STATE OF NEW YORK
UNIFIED COURT SYSTEM
25 BEAVER STREET
NEW YORK, NEW YORK 10004
TEL: (212) 428-2160
FAX: (212) 428-2155

ANN PFAU
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

January 14, 2010

TO: Hon. Fern Fisher
Hon. Michael V. Coccoma

FROM: John W. McConnell

SUBJECT: Domestic violence convictions of harassment in the second degree

As you may be aware, effective January 14, 2010, new sealing requirements go into effect for domestic violence cases involving charges of harassment in the second degree under Penal Law § 240.26. The following memo briefly summarizes the new law and outlines the procedures courts should follow to help insure compliance. A copy of the relevant portion of the new law is attached (L 2009, ch 476).

The goal of the new legislation is to insure that law enforcement authorities are not misled by the current sealing provisions of CPL 160.55 into treating repeat domestic violence offenders who commit harassment in the second degree as first time offenders. To accomplish this goal, a new subdivision 8-a has been added to CPL 170.10, setting forth a procedure allowing the prosecution to serve on defendant and file with the court, within 15 days of a defendant's arraignment on a charge of harassment in the second degree, a notice alleging that the harassment was committed against "a member of the same family or household as the defendant." Once the notice is served and filed, the defendant may either admit or deny the allegation. If the defendant admits to the allegation, it is deemed established. If the defendant denies the allegation, the court must provide the prosecution with an opportunity to prove the allegation beyond a reasonable doubt as part of its case-in-chief to the trier of fact. The trier of fact must then make a determination on the issue either orally on the record or in writing (CPL 170.10(8-a (a)).

Once a defendant concedes, or the court determines, that the victim is a member of the same family or household as the defendant, a subsequent conviction of the harassment charge requires the court to "include notification of that determination" in a report to the Division of Criminal Justice Services [DCJS] (CPL 160.55(2)). When DCJS receives the report, it must then make the defendant's criminal record of the conviction available to a broad list of designated law enforcement agencies (CPL 170.10(4)). Further, the "palmprints and fingerprints" made in connection with the harassment charge must be retained and not destroyed or returned to the defendant (CPL 160.55(1)(a)). In all other respects, the conviction will be sealed under CPL 160.55.

There are significant operational difficulties in complying with the new statute, and counsel's office has worked closely with the Division of Technology, Trial Court Operations and DCJS to develop procedures that will assure compliance with the law. A separate operational directive will be sent to all part clerks and data-entry clerks advising them of a new disposition code that has been established for this purpose. It is critical to accurate reporting, however, for judges to advise their clerks at the time of conviction whenever a determination is made pursuant to CPL 170.10 that the victim of the harassment was a member of the same family or household as the defendant.

Please distribute this memorandum to all judges exercising criminal jurisdiction. Any questions regarding this matter should be referred to Paul McDonnell in Counsel's Office at (212) 428-2150.

cc: Hon. Ann T. Pfau
Hon. Judy Harris Kluger
Hon. Lawrence Marks
Ron Younkins
Nancy Mangold
Chip Mount
Paul McDonnell

STATUS:

A9017 Weinstein (MS) Same as S 55306 RULES, S 5031-A HASSELL-THOMPSON
Family Court Act
TITLE....Enacts provisions relating to domestic violence; requiring attorneys for children to receive training or education in domestic violence
This bill is not active in the current session.

06/19/09 referred to judiciary
06/22/09 reported referred to codes
06/22/09 reported referred to ways and means
06/22/09 reported referred to rules
06/22/09 reported
06/22/09 rules report cal.623
06/22/09 ordered to third reading rules cal.623
06/22/09 passed assembly
06/22/09 delivered to senate
06/22/09 REFERRED TO RULES
07/16/09 SUBSTITUTED FOR S5031A
07/16/09 3RD READING CAL.857
07/16/09 PASSED SENATE
07/16/09 RETURNED TO ASSEMBLY
09/04/09 delivered to governor
09/16/09 signed chap.476

CHAPTER TEXT:

LAWS OF NEW YORK, 2009

CHAPTER 476

AN ACT to amend the family court act, in relation to requiring attorneys for children to receive training or education in domestic violence prevention; to amend the domestic relations law, in relation to requiring the court to state on the record the domestic violence and child abuse factored into their award of custody or visitation; to amend the criminal procedure law and the family court act, in relation to orders of protection; and to amend the criminal procedure law, in relation to reporting domestic violence incidents to the supervising probation department or the division of parole

Became a law September 16, 2009, with the approval of the Governor.
Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 249-b of the family court act, as added by chapter 626 of the laws of 2007, is amended to read as follows:

§ 249-b. Rules of court. **(a)** The chief administrator of the courts, pursuant to paragraph (e) of subdivision two of section two hundred twelve of the judiciary law, shall promulgate court rules [~~prescribing~~] **for attorneys for children. Such court rules shall:**

1. prescribe workload standards for attorneys for children, including maximum numbers of children who can be represented at any given time, in order to ensure that children receive effective assistance of counsel comporting with legal and ethical mandates, the complexity of the

proceedings affecting each client to which the law guardian is assigned, and the nature of the court appearance likely to be required for each individual client[. ~~Appointments of attorneys for children under section two hundred forty nine of this part shall be in conformity with the rules~~]; and

2. provide for the development of training programs with the input of and in consultation with the state office for the prevention of domestic violence. Such training programs must include the dynamics of domestic violence and its effect on victims and on children, and the relationship between such dynamics and the issues considered by the court, including, but not limited to, custody, visitation and child support. Such training programs along with the providers of such training must be approved by the office of court administration following consultation with and input from the state office for the prevention of domestic violence; and

3. require that all attorneys for children, including new and veteran attorneys, receive initial and ongoing training as provided for in this section.

(b) Appointments of attorneys for children under section two hundred forty-nine of this part shall be in conformity with the rules.

§ 2. Paragraph (a) of subdivision 1 of section 240 of the domestic relations law, as amended by chapter 538 of the laws of 2008, is amended to read as follows:

EXPLANATION--Matter in italics is new; matter in brackets [-] is old law to be omitted.

(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and shall enter orders for custody and support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child and subject to the provisions of subdivision one-c of this section. Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section **and state on the record how such findings, facts and circumstances factored into the direction.** If a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be deprived of custody, visitation or contact with the child, or restricted in custody, visitation or contact, based solely on that belief or the reasonable actions taken based on that belief. If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child, **and shall state on the record how such findings were factored into the determination.** An order directing the payment of child support shall contain the social security numbers of the named parties. In all cases there shall be no prima facie right to the custody of the child in either parent. Such direction shall make provision for child support out of the property of either or both parents. The court shall make its award for child support pursuant to subdivision one-b of this section. Such direction may provide for reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties. Such direction as it applies to rights of visitation with a child remanded or placed in the care of a person, official, agency or institution pursuant to article ten of the family court act, or pursuant to an instrument approved under section three hundred fifty-eight-a of the social services law, shall be enforceable pursuant to part eight of article ten of the family court act and sections three hundred fifty-eight-a and three hundred eighty-four-a of the social services law and other applicable provisions of law against any person having care and custody, or temporary care and custody, of the child. Notwithstanding any other provision of law, any written application or motion to the court for the establishment, modification or enforcement of a child support obligation for persons not in receipt of public assistance and

care must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision (c) of section fifty-two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required. The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit. Additionally, the copy of any such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party from whom child support is sought or from the party ordered to pay child support to the other party. Such direction may require the payment of a sum or sums of money either directly to the custodial parent or to third persons for goods or services furnished for such child, or for both payments to the custodial parent and to such third persons; provided, however, that unless the party seeking or receiving child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law. Every order directing the payment of support shall require that if either parent currently, or at any time in the future, has health insurance benefits available that may be extended or obtained to cover the child, such parent is required to exercise the option of additional coverage in favor of such child and execute and deliver to such person any forms, notices, documents or instruments necessary to assure timely payment of any health insurance claims for such child.

§ 3. The opening paragraph of subdivision 1 of section 530.11 of the criminal procedure law, as amended by chapter 326 of the laws of 2008, is amended to read as follows:

The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, **sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law,** stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree or an attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding. Notwithstanding a complainant's election to proceed in

family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. For purposes of this section, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this section, "members of the same family or household" with respect to a proceeding in the criminal courts shall mean the following:

§ 4. The opening paragraph of subdivision 1 of section 812 of the family court act, as amended by chapter 326 of the laws of 2008, is amended to read as follows:

The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, **sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law,** stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree or an attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. For purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this article, "members of the same family or household" shall mean the following:

§ 5. Paragraph (a) of subdivision 1 of section 821 of the family court act, as amended by chapter 635 of the laws of 1999, is amended to read as follows:

(a) An allegation that the respondent assaulted or attempted to assault his or her spouse, or former spouse, parent, child or other member of the same family or household or engaged in disorderly conduct, harassment, **sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law,** stalking, **criminal mischief,** menacing or reckless endangerment toward any such person; **[~~and~~]**

§ 6. Subdivision 5 of section 140.10 of the criminal procedure law, as amended by chapter 626 of the laws of 1997, is amended to read as follows:

5. Upon investigating a report of a crime or offense between members of the same family or household as such terms are defined in section 530.11 of this chapter and section eight hundred twelve of the family court act, a law enforcement officer shall prepare and file a written report of the incident, on a form promulgated pursuant to section eight hundred thirty-seven of the executive law, including statements made by the victim and by any witnesses, and make any additional reports required by local law enforcement policy or regulations. Such report shall be prepared and filed, whether or not an arrest is made as a result of the officers' investigation, and shall be retained by the law enforcement agency for a period of not less than four years. Where the reported incident involved an offense committed against a person who is

sixty-five years of age or older a copy of the report required by this subdivision shall be sent to the New York state committee for the coordination of police services to elderly persons established pursuant to section eight hundred forty-four-b of the executive law. **Where the reported incident involved an offense committed by an individual known by the law enforcement officer to be under probation or parole supervision, he or she shall transmit a copy of the report as soon as practicable to the supervising probation department or the division of parole.**

§ 7. Paragraph (a) of subdivision 1 of section 160.55 of the criminal procedure law, as amended by chapter 169 of the laws of 1994, is amended to read as follows:

(a) every photograph of such person and photographic plate or proof, and all palmprints and fingerprints taken or made of such person pursuant to the provisions of this article in regard to the action or proceeding terminated, and all duplicates and copies thereof, except a digital fingerprint image where authorized pursuant to paragraph (e) of this subdivision, **except for the palmprints and fingerprints concerning a disposition of harassment in the second degree as defined in section 240.26 of the penal law, committed against a member of the same family or household as the defendant, as defined in subdivision one of section 530.11 of this chapter, and determined pursuant to subdivision eight-a of section 170.10 of this title,** shall forthwith be, at the discretion of the recipient agency, either destroyed or returned to such person, or to the attorney who represented such person at the time of the termination of the action or proceeding, at the address given by such person or attorney during the action or proceeding, by the division of criminal justice services and by any police department or law enforcement agency having any such photograph, photographic plate or proof, palmprints or fingerprints in its possession or under its control;

§ 8. Paragraph (d) of subdivision 1 of section 160.55 of the criminal procedure law, as amended by chapter 169 of the laws of 1994, is amended to read as follows:

(d) the records referred to in paragraph (c) of this subdivision shall be made available to the person accused or to such person's designated agent, and shall be made available to (i) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chapter, or (ii) a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it, or (iii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the accused has made application for such a license, or (iv) the New York state division of parole when the accused is under parole supervision as a result of conditional release or parole release granted by the New York state board of parole and the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision, or (v) the probation department responsible for supervision of the accused when the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision, or (vi) **a police agency, probation department, sheriff's office, district attorney's office, department of correction of any municipality and parole department, for law enforcement purposes, upon arrest in instances in which the individual stands convicted of harassment in the second degree, as defined in section 240.26 of the penal law, committed against a member of the same family or household as the defendant, as defined in**

subdivision one of section 530.11 of this chapter, and determined pursuant to subdivision eight-a of section 170.10 of this title; and

§ 9. Subdivision 4 of section 170.10 of the criminal procedure law is amended by adding a new paragraph (e) to read as follows:

(e) Where an information, a simplified information, a prosecutor's information, a misdemeanor complaint, a felony complaint or an indictment charges harassment in the second degree, as defined in section 240.26 of the penal law, if there is a judgment of conviction for such offense and such offense is determined to have been committed against a member of the same family or household as the defendant, as defined in subdivision one of section 530.11 of this chapter, the record of such conviction shall be accessible for law enforcement purposes and not sealed, as specified in paragraph (a) and subparagraph (vi) of paragraph (d) of subdivision one of section 160.55 of this title; and

§ 10. Subdivision 2 of section 160.55 of the criminal procedure law, as added by chapter 142 of the laws of 1991, is amended to read as follows:

2. A report of the termination of the action or proceeding by conviction of a traffic violation or a violation other than a violation of loitering as described in paragraph (d) or (e) of subdivision one of section 160.10 of this [~~chapter~~] title or the violation of operating a motor vehicle while ability impaired as described in subdivision one of section eleven hundred ninety-two of the vehicle and traffic law, shall be sufficient notice of sealing to the commissioner of the division of criminal justice services unless the report also indicates that the court directed that the record not be sealed in the interests of justice. Where the court has determined pursuant to subdivision one of this section that sealing is not in the interests of justice, the clerk of the court shall include notification of that determination in any report to such division of the disposition of the action or proceeding. When the defendant has been found guilty of a violation of harassment in the second degree and it was determined pursuant to subdivision eight-a of section 170.10 of this title that such violation was committed against a member of the same family or household as the defendant, the clerk of the court shall include notification of that determination in any report to such division of the disposition of the action or proceeding for purposes of paragraph (a) and subparagraph (vi) of paragraph (d) of subdivision one of this section.

§ 11. Section 170.10 of the criminal procedure law is amended by adding a new subdivision 8-a to read as follows:

8-a. (a) Where an information, a simplified information, a prosecutor's information, a misdemeanor complaint, a felony complaint or an indictment charges harassment in the second degree as defined in section 240.26 of the penal law, the people may serve upon the defendant and file with the court a notice alleging that such offense was committed against a member of the same family or household as the defendant, as defined in subdivision one of section 530.11 of this chapter. Such notice must be served within fifteen days after arraignment on an information, a simplified information, a prosecutor's information, a misdemeanor complaint, a felony complaint or an indictment for such charge and before trial. Such notice must include the name of the person alleged to be a member of the same family or household as the defendant and specify the specific family or household relationship as defined in subdivision one of section 530.11 of this chapter.

(b) If a defendant, charged with harassment in the second degree as defined in section 240.26 of the penal law stipulates, or admits in the

course of a plea disposition, that the person against whom the charged offense is alleged to have been committed is a member of the same family or household as the defendant, as defined in subdivision one of section 530.11 of this chapter, such allegation shall be deemed established for purposes of paragraph (a) and subparagraph (vi) of paragraph (d) of subdivision one of section 160.55 of this title. If the defendant denies such allegation, the people may, by proof beyond a reasonable doubt, prove as part of their case that the alleged victim of such offense was a member of the same family or household as the defendant. In such circumstances, the trier of fact shall make its determination with respect to such allegation orally on the record or in writing.

§ 12. The opening paragraph of subdivision 5 of section 530.12 of the criminal procedure law, as amended by chapter 215 of the laws of 2006, is amended to read as follows:

Upon conviction of any crime or violation between spouses, parent and child, or between members of the same family or household as defined in subdivision one of section 530.11 of this article, the court may in addition to any other disposition, including a conditional discharge or youthful offender adjudication, enter an order of protection. Where a temporary order of protection was issued, the court shall state on the record the reasons for issuing or not issuing an order of protection. The duration of such an order shall be fixed by the court and[~~,~~]: (A) in the case of a felony conviction, shall not exceed the greater of: (i) eight years from the date of such conviction, or (ii) eight years from the date of the expiration of the maximum term of an indeterminate or the term of a determinate sentence of imprisonment actually imposed; or (B) in the case of a conviction for a class A misdemeanor, shall not exceed the greater of: (i) five years from the date of such conviction, or (ii) five years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed; or (C) in the case of a conviction for any other offense, shall not exceed the greater of: (i) two years from the date of conviction, or (ii) two years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed. For purposes of determining the duration of an order of protection entered pursuant to this subdivision, a conviction shall be deemed to include a conviction that has been replaced by a youthful offender adjudication. In addition to any other conditions, such an order may require the defendant:

§ 13. The opening paragraph of subdivision 4 of section 530.13 of the criminal procedure law, as amended by chapter 215 of the laws of 2006, is amended to read as follows:

Upon conviction of any offense, where the court has not issued an order of protection pursuant to section 530.12 of this article, the court may, in addition to any other disposition, including a conditional discharge or youthful offender adjudication, enter an order of protection. Where a temporary order of protection was issued, the court shall state on the record the reasons for issuing or not issuing an order of protection. The duration of such an order shall be fixed by the court and[~~,~~]: (A) in the case of a felony conviction, shall not exceed the greater of: (i) eight years from the date of such conviction, or (ii) eight years from the date of the expiration of the maximum term of an indeterminate or the term of a determinate sentence of imprisonment actually imposed; or (B) in the case of a conviction for a class A misdemeanor, shall not exceed the greater of: (i) five years from the date of such conviction, or (ii) five years from the date of the expiration of the maximum term of a definite or intermittent term actually

imposed; or (C) in the case of a conviction for any other offense, shall not exceed the greater of: (i) two years from the date of conviction, or (ii) two years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed. For purposes of determining the duration of an order of protection entered pursuant to this subdivision, a conviction shall be deemed to include a conviction that has been replaced by a youthful offender adjudication. In addition to any other conditions such an order may require that the defendant:

§ 14. Consistent with available resources, the division of human rights, in conjunction with the office for the prevention of domestic violence, shall develop training programs where necessary to implement subdivision 20 of section 296 of the executive law, as added by a chapter of the laws of 2009.

§ 15. This act shall take effect on the ninetieth day after it shall have become a law; provided, however, sections seven, eight and ten of this act shall take effect on the one hundred twentieth day after it shall have become a law and shall apply to convictions entered on or after such effective date; provided, however, that sections nine and eleven of this act shall take effect on the thirtieth day after it shall have become a law; and provided, further, that the amendments to the opening paragraph of subdivision 5 of section 530.12 and the opening paragraph of subdivision 4 of section 530.13 of the criminal procedure law made by sections twelve and thirteen of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith.

The Legislature of the STATE OF NEW YORK ss:

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

MALCOLM A. SMITH
Temporary President of the Senate

SHELDON SILVER
Speaker of the Assembly