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LETTERS

To The Editor

Creativity Is Not Incivility

As a matrimonial lawyer, I am a huge believer that something must be done to obviate the "climate of incivility" in the courtroom. However, Judge Bruce Balter and Michael J. Simone's article (Aug. 25), "How Judges Can Enforce Civility By Punishing Frivolous Conduct" (*NYLJ*, page 1) is certainly not the answer. Not only is the line in the sand that separates frivolity from creative lawyering nearly indiscernible, it is the very reason why there are so few reported decisions on that issue. Today's allegedly frivolous argument is not so infrequently tomorrow's laws.

Moreover, creative lawyering is to be encouraged. For example, who would have thought that a non-biological parent could pursue custody of that child on equitable estoppel grounds? Yet, in *Maby S. v. Joseph H.* (*NYLJ*, Aug. 20), the Second Department held precisely that. That argument, before a judge with sanctions on his or her mind, might have cost counsel thousands in such a punitive setting, instead of a father an opportunity to obtain custody.

Finally, while sanctions may be appropriate as a penalty for the attorney who appears habitually late for court, the judiciary should confine its use of sanctions to punish the legitimate wrongdoer, not an attorney "asked to try a case when the attorney familiar with the file has a scheduling conflict." A better rule would be for the Legislature to allow for an award of counsel fees in all cases, based upon the totality of circumstances, as is authorized in matrimonials under §237 of the Domestic Relations Law.

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