meaningful  
9    mandatory CLE training, not optional but mandatory  
10   training, and not deciding which courses to take.  
11   Let them take good, solid discovery cases and  
12   others like that.

13                  So, let me just end with this: Kids  
14   cannot be treated like cans of peas on a shelf.  
15   It's not good, and nobody likes to see that in the  
16   personal injury field.

17                  You want to move cases along, but the  
18   people will survive even if they're not moved  
19   along rapidly.

20                  In the cases involving kids like my  
21   grandchildren, time is really of the essence, and  
22   immediate attention has to be given to those  
23   matters.

24                  Thank you.

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2 CHAIRPERSON MILLER: This is a very enthusiastic  
3 audience. I know how you feel about that. Please hold  
4 the applause because we don't want to limit anybody else's  
5 presentation.

6 MS. BALA: I would like to have that audience in  
7 some of my trials in civil court.

8 CHAIRPERSON MILLER: The next speaker is  
9 Katherine Bala.

10 We ask all our speakers to make sure to use the  
11 mic. We opened the windows so you wouldn't suffocate.  
12 That means you have to speak up.

13 MS. BALA: Thank you, Chief Judge Judith Kaye  
14 and the Matrimonial Commission for this opportunity to  
15 address you today.

16 My name is Catherine Bala. I am the director of  
17 the Family Life Office of the Roman Catholic Diocese of  
18 Brooklyn.

19 Today I represent the views not just of my own  
20 diocese, but of all 8 diocese in the state as I speak on  
21 behalf of the New York State Catholic Conference.

22 The conference founded in 1916 provides unified  
23 voice for the bishops of New York State in matters of  
24 public policy. Our church has much expertise and  
25 experience to offer in matters effecting family life as we  
26 provide not only the sacrament of marriage, but also a

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2 wide array of services to families, including pre-marriage  
3 education, marriage counseling, divorce mediation,  
4 adoption care, foster care services, parenting classes,  
5 teen pregnancy prevention, domestic violence protection  
6 and much more. Indeed, the Catholic church is the largest  
7 non-profit provider of education, health care and human  
8 services in the state.

9

10 The New York State legislature is now  
11 considering a proposal drafted by the New York State Bar  
12 Association that would amend the Domestic Relations Law to  
13 allow for "irretrievable break down of a marriage" as  
14 grounds for divorce. Commonly referred to as no-fault  
15 divorce, the bill is numbered Senate 4154 and Assembly  
16 7682. It is pending in the judiciary committees of the  
17 respective houses.

17

18 The stated objective of the proposal is to  
19 reduce unnecessary delay in divorce proceedings, decrease  
20 litigation costs and lessen confrontation between spouses.  
21 We recognize that this commission is not a legislative  
22 body and as such will not vote on the legislation  
23 reference. However, earlier this year Chief Judge Judith  
24 Kaye called on the legislature to consider passing the  
25 no-fault divorce law, noting that the current process is  
26 cumbersome.

26

We understand the intent of these hearings is to

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2 receive public views about and review all aspects of  
3 matrimonial litigation with an eye toward improving how  
4 the courts handle such litigation. Toward that objective  
5 and in response to Judge Kaye's call, we offer these  
6 comments in opposition to no-fault divorce. We believe  
7 that such a policy will change the legal system into an  
8 assembly line for quick dissolution of marriage, making  
9 divorce a forgone conclusion and guaranteeing divorce for  
10 any spouse that desires one.

11 The rejection of no-fault divorce bills has been  
12 a longstanding position of the New York State Catholic  
13 Conference, a position we adhere to on measures which  
14 break down the institution of marriage.

15 So important is marriage to society and family  
16 life that the church recognizes it as a sacrament, a  
17 blessed union of husband and wife. Marriage is the very  
18 foundation of every society, recognized not just by  
19 religions but by civilization for thousands of years as  
20 the cornerstone of the family.

21 It is a public legal commitment not just in a  
22 private exchange of sentimental wishes. Marriage is a  
23 powerful protector of children. Through marriage children  
24 are raised, nurtured and educated. In short, marriage  
25 matters. And we believe that government through its laws  
26 and policies needs to send a strong message that it

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2 supports and nurtures strong marriages.

3 To the contrary, no-fault divorce laws send a  
4 message that marriage is trivial, it's temporary and can  
5 be easily dismantled, like terminating the lease on your  
6 apartment or breaking a contract on your new cell phone.

7 The pending no-fault divorce bill would allow  
8 one spouse to obtain a divorce without the consent of the  
9 other spouse for any reason or for no reason at all.

10 No fault is somewhat of a misnomer. While it  
11 sounds like a simple method for decreasing acrimony  
12 between spouses as they mutually agree to end their  
13 marriage, the reality is that it allows one spouse to take  
14 unilateral and blameless action to the detriment of an  
15 innocent spouse and, possibly, children. A more accurate  
16 term might be unilateral divorce on demand.

17 According to the National Marriage Project at  
18 Rutgers University, the lifetime probability of divorce  
19 and separation in America today is 50%. We believe  
20 no-fault divorce law will do as its proponents wants, lead  
21 to quicker and easier divorces and thus lead to a higher  
22 divorce rate and further breakdown of the family in New  
23 York State.

24 The social sciences have amply demonstrated the  
25 significant negative impact of marital dissolution,  
26 especially on women and children.

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2           Following divorce a woman's standard of living  
3 drops by an average of 27% and a man's increases by 10%.  
4 These statistics are from the National Marriage Project at  
5 Rutgers University conducted in 2002.

6           While this is actually an improvement over  
7 previous years, the gender gap continues to exist.  
8 Divorce has ugly consequences for children who suffer  
9 greater risk of behavioral problems with long term  
10 empirical studies have proven to be longstanding.

11           CHAIRPERSON MILLER: Just one minute, please.

12           MS. GELFMAN: Children also have an increased  
13 risk of academic problems, unwed pregnancy, substance  
14 abuse and child abuse and divorce.

15           We would like to recommend the following public  
16 policy alternatives to no-fault divorce.

17           We would like to found vouchers and referrals to  
18 commune and faith-based pre-marital and marriage education  
19 programs. Marriage counseling and marriage mentoring  
20 programs, especially for high risk couples, can reduce  
21 negative interactions, domestic violence and divorce.

22           We would like to add an explicit marriage  
23 message to all government financed/funded teen-age  
24 pregnancy programs. Taxpayers pay huge costs for  
25 government funded programs generated by family  
26 fragmentation.

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2           We would like the government to be deeply  
3 involved in the family lives of poor single parents and  
4 their children. In such programs governments should send  
5 the powerful message that marriage matters.

6           Finally, we would like to fund pilot projects of  
7 divorce mediation that are designed to reconcile spouses.  
8 Studies have shown that one year after divorce at least  
9 one spouse in 75% of divorcing couples has reported having  
10 second thoughts.

11           Court connected divorce mediation has been shown  
12 to lead to dramatic reductions in acrimony, litigation and  
13 unnecessary divorce.

14           CHAIRPERSON MILLER: Thank you.

15           MS. BALA: If enacted, such policies would serve  
16 to protect the integrity of the institution of marriage  
17 and family to the betterment of all societies.

18           CHAIRPERSON MILLER: Thank you very much.

19           MS. BALA: Thank you.

20           CHAIRPERSON MILLER: Mr. Ken Jockers.

21           MR. KOVNER: I will be presenting testimony on  
22 behalf of the Fund of Modern Courts.

23           Judge Miller and members of this distinguished  
24 commission, thank you for the opportunity to provide the  
25 news of the Fund for Modern Courts, the state leading  
26 citizen's group concerned with the fair and efficient

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administration of justice.

My name is Victor A. Kovner. I appear before you in my capacity as chair of the Collective of Modern Courts. As many of you know, Modern Courts was formed in 1955 and that its reached as has continuously extended through its associated coalition for court reform. That growing group has recently changed in character from primarily civic and good government groups such as the League for Women Voters, Citizen Union and Common Cause, to a far wider list of organizations that now include civil rights, domestic violence, family and children's organizations.

Speaking on behalf of these organizations and the more than 600 volunteers who participate in our programs statewide, my testimony today will focus on one issue that represents, we believe, a critical opportunity to dramatically improve the matrimonial process. That issue involves restructuring of our court system.

Restructuring New York courts into a more efficient, effective and coherent system provides better outcomes for all participants in the process and will increase public trust and confidence in the courts.

The painful and stressful nature of matrimonial and family law litigation is well known to members of this commission. I recognize several among you far better

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2 known than to me. The fact patterns and legal issues are  
3 among the most difficult matters that are heard in our  
4 courts. The unfortunate reality is that in addition to  
5 the problems arising from the troubling substantive  
6 issues, matrimonial litigants and their families are  
7 further traumatized by the process itself. Inefficiency,  
8 delay and multiplication of services all create undue  
9 burdens on litigants, leaving them frustrated and  
10 disillusioned with a system that effects their most  
11 critical concerns.

12 In the original disposition of matters and in  
13 the continuing adjudication of issues such as child  
14 support, maintenance, custody and visitation, the basic  
15 structure of the courts creates unnecessary problems for  
16 litigants and court personnel alike. Overlapping  
17 contradictory or duplicative orders can lead individuals  
18 and families unsure about the resolution of cases and can  
19 waste court time and resources to eliminate these burdens  
20 and speed the process and achieve faster and more  
21 convenient outcomes for families. New York now has the  
22 opportunity to improve the process by consolidating the  
23 courts that handle matrimonial and family matters, giving  
24 judges command over the full set of facts in each case and  
25 giving the parties a more organized process on which they  
26 may rely.



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2 As you know, the current structure of nine  
3 separate trial courts requires a litigant with family  
4 related matters to appear in as many as three different  
5 courts to obtain relief in matrimonial family and domestic  
6 violence cases.

7 I want to add that Modern Courts has just  
8 completed a guide to the New York State Family Court which  
9 is going to all the family courts throughout the state and  
10 to 62 counties as a social service organization that  
11 support them.

12 It is a convenient guide. On page 4 of it -- we  
13 will make copies available to the commission -- there they  
14 are. The maze of our current trial court system. 9  
15 separate trial courts can deal with the kinds of matters  
16 that arise in connection with family -- matrimonial child  
17 support and domestic violence. It is an intolerable  
18 situation.

19 The call for restructuring made most recently by  
20 Chief Judge Kaye and endorsed by numerous community and  
21 social service groups would consolidate the current maze  
22 of trial courts into only two; a Supreme Court and a  
23 district court. The new Supreme Court would consolidate  
24 Family Court, Surrogates Court, Court of Claims, and  
25 County Court, all of which have jurisdiction over many of  
26 these same family law related issues, into one body. The

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2 newly configured Supreme Court would have a special  
3 division to hear all proceedings involving families and  
4 children, including matrimonial cases, Family Court  
5 actions and claims involving domestic violence.

6 Cases involving the same parties would be heard  
7 by one judge in one courtroom where the full range of  
8 facts can be assessed and the parties can have all of  
9 their claims addressed in one action. Such unification  
10 would eliminate potential for conflicting orders, decrease  
11 the number of court appearances, reduce delay and  
12 duplications and so forth.

13 I want to add, in this restructured system  
14 Family Court judges would be eligible for elevation to the  
15 Appellate Term and the Appellate Division, something not  
16 permitted under our structure, and it seems to me  
17 inappropriately so.

18 In addition to improving the process for  
19 litigants and for their children, restructuring the courts  
20 would also benefit judges and the court system as a whole.  
21 The present system fosters piecemeal litigation. This  
22 approach requires different judges to review the facts and  
23 history of cases heard in other courts where parties have  
24 already obtained duplicative or contradictory orders. A  
25 restructured court system would promote the efficient use  
26 of judiciary resources by citing judges who are

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2 knowledgeable and experienced to family-related litigation  
3 to handle all aspects of the family's legal problems.

4 Look at the success of the commercial division throughout  
5 the state. Do only commercial cases deserve that kind of  
6 priority? Why shouldn't family law related cases receive  
7 it as well?

8 In 15 upstate counties Supreme Court judges are  
9 also Family Court judges. They hold two or three hats and  
10 they don't have those problems. Why should people be  
11 subjected to going into different courts in the rest of  
12 the state while in 15 courts you have, in effect, a  
13 restructured system? And that's only because the  
14 populations in those communities or those counties are  
15 small. But the need, it seems to me, is greater in large  
16 urban areas.

17 A restructured -- judges who are familiar with  
18 the problems, if you have a single family division, would  
19 be familiar with the obstacles that most commonly arise in  
20 family related litigation. They would be trained to  
21 manage the multiple facets of each of the cases. They  
22 would be able to speed case processing and reduce  
23 duplication of services.

24 Beyond the direct impact on matrimonial  
25 litigation, restructuring the courts would also produce  
26 benefits for the court system and the general public.

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2 Unification would result in significant cost savings to  
3 litigants and to taxpayers. There have been studies, and  
4 I believe you may have already heard the testimony, that  
5 in the most recent proposal the Office of Court  
6 Administration projected direct savings of \$131 million to  
7 taxpayers over the first 5 years with additional savings  
8 projected in litigation and administrative services costs.  
9 But that's just to the court system. But fewer court  
10 appearances save litigants lost wages, intrude on their  
11 lives to a much lesser degree and save them significant  
12 legal fees and child care expenses.

13 Recently, the Atlantic Legal Foundation, a  
14 public interest foundation led by prominent corporate  
15 officials, released a report calling on the business  
16 community to support restructuring, noting among other  
17 things that a streamlined court system would increase  
18 worker productivity and decrease absenteeism. The  
19 Atlantic Legal Foundation concluded that an efficient and  
20 fair court structure is good not only for New York, but  
21 for business in New York.

22 As this commission pursues its mandate to reduce  
23 costs and delays and trauma to families involved in  
24 divorce proceedings, Modern Courts urges you to include a  
25 call for court restructuring through either constitutional  
26 or administrative means in your final recommendations to

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improve the matrimonial procedures in New York courts.

Thank you very much.

CHAIRPERSON MILLER: Thank you very much.

I hope you will leave your material for us.

MR. KOVNER: I have copies of my testimony and we are going to -- this guide to family courts is just out. I will send it to you --

CHAIRPERSON MILLER: Thank you.

MR. KOVNER: -- to all the family courts.

Thank you.

1                   Ruben

2           THE COURT: Emely Ruben.

3           MS. RUBEN: Good afternoon.

4           My name is Emely Ruben, and I'm the  
5 attorney in charge of the Brooklyn Office of the  
6 Civil Division of the Legal Aid Society.

7           I'm also the city-wide family law  
8 supervisor and co-supervisor of Legal Aid  
9 Society's city-wide domestic violence.

10           However, I'm honored to be here this  
11 afternoon speaking on behalf of the lawyers  
12 speaking against domestic violence.

13           The Lawyers Committee Against Domestic  
14 Violence, LCADV -- and I'll use that for short  
15 from now on -- is composed of more than 60 lawyers  
16 and applicants from various sectors of the legal  
17 community.

18           Over the last ten years, the LCADV has  
19 spearheaded innovative domestic violence training  
20 program and worked with the court system and  
21 policy makers to help develop appropriate  
22 system-wide responses to domestic violence.

23           The LCADV has organized working groups  
24 of judges and advocates that are addressing  
25 domestic-violence-related issues in the courts.

26           I'd like to thank Justice Miller and the

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1                   Ruben  
2   entire Commission for inviting me here to speak to  
3   you on behalf of the LCADV and for taking on the  
4   overwhelming, yet vitally important task of  
5   reforming matrimonial practice in New York .

6           Members of the LCADV have extensive  
7   experience representing clients, most of them  
8   domestic violence and most of them indigent or  
9   working-poor people in matrimonial actions in  
10  Supreme Court and Family Court matters.

11          I'll be focusing my remarks on this  
12  today. Informed by our collective experiences, we  
13  believe that matrimonial reform must include  
14  provision of meaningful maintenance awards and a  
15  comprehensive plan to provide competent,  
16  continuous representation for every person of  
17  limited means who turns to the court system to  
18  resolve their matrimonial issues.

19          Meaningful maintenance awards and a  
20  comprehensive plan to provide competent and  
21  continuous representation must exist if we are to  
22  level the playing field with a court system that  
23  serves the needs of our most vulnerable litigants,  
24  women and children at poverty level who have  
25  experienced domestic violence.

26          The LCADV has proposed a package of



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1                   Ruben  
2   matrimonial reform that addresses these two  
3   crucial issues: Meaningful maintenance awards and  
4   a comprehensive plan of competent and continuous  
5   representation.

6                   Copies of the proposed packages and  
7   explanatory memo are being submitted to you today  
8   with a copy of my testimony.

9                   Just last week I received a telephone  
10   call from a colleague at another legal services  
11   provider. A woman had come to her office seeking  
12   representation in a divorce case.

13                  But they were simply too overwhelmed to  
14   take the case. "Please," she said to me, "if you  
15   can't take her case, she will have to continue pro  
16   se, and although she has an extremely meritorious  
17   and sympathetic case, she stands to lose  
18   everything."

19                  I agreed to meet with the client. She  
20   speaks little English and works sporadically as a  
21   home health aide. Her income is less than  
22   \$10,000 a year.

23                  The parties have two elementary  
24   school-age children, and she is their primary  
25   caretaker. She and her children fled the marital  
26   residence, a small co-op purchased during the

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1                   Ruben  
2 marriage, and are now living in a domestic  
3 violence shelter.

4           She seemed fairly traumatized by the  
5 violence she experienced and by the intimidating  
6 court process.

7           Hers is a 12-year marriage, and her  
8 husband has worked for the Transit Authority her  
9 entire marriage. He is a conductor and now earns  
10 in excess of \$70,000 annually.

11          He is, of course, represented by an  
12 attorney.

13          If she is not represented by counsel  
14 and, in the absence of clear, meaningful  
15 guidelines for a maintenance, she will likely get  
16 no meaningful maintenance award and may lose her  
17 rights to her husband's pension and to the marital  
18 residence.

19          She told me with a tremor in her voice,  
20 the judge had ordered her not to come back to  
21 court without an attorney.

22          It's cases such as these which we  
23 implore you to address. First, what if there were  
24 a easy and straightforward way for this litigant  
25 to seek counsel fees?

26          Perhaps she could have hired private

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1                   Ruben  
2   counsel. We propose that matrimonial rules be  
3   clarified and be amended to clarify that a pro se  
4   litigant can seek attorneys' fees without the  
5   affidavit of an attorney attached and that a clear  
6   and simple form of motion for counsel fees be  
7   given to pro se litigants to fill out.

8                   Members of the LCADV have drafted such a  
9   pro se motion form and submitted it to the  
10   Commission for its consideration in January.

11                  I have taken the liberty of attaching  
12   another copy of that submission to the written  
13   version of my testimony today as well.

14                  Second, what if there were clear  
15   guidelines for a maintenance as there are for  
16   child support?

17                  In the situation I just described, this  
18   would at least ensure a meaningful maintenance  
19   award for this client.

20                  What if the husband in the case I just  
21   described earned only \$25,000 a year but was  
22   represented by his union's legal services program?

23                  Well, then there must be a mechanism for  
24   appointing counsel such as provided in the LCADV  
25   proposed amendment to the Domestic Relations Law  
26   as part of our matrimonial format.

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1                   Ruben

2                   Let me take a minute now and explain the  
3   genesis and purpose of the matrimonial reform  
4   package to which I've been referring.

5                   In the past advocates for women have  
6   opposed no-fault because they feared that some  
7   number of vulnerable women will be harmed.

8                   Underlying their opposition was concern  
9   for the financial stability of women post divorce,  
10   particularly women in long-term marriages and  
11   women who have compromised their ability to earn  
12   money and develop careers.

13                  Existing New York laws fail to secure  
14   protection or equity for these people. The  
15   leverage provided by fault rounds may be  
16   inadequate and clumsy, but for some women it's  
17   better than nothing.

18                  On the other hand, we've also come to  
19   understand that no-fault divorce may serve the  
20   interests of some of our clients who might be able  
21   to more easily extricate themselves from abusive  
22   marriages.

23                  Our proposed matrimonial reform package  
24   is an effort to reconcile no-fault divorce with  
25   equity for vulnerable marital partners.

26                  Recognizing that provisions of divorce



BARBARA STROH, CSR, CRR, CMR

1                   Ruben  
2 statutes are interconnected and divorce itself is  
3 a dynamic process, we propose revised rounds, as  
4 well as a new name.

5                   We now want to call it postmarital  
6 compensation and limited right to counsel as well.

7                   We propose the establishment of  
8 postmarital compensation guidelines similar to  
9 guidelines used in the Child Support Standards  
10 Act.

11                  This would introduce fairness and  
12 consistency into the currently murky and  
13 unpredictable area of matrimonial law.

14                  We have used the CSSA as a reference  
15 point for structure, language and definitions.

16                  Like the Child Support Standards Act,  
17 our proposal of postmarital compensation relies on  
18 a relatively simple formula.

19                  As with the Child Support Standards Act,  
20 we propose flexibility in the form of deviation  
21 factors to accommodate cases for which the formula  
22 produces some results.

23                  We also propose a cap after the first  
24 \$300,000 of the higher spouse's income with  
25 discretion for judges to apply the formula to  
26 income above that amount.

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1                   Ruben

2                   The formula we propose is more  
3 complicated to describe than it is to use.

4                   Briefly, the proposed postmarital  
5 compensation amount would be 30 percent of the  
6 higher income spouse's income minus 50 percent of  
7 the lower income spouse's income.

8                   The income is defined as it is in the  
9 Child Support Standards Act, and child support  
10 will continue after the postmarital compensation  
11 obligation is determined.

12                   Also, postmarital compensation will be  
13 taxable to the recipient and deductible by the  
14 payer.

15                   The duration of the postmarital  
16 compensation obligation will be a percentage of  
17 the length of the marriage, ranging from a low of  
18 35 percent of the length of the marriage for  
19 short-term marriage to zero to five years to a  
20 high of 75 percent of the length of the marriage  
21 in marriages of more than 20 years.

22                   So, what would this mean in a case like  
23 the one I just described? To make it easier,  
24 let's pretend the parties' incomes are \$70,000 and  
25 \$10,000 respectively after the deduction of social  
26 security and local taxes.

BARBARA STROH, CSR, CRR, CMR

1                   Ruben

2                   The amount of postmarital compensation  
3 would be roughly \$16,000 a year for 7.8 years.  
4 The child support would be calculated on \$54,000  
5 instead of \$70,000 and would be adjusted after the  
6 postmarital compensation obligation ceased.

7                   The wife and two children, household of  
8 three, would have \$39,500 to live on, and the  
9 husband, a household of one, would have \$40,500 to  
10 live on, thus providing rough parity to the two  
11 households.

12                  The final prong of our proposed  
13 matrimonial reform package is the right to counsel  
14 as a means to achieve greater equity and swifter  
15 resolution of cases for the parties and judicial  
16 economy.

17                  The proposal limits the right to counsel  
18 in cases in which one party has or could readily  
19 afford a lawyer and the other party lacks the  
20 resources.

21                  THE COURT: You have one minute.

22                  MS. RUBEN: There are several viable  
23 mechanisms for effectuating this proposal,  
24 including funding existing providers to provide  
25 services, increasing 18(b) allocations or creating  
26 new institutional providers.

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1                   Ruben

2                   Some of these mechanisms may be better  
3 suited to downstate urban areas and some better  
4 suited to upstate rural areas.

5                   We need not resolve this now, and a  
6 cookie-cutter approach is certainly not necessary.

7                   This Commission has the power and  
8 ability to effect major changes in the way  
9 matrimonial litigation is carried out in New York.

10                  On behalf of the Lawyers Committee  
11 Against Domestic Violence, I ask that you use that  
12 power to recommend changes that will level the  
13 playing field for indigent and low-income  
14 litigants, many of whom are survivors of domestic  
15 violence.

16                  We seek a strong mandate from the  
17 Commission, not simple proposing legislative  
18 change, which we all know can take a very long  
19 time to effectuate, but encouraging immediate  
20 change.

21                  Recommend that judges proactively  
22 appoint 18(b) counsel in Supreme Court custody  
23 cases, clarify that pro se litigants can seek  
24 counsel fees without the need of an attorney's  
25 affidavit and ask judges and lawyers to employ the  
26 postmarital compensation form in resolving



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1           Harris

2 maintenance issues.

3           The playing field must be level, and  
4 this can only be achieved with a comprehensive  
5 plan of competent and continuous representation  
6 for those who cannot afford it and with the  
7 implementation of meaningful maintenance awards.

8           THE COURT: Mr. Leigh Harris -- Miss  
9 Leigh Harris. Sorry.

10          My name is Leigh Harris. I would like  
11 to begin by introducing myself as a child's  
12 advocate.

13          I have a Masters in public health and a  
14 Masters in social work and have a Ph.D in my  
15 profession.

16          I'm here to talk about mediation. I'm  
17 very excited to have followed honorable Judge  
18 Frazee, and my topic is like hers.

19          I am very grateful to have this  
20 opportunity to speak today.

21          Thanks to a large body of research  
22 completed over the last decade, we now have a  
23 better understanding of the impact of separation  
24 and divorce on children.

25          With the current national divorce rate  
26 hovering around 50 percent, states have

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1                   Harris  
2 increasingly been looking to protect children from  
3 the effects of divorce.

4                   Divorce has become a cultural  
5 phenomenon, and its impact is a public health  
6 issue.

7                   After witnessing the increase in divorce  
8 rates in other states with the passing of no-fault  
9 legislation, I feel, as a child's advocate, that  
10 it's important that we address during this  
11 legislative session the needs of parents and  
12 children in experiencing divorce and provide  
13 safeguards for families in transition through  
14 education regarding parenting and family life in  
15 the postdivorce world.

16                   In this effort the question we ask is  
17 what are the factors in divorce and families that  
18 contribute to children and what are the factors of  
19 divorce? There are several major areas. These  
20 are parental --

21                   THE COURT: Sorry. We don't want to  
22 miss your presentation. You'll have to speak into  
23 the mike.

24                   MS. HARRIS: These are parental laws,  
25 economic loss, increased life stress, lack of  
26 parental competence and exposure to inter-parental

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1                   Harris

2    stress.

3           We know that children do best when both  
4    parents maintain an involvement in their lives.

5           We also know each parent is different  
6    and has separate value contributions to make to  
7    their children's development.

8           We know that children need structure,  
9    routine time, but we now know the importance of  
10   unstructured time. There is research out on this  
11   now, for children to spend this unstructured time  
12   with each parent.

13          We know that the most consistent finding  
14   across all studies regarding harmful effects of  
15   divorce on children is exposure to conflict  
16   between parents.

17          So, the ability of parents to  
18   communicate cooperate with each other is of  
19   primary importance in reducing stress on their  
20   children.

21          They need to learn to be courteous with  
22   each other, communicate in a business-like  
23   fashion.

24          I am pleased to tell you that a piece of  
25   legislation entitled Cooperative Parenting Act is  
26   currently being introduced perhaps as we speak in

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1                   Harris  
2   the New York State Assembly and shortly in the  
3   Senate as well.

4           The Cooperative Parenting Act addresses  
5   this need for education not unlike Judge Frazee's  
6   recommendation for mandated parenting education  
7   course, on desensitizing divorced parents both  
8   during and after the divorce process.

9           The subject matter for divorce will  
10   cover the developmental stages of children,  
11   adjustment of children to parental separation,  
12   family dispute resolution and conflict managing --  
13   we can't leave that out -- stress reduction on  
14   children, cooperative parenting and, most  
15   importantly, the continued presence, the  
16   predictable presence of both parents in the lives  
17   of minor children.

18           The course will culminate in two things  
19   mandated by the court. Typically, the mandated  
20   parenting plan, which requires their completing  
21   the actual course.

22           Its preparation will be guided by a team  
23   teaching the course and demand certification  
24   requirements. A committee will be formed to study  
25   existing parent education courses in other states,  
26   of which there are 13, and review that for New



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1                   Harris

2    York State.

3                   The mandated parenting plan includes but  
4    is not limited to the following: The general  
5    statement of objectives and outline of parental  
6    responsibilities, a residential sketch for the  
7    child, allocating residential times where possible  
8    and recommended for both parents in the absence of  
9    domestic abuse, provision made in the event of  
10   relocation by the parent.

11                  It also includes, as we said, a dispute  
12    resolution process chosen by the parties. It  
13    could be Aunt Em, it could be Grandpa Joe. Then  
14    communication in the courts. But they decide as  
15    per their family.

16                  Enforcement of the plan also includes  
17    allocation of decision-making authority and  
18    responsibilities, and violations of the parenting  
19    plan within a particular family are delineated in  
20    their specific plan.

21                  There is a presumption that parents will  
22    agree will share 50/50 residence unless deemed  
23    unhealthy for the child or in the presence of  
24    domestic violence.

25                  To end, Martin Luther King said we can't  
26    pass laws that will affect behavior. If we cannot

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1           Harris  
2    make people good parents, we can require that  
3    parents take education courses and make parenting  
4    plans, and hope for the best.

5           That's it.

6           Does anyone have any questions?

7           THE COURT: Yes, we do. Is it  
8    contemplated that both parents attend the course  
9    together?

10          MS. HARRIS: Only if they want to.  
11    Everything in this law, which I have right here,  
12    exists in another state.

13          What other states have done is given  
14    them the course. Of course, that would be  
15    preferable, since you're working together.

16          If they're not, chances are they're  
17    going to do parenting course separately.

18          THE COURT: The divorce rate is 50  
19    percent. Why do you not advocate that parents  
20    take courses before marriage?

21          MS. HARRIS: Well, that leads me to a  
22    very important point which ties in with what Judge  
23    Frazee said.

24          Parenting education is virtually the  
25    latest thing if you go on the Internet.

26          In fact, this an organization called

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1 Harris

2 National Parenting Education Network that  
3 attempted to consolidate all of the parenting  
4 groups and form one governing body.

5 There are so many of them, they could  
6 not. So what they have accomplished is a  
7 referral source, and they do special projects,  
8 many kinds of special projects.

9 They are currently establishing criteria  
10 and standards as a parent education source, so  
11 that someone from that committee would be a very  
12 good resource on our committee.

13 Judge Frazee would be a very good  
14 resource, Andrew Shepherd of Hofstra would be a  
15 very good resource mediator.

16 Basically there is parenting education  
17 out there, and Andrew Shepherd said that we are  
18 one of the four states that does not have parent  
19 education.

20 There are only 13 states that have  
21 mandated parenting education courses, so I am  
22 assuming that the other 33 are cases like New  
23 York, where they're mandated on a case-by-case  
24 basis by the judge.

25 I'm hoping that that will not be the  
26 case, that we would change that and understand the

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1                   Harris  
2    people need support in trying times, and sometimes  
3    it's just a matter of taking your teenager out for  
4    pizza.

5                   THE COURT: Thank you. I hope you will  
6    submit your materials.

7                   MS. HARRIS: I will.

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Ms. Cockrell 103

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2 CHAIRPERSON MILLER: Elizabeth Cockrell.

3 MS. COCKRELL: Hello, your Honors and committee  
4 members. My name is Elizabeth Cockrell.

5 Several years ago I was instrumental in changing  
6 archaic IRS law which injured over 50,000 American  
7 taxpayers per year and their children. The IRS was guilty  
8 of cronyism, abuse of power, corruption, going beyond the  
9 legal boundaries of acceptable professional behavior,  
10 destroying honest people's lives, using strong arm  
11 techniques and out right fear, because it was a system run  
12 amuck with no oversight. It broke people financially.

13 The same thing can now be said of the current state of the  
14 New York State matrimonial system.

15 Let me tell you. Taking on the IRS was a piece  
16 of cake compared to trying to help reform the New York  
17 State matrimonial system.

18 I represent today many parents who are litigants  
19 who did not have the opportunity to speak today, so all of  
20 these suggestions come from parents who have been at the  
21 mercy of the system, who were in the system and are still  
22 in the system.

23 I have compiled ideas for reform from many  
24 parents, fathers and mothers, republicans and democrats,  
25 gay and straight, conservative and liberal, everybody  
26 else, purple and everything. So I urge you to take their

1  
2 ideas seriously and immediately begin to work on enacting  
3 change.

4       When we were working with the IRS law the new  
5 IRS commissioner made a commitment to wanting change. If  
6 he could take an old dinosaur like the IRS and reform it  
7 within a couple of years, you can do this in New York  
8 State.

9       Let's put respect back in the courtroom. It  
10 starts at the top. Respect for the litigants, respect for  
11 the children.

12       A significant problem is the children's voices  
13 are not being heard.

14       CHAIRPERSON MILLER: I would kindly advise all  
15 of you tha this is taking away from her time, so hold it.

16       MS. COCKRELL: They are classified as impaired  
17 in their judgment simply because parents are divorcing or  
18 separating. Most children are more competent and  
19 intelligent in these matters than the court realizes or  
20 portray in their reports. Court and law guardians should  
21 not consistently ignore the opinions of the child when  
22 they can be validated.

23       Children should not live from a suitcase. They  
24 need a stable home environment. They can't be shuttled  
25 around continuously. I spoke to several school directors  
26 who commented on the difficulties children have with these

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2 continuing shuttle arrangements between homes.

3 The biggest problem that we have faced, and this  
4 was in the newspapers, is there is no place to go to  
5 complain.

6 A colleague and I several years ago, one of the  
7 women in our group, we have men in our group, too, stood  
8 in Central Park and obtained over a thousand signatures on  
9 a petition and we sent to the this chairman of the  
10 Matrimonial Bar Association. We received a little curt  
11 letter back stating nothing really could be done.

12 So anyway, four other parents later on sent a  
13 complaint about a certain forensic psychiatrist to the  
14 Office of Professional Misconduct. We received a reply  
15 back from them that complaints about doctors could not be  
16 handled by them even though they license doctors because  
17 technically these doctors were not practicing medicine  
18 because they had this immunity because they were appointed  
19 by the courts. So we went to the judiciary who then sent  
20 us back to the Office of Professional Misconduct, and  
21 basically this guy is still practicing. And we found he  
22 had numerous, numerous complaints.

23 I was a stockbroker for 24 years. Complain  
24 about a broker, every complaint was registered with the  
25 NASD whether there was merit or not and it was  
26 investigated. That broker had several complaints by, say,

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2 abusing client's trust, profiting above and beyond the  
3 average fees, churning client accounts, they could be  
4 personally held liable and be sued and lose the privilege  
5 of having a brokerage license. Panels of their peers  
6 oversaw arbitration. We as customers in the New York  
7 State matrimonial system, for that is what we are, we are  
8 consumers, often having to purchase what we have been  
9 ordered to at various different costs, it is imperative  
10 that New York State adopt an oversight committee similar  
11 to NASD, National Association of Securities Dealers. The  
12 Court should set clear rules for the removal of an  
13 evaluator, such as they do in the brokerage field, and law  
14 guardians and forensic psychiatrists, for lack of  
15 adherence to ethical rules or failure to fulfill the  
16 standards and duties and responsibilities that they have  
17 been given.

18       The lack of guidelines and oversight are  
19 allowing forensics and law guardians to be heady with  
20 power because of their apparent immunity from misconduct.  
21 This problem continues as we speak. I am personally aware  
22 of cases pending right now where inappropriate results are  
23 being dictated by forensics and law guardians who still  
24 believe they are above the law. And even this  
25 commission's work today will have no impact upon them.

26       There are attorneys, law guardians and forensics

1  
2 here today who are desperately digging their claws to the  
3 old system worrying about losing the gravy train they have  
4 been riding on for years. In fact, some of these lawyers  
5 are business associates of forensics or law guardians who  
6 worked on their client's cases, yet their allegiances were  
7 never disclosed. Also, they continue to criticize  
8 litigants for daring to change the system and to support  
9 the forensic process. Some of these attorneys continue to  
10 promote the same forensics and ask for repeatedly  
11 custodial evaluations even after litigants have already  
12 adjudicated custody and there is no reason to continually  
13 relitigate. These attorneys should be sanctioned for  
14 frivolous litigation or questionable relationships with  
15 these forensics and examined by outsiders for conflicts of  
16 interest.

17 I was fortunate to have taped my expert  
18 psychiatrist unbeknownst to him and I had them  
19 transcribed. I know of others who have done the same.  
20 When you read the transcript of the actual sessions when  
21 and what he submitted in the actual report, it is  
22 blatantly obvious that he twisted facts, reported  
23 disfacts (sic). His conduct was completely unprofessional  
24 He yelled. Swore. He was arrogant. And all  
25 this is on tape. Almost a third of the first session I  
26 had with him resolved around asking questions about my

1  
2 mortgage, my finances, what took so long to pay him. I  
3 had to borrow money from my brother. And I understand  
4 that this was my experience with this so-called expert  
5 which was not unique. Even though the report was flawed,  
6 I had him on tape. Who was I to turn to? Where is the  
7 data base on this forensic and others so I could see if  
8 there are other complaints, maybe history of this kind of  
9 similar practice which we have since found out is quite  
10 extensive?

11       So anyway, the parents that I have spoken with  
12 really believe that forensics should be appointed as a  
13 last resort, if at all. If they must, be here is some  
14 ideas for reform.

15       Litigants should be entitled to get copies of  
16 bills from law guardians who have stonewalled everywhere  
17 in order to get this. Even though we have to pay for them  
18 we are not allowed to see them.

19       Parents should be entitled to contest the bills  
20 like we can from other bills, like forensics and law  
21 guardians.

22       The rate for forensics and law guardians should  
23 be standardized and capped. Some judges orders certain  
24 things and the law guardian goes beyond their duty and  
25 charges a different fee than ordered to.

26       Forensics should not be allowed to ask patients

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2 for cash, which happened in a recent case. A well-known  
3 forensic asked a woman for cash.

4 Certain law guardians should not be collecting  
5 fees for or holding up reports because a person has not  
6 paid the forensic psychiatrist with whom they were  
7 appointed.

8 And if the people can't come up with the \$15,000  
9 fee, forensics should work with parents so they can do a  
10 payment plan. My forensic didn't even want to talk with  
11 me, cut me off, which I have on tape, until I coughed up  
12 the whole \$15,000.

13 If a forensic refers parties to another forensic  
14 that referral report must be used in evidence. Because of  
15 what happened with my report, I believe all interviews  
16 should be recorded or videotaped with forensics, including  
17 the children. Their words need to be heard so nothing can  
18 be distorted due to someone's bias. It needs to be on the  
19 record.

20 So many law guardians and forensics are  
21 overburdened that the number of cases assigned should be  
22 limited. The same teams of law guardians and forensics  
23 should not be reported together routinely. They should be  
24 broken up and there should be rotation so these teams are  
25 not together all the time.

26 What happened with the IRS, which is what the

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2 commissioner did, is they enacted that new computer  
3 system. It had a database. It cut down on billions of  
4 dollars of wasted taxpayer money.

5 We could have a database which lists the date,  
6 name of Judge, forensics involved, date of report, date it  
7 was due, date it was submitted, the number of visits the  
8 law guardian made to the mother, father and children.  
9 Same with forensics. How many visits he or she had with  
10 the children or parents. How many times law guardian had  
11 been appointed with the same forensic. Which judge  
12 appointed them.

13 CHAIRPERSON MILLER: You have one minute.

14 MS. COCKRELL: Thank you.

15 The amount of fees they charged, any  
16 professional associations they have. Whether they are  
17 with the APA, for example, and important business  
18 affiliations with others in the matrimonial industry.

19 Any complaints and disciplinary actions should  
20 be lodged somewhere. And they should also document the  
21 outside fees that are made as experts for hire, parties,  
22 because you can hire a shrink to take your side. They  
23 should document those outside fees.

24 Better record keeping of the hours they spent on  
25 each case and their political contributions.

26 Thank you for listening.



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CHAIRPERSON MILLER: Mr. Rob Dobrish.

MR. DOBRISH: I am wondering if you planned it that I would follow that particular speaker.

Thank you for having me here this afternoon, matrimonial commission.

I just heard from the speaker prior to the last one about how much power you have and I hope that you are able to utilize some of that power. It is fantastic that you are listening to so many people. It is a very, very hard job. I had a hard job just listening to the few people that I heard today and in previous times.

I am a member of quite a number of organizations and a member of the board of governors of some of those organizations that have either testified before you already or should have appeared before you. But today I don't appear on behalf of any of those organizations. I am here -- I appear on behalf of myself.

It would have been easier for me to stay home, quite frankly, because I have experienced what you just experienced. And I know that that's -- it is very difficult for you and it is very difficult for me, someone who toils in these fields, to hear the kind of criticism of the attorneys who are trying to represent clients in this system. It is very difficult for those of us who care about what we do and care about the system.

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2 I have been doing this for a long time. I was  
3 doing this since before equitable distribution actually  
4 came about.

5 I am really here to talk about custody cases. I  
6 will get to those. But I want to point out that equitable  
7 distribution has been in New York since 1980, 25 years.  
8 It was in 1975 that Goldstein, Freud and Solnick (phon.)  
9 came out with their book, Beyond the Best Interests of the  
10 Children, and when we first heard about psychological  
11 parents and when we first really got into modern day  
12 custody. I will talk about that. It was only five years  
13 before equitable distribution.

14 Equitable distribution in New York is in its  
15 infancy. And so are custody cases. There are significant  
16 imperfections in our system. The area is a difficult  
17 area. It is very, very case specific. It is difficult  
18 for attorneys to represent clients in this area because  
19 the law is extremely complex and it is often wrong. The  
20 law is just wrong.

21 The trial level judges often do not follow their  
22 Appellate Division decisions which are right on point.  
23 The appellate divisions, four of them in this state, are  
24 in disagreement about what these laws are. And the Court  
25 of Appeals, with all due respect, has done a very  
26 significant amount of mischief with regard to several of

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2 the very important cases that have come down.

3 New York is a tough place to live, it is a tough

4 place to practice law. New Yorkers are tough people.

5 They come up to these podiums, they have got tough things

6 to say. They are hard to argue with.

7 The system is a clumsy system. It takes a long

8 time in order to get a result. There is a saying, the

9 wheels of justice grind very slow but exceedingly fine.

10 We know they grind slow. And that's worse in custody

11 cases.

12 The people in the system who operate the system

13 are imperfect people. There is something that I have

14 always kept in my desk drawer, a saying, I don't even know

15 who said it the first time, but it goes as follows: Is a

16 government of imperfect rules preferable to a government

17 of wise rules, the implementation of which requires an

18 increase in the discretionary power of imperfect people?

19 We have imperfect laws. We have imperfect

20 judges administering those laws. We have imperfect

21 attorneys who are arguing how those laws should be

22 applied. And we have imperfect litigants.

23 In this particular area, in the area of custody,

24 the litigants will rarely take responsibility for their

25 own inadequacies. I come to you as someone who has

26 represented men. And I have won on behalf of men and I

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2 have lost on behalf of men. I have represented women.

3 And I have won on behalf of women and I have lost on

4 behalf of women.

5 And I have represented children. I was actually

6 one of the first lawyers who represented a child who

7 selected her own attorney. It went to, I believe, the

8 court of appeals when they denied leave.

9 But I would like to tell you something about the

10 criticism that's being levied against law guardians. I

11 have in the past, perhaps five years, handled about eight

12 cases as a law guardian or guardian ad litum, in each case

13 being appointed by a judge in New York County Supreme

14 Court. Of those eight cases, in three of them it was a

15 pro bono appearance on my behalf. Took no fee. In the

16 other four, in the four I was not paid my hourly rate. In

17 only one of the eight cases was I paid my private pay

18 rate. And I have never said no to a judge who has asked

19 me to handle one of those cases. And I wouldn't. And I

20 have even indicated to several Family Court judges who I

21 get to speak to every now and then at events, there is

22 nothing wrong with my speaking to those Family Court

23 judges at events about the system, and I don't believe

24 there is anything wrong with my talking to the

25 psychiatrist or the psychologist or the social workers on

26 -- with whom I participate in bar association functions

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2 and interdisciplinary function and from time to time sit  
3 at the same table with them, and we break bread together  
4 and sometimes have a ginger ale, and don't find that there  
5 is anything that compromises our relationship. My  
6 goodness. If they could not be unbiased because they had  
7 a ginger ale with me then none of us should be in this  
8 system. The same thing is true with the judges who from  
9 time to time we get to speak to.

10 Now, those judges, I have told them, Family  
11 Court judges, that if they have a particular kind of a  
12 case where they feel that my particular expertise could be  
13 helpful, I will do it on a pro bono basis. Only because I  
14 think that the bar should do that. I don't believe that  
15 lawyers working in corporate firms should be providing  
16 young associates to come in and become law guardians  
17 rather than Legal Aid Society lawyers. I don't think that  
18 that's really going to help.

19 One minute.

20 Let me just quickly get to custody. Let me sell  
21 you or suggest to you something that I think could be  
22 done.

23 I know -- I hope that you have read some of the  
24 articles that I have written in connection with this  
25 Tippens Dobrish dispute that's going on. I am not going  
26 to speak about that.

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I think that we have to change the custody system. There are too many cases that are being processed that shouldn't be processed that aren't real custody cases.

I think that there should be some discovery in the First and Second Departments with regard to custody. I think that that will decrease the number of cases that are actually litigated.

I think that there should be a type of summary judgment motion that would be available for litigants to make, attorneys to make on litigant's behalf, so that those cases that are not real custody cases can be eliminated from the system.

There are real custody cases. Those real custody cases are complex and require the attention of judges who are well trained in custody cases and lawyers who know what they are doing when they are presenting those cases.

Thank you very much.

CHAIRPERSON MILLER: Thank you very much.

1 D'Andrea

2 THE COURT: Robert D'Andrea.

3 MR. D'ANDREA: Good afternoon, everyone.

4 I was really intimidated when I was a  
5 pro se litigant in Supreme Court, so I'm ten-fold  
6 intimidated here today.

7 Let me begin by introducing myself. My  
8 name is Bob D'Andrea, and I've been living and  
9 teaching here in New York City for 23 years.

10 Twenty-three years ago I began teaching  
11 children with behavioral problems in East Harlem.  
12 During my ten years there, I was awarded teacher  
13 of the year by the Council and received plaques  
14 from the parents and teachers of that community  
15 for my outstanding service to children.

16 At that time I was awarded a child via  
17 Family Court because the boy's mother became  
18 addicted to crack, and I had a close relationship  
19 with the student.

20 I was awarded custody of a young man  
21 named Jamal Richardson.

22 For the last 13 years I've been teaching  
23 at PS 87 on the Upper West Side. We've  
24 occasionally been in to New York City. You may  
25 have heard of us. We're a great school and great  
26 community of people.

BARBARA STROH, CSR, CRR, CMR



1 D'Andrea

2 I have been on Channel 1 News for  
3 supporting and promoting positive learning  
4 environment for children of learning disabilities.

5 During that time my son's mother and I  
6 gave birth to a beautiful boy eight years ago.

7 I'm here today as an advocate for court  
8 reform. But I'm also here because of the  
9 litigation process that I had to suffer through  
10 for five years.

11 When I entered the legal system, it's a  
12 really difficult and intimidating place, and money  
13 quickly is drained from the lawyers that have to  
14 be retained.

15 I spent approximately \$60,000, and they  
16 really only represented me for half of my time in  
17 litigation.

18 The other time I was a pro se litigant.  
19 I pretty much messed up the case because I didn't  
20 know the policies, the things to do and how to  
21 present myself, but over the years things got  
22 better, and I learned to catch on.

23 What I'm asking you today to do is, as a  
24 Commission, try to create some sort of policies  
25 where other families will not have to be victims  
26 or suffer the way my son and I have suffered.

BARBARA STROH, CSR, CRR, CMR

1 D'Andrea

2 The fact that your system does not have  
3 some sort of preset path creates a bottomless pit  
4 for tens of thousands of dollars wasted by  
5 parents, money that could go to my son's future,  
6 go to my son's mom or to myself.

7 Though I've only spent about 60 grand,  
8 and I took out a second and third mortgage, for my  
9 son's mother's attorney, she spent over a hundred  
10 grand.

11 There should be some sort of standard  
12 procedure where discoveries are due in three  
13 months, and then in six months a court date is set  
14 to determine in which direction the case will be  
15 heading.

16 In nine months there should be some sort  
17 of finalization, and if need be, a trial should  
18 occur within 12 months.

19 My trial occurred in the third year. It  
20 lasted for two weeks, and it really resolved  
21 nothing.

22 She got custody, which was okay with me,  
23 because in many ways she is good mom. I pay a  
24 thousand dollars a month in child support, which  
25 is okay with me, even though she gets income,  
26 because I believe she uses the money wisely.

BARBARA STROH, CSR, CRR, CMR

1           D'Andrea

2           I'm not worried about that. I guess  
3 what I'm really here to do today is to try to get  
4 you people to help protect my son and in terms of  
5 visitation.

6           Since October the mother has cancelled  
7 eight weeks of visitation, which won't be  
8 addressed, and I don't know if that means anything  
9 to anybody, but do the math on that.

10          If she cancels two to three months a  
11 year over the last five years, I've lost a whole  
12 year with my son.

13          It's gotten to the point where I know my  
14 students better than I know my son, and that  
15 should never be the case.

16          I have attended programs that deal with  
17 parent training, like your program, Judge, I think  
18 it's the peace program, and it is helpful; it  
19 certainly is.

20          I have heard speakers talk about both  
21 parental programs, and I think they're a good  
22 idea, they certainly are, but we need more of a  
23 structure.

24          We need something from you guys to help  
25 us go through this system quickly and get us out.

26          I've only gone through one divorce, and

BARBARA STROH, CSR, CRR, CMR

1                   D'Andrea

2   I can't stand it. I don't know how any Judge  
3   could go through decades or two decades of this  
4   sort of combative behavior.

5           I would like to think that you want to  
6   get us in, get us out, protect children, minimize  
7   costs, save taxpayers money and just end it and  
8   let us move on with our lives.

9           If you could create a tri-monthly  
10   calendar, we would be able to demonstrate to our  
11   children that family problems can be resolved in a  
12   timely fashion.

13          As it stands now, years of litigation  
14   drains families of future spending, and it teaches  
15   our children to be combative or sort of  
16   untrustworthy of our legal system.

17          The legal system itself is a good  
18   system. It's just that the people that are  
19   running it are a little misguided. I'm not trying  
20   to insult any judges because I've learned that has  
21   not been good for me.

22          I just want to show you that it involves  
23   me and this person. Two years ago I said to him,  
24   I was going to ask the judge for more time.

25          This little boy, then being six, said,  
26   dad, maybe you should pay.

BARBARA STROH, CSR, CRR, CMR



1 D'Andrea

2 And I don't think any child or father or  
3 mother and each noncustodial parent should ever  
4 have to beg to be with their children. It should  
5 be a natural right that we all have.

6 I'm kind of jumping around on my speech  
7 until I feel comfortable here, but there are two  
8 rumors floating around about this Commission.

9 One is that it's really just for show.  
10 That you guys are really not going to do much. I  
11 don't know if I feel that way.

12 When I look into your eyes and share  
13 with you a picture of my son, I can't believe that  
14 you people would walk away here today and not make  
15 some effort.

16 I became a teacher in the city schools  
17 to make a difference because I had a brother with  
18 learning disabilities who went to Catholic school,  
19 so you can imagine what that was like. I feel like  
20 I made a difference.

21 I would like to feel that you people,  
22 too, have chosen your careers and your professions  
23 because you really wanted to make a difference.

24 When I hear all these discussions today,  
25 I know that it's a complicated issue. I know that  
26 you're not going to solve this overnight, but I

BARBARA STROH, CSR, CRR, CMR

1                   D'Andrea  
2    think most of us would feel so much more  
3    comfortable if you could protect the rights of  
4    noncustodial parents, whether it be a male or  
5    female, because I've heard the same sad stories  
6    from both people. Do something for us.  
7                   So, these are my recommendations:  
8                   Number 1, set up some sort of process  
9    where manipulating lawyers cannot drain us for  
10   money.  
11                  Have a tri-monthly come-back into court  
12   with certain goals set, and I know that sounds  
13   ridiculous, but we need to start somewhere.  
14                  I know personally I would now support  
15   those sort of things. So, tri-monthly court  
16   dates, try to get this thing done in a year.  
17                  A trial should be done within a year.  
18   Mine was the third year. It should never have  
19   happened.  
20                  Try to protect noncustodial people in  
21   terms of visitation. If my son's mother -- and in  
22   many ways she's a good mom, so I'm not here to  
23   berate here.  
24                  If she takes my son from me one or three  
25   or four months a year, there has to be some sort  
26   of consequence to that, and I feel when you start

BARBARA STROH, CSR, CRR, CMR

1           D'Andrea  
2    attacking stuff like child support money, people's  
3    money, something, that might cause a change in  
4    her, even though she is pretty well off.

5           So there need to be consequences with  
6    that.

7           I've heard these things about the  
8    forensic reports of guardian ad litem, and I  
9    couldn't agree more.

10          The way they demonstrate their positions  
11    is ridiculous. I'm not going to speak on it, but  
12    there needs to be a lot of improvements.

13          One of my jobs now is working with  
14    school psychologists and counselors and part of an  
15    evaluation team, so I know, kind of, what these  
16    people could be doing, and I see that they're not  
17    doing it.

18          Other than that, I don't think I have  
19    anything else to say, except that my son and I  
20    truly, truly hope that you can make some small  
21    difference, so all these groups here that are  
22    trying to like see what you're going to do, let  
23    them walk away with something. And don't give us  
24    something simple like mandating parental classes.  
25    I'm all for it. I think it's great.

26          But that's not enough. We need

BARBARA STROH, CSR, CRR, CMR

1           D'Andrea  
2 something to protect the rights of noncustodial  
3 parents in terms of access to their children.

4           My son has lost five years with his dad.  
5 It should never happen to anybody, ever.

6           If there are any questions.

7           I thank you for your time.

8           THE COURT: As you look at your  
9 situation, do you think that you or your ex-wife  
10 caused any of the delays in the three years of  
11 litigation?

12          MR. D'ANDREA: I think when we entered  
13 this combative environment, that neither of us  
14 knew another way out.

15          You go in. Two lawyers like to argue,  
16 don't mind arguing. It's like it's in their  
17 nature to argue.

18          I believe that if you could -- if we had  
19 some sort of a guide like I proposed, the  
20 tri-monthly court date schedule, where we could go  
21 through and get out quickly, I think it would have  
22 been helpful.

23          Do I think -- yeah, you've got to  
24 understand something. I've only been divorced  
25 once.

26          I hope I never do this again, but if I

BARBARA STROH, CSR, CRR, CMR



1           Bienstock  
2    did do this a second time, I certainly would have  
3    handled it a different way, so I would have to say  
4    to the judges and lawyers who do this year after  
5    year, decade after decade, what's taking you guys  
6    so long to make this a little better?

7           So, yes, I do take responsibility for  
8    it. My only excuse is that I've never done it  
9    before.

10          THE COURT: Inexperience.

11          MR. D'ANDREA: Yes, inexperience.

12          THE COURT: Thank you very much.

13          MR. D'ANDREA: Thank you.

14          THE COURT: Mr. Peter Bienstock.

15          MR. BIENSTOCK: Justice Miller, members  
16    of the Commission, my name is Peter Bienstock. I  
17    speak along with my co-chair Susan Kuntzler.

18          We speak on behalf of New York County  
19    Lawyers Association, particularly the Matrimonial  
20    Law Section of the association.

21          My remarks are limited to only a few of  
22    the important topics discussed in our written  
23    statement also submitted today.

24          As a matrimonial practitioner, we  
25    represent clients who, by definition, are going  
26    through one of the most painful and difficult

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1            Bienstock  
2 situations in their lives, the dismantling of  
3 their families and often of their expectations.

4            We agree that the process is too  
5 expensive. We agree with the complaint that the  
6 process takes too long, particularly disputes  
7 concerning children.

8            We agree with those who argue that law  
9 guardians and forensic experts are appointed too  
10 frequently and are given an inordinate degree of  
11 control over the direction and sometimes the  
12 outcome of the matter.

13           We support all efforts to reduce the  
14 time and the expense of divorce litigation,  
15 provided that they are consistent with fundamental  
16 fairness and do not adversely affect litigants'  
17 due process rights.

18           First, there is a need for greater  
19 uniformity and predictability. We should be able  
20 to advise our clients whether and to what extent  
21 child support provisions in a divorce judgment or  
22 an agreement can be modified to meet changing  
23 needs.

24           We cannot do that now because, as you  
25 know, there are many different standards for  
26 modifications and fundamentally two separate

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1           Bienstock

2    courts governed by very different rules.

3           Obviously, there is a pressing need for  
4    dealing with the dichotomy that we face between  
5    Family Court and the Supreme Court.

6           We also ask preliminarily that the  
7    Commission mandate the keeping of statistics for  
8    any trial or experimental program to require  
9    feedback from participants.

10          This should apply both to all recent  
11    reforms, such as the certification, selection and  
12    remuneration of law guardians, and implemented as  
13    a result of this Commission work.

14          Without this, we may be having the same  
15    discussions, same arguments 25 years from now.

16          With respect to disputes concerning  
17    children, which is the majority of our concerns,  
18    the first terminology -- I think most of us agree  
19    that the terminology needs to be changed so that  
20    there is not one winner and one loser in a custody  
21    dispute.

22          The words "custody" and "visitation"  
23    should be dispensed with and are, I think,  
24    gradually being dispensed with.

25          The Raymond case has created unnecessary  
26    problems and hindered settlements.

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1           Bienstock

2           Raymond creates an incentive for a  
3 parent who does not want joint custody and insists  
4 upon sole custody to refuse to agree about the  
5 other parent concerning anything concerning the  
6 children.

7           Conversely, the other parent may be  
8 forced to acquiesce in both small and large ways  
9 throughout the course of the litigation.

10          We do not advocate the presumptions in  
11 favor of or against joint custody. Only in a  
12 different way of addressing the issue.

13          This is not to say that there is  
14 sometimes not a demonstrably unfit or unable  
15 parent.

16          We should not prevent attorneys from  
17 settling matters and courts deterring them from  
18 stating "parenting time is as follows..." and  
19 "decision making is as follows..."

20          We support in particular the use of the  
21 model of alternate dispute resolution, the neutral  
22 evaluation program, which was in use in New York  
23 County in 1997 and through 1999.

24          The program was without cost to  
25 litigants and, although limited at that time to  
26 financial matters, it should be used today to help

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1           Bienstock  
2 litigants resolve disputes over children and to do  
3 so with far less time and expense than presently  
4 occurs.

5           We strongly recommend, with respect to  
6 law guardians and forensics -- the topic du jour.

7           We recommend doing away with automatic  
8 appointments of law guardians and forensic  
9 experts.

10          Most litigants can barely afford to pay  
11 their attorneys. Few can afford the additional  
12 expense of a law guardian and a forensic expert.

13          Most cases require only the parties,  
14 their attorneys and the able assistance of a judge  
15 and the court attorney.

16          Law guardians and forensics should be  
17 appointed only in those cases where there is good  
18 reason to do so.

19          They should be appointed only at the  
20 point at which it is clear that such an  
21 appointment is needed.

22          They should not be automatically  
23 appointed at the outset of the litigation merely  
24 because one party states, often quite loudly, that  
25 everything concerning the children is unresolved.

26          A law guardian should not be appointed

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1            Bienstock  
2    in every case where there is a dispute concerning  
3    children.

4            Where children are too young to express  
5    a position for the law guardian to advocate, the  
6    law guardian adds little, if anything, to the case  
7    except his or her personal opinions as someone  
8    untrained in mental health.

9            Even where the child is older, restraint  
10   should be exercised in law guardian appointments  
11   because law guardians for an older child sometimes  
12   advocate their personal views as well and, once  
13   again, the parties are paying for an untrained  
14   assessment.

15           Where the court is sufficient that the  
16   parents' attorneys will fully develop the record,  
17   law guardians need not be appointed.

18           In the limited cases where law guardians  
19   are appointed for younger children or children who  
20   lack capacity to make life choices, a law guardian  
21   should not advocate a particular outcome, but  
22   ensure that all of the evidence is developed so  
23   that the Court can make a reasoned decision.

24           Where the Court determines to appoint a  
25   forensic or a law guardian, the appointment order  
26   should spell out clearly and in detail parameters

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1           Bienstock  
2   and rules governing the appointment.

3           Appointments are usually made at the  
4   very early stages of the litigation, often at the  
5   preliminary conference if the parties have stated  
6   that the issue of custody is, quote, unquote,  
7   unresolved.

8           At this early stage it's almost  
9   impossible to determine what the forensic expert  
10   should examine.

11          The result can be an order which allows  
12   and encourages the forensic to investigate matters  
13   which may have little bearing upon what is  
14   actually required.

15          In those cases which an appointment is  
16   necessary, which should be a rarity, not the norm,  
17   an appointment at a later time in the proceeding  
18   can greatly reduce expense.

19          We have seen the many inordinately long  
20   reports with attendant great expense to our  
21   clients.

22          These reports may be of little or no use  
23   in settlement or trial.

24          There are all sorts of issues which I'm  
25   going to skip over concerning when these decisions  
26   ought to be made. It's in the written testimony.

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1           Bienstock

2           I want to talk just briefly about  
3   discovery in matters concerning children. Any  
4   changes in discovery practice and litigation  
5   concerning children should minimize time and  
6   expense without sacrificing fundamental fairness.

7           For many reasons, not the least of which  
8   is added time and expense, any change must be  
9   carefully considered and, if implemented, should  
10   be done only on a trial basis.

11          We have serious reservations at the  
12   County Lawyers Matrimonial Section about adopting  
13   what we call the upstate model, with all due  
14   respect to those of you from Upstate, which  
15   permits discovery and depositions in disputes over  
16   children.

17          If the Upstate model is adopted, it  
18   should be done on a trial basis for a discrete  
19   period of time, during which statistics would be  
20   kept both as to additional time and expense and  
21   the number of settlements resulting therefrom.

22          As difficult as it may be to establish  
23   criteria from which you choose a group of cases,  
24   the model should be used in only a carefully  
25   selected group of cases.

26          We reach a far different conclusion as

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1            Bienstock  
2    to discovery of forensic experts. The prevailing  
3    case law is that if one party is not satisfied  
4    with the expert's report, that party is relegated  
5    to going forward to trial but often denied  
6    pretrial the ammunition with which to prepare.

7            Some of the cases hold that a party is  
8    permitted to see the expert's underlying notes and  
9    law data, including test results and supporting  
10   data.

11           The material can be obtained only at  
12   trial, and not before.

13           We view this practice as unethical to  
14   the tenets of fundamental fairness. It delays  
15   trial and increases expense because necessary  
16   discovery must occur during trial.

17           In genuinely disputed cases concerning  
18   children, it often is necessary to retain an  
19   expert to prepare for trial.

20           There is no other area of the law in  
21   which the party and an independently retained  
22   expert are relegated to trying a case without  
23   discovery of the other expert before trial.

24           Once the court-appointed expert's report  
25   has been prepared, pretrial discovery should be  
26   permitted if the party disagreeing with the report

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1           Bienstock

2 is to contest it at trial.

3           I will conclude, your Honor, by  
4 mentioning that I've always been asked to mention  
5 on behalf of the New York County Lawyers  
6 Association task force on same-sex marriage that  
7 they have issued a fabulous report which we have  
8 appended to our written remarks.

9           The task force is run by a former  
10 president, Michael Miller, and Yvonne Dominguez,  
11 and our matrimonial section is in complete accord  
12 with the conclusions of the task force report.

13           To the extent that this Commission views  
14 it as within its jurisdiction, we support the  
15 NICLA report, as well as the majority report of  
16 the New York State Bar Association advocating  
17 legislative change to permit equality of marital  
18 rights to same-sex couples.

19           Thank you very much.

20           THE COURT: Thank you very much.

21

22

23

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2 THE COURT: Connie Neal.

3 MS. NEAL: Good afternoon.

4 My name is Connie Neal. I am the Criminal

5 Justice Project coordinator for the New York State

6 Coalition Against Domestic Violence.

7 On behalf of the Coalition, I want to thank you,

8 the members of the matrimonial commission, for the

9 opportunity to speak at today's hearing.

10 The New York State Coalition Against Domestic

11 Violence is not-fora-profit membership organization of 120

12 domestic violence programs throughout the state, whose

13 mission it is to eradicate domestic violence and to ensure

14 the provision of effective and appropriate services to

15 victims of domestic violence.

16 The Coalition operates the only 24-hour

17 toll-free statewide domestic violence hotline in New York,

18 and also provides training, technical assistance, public

19 policy development, community outreach and systems

20 advocacy.

21 Through the course of these public hearings,

22 numerous issues have come to light which require lengthier

23 treatment than what I am able to cover in the next ten

24 minutes. So today, instead I will focus my time on issues

25 related to custody.

26 My comments represent the collective voices of

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2 hundreds of domestic violence advocates and thousands of  
3 women who are abused throughout New York State for whom we  
4 provide services. A significant number of calls that come  
5 into the statewide domestic violence hotline are related  
6 to the struggles that women who are abused face regarding  
7 the custody of their children. The feedback that we  
8 receive from domestic violence programs statewide has also  
9 reiterated that custody is one of the most complex and  
10 challenging issues that women who are abused face.

11 The Office of Court Administration website  
12 includes a link to the report, Women In The Courts: A  
13 Work in Progress. 15 Years After the Report of the New  
14 York Task Force on Women in the Courts.

15 Within the introduction to that report is the  
16 following quote: "... To those who spend their  
17 professional lives in New York's courts, change is visible  
18 everywhere but so is the persistence of troubling  
19 attitudes and harmful practices."

20 For women who are abused, the stakes with  
21 matrimonial matters are high. Often, the children are the  
22 continuing link between a woman who is abused and her  
23 abuser, under court-ordered arrangements that guarantee  
24 his access to both her and the children. Often this  
25 access is facilitated by abusers' use of the court system  
26 as a weapon itself, dragging her back in to contact again

1

2 and again.

3 Domestic Violence is an intractable societal  
4 problem inflicting danger, disruption, and tragedy on  
5 predominantly women and their children. The injustices  
6 women who are abused encounter in the courts regarding  
7 custody and visitation arrangements for their children are  
8 an incalculable measure of salt in the wounds. Women are  
9 typically incredulous over the court's treatment of them  
10 and the outcomes of their cases and their futures without  
11 their children. This is a special tragic since it is  
12 well within our power to change.

13 The New York State Coalition Against Domestic  
14 Violence is calling on the Matrimonial Commission to  
15 recommend that the Office of Court Administration develop  
16 and disseminate Principles for Practice which ensure a  
17 civil legal system that is responsive to the needs of  
18 women who are abused, particularly as they relate to  
19 matrimonial and custody matters. The foundation of these  
20 Principles for Practice can be found in the following the  
21 resource documents.

22 The National Council of Juvenile Family Court  
23 Judges, Model Code on Domestic and Family Violence;

24 The Toolkit to End Violence Against Women  
25 developed by the U.S. Department of Justice, Office on  
26 Violence Against Women;

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2           The Lawyers Manual on Domestic Violence, which  
3 is endorsed by Chief Judge Judith Kaye and which is  
4 available through the OCA website;

5           The report from the Battered Mothers Testimony  
6 Project A Human Rights Approach to Child Custody and  
7 Domestic Violence of the Arizona Coalition Against  
8 Domestic Violence; and

9           New York State Judicial Committee on Women in  
10 the Courts report entitled, Women in the Courts: A Work in  
11 Progress 15 Years After the Report of the New York Task  
12 Force on Women in the Courts, which is also available on  
13 the OCA website.

14           Based on these documents and as well as the  
15 feedback and information that we are hearing from women  
16 who are abused by domestic violence statewide, the  
17 Coalition has developed a list of more than 30 principles  
18 for Practice, including the following:

19           Understand that the well-being of children is  
20 inextricably linked with the safety of nonabusing parents.

21           Recognize that custody orders and in cases that  
22 involve domestic violence should be demonstrably different  
23 than those of cases in which there has been no violence  
24 much.

25           Recognize that a parent who instills profound  
26 fear in his children for their themselves and mother,

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2 engages in violent criminal behavior, denies his abusive  
3 behavior and blames the other parent or the children,  
4 lacks the capacity to place the needs of the children  
5 above his own, and/or jeopardizes the health and  
6 well-being of his children and their mother is not a good  
7 parent.

8 Recognize that without awareness of an incident  
9 fits with patterns of violence a judge cannot identify the  
10 stalking, the risk of escalating violence, or its impact  
11 on women who are abused and their children.

12 Recognize that the American Bar Association and  
13 the National Council of Juvenile Family Court Judges  
14 identify Parental Alienation Syndrome as bad science, and  
15 because neither psychological theory, nor case law  
16 supports its validity, it should be restricted from use in  
17 all custody cases. "Parental alienation" is the same bad  
18 theory dressed down after PAS was exposed as the junk  
19 science that it is.

20 Understand and recognize the tactics of many  
21 so-called "father's rights" groups which do not promote  
22 ethical and responsible fatherhood, but rather have as a  
23 primary purpose goals of their organizations goals which  
24 include produce reducing men's child support obligations.

25 Recognize that the state is obligated under  
26 human rights laws and principles to remedy the problems



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identified through the Matrimonial Commission Public Hearings process, and that the state has an obligation to do the following:

Protect women and children from abuse.

Truly act in the best interests of the child.

Ensure that women who abused are not discriminated against in the courts and remove any biases confronting poor women, women of color, disabled women, lesbians, non-English-speaking or immigrant women, young or elderly women, and women who have been convicted of crimes.

Ensure that women who are abused have access to the economic resources they need to build lives free from violence for themselves and their children.

Ensure that women and children are free from economic abuse or discrimination.

Uphold due process rights of mothers who are abused in the courts.

Treat all women are dignity and respect.

Hold perpetrators accountable for their choices to abuse.

As described in the National Council of Juvenile and Family Court Judges' Model Code on Domestic or Family Violence, the continuing education of judges and court personnel must include courses that are "prepared and

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2 presented in consultation with public and private agencies  
3 that provide programs for victims of domestic violence,  
4 advocates for victims, the statewide domestic violence  
5 coalition, and the state advisory council on domestic and  
6 family violence." In addition to judges, court personnel  
7 include magistrates, judicial officers, law clerks, court  
8 administrators, clerical assistants, registry staff,  
9 security personnel, process servers, and others working in  
10 courts where issues of domestic violence are addressed.

11 The Model Code also applies to continuing  
12 education for state, county, and city employees who work  
13 with domestic violence cases and includes probation  
14 officers, CPS, psychologists, social workers, court  
15 appointed special advocates, mediators, custody  
16 evaluators, and others. The list of professionals is  
17 extensive in "order to assure that practice among and  
18 between the professionals is compatible and subscribes to  
19 the same goals of prevention and intervention." Thus, the  
20 court should not contract with professionals who have not  
21 been trained in this fashion.

22 In addition to the Model Code, the 2002 report  
23 of the New York State Judicial Committee on Women in the  
24 Courts includes the following recommendations regarding  
25 training.

26 Court administrators should assure that judges

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2 assigned to matrimonial parts are experienced and well  
3 informed about the following:

4       The need for realistic awards for temporary and  
5 permanent maintenance.

6       The need for prompt awards of interim attorneys  
7 fees, made regularly during the course of litigation and  
8 made with adequate consideration of the amount the spouse  
9 with greater financial resources is paying for an  
10 attorney.

11       THE COURT: One minute.

12       MS. NEAL: Adopting custody rules that  
13 articulate safety first as the controlling legal principle  
14 in custody and visitation cases involving domestic  
15 violence.

16       Assess whether a history of domestic violence  
17 exists in every custody case.

18       Rigorously restrict the use of mental health  
19 testing as primary components of custody evaluation, and  
20 understand how the trauma women who are abused have  
21 experienced as a result of the abuse is often  
22 misinterpreted

23       Forensic or custody evaluators who have limited  
24 or no understanding of domestic violence should be  
25 restricted from conducting custody evaluations.

26       Although the New York State legislature require

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2 that domestic violence be considered in custody and  
3 visitation matters, these cases continue to pose  
4 significant challenges.

5 At stake is the lives and well being of  
6 countless women and children, as well as the compounding  
7 public crisis of confidence in a system that is designed  
8 to serve and protect. According to OCA's own reports:  
9 "{Women who are abused by thier partners } are still  
10 victimized by the legal system as a matter of course.

11 Without implementing significant change in  
12 matrimonial practice in New York State, there is no  
13 stopping the growing number of violations of  
14 constitutional and human rights that women who are abused  
15 are facing. It is time for a new system based on  
16 principles and practices that embrace judicial  
17 accountability, and truly assure justice for all. Indeed,  
18 the Coalition would welcome any opportunity to work  
19 closely with OCA in drafting Principles for Practice on  
20 domestic violence in the civil legal system.

21 On behalf of the Coalition and the thousands of  
22 women who are abused who are in New York State, I want to  
23 thank you all for your commitment to implementing the  
24 changes necessary to ensure justice in matrimonial issues.

25 As you noted, I ran short on time and did cut  
26 out many of the principles that we are proposing.

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I want to say that I will be passing on written documentation to the commission.

THE COURT: Thank you.

Assistant district attorney Barbara Egenhauser who is speaking for District Attorney Jeanine Pirro of Westchester County.

MS. EGENHAUSER: Honorable Justice Miller and members of the commission, I am Barbara Egenhauser. I am Second Deputy District Attorney in the Office of the Westchester County District Attorney Jeanine Pirro.

I am here to represent District Attorney Pirro and present her remarks to this committee.

I commend Judge Miller and the members of the this Commission for taking on the challenge of reforming matrimonial practice in New York State. I commend the Commission on its attempts to make our system work better for our children and families, and I support the mandate of the Commission to reduce and eliminate trauma to the parties, avoid unreasonable expense and reduce delays.

I would like to address the challenge of reforming matrimonial practice as it relates to domestic violence victims.

I would like to speak on behalf of the domestic violence victims that have come to our office over the years and the issues that they have brought and continue

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2 to bring to our attention.

3 In 1978 District Attorney Jeanine Pirro started  
4 the first special -- the first domestic violence unit in  
5 New York State. It is now the Special Prosecution  
6 Division. The unit was started in response to a criminal  
7 justice system that characterized domestic violence as a  
8 family matter and did not even recognize it as a crime.

9 We have come a long way from that day to this.  
10 Over the past 20-odd years thousands of Westchester County  
11 residents who have been victims of domestic violence have  
12 come to our doors and received help from the bureau to  
13 make themselves and their children safe.

14 The assistance that we provide includes  
15 investigation and prosecution of original charges,  
16 short-term counseling, legal advice on options presented  
17 and referrals to assisting agencies. We operate the  
18 Domestic Violence Bureau under an expanded definition of  
19 domestic violence which includes all intimate  
20 relationships, whether or not the parties involved are  
21 married. This includes couples who are together, who have  
22 had children together, who are involved in an intimate  
23 dating relationship, who are related by blood and  
24 marriage. We include same sex couples in this definition.

25 In 2004 the Domestic Violence Bureau handled  
26 almost 2,500 reports of adult domestic violence, over

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2 2,000 of these complaints resulted in the filing of  
3 criminal charges. Of these cases about 90% of the victims  
4 of adult domestic violence were women. About 30% of these  
5 victims were or are married to their abusers.  
6 Approximately 50% of the victims are involved in a common  
7 law relationship or had children with the abuser or were  
8 same sex couples.

9       Since the overwhelming number of domestic  
10 violence complaints, as we see them, are women, I will use  
11 that language when I say the domestic violence.

12       These statistics are formidable, and as you can  
13 see the vast majority of domestic violence cases carry  
14 with them the complex interpersonal relationships that  
15 give rise to the issues of divorce, child support, child  
16 custody and ;visitation, the issues that this commission  
17 is addressing.

18       Women approach District Attorney Pirro all the  
19 time about these issues. They speak to her about  
20 conferences. They write letters. They call our office  
21 every day asking for help in matrimonial matters. They  
22 speak to domestic violence aides, English speaking,  
23 Spanish speaking, about their problems. From the women  
24 that contact us and from the cases that we have handled  
25 over the years, we do hear about a matrimonial court  
26 system that is not always meeting the needs of those it is

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2 supposed to serve.

3 One of the reasons is because domestic violence  
4 victims tell us that they do not have access to necessary  
5 legal services. I am here to support the advocates who  
6 recommend that we find a way to provide legal services for  
7 battered women.

8 One of the things that we hear all the time is  
9 that domestic violence victims cannot get the legal  
10 assistance they need in order to get into the matrimonial  
11 courts and legally separate from and/or divorce their  
12 abusers. The women that we hear from want and need access  
13 to legal services so that matters of custody, visitation  
14 and child support can be decided in a manner that provides  
15 for their independence and safety and permits their family  
16 needs to be met.

17 The need for legal services as we reached the --  
18 cuts across all classes of women just as domestic violence  
19 does. Foreign and immigrant women often need free legal  
20 services. Middle income women need affordable and  
21 accessible legal services. And even those who are  
22 financially well off are unable to access family funds and  
23 obtain the resources they need to hire an attorney.

24 Most serious of all to us are the battered women  
25 that we hear from who have nowhere to turn to find  
26 representation to separate legally from the person who has



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2 abused them for years.

3           And here is an example of what we hear. This is  
4 a compilation. I will call this woman Gloria. She is  
5 typical of many women who come into our office. She was  
6 married for 20 years, has several children. She works in  
7 a grocery store. Her husband works in construction. He  
8 was angry, controlling and abusive during the marriage.  
9 One time she had him arrested but dropped the charges.  
10 When his physical abuse became more violent and she  
11 required stitches for a serious head injury he inflicted,  
12 she decided to file criminal charges and seek a divorce.  
13 She has -- she cannot afford to hire a private matrimonial  
14 attorney and has been told by our Westchester County  
15 agencies that the waiting list for free or moderate cost  
16 legal services is at least two years. She said she will  
17 wait those 2 years.

18           Women like Gloria come into the Domestic  
19 Violence Bureau every day. They desperately want to  
20 create lives of independence and safety for their  
21 families. They want to divorce their abuser but lack the  
22 resources to obtain legal services.

23           According to Julie Dimarcos (phon.) of My  
24 Sister's Place, whose testimony is before this commission,  
25 My Sister's Place had to turn away 295 women who sought  
26 representation in 2004. Gloria is one of those women.

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2 Sometimes the lack of financial resources force  
3 these women into making decisions without fully  
4 considering issues of safety.

5 The matrimonial court system must address the  
6 issue of providing legal services to victims of domestic  
7 violence. It is challenging, but domestic violence  
8 advocates have faced challenges before. In the early  
9 years when the domestic violence movement was starting  
10 there was nothing available for victims. There was no  
11 support services, no shelters, no hotlines, no safety  
12 plans, no organizations like My Sister's Place or the  
13 Women's Justice Center. Somehow, advocates found a way to  
14 create and fund domestic violence court services. Usually  
15 it was through a combination of federal and state funds in  
16 the form of grants and private and corporate contribution.  
17 In fact, the Westchester Domestic Violence Unit was  
18 started with such a grant.

19 THE COURT: One minute. One minute.

20 MS. EGENHAUSER: Let me get to the other  
21 recommendations then.

22 I am here to say that the matrimonial court  
23 should respect the integrity of the criminal process. I  
24 hear from women that come into my office that they are  
25 often advised to work out a settlement in exchange for  
26 dropping criminal charges. I am here to say that women

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2 should not have to barter away valuable rights such as a  
3 criminal court order of protection in order to gain a  
4 benefit in a matrimonial process.

5 It took a long time to criminalize domestic  
6 violence. It took a long time to develop policies,  
7 mandatory arrest laws, and these policies and laws should  
8 not be undermined in a system that does not respect the  
9 integrity of the criminal courts.

10 I am here to speak in favor of integrated  
11 domestic violence courts. We have one in Westchester  
12 County and we believe that it is working. Women tell us  
13 all the time that although abusers are about power,  
14 control and manipulation, and they bring these tactics to  
15 bear, in matrimonial proceedings they are less likely to  
16 prevail in an integrated domestic violence court setting  
17 where the judge is aware of everything that is going on  
18 and where it is a specialized court and the judge has  
19 acquired some specialized knowledge.

20 I am here to say that women ask -- women  
21 perceive judges to be insensitive and ask that judges  
22 receive training, particularly in the tactics of abusers.  
23 Such training was recently held at the Pace Judicial  
24 Institute.

25 We are partnered in the Integrated Domestic  
26 Violence Court with My Sister's Place and we support the

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court and what it represents.

Just as a last point, we urge the committee to act to incur even-handed application of Domestic Relations Law 240, I am sure this committee has heard much about it, which requires judges to consider evidence of domestic violence in deciding on matters of custody and visitation. In this way, the criminal courts and matrimonial courts are truly working together toward a goal of making our system work better for children and families.

THE COURT: Thank you very much.

1 Panken

2 THE COURT: Rhonda Panken.

3 MS. PANKEN: Good afternoon. My name is  
4 Rhonda Panken. I'm supervising attorney of the  
5 New York Legal Assistance Groups matrimonial  
6 project.

7 Thank you for the opportunity to speak  
8 today about the problems facing low-income  
9 matrimonial litigants.

10 The New York Legal Assistants Group is a  
11 not-for-profit law firm providing free legal  
12 assistance to New York City's poor and working  
13 poor.

14 We practice in several areas of the law  
15 and in all the boroughs. Unlike civil and legal  
16 services programs, we are geared to serve these  
17 who may be above the Federal poverty guidelines  
18 but still cannot afford to hire counsel.

19 Our family law unit created in 1992  
20 offers direct legal representation in a range of  
21 family law matrimonial matters, including  
22 contested divorces.

23 Nearly half of the family law cases are  
24 matrimonials. Serving domestic violence victims  
25 is the family law unit priority.

26 Through our telephone intake system, our

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1 Panken

2 lawyers provide case consultations five days a  
3 week.

4 Last year we received approximately 950  
5 calls for assistance with matrimonial matters and  
6 had the resources to represent only a fraction of  
7 those cases.

8 The reality is that it would take 38  
9 full-time NYLAG attorneys to handle all of the  
10 calls for matrimonial calls that we receive. We  
11 have, however, only five.

12 As others have stated, and with good  
13 reason, there is an enormous need for free legal  
14 services.

15 There are two few programs such as ours  
16 providing direct representation in contested  
17 divorces.

18 Finding funding for these programs is  
19 very difficult. Some legal services programs are  
20 forced to consider modest assets, such as the  
21 marital residence, when making eligibility  
22 determinations, and many pro bono programs handle  
23 only uncontested matters.

24 We frequently hear from battered women  
25 forced to proceed pro se in the Supreme Court.

26 Many women tell us that the judge

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1                   Panken  
2    ordered them to come back with an attorney, but  
3    typically they can't afford to retaining counsel,  
4    and they can't find a legal services agency that  
5    can take on their case.

6                   Their cases go forward without anyone  
7    safeguarding their rights. We had one case where  
8    an immigrant mother of three children who speaks  
9    English poorly was sued for a divorce by her  
10   abusive husband.

11                  He had an attorney, and she didn't.

12                  He presented false allegations of abuse  
13   and got an order of protection and custody of the  
14   children.

15                  At the first case conference she was  
16   forced to negotiate visitation with her husband's  
17   attorney, who told her she had no choice but to  
18   accept a few hours with the children twice a week.

19                  Confused and terrified, without an  
20   interpreter, any lawyer, any court hearing or any  
21   knowledge of how to proceed, she agreed.

22                  Proceeding pro se places battered women  
23   in the worst possible position of having to  
24   negotiate with a manipulative batterer to attempt  
25   to resolve the most important issues in her life.  
26   It is simply a no-win position.

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1 Panken

2 Having an attorney will, at the very  
3 least, allow her to remain distanced from the  
4 abuser, insuring her emotional and physical  
5 safety.

6 We need to level the playing field for  
7 victims of domestic violence, even those  
8 represented by counsel, by making the divorce  
9 process more fair and less traumatic.

10 Untenable issues and outcomes arise  
11 again and again.

12 First, to control the abusers who  
13 manipulate the case and the victims. Abusers  
14 infect their cases with false claims, portraying  
15 themselves as victims, requesting orders of  
16 protection and litigating issues of custody.

17 Second, abusers use recalcitrance and  
18 obstructionist tactics against their victims.  
19 When batterers, often the monied spouse, are  
20 court-ordered to pay for forensic or financial  
21 experts, they simply refuse to pay them, causing  
22 delays and burdening the court with compliance  
23 issues.

24 In discovery matters, abusers withhold  
25 or selectively disclose financial discovery,  
26 necessitating third-party discovery, depositions,

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2 motions to compel and discovery sanctions.

3 When it comes to paying their equitable  
4 distribution and support obligations, abusers  
5 resist and retaliate.

6 We have seen abusers file for custody,  
7 quit their jobs, transfer, hide and shield their  
8 assets and leave the jurisdiction, all to avoid  
9 paying.

10 We need the courts to recognize abusers'  
11 tactics as unacceptable and hold them accountable  
12 for their actions.

13 Most importantly, the courts must better  
14 monitor and effectively enforce compliance with  
15 their orders. The integrity of the system depends  
16 on it.

17 I will touch briefly on several other  
18 issues of importance.

19 To increase access to legal services, we  
20 ask the Commission to recommend establishing the  
21 rights of counsel in Supreme Court and setting up  
22 an assigned counsel program with the court system  
23 clearly supporting the idea that low-income  
24 litigants deserve free legal representation.

25 Private funders should be encouraged to  
26 provide resources in this area. NYLAG is happy to

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1                   Panken  
2   work on any committee or task force to brainstorm  
3   workable solutions to the access-to-counsel  
4   crisis.

5           In the meantime, we seek to ensure that  
6   pro se litigants are provided with the requisite  
7   materials and pro se legal assistance.

8           At a minimum, this includes forms with  
9   which pro se litigants may request counsel fees,  
10   pendete lite support, TROs to prevent dissipation  
11   of assets, contempt of court applications, as well  
12   as forms for supplying written opposition to their  
13   spouses' applications.

14          In this way such litigants can get their  
15   applications and their opposition before the Court  
16   and, hopefully, move their cases forward and  
17   safeguard their safety or economic or custodial  
18   rights.

19          Some have argued that enacting no-fault  
20   divorce laws would save time and money and relieve  
21   our overburdened courts over disputes over  
22   grounds.

23          The truth is that in prolonged  
24   litigation it is almost always about children and  
25   more money. We do believe though that no-fault  
26   divorce could work for our clients, many of whom

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1                   Panken  
2   are desperate to escape from their spouses' abuse  
3   and control sooner than later.

4           We feel, however, that the no-fault  
5   divorce statute should be carefully crafted and  
6   truly reformity.

7           The economic and custodial issues of the  
8   parties should be completely equitably resolved  
9   prior to judgments of divorce being granted. This  
10   will ensure that litigants don't give up their  
11   fair share just to get divorced or retain custody  
12   of their children.

13          We also support establishing more  
14   certainty and uniformity with regard to  
15   maintenance courts.

16          We propose that New York State adopt a  
17   guidelines approach to maintenance as it's used in  
18   child support cases.

19          The duration of maintenance should be  
20   set forth in the guidelines. The Courts should be  
21   allowed no discretion to deviate according to  
22   statutory factors which will include domestic  
23   violence.

24          This will bring consistency to the  
25   process and encourage settlement, reducing the  
26   time, expense and energy expended on disputes over

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2 maintenance.

3 Although low-income clients cases do not  
4 involve wealth of resources being divided or large  
5 support awards, fair and sufficient economic  
6 outcomes make all the difference to families  
7 seeking to get self-sufficiency and to establish a  
8 life free from violence.

9 THE COURT: Let me interrupt with a  
10 question. Is there any such legal assistance  
11 provided for appellate cases?

12 MS. PANKEN: For low-income litigants?

13 THE COURT: Yes.

14 MS. PANKEN: I believe so.

15 THE COURT: For your agency.

16 MS. PANKEN: We are looking into such  
17 work, actually. We on occasion do appellate work.  
18 Economic reality plays a critical role.

19 THE COURT: One minute.

20 MS. PANKEN: Sure.

21 Economic realities play a critical role  
22 in a woman's ability to leave an abusive  
23 relationship.

24 With regard to the appointment and use  
25 of forensic experts, we have found that judges'  
26 practices differ from courtroom to courtroom and

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1 Panken

2 from borough to borough.

3 We agree with previous testimony and the  
4 sentiments expressed in the committee's working  
5 groups that there must be uniform protocols  
6 regarding the appointment of and communication  
7 with forensic experts.

8 There also needs to be a review or  
9 accountability process, so that the same  
10 problematic reports aren't generated again and  
11 again.

12 We recognize that many of the reforms  
13 called for here involve legislative change and  
14 that this Commission has a large mandate before  
15 it.

16 We ask support for those legislative and  
17 systemic changes and ask that the Commission's  
18 report contain recommendations for best practice  
19 guidelines on the critical issues discussed here.

20 Protocols and criteria for choosing and  
21 using forensic evaluators, factors for the Courts  
22 to consider in assigning law guardians, guidance  
23 for judges on cutting through gamesmanship and  
24 abuse of process and financial discovery matters  
25 and insuring effective compliance with the court  
26 orders must be included.

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1           Gruner-Gans

2           THE COURT: Thank you very much.

3           MS. PANKEN: Thank you.

4           THE COURT: Is Betty Segura here?

5           A VOICE: She's out in the hallway,

6           Judge.

7           THE COURT: Judge Louise Gruner Gans.

8           JUDGE GRUNER-GANS: Good afternoon. I

9           address you today --

10          THE COURT: Please speak into the mike.

11          We want to hear you.

12          JUDGE GRUNER-GANS: All right.

13          THE COURT: That's better.

14          JUDGE GRUNER-GANS: I am addressing you

15          today in my capacity as chair of the Family Court

16          and child welfare committee of the New York County

17          Lawyers Association.

18          Although the Family Court has no

19          matrimonial jurisdiction, as you well know, many

20          issues heard as part of the matrimonial action,

21          such as custody and visitation, issues of domestic

22          violence and the termination and enforcement of

23          child support are heard in both courts.

24          Determination of these issues is often

25          split between the two courts. For this reason,

26          Family Court practitioners have an obvious

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1           Gruner-Gans  
2 interest in how Supreme Court matrimonial actions  
3 are processed.

4           The specific subject to which we wish to  
5 draw your attention is the persistent failure by  
6 the Supreme Court to assign counsel to indigent  
7 litigants in two components of matrimonial  
8 litigation: The determination of child custody  
9 and visitation disputes and of contempt  
10 proceedings for enforcement of judgments, which  
11 often involve failing to pay child support and  
12 maintenance.

13          A right to counsel in custody and  
14 contempt proceedings is firmly established in  
15 Family Court at section 261 and 262(a), 3(b) and 6  
16 but is generally ignored by the Supreme Court.

17          The failure of the Supreme Court  
18 routinely to recognize and extend the right to  
19 counsel to these aspects of matrimonial practice  
20 is arguably not only contrary to law and unjust  
21 but contributes to the Family Court's  
22 disproportionately large caseload and to  
23 undesirable fragmentation of litigation.

24          THE COURT: Judge, please speak into the  
25 mike. We want to hear you.

26          JUDGE GRUNER-GANS: Okay.

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1           Gruner-Gans

2           There are several aspects to this  
3 assignment of counsel problem. The first is the  
4 institutional favor of the Supreme Court to  
5 acknowledge that, as a court of original unlimited  
6 and unqualified jurisdiction, it has the power to  
7 exercise all the powers of the Family Court and  
8 that the scope of its jurisdiction is not  
9 diminished by the jurisdiction granted to the  
10 Family Court, or to the Surrogate's Court in the  
11 case of custody matters.

12           Now, when I say "institutional failure,"  
13 I am not casting blame on individual judges. It's  
14 an institutional failure in the sense that there  
15 is some kind of tacit agreement that we don't do  
16 these things.

17           Despite the clear language of Family  
18 Court at sections 261 and 262 and appellate  
19 precedent, which appears to recognize the right to  
20 counsel in all custody determinations, state and  
21 individual and private, for example, as decided by  
22 the Appellate Division, Second Department in  
23 *McNeill v. Ressel* and, likewise, recognized in  
24 contempt proceedings in cases such as *People ex*  
25 *rel Lobenthal v. Koehler* and *DeMarco v. Raftery*,  
26 there are only two lone and conflicting lower

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1           Gruner-Gans  
2 court decisions on the subject of the assignment  
3 of counsel by the Supreme Court to components of  
4 matrimonial actions pursuant to Family Court at  
5 section 262 Borkowski against Borkowski and McGee  
6 v. McGee.

7           One says yes, assignment to counsel  
8 pursuant to section 262, and one says no, we  
9 can't.

10          We believe that the answer is yes, we  
11 can. All necessary legal trends leading to the  
12 conclusion that there is a right to counsel,  
13 including assigned counsel for indigents in  
14 custody determinations and contempt proceedings in  
15 matrimonial actions in Supreme Court are in place,  
16 but they have not been incorporated into a single  
17 clear statewide statement.

18          Although this may be a less visible  
19 issue, we don't have -- although my committee did  
20 not have at this time sufficient information about  
21 it, we note that there is, likewise,  
22 a case for assigned counsel as part of  
23 matrimonial actions with respect to issuance of  
24 orders of protection.

25          We would argue that the Supreme Court  
26 also has a duty to extend the right to due counsel

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1           Gruner-Gans  
2 to pro se litigants in connection with the  
3 issuance of those orders in matrimonial actions.

4           It is difficult to explain, but there  
5 seems to be a virtual conspiracy of an action by  
6 the Supreme Court, the several Appellate Divisions  
7 and court administration when it comes to the  
8 exercise of the Supreme Court's power to assign  
9 counsel pursuant to section 262 of the Family  
10 Court Act.

11           Of all the Appellate Divisions, only the  
12 Second Department has adopted a rule, 22 NYCRR  
13 678.11, which explicitly applies the right to  
14 counsel, including assigned counsel provided for  
15 in Family Court section 262 to adults in  
16 proceedings in the Supreme Court, albeit only to  
17 two districts within the Department, the Second  
18 and the Eleventh.

19           The First Departments rules are silent  
20 in each. While individual justices in those  
21 departments in the Supreme Court may make  
22 individual assignments of counsel on occasion,  
23 there is not the uniform practice of advice of a  
24 right to counsel including assigned counsel with  
25 respect to issues of custody or contempt which  
26 Family Court Act, section 262(a) requires.

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1           Gruner-Gans

2           This would require a clear and  
3 enforceable mandate supported by administrators at  
4 all levels and coordinated with the assigned  
5 counsel plan.

6           At present the assigned counsel plan  
7 created pursuant to Article 18(b) of the County  
8 Law is not explicitly designed to provide assigned  
9 counsel in aspects of matrimonial actions in the  
10 Supreme Court.

11          Article 18(b), section 722 and the other  
12 section is entitled "Representation of persons  
13 accused of crime or parties before the Family  
14 Court or Surrogate's Court," again, requiring the  
15 Supreme Court to exercise its plenary jurisdiction  
16 to assume the powers granted to these specialty  
17 courts and assign counsel" --

18          THE COURT: You have one minute left.

19          JUDGE GRUNER-GANS: Okay -- where the  
20 right -- "where that right exists."

21          In addition, the panel itself is not  
22 organized to assign counsel in Supreme Court,  
23 which may require different arrangements than the  
24 Family Court.

25          In the First Department, matrimonial  
26 judges report that the cases where they do wish to

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1           Gruner-Gans  
2    make assignment, the difficulty of obtaining an  
3    actual assigned counsel is enormous.

4           In the Bronx, as apparently in Erie  
5    County, voluntary attorneys are solicited, but  
6    assignments are few and far between.

7           I don't believe that I need to argue to  
8    you or my committee that assignment -- is the  
9    right to counsel including assignment of counsel  
10   to indigents is an essential right of the value of  
11   family rights under risk or incarceration is at  
12   stake.

13          They have well been summarized in the  
14   McNeill v. Ressel, a Second Department case, and  
15   other decisions which I cite in my written  
16   Commission submission.

17          We urge you, the Commission, to pull  
18   together the various legal strands supporting  
19   implementation of the right to counsel, including  
20   assigned counsel, with respect to custody,  
21   contempt and family offense aspects of matrimonial  
22   actions in the Supreme Court and to recommend that  
23   the right be implemented in the Supreme Court, as  
24   well as in Family and Surrogate's Court, by  
25   Appellate Division rules, judicial training,  
26   training of court clerks, other forms of

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1           Gruner-Gans

2 enforcement by court administration and, if  
3 necessary, but legislation.

4           We have not urged you to recommend a  
5 broader right to counsel to matrimonial actions,  
6 not because we would not support such a right but  
7 because our more modest proposal seems more  
8 immediately feasible.

9           It's feasible now.

10          Nor do we seek a problem implementing  
11 the right to counsel only in some aspects of an  
12 overall matrimonial action, including postjudgment  
13 proceedings.

14          Again, how it's done would require  
15 careful structuring and thinking out, but custody  
16 issues are often tried separately from the rest of  
17 the matrimonial action.

18          Contempt proceedings are separate and,  
19 obviously, orders of protection, contested orders  
20 of protection require separate hearings.

21          THE COURT: Thank you. Would you wind,  
22 up, please.

23          JUDGE GRUNER-GANS: Those are my  
24 remarks, and I thank you for the opportunity to  
25 address you.

26          THE COURT: Thank you very much.

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2 CHAIRPERSON MILLER: Glenn Liebman.

3 MR. LIEBMAN: Good afternoon. My name is Glenn

4 Liebman. I am a business appraiser and forensic

5 accountant. I am partner in the firm Klien Liebman

6 Gressen. We are an forensic accounting firm located in

7 Woodbury on Long Island. We also have office in

8 Westchester and Manhattan.

9 On behalf of my partners and my staff I want to

10 thank you, the commission, for allowing me to speak on

11 what I feel is an important topic about standardization of

12 court orders appointing neutral forensic accountants.

13 I just want to make everyone on the commission

14 aware that our firm handles several hundred cases a year

15 and is court appointed in probably 50 to 60% of those

16 cases. We work in all five boroughs, Nassau and Suffolk

17 County, Westchester, Rockland County, as well as other

18 states.

19 We have firsthand experience, obviously, of

20 being court ordered on some of the eliminations on the

21 existing court orders.

22 We feel that a standardization should be done,

23 perhaps a committee should be appointed, to develop some

24 standardization features within the court order because

25 right now within -- among counties and even among judges

26 within the same county there are differences when you look

1

2 at an order among different judges.

3

4 I want to present a couple of different aspects  
5 of some of difficulties that we have when we get orders  
6 and some of the things that should be standardized in the  
7 order.

8

9 The first point should obviously be the asset  
10 that was supposed to be evaluated. In our world examples  
11 of this often times will include a business or multiple  
12 businesses or enhanced earning capacity stemming from the  
13 degrees or licenses that one of the parties earned during  
14 the marriage. These are obvious and these are generally  
15 indicated in all court orders. What the court orders  
16 don't indicate for us and becomes problematic is an  
17 indication that if we discover other assets that we are to  
18 notify the attorney and or the court and what we are  
19 supposed to do with those assets.

20

21 An example of how this is problematic, not  
22 having this language in a court order, I have had cases  
23 where a court order has asked me to just value a medical  
24 practice, for example, and in the course of my discovery I  
25 found out that the individual also obtained a medical  
26 license during the marriage. And that became an issue of  
27 well, now, what do we do? Do we go ahead and value that  
28 license? Do we notify the court? Do we notify the  
29 attorneys?

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2           It used to be the case where we just went ahead  
3 and either did it or notified the attorneys. And we have  
4 been accused by the attorneys if we raise that issue of  
5 overstepping our grounds as neutral forensic accountants  
6 and stepping into the role of judge or attorney to raise  
7 other issues. So I think there ought to be an indication  
8 in the standard order that contemplates that if we find  
9 another asset that we are to raise that issue through the  
10 attorneys and then the attorneys can then make a motion to  
11 the court to extend the original scope of the retainer.

12           Another issue that becomes problematic is the  
13 date of evaluation. Sometimes it is stated that we should  
14 utilize the date of the commencement of the action. If  
15 that's not stated, generally it is common knowledge that  
16 that's the date that we are supposed to use.

17           When we go into our discovery mode, though,  
18 often times the situation comes up that there is separate  
19 property claim, either one of the parties had the business  
20 interest at the date of marriage or were gifted interests  
21 during the marriage. These are separate property claims.  
22 The question becomes, do we go ahead and step beyond the  
23 scope of the original appointment where we are supposed to  
24 just value as of the date of commencement and do it as  
25 opposed to other dates? Again, I think there ought to be  
26 a provision in the court orders that guides us and tells



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2 us to notify the attorneys. Again, if they want to make a  
3 motion to extend the court order and have additional  
4 evaluation done as of different dates then that should  
5 occur.

6 Another point of confidentiality. It is common  
7 place for forensic accountants to do this routinely. All  
8 information will be confidential. But often times since  
9 it is so stated in the court order. We have had many  
10 situations where we have been involved in cases where ten  
11 page confidentiality agreements have been submitted to us.  
12 We have had to go bring those confidentiality agreements  
13 to our attorneys, our own corporate counsel, have them  
14 interpreted and then an exchange goes back and forth among  
15 several attorneys, thousands of dollars are expended  
16 before we even have done a stitch of work on the case.

17 I think there ought to be something standard in  
18 the court order that stipulates that we are supposed to  
19 keep information confidential and end of story right  
20 there. There should be no discussion beyond that point as  
21 far as our confidentiality is concerned.

22 Another point is communications among us and the  
23 attorneys in the case as well as the court. Generally,  
24 orders don't provide that. They ought to have clear cut  
25 indication that when we are corresponding with attorneys  
26 we are to copy all sides. And corollary to that, the

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2 attorneys when corresponding to us ought to be carbon  
3 copying their adversary on the case.

4 Another aspect as far as communication that is  
5 not addressed is how we are to communicate with the court,  
6 if necessary. A lot of times we have just called judges  
7 or law secretaries and we have been told you should not be  
8 contacting us you should be contacting the attorneys and  
9 let the attorneys deal with us. So this is an area that  
10 is really unclear to us. Whether we can make direct  
11 communication with the court who has appointed us or if we  
12 are just supposed to deal with the attorneys and have them  
13 deal with certain issues that we encounter.

14 Another point that has come up and has become a  
15 problem is what to do in a trial setting. Often times, I  
16 would say in most instances, our court orders stipulate  
17 that we are supposed to produce evaluations to court, but  
18 they don't discuss what happens after that point in time  
19 when a neutral case goes to trial, when there is a neutral  
20 forensic accountant.

21 It is our opinion that the report ought to go in  
22 and be admissible as evidence without necessarily any  
23 direct testimony needed. This would save time, this would  
24 save cost on the part of the litigants. But we recognize  
25 there are many situations where cross-examination may be  
26 necessary or other experts may even be brought in to

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2 solicit other opinions of value. What is problematic in  
3 this instance is as neutral forensic accountants what is  
4 our role and responsibility past the issuance of the  
5 report? Are we allowed to, for example, prepare one of  
6 the attorneys for our own cross-examination or our own  
7 direct testimony? Are we supposed to sit idly? It seems  
8 to me that would taint the neutrality of our appointment.  
9 So these are issues that can become very problematic in  
10 the trial process.

11 Another problem is fees. Often times we have  
12 had situations where the non-propertied spouse has wanted  
13 to bring us in to offer testimony on a report but they  
14 just don't have the funds to do it. They are at a  
15 disadvantage at that point as to how to proceed with  
16 bringing the expert to trial.

17 CHAIRPERSON MILLER: One minute.

18 MR. LIEBMAN: Thank you.

19 One last point that I would like to mention that  
20 a lot of experts have had problems with is the issue of  
21 income duplication. This is particularly in the Grunfeld  
22 case where issues have come up on business evaluation and  
23 the issue of maintenance. We all know it is out there.  
24 The attorneys know it is out there. However, when we go  
25 the next step and try to be helpful and issue a discussion  
26 like this in our report, we sometimes have gotten accused

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2 by attorneys of overstepping our bounds and going beyond  
3 the scope. I think there ought to be some kind of  
4 language in the retainer that included in the evaluation  
5 report can also be discussion of party's income and where  
6 we can be helpful in the process to avoid the duplication  
7 issue of income that's being used to value the business  
8 versus that which is left for maintenance issues.

9 These are just several examples of issues that  
10 could be standardized and would be very helpful for the  
11 commission to consider appointing a separate  
12 subcommission, perhaps forensic accountants and attorneys,  
13 to help standardize a neutral court order.

14 I want to thank the commission for having me  
15 present today.

16 CHAIRPERSON MILLER: Thank you very much.

17 Sherry Frohman.

18 MS. FROHMAN: Good afternoon.

19 My name is Sherry Frohman. I am the newly  
20 appointed executive director for the State Office for the  
21 Prevention of Domestic Violence and I am a former  
22 executive director of the New York State Coalition against  
23 Domestic Violence.

24 I am also a licensed social worker, mediator and  
25 on the Parent Education Advisory Committee, as well.

26 I don't know how you are all sitting for so long

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here.

CHAIRPERSON MILLER: It's not easy.

MS. FROHMAN: So clearly what my remarks will be will be in regards to domestic violence and the issues that victims of domestic violence and their children's experience going through the court system.

And it is imperative for those who are working in connection with the court to be able to recognize abuse and its profound impact on victims as well as their children.

Domestic violence cases clearly are very complex and they necessitate a deep understanding of abuse, including the psychology of perpetration tactics of power and control and how an abuser uses the custody determination process to manipulate. And as professionals we can unknowingly and unintentionally collude with the abuser's attempt to discredit the victim.

Abuse is not conflict. Court cases where there has been domestic violence are not and should never be considered high conflict cases. Expecting a victim to participate in working out differences disempowers her and puts her at greater risk. It also inadvertently supports the batterer and enforces his belief that it is her fault also.

Expecting that there is anything a victim could

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2 do that would change his behavior flies in the face of  
3 decades of sound research on domestic violence.

4 Family Court and Supreme Court have the power  
5 and obligation to consider all the information brought to  
6 its attention, including information from the victim. And  
7 sometimes without having court records, without having  
8 police, without having hospital records, the only thing  
9 that we can go by is her word.

10 Assigning equal responsibility to both parties  
11 does not acknowledge the measures a victim must take to  
12 survive abuse, including why she will fight for what she  
13 believes to be the safest and best option for her  
14 children.

15 Victims employ strategies on an ongoing basis to  
16 survive and to protect their children, ones that we never  
17 even know about. It is a cruel irony to have such  
18 strategies labeled as parental alienation; for a victim to  
19 be judged as the non-friendly parent, to be punished by  
20 losing custody or required to submit to supervised  
21 visitation. A more thorough understanding ultimately  
22 means taking seriously a victim's fear for her own safety  
23 and for her children and acknowledging both the validity  
24 and necessity of a victim's behavior and her choices.

25 Significant efforts have certainly been made to  
26 improve the judicial response to domestic violence,

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2 including training conferences, judicial involvement in  
3 local domestic violence coalitions. And I have sat with  
4 enough judges to know the real commitment that they have  
5 to dealing with domestic violence and the real barriers  
6 that they have as well.

7       However, one of the most pressing concerns is  
8 that judges' continued lack of understanding about  
9 domestic violence and failure to comprehend the dynamics  
10 and impact of domestic violence results in inappropriate  
11 assumptions such as, "it takes two to tango." "Victims  
12 are manipulative." "Victims use domestic violence to gain  
13 advantage in the court." This results in mutual orders of  
14 protection, joint custody, when there is violence,  
15 referral to mediation and counseling, et cetera. Decades  
16 of advocacy to legitimize the terror of domestic violence  
17 in the eyes of legal system could result in a victim  
18 actually penalized for coming forward, for risking  
19 exposure.

20       Abusers use the court as a tactic to abuse by  
21 repeatedly requesting postponements of court appearances,  
22 filing repeated petitions with no change in circumstances.  
23 Essentially batterers are stalking the victim by the  
24 court. Eliminating these manipulative maneuvers could  
25 also save precious court time as well as resources.

26       Fathers should be involved as parents. Fathers

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2 should have as much right to parent as mothers should.

3 But the right should be denied or curtailed if a father

4 hurts his child's mother. We can't lose sight of the

5 safety issues. Because a father shows interest in a

6 child, the question is not who should be parenting but

7 rather who should not be parenting.

8 We place our trust in the judicial system. We

9 look to the judge to fairly examine the issues and to make

10 the right decision. Judges make decisions based on the

11 best interest of the child, based on the belief that the

12 information presented to them is appropriate, professional

13 and accurate. However, the courts are making life

14 altering decisions with inaccurate information that is

15 given to them.

16 Which leads me into the beginning of legal

17 representation.

18 There is a real dearth of attorneys with

19 expertise in handling domestic violence cases. The

20 schools that address domestic violence, law school

21 clinics, the federal funding that keeps getting cut, there

22 are very few attorneys that really have a good idea or

23 knowledge of domestic violence. And expertise. And those

24 people are overwhelmed with the case load, as you have

25 heard today.

26 Outside of these specialized services there is a



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2 profound lack of domestic violence training for attorneys.

3 This situation is further exacerbated about the large

4 percentage of victims that can't afford attorneys. And

5 the attorney must voraciously convey to the various

6 players in the process itself the danger the victim faces.

7 They are the voice. They are the ones who have to

8 represent and try to convince and let everybody know what

9 these real dangers are.

10 Issues even more specific that we are going to

11 focus on is law guardians and forensic evaluators.

12 When domestic violence is present there are no

13 steps in the process that can be assumed to be neutral

14 without danger to the victim. There should always be

15 vigilance to protect the emotional and physical safety and

16 health of victims and their children. Issues such as how

17 to safely interview parties, the need to gather thorough

18 and balanced information from multiple unbiased collateral

19 professional and community contacts effect not only safety

20 but profoundly impact the observations or recommendations

21 reported to the court and ultimately the outcome of a

22 case.

23 Victims are justifiably terrified of losing

24 their children. They desperately need to respect and

25 trust the professionals who interview and interact with

26 their children. Unfortunately, this is often not the

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2 case. It is the law guardian's responsibility to  
3 independently consider allegations of domestic violence.  
4 To raise, argue and prove such acts in the absence of the  
5 party's allegations. To consider any act of domestic  
6 violence when arguing and providing specific custody and  
7 visitation disposition.

8 We get countless reports of law guardians  
9 failing to meet or to speak to the children they are  
10 assigned to represent. They do not contact or interview  
11 the primary neutral people in the child's life such as  
12 teachers, school counselors, child care providers.

13 Law guardians have often used the supervised  
14 visitation centers as the basis for observing abusers.  
15 Behavior observed in such a controlled environment are not  
16 reliable indicators of parenting skills. Children often  
17 feel safer when they are in that controlled environment,  
18 so thus they are not going to be able to be seen as  
19 showing that kind of fear to the abuser.

20 Abusers know how to perform and behave. Since  
21 supervised visitation arrangements are specifically  
22 designed to increase that feeling of safety, they know how  
23 to work it well.

24 Law guardians and custody evaluators wield an  
25 incredible amount of power. It is imperative that they  
26 see a victim in the context of victimization. Understand

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2 that she is stressed, may be nervous, agitated, fearful,  
3 angry or combative.

4 It is necessary to understand protecting  
5 children is not a mental health issue. Victims of  
6 domestic violence are terrified of losing their children.  
7 She is truly in a Catch-22. If she tries to protect her  
8 children, she is accused of alienating. If she is  
9 perceived as not vigorously protecting them, she is  
10 accused of being neglectful.

11 These professionals may not recognize that the  
12 batterer has manipulated them and they end up colluding  
13 with them and ultimately resulting in an inappropriate and  
14 dangerous outcome. It is tragic when a law guardian bases  
15 conclusions or recommendations on a forensic investigation  
16 that's flawed based on incorrect assumptions.

17 Parental Alienation Syndrome is finally being  
18 challenged as a fraudulent ungrounded theory. Yet  
19 parental alienation minus the label syndrome flourishes  
20 with misconception and presumptions that women lie. In  
21 custody cases this bias translates into a belief that  
22 women fabricate domestic violence charges to gain unfair  
23 advantage.

24 CHAIRPERSON MILLER: One minute.

25 MS. FROHMAN: Evaluators rely heavily on  
26 psychological tests that are not particularly relevant to

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2 custody considerations and are not appropriate for  
3 domestic violence cases. Tests can neither reliably  
4 determine nor exclude the possibility that someone is a  
5 perpetrator or a victim and therefore are not useful.

6 Based on that information, the State Office For  
7 Prevention of Domestic Violence recommends the following:

8 There must be accountability on the part of judges, law  
9 guardians and forensics. Our judicial system is designed  
10 to be objective and happy families. There are many  
11 excellent judges, attorneys and evaluators. The problems  
12 domestic violence victims endure in the court system are  
13 too consistent. OCA must develop the process to oversee  
14 and monitor the way these cases are handled. This is  
15 especially so for the DV because we see them at a much  
16 higher level. And if they are not implementing the law,  
17 if they are not following on violations of orders of  
18 protection, then we as a system are clearly telling the  
19 batterer that you can get away with this in our courts as  
20 well.

21 We need to hear domestic violence cases as early  
22 on in the case as possible. We need to know the physical  
23 environment is safe and develop a separate waiting room.

24 Orders of protection, we need to request removal  
25 and access to firearms all the time. We need stay away  
26 provisions that need to be strong and specific and adhere

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2 --

3 CHAIRPERSON MILLER: The court reporter can't go  
4 that fast.

5 MS. FROHMAN: And most importantly,  
6 accountability. Impose swift and serious sanctions for  
7 each and every violation. And eliminate dangerous  
8 practices that put victims and their children at greater  
9 risk.

10 The Court should note the limitations of law  
11 guardians and evaluators. Their recommendations should  
12 not determine the judge's decision.

13 If there is an outstanding family offense  
14 petition, resolve the family offense matter before making  
15 a custody or visitation determination.

16 Speed the process. And if it is slow, use  
17 Family Court for violations or modifications. Domestic  
18 violence must continue to be used as a factor.

19 CHAIRPERSON MILLER: We will read your  
20 presentation.

21 MS. FROHMAN: But I don't have this. Just one  
22 more.

23 Referrals to batterers programs should only be  
24 used as a tool for accountability, one of the many  
25 sanctions available to the Court and, preferably, ordered  
26 in conjunction with probation supervision. And never

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should couple counseling or mediation ever be used when  
there is domestic violence. We need to follow OCA's  
standards.

Thank you very much.

1           Mayerson

2           THE COURT: Is Ms. Segora here at this  
3 point?

4           Michael Kramer.

5           Diane Fraticelli.

6           Al Mayerson.

7           MR. MAYERSON: Red lights and green  
8 lights.

9           I'm supremely pleased to be afforded the  
10 opportunity to appear before this Commission  
11 chaired by the Justice Sondra Miller.

12          I think all of you know here is a jurist  
13 not only known for keen intellect but having a  
14 deep reservoir of concern and compassion for  
15 thousands of litigants, tens of thousands of  
16 children who are affected by decisions rendered in  
17 the courts of our state every year.

18          She's joined in this Commission by each  
19 distinguished commissioner, all of whom are deeply  
20 involved in the various aspects of matrimonial  
21 litigation and who have, no doubt, made a major  
22 contribution to the improvement of the practice of  
23 family law in our state for years to come.

24          Before getting to the specific points of  
25 my testimony, I would like to say a few words of  
26 praise to the hundreds of judges and court

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1           Mayerson  
2 attorneys, court-based social workers and  
3 neutral-appointed forensics both in the field of  
4 mental health and economics, who do the  
5 extraordinary work they do in the very difficult  
6 circumstances in a resource-deprived system.

7           I'd also like to state to all the  
8 families that have no choice because the law  
9 requires it to seek redress in our courts that  
10 they could be assured that the majority of the  
11 overwhelming number of matrimonial attorneys and  
12 members of the bar who specialize in family law  
13 issues know full well the agony that many of you  
14 suffer in the present system.

15           We, those members of the bar who  
16 specialize in this area, are looking forward to  
17 the recommendations of this Commission, in the  
18 hopes that they will point the way to doing more  
19 for these families, doing it more expeditiously  
20 and at a lower human financial cost.

21           Because we all live in the age of  
22 Letterman. I have ten points. How many I'll get  
23 to, I don't know.

24           The first point is the only one that I  
25 speak in an official capacity as chair of the  
26 Matrimonial Law Review Association of the Bar of

BARBARA STROH, CSR, CRR, CMR

1           Mayerson

2   the City of New York.

3           That is on the issue of no-fault

4   divorce.

5           On this issue, and solely this issue, I

6   speak on the behalf of the Bar Association. The

7   other points I raise are mine personally as an

8   active practitioner of matrimonial law.

9           Several years ago we sat down to discuss

10   this issue, no-fault divorce, guided by one sole

11   principle.

12           We agreed that the parents, men and

13   women of our state and the children of our state,

14   no longer are being served well by a law which

15   made no sense.

16           This law is harmful if not inimical to

17   the resolution of matrimonial disputes.

18           It stokes the flames of fighting between

19   parties. It certainly increases the burdens

20   placed on the parties and their children during

21   the course of the litigation.

22           It adds financial costs to the practice,

23   a process which I know most of you agree is

24   frequently far too expensive.

25           I am pleased to appear before you,

26   knowing full well that the efforts of the Bar

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1           Mayerson  
2   Associations such as the New York Women's Bar  
3   Association, the New York County Lawyers  
4   Association, Association of the Bar of the City of  
5   New York, the Brooklyn Bar Association, the Erie  
6   County Bar Association, the Queens County Bar  
7   Association, the American Academy of Matrimonial  
8   Lawyers, New York State chapters, and other bar  
9   associations in the state have made this issue a  
10   legislative priority.

11           There has been and there will continue  
12   to be much help and debate around this issue,  
13   which I trust will ultimately result in helping  
14   families who come into our system.

15           In the course of this debate, two  
16   messages should be made clear. One is that no  
17   divorce will be entered until all the issues  
18   involved in the case are resolved.

19           There are some who raise issues that the  
20   legislation as has been proposed does not say it.

21           Let it be clear, nothing is entered as a  
22   final judgment of divorce until the issues before  
23   -- all the issues before the court have been  
24   resolved.

25           2, in my 37 years at the bar, it is the  
26   first time that I've heard lawyers urging reform

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2   that will essentially have them earning less and  
3   not more.

4           We have come to this conclusion because  
5   we have seen the pain of our clients in this area  
6   and the mischief and damage that it causes to many  
7   litigants and children.

8           We're keenly aware of the waste of  
9   precious judicial resources, the few that there  
10   are that need to be used and not abused in this  
11   process.

12          We believe that no-fault law favors men.  
13   I know the chivalrous code never hurts women.  
14   Women principally are the ones who are raising  
15   children.

16          They are principally the ones who cannot  
17   take advantage of all our sister states that  
18   surround us. Blue or red, whatever the color is,  
19   they surround us.

20          It could be Pennsylvania, Massachusetts,  
21   Vermont, Connecticut and New Jersey, where you can  
22   go, and it is most often men who go to those  
23   states to take advantage of their no-fault laws  
24   because they're not grounded here with the  
25   children.

26          Now, I made that first issue because

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1           Mayerson  
2   that's my official capacity. Actually, the second  
3   issue is really what I consider to be the primary  
4   issue.

5           This is -- I consider gay and lesbian  
6   marriages. This is perhaps the fundamental civil  
7   rights issue of our time.

8           Why should heterosexuals receive tax  
9   benefits that gay and lesbian parents don't? They  
10   are taxed the same as other citizens and should  
11   not be delegated to second-class status in any  
12   manner whatsoever.

13          This Commission, I hope, will not be  
14   dissuaded by some who may argue that the  
15   Commission should not address this controversial  
16   area.

17          I and many others hope that the  
18   blueprint you lay down will be the gold standard  
19   for decades to come of how we become a more humane  
20   society to protect our families in whatever shape  
21   or constellation they come.

22          One final point in this area. We must,  
23   for the benefit of so many children, seek the  
24   judicial or legislative appeal of Allison D.

25          Divorce tax, point number 3:

26          Some of you may not be aware that we do

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2    have divorce tax in New York. Most divorces in  
3    The State of New York involve people of very  
4    modest means. They have pensions, they have  
5    homes, and the homes get passed back and forth,  
6    and when it gets transferred, there is a tax on  
7    that.

8                   That tax frequently results in thousands  
9    and thousands of dollars being added to the cost  
10   of the litigation.

11                  How difficult it is to explain to  
12   working class people who are getting divorced that  
13   they have to pay divorce lawyers, they may have to  
14   pay some mental health professionals, and now the  
15   State of New York and City of New York wants to  
16   get its cut.

17                  If there is any call to reduce the cost  
18   of working class people on the issues of divorce,  
19   this issue must be dealt with.

20                  You have to stop making money off  
21   divorce, and the government shouldn't be living on  
22   those type of funds.

23                  Social workers: Under the leadership of  
24   Judge Kaye and Jacqueline Silbermann, some courts  
25   have social workers, and they have done an  
26   enormous job.

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2           These men and women have helped  
3 hundreds, if not thousands, of families who have  
4 come to court. They do a great job. We need more  
5 of them.

6           They should be made available in all the  
7 Courts of our State to assist all the families who  
8 come there as soon as they come into the system.

9           They save us, in the long run,  
10 taxpayers' money because, by helping families get  
11 through this process without the enormous damage  
12 it inflicts on people, I think families get on  
13 with their lives and use less of the resources of  
14 the State.

15          Counsel fees: A Judge recently wrote a  
16 decision last week. There's a lot of lip service  
17 paid to people about counsel fees. It isn't  
18 happening.

19          The judges of this State have to be sent  
20 even clearer messages, of course, excluding all  
21 the judges sitting here today.

22          It is not a level playing field. The  
23 field has to be leveled. Too many women are  
24 forced into settling cases because funds are not  
25 made available to their counsel.

26          This has to be dealt with, and it has to

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2   be dealt with promptly because settlement should  
3   not be, based on the fact we don't have enough  
4   money to continue the process.

5           Parent education: Judge Frazee's report  
6   and setting up of parent education programs in  
7   this State is a great point of departure, but  
8   where it is inadequate is in this State, we do  
9   everything on the cheek.

10          There is no funding, and if you're going  
11   to have parent education, it should be available  
12   to all the citizens of our state.

13          It should not just be in some pockets  
14   where there happens to be a program, and it  
15   shouldn't be because affluent people can buy  
16   mental health professionals to help them get  
17   through divorce.

18          I would urge you to look closely at  
19   funding mechanisms for parent education.

20          Parent coordination: There is nothing  
21   worse than, as we call in the business,  
22   recidivists, who come back over and over again on  
23   access issues and on custody decision issues.

24          Nassau County and, I believe, the Second  
25   Department have acknowledged the importance of the  
26   role of parent coordinators.

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1           Mayerson

2           This is something that is needed in the  
3 State. It is something different than the ADR  
4 program Mr. Weitz has put into effect, I think, in  
5 Suffolk County, and certainly our County, but have  
6 parent coordinators who can deal with the parents  
7 to see if problems can be resolved.

8           They take up an enormous amount of time  
9 in the system, and they come back and back, and I  
10 think good social work and good mental health  
11 professionals can help there.

12          Forensics -- and this, I think, is  
13 important -- and I haven't heard the first bell  
14 yet. I understand you will be hearing from  
15 experts on this this week.

16          As a practicing attorney, I strongly  
17 support the continued employment in appropriate  
18 cases of neutral mental health professionals in  
19 custody access disputes.

20          I do not think it would be helpful to go  
21 back to a system where what we had was the dueling  
22 of competing experts or, worse yet, no experts at  
23 all.

24          The Court should be given discretion to  
25 appoint and should be also given the discretion to  
26 request recommendations in appropriate cases.

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1           Mayerson

2           We all know that these professionals  
3   give no more than their expert opinions. We all  
4   know that it's the judges who make the final  
5   decisions, and that is as it should be, and that  
6   is how it is.

7           One final note in this area: I believe  
8   that all forensics notes -- and this is, I guess,  
9   for my good friend and colleague at the bench,  
10   Judge Balzino.

11          I continue to believe, notwithstanding  
12   his decision in Oaks versus Oaks, that all  
13   forensic notes should be provided prior to trial  
14   to counsel to enable them to prepare properly for  
15   cross-examination of an expert.

16          Uniformity of uncontested divorces: Can  
17   you believe that we still don't have that, after  
18   the herculean evidence of Justice Jackie  
19   Silbermann to try to have it, that someone in Erie  
20   County can file papers on an uncontested divorce  
21   and go to my beloved County where I was raised,  
22   Kings County, and file the same types of papers?  
23   Does not happen.

24          Somehow, if you can't even get that  
25   minimal reform, how can we go to the next step?

26          Finally, and perhaps the most important

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2   issue: A wise Judge once told me, in the Criminal  
3   Courts, where I began my career, you see  
4   frequently bad people at their best behavior and  
5   in Divorce Courts you see good people at their  
6   worst behavior.

7                   Obviously, this is a substantial  
8   oversimplification, but I do it to make a point.  
9   There is no excuse by any citizen who comes to  
10   divorce court to be treated with anything other  
11   than the utmost respect.

12                  If they are treated respectfully, it is  
13   more than likely that they will be willing to  
14   follow the mandate of the court, even if it goes  
15   against their interest.

16                  One final note on this point: We  
17   understand the frustration that many of the judges  
18   have in terms of dealing with these cases.  
19   They're overwhelmed.

20                  They have goals and standards, which is  
21   a whole other discussion, and I'll do that at the  
22   next Commission in ten years, I hope.

23                  We think that -- I think that if  
24   matrimonial judges were treated the way commercial  
25   judges are treated, if they were given the staff  
26   that they need to do their work to supervise

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1                   Gische  
2 cases, to supervise issues of discovery, to try to  
3 guide people into programs, I think that a lot of  
4 the families in this state would be much better  
5 served.

6           THE COURT: Thank you very much, Mr.  
7 Mayerson.

8           THE COURT: The Honorable Judith Gische.

9           JUDGE GISCHE: I have to move this mike  
10 down a little lower, speaking after Mr. Mayerson.

11           Good evening, everybody. I'm going to  
12 start out by thanking you all and thanking Justice  
13 Miller for inviting me here to speak today about  
14 ways in which we can improve the delivery of  
15 justice in matrimonial cases.

16           The constraints of judicial office  
17 usually prevent me from having the same access to  
18 speak publicly about these issues and, therefore,  
19 I appreciate the opportunity that this forum is  
20 giving me to speak openly about matters which  
21 concern me greatly.

22           After praising you, I'm going to start  
23 out my remarks with a disclaimer. I don't  
24 represent any judicial group here today or any  
25 other group, for that matter.

26           The remarks that I make, for good or for

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1                   Gische  
2    bad, are entirely my own. They do not necessarily  
3    reflect the views of my colleagues.

4                   To find out their viewpoints, you would  
5    have to ask them, either formally or informally,  
6    and I urge you to do so before you complete your  
7    very important work.

8                   My remarks are based upon the eight  
9    years during which I presided over a dedicated  
10   matrimonial part in the New York State Supreme  
11   Court.

12                  I first served in Bronx County and more  
13    recently in New York County.

14                  Since the beginning of the year, by my  
15    own choice, I have been reassigned to a general  
16    civil part in the Supreme Court.

17                  I am still involved in the area of  
18    matrimonial law and currently teach a course on  
19    the subject at New York Law School.

20                  My recent change in assignment, I  
21    believe, gives me the unique perspective of  
22    looking back at my experience, drawing certain  
23    conclusions which I hope will be useful to you in  
24    your very important work.

25                  When I lecture, I'm often heard to say  
26    that matrimonial cases are like snowflakes. Each

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1                   Gische  
2    one is uniquely different, each one presents its  
3    own problems and requires its own solutions.

4                   This uniqueness presents special  
5    challenges to you here on the Commission. The  
6    cases defy cookie-cutter treatment, and no  
7    solutions you suggest to address problems will be  
8    a panacea that improve all cases.

9                   Some changes to the process, however,  
10   will make some of the cases much better some of  
11   the time. This is a salutary goal.

12                  I want to first talk to you about the  
13   issue regarding the laws on divorce grounds. I  
14   did have the opportunity to read some of the  
15   transcripts of the prior sessions before you, and  
16   I know you've heard a great deal of testimony  
17   regarding divorce grounds.

18                  I don't want to repeat, bore you with  
19   what you've already heard, and I'm not going to  
20   talk about the history of the laws or what they  
21   were intended to accomplish and what they actually  
22   do accomplish, but I thought it would be helpful  
23   for you to know what I see in the courtroom as  
24   unintended results and probably unwanted outcomes  
25   from the applications of the laws as they  
26   currently exist.

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1                   Gische

2                   Both of our neighboring states, New  
3    Jersey and Connecticut, have more liberal divorce  
4    laws.

5                   When the financial means of the parties  
6    allow it, litigants who cannot get a divorce in  
7    New York State simply move to one of our  
8    neighboring states.

9                   Litigants who are poor or of moderate  
10   means don't have this option. This creates an  
11   incongruent, problematic situation, where  
12   wealthier litigants can get divorced whether they  
13   can prove grounds under New York law or not, and  
14   the people of modest or little means cannot get  
15   that same result.

16                  This different access to justice and  
17   result based solely on a person's financial  
18   standing concerns me, and I would hope that it  
19   concerns the Commission as well.

20                  More often than not, divorces are  
21   opposed to gain an advantage in negotiating other  
22   ancillary relief, such as financial gain or  
23   custody.

24                  During the eight years that I presided  
25   in the dedicated matrimonial part, I tried about  
26   four or five grounds trials a year.

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1           Gische

2           I can only recall in about three of  
3 those cases where the opposition to the divorce  
4 was motivated by a true desire or a moral  
5 conviction of the opposing party to actually stay  
6 married.

7           Grounds trials are time consuming, and  
8 they reduce valuable court time that could  
9 otherwise be available for other issues and other  
10 cases.

11          Occasionally jury trials are requested  
12 in these cases. I've tried approximately five  
13 jury trials on grounds in the last eight years.  
14 These were even more protracted and time  
15 consuming.

16          The last jury trial over which I  
17 presided, I believe illustrates my point. The  
18 wife opposed the husband's request for a divorce  
19 for financial reasons. There was no pretext  
20 given. This was clearly her reason.

21          After eight days of trial and jury  
22 deliberation, the jury was hung. We had no  
23 result.

24          I declared a mistrial, and before I  
25 could reschedule a trial in the matter, the  
26 husband moved to withdraw the case, with

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1                   Gische  
2    prejudice, claiming that he was both financially  
3    and emotionally depleted and he did not want to  
4    continue the case anymore.

5                   Astonishingly, the wife opposed the  
6    motion, even though it was exactly the result that  
7    she would have achieved had she prevailed in her  
8    jury case.

9                   Later I learned that the husband tried  
10   to move back into the marital residence, at which  
11   time the wife called the police and sought an  
12   order of protection. And so these people were  
13   brought back into the court system again.

14                  I know and respect that many advocates  
15   for domestic violence victims are concerned that  
16   if the divorce is easy to be obtained, victims may  
17   lose their ability to effect appropriate and  
18   global outcomes in divorce cases.

19                  But while I believe that their concerns  
20   about unequal bargaining power in domestic  
21   violence cases is real, I do not agree that the  
22   remedy is to keep divorce laws in effect. Why  
23   would a domestic violence victim even want to  
24   remain married to an abuser?

25                  The Commission should instead consider  
26   more direct ways to address these concerns.

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1                   Gische

2                   If there are problems in custody  
3 outcomes and domestic violence cases, then look at  
4 the interplay between the law and custody and  
5 domestic violence and consider whether and in what  
6 ways it should be improved.

7                   If there are problems with support and  
8 property distribution in DV cases, look at those  
9 laws and improve them. But don't keep the  
10 antiquated divorce laws in place.

11                  My next series of remarks are really and  
12 the rest of my presentation is going to go to the  
13 issue of custody.

14                  I do have some concerns about financial  
15 issues, but I think that this is probably the most  
16 important area that I'd like to talk to you about.

17                  The most emotionally charged issues that  
18 come up in matrimonial cases concern children and  
19 their care. I think almost everybody agrees with  
20 that.

21                  Certainly one of the reasons that many  
22 litigants find custody outcomes in court  
23 unsatisfactory is that they are closely aligned  
24 with the grief a parent must feel when a family  
25 ceases to function as a unit.

26                  I don't believe the court process for

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1                   Gische  
2   divorce can alleviate this grief over life's  
3   disappointments, but another reason that custody  
4   outcomes after trial are not as satisfactory as  
5   other litigated outcomes and other types of cases  
6   I believe has something to do with the nature of  
7   the decision that must be made in such situations.

8                   Our justice system works very well in  
9   addressing remedies for past events, like an  
10   accident or a crime. Custody, however, is  
11   fundamentally different.

12                  We are not asking the courts to address  
13   a past event. We are asking the courts to make a  
14   prediction about the future: What environment  
15   would be best for this child today and forward?

16                  Families, however, are dynamic. They  
17   change over time. The ability of any person, even  
18   a Judge, to reliably predict the future is not  
19   great.

20                  Consequently, the Courts rely on a lot  
21   of past family history to make reasonable  
22   predictions about the future.

23                  The nature of testimony at custody  
24   proceedings is largely anecdotal. It is not about  
25   one static past event. Lives are made up of  
26   thousands, maybe more, anecdotes.

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1                   Gische

2                   One problem that troubles me in these  
3 cases is that wealthier people have longer custody  
4 trials than poorer ones.

5                   The wealthier you are, the more ability  
6 you have to present more anecdotes before the  
7 Court. As best I can tell, however, the  
8 complexity of interfamilial dynamics does not bear  
9 any relationship to the degree of wealth of any  
10 particular family.

11                  Because a litigated outcome in custody  
12 cases is expensive and the outcome is not as  
13 reliable as it is in, say, a personal injury case,  
14 I strongly believe that all parties in divorce  
15 actions should have access to an alternative means  
16 of dispute resolution.

17                  I believe that many mediation should be  
18 available to the parties to help resolve their  
19 disputes, especially when it comes to the child  
20 related disputes.

21                  While mediation is not appropriate in  
22 every case, it is an important alternative for  
23 many cases.

24                  In endorsing the availability of  
25 mediation, I want to more fully explain what I  
26 mean by it.

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1                   Gische

2                   I am not talking about private outside  
3 mediators that are available to parties who choose  
4 them. This, I believe, is a good alternative but  
5 it all exists.

6                   Parties are always free to engage  
7 mediators of their own choosing to help them  
8 resolve custody or any other issue in a  
9 matrimonial case.

10                  What I'm talking about is a mediation  
11 program offered through the court system after a  
12 divorce proceeding is brought. Court-hired  
13 mediators could serve as part of a team with  
14 judges in the dedicated matrimonial parts.

15                  While I know that this has significant  
16 fiscal implications, I believe it is important for  
17 the success of any mediation project to be  
18 structured in such a way.

19                  In this way the court can control the  
20 quality and training of the mediators and the  
21 Court can vet out what cases are appropriate for  
22 mediation.

23                  The resources could be available to all  
24 litigants, no matter what their socioeconomic  
25 status is.

26                  I know that there are and have been

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1                   Gische  
2    programs that rely on voluntary mediators, and in  
3    the long run voluntary mediator programs can only  
4    meet with limited success because there is only so  
5    much you can ask people to do on a voluntary  
6    basis.

7                   A successful mediation may require  
8    multiple meetings or sessions. Moreover, the  
9    court system loses its ability to train and  
10   control the quality of mediators and voluntarily  
11   programs.

12                  Court-available mediators would also  
13   impact the timing of the mediation. I believe  
14   that timing plays an important part in a success  
15   custody outcomes.

16                  If anger and hostility can be diffused  
17   in the outset of a contested case and the parties  
18   are given the gift of time before heading  
19   immediately toward a litigated solution, you  
20   oftentimes will get a settlement.

21                  Most families should have a chance to  
22   settle the custody issues before expensive  
23   resources are used to reach a conclusion.

24                  What is critical is that if mediators  
25   are employed by the court system, then OCA could  
26   control the training and performance.

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1                   Gische

2                   I know that you've previously heard a  
3 lot of testimony about the varying quality of  
4 forensic reports and law guardian services.

5                   Any mediation program would suffer the  
6 same kind of criticisms if it did not issue the  
7 property certification and qualifications of the  
8 mediators that are part of the program.

9                   THE COURT: I have to stop you, Judge  
10 Gische.

11                   JUDGE GISCHE: Okay.

12                   I have materials that I have prepared  
13 that do concern some other remarks, and they  
14 concern forensics and law guardians and I urge you  
15 to read them because I know that's also --

16                   THE COURT: Thank you very much.

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Ms. Aoyama-Martin 211

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2 CHAIRPERSON MILLER: Jane Aoyama-Martin.

3 MS. AOYAMA-MARTIN: Justice Miller, members of

4 the commission, thank you very much for inviting the Legal

5 Aid Society, Civil Practice Division, to testify. I am

6 Jane Aoyama-Martin. I am supervisor of the Family Unit in

7 our Bronx Neighborhood Office and supervising attorney of

8 our City-Wide Domestic Violence Project.

9 The Legal Aid Society was founded in 1876. It

10 is the nation's largest and oldest provider of legal

11 services to poor people. The society's family law

12 practice has a long and active history of advocating and

13 litigating on behalf of low income clients in family law

14 cases and in Supreme Court matrimonial cases in

15 particular.

16 We are also -- we also have a founded City-Wide

17 Domestic Violence Project. We are now in our fifth year.

18 We provide comprehensive legal services through our

19 network neighborhood offices in all five boroughs.

20 Last year the society received thousands of

21 calls for representation in family law matters, but

22 through triage we were able to open only 1,377. Out of

23 those cases 945 were divorce cases, both contested and

24 uncontested.

25 Our clients are mostly women with children

26 living within and on the edge of poverty. In order to

1

2 qualify for our services they are always the non-monied  
3 spouse or without access to any marital assets, if there  
4 are any.

5 Many of our clients are separating from an  
6 abusive relationship after years of enduring physical,  
7 emotional and financial abuse. It is from this  
8 perspective that I am here to provide the commission with  
9 information on the need for reforms in the divorce  
10 process.

11 There is a really old joke floating around  
12 between lawyers. It comes at the end of the case. It is,  
13 "you know have you done your job when both sides are  
14 unhappy."

15 Well, of course, this joke may partially be true  
16 at times, especially in family law cases. Divorce is no  
17 joke. I use it as an example. And just one indication of  
18 the litigant's dissatisfaction with the process, it  
19 reflects the feeling of many litigants that the process  
20 was too long, too expensive, too complicated and unfair.  
21 It serves to identify problem areas within our system that  
22 hopefully this commission will be able to rectify.

23 I will limit my testimony to areas of particular  
24 concern to the Society and our clients in the hope that my  
25 suggestions will help to streamline the process and make  
26 the whole thing less complicated and yield results that

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add to fairness.

Because our wish list of things to reform would take much longer than 10 minutes I have limited myself to 3 areas. The first is the need for equal access to counsel in Supreme Court divorce cases. The second, the need for interim relief on immediate basis. And the third, the need for maintenance standards and no-fault divorce as an indivisible package.

On the first issue, equal access to justice. While the Legal Aid Society is one of the largest providers of legal services to the poor in divorce cases in the city, we are among only had a handful of providers. Our small community of lawyers and paralegals cannot meet the enormous need for counseling uncontested and divorced case. For the poor there is unequal access to counsel in Supreme Court, in stark contrast to Family Court cases.

Family Court has a petition room where pro se litigants can file their petitions with some help. In Supreme, in boroughs where there is no office for the self-represented, are pro se clerks. Pro se litigants find the courts difficult to navigate and they are baffled by the process, especially motion practice and discovery. They really need a lawyer to proceed. Similarly, in Family Court, 18-Bs are assigned for poor litigants in custody, order of protection and other matters, while



1  
2 similar programs for assigned counsel in Supreme Court  
3 does not exist. The issues are identical, yet in one  
4 court we get counsel and in the other you don't. Because  
5 of this lack of access to counsel in Supreme, which is the  
6 only forum that can address divorce and equitable  
7 distribution, many poor litigants are, in essence, denied  
8 access to Supreme Court relief.

9 In some cases, indigent litigants in Family  
10 Court lose their right to assigned counsel when their  
11 Family Court cases consolidate with the divorce case  
12 that's started in Supreme. They are forced to muddle  
13 their way through the litigation in Supreme at a  
14 significant disadvantage.

15 Another situation is many poor people remain  
16 legally married long after the marriage is ended because  
17 they can't forward a lawyer. We have hundreds of people  
18 simply in legal limbo on our plaintiff divorce waiting  
19 list hoping that some day their name will arrive at the  
20 top of our waiting list.

21 Yet some other clients choose to forgo pursuing  
22 property rights and marital assets to which they are  
23 entitled. Some waive these rights without even knowing it  
24 because they fall prey to and they pay the infamous travel  
25 agent or notary public who uses a computer program to  
26 process a simple divorce. We see numerous cases like this

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2 where people pay \$500, they get their divorce and they  
3 receive no legal advice or anything.

4 I recently saw a poor client of a long term  
5 marriage who used such travel agent out of desperation to  
6 obtain a cheap divorce. She subsequently found out  
7 through watching Oprah that she may have been entitled to  
8 a portion of her ex-husband's pension. While I like  
9 Oprah, she is clearly no substitute for legal counsel.

10 The travel agent, of course, was paid just to help her  
11 process her pro se divorce, never told her about any of  
12 her rights and she never thought to even ask for equitable  
13 distribution.

14 Other people actually scrape together funds.  
15 They borrow money to pay a private attorney the initial  
16 retainer fee. And the problem is she can't afford to  
17 continue paying the private attorney, so in most of these  
18 situations they end up pro se. The Society can take some  
19 of these cases, but only a small fraction given our  
20 existing case loads and our waiting list.

21 Other legal services providers are equally  
22 overwhelmed by the demand. The result is that these  
23 litigants have nowhere to go for help.

24 So level the playing field. And it seems to be  
25 a common theme today, for poor people, in Supreme, insofar  
26 as legal representation is concerned.

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We have three recommendations. The first is that we support the position of the Lawyer's Committee Against Domestic Violence for appointment of counsel in divorce cases, particularly in situations where one party is unrepresented and the other can't afford to hire an attorney and can't get the legal fees paid by their spouse. Or where both parties are unrepresented, that the facts present a situation involving ancillary issues that really need a lawyer, such as a contested custody case or equitable distribution of a pension.

CHAIRPERSON MILLER: One minute.

MS. AOYAMA-MARTIN: Secondly, we recommend establishing and expanding the offices for the self-represented in each of the Supreme Courts. These offices can help people complete forms, draft motions, demystify the process and let litigants know their rights.

The third is in cases where there are financial resources there should be a mechanism for the unpropertied litigant to apply for a reasonable amount of attorney fees early in the case.

The second issue involves the need for interim relief; immediate and reasonable.

Our recommendations, I will skip to those, for ways to reduce delays is first have preliminary interim relief for child support maintenance during the period

1

2 between the first return date of a motion and the  
3 adjourned date. It should be argued, resolved and granted  
4 at that point. The temporary amount rewarded to be  
5 consistent with the needs and the existing life style of  
6 parties. Status quo approach whenever possible.

7 Second, the automatic and immediate restraining  
8 orders prohibiting parties from dissipating assets should  
9 be in place at the commencement of the action.

10 The third point is the need for maintenance  
11 standards. We support the matrimonial reform package that  
12 includes a reform statute, but only as it provides for a  
13 maintenance formula similar to the Child Support Standards  
14 Act. My colleague Emily Rubin addressed that form  
15 outside. I will not repeat them here.

16 We feel that maintenance guidelines will  
17 increase settlements, reduce timely disputes over  
18 maintenance.

19 In conclusion, thank you again for providing us  
20 with this opportunity to address the commission. The  
21 Legal Aid Society is available to help and we offer our  
22 assistance to the commission in any way that we can.

23 CHAIRPERSON MILLER: Thank you very much.

24 Betty Segura is now here?

25 MS. SEGURA: Thank you for letting me speak.

26 My name is Betty Segura and I have been a

1

2 domestic violence advocate for two and-a-half years.

3

4 As an advocate who frequently accompanies  
5 clients to court I will address the issue of treatment  
6 that domestic violence survivors receive in Family Court  
7 and how this effects the court process.

8

9 I will also offer some recommendations which I  
10 feel will help the Family Court experience to be less  
11 traumatic.

12

13 I work for the New Dawn Domestic Violence  
14 Program which operates under the umbrella of the Dominican  
15 Women's Development Center. We work with female victims  
16 of domestic violence, predominantly Latina women from the  
17 Washington Heights community. So my statements, I will  
18 refer to the victims as females, which are our clients,  
19 and the abuser as male, even though we recognize that this  
20 is not the only possible scenario.

21

22 When our company accompanies to Family Court we  
23 find our environment is hostile to our client and the  
24 advocates. From the moment we have to submit the  
25 paperwork to the clerk my clients are advised that the  
26 process is going to take all day. However, more than a  
warning, it feels like a deterrent to discourage them from  
proceeding. I can not even begin to tell you how much  
work and counseling it takes in order to motivate and  
encourage a victim to proceed to obtain a order of

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2 protection. And it is not appreciated that the Family  
3 Court clerks ignore our efforts rather than  
4 collaboratively work with us.

5 When our clients are interviewed by the clerk in  
6 order to sign the Family Court petition they are often  
7 treated in a humiliating manner. My clients and I build a  
8 trusting counseling relationship and they look at me for  
9 support. However, I am not allowed to intervene even if I  
10 see that they are being mistreated by the clerks.

11 My clients often become distressed and sometimes  
12 do not understand the tone and the phrasing of the  
13 questions and the impatience of the clerks.

14 As an advocate I have frequently been viewed as  
15 intrusive and I have been told that I am obstructing the  
16 process. When in actuality my goal is to facilitate  
17 information, help the client to avoid further  
18 victimization and contribute and collaborate in any way  
19 that I can.

20 Unfortunately, I often receive no cooperation  
21 from the court staff.

22 Once we finally go in to see the judge my  
23 clients usually need an interpreter. Being Spanish  
24 speaking myself, I have to say that the court interpreters  
25 are in most cases not as competent as they should be and  
26 my clients come out feeling confused and disoriented.

1

2 They frequently tell me after we have left the court that  
3 they did not understand what they have been told and that  
4 everything happened too quickly.

5       Something else that I would like to mention is  
6 that in most instances the judges that I have dealt with  
7 have poor knowledge or understanding of the dynamics of  
8 domestic violence. And they have also on many occasions  
9 minimized or discarded verbal and emotional abuse and have  
10 not issued an order of protection.

11       In some cases the Court has even permitted for  
12 the abuser to remain in the apartment even though my  
13 clients have disclosed that they fear their abuser and  
14 that they want them to be removed from the home.  
15 Therefore, it is safe to say that they are not being heard  
16 or protected by the court system.

17       In conclusion, there have also been  
18 circumstances in which judges have made arbitrary  
19 decisions regarding visitation and custody and they have  
20 not taken into account the history of domestic violence to  
21 help them make fair and just decisions in the best  
22 interest of the child, much less the abused mother.  
23 Furthermore, they have placed the children or mother at  
24 risk by allowing unsupervised visitation or granting  
25 custody to the abuser.

26       Finally, I have four recommendations to be

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implemented or immediately in effect.

Number 1, enhance security and designated areas for victim's safety.

Number 2, sensitivity and domestic violence training for all staff at all levels, particularly judges, 18-B attorneys and law guardians.

Number 3, only trained, competent translators should be available at the courts.

And 4, no custody or unsupervised visits to a parent with a history of domestic violence.

Thank you for your time.



1 Sommer

2 THE COURT: If there is anyone here who  
3 is scheduled to speak, please make certain that  
4 you have signed in. First precenter Susan Sommer.

5 MS. SOMMER: Good evening.

6 Thank you for allowing me to opportunity  
7 to speak on behalf of Lambda Legal Defense and  
8 Education Fund and the communities we serve.

9 Headquartered in New York, Lambda is a  
10 legal organization committed to achieving civil  
11 rights for lay and lesbian people through impact  
12 litigation, public policy work and education.

13 We are lead counsel in Hernandez versus  
14 Robles, a case seeking the right to marry for same  
15 sex couples in which we recently won a ruling from  
16 Justice Doris Ling-Cohan declaring New York's  
17 domestic relations law unconstitutional for  
18 excluding same-sex couples from marriage.

19 The very name of this blue chip  
20 Commission charged with recommending system-wide  
21 ways to include to preside over family law issues  
22 in many ways sums up how how the State is failing  
23 its gay and lesbian families.

24 I stand before the matrimonial  
25 Commission pertaining to the state of being  
26 married.

BARBARA STROH, CSR, CRR, CMR

1                   Sommer

2           Yet the matrimonial state is denied to a  
3 whole class of New Yorkers, gay and lesbian  
4 couples who, no matter how long their  
5 relationship, how committed they are to each  
6 other, are shut out of matrimony and the  
7 matrimonial Courts of New York.

8           To give you just a taste of the bitter  
9 experiences of so many gay and lesbian New Yorkers  
10 because their relationships receive inadequate  
11 recognition and protection under New York law, and  
12 in our courts, I ask you to imagine for a moment  
13 what it is like to have these experiences commonly  
14 endured by our clients and community.

15           You and your beloved have planned for  
16 many years to have a child together. Like many  
17 couples, you use assisted reproduction technology,  
18 donor insemination, with your partner becoming  
19 pregnant.

20           Though you have been part of this  
21 momentous decision and process every step of the  
22 way, you are deemed a legal stranger to your child  
23 because you are not its biological parent.

24           Now, fortunately, in New York you can do  
25 a second-parent adoption of your child if you and  
26 your loved one can spare several thousand dollars

BARBARA STROH, CSR, CRR, CMR

1                   Sommer  
2   for legal fees, your home and life are inspected  
3   by a case worker who may be untrained and biased  
4   about same-sex couples, you are fingerprint  
5   checked, and you, your loved one and your child  
6   appear before a Judge who has the final say about  
7   whether you can be your child's legal parent.

8           Imagine, as what happens with some  
9   relationships, regardless of some sexual  
10   orientation, you and your partner break up. Your  
11   estranged partner, the only parent recognized  
12   under New York law, can decide that you will never  
13   see again the child you dropped off at school this  
14   morning.

15           When you rushed to Family Court to  
16   petition to see your child who is suffering  
17   because their mommy or daddy isn't allowed to see  
18   them, you are told you are a legal stranger to  
19   that little girl or boy, with no standing at all  
20   even to explain to a Judge why it is in your  
21   child's best interest to have an ongoing  
22   relationship with their parent who has raised them  
23   since birth.

24           It's pretty depressing, I know, but it  
25   gets worse. Imagine this you kissed your loved  
26   one good-bye at the subway this morning but get a

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1                   Sommer  
2    call at work that he or she has been in an  
3    accident and rushed unconscious to the hospital.  
4                   You run to be by his or her side and to  
5    help make crucial medical decisions.  
6                   At the hospital you are told you have no  
7    right to information at all about your loved one's  
8    condition, much less to tell the doctors your love  
9    ones wishes about life-sustaining treatment.  
10                  Because New York wouldn't let you marry  
11   your loved one, your employer gives health  
12   insurance coverage only to spouses of its  
13   employees.  
14                  Your partner has no health insurance, so  
15   this hospital stay is uninsured.  
16                  If, God forbid, your loved one should  
17   die, especially without having gotten around to  
18   drafting a will, something many New Yorkers can't  
19   afford to do, you have no legal right to make  
20   burial decisions, to inherit what you and you  
21   loved ones built and together you have to to get  
22   workers compensation benefits if the accident  
23   happened on the job or to bring a wrongful death  
24   action, thoroughly depressing isn't it in well,  
25   this muck fix it and it can be fix it.  
26                  I'll focus tonight on four primary

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1                   Sommer  
2   examples of needed reform that this Commission can  
3   recommend that there are far more areas to work  
4   on. I'm also submitting this proposal in written  
5   form in greater detail.

6                   The first and overarching reform at that  
7   same six couples should be granted access to civil  
8   marriage and varying rights and protections  
9   automatically inferred only through marriage.

10                  In *Hernandez versus Robles*, Justice  
11   Ling-Cohan recently held that the inability of  
12   same-sex couples to marry excludes them from the  
13   vast range of statutory protections, benefits and  
14   mutual responsibilities automatically afforded to  
15   married couples by New York law and is  
16   unconstitutional.

17                  And denying these couples access to  
18   marriage also treats them as second-class citizens  
19   and brands their relationships as inferior to  
20   those of couples allowed to marry.

21                  Let me ask you, how would you explain to  
22   your child why our State doesn't think that your  
23   family is good enough for you to be married to the  
24   love of your life?

25                  While pressing for full marital equality  
26   must be a priority in this State, at minimum, the

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1                   Sommer  
2   Commission should recommend at least some  
3   incremental, discrete protections crucial to  
4   safeguarding the best interests of the children of  
5   gay and lesbian parents.

6                   So, as a second priority, the  
7   relationships of gay and lesbian parents and their  
8   children should be secured by recognizing standing  
9   to seek custody of and visitation with a  
10   non-biological child.

11                  Fourteen years ago, in 1991, in a case  
12   in which Lambda was counsel, the New York Court of  
13   Appeals ruled in *Alison D. versus Virginia M.*,  
14   that a person who has nurtured a close and loving  
15   relationship with the child conceived through  
16   donor insemination by that person's same-sex  
17   partner and reared as the child of both parents is  
18   not a parent within the meaning of Domestic  
19   Relations Law section 70 and has no standing to  
20   petition a Court for visitation after the adults'  
21   relationship ends.

22                  And in a vigorous dissent, Chief Judge  
23   Kaye observed the sad fact that "The impact of  
24   today's decision falls hardest on the children of  
25   those relationships, limiting their opportunity to  
26   maintain bonds that may be crucial to their

BARBARA STROH, CSR, CRR, CMR

1                   Sommer

2   development."

3                   While courts and the legislature of this  
4   State have stood by as children have lost one of  
5   the adults who has loved and parented them from  
6   conception, the advancing trend in many other  
7   states has been to recognize and protect these  
8   vital parent-child relationships.

9                   New York has fallen woefully behind in  
10   protecting the children of our gay and lesbian  
11   families.

12                  The third reform we propose: The  
13   relationships of lesbian parents and their  
14   children should be secured by extending to lesbian  
15   partners the same automatic parental rights  
16   conferred under Domestic Relations Law section 73  
17   to husbands when a couple use assisted-donor  
18   insemination to conceive their child.

19                  Domestic Relations Law section 73  
20   provides simple mechanism for establishing the  
21   legal parenthood of a man whose wife with his  
22   written consent conceives a child through donor  
23   insemination.

24                  This same procedure should be made  
25   available to lesbian couples so that the  
26   nonbiological mothers' parental rights can be

BARBARA STROH, CSR, CRR, CMR

1                   Sommer  
2   secured even before the planned child of the  
3   relationship is born.

4           My fourth proposal tonight: We urge the  
5   Commission to help insure that full respect and  
6   comity be afforded to the out-of-state marriages  
7   and civil unions, domestic partnerships and other  
8   legally conferred relationships of same-sex New  
9   York couples.

10           While New York continues to deny  
11   same-sex couples the right to marry in this State,  
12   numerous gay and lesbian couples seeking legal  
13   protections and respect for their relationships  
14   have turned to other jurisdictions; for example,  
15   to Canada, where nonresident same-sex couples may  
16   marry, and to Vermont, where they may enter into  
17   civil unions.

18           Under longstanding New York common law,  
19   a marriage validly entered in another jurisdiction  
20   must be recognized as valid and legally respected  
21   in New York even if New York law prohibits the  
22   marriage from being solemnized within the State.

23           The recognition rule already has been  
24   acknowledged in a variety of contexts in this  
25   State to apply to valid legal unions of same-sex  
26   spouses entered elsewhere, for example, in Langan

BARBARA STROH, CSR, CRR, CMR



1                   Sommer  
2    versus St. Vincent's Hospital, respecting a  
3    Vermont civil union for purposes of bringing  
4    lawful death claim as a spouse, and in the opinion  
5    of Attorney General Spitzer confirming that New  
6    York comity principles apply to marriages and  
7    other unions between same-sex spouses that are  
8    lawfully entered into in other jurisdictions.

9           In the coming months and years, numerous  
10   situations inevitably will arise requiring New  
11   York courts and others to honor, protect and  
12   enforce legal relationships entered into by  
13   same-sex couples in other jurisdictions.

14           This Commission should recommend  
15   measures to ensure that these relationships are  
16   accorded the fullest respect.

17           Our State's judicial staff should be  
18   trained to preside over such cases, and its  
19   judicial forums should be fully open to these  
20   families.

21           We also urge the Commission to consider  
22   and support the recommendations submitted to you  
23   by other individuals and organizations advocating  
24   on behalf of gay, lesbian bisexual and transgender  
25   New Yorkers --

26           THE COURT: You have one minute.

BARBARA STROH, CSR, CRR, CMR

1                   Shah

2                   MS. SOMMER: Thank you -- including  
3   State Senator Tom Duane, who testified in October  
4   2004 and others who would have testified and will  
5   be submitting written comments, including the  
6   Lesbian Gay Law Association, the New York City Bar  
7   Association, the Empire State --ESPA, the American  
8   Psychoanalytic Association, the wedding party and  
9   others.

10                In conclusion, we urge the Commission to  
11   consider the many additional ways in which our  
12   State's laws and judicial system should be  
13   reformed to acknowledge and protect same-sex  
14   couples and their children.

15                There are many practitioners and  
16   organizations, Lambda included, that would gladly  
17   assist in this undertaking.

18                Please do not forget our families.

19                THE COURT: Thank you.

20                Purvi Shah.

21                MS. SHAH: On behalf of the Sakhi  
22   Foundation for South Asian Women and the women and  
23   communities we serve, I would like to thank Judge  
24   Judith Kaye, Justice Miller and the members of the  
25   matrimonial Commission for undertaking this  
26   crucial work to better matrimonial processes and,

BARBARA STROH, CSR, CRR, CMR

1                   Shah

2   consequently, the lives of those.

3           I admire your efforts to hear the range  
4   of important issues faced in matrimonial dealings  
5   before making recommendations for change.

6           I especially applaud the spirit for  
7   reform because change is hard to agree upon, if  
8   necessary, but you have an opportunity now to  
9   implement reforms that really affect people for  
10   their whole lives.

11          My name is Purvi Shah, and I serve as  
12   executive director at Sakhi, an antiviolence  
13   agency based in New York City.

14          We work with survivors of domestic  
15   violence in communities. Sakhi, which was  
16   founded in 1989, has witnessed a tremendous rise  
17   in services needed for domestic violence within  
18   our communities and especially in the need to  
19   access the courts.

20          Last year alone we handled more than 581  
21   new pleas for assistance. We also do community  
22   change advocacy work, and last year we did more  
23   than 50 presentations in our community in these  
24   issues in terms of addressing violence.

25          We work with various South Asian  
26   countries including Bangladesh, India and

BARBARA STROH, CSR, CRR, CMR

1                   Shah  
2 Pakistan, as well as including Indo communities.  
3           The vast majority of women Sakhi works  
4 with are immigrant women who have few avenues of  
5 information and support.  
6           Thank you for giving me this opportunity  
7 to testify. I would like to focus on the  
8 importance of language access in the courts and  
9 especially in matrimonial and family court  
10 proceedings.  
11          Before I speak to language access  
12 issues, however, I want to recognize that there  
13 are a number of other pivotal issues facing  
14 immigrant survivors of abuse, including the need  
15 for safety and confidentiality measures in the  
16 courts, access to counsel for matrimonial cases  
17 and the importance of economic settlements which  
18 consider health insurance and immigration status.  
19          I know you've heard from a number of my  
20 colleagues in the antiviolence movement, and my  
21 comments are really to add to their concerns for  
22 immigrant women who are caught in abusive  
23 relationships.  
24          Reaching out for help and services is a  
25 tremendous act of courage. Many survivors of  
26 violence are threatened by their abusers if they

BARBARA STROH, CSR, CRR, CMR



1                   Shah  
2 speak out, threatened with further violence,  
3 whether it's to them or their families in their  
4 home countries; they're threatened with  
5 deportation or other forms of retaliation.

6           In fact, we have routinely seen abusers  
7 manipulate the court system by filing false orders  
8 of protection or approaching other agencies with  
9 false complaints and attack women in other  
10 contexts.

11           Through our 15 years of work, we have  
12 noticed immigrant women often have very little  
13 access to information about their legal rights and  
14 options or how the courts work.

15           Unfortunately, abusers tend to have much  
16 more information, and they use this information in  
17 order no manipulate the situation.

18           Immigrant women who do take the step to  
19 address abuse in their lives are faced with a  
20 number significant challenges.

21           One key challenge for women who are  
22 limited English proficient is communicating their  
23 experiences to the court.

24           Survivors of domestic violence may go to  
25 family and criminal court for a range of vital  
26 reasons, including obtaining orders of protection,

BARBARA STROH, CSR, CRR, CMR

1                   Shah

2    custody as well as divorce and maintenance.

3            If a court interpreter does not  
4    adequately present a survivor's case, her whole  
5    life and her children's lives will be affected.

6            While the Courts do utilize interpreters  
7    in our experience as advocates in the courtroom  
8    who accompany survivors, we have witnessed  
9    interpreters who at best simply do not speak the  
10   language that they're asked to speak and, at  
11   worst, offer legal advice, break ethical standards  
12   or harass survivors of abuse.

13          Let me share a few experiences we have  
14   witnessed with immigrant survivors. In one  
15   situation a survivor indicated that she believed  
16   the interpreter would translate in favor of  
17   whichever party paid him the most money.

18          She described the experience, stating  
19   that, "He didn't translate in an accurate manner.  
20   He told the wrong thing, but I know a little bit  
21   of English. That's how I knew.

22          "I think he was in a conspiracy with my  
23   husband. It seemed like they were all in a scam.  
24   It seemed like a money thing. He translated in  
25   favor of whoever gave him money."

26          Another survivor explained to us that

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1                   Shah  
2   the interpreter spoke to the other party for a  
3   long time. She summarized her experience with  
4   interpreters by saying, "The interpreters rushed  
5   and did not explain properly.

6                   "Of the five interpreters I used, one  
7   was good, another okay, and three were bad. One of  
8   the three was speaking in English. He wouldn't  
9   translate."

10                  Finally, one survivor attested to mixed  
11   experiences and the positive role an interpreter  
12   can lay by saying, "The first two translators were  
13   not professional.

14                  "One of them spoke Punjabi, and that is  
15   not my language, so I couldn't understand the  
16   translator. The third translator was professional  
17   and translated everything."

18                  In a sample study Sakhi conducted of  
19   seven women with 12 different court cases, three  
20   out of the seven indicated that their cases had  
21   been delayed due to interpretation, basically an  
22   interpreter not showing up.

23                  The delays were up to nine months in  
24   time. None of the seven women knew how the file a  
25   compliant or take the process forward.

26                  We know if more extensive research were

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1                   Shah

2   to be conducted, additional disheartening findings  
3   would be discovered.

4           Sakhi's daily experience of working with  
5   immigrant women accessing the court has shown us  
6   that women who are not able to share their  
7   experiences are often voiceless in the court.

8           On behalf of Sakhi and the many  
9   advocates working to insure immigrant women access  
10   to the courts, I'd like to propose seven  
11   recommendations. That's quite a number.

12           First, it is essential that the court  
13   implement clear testing, training, monitoring and  
14   grievance procedures for court interpreters.

15           Without adequate training, court  
16   interpreters are not be assessed for proficiency  
17   nor understand their legal obligations.

18           Second, it is imperative that court  
19   interpreters are provided with specialized  
20   training around domestic violence, sexual assault  
21   child abuse and other issues.

22           Such training should underscore the need  
23   for confidentiality of survivors' stories and the  
24   importance of not divulging information about any  
25   ongoing case or previous case to other community  
26   members, since they could jeopardize the safety of

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1                   Shah

2 the survivor and her children.

3           As many of you know, although immigrant  
4 communities are not numerically small, word  
5 travels very fast. So, if you have an interpreter  
6 who breaches confidentiality, people can find out  
7 very quickly what's happening in the community.

8           Third, judges and attorneys should also  
9 be given specialized training in reference to  
10 interpreters which specifically build skills to  
11 assess an interpreter not performing their duty  
12 appropriately.

13          Such training would enable judges and  
14 attorneys to fulfill their duties in the courtroom  
15 on behalf of their clients more effectively.

16          While enhancing the interpretation  
17 process overall will take time, this kind of  
18 training can help individual judges and attorneys  
19 insure language barriers do not prevent access to  
20 the courts.

21          Fourth, court interpreters should be  
22 able to undergo background checks to identify if  
23 they have cases in front of them or, if there's a  
24 conflict of interest, including themselves being  
25 an abuser.

26          Fifth, there should be clear grievance

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1                   Shah  
2    procedures that enable the parties and courts to  
3    hold interpreters accountable for egregious  
4    behavior or failing to perform their duties  
5    professionally.

6           This procedure should be explained to  
7    all parties requiring interpretation, to ensure  
8    that appropriate action when needed would be  
9    taken.

10          Sixth, the Court should recognize that  
11   more than one interpreter may be needed in certain  
12   situations.

13          For example, if a witness needs an  
14   interpreter, who is going to explain what is  
15   happening in that situation to the other parties  
16   that may need interpretation as well?

17          Attorneys may also make comments to the  
18   judge or other parties while the interpreter is  
19   performing another duty. Who would then share  
20   that information with the parties that might  
21   require interpretation?

22          If no one is translating what is  
23   happening every moment, there is no way for any  
24   party to fully understand what is happening in  
25   terms of the case or the court proceeding.

26          Finally, as in New Jersey, which I

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1                   Shah  
2 really recommend, in terms of having really high  
3 standards of court interpretation, court  
4 interpreters in New York should also be given  
5 incentives to obtain training and additional  
6 skills.

7           We need to take the profession of  
8 interpretation seriously and understand that it's  
9 a highly complex set of skills and cognitive  
10 abilities.

11          If these recommendations are not  
12 adopted, we will continue to face justice in the  
13 court so, for example, we'll continue to have  
14 supervised visitation where abuser threatens  
15 children or makes comments about the mother in  
16 another language than English, and nobody will  
17 know the difference.

18          We will have situations where law  
19 guardians cannot interview children because they  
20 don't speak the language the child speaks and,  
21 therefore, can't make informed recommendations to  
22 the court.

23          Ensuring the availability of qualified  
24 interpreters is certainly a resource issue and  
25 opens up a complex series of challenges, but in  
26 our increasingly diverse society, we must strive

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1                   Shah

2   to address these challenges head-on.

3           The Matrimonial Commission will not  
4   achieve its goal of producing trauma in the  
5   courtroom if it does not insure that  
6   interpretation processes are enhanced.

7           To underscore this point, I leave you  
8   with one final statistic from the National Center  
9   for State Courts study currently in progress on  
10   access to temporary orders of protection.

11          In a preliminary finding, this study  
12   discovered that 8 to 11 percent of the 158 courts  
13   surveyed nationwide had utilized minors to  
14   interpret.

15          This is a shocking statistic, given that  
16   minors should never be forced to detail  
17   experiences of violence. It is traumatic for  
18   children to record such experiences, usually on  
19   behalf of their mothers.

20          They experience is so painful and  
21   threatening for women who, understandably, will  
22   not disclose the experience of abuse in that  
23   situation, so you then have a problem of evidence  
24   and what is actually documented.

25          Without access to qualified  
26   interpretation inside and outside the courtroom,

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1                   Shah  
2    we are keeping immigrant survivors of violence who  
3    seek to make a new life shackled to abuse.

4           By making substantive reforms, we can  
5    make sure immigrants survive the violence and  
6    their families are able to access the courts.

7           Thank you.

8           THE COURT: I have a question for you.  
9    Thank you.

10          Apart from the question of interpreters,  
11    what views do you have on the need for cultural  
12    information?

13          MS. SHAH: I think that's a very  
14    complicated question because culture is not a  
15    static thing, so I would hesitate to say that  
16    cultural sensitivity alone is enough. You don't  
17    want to define culture in a particular way.

18          On the other hand, I do think that there  
19    are people such as DOCRA (SIC) or state violence  
20    prevention doing that kind of work in a complex  
21    format.

22          I think cultural sensitivity training  
23    should be ongoing, regular and nuanced.

24          I think that would definitely help, but  
25    that doesn't solve the problem of immigrant women  
26    who have language barriers being able to access

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1 Moss

2 information.

3 THE COURT: Thank you very much.

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Ms. Mandel 243

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2 CHAIRPERSON MILLER: Veronica Mandel.

3 MS. MANDEL: Good evening.

4 Thank you for the opportunity to address the  
5 commission. I am the chairperson of the Matrimonial and  
6 Family Law Committee for the Bronx County Bar Association.

7 The Bronx is a special place. It is an  
8 undiscovered secret. It is a small, warm legal community  
9 where, in general, practitioners know one another, respect  
10 one another, where a sense of comradery still exists in  
11 the legal community in order to cope with and ease the  
12 daily stress of working in a community which has its share  
13 of problems, poverty, despair and needs.

14 In this community of people we need a court  
15 system that works, that is easily maneuverable with or  
16 without an attorney and treats all litigants and those who  
17 service our systems with dignity and respect.

18 One concern is the unauthorized practice of law  
19 that is prevalent in the Bronx from the small bodegas  
20 travel agencies to the larger divorce mills. I have asked  
21 Sergio Villaverde, one of our committee members, to  
22 address this panel at the end of my presentation.

23 However, first and foremost, our committee  
24 believes that the system which should be uniting families  
25 often times causes families to deteriorate and to break.

26 The reality is that all too often the system as

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2 it is assists non-custodial parents to just walk away from  
3 their family and children as it becomes too emotionally  
4 and financially difficult to fight.

5 It is so sad that the wonderful reformatory and  
6 interactive Peace Program is simply not available to  
7 Supreme Court litigants. We have been told that there is  
8 no funding for Supreme Court litigants to participate in  
9 this program and, so, unfortunately, the effects of  
10 battling parents upon our children is allowed it continue.

11 There is a real concern as to the ease that  
12 orders of protection are often issued in this community.  
13 Not minimizing the necessity to protect children and  
14 litigants. The concern is that courts cannot truly  
15 understand or comprehend what happens to the familial  
16 unit.

17 Practitioners on both sides can attest to the  
18 fact that the reality is that all too often an accused  
19 parent simply leaves the familial unit for good, deciding  
20 not to visit the child. After coming to court on numerous  
21 occasions, losing a day's pay or a job, not able nor  
22 willing to fight accusations often designed to manipulate  
23 issues of custody, visitation, relocation or child  
24 support, and the courts do not have the time or the  
25 courage to truly ascertain credibility and reflect on the  
26 effects of its decision.

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2           Indeed, while years ago litigants had to choose  
3 between Family Court and Criminal Court to bring a family  
4 offense accusation, now litigants can use both courts.  
5 Just try and get two witnesses to testify in two courts.  
6 It is a great concept, but the reality in the Bronx, or  
7 anywhere, your witnesses cannot or will not lose several  
8 days' pay to testify in two courts. As a result, anger,  
9 resentment and abandonment occurs and, frequently, the  
10 child has just lost a parent.

11           Defense attorneys in this field hear all too  
12 frequently that a parent simply will not lose their  
13 livelihood if there is a problematic parent who uses the  
14 courts to jam up the parent at work or seek repeated  
15 arrests and tearfully say that they will find a job when  
16 the child is older. This leads to the concern and  
17 recommendation that strong, qualified judges are needed to  
18 work in this field. Ones that want to work in this  
19 challenging field, have the expertise and, most  
20 importantly, the judicial independence and temperance to  
21 protect and deal with the familial problems because of the  
22 effects on the family.

23           Indeed, we have the courage to question the  
24 pendulum of protecting families and children has swung so  
25 far to the left in the guise of protecting children and  
26 families that the family is often now being hurt.

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2 Equally, the Support Collection Unit prevalent  
3 in both Supreme and Family Court has an effect on the  
4 familial unit. All too often the non-custodial parent  
5 will stop visiting the child due to the very real and  
6 monumental financial stakes caused by SEU, an overburdened  
7 agency which needs more qualified personnel to administer  
8 collections.

9 The horror stories of SEU taking money that are  
10 in error exist. And the SEU routinely fails to follow  
11 court orders with grave consequences to the children.  
12 Non-custodial parents stop visiting, are resentful and  
13 angry and truly without funds to visit the child.

14 The adjournments needed simply because there are  
15 no SEU statements are unnecessarily burdensome to  
16 families.

17 We have been advised and shown that SEU does not  
18 believe that as a state agency they must follow Family  
19 Court orders such as income deduction orders, non-income  
20 deduction orders the parties have agreed to such.

21 A particular employer would rather fire the  
22 parent than deal with garnishment procedures of a small  
23 company that's just not set up to do it.

24 Further, the fact that support magistrates no  
25 longer have the discretion to work out the amount of  
26 retroactive arrears even if the parents have agreed to

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2 such destroys settlements and create unnecessary familial  
3 turmoil.

4 I have spoken to several support magistrates and  
5 urged this panel to address this. Support magistrates in  
6 the Bronx can tell you they have their concerns, such as  
7 needing a state-wide system, needing accurate statements  
8 and dealing with an agency that changes account numbers  
9 without advising litigants or the Court.

10 There is also a real need to implement services  
11 for family, matrimonial cases heard in supreme or the IDB  
12 part. COIs or INRs which grant the Court the opportunity  
13 to ascertain what is actually happening in this home and  
14 what services, if any, may be necessary, should be  
15 available as a recourse.

16 We have heard about merger, but problems with  
17 one court continues.

18 I recently had a case in Family Court in which  
19 one party was then rested and so the cases were moved to  
20 the city court IDB part. I was the second attorney on  
21 this case. And the plaintiff, my client had filed for  
22 divorce in the midst of filing various Family Court  
23 actions. The cases then had to be removed from the City  
24 IDB part to the Supreme Court IDB part of much expense and  
25 time. All cases were then placed in the County Supreme  
26 IDB part. However, I had been advised by the court that



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2 the Family Court cases will be heard on one day and the  
3 criminal court cases will be heard on another day, thereby  
4 wearing down families, causing settlements that should or  
5 maybe should not be made in the best interest of the child  
6 and defeating the purpose of the court.

7       There is further real concern as to the question  
8 of pro bono work for indigent clients or people that  
9 simply cannot afford attorneys. In the Bronx, matrimonial  
10 attorneys that are filed in the Supreme Court are assigned  
11 to cases, which is troubling. First, the question arises  
12 is the assigned counsel competent to handle this  
13 particular matter. Is she or he financially able to  
14 handle a pro bono contested divorce?

15       We recommend that a qualified panel to handle  
16 these cases be implemented, thereby protecting our  
17 community members. And/or CLE credits be initiated for  
18 pro bono work for our attorneys.

19       Now is Mr. Villaverde to address the commission.

20       MR. VILLAVARDE: Thank you. Good evening.

21       I would like to very quickly point out an issue  
22 that's come to light in the Bronx and all over the city.  
23 It is the unauthorized practice of law of the "divorce  
24 mills" that we see. They advertise very regularly. This  
25 is a violation of the judiciary law which defines practice  
26 of law as including the giving of legal advice outside of

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2 court.

3 Very famous case, one of the leading cases, is  
4 New York County Lawyers Association, coincidentally, versus  
5 Casey. A First Department case which clearly sets forth  
6 that the regular practice of giving legal advice, of  
7 someone calling it and saying, hey, I haven't seen my wife  
8 in two years since they left, and someone says that's  
9 abandonment, constitutes the practice of law in New York  
10 State.

11 It is already a misdemeanor. There is already  
12 an enforcement authority with the district attorney's  
13 office and with the Attorney General civilly.

14 However, enforcement is woefully lacking. In  
15 the Bronx, as in many other counties, it is consumer  
16 issues. The people who are preyed on are typically people  
17 on the lower echelon of the economic curve.

18 Tying into the pro bono requirements, in showing  
19 those up we have the ability to address the needs of the  
20 poor in the matrimonial area without allowing this no  
21 longer cottage industry. It a very big industry. They  
22 advertise in the newspapers, on television, very  
23 regularly, and that's a testament to the fact that there  
24 is absolutely no enforcement in this area.

25 I have had myself, and many other practitioners  
26 in the Bronx have had, numerous case where you end up with

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2 the results of a divorce done by one of the divorce mills.  
3 Either equitable distribution is left out because it is  
4 just too complicated to handle, or in one case that I  
5 presently have we have two medical doctors who were under  
6 the impression that they were divorced for two years and  
7 they just have a fraudulent divorce with the signature of  
8 a Supreme Court justice, or the purported signature of a  
9 Supreme Court justice that doesn't -- that turned out not  
10 to be true.

11 There is no -- other than the District Attorney  
12 and the Attorney General, there are no other enforcement  
13 mechanisms. There is no contempt for people in such  
14 situations unless civil action is brought. And there is  
15 just no interest on the behalf of law enforcement to do  
16 something about this. This has become a reoccurring  
17 problem in my practice. And we have seen it happen  
18 throughout the city, frankly. But it is something that we  
19 have never yet spoken of.

20 This is one of the reasons that we personally  
21 wanted to come down and bring this to light. That is  
22 something that we recommend. That, A, that cases -- that  
23 the county clerks refer cases to the District Attorney's  
24 offices and the Attorney General when they see these  
25 divorce mills coming in.

26 Because it is very apparent. Some of them will

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2 actually go down to the court for the client and file a  
3 case. The clerks will see this. And typically the clerks  
4 are not instructed to or just don't know what to do. They  
5 will just file the case and proceed as if they were  
6 attorneys.

7 New York County recently had a sign-up when they  
8 were under construction about directing all matrimonial  
9 and divorce mills to do et cetera, et cetera. So it is  
10 practically a sanctioned practice in the city and it is  
11 something that there is already a law against. There are  
12 already numerous laws against. There is just no attention  
13 and focus upon it.

14 So I know that the committee has had pro bono as  
15 one of the primary things that it's been looking at, one  
16 of the many things it's been looking at. So there are  
17 mechanisms within the system to address the needs of the  
18 poor.

19 At the end of the day, we have the right to  
20 practice law not just for ourselves but as a protection to  
21 the public. Because there are constraints and there are  
22 remedies for people who suffer at the hands of an  
23 attorney. There are no such remedies for people who  
24 suffer at the hands of divorce mill, especially if they  
25 are working out of bodega or out of a travel agency and  
26 they are just not there in six months. We have no one to

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2 turn to and the public has no one to turn to in this case.

3 Thank you very much.

4 CHAIRPERSON MILLER: Mr. James Hickey.

5 MR. HICKEY: Good evening.

6 Thank you for allowing me to speak tonight.

7 I am a former litigant, former plaintiff. Using  
8 my personal experiences in a respectful and passionate  
9 manner I will address the agenda of this commission and  
10 offer suggestions for improvement.

11 My name is Jim Hickey. I am the proud and  
12 loving father of four children; a 20 year-old daughter, 15  
13 year-old boy and girl who are twins and one 12 year-old  
14 daughter.

15 Financially, I have been the sole provider for  
16 over 20 years for my family.

17 I am very responsible both as a parent and in my  
18 career as a software developer commuting from Long Island  
19 to Jersey City, New Jersey.

20 About three years ago I took up residence in the  
21 one room basement apartment just blocks from my home. All  
22 along I had been able to see my children every other day  
23 and have been very involved in their lives. Anyone here  
24 with children knows how difficult adolescence is, even for  
25 intact families. Our family experience makes this stage  
26 of development much worse for children than it had to be.

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2           The judgment for my divorce was signed recently  
3 and I would like the committee to pay particular attention  
4 to what I am about to say.

5           Since the divorce was finalized tension within  
6 our family has decreased tremendously. It is as if a  
7 tight rubber band was around us for 3 years and has now  
8 been loosened.

9           The family should be paramount in the eyes of  
10 the court. It was this judgment of divorce that my family  
11 has started to heal.

12          In August of '99 I retained a lawyer for  
13 divorce. After just one year of unsuccessful  
14 negotiations, Peace classes and only two court dates, the  
15 retainers I paid for both lawyers, my lawyer and my  
16 ex-wife's lawyer, were exhausted. Frightened by how  
17 quickly our family resources were being depleted, I  
18 withdrew the divorce action.

19          In December of 2002 I retained another attorney  
20 for the same purpose. I explained to him that I would  
21 like to settle out of court, understanding how much I  
22 would be required to pay in child support plus the  
23 significant amount of maintenance since my ex-wife had  
24 been out of work for over 20 years.

25          My ex-wife and I wanted the process to end  
26 quickly. Seven months transpired with only one

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2 unsuccessful attempt at negotiation for settlement. I  
3 filed for divorce once again.

4 At our preliminary conference in September of  
5 2003 the judge initially assigned to the case told us, and  
6 I can still hear the words today, this is a divorce about  
7 nothing. We have no custody issues, we have a middle  
8 class family of modest means whose only asset is their  
9 home. The plaintiff is a sole income earner, W-2. They  
10 clearly are not rich folk. I urge counsel and their  
11 parties to settle this outside the court system.

12 Both attorneys nodded and agreed.

13 What followed, however, was in direct opposition  
14 to what was suggested by the judge. The lawyer's mantra  
15 for the next 19 months seemed to be fraud and perpetuate,  
16 which appears to be the essence of the system. With  
17 several subsequent dates and no settlement a trial date  
18 set for April 2004.

19 After three days of what was listed on the  
20 calendar of trial, the terms of the agreement were orally  
21 spread on the record by my attorney. The judge allocuted  
22 both parties and congratulated all and commented that the  
23 agreement was very generous to my ex-wife, but considering  
24 the length of marriage and that she had been out of the  
25 work force for over 20 years, he believes it was a fair  
26 agreement that benefits the family.

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I was in agreement with the outcome.

The judge did not so order the agreement.

Instead, the judge asked both attorneys how they would like to proceed with the divorce, in court or on paper. I found it a bit odd that both attorneys responded, in concert, on paper. This was the first thing they had ever agreed upon so quickly. On paper was just another way they can continue with their bantering, fraud and perpetuate. And that they did.

Due to a discrepancy between the oral agreement spread on the record and the written stipulation that my attorney drafted, the opposing attorney advised my ex-wife not to sign the stipulation. The case never settled. Several additional court dates ensued and no progress was made. At a court date in November 2004 I dismissed my attorney, telling the judge I know longer had faith in him.

Acting pro se after meeting for an additional three days in court, on January 28th of this year an agreement had been reached by both parties.

The judge so ordered the agreement this time.

During allocution, the second allocution, the judge asked me if the Court in any way coerced me into making my decision. I answered, "indirectly, your Honor, absolutely yes."



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2 I took 24 days off from work for court-related  
3 issues and felt backed into a corner. I could no longer  
4 take time off from work and was forced into an agreement  
5 that was much worse financially for me than the previous  
6 agreement. The judge was angered by my statement and said  
7 that he was the court. He threatened to stop everything.  
8 I apologized and told him I was speaking of the court as  
9 the entire system. That's how I understood it.

10 Since I have been in the courtroom a significant  
11 number of times I have compiled a list of what I see as  
12 shortcomings of the court system, observations, and offer  
13 some suggestions for approval.

14 Poor behavior. The bar for bad behavior in  
15 court is high. If measured in degrees they would be  
16 cosmic. This poor behavior is not limited to lawyers.  
17 This egregious behavior is done so in such a conspicuous  
18 manner. The judges exhibit poor behavior in a more  
19 passive way. I will explain this as we go along.

20 Accountability. Lawyers are not accountable for  
21 anything. Day in and day out I am held accountable at my  
22 job. I must make progress and be given strict deadlines.  
23 I must adhere to it. Seasoned lawyers are allowed to use  
24 the system for their profit margin at the expense of the  
25 family.

26 Here is a for instance. An opposing attorney

1  
2 requests depositions. The plaintiff takes a day off from  
3 work, shows up in court only to find out the attorney  
4 cancelled. This is not once but twice. Don't you think  
5 the judge should reprimand the attorney for this behavior  
6 instead of encouraging it by scheduling yet a third  
7 deposition date? The third date was also cancelled.

8         These events incur costs on both sides with no  
9 movement on the case.

10         In my instance, since I was paying for both  
11 attorneys it is as if I was shooting myself in the foot.

12         Incentives. If a litigant is paying both  
13 lawyers or if there is a retainer balance what incentive  
14 is there for a lawyer to settle?

15         Listen. Litigants are intelligent people and  
16 their voice should be heard. Instead, the litigants must  
17 speak through the attorneys. The attorney's interest or  
18 are not necessarily the same as the litigants. If a judge  
19 receives a letter from a litigant, please read it and  
20 respond. I have a handful of letters I wrote to the  
21 standing judge, matrimonial administrative judge for the  
22 county and my state center. I received but one response  
23 from the matrimonial administrative judge. The letter to  
24 the state center was forwarded to Justice Kaye, which in  
25 turn was answered stating they cannot intervene with  
26 pending litigation.

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2 I spoke over the phone to the county  
3 administrative judge and was given a sympathetic ear.

4 However, it did nothing to speed the process.

5 Greed. Let's face it. For most attorneys law  
6 is a money-making business. There is nothing wrong with  
7 lawyers wanting to make an honest living. The matrimonial  
8 attorneys for my observation are gluttons for anything  
9 that remotely resembles the opportunity to make money. I  
10 am embarrassed for these lawyers to use the system for  
11 their benefit. They should be embarrassed for their  
12 behavior.

13 Judges, be mindful of the family. If a litigant  
14 is a sole provider of a family and must take upwards of 20  
15 days off from his employment, something is seriously  
16 wrong. The family is suffering. Be more proactive and  
17 forceful with lawyers to bring divorces to an end instead  
18 of just scheduling next court dates. This only serves to  
19 perpetuate the problem. Do not tolerate the poor behavior  
20 of the lawyers.

21 From my point of view the entire process has the  
22 glaring appearance of impropriety. It is as if the  
23 lawyers hold the courts in their pockets.

24 My employer has an invaluable EAP program that  
25 allows me to speak regularly with a psychologist during my  
26 family crisis. The doctor was well aware of the cost,

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2 delays and trauma to my family unit. Here are his  
3 comments.

4 "When a family is going through divorce  
5 proceedings as well as the time leading up to the actual  
6 break, there is chaos in the family. The divorce itself  
7 can be a remedy because it provides legal and  
8 psychological closure for the individuals who have been  
9 suffering the chaos. This is especially true for children  
10 who need to if feel secure and who naturally look to their  
11 parents to provide their sense.

12 Parents in turn look to the courts. The court  
13 has, certainly in the case with the Hickeys, dragged out  
14 the proceedings the necessary closure doesn't get reached  
15 and everyone suffers. Most especially the children.

16 In the end, the delays provide fertile ground  
17 for interpersonal recrimination between parents and among  
18 parents and children. There is inevitably sides taken  
19 which tears the family apart even further than the factors  
20 that led to the divorce in the first place.

21 Everyone is entitled to a fair and speedy trial  
22 no matter what the issue, but in the case of divorce and  
23 families with children judicial procrastination palpably  
24 worsens the reasons that people have turned to the courts  
25 in the first place. The courts go from being a possible  
26 healing institution to one that severely aggravates the

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2 family in pain.

3 In closing, I ask the Court not to just provide  
4 lip service and say that the family is paramount. It must  
5 be proactive to ensure that this is the case."

6 Change is difficult, but great strides can be  
7 made with a concerted effort by those here in this room.

8 I would hope the minutes from all the hearings  
9 are carefully read by the committee as well as Justice  
10 Judith Kaye and Jacqueline Silbermann.

11 If any of the aforementioned would like to speak  
12 to me regarding my experience I would be more than willing  
13 to speak to them.

14 CHAIRPERSON MILLER: I think you are just about  
15 finished.

16 MR. HICKEY: This won't even --

17 CHAIRPERSON MILLER: I was just going to ask you  
18 a question.

19 MR. HICKEY: Yes?

20 CHAIRPERSON MILLER: During the course of your  
21 problems, your litigation, did anyone ever suggest  
22 mediation to you?

23 MR. HICKEY: Yes. And the first attorney my  
24 ex-wife visited drilled it into her you cannot do that and  
25 she didn't do it. I would have gladly done it. It would  
26 have saved us a bundle of money.

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2 CHAIRPERSON MILLER: Who recommended the  
3 mediation? Your wife's lawyer?

4 MR. HICKEY: No. Common knowledge. I suggested  
5 it.

6 CHAIRPERSON MILLER: You suggested it?

7 MR. HICKEY: Yes.

8 CHAIRPERSON MILLER: And they were not willing.

9 MR. HICKEY: No. And it was drilled in early  
10 on.

11 A VOICE: It's obvious why the lawyer wouldn't  
12 want to.

13 MR. HICKEY: Can I say one thing on fee  
14 arbitration?

15 This falls under the courts.

16 I recently filed for fee arbitration. I  
17 contested a significant amount of attorneys fees. I felt  
18 my attorney billed for services that were not performed  
19 properly and made a serious mistake that caused me to lose  
20 a significant amount of money and prolong the process. I  
21 was awarded \$37.50. Adding insult to injury.

22 I would have rather it been zero. The hearing  
23 was run by a matrimonial lawyer with two civilians present  
24 who were just figureheads. At two separate instances  
25 during the hearing the civilian arbitrator stated that  
26 they felt that like they were being excluded from the

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2 hearing. I am left with the feeling that this, too, is

3 tainted.

4 Thank you.

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1 Moss

2 Susan Moss.

3 MS. MOSS: Good evening.

4 My name is Sue Moss. I'm speaking on  
5 behalf of the Women's Bar Association of the State  
6 of New York, an organization of 3500 attorneys  
7 working to promote equal and fair administration  
8 of justice and also to promote the status of women  
9 in the legal profession.

10 I'm also partner of the matrimonial law  
11 firm of Shebtob, Moss & Talbot. The Women's Bar  
12 Association of the City of New York has prepared  
13 detailed written testimony regarding 11 specific  
14 points. We will provide you with this after the  
15 hearing.

16 I would like to spotlight on just a few  
17 of these points in this testimony.

18 Number 1, no-fault divorce: Make no  
19 mistake WBASNY has endorsed the concept of  
20 no-fault divorce, so long as appropriate  
21 provisions are made for survivors of domestic  
22 violence and the children of divorce.

23 It is WBASNY's position that all issues,  
24 including custody and child support, must be  
25 resolved before the entry of a judgment of a  
26 divorce.



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2 Standardized forms for motions and other  
3 court papers: This is imperative to help pro se  
4 litigants.

5 In an effort to reduce litigation costs  
6 and increased judicial efficiency, WBASNY strongly  
7 recommends that standardized forms, and by  
8 "standard forms," we mean standard forms across  
9 the state.

10 They should be instituted for not only  
11 net worth statements and statements of proposed  
12 disposition like we have but for many, many other  
13 broader purposes, including counsel fee  
14 applications.

15 Toward this end, we'd like to thank  
16 Justice Jacqueline Silbermann for providing more  
17 uniform forms on the Unified Court System web site  
18 for this purpose.

19 Those forms are up now, and they are  
20 terrific, and they are being used by my office and  
21 many offices like my office.

22 The next issue: Automatic temporary  
23 restraining orders: In sister states, such as  
24 Connecticut, as soon as you file for an action for  
25 divorce, there is implemented uniform and  
26 automatic temporary restraining orders that

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2 require the continuation of health insurance as it  
3 currently is, and it requires that parties not in  
4 any way terminate life insurance policies.

5 Oftentimes these orders require parties  
6 to not in any way take children out of the  
7 jurisdiction. It also stops people from  
8 transferring assets.

9 So much in temporary motion practice, so  
10 much in terms of cost and judicial time is wasted  
11 because we do not have automatic temporary  
12 restraining orders.

13 Sarah Ashcroft, the chairperson of the  
14 matrimonial committee of WBASNY, spoke on this  
15 issue at the Buffalo Commission hearings, and we  
16 refer to her testimony.

17 Another very important point -- and this  
18 goes under the heading of mediation. WBASNY  
19 strongly supports postdiscovery settlement panels.

20 You've heard from many of the litigants  
21 about the importance of trying mediation. We need  
22 a statewide program that does this.

23 What we propose is a system that is very  
24 similar to New Jersey settlement panels, early  
25 settlement panels, and using that model which has  
26 been in place since 1983.

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2 That model has proven to be very  
3 successful in resolving judgment divorce cases and  
4 certainly could be so here.

5 We believe that this settlement panel  
6 should be mandatory for all financial cases except  
7 -- and this is a big exception -- if there are  
8 issues of domestic violence alleged, not proven  
9 but alleged.

10 For custody matters we think that we  
11 should still provide the opportunity for the  
12 settlement panels. However, they would not be  
13 mandatory.

14 In terms of the financial settlement  
15 panels, if there is a need for a forensic expert,  
16 then we can also invite one to be part of the  
17 panel, but what we mean by this panel is having  
18 two or three experienced matrimonial lawyers  
19 sitting and giving their time for a day or so, and  
20 the parties, either represented or not  
21 represented, would come in and present their case.

22 At the end of the presentation, which  
23 would be relatively short, those attorneys would  
24 give their impression of what they think the judge  
25 will do.

26 With litigants who have a good sense of

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2 what they think a judge will do, this will promote  
3 settlement, and settlement will promote parties  
4 being able to move on with their lives, and this  
5 is of the utmost importance.

6 Although not included in our materials,  
7 we think that the Commission should consider  
8 setting -- recommending setting up a dedicated  
9 postjudgment part that would hear cases that are  
10 brought after a judgment of divorce has been  
11 issued.

12 These postjudgment cases are huge in  
13 number, and they are clogging up our courts and  
14 really taking away from making the normal divorce  
15 cases go a lot quicker.

16 The next issue is mandatory versus  
17 permissive joinder of divorce and tort claims.  
18 New York should follow its current law and the law  
19 of 47 other states by allowing tort cases to be  
20 brought after the conclusion of a judgment of  
21 divorce.

22 There is a recent case from the Second  
23 Department that I'm sure you're all familiar with,  
24 Chen versus Fischer. That suggests that all tort  
25 cases would be required to be brought in a  
26 matrimonial matter.



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2 That presents a whole host of problems  
3 that are detailed in very specific terms in our  
4 written testimony.

5 Essentially, WBASNY's recommendizations  
6 are intended to reduce the cost and time relegated  
7 to obtain judicial relief in the Matrimonial  
8 Courts and the Family Courts.

9 It is our goal to provide a uniform  
10 system so that litigants and attorneys can get  
11 through this process as quickly and with spending  
12 the least amount of money as possible.

13 Thank you.

14 THE COURT: Thank you very much.

15 Is Guy Yanfrat (sic) here? Is Michael  
16 Kramer here?

17 Thank you all very much for attending.

18 (End of proceedings)

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