



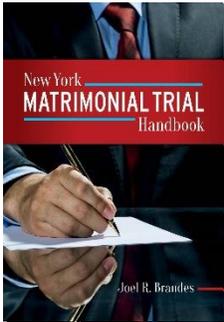
## Bits and Bytes™

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Welcome to **Bits and Bytes,™** our electronic newsletter published for the New York divorce and family law bench and bar, by **Joel R. Brandes Consulting Services, Inc.**

[Joel R. Brandes Consulting Services, Inc.](#) is a creative writing and publishing company. We provide expert matrimonial and family law content for client newsletters, law firm websites and attorney and law firm blogs. We also assist lawyers with drafting articles for legal journals and preparing presentations and materials for lectures and seminars.



The [New York Matrimonial Trial Handbook](#) by **Joel R. Brandes** is available in Bookstores and online in the print edition [at the Bookbaby Bookstore, Amazon Barnes & Noble, Goodreads and other online book sellers.](#) It is available [in Kindle ebook editions](#) and [epub ebook editions](#) in our [website](#) bookstore.

The **New York Matrimonial Trial Handbook** was reviewed by Bernard Dworkin, Esq., in the New York Law Journal on December 21, 2017. His review is reprinted on our website at <http://www.nysdivorce.com> with the permission of the New York Law Journal.

### [Rules of Professional Conduct amended effective June 1, 2018](#)

The Judicial Departments of the Appellate Division of the New York State Supreme Court, amended Title 22 of the Official Compilation of Code, Rules, and Regulations of the State of New York Part 1200 (Rules of Professional Conduct, Rule 8.4[g]) and Part 1210 (Statement of Client's Rights) to prohibit discrimination in the practice of law on the basis of, gender identity. or gender expression, as follows:

#### Part 1200. Attorney Rules of Professional Conduct

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##### Rule 8.4. Misconduct

A lawyer or law firm shall not:

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(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis. of age, race, creed, color, national origin, sex, disability, marital status, sexual orientation, gender identity. or gender expression. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful

discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

**Part 1210. Statement of Client's Rights**  
**§ 1210.1. Posting**

Every attorney with an office located in the State of New York shall insure that there is posted in that office, in a manner visible to clients of the attorney, a statement of client's rights in the form set forth below. Attorneys in offices that provide legal services without fee may delete from the statement those provisions dealing with fees. The statement shall contain the following:

**STATEMENT OF CLIENT'S RIGHTS ...**

10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, gender identity, gender expression, age, national origin, or disability.

**Statewide Practice Rules of the Appellate Division Amended and Local Rules Adopted**

22 NYCRR Part 1250, Statewide [Practice Rules of the Appellate Division](#) were adopted by the four Judicial Departments of the Appellate Division on December 12, 2017 and revised by joint order on June 29, 2018, to take effect on September 17, 2018. See: [Joint Order of the Departments of the New York State Supreme Court, Appellate Division](#)

22 NYCRR Part 1250 applies to all matters that are commenced in the Appellate Division, or in which a notice of appeal to the Appellate Division is filed, on or after September 17, 2018. Unless otherwise ordered by the Court upon a showing that application of part 1250 to the matter would result in substantial prejudice to a party or would be manifestly unjust or impracticable under the circumstances, part 1250 applies to each matter pending in the Appellate Division on September 17, 2018.

Due to the differences inherent in practice among the four departments of the Appellate Division, each department has also adopted a set of local rules.

The Appellate Division, First Judicial Department rescinded 22 NYCRR Part 600 and adopted a [new 22 NYCRR Part 600](#) to supplement the statewide Practice Rules of the Appellate Division, effective on September 17, 2018.

The Appellate Division, Second Judicial Department rescinded 22 NYCRR Part 670 and adopted a new [22 NYCRR Part 670](#), effective September 17, 2018.

The Appellate Division, Third Department rescinded 22 NYCRR Part 850 and adopted a new [22 NYCRR Part 850](#) effective September 17, 2018.

The Appellate Division, Fourth Department repealed in its entirety 22 NYCRR Part 1000, governing practice before the Court and enacted a new 22 NYCRR Part 1000, effective September 17, 2018.

### **Appellate Division, Second Department**

#### **Mother Did Not Consent to Reference Merely by Participating in The Proceeding Without Requesting Judge to Hear Case**

In *Matter of Rose v Simon*, --- N.Y.S.3d ----, 2018 WL 3131427, 2018 N.Y. Slip Op. 04736 (2d Dept., 2018) the father filed a petition for sole physical custody of the child. During the pendency of the custody proceeding, the mother filed a family offense petition against the father. The matters were heard before a Court Attorney Referee, who, after a consolidated hearing, granted the father's petition and dismissed the mother's family offense petition. The Appellate Division observed that a referee derives authority from an order of reference by the court (see CPLR 4311, 4317). The order of reference did not authorize the Court Attorney Referee to hear and report or to hear and determine a contested family offense petition. The Court Attorney Referee therefore lacked jurisdiction to dismiss the mother's family offense petition.

With respect to the determination of custody, the order of reference recited that, upon the parties' stipulation, a court attorney referee is authorized to hear and determine the parties' rights to custody of and visitation with the child, including the determination of motions and temporary orders of custody. A review of the record revealed that the parties had not stipulated to the reference in the manner prescribed by CPLR 2104, and, absent such stipulation, the Court Attorney Referee had the power only to hear and report her findings. It further found that the mother did not consent to the reference merely by participating in the proceeding without expressing her desire to have the matter tried before a judge. The order of reference was therefore deemed an order to hear and report. Thus, the Court Attorney Referee had no jurisdiction to determine, but only to hear and report, with respect to the parties' respective rights of custody and visitation. The portion of the order, which determined custody and visitation, was deemed a report (see CPLR 4320[b]), and the custody matter was remitted for further proceedings pursuant to CPLR 4403 before a judge of the Family Court.

#### **Attorney Sanctioned for Submissions Filled with Half Truths, Distortions of Facts, Facts Taken Out of Context, And Omissions of Material Facts and Relevant Decisions**

In *Matter of Ermini v Vittori*, --- N.Y.S.3d ----, 2018 WL 3295635, 2018 N.Y. Slip Op. 05038 (2d Dept., 2018) after Family Court, issued a final order of protection in favor of the mother and the children and against the father, the attorney for the children moved pursuant to Family Court Act § 842 to extend that order of protection. The father cross-moved, in effect, to enforce certain purported orders of an Italian Court pertaining to visitation, and to remove the attorney for the children. The attorney for the children

cross-moved, inter alia, pursuant to 22 NYCRR 130–1.1 for an award of an attorney’s fee. The mother’s attorney made an application pursuant to 22 NYCRR 130–1.1 for an award of an attorney’s fee. Family Court, inter alia, granted the cross motion of the attorney for the children, and the separate application of the mother’s attorney, pursuant to 22 NYCRR 130–1.1 for an award of attorneys’ fees to the extent of directing the father’s attorney, to pay the sum of \$2,000 to each attorney. On the issue of attorney’s fees pursuant to 22 NYCRR 130–1.1, the court concluded, in part, that the father’s “submissions are filled with half truths, distortions of facts, facts taken out of context, and most distressingly, omissions of material facts and relevant decisions” and that most of the father’s “submissions were an attempt to revise and re-litigate facts that were already decided.” The father and his attorney appealed from those portions of the order. The Appellate Division affirmed.

### **Appellate Division, Third Department**

**Procedures mandated by FCA § 1017 must be strictly followed. Placement order must be set aside if a failure to comply with statute prejudiced either the rights of a relative to seek placement or the child’s right to be placed with a suitable relative**

In *Matter of Richard HH v Saratoga County of Social Services*, --- N.Y.S.3d ----, 2018 WL 3276162, 2018 N.Y. Slip Op. 04990 2018 WL 3276162 (3d Dept., 2018) in September 2014, the children were removed from the mother’s care and placed in the custody of respondent (DSS) after neglect petitions were filed against the mother and the children’s father. In February 2015, Family Court issued an order finding the children to be neglected and continuing their placement in the custody of DSS. In October 2015, petitioner, the children’s maternal uncle, filed two petitions seeking custody of the children and for permission to intervene in the neglect proceedings pursuant to Family Ct. Act § 1035 (f). Family Court’s denial of the uncle’s motion to intervene was reversed on appeal and upon remittal, the uncle was joined and two permanency hearings were conducted with respect to the younger child. Following a trial on the uncle’s custody petition and a Lincoln hearing, Family Court dismissed the uncle’s petition. The Appellate Division reversed.

The Appellate Division held that the uncle was prejudiced by DSS’s failure to comply with Family Ct. Act § 1017, which provides, as relevant here, that when a court determines that a child must be removed from his or her home based on neglect, the court shall direct the local commissioner of social services to conduct an immediate investigation to locate relatives who may be a placement resource and to provide any such individuals with written notice of the pendency of the neglect proceeding and the opportunity to seek custody of the child (see Family Ct. Act § 1017[1][a] ). After the investigation is completed, the court must determine whether there is a relative with whom the child may appropriately reside (see Family Ct. Act § 1017[1][c]). If a suitable relative exists, the court is required to “either place the child with that relative or with the local commissioner of social services with directions to allow the child to reside with that relative pending his or her approval as a foster parent,” and, notably, only if no suitable

relative can be located should Family Court consider another placement. The statute, in short, is intended to guard not only the rights of relatives of a child who is removed from his or her home, but also to protect the rights and interests of children to be placed with their relatives". It accomplishes this purpose by requiring that the initial placement of children who must be removed from their homes be made, whenever possible, with a relative, thereby allowing them to form or maintain bonds with family members rather than with foster parents. A placement order must be set aside if a failure to comply with [Family Ct. Act § 1017] prejudiced either the rights of a relative to seek placement or the child's right to be placed with a suitable relative.

The Appellate Division found that the uncle testified that he received a single telephone call from DSS personnel approximately four months after the children were placed in DSS custody asking whether he would be a custodial resource if the mother's parental rights were terminated, and that he responded affirmatively. He stated that DSS did not contact him again until after he filed the instant custody petition—more than one year after the children were first removed from the mother's home—when it sent him the New York State Handbook for Relatives Raising Children. In its appellate brief, DSS admitted that it did not timely provide the uncle with the required information but criticized him for not sooner seeking custody. Notably, the statute did not impose a duty on the uncle to have affirmatively sought placement based solely upon DSS's inquiry regarding his willingness to be a custodial resource if the mother's parental rights were terminated and before he was advised of the procedures by which he could do so. Rather, the statute imposed a duty on DSS to "immediately" conduct an investigation to locate relatives and provide the required information, in writing (Family Ct. Act § 1017[1][a]).

The Appellate Division found that the failure of Family Court and DSS to strictly follow the statutory mandate to seek initial placement with a relative in this case created the very harm the statute was intended to prevent—long-term placement in foster care rather than with a suitable relative. Not only did DSS fail to identify the uncle as a custodial resource and to provide him with the mandated information, it ignored his initial expression of willingness to serve as a custodial resource for the child. Moreover, when the uncle filed his custody petition, he was treated as an unwelcome interloper by both DSS and Family Court, which erroneously denied his motion to intervene in the Family Ct Act article 10 proceeding and contemplated staying an investigation regarding the uncle's suitability as a custodial resource that was being conducted in Texas pursuant to the Interstate Compact on the Placement of Children (see Social Services Law § 374—a [hereinafter ICPC]). Family Court's conclusion that "[h]ad the [u]ncle requested that [the child] be placed with him in September, 2014, when she was initially placed in foster care, DSS may very well have placed [the child] with the [u]ncle" ignored the fact that DSS failed to fulfill its statutory duty to inform the uncle of the methods by which he could seek placement of the child. These failures were especially egregious given that Family Court and DSS now agreed that the uncle and his wife were able to provide a good home for the child. The procedures mandated by Family Ct. Act § 1017 are to be strictly followed.

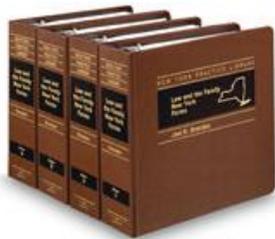
**Joel R. Brandes, the President of Joel R. Brandes Consulting Services, Inc. is the author of Law and The Family New York, 2d (9 volumes) (Thomson Reuters Westlaw), and Law and the Family New York Forms (5 volumes) (Thomson Reuters Westlaw).**

**These sets can be purchased directly from Thomson Reuters Westlaw, 1-800-544-3008. See [legalsolutions.thomsonreuters.com](http://legalsolutions.thomsonreuters.com).**



**Law and the Family New York, 2d (New York Practice Library, 9 Volumes) By Joel R. Brandes. (Updated October 2017) by Joel R. Brandes, Bari Brandes Corbin and Evan B. Brandes).**

**Description:** This set is both a treatise and a procedural guide. The usual family law issues are covered such as Formation of the Family Unit, Divorce, Judicial Separation, and Annulments. It presents such vital practical considerations as counsel fees to prosecute or defend an appeal. The text analyzes statutes, discusses cases, and includes authors' notes which present hints, practice pointers, and pitfalls to avoid. It also features a complete discussion of appellate practice and offers step-by-step guidance on how to handle an appeal in each of the state's judicial departments. Research aids annotate the text.



**Law and the Family New York Forms, 2d (New York Practice Library, 5 Volumes) By Joel R. Brandes. (Updated August 2017) by Bari Brandes Corbin and Evan B. Brandes)**

**Description.** This set provides you with practitioner-tested forms for a wide variety of family law matters. It includes forms relating to the creation of the marriage relationship, the attorney-client relationship, matrimonial agreements, and matrimonial litigation. Specific topics covered include antenuptial agreements, separation agreements, modification agreements, and matters relating to infants and incompetents, and service of process.

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