

NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
THE OTESAGA, COOPERSTOWN, NEW YORK
JUNE 22, 1991

PRESENT: Members Adler; Agress; Ange; Aronson; Baker; Baldwin; Banner; Barnosky; Bermingham; Besso; Bracken; Brevorka; Ciulla; Clarke; Clements; Cometa; Connolly; Cooke; Cooper; Daly; D'Angelo; Davidson; Doyle; Duckworth; Dwyer; Egelfeld; Eiber; Englert; Eppler; Feigenbaum; Field; Forger; Freedman; Friedman; Gates; Geltzer; Gershon; Goldblum; Goldstein; J. Gross; M. Gross; Haig; Harper; Hart; Hassett; Headley; Heming; Hesterberg; Hoffmann; Horan; Jacoby; Jones; Kamins; Karan; Kellar; Kennedy; T. Kenney; Kessler; King; Klein; Lashley; Lee; Leinhardt; Levin; Lindenauer; Long; Madigan; Maher; Mahoney; Maney; Markuson; Marrero; McDonough; McGlenn; Meng; Meyer; E. Miller; Millon; Mitchell; J.C. Moore; Murray; O'Keeffe; Okin; Ostertag; Pearl; Peckham; Pelky; Perrin; Pfeifer; Pisani; Pruzansky; Rachlin; Raysman; Reich; Reilly; Reiniger; Reizes; Rice; Richardson; Rifkin; Riley; Robfogel; Roper; Rosiny; Rossetti; Rybak; Santemma; Schapiro; Seward; Sienko; Small; Souther; Spellman; Stave; Triebwasser; Troeger; Walker; J. Walsh; White; Williams; Wolf; Woodman; 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. Bracken. The following is a list of the new members of the House: Dennis R. Baldwin; Paul L. Banner; Joseph D. Bermingham, Jr.; John E. Blyth; Susan P. Bracht; Bradford H. Brinton; John H. Ciulla, Jr.; Peter D. Clark; Thomas G. Clements; Terrence M. Connors; Michael A. Cooper; Frank G. Dangelo; Peter J. DeLuca; William F. Dowling; James F. Dwyer; Madaleine S. Egelfeld; Bernard M. Eiber; Thomas R. Elmer; Dennis M. Englert; Arthur A. Feder; Michael K. Feigenbaum; Rosalind S. Fink; John J. Fitzgerald; Lawrence I. Fox; Hon. Lewis R. Friedman; Richard A. Frye; Elbert N. Gates; Harold D. Gordon; John H. Gross; Peter G. Grossman; Edward J. Hart; Jules J. Haskel; David E. Jacoby; Barry Kamins; Paul Richard Karan; Paul T. Kellar; Michael J. Kelly; Frank Klein; William F. Kuntz; Allen Lashley; James F. Lee; A. Thomas Levin; Susan B. Lindenauer; Joseph F. Longo; Frank E. Maher; Michael M. Maney; Martin A. Meyer; Hon. Edith L. Miller; Steven Millon; John T. Mitchell; John V. Moore; Eugene J. Morris; Ralph R. Nobile; James P. O'Brien; Richard J. O'Keeffe; Avery Eli Okin; Casimir C. Patrick, II; Paul L. Pelky; Michael J. Pisani; A. Craig Purcell; Hon. C. Raymond Radigan; Richard P. Rossettie; Alan Rothstein; Anne B. Ruffer; William E. Russell; David S. Sampson; Leonard E. Sienko, Jr.; Florence L. Simberkoff; Mark D. Stern; Sidney F. Strauss; Jonah I. Triebwasser; Sam D. Walker; John A.R. Walsh; Stephen L. Weiner; Donald J. White; Gail J. Wright-Sirman.

2. Approval of minutes of April 13, 1991 meeting. The minutes were approved as distributed.

3. Report of Treasurer. Mr. Gershon reviewed the audited balance sheet for year ending December 31, 1990 and indicated that the Association had completed year in a surplus posture. He then summarized the Treasurer's report for the period January 1 to May 31, 1991 and noted 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. Recommendations regarding the report of the Appellate Division Task Force. Myrna Felder, Chair of the Committee on Courts of Appellate Jurisdiction, summarized the recommendations prepared by the committee based on its analysis of the report of the Appellate Division Task Force. She noted that in addition to the recommendation adopted by the House of Delegates at the April meeting, the committee had two further proposals with respect to the appellate process: first, that no further restrictions be placed on the appealability of interlocutory orders; and second, that the Appellate Division, Second Department, return to sitting in panels of five justices as soon as practicable, and that any suggestions that appellate divisions sit with fewer than four justices be rejected. Mark L. Davies of the Commercial and Federal Litigation Section then summarized the section's views with respect to the Appellate Division Task Force report. He noted the section's concurrence with the resolution adopted in April to add five justices to the Second Department, as well as its agreement with the proposal that Appellate Division panels should consist of five justices. Mr. Davies indicated that the section also felt interlocutory appeals should be preserved, but that consideration should be given to making certain orders now appealable as of right appealable only by permission. In addressing longer term solutions to the appellate caseload problem, Mr. Davies advised that the section favored the creation of a Fifth Department, as endorsed previously by the Association, and did not support the transfer of the Ninth Judicial District to the Third Department. Following discussion, the House defeated the proposal by the Commercial and Federal Litigation Section that appeals from interlocutory orders be preserved, but with some restrictions. The following resolution was then adopted on motion of the House:

RESOLVED, that the New York State Bar Association recommends that no further restrictions should be placed on the appealability of interlocutory orders; and it is further

RESOLVED, that the New York State Bar Association recommends that the Second Department return to sitting in panels of five justices as soon as practicable and that any suggestions that appellate divisions sit with fewer than four justices be rejected.

The House also adopted a further motion disapproving the transfer of the Ninth Judicial District to the Third Department as a means of equalizing Appellate Division caseloads, given the Association's prior support for the creation of a Fifth Department.

5. Report and recommendation concerning occupational juror exemptions by Committee on Courts and the Community. Hon. Norman Goodman, Chair of the Committee on Courts and the Community, summarized the committee's report and recommendations to eliminate all occupational juror exemptions enumerated in Section 512 of the Judiciary Law except those applicable to lawyers, physicians, police officers,

fire fighters, persons over 70 years of age, and parents with young children. Melanie L. Cyganowski, Chair of the Commercial and Federal Litigation Section's Committee on Lawyers as Jurors, presented the section's position that all occupational exemptions be eliminated as unwarranted. Richard J. O'Keeffe, immediate past Chair of the Trial Lawyers Section, summarized that section's views that all juror exemptions and disqualifications be removed. Following discussion, a motion was adopted to amend the resolution offered by the Committee on Courts and the Community to read as follows:

NOW THEREFORE BE IT RESOLVED, that the New York State Bar Association urges the New York State Legislature to adopt appropriate legislation amending Sections 511 and 512 of the Judiciary Law to eliminate all occupational jury exemptions.

The foregoing resolution was then defeated by vote of the House. After further consideration, it was the sense of the House that this matter be resubmitted to the interested sections and committees for further study consistent with the discussion by the House.

6. Presentation of Root/Stimson Award, Public Service Awards and Award of Merit. Joseph D. Bermingham, Jr., Chair of the Committee on Lawyers and the Community, presented the Root/Stimson Award to Dermot Groome of New York City for outstanding service to the community.

Mr. Bermingham presented the Public Service Medal to Patrick Casillo, Jr. for outstanding personal courage contributing to the enhancement of the administration of justice.

Mr. Bermingham presented the Award of Merit for larger bar associations to the Bar Association of Erie County, and Joshua M. Pruzansky, a member of the Association's Executive Committee, presented the Award of Merit for smaller bar associations to the Nassau County Chapter of the New York Women's Bar Association in recognition of their outstanding service to the public and the profession accomplished through programs administered at the local level.

7. Report of President. Mr. Ostertag reported the following matters:

a) On June 11, 1991, he and Mr. Bracken had met with representatives of the Office of Court Administration to discuss matters of mutual interest. He stated that the topics addressed had included the following:

i) The 1991-92 judiciary budget. The Chief Judge and the Chief Administrator had advised that the judiciary budget as adopted had left the court system with a shortfall exceeding \$34 million, which would necessitate reductions in both personnel and non-personnel items, including the layoff of nearly five hundred employees. The Chief Judge was confronted with having to shift resources from the civil to the criminal and family courts to maintain the operations of the latter. Mr. Ostertag indicated the Chief Judge was considering what further initiatives to take to deal with the problems created by the lack of adequate funds, and the Executive Committee was

reviewing the matter to determine an appropriate Association position depending on steps taken by the judiciary.

ii) Cameras in the courtroom. Despite communication of the Association's position adopted at the April House of Delegates meeting favoring continuation of the experimental program for an additional two years, the matter remained unresolved. The Chief Judge advised at the meeting that the Governor's Counsel was attempting to work out a compromise to resolve the division between the Senate and the Assembly, primarily with respect to the issue of witness consent. Mr. Ostertag indicated that while a solution had not yet been found, the Chief Judge remained hopeful that a compromise could be reached to allow for continuation of the program.

iii) Courthouse facilities. The Chief Administrator advised that due to financial difficulties, New York City was seeking to postpone a major portion of its court facilities improvement program, and that this could lead to similar requests from other localities. To ease the fiscal problem at the local level, the Office of Court Administration may allow communities to divide renovation projects into segments. Mr. Ostertag indicated that the Association would be kept apprised of developments in this area.

iv) Lawyer referral services regulation. The Chief Judge reported that the report and recommendations of the Association's Special Committee on Lawyer Referral Services Regulation had been submitted to the Administrative Board, and at the suggestion of that body, the Appellate Divisions would be designating a committee to review the NYSBA report and present appropriate recommendations to the Administrative Board. Mr. Ostertag indicated that the Association would be kept advised concerning any future action taken by the courts.

v) Prompt hearing of custody matters in Family Court. Mr. Ostertag stated that the concerns discussed at the April 1991 meeting of the Executive Committee regarding the need for more expeditious handling of custody matters in Family Court had been raised with the Chief Judge and the Chief Administrator. The latter indicated he would review the relevant background materials and confer with the Chair of the Association's Family Law Section regarding the situation.

vi) Mandatory continuing legal education. The Chief Judge reported that he had advised the Legislature of the Administrative Board's conceptual approval for a mandatory continuing legal education plan structured along the lines of the NYSBA model, and had requested authorization from the Legislature for the funding elements of the plan. The Chief Judge advised that the Legislature had not acted, but he would keep the Association advised concerning developments. Mr. Ostertag noted that he had testified in favor of the Association's proposed plan at hearings held by the Assembly Judiciary Committee.

b) On June 11, 1991 he and Mr. Bracken had met with the President of the Association of the Bar of the City of New York to discuss matters of mutual interest, including *pro bono* programs, courthouse facilities, solo and small firm practitioners, and the expansion of opportunities for minority attorneys and law firms.

c) During the General Meeting in April, local bar leaders from the Long Island and metropolitan New York region had suggested the use of an identification card by attorneys statewide to facilitate admission to jails and other detention facilities to interview clients. Mr. Ostertag indicated that this proposal was under active consideration by the Office of Court Administration.

d) Based on a recommendation by the Special Committee on Association Publications, he had appointed Paul S. Hoffman, a current member of the Editorial Board of the *New York State Bar Journal* as Associate Editor-in-Chief of the *Journal*. He reported that the Executive Committee had confirmed this appointment at its recent June 21-22, 1991 meeting.

e) President Bush has advocated medical malpractice reforms which would encourage states to limit the amounts malpractice victims can recover for pain and suffering, require that lump sum payments not be made to victims, strengthen state medical licensing boards, and establish guidelines for appropriate treatments for certain problems. Mr. Ostertag advised that these initiatives were under review by interested sections and committees of the Association, particularly the Special Committee on Medical Malpractice, for the purpose of developing suitable recommendations.

f) On May 20, 1991, the Committee on Courts and the Community and the Subcommittee on the Tricentennial hosted a reception in New York City in honor of the three hundredth anniversary of the New York Supreme Court. As part of the program, Hon. Judith S. Kay, Associate Judge of the Court of Appeals, was presented the New York Supreme Court Tricentennial Medal, and Thomas R. Pickering, Permanent Representative of the United States to the United Nations, was awarded the Respect for Law Medal.

g) Following the April meeting of the House of Delegates, the Association positions in favor of continued funding for the State Law Revision Commission and the addition of five justices to the Appellate Division, Second Department, were conveyed to the governmental leaders and the Office of Court Administration. He noted that funding for both items was included the budget as passed by the Legislature, but the Governor had vetoed the funds for the Law Revision Commission, while leaving intact those for the Appellate Division justices. He indicated that funding for the commission was restored ultimately.

h) The implementation of an experimental program for auditing attorney trust accounts was unlikely to be implemented in view of the state budget situation. He reported that on a related item, the New York State Bankers Association has indicated it will cooperate in principle with the judiciary to implement an overdraft notification rule to assist in detecting attorneys who misappropriate their clients' funds. Mr. Ostertag indicated that the Executive Committee would continue to monitor developments in this area.

i) The Task Force on Solo and Small firm Practitioners would be conducting a statewide conference in Albany on November 15 and 16, 1991 to assist it in developing recommendations for initiatives or programs to assist those in solo or small firm practice, primarily in the areas of law office economics and management.

j) Mr. Ostertag expressed appreciation to Mr. Cometa for his energetic 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 Angelo T. Cometa 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 1990-91.

8. Report and recommendation of Commercial and Federal Litigation Section regarding judicial immunity. Robert L. Begleiter of the Commercial and Federal Litigation Section summarized the section's position in favor of legislation pending in Congress to restore judicial immunity removed under court decisions holding that judges are subject to actions for punitive relief, court costs and attorneys' fees under the Civil Rights Act. Mr. Begleiter explained that to remedy this situation, legislation had been introduced to amend the Civil Rights Act to exempt judicial officers from liability for costs and fees unless they clearly exceed their jurisdiction. He noted the section's recommendations to remedy technical aspects of the legislation by deleting the provision prohibiting the grant of injunctive relief, inserting a definition of judicial officers for the sake of clarity and conforming certain subdivisions of the bill to state that judges will remain liable for acts clearly in excess of their jurisdiction. Mr. Bracken noted the separate views regarding the legislation submitted by the Committee on Federal Legislation, the Committee on Public Interest Law, the Committee on District, City, Village and Town Courts, and the Judicial Section. Following discussion, a motion was adopted to support the legislation with the caveats proposed by the Commercial and Federal Litigation Section.

9. Report and recommendation of Committee on Legal Aid regarding the Legal Services Corporation. Stephen G. Brooks, Co-Chair of the Committee on Legal Aid, summarized separate resolutions by the committee with respect to the Legal Services Corporation. He explained that the first opposed the enactment of the Legal Services Reform Act of 1991 which would adversely affect the independence, effectiveness and local control of the legal services program, and that the second resolution supports the criteria adopted by the American Bar Association for membership on the board of directors of the Legal Services Corporation. Following discussion, a motion was adopted unanimously approving the following resolution:

WHEREAS, the New York State Bar Association has a long tradition of commitment to and support for legal services to the poor; and

WHEREAS, the New York State Bar Association has in the past supported adequate federal funding for legal services to the poor which allows for allocation of resources and determination of program priorities to be made at the state and local level; and

WHEREAS, there were introduced and narrowly defeated in the 1989 session of the United States House of Representatives amendments to the Legal Services Corporation Appropriations Act which would

have taken away that state and local decision-making ability, and would have restricted the ability to determine the most effective use of funds for legal services to the poor, and would have required the poor to take steps required of no other groups of citizens in order to assert their rights while imposing burdens on legal services programs that no other public or private provider must meet in order to provide representation; and

WHEREAS, such amendments were reintroduced during 1990 as the "McCollum-Staggers-Stenholm Amendments" in an expanded and even more restrictive version and were later withdrawn, due in large part to opposition expressed by the organized bar; and

WHEREAS, a similar package of proposals has been introduced this year as the McCollum-Stenholm "Legal Services Reform Act of 1991" (H.R. 1345); and

WHEREAS, it is critical that bar associations and others concerned with equal access to justice and legal services for the poor continue to express concerns about this detrimental legislation; and

WHEREAS, the important services provided to the indigent in New York State would be compromised by the negative impact of McCollum-Stenholm proposed legislation;

NOW, THEREFORE, BE IT RESOLVED that the New York State Bar Association in furtherance of its goals and responsibility to promote the availability of legal services so that the poor in New York have access to the courts to protect their legal rights, actively opposes each and every part of the McCollum-Stenholm "Legal Services Reform Act of 1991" and urges defeat thereof; and

BE IT FURTHER RESOLVED that the New York State Bar Association urges the entire New York congressional delegation to reject the McCollum-Stenholm "Legal Services Reform Act of 1991" provisions as unnecessary and highly detrimental restrictions on the civil legal services delivery system which has served the legal needs of the country's poorest citizens for the past 25 years.

A further motion was then adopted by the House approving the following resolution:

WHEREAS, the federal Legal Services Corporation is the organization charged by Congress with funding legal services programs throughout the country to deliver legal services to the poor, and

WHEREAS, until recently, the Board of Directors of the Legal Services Corporation has been controlled by a majority which failed to promote

the program's principal purpose of assuring that the poor have full access under law to comprehensive and effective legal services; and

WHEREAS, the future of the Legal Services Corporation is at a critical juncture, now that the President has nominated a slate of eleven individuals to serve on the Board of Directors, the qualifications of whom will soon be carefully evaluated by the Senate and its Committee on Labor and Human Resources; and

WHEREAS, the American Bar Association, in a resolution adopted at the 1989 Midyear Meeting (see attached) urged that the Senate apply specific criteria when considering nominations to the Legal Services Corporation Board of Directors; and

WHEREAS, the New York State Bar Association, being fully committed to adequate federal funding of legal services for the poor, has worked diligently for many years with the American Bar Association to prevent the elimination of the Legal Services Corporation and to strengthen the membership of its Board;

NOW, THEREFORE, BE IT RESOLVED that the New York State Bar Association in order to secure Legal Services Corporation leadership which will work cooperatively and constructively with the bar and other segments of the legal services community to increase access to justice for the poor, fully supports the criteria for Legal Services Corporation Board of Directors membership adopted by the American Bar Association; and

BE IT FURTHER RESOLVED that the New York State Bar Association urges the Committee on Labor and Human Resources to recommend and the Senate to confirm only those Legal Services Corporation Board nominees who meet the criteria set forth in the American Bar Association's 1989 resolution.

10. Report of Chair. Mr. Bracken reported the following matters:

a) The Committee on Judicial Elections had requested that it be discharged, as its function had been assumed by the Office of Court Administration's Advisory Committee on Judicial Ethics. A motion was adopted discharging the Committee on Judicial Elections with the thanks of the House for its past service.

b) The annual report to the membership covering the 1990-1991 Association year had been distributed and additional copies could be obtained from the staff at Bar Headquarters.

11. New business. Mr. Walsh noted that the Legislature, as revenue-generating measures, had increased the surcharges in vehicle and traffic matters and had amended the Civil Practice Law and Rules to require the purchase of an index number within 30 days of the commencement of an action. He requested that the appropriate

Association committees and sections review such enactments which increase the cost to litigants. Mr. Bracken indicated that these measures had been and would continue to be reviewed by interested groups within the Association.

12. Date and place of next meeting. Mr. Bracken announced that the next meeting of the House of Delegates will be held on Saturday, November 2, 1991 at the Bar Center in Albany.

Text of ABA Resolution on Criteria
for the
Directors of the Legal Services Corporation

The American Bar Association strongly urges the President of the United States in nominating and the Senate of the United States in confirming members of the board of directors of the Legal Services Corporation to require that:

1. All persons considered for nomination be free of all conflict, or the appearance of such conflict, with the existence and function of the Corporation or the representation of poor persons in legal matters so that they may act and may be perceived to act with objectivity and fairness;
2. All nominees support and demonstrate a high order of commitment to the continued existence and the effective operation of the Legal Services Corporation;
3. The persons so designated are committed to the freedom of the Legal Services Corporation, its operation and its grantees from political control;
4. Potential board members provide assurance that they understand and are fully committed to the role of legal services attorneys and support the underlying principle of the Legal Services Corporation Act that it is in the national interest that the poor have full access under law to comprehensive and effective legal services; and
5. The Board of Directors as finally constituted is adequately representative of the organized bar, legal education, legal services attorneys, the clients to be served and organizations involved in the development of legal assistance for the poor.

Adopted by ABA House of Delegates, February 1989

