

NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
THE OTESAGA, COOPERSTOWN, NEW YORK
JUNE 27, 1992

PRESENT: Members Adler; Ange; Aronson; Ayers; Baker; Baldwin; Banner; Barnett; Barnosky; Bavoso; Berman; Birmingham; Besunder; Blyth; Bracht; Bracken; Brand; Brenner; Buzard; Clark; Clements; Coffey; Cohen; Cohn; Collier; Cometa; Connolly; Corcoran; Cyrulnik; Daly; Deptula; Devine; Dowling; Egelfeld; Eiber; Eppler; Farrell; Feerick; Feigenbaum; Ferguson; Field; Fink; Forger; Friedman; Frye; Gates; Gershon; K. Gibbons; W. Gibbons; Goldblum; Goldstein; J. Gross; M. Gross; Haig; Halpern; Hart; Haskel; Hassett; Heming; Hesterberg; Jacoby; Jaffe; H. Jones; M. Jones; Kahler; Kamins; Karan; Kelly; Kennedy; Kenney; Lagarenne; Lashley; Lee; Levin; Lindenauer; Lubow; Mackey; Madigan; Mahoney; Markuson; Martusewicz; McCarthy; McDonald; McDowell; Meyer; Meyers; Miklitsch; E. Miller; M. Miller; Minardo; Moore; Moreland; Morris; A. Murray; K. Murray; O'Brien; Offermann; O'Keefe; Okin; Ostertag; Pearl; Peckham; Pfeifer; Pisani; Plotkin; Pool; Pruzansky; Rachlin; Reich; Reilly; Reizes; Reiniger; Richardson; Ritholz; Robfogel; Robinson; Roper; Ruslander; Rybak; Sachs; Santemma; Schaab; Scheindlin; Schumacher; Seward; Simberkoff; Sklarin; Spellman; Standard; Steflik; Stern; Stevens; Sunshine; Swartwood; Tharp; Tomaselli; Triebwasser; Troeger; Vigdor; Vitacco; Wales; C. Walker; J. Walsh; Weiner; R. White; Williams; Windstein; Witmer; Wolman; Wright-Sirmans; Yanas; Zalayet.

1. Introduction of new members. The new members of the House of Delegates who had assumed office on June 1 were introduced and welcomed by Mr. Murray. The following is a list of the new members of the House: Burnside E. Anderson, III; James B. Ayers; Peter A. Baum; William D. Bavoso; Henry T. Berger; Lester M. Bliwise; Frank Brenner; Neil D. Breslin; A. Vincent Buzard; Richard Cashman; Ira J. Cohen; William H. Collier, III; Robert W. Corcoran; Miriam Cyrulnik; George S. Deptula; W. Robert Devine; Joseph DiFede; Roscoe A. Eisenhauer, Jr.; Susan Beth Farmer; Joseph H. Farrell; John D. Feerick; Dudley M. Ferguson; G. Gerald Fiesinger, Jr.; Kenneth T. Gibbons; William J. Gibbons; Barbara E. Handschu; Barbara S. Jones; Matthew J. Jones; John L. Juliano; Camille T. Kahler; Lynn Mary Kelly; Edward Labaton; Lawrence E. Lagarenne; William F. Levine; Dianne S. Lovejoy; George G. Mackey; Vincent A. Malito; Hon. George D. Marlo; Kim H. Martusewicz; Joseph V. McCarthy; Gerald T. McDonald; Victor M. Meyers; Catherine M. Miklitsch; Michael Miller; Thomas H. Moreland; Kay C. Murray; Francis J. Offermann, Jr.; Terrence M. Parker; James M. Peaslee; Lawrence B. Pedowitz; Susan C. Picotte; Eve S. Plotkin; Paul E. Pool; Rory J. Radding; Jules Ritholz; Edward T. Robinson, III; Robert K. Ruslander; Joel H. Sachs; Arnold J. Schaab; Shira A. Scheindlin; Perry Sklarin; Alden B. Smith; Kenneth G. Standard; Joseph J. Steflik, Jr.; John A. Stevens; Jeffrey S. Sunshine; Hon. Charles B. Swartwood; Lorraine Power Tharp; Patrick J. Tomaselli; Merle M. Troeger; Guy R. Vitacco; H. Elliot Wales; Cora T. Walker; Richard Weinberger; Hon. Leonard A. Weiss; Kenneth A. Windstein; Paul L. Wollman; George J. Zurlo.

2. Approval of minutes of April 4, 1992 meeting. The minutes were approved as distributed.

3. Report of Treasurer. Mr. Gershon reviewed the audited balance sheet for the year ending December 31, 1991 and indicated that the Association had completed the year in sound fiscal condition. He then summarized the Treasurer's report for the period January 1 to May 31, 1991. He indicated that the current economic climate had caused some increase among those who had not renewed their membership for the current year, as well as a rise in the usage of the affordable dues program. He observed that the Membership Department was expanding its efforts to renew the lapsed members and to enhance the recruitment of newly-admitted attorneys. He noted that the officers, Finance Committee, section and committee chairs, and staff were cooperating to maintain overall expenses at a level below that for the previous year. Mr. Gershon concluded that the Association remained in sound financial condition as it neared the mid-point of the current fiscal year. The report was received with thanks.

4. Report and recommendations of Committee on Professional Ethics concerning proposed amendments to the Code of Judicial Conduct. Marjorie E. Gross, Chair of the Subcommittee on the Code of Judicial Conduct of the Committee on Professional Ethics, summarized that committee's study of the Code of Judicial Conduct in cooperation with other interested sections and committees of the Association. She reviewed the major recommendations for modifications to the New York version of the Code of Judicial Conduct developed by the committee following its evaluation of amendments made by the American Bar Association to its Model Code of Judicial Conduct in 1990. She also discussed the interrelationship between the Code of Judicial Conduct and the Rules of the Chief Administrator of the Courts, and the committee's recommendation that there should be a single set of standards to govern judicial conduct in New York. Ms. Gross then reviewed those issues embodied in the proposed amendments which could generate disagreement, such as membership in private clubs, comment on pending proceedings, disqualification, ex parte communications, and the announcement of political views on judicial issues during election campaigns. She indicated that the committee's report was being widely circulated among Association sections and committees, local bar associations, and other interested groups to allow for comment in advance of the House of Delegates being asked to take final action regarding the proposed amendments at the November 1992 meeting. After discussion, the following procedural resolution was adopted on motion of the House of Delegates:

RESOLVED, that the House of Delegates hereby adopts the following procedures to govern consideration at the November 7, 1992 meeting of the report of the Committee on Professional Ethics ("Committee") and amendments proposed to the Code of Judicial Conduct ("CJC"):

1. Any amendments to the Committee proposals or to the CJC must be submitted in writing to the Secretary of the Association at Bar Headquarters on or before October 1, 1992 and be in the style used by the Committee with deletions denoted by strikeovers and new material by underscoring, and be accompanied by a brief explanation of the

proposed change. All amendments shall be distributed to the members of the House prior to the November 7 meeting.

2. At the November 7 meeting, consideration of the Committee's proposals and other amendments shall be as follows:

a. The Committee will be given the opportunity to provide a brief overview of its report and recommendations.

b. The Committee will make a presentation of each section of the CJC in the following order: Preamble, Terminology, Canon 1 through Canon 5, and Application. Following the Committee's presentation of each section, amendments to the Committee's proposals will be considered seriatim.

c. All those wishing to speak with regard to a particular amendment may do so only once for no more than three minutes, except the sponsor of any amendment may speak a second time for two minutes, and a representative of the Committee will have two minutes to close.

d. Procedural motions will be considered out of order until debate on all substantive amendments has been concluded.

e. A final vote will be taken to approve the CJC, as amended, for transmittal to the Chief Judge and the Chief Administrator of the Courts.

5. Report and recommendations of Commercial and Federal Litigation Section regarding the proposed changes in the federal rules governing discovery. Bernice K. Leber, Chair Emeritus of the Committee on Discovery of the Commercial and Federal Litigation Section, summarized the report of the section presenting alternatives to changes in the federal rules governing discovery as proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. She outlined the abuses which currently exist in the federal discovery process, and the shortcomings perceived in the proposals by the Judicial Conference to remedy those defects. She then outlined the nature of the revisions developed by the Commercial and Federal Litigation Section to narrow the scope of discovery, focus discovery requests on admissible evidence, add a cost-benefit test to Rule 26(b)(1) of the Federal Rules of Civil Procedure, and implement the use of pre-discovery conferences to facilitate joint planning by counsel of the course of discovery before formal requests are made. Following discussion, a motion was adopted approving the report and recommendations as proposed by the Commercial and Federal Litigation Section.

6. Presentation of Root/Stimson Award, Public Service Awards and Award of Merit. Peter H. Levy, Chair of the Committee on Lawyers and the Community, presented the Root/Stimson Award to Victor Marrero of New York City for outstanding service to the community.

Mr. Levy then presented the Public Service Award to the Nassau County Coalition Against Domestic Violence, Inc. for its significant contribution to improving the administration of justice.

Robert J. Pearl, Vice President from the Seventh District, presented the Award of Merit for larger bar associations to the Monroe County Bar Association, and M. Catherine Richardson, Vice-President from the Fifth District, presented the Award of Merit for smaller bar associations to the Oneida County Bar Association in recognition of their outstanding service to the public and the profession accomplished through programs administered at the local level.

7. Report and recommendations of Special Committee on Biotechnology and the Law. Grace Marie Ange, a present member and former Chair of the Committee on Biotechnology and the Law, summarized the committee's report addressing the legal significance of gestation in assisted reproduction, including issues related to *in vitro* fertilization, artificial insemination and gestational surrogacy. She described the complex and difficult legal issues which advancements in medical technology have generated, and the recommendations proposed by the committee to deal with these questions, including amendments to Section 73 of the Domestic Relations Law to clarify parental rights in surrogacy situations. Discussion then ensued regarding the recommendations, during which concerns were raised regarding possible ambiguities contained in the proposed Domestic Relations Law amendment, and it was suggested that the statute warranted further study and refinement by the committee. A motion was adopted accepting the report with the exception of the proposed Domestic Relations Law amendment which was referred back to the Committee on Biotechnology and the Law for further review based on the concerns raised by the House.

8. Report of President. Mr. Bracken reported the following matters:

a) The Governor had recently filled 13 of the 36 statewide judicial vacancies, and the Association would continue urging that the balance of the vacancies be filled to alleviate case backlogs in the various courts.

b) The annual report for 1991-1992 Association year had been distributed, and it reflected the diverse activities and initiatives of the NYSBA for the benefit of the membership, the legal system and the public.

c) Following the release of the report of the Governor's Task Force on Judicial Diversity, which concluded that women and minorities were underrepresented among the judiciary, he had requested that Action Unit No. 4, as well as other interested sections and committees review that report and related court decisions in conjunction with the Association's longstanding position in support of a merit selection process for judges. Mr. Bracken indicated that the composition of Action Unit No. 4 had been expanded to deal with this topic, as the conclusions reached by the Governor's Task Force, coupled with the increasing cost of judicial election campaigns, could provide sufficient impetus for the adoption of a merit selection system in New York. He advised that after a preliminary report given by the action unit on the previous day, the following resolution had been adopted by the Executive Committee:

WHEREAS, the United States Supreme Court in *Chisom v Roemer* recently held that judicial elections are subject to the federal Voting Rights Act of 1965, and

WHEREAS, the Governor's Task Force on Judicial Diversity has found in its 1992 report that women and minorities are seriously underrepresented on the Bench, and

WHEREAS, in 1979 the New York State Bar Association endorsed merit selection as the most effective method for ensuring the selection of competent jurists, it is hereby

RESOLVED, that the Executive Committee of the New York State Bar Association reaffirms support and endorsement of merit selection of judges, and it is further

RESOLVED, that Action Unit No. 4 is encouraged and directed to continue its study and development of a merit selection plan which will respond appropriately to the decision in *Chisom v Roemer* and the findings of the Governor's Task Force on Judicial Diversity, recognizing that a goal of any merit selection system is achieving and sustaining diversity on the Bench, since diversity not only enhances the quality of the judiciary but also fosters the respect of the entire community when the judiciary is reflective of the diverse elements of that community.

Mr. Bracken stated that the House would be kept apprised of future developments in this area.

d) Despite the settlement earlier this year of the judiciary budget litigation, fiscal problems still remain, as decisions regarding lag payroll and pay parity suits will add to the deficit which the court system is carrying forward from the previous year. He indicated that after studying the court system problems earlier this year, the Special Planning Committee chaired by Whitney North Seymour, Jr. had recommended coordinated efforts through a citizens commission to secure court system improvements, such as trial court merger, improved use of technology, simplification of discovery, and reduction of delays in civil cases, all of which had been endorsed previously by the Association. Mr. Bracken noted that after reviewing this proposed course of action, the Executive Committee had determined that a management study of the court system would be a preferable initial step to establish a basis on which to advocate necessary changes. He indicated that the Executive Committee was continuing to consider of this matter, including the designation of a special committee to investigate the feasibility, scope and expense of a possible court system management study. He indicated the House would be kept advised of developments in this area.

e) As a cost savings measure, this year's judiciary budget legislation allows the electronic recording of proceedings in Surrogate's Court and the Court of Claims in lieu of the traditional stenographic method. He indicated that interested Association sections and committees, primarily the Trusts and Estates Law Section, were monitoring

the new procedure so that the Association would be in a position to recommend any changes or improvements which were deemed warranted.

f) While courthouse facilities improvements are progressing satisfactorily in many areas of the state, delays were being encountered in New York City, where the city administration was seeking to defer major elements of its courthouse construction and renovation plan due to fiscal problems. Mr. Bracken indicated that the State Court Facilities Capital Review Board had considered and rejected the city's deferral request. He advised that the Office of Court Administration was seeking to negotiate a satisfactory resolution of the problem with the New York City authorities, and that the Association's Special Committee to Improve Courthouse Facilities would continue to monitor the situation.

g) On May 21, 1992, he and Mr. Ostertag had met with representatives of the Office of Court Administration to discuss matters of mutual interest including the judiciary budget, court system management studies, the electronic recording of court proceedings, courthouse facilities, and the Association's continuing opposition to increases in court filing fees as a means of alleviating the state's fiscal problems.

h) The legislation endorsed previously by the Association to streamline the procedure for obtaining in forma pauperis status by substituting certification of counsel for a formal motion had been enacted.

i) In May, the House of Representatives had passed a five-year reauthorization bill for the Legal Services Corporation, and the legislation was scheduled to be taken up by the U.S. Senate. Mr. Bracken noted that the action taken by the House of Representatives was consistent with the resolution adopted by the House of Delegates at the January 1992 meeting.

j) The Association has initiated a public service campaign, using television announcements, to heighten awareness regarding the problem of domestic violence.

k) The Business Law Section had recently participated in a Soviet-American Banking Law Working Group Conference in Moscow to assist the Russians in reorienting their banking system to a market economy. He noted that the section had developed extensive educational materials for use at the conference.

l) Consistent with the resolution adopted at the April 1992 meeting of the House of Delegates, the proposal developed by the Commercial and Federal Litigation Section endorsing the establishment of an international criminal court had been placed on the agenda for consideration at the August 1992 meeting of the American Bar Association's House of Delegates.

m) As authorized at the April 1992 House meeting, a special drafting committee had been formed to prepare the statutory language necessary to change New York to a filing system for the commencement of civil actions and to make required modifications to Section 306-a of the Civil Practice Law and Rules. Mr. Bracken advised that the proposed legislation had been enacted, and that a monitoring committee would be appointed to evaluate the experience under the new filing system.

n) The Lawyers' Fund for Client Protection had released its 1991 annual report, which showed that claims for the year had totaled \$28.3 million, causing the Legislature to make a special appropriation to supplement the fund's normal income derived from the biennial attorney registration fee. Mr. Bracken noted that as part of the effort to offset the effects of the misappropriation of client funds, the Assembly was considering legislation to mandate that attorneys obtain fiduciary bonds insuring client funds in excess of \$100,000 held in connection with real property transactions or in the administration of trusts and estates. He indicated that the Executive Committee would continue to monitor developments in this area.

o) A special committee was being appointed to study current rules of the Nominating Committee with the objective of developing more comprehensive, permanent guidelines to regularize procedures and facilitate the functioning of the nominating process.

p) Robert L. Geltzer, a member of the House and the Executive Committee, had suffered severe leg injuries in an automobile accident. He encouraged the members of the House to contact Mr. Geltzer to express their wishes for his complete recovery.

q) Mr. Bracken expressed appreciation to Mr. Ostertag for his energetic and dedicated leadership as President during the past year, and presented him with a plaque inscribed as follows:

The New York State Bar Association presents this testimonial to Robert L. Ostertag in recognition of his devoted service to the Association in the successful furtherance of its ideals and in the promotion of the best interest of the profession through his service as President of the Association 1991-92.

9. Reports and recommendations concerning the Individual Assignment System by Action Unit No. 6 and the Commercial and Federal Litigation Section. Maxwell S. Pfeifer, Chair of Action Unit No. 6, summarized the action unit's report regarding the functioning of the Individual Assignment System. He described the liaison system which had been developed in each of the judicial districts to facilitate communication with the various administrative judges during the judicial budget crisis and its aftermath. He also outlined the nature of the action unit's review of the Individual Assignment System, discussions with court officials, and relevant comparative data gathered from other jurisdictions. Mr. Pfeifer summarized the action unit's recommendations with respect to: the implementation of a Trial Assignment System; the creation and implementation of uniform rules of individual judges; oral argument of motions; the reallocation of budgetary resources; ex parte practice; the possible implementation of specialized civil parts and rules for differential case management; the implementation of a "milestone" approach for managing civil lawsuits; and the use of test "pilot programs" by the Office of Court Administration.

Shira A. Scheindlin, the immediate past Chair of the Commercial and Federal Litigation Section, summarized that section's review of the Individual Assignment

System. She noted the section's observation that while the system had resulted in quantitative reductions in civil caseloads, corresponding qualitative improvements had not been achieved. She indicated that while the section had concluded that the Individual Assignment System was commendable and necessary, there remained a need to address problem areas associated with it. Ms. Scheindlin then outlined the following recommendations developed by the section to improve the Individual Assignment System: (1) OCA should propose uniform rules regarding matters such as motion practice and adjournments; (2) Judges should avoid delegating the familiarity with the case and counsel that the IAS was supposed to provide; (3) Oral argument should not be mandatory for all motions; (4) OCA should encourage the resolution of discovery disputes through conferencing rather than written motions; (5) As a timesaving measure, telephone conferences should be used instead of personal appearances by counsel; (6) Counsel should be able to go directly to the IAS judge with an order to show cause; (7) The "cattle-call" calendar should be dropped in favor of staggered scheduling.

Discussion then ensued regarding the two reports, with concerns being expressed by several members that due to varying circumstances in the judicial districts, not all recommendations were appropriate for implementation statewide. Modifications were also made and accepted to the report of Action Unit No. 6 to reflect that in the process of creating uniform rules of individual judges, input should be sought from the local bars, and to reflect that in limiting the oral argument of motions, argument should not be precluded when requested by counsel. After further discussion, the following resolution was adopted on motion of the House:

RESOLVED, that the House of Delegates hereby accepts as preliminary reports, those presented by Action Unit No. 6 and the Commercial and Federal Litigation Section and authorizes that they be conveyed to the Office of Court Administration with the caveat that all recommendations may not be appropriate for implementation in all areas of the state, and may warrant further study by this Association and the Office of Court Administration.

10. Report and recommendations of Committee on Professional Discipline regarding the report of the ABA Commission on Disciplinary Enforcement. Martin Minkowitz, the immediate past Chair of the Committee on Professional Discipline, summarized the committee's analysis and recommendations with respect to the report of the American Bar Association's Commission on Disciplinary Enforcement. He reviewed the NYSBA's previous position and the applicable provisions of the Judiciary Law which govern when it is appropriate to make public the fact that a grievance has been filed against an attorney, noting that New York law precludes disclosure until the Appellate Division has sustained charges against an attorney. In contrast, he outlined the position of the ABA in this area which supports public disclosure following a determination that there is probable cause to believe attorney misconduct has occurred. Mr. Minkowitz then explained the basis for the committee's recommendation that New York's present approach remain unchanged, as it provides an appropriate balance between the public's need to be informed and the rights of attorneys accused of misconduct. After discussion, the following resolution was approved on motion of the House:

WHEREAS, Judiciary Law Section 90 (10) provides that, absent a showing of good cause, all documents relating to an investigation of the conduct of an attorney by a disciplinary committee are to be sealed unless charges resulting from such investigation are sustained by the Appellate Division, in which event such documents are to be deemed public records; and

WHEREAS, in 1985, the New York State Bar Association found that the public's need to know of disciplinary proceedings is served by publication of the findings where misconduct is deemed to have occurred and that confidentiality protects the innocent; and

WHEREAS, this Association's Committee on Professional Discipline has once again reviewed this issue and concluded that the present law strikes an appropriate balance between the protection of the public and the preservation of the rights of attorneys not yet found guilty of professional misconduct;

NOW, THEREFORE, BE IT RESOLVED that the New York State Bar Association endorses the report of the Committee on Professional Discipline and strongly supports the continuation of the provisions contained in Judiciary Law Section 90 (10).

11. New business. Robert L. Haig, a member of the Executive Committee and a former Chair of the Commercial and Federal Litigation Section, reported that the approval of nominees to fill federal judicial vacancies in New York was being withheld by the United States Senate because of political considerations. He explained the adverse impact this delay was having on the federal courts, as it was denying them the judicial resources necessary to deal effectively with current caseloads. After discussion, the following resolution was adopted unanimously on motion of the House:

RESOLVED, that the New York State Bar Association urges the Senate Judiciary Committee to approve all nominees for federal judicial office in the State of New York which the Judiciary Committee deems deserving of such approval on the merits and to put aside any political considerations in doing so.

12. Date and place of next meeting. Mr. Murray announced that the next meeting of the House of Delegates will be held on Saturday, November 7, 1992 at the Bar Center in Albany.

