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**COMMENT ON OFFICE OF COURT ADMINISTRATION'S
PROPOSAL REGARDING ACCESS TO FORENSIC EVALUATION REPORTS IN
CHILD CUSTODY AND VISITATION CASES**

The New York City Bar Association appreciates having the opportunity to weigh in on the very important matter of access to forensic evaluation reports. We also appreciate the Office of Court Administration's desire to issue a court rule, so that there will be uniformity and guidance to Judges, attorneys and litigants with regard to access to forensic reports in child custody and visitation cases.

To develop its position, the City Bar convened a subcommittee of our relevant committees, (the Council on Children, Family Court and Family Law, Children and the Law, Domestic Violence and Matrimonial Law), and then each Committee met individually to discuss the issues. A vigorous debate centered on whether compliance with *Sonbuchner*¹ requires that parents receive a copy of the report, or whether it is preferable to establish comparable place and time limitations for represented and pro se litigants. In the latter case, represented litigants could review the document in their attorney's office while pro se litigants could review it in the courthouse. These time and place restrictions address the fact that in contested custody and visitation cases, litigants whose judgment and parenting ability is often impaired have abused these reports, to the detriment of the child, by placing copies of the reports on the Internet, inappropriately showing reports to the child, etc. In addition, sanctions alone have proven an ineffective deterrent and once access to the reports has been misused, there is no sanction that could possibly undo the harm to the subject-children.

After much discussion and internal debate, the City Bar's position is as follows: given the harm that can be done by providing parents with a copy of the report (harm that would not be undone by any sanction nor prevented by any affirmation/affidavit), the court rule should not allow parents to receive a copy of the forensic report.² Instead, the court rule should allow represented litigants to review the report in their attorneys' offices, and should allow unrepresented parties to review the report in the courthouse and to have access to the report in the courtroom during trial.

¹ 96 A.D.3d 566 (1st Dept. 2012).

² Under current law, a parent who is a party to the proceeding may petition the court for permission to receive a copy.

The Association's Family Court and Family Law Committee has a different view, supporting providing pro se litigants with a copy of the evaluation, with affidavits of non-disclosure, defined consequences for disclosure, and discretion to the court to restrict access further if circumstances warrant. The Committee is concerned that the recommended time and place restrictions create a non-level playing field, with pro se litigants not having the advantage of viewing the report outside of the courthouse. The Committee is also concerned about the logistics of providing pro se litigants with courthouse review of the report under the parameters set forth in the rule. The other committees acknowledged these are real issues but concluded that the substantial risk of harm to the child that may result if the reports are released to parties outweighs these concerns.

To safeguard against unauthorized disclosure/sharing of the report or the contents of the report and to ensure represented and unrepresented litigants/parties are afforded due process, the City Bar also requests that any Court Rule on this issue include the following:

- Upon assignment of a forensic expert in custody proceedings, the court shall utilize a standardized assignment order that reflects the proposed uniform court rules.
- Upon receipt of the forensic report, the court shall advise counsel for the parties, counsel for the child(ren), and pro se litigants that it has received the report.
- Each counsel will be required to sign an affirmation to protect the report from unauthorized disclosure. Upon receipt, the court shall then provide one copy of the report to each counsel from whom it has received an executed affirmation. Each attorney shall retain his/her copy of the report in confidence and may make an additional copy for his/her own use in preparing for litigation, which copy shall also be held in confidence when not being used.
- Each party shall be permitted to read the report and make notes concerning it but shall not be permitted to have a copy. A represented party may read the report in his/her attorney's office. A pro se litigant may read it in the courthouse or other secure location approved by the court after executing an affidavit (described more fully below). A secure location must be one where the pro se litigant would not be left unattended with access to any type of device that could be used for copying, including but not limited to a photocopier, cell phone, camera, scanner, etc.
- In the event that an unrepresented litigant is unable to read the forensic report in the courthouse because of language skills or disability, the court shall make appropriate accommodations.
- Litigants will also be allowed to have access to the report in the courtroom during the proceedings.
- To help prevent unauthorized disclosure, litigants (including pro se litigants) will be required to sign an affidavit that they will not remove the report from the courthouse/the secure location/their attorney's office, will not make a copy of the report, and will not share the contents of the report with anyone else, including the other parties, subject child or the press; and that they acknowledge that they will need to relinquish their cell phone

and any other handheld or electronic device that could be used to copy the report as a condition of reviewing the report.

- A rule that if counsel or a litigant wishes to share the forensic report with a mental health professional to assist the counsel or party in the case, the mental health expert must first sign a nondisclosure affidavit.
- Violations of the disclosure restrictions contained in the aforementioned affidavits by a party or mental health professional shall be punishable by findings of contempt.
- A requirement that counsel make a good faith effort to ensure that their clients do not receive a copy of the report nor have access to unauthorized devices while reviewing the report. If the court determines that an attorney or law office fails repeatedly to take the steps necessary to preclude unauthorized disclosure, the court may impose additional restrictions on that attorney, law office and/or their clients when reviewing copies of the forensic report.
- A clear requirement that parties be advised not to discuss or share the contents of the report with the child(ren).
- Language requiring disclosure, if sought, of the files, notes and other documents upon which the forensic expert's evaluation is based.
- A requirement that in cases involving domestic violence or where the child's safety could be jeopardized, information shall be redacted as deemed necessary to protect the confidentiality and safety of another party or the subject child(ren), including information related to home addresses or schools the child(ren) attends.

Thank you for the opportunity to provide our input.

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