

NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
MARRIOTT MARQUIS, NEW YORK CITY
JANUARY 27, 1995

PRESENT: Members: Abramowitz; Abrams; Adler; Alden; Ange; Armstrong; Asarch; Baldwin; Banner; Baum; Berger; Birmingham; Bidwell; Bohner; Bongiovanni; Bracken; Branca; Brenner; Burgman; Burns; Cashman; Chesler; Ciulla; Civilette; Clements; Coffey; Cohn; Cometa; Connolly; Cooke; Corcoran; Cyrulnik; Daly; Davidson; Delle Cese; Denton; Dollard; Dorsey; Dowling; Drinkwater; Dwyer; Edmead; Edwards; Eisenhauer; Eppler; Epstein; Fales; Farrell; Field; R.L. Fink; R.S. Fink; Fishberg; Friedman; Frye; Gardella; Gassman; Geltzer; Gingold; P.J. Goldstein; P.S. Goldstein; Gouldin; Gross; Gutleber; Haig; Hall; Halpern; Handschu; Hansen; Hart; Haskel; Headley; Heming; Hoffman; Horowitz; H. Jones; M. Jones; Kamins; Kelly; M. Kessler; S. Kessler; Kilsch; Kissel; Kmiotek; Labaton; Lagarenne; Lamb; Landy; Lashley; Lawrence; Lazar; Lee; Leinhardt; Levin; Levine; Lindenauer; M. Longo; Mack; Madigan; Maldonado; Malfitano; Malito; Maney; Marten; Martusewicz; Mayden; McCarthy; McDonald; McDonough; McGlenn; Meng; Meyer; Miklitsch; M. Miller; Millon; Minardo; Moore; Moreland; Morris; A. Murray; K. Murray; Netter; Norfleet; O'Connell; Offermann; Oliver; Ostertag; Ostrow; Palermo; Palmer; Patrick; Pearl; Penzel; Pfalzgraf; Pfeifer; Picotte; Pollio; Pool; Pruzansky; Purcell; Radding; Raysman; Rice; Richardson; Rider; E. Robinson; Rosiny; Ross; Rothstein; Rubin; Ruslander; Rybak; Sachs; Scheindlin; Seymour; Sirmans; Souther; Spellman; Standard; Strauss; Sunshine; Taisey; Terranova; Tharp; Thomashower; Tishler; Tomaselli; Torres; Triebwasser; Vitacco; Waldauer; Wales; C. Walker; S. Walker; Weaver; Wee; Weiner; White; Witmer; Yanas; Zurlo.

1. Approval of minutes of November 5, 1994 meeting. The minutes were approved as distributed.
2. Report of Treasurer. The Treasurer's report for the preceding fiscal year, which had been presented by Treasurer Thomas O. Rice to the members of the House at the Annual Meeting of the Association, was received with thanks.
3. Report of Nominating Committee and election of officers and members-at-large of the Executive Committee. Robert L. Ostertag, Chair of the Nominating Committee, reported that the committee had nominated the following individuals for election to the indicated offices for the 1995-96 Association year.

President-Elect: M. Catherine Richardson, Syracuse
Secretary: Robert J. Pearl, Rochester
Treasurer: Thomas O. Rice, Brooklyn

District Vice-Presidents:

First: Arthur Norman Field, Manhattan

Second: Joseph H. Farrell, Manhattan
Third: Miriam M. Netter, Troy
Fourth: Peter V. Coffey, Schenectady
Fifth: Dennis R. Baldwin, Syracuse
Sixth: Kathryn Grant Madigan, Binghamton
Seventh: James C. Moore, Rochester
Eighth: Joseph D. Bermingham, Jr., Buffalo
Ninth: William J. Daly, Ossining
Tenth: Joshua M. Pruzansky, Smithtown
Eleventh: Wallace L. Leinhardt, Jamaica
Twelfth: Hon. Alexander A. DelleCese, Bronx

At-Large Members of the Executive Committee:

A. Vincent Buzard, Rochester
Muriel S. Kessler, Manhattan
A. Thomas Levin, Mineola
Francis J. Offermann, Jr., Buffalo
Kenneth G. Standard, Chappaqua
Lorraine Power Tharp, Albany

There being no further nominations, a motion was made and carried that the nominations be closed. The Secretary then cast a single ballot for the election of the aforesaid officers and members-at-large of the Executive Committee for the 1995-96 Association year.

4. Report and recommendations of Task Force on the Profession. Haliburton Fales, 2d, Chair of the Task Force on the Profession, summarized the study conducted by the task force in furtherance of the goals of improving the delivery of legal services, advancing client relations, and enhancing public perception of the profession. He indicated that the task force's review of relevant issues had led it to develop recommendations in four topical areas as set forth in the report distributed to the members: attorney-client relations; education, both at the law school level and beyond; attorney discipline; and the leadership responsibilities of the NYSBA. He indicated that the recommendations with respect to the lawyer discipline system would be deferred until the April meeting, when they would be considered in conjunction with a related report by the Committee on Professional Discipline. He also noted, based on comments received from interested sections, committees and local bar associations, that the task force had modified its recommendations with respect to retaining liens and fee arbitration to suggest further study of those issues without taking a final, specific position at this time.

Mr. Fales then summarized the task force's recommendations in the areas of attorney-client relations and the leadership responsibilities of the NYSBA. Following discussion, a motion was made to refer the task force's report to appropriate sections and committees for further study was defeated by a vote of 100-53. An amendment was then accepted to the resolution proposed by the task force to limit House endorsement to the recommendations presented rather than to the report as a whole. The House then adopted the resolution set forth below with respect to the

recommendations pertaining to attorney-client relations and the leadership responsibilities of the NYSBA.

Mr. Fales next summarized the task force's report with respect to education at the law school level and beyond. Ellen Leiberman, a member of the Committee on Legal Education and Admission to the Bar, summarized that committee's support for the recommendation relating to the size, term, composition and role of the State Board of Law Examiners [III(2)] and the recommendation regarding the form and substance of the bar examination [III(3)]. Hon. Richard J. Bartlett, a member of the State Board of Bar Examiners, and Hon. Richard D. Simons, Associate Judge of the Court of Appeals, described changes made in recent years to the bar examination, outlined the nature of previous reports in this area by other entities, and expressed concerns with respect to recommendations III(2) and (3), and requested that there be time for further study of these issues by the Court of Appeals. Following discussion, the House adopted separate motions to table recommendations (2) and (3). The House then approved, in principle, by a 91-49 margin, the balance of the recommendations with respect to legal education. The resolution as adopted by vote of the House with respect to attorney-client relations, leadership responsibilities of the NYSBA, and legal education was as follows:

RESOLVED, that the New York State Bar Association hereby endorses in principle the recommendations of the Task Force on the Profession with respect to attorney-client relations, leadership responsibilities of the NYSBA, and legal education, with the exception of those pertaining to the size, term, composition and role of the State Board of Bar Examiners and to the form and substance of the bar examination; and it is further

RESOLVED, that the New York State Bar Association hereby commends to the sections and committees of the Association and to local and county bar associations so much of the report and recommendations of the Task Force on the Profession as may be relevant to their respective areas of interest; and it is further

RESOLVED, that this report be referred to the Association Strategic Planning Committee for review and inclusion in the priorities to be established for the Association.

5. Report and recommendation of Commercial and Federal Litigation Section re civility in litigation. Mark C. Zauderer and Vincent C. Alexander of the Commercial and Federal Litigation Section summarized that section's report proposing guidelines on civility in litigation to address the problem of incivility and the negative perception it creates both within the profession and among the public. They indicated that education of the bar in this area would be beneficial, and that the dissemination of written guidelines underscoring the value of civility would assist the educational process by providing a discussion tool for use in law school courses, law firm training sessions, and continuing legal education programs. Messrs. Zauderer and Alexander

emphasized that the proposed guidelines were not intended for adoption as mandatory rules, as the section viewed them as an advisory document to facilitate the education of attorneys. They also explained revisions made to the guidelines based on comment by interested Association sections and committees, and summarized views received from county and local bar associations following the November 1994 meeting of the House of Delegates. After discussion, a motion was adopted approving the report and proposed guidelines as submitted.

6. NYSBA/OCA reports on jury selection pilot projects. Arthur Norman Field, Chair of the Ad Hoc Committee on the Jury System, provided an overview of activities since the June House meeting at which the committee's report, and the recommendations developed by the Jury Project Committee appointed by the Chief Judge were considered. He described the nature of the cooperative efforts by the court system and the organized bar to implement non-controversial improvements in the jury system, and to develop meaningful experimental programs to test initiatives regarding which concerns had been expressed. Jonathan Lippman, OCA's Deputy Chief Administrator, outlined efforts already underway to enlarge the jury pool, improve and streamline the process, and to minimize wasted time in the selection of juries. He then reviewed experimental pilot programs being instituted in Manhattan, Nassau County, Erie County, and four counties in the Fourth Judicial District to evaluate different levels of judicial supervision, various jury selection methods, the imposition of time limits for questioning, mandatory settlement conferences, and the use of non-designated alternate jurors. Jerome M. Ginsberg, Claire P. Gutekunst, and Lawrence R. Bailey, Jr., subcommittee chairs of the Ad Hoc Committee, then detailed various aspects of the committee's role in coordinating with both OCA and local bar groups, reviewing data collection methods for the pilot programs, and providing follow-up procedures to facilitate comment by members of the bar. Subcommittee chair Craig A. Landy and New York County Chief Clerk, Civil Branch, John I. Werner then detailed the pilot project as it would function in New York County. The report was received with the thanks of the House.

7. Report of President. In view of the length of time required to address the other agenda items, Mr. Witmer, in lieu of presenting the usual oral report, submitted the attached written summary to inform the House of significant activities and issues of relevance to the Association.

8. Report and recommendations of Intellectual Property Law Section. Rory J. Radding, former Chair of the Intellectual Property Law Section and its current delegate to the House, summarized the section's report and recommendation that the Association endorse the adoption of a revised Model State Trademark Law. He indicated that the adoption of a new model statute at the state level would maintain conformity with statutory revisions enacted at the federal level, and would enhance uniformity among the various state trademark laws. Mr. Radding also noted that the proposed model state statute would facilitate the removal of unused registrations from the New York State Register of Trademarks, improve the state's application examining process, and encourage the owners of marks to register them in New York. Following discussion, a motion was adopted endorsing the model statute for enactment in New York.

9. Report and recommendation of Corporate Counsel Section re planning and budgeting of legal services for corporations by outside counsel. John E. Nevins, Chair of the Corporate Counsel Section, and past Chair Lawrence D. Chesler summarized the section's report with respect to the planning and budgeting of legal services for corporations by outside counsel. They reviewed the elements of the proposed model plan and budget and indicated they had been developed for use by corporations in engaging the services of outside counsel to increase the cost-effectiveness of such legal services, to foster communications between corporations and outside counsel, and to reduce the potential for misunderstanding between outside counsel and the corporate client. They indicated that the model was intended as a tool for use by counsel and corporations and could be varied to fit the practical circumstances of any given engagement. Discussion then ensued during which concern was expressed that the proposal might not adequately reflect the views of outside counsel. A motion was then adopted to table further consideration of the matter.

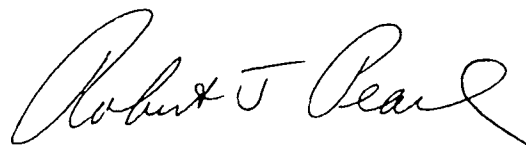
10. Report of Chair. Mr. Pfeifer announced that at the April meeting the House would be requested to elect five of the NYSBA's eleven delegates to the American Bar Association's House of Delegates. He stated that the Nominating Committee had reported the following nominees for those positions: Angelo T. Cometa, Maryann Saccomando Freedman, Robert L. Geltzer, M. Catherine Richardson and G. Robert Witmer, Jr.

11. Consideration of proposed resolution re legislation affecting the testing of members for HIV. Mr. Pfeifer advised that this item had been deferred to the April meeting of the House.

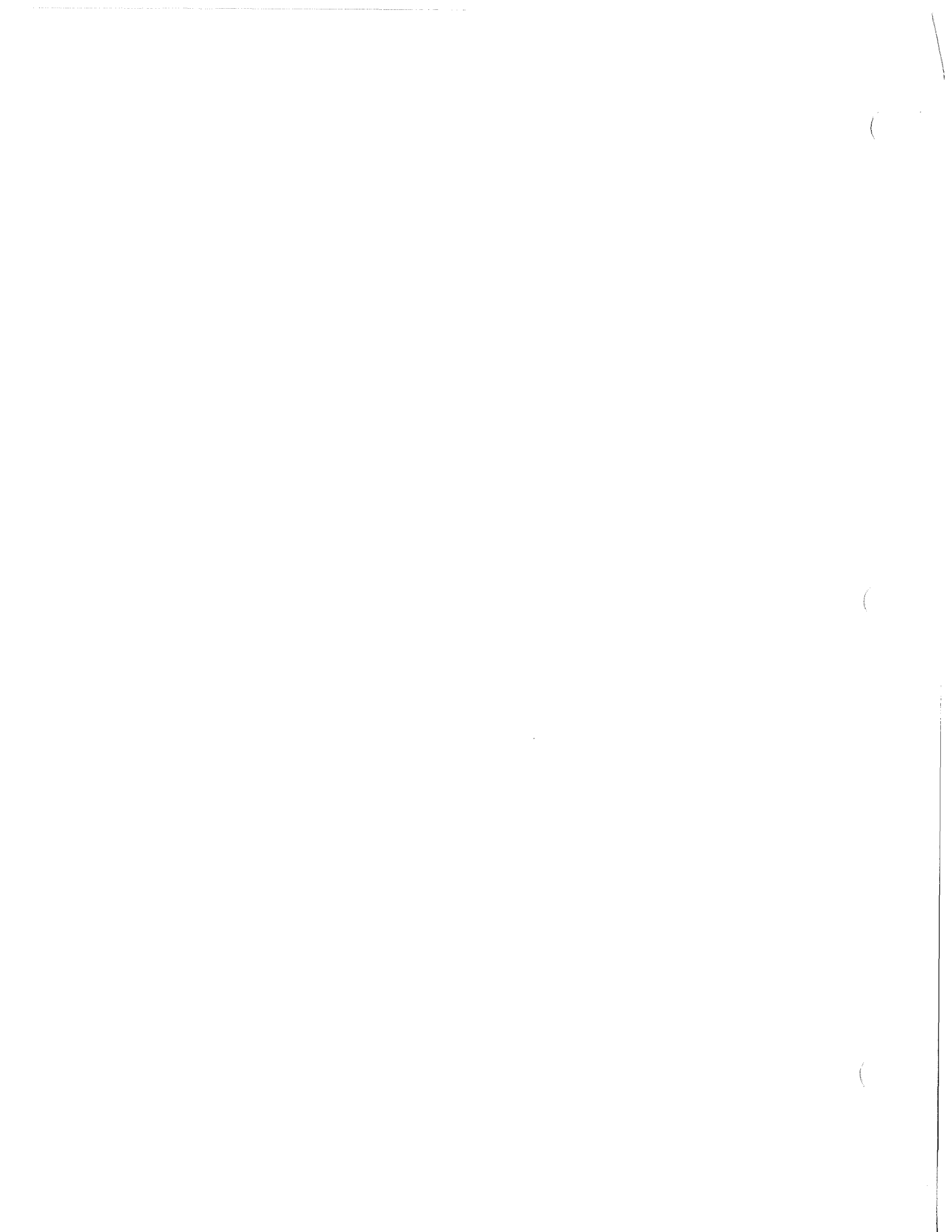
12. Report of Commercial and Federal Litigation Section on a New York Commercial Court. Mark H. Alcott, Chair of the Commercial and Federal Litigation Section, summarized the section's report with regard to establishing a commercial court as part of the New York State court system. He outlined trends with respect to the resolution of commercial disputes, and presented the section's analysis of issues and legal considerations relevant to the establishment of a commercial court. Mr. Alcott advised that the section recommended the creation of a Commercial Division of State Supreme Court, and then described the structure, procedures and jurisdiction of the proposed court. He also reviewed possible funding mechanisms and the allocation of resources and personnel necessary for the functioning of the court. The report was received with the thanks of the House.

13. Date and place of next meeting. Mr. Pfeifer announced that the next meeting of the House of Delegates was scheduled for Saturday, April 8, 1995 at the Bar Center in Albany, New York.

Respectfully submitted,



Robert J. Pearl
Secretary



G. ROBERT WITMER, JR.

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February 1995

TO: Members of the House of Delegates

RE: President's Report in connection with
January 27, 1995 meeting

Since we had a rather lengthy agenda with a number of significant topics to consider at our January 27, 1995 meeting, and to allow us to devote as much time as possible to those substantive items, I thought it best to depart from the usual oral format for the President's report and instead provide you with this written summary. While I took a few moments at the meeting to highlight some particularly important matters, you can read the details contained in the following summary at your leisure, as I am sure you will find a number of these subjects both topical and interesting.

1. Office of Court Administration. The Association's quarterly meeting with the Office of Court Administration took place on December 15, 1994 in New York City. Among the items discussed were the following:

a) Judge Kaye advised us that, based on the Governor's request for fiscal restraint, the proposed Judiciary budget for the 1995-1996 fiscal year was being reduced wherever possible without adversely impacting the essential functions of the court system. She indicated it was her understanding that in its reduced form the budget would be endorsed by the Governor for adoption by the Legislature. In connection with the budget, Judge Milonas reported to us that overall funding reductions in state government could have a severe adverse impact on court facilities' cleaning and maintenance, particularly in New York City with severe understaffing causing the major difficulty. A. Paul Goldblum, the Chair of our Committee on Judicial Administration, and I held a follow-up meeting with OCA officials to discuss this problem further, and Judge Milonas has formed a group to address this situation.

b) Judge Kaye outlined for us the pilot projects being undertaken to test various improvements in the jury system in the areas of selection methods, time limits for *voir dire*, the use of non-designated alternates, and the implementation of mandatory settlement conferences. She also summarized OCA's ongoing efforts to improve jury lists and public facilities and to eliminate jury stacking. At the House meeting, you also heard a fuller report on these initiatives from OCA and Arthur Norman Field, the Chair of our Ad Hoc Committee on the Jury System, as well as other representatives of his group.

c) We apprised the Chief Judge of the status of the studies by the Task Force on the Profession and the Committee on Professional Discipline to enhance professionalism and improve the lawyer discipline system. At the January 27th House session, you received an in-depth presentation from the Task Force on the Profession regarding the bulk of its proposals and you will hear its recommendations, as well as those of our Committee on Professional Discipline, for improving the attorney discipline process at the April 8th House meeting.

d) We also continued our ongoing dialogue with the Chief Judge regarding the establishment of a Youth Education Project to develop civic literacy through the law-related education of young people. We explored various approaches for implementing this objective, but progress in this area will in large measure depend on the outcome of state budget discussions during the coming months.

e) OCA reviewed for us the status of efforts to provide attorneys with computer access to court calendar information. In turn, we outlined the activities of our Special Committee on New York Law/Net to develop a statewide computer network for lawyers which will also enable them to access government agencies, selected courts and other information providers.

2. Discrimination case in filling of state court judgeships. In December, the Justice Department denied pre-clearance for fifteen judgeships added to the Supreme Court in Brooklyn and the Bronx in recent years, premised on a finding that these positions were violative of the Federal Voting Rights Act because of perceived discrimination against minorities in the electoral process. However, I am pleased to report that this denial of pre-clearance has been overturned by a three-judge federal panel in State of New York v. United States of America. This decision will permit the state to go forward to fill much-needed judgeships. I should caution though, that other cases still remain open in this area, particularly France v. Cuomo, which challenges the method for nominating state Supreme Court candidates as well as the system for electing Supreme Court Justices in county-wide races. Consequently, it is possible that the overall situation in New York might generate renewed interest in implementing a merit selection process for choosing judges, and we will continue to pursue this issue with the Governor and the Legislature during the coming months.

3. Commercial Parts of Supreme Court. Thus far, the new commercial parts of Supreme Court in New York County have been favorably received, based on survey data compiled by the New York Law Journal this past December. I should note in this context that the Commercial and Federal Litigation Section has formulated a proposal for establishing a Commercial Division of State Supreme Court, and you heard a detailed informational presentation on this subject from section Chair Mark H. Alcott at the House meeting.

4. Carrier change for sponsored professional liability insurance program. Bertholon-Rowland, the Association's insurance administrator, in conjunction with the Committee on Association Insurance Programs, has announced a change in carrier for the NYSBA-endorsed professional liability program.

The new, endorsed carrier is the Chicago Insurance Company, a member of the Interstate Insurance Group, which is a subsidiary of the Fireman's Fund. This change will offer participants improved policy provisions, highly competitive rates and a simplified application process. Further details can be obtained by contacting Bertholon-Rowland.

5. State/federal cooperation regarding judges' chambers. To cope with the loss of space caused by the renovation at 60 Centre Street in New York City, OCA is negotiating with the federal judiciary to permit state judges to utilize space in the federal courthouse at 40 Centre Street in Foley Square. The discussions are still in a preliminary stage, but may enable the state judiciary to rent much-needed space.

6. Business Law Section pro bono awards. The Business Law Section has established an award program to promote pro bono service by business lawyers in New York State. I am

pleased with this initiative, as the section's program is totally consistent with the Association's goal of promoting enhanced pro bono services and will enable grants to be made to worthy organizations which promote the pro bono handling of business cases for the indigent.

7. Code of Professional Responsibility amendments. The four Appellate Divisions have jointly amended DR 9-102 of the Code of Professional Responsibility, which provision deals with preserving client funds, fiduciary responsibility, and the maintenance of bank accounts in two respects. The missing client provision has been amended to provide that funds owed to a missing client are now to be paid over to the Lawyers' Fund for Client Protection rather than the clerk of the court. Also, a new section has been added to the rule to provide for the designation of a successor signatory on the death for a lawyer who was the sole signatory on an escrow account. Copies of the amendment may be obtained from Association Counsel Kathleen R. Mulligan-Baxter at Bar Headquarters.

8. Amicus Curiae brief. The *amicus curiae* brief in *The Florida Bar v. McHenry*, as authorized at the November meeting of the Executive Committee, has been filed with the United States Supreme Court. This case, which deals with the regulation of lawyer advertising, was argued on January 11, 1995. We will advise the Executive Committee and House when the court releases its opinion, as this case has the potential for significant national impact on the manner in which advertising by attorneys is regulated by bar associations and appropriate state authorities.

9. Annual Dinner. I want to thank all who attended the Association's Annual Dinner on January 26th, as attendance by nearly 800 represented approximately a doubling of last year's crowd. The presence of Governor Pataki at the pre-dinner reception and having Catherine Crier as our principal post-dinner speaker made for an enjoyable evening, and I hope most of you were able to participate.

10. Meetings. In recent weeks, I have had the opportunity to attend meetings of several of our committees and sections, as well as to present Association positions on a variety of matters to the editorial boards of several publications. These activities included meetings with the editorial boards of the Rochester and Binghamton newspapers, as well as my participation in sessions of the Ad Hoc Committee on the Jury System, the Council of Judicial Associations, the Committee on Solo and Small Firm Practitioners, the Committee on Judicial Administration, the Commercial and Federal Litigation Section, the Judicial Section, the Ad Hoc Committee on Death Penalty Legislation, the Commission on Providing Legal Services for the Middle Income Consumers, the International Law and Practice Section, and the Steering Committee on a Proposed Section on Health, Law, and Related Issues. I was also a welcome guest at functions of the New York County Lawyers' Association and the Brooklyn Bar Association.

11. Possible formation of Section on Health, Law, and Related Issues. M. Catherine Richardson, who will become President-Elect on June 1, 1995, is currently chairing a Steering Committee on a Proposed Section on Health, Law, and Related Issues. This group consists of representatives from our relevant committees, including those on Health Law, Mental and Physical Disability, Confer with Committee of the State Medical Society, Biotechnology and the Law, and AIDS and the Law, and is seeking to determine if sufficient common basis exists to form a section encompassing the various health law fields and related issues. The steering committee has drafted a questionnaire to aid it in assessing the level of interest of both members and non-members in participating in such a section. On January 26th, the Executive Committee authorized the steering committee to proceed with this survey, and we should be able to report the results to you in the coming weeks.

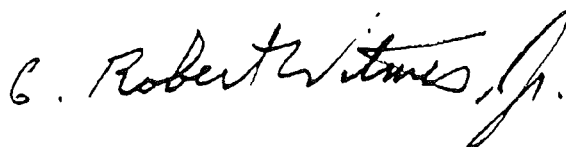
12 Death penalty legislation. Given Governor Pataki's stated intention of securing the enactment of a death penalty in New York, we formed an Ad Hoc Committee on Death Penalty Legislation, which is co-chaired by Martin B. Adelman and Paul J. Cambria, Jr. This committee, which consists of representatives from a broad range of legal disciplines within the Association, did not take a position on the propriety of the death penalty itself. Rather, the committee addressed the significant legal issues that any death penalty legislation should encompass, including the need for competent counsel, exclusion of the mentally disabled and those under 18 from the ambit of the statute, avoiding discrimination on the basis of race, providing for an alternative life sentence without parole option for juries, and increasing the number of peremptory challenges in capital cases. The committee's report was approved by the Executive Committee on January 26th and was forwarded to the Governor and the Legislature to guide their deliberations.

13. Legal Services Corporation funding. On January 26, our Committee on Legal Aid, chaired by Thomas Maligno, and our President's Committee on Access to Justice, which Joseph S. Genova and Maxwell S. Pfeifer co-chair, reported jointly to the Executive Committee regarding the proposals pending in Congress to curtail federal funding for civil legal services to the indigent. A coordinated effort is being developed among interested NYSBA groups, local bar associations, other state bars, and the ABA, to communicate to Congress the beneficial services performed by the Legal Services Corporation ("LSC") and the need for continued funding at adequate levels if the LSC is to continue to fulfill its role in a meaningful manner. During the coming months, we will continue to support necessary funding for the LSC, and I ask for your active support in this area, particularly with our two Senators and the members of the House of Representatives from your locality.

14. Lawyer/judge feedback plan. Our Committee on Judicial Administration, chaired by A. Paul Goldblum, has developed a lawyer/judge feedback plan to allow practitioners a means for discreetly communicating their observations of judicial behavior in a spirit of constructive criticism. This proposal is modeled on plans currently functioning in Monroe and Erie Counties and is intended to be administered by local bar associations utilizing a questionnaire distributed to attorneys. The survey data is then compiled and the results are communicated confidentially to judges. On January 26, the Executive Committee authorized the Judicial Administration Committee to pursue this program on a three-year pilot basis. Three counties will be selected in consultation with local bars and the Judiciary, one in New York City, a suburb of New York, and an upstate county. After the experiment has been concluded, a special committee will be designated to evaluate the results and make appropriate recommendations to the Association.

As evidenced by the foregoing items, the NYSBA is actively involved with a number of worthwhile activities and studies. We can take considerable pride in our Association, which is making a constructive contribution to the improvement of the legal profession and society generally. I am humbled by the dedication of our volunteer members who give so generously of their time and professional talent on our behalf. During the remainder of my term, I pledge to you that I will do all that is within my power to assist you, as well as our sections and committees, in maintaining the preeminent status of the New York State Bar Association.

Respectfully submitted,



G. Robert Witmer, Jr.