

NEW YORK STATE BAR ASSOCIATION  
MINUTES OF HOUSE OF DELEGATES MEETING  
THE OTESAGA, COOPERSTOWN, NEW YORK  
JUNE 26, 1993

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PRESENT: Abramowitz; Ange; Ayers; Baldwin; Banner; Bargar; Baum; Bavoso; Berger; Bermingham; Besuner; Bohner; Brachtl; Bracken; Brenner; Breslin; Buzard; Cohn; Cometa; Connolly; Corcoran; D'Angelo; Daly; Davidson; Denton; Deptula; Dixon; Dorsey; Edwards; Epstein; Farmer; Farrell; Fetter; Field; R.L. Fink; R.S. Fink; Fishberg; Fishell; Freedman; Geltzer; Glass; Goldstein; Goodstein; Gouldin; M. Gross; Haig; H.G. Hall; Halpern; Hart; Hartman; Hassett; Headley; Heming; Heppner; Hesterberg; Hoffman; Jacoby; H. Jones; M. Jones; Kamins; Karson; Kelly; Kennedy; Kessler; Kilsch; Lagarenne; Lamb; Lashley; Lawrence; Lee; Leinhardt; Lindenauer; M. Longo; Madigan; Mahoney; Malfitano; Marangos; Martusewicz; McCarthy; McDonald; McDowell; McGlinn; Meng; Meyer; Miklitsch; M. Miller; Millon; Moore; Morris; A. Murray; K. Murray; Offermann; Ostertag; Patrick; Pearl; Peckham; Penzel; Pfalzgraf; Pfeifer; Picotte; Pruzansky; Raysman; Reiningger; Rice; Richardson; Ritholz; Robfogel; Robinson; Roper; Rosiny; Ruslander; Sachs; Santemma; Scheindlin; Schumacher; Seward; Sharkey; Sienko; Souther; Standard; Steflik; Stern; Sunshine; Taisey; Tharp; Trueheart; Vigdor; Vitacco; Waldauer; C. Walker; D. White; R. White; Williams; Witmer; Yanas; Zalayet; Zurlo.

1. Inauguration of Archibald R. Murray. Mr. Witmer announced that in keeping with the duties and responsibilities of the office of President, the Association was instituting a formal swearing-in of the President to be performed each year at the June meeting of the House of Delegates, given the close proximity of the Cooperstown meeting to the commencement of the President's term of office on June 1. The oath of office was then administered to Archibald R. Murray by Hon. Richard D. Simons, Associate Judge of the Court of Appeals.

2. 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. Witmer. The following is a list of the new members of the House: Alton L. Abramowitz; Martin B. Adelman; John W. Arpey; Hon. Harold Baer, Jr.; Mark L. Bargar; Joseph A. Baum; J. Truman Bidwell, Jr.; Robert J. Bohner; John A. Corry; Hon. Alexander A. DelleCese; Christopher Denton; Mark A. Dixon; Richard J. Dorsey; Pamela Edwards; Jacob J. Epstein; Jeffrey M. Fetter; Raymond L. Fink; Gerard Fishberg; Gustave Fishell, III; Hon. Marquette L. Floyd; David R. Garner; Leo Glass; Robert S. Gorin; David M. Gouldin; H. Glenn Hall; James M. Hartman; Frank M. Headley, Jr.; Daniel G. Heppner; Stephen D. Hoffman; Scott M. Karson; Hon. Edwin Kassoff; Gunther H. Kilsch; Maureen Pilato Lamb; C. Bruce Lawrence; Wallace L. Leinhardt; Carl F. Lodes; Mark A. Longo; Roger J. Maldonado; Larry P. Malfitano; Hon. Gerard E. Maney; John Z. Marangos; Kevin M. McArdle; Joseph P. McGlinn; M. Kathryn Meng; Miriam M. Netter; Joseph H. Oswald; Arthur L. Penzel; David R. Pfalzgraf; Robert A. Presutti; Thomas O. Rice; Frank R. Rosiny; Edward M. Sharkey; Leonard E. Sienko, Jr.; Eugene P. Souther; Robert D. Taisey; Austin Torres; Harry P. Trueheart, III; Marc Waldauer.

3. Approval of minutes of April 3, 1993 meeting. The minutes were approved and distributed.

4. Report of Treasurer. Mr. Rice reviewed the audited balance sheet for the year ending December 31, 1992 and indicated the Association had completed the previous year in a surplus condition. He then summarized the Treasurer's report for the period covering January 1 to May 31, 1993. He summarized the major income and expense items for the initial five months of 1993 and also reviewed data with respect to the usage by members of the affordable dues program, noting that this experimental program was enabling the Association to retain members who would otherwise be lost due to financial hardship. Mr. Rice also reported that the Finance Committee had authorized the acquisition of a new computer system for the Bar Center to improve member services, as well as repairs to the older portion of the building at a total cost of \$1,750,000. He explained that to minimize interest expenses, the bulk of this cost, \$1,125,000, would be paid from reserves with the balance being borrowed. Mr. Rice indicated that with these planned expenditures the Association remained in sound financial condition as it neared the mid-point of the current fiscal year. The report was received with thanks.

5. Report and recommendations of Committee on Professional Ethics concerning amendments to the Code of Judicial Conduct. Marjorie E. Gross, a member of the Committee on Professional Ethics, summarized that committee's proposed amendments to the Code of Judicial Conduct following its study of the new ABA Model Code of Judicial Conduct and the Rules of the Chief Administrator of the Courts. Pursuant to the scheduling resolution adopted initially at the January 1993 meeting and carried forward at the April meeting of the House, those amendments were considered together with further amendments offered by various sections and committees of the Association, members of the House, as well as county and local bar associations. After discussion and the completion of action with respect to those amendments, the following resolution was adopted on motion of the House:

**WHEREAS**, the New York State Bar Association ("NYSBA") has adopted the Code of Judicial Conduct ("CJC"); and

**WHEREAS**, the Rules of the Chief Administrator of the Courts (22 NYCRR part 100) contain the rules relating to judicial conduct applicable to judges and justices of the Unified Court System of the State of New York; and

**WHEREAS**, a revised CJC has been proposed following review by the NYSBA Committee on Professional Ethics, county and local bar associations and by interested sections and committees of the NYSBA; it is

**RESOLVED**, that the House of Delegates of the NYSBA hereby approves the CJC as revised by this House, contingent upon adoption by the Chief Administrator of the Courts of amendments to 22 NYCRR part 100 consistent with the modifications to the CJC approved by this House.

6. Reports and recommendations of Committee on Courts of Appellate Jurisdiction and Committee on Judicial Administration regarding the establishment of a Fifth Department. Mr. Murray summarized the current case backlog confronting the Appellate Division, Second Department, the strain which this caseload had placed on that court's resources, and the adverse impact which delays were having on appellants and their counsel. He also reviewed the analysis of this problem made by the Committee on Courts of Appellate Jurisdiction and the Committee on Judicial Administration. Mr. Murray noted that both committees had concluded that the creation of additional departments would provide the only effective long-term solution to the Second Department's situation. He indicated their recommendations were consistent with prior Association positions in this area. After discussion, the following resolution was adopted unanimously on motion of the House.

**WHEREAS**, the Appellate Division, Second Department, continues to experience an expanding caseload crisis which severely strains the resources of that court and imposes lengthy delays on appellants and their counsel as set forth most recently in the report of that court entitled, "Justice Delayed...A Status Report on the Condition of the Court"; and

**WHEREAS**, the New York State Bar Association has repeatedly recommended the establishment of additional appellate departments to alleviate the inexcusable delay of justice which confronts the citizens of the present Second Department, which recommendation continues to be supported by the Association's Committee on Courts of Appellate Jurisdiction and Committee on Judicial Administration; it is

**RESOLVED**, that the Association urges the Legislature immediately to put aside political considerations and to act in the best interests of the citizens of New York by adopting without further delay a resolution to place a constitutional amendment before the voters to establish additional judicial departments; and it is further

**RESOLVED**, that the officers of this Association are directed to make this an issue of highest priority and to pursue all steps necessary to secure prompt action by the Legislature.

7. Report and recommendations of Corporate Counsel Section regarding model engagement letter. Mr. Witmer advised that because of the concerns expressed by other sections, the Corporate Counsel Section had elected to withdraw its proposal to allow for further study in consultation with those interested groups, and anticipated resubmitting the matter at a future meeting.

8. Presentation of Root/Stimson Award, Public Service Award and Award of Merit. Peter D. Levy, Chair of the Committee on Lawyers and the Community, presented the Public Service Award to Robert E. Moore for his significant contribution to enhancing the administration of justice.

Thomas P. Connolly, Third District Vice-President, presented the Award of Merit for smaller bar associations to the Capital District Black Bar Association, and First District Vice-President Arthur Norman Field presented the Award of Merit for larger bar associations to the Association of the Bar of the City of New York and to the New York County Lawyers' Association in recognition of their outstanding service to the public and the profession accomplished through programs administered at the local level.

Mr. Levy presented the Root/Stimson Award to Michael Toohey of Saratoga Springs for outstanding service to the community.

9. Report of President. Mr. Murray reported the following matters:

a) On May 18, 1993, together with Messrs. Bracken and Witmer, he had met with Chief Judge Kaye and representatives of the Office of Court Administration to discuss matters of mutual interest. He indicated that the subjects addressed had included the status of court operations under the current year's Judiciary budget; the Association's merit selection proposal; the report of the Committee to Examine Lawyers Conduct in Matrimonial Actions; the court management study performed by the Justice Research Institute and the National Center for State Courts under the supervision of OCA's Court Management Study Committee; the progress being made on efforts to secure improvements to courthouse facilities, with particular emphasis on the delays being encountered in New York City; the status of the experimental program for the electronic recording of court proceedings; the effectiveness of initiatives adopted by OCA to streamline the Individual Assignment System; and *pro bono* service by attorneys.

b) Since the OCA meeting on May 18, 1993, he had been in further contact with the Chief Judge to express his concerns regarding legislation introduced in the Assembly to implement a mandatory continuing legal education plan which would shift part of the authority over the legal profession from the court system to the Legislature and would create an uncertain funding mechanism using fees levied against program sponsors. The Chief Judge had advised him that based on information from the Legislature, this measure would not be pursued during the current session.

c) He had also conferred with the Chief Judge concerning future actions with respect to the report of the Committee to Examine Lawyers Conduct in Matrimonial Actions following its preliminary consideration by the Administrative Board of the Courts on June 17. She advised that the report was under review by the four Appellate Divisions with the goal of implementing court-related recommendations in the fall, while providing a reasonable opportunity for the organized bar to comment on those recommendations which pertain to attorney conduct.

d) Chief Judge Kaye and Chief Administrative Judge Milonas had forwarded a letter to the members of the judiciary outlining the areas which they would be emphasizing during the coming months. These included the development of a method to assure periodic salary increases for judges; further decentralization of the operation and management of the courts, with an opportunity for input from trial judges, bar leaders and the citizenry; the upgrading and improvement of courthouse facilities; the filling of judicial vacancies and the taking of other steps to reduce case backlogs, sur

as the formation of committees of trial judges and lawyers to study various matters; making OCA more helpful in addressing the everyday needs of judges, such as through the creation of an Office of Judicial Benefits; implementation of key recommendations contained in the management study conducted of the court system; the enhancement of judicial education programs; the improvement of conditions for jury service; the development of long-term strategic plans for the court system; and the encouragement of better cooperation and communication among the three branches of government.

e) In furtherance of the goal of improving relations with the other two branches of government, the Chief Judge and Judge Milonas had met with Governor Cuomo. To help address the caseload problem confronting the Appellate Division, Second Department, agreement had been reached to add five justices to that court and to distribute temporarily some of the Second Department's cases to other departments. In addition, the Governor had agreed that all outstanding judicial vacancies should be filled expeditiously to aid the court system in dealing with its caseload.

f) Until September 3, nominations were being accepted for the Association's Ruth G. Schapiro Memorial Award which would be presented at the November House meeting to a member of the Association who has made a noteworthy contribution to the concerns of women.

g) The Committee on Women in the Law was encouraging House members to attend the Margaret Brent Women Lawyers of Achievement Awards luncheon sponsored by the ABA on August 8 in New York City, as the honorees would include Hon. Betty Weinberg Ellerin, Associate Justice, First Department, and Hon. Ruth Bader Ginsburg, U.S. Supreme Court nominee.

h) Effective July 1, 1993, the four Appellate Divisions amended DR 2-101 of the Code of Professional Responsibility with respect to lawyer advertising. Specifically, the revisions require that at the time of publication, lawyers advertising contingent fee rates must disclose whether percentages are computed before or after the deduction of costs, disbursements and other litigation expenses, and that in the event there is no recovery, the client remains liable for the expenses of litigation, including court costs and disbursements. Mr. Murray reminded the members that under the resolution adopted at the January 1993 House meeting, it was no longer necessary for the House to approve such amendments for inclusion in the NYSBA version of the Code, as they were now incorporated automatically.

i) To preserve state bar representation in the ABA's House of Delegates, the NYSBA, with the approval of the Executive Committee, had joined the National Caucus of State Bar Associations.

j) Governor Cuomo had recently released a revised Executive Order governing judicial selection with reference to the appointment of individuals to the screening committees which review candidates for justices of the Appellate Division and the Supreme Court, as well as judges of the Court of Claims and the County, Family and Surrogate's Courts. Mr. Murray indicated that in keeping with these purposes, he would be making one appointment to each of the four departmental screening committees during the coming months.

k) The U.S. State Department had responded to the resolution adopted at the April House meeting with reference to the U.S. Supreme Court decision in U.S. Alvarez-Machain. He reported that the State Department is reviewing the decision and the policies of the prior administration, and that President Clinton has provided assurances to Canada and Mexico that the United States will not conduct or encourage illegal transborder abductions from either country.

l) Mr. Murray expressed appreciation to Mr. Bracken 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 John P. Bracken 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 1992-93.

10. Report and recommendations of New York County Lawyers' Association regarding amendments to the Immigration and Nationality Act. Robert Klipstein of the New York County Lawyers' Association summarized that organization's "Proposal to protect the U.S. labor market, accommodate the needs of U.S. employers of family care givers and protect the rights of undocumented aliens." He outlined the difficulties encountered by many working families who are compelled to hire undocumented aliens to care for children or disabled relatives, the impact this has on the American job market and the effect current federal statutes have on alien workers in the United States. He described the manner in which the immigration laws currently operate with respect to alien workers and summarized the proposal developed by the New York County Lawyers' Association to balance the interests of American families in need of care givers, the U.S. labor market, and undocumented foreign workers, including amendments which would be required to the Immigration and Nationality Act to implement the proposal. Mr. Klipstein advised that if approved, the New York County Lawyers' Association would then be able to submit the matter to the ABA's House of Delegates with the NYSBA as co-sponsor of the proposal.

Mr. Witmer noted the comments which had been received from the Labor and Employment Law Section, the Committee on Federal Legislation and the Committee on Women in the Law with regard to the proposal. After discussion of the merits of the proposal, as well as the concerns which had been raised by these other groups, a motion was adopted approving the report and recommendations.

11. Report and recommendations of New York County Lawyers' Association regarding amendments to the Surrogate's Court Procedure Act. Michael Miller of the New York County Lawyers' Association summarized that organization's report in opposition to the new Sec. 2313 proposed to the Surrogate's Court Procedure Act by the EPTL-SCPA Legislative Advisory Committee. He indicated that the proposed measure, which would halve the commissions of an executor who receives fees from an estate for other services rendered, placed an unwarranted and unsupported restriction on attorney-executors and was an overly-broad remedy for the perceived failure of a few attorneys to disclose to testators that service in the dual capacity of attorney and

executor would entitle the lawyer to receive both legal fees and executor's commissions. He pointed out that the statute would not cure the non-disclosure problem and that there appeared to be more equitably targeted remedies to address such situations. Arthur E. Bongiovanni, Chairperson of the Trusts and Estates Law Section, outlined the reasons for that section's support for the proposed legislation as drafted by the Legislative Advisory Committee, and stated that the measure represented a reasonable approach to resolving the compensation of an attorney who serves an estate in a dual capacity. Eugene E. Peckham appeared on behalf of the EPTL-SCPA Legislative Advisory Committee and explained the basis for the proposed legislation. As background, he noted the problems and concerns which had been identified when attorneys also serve as executors for an estate. He observed that the measure had been proposed as the least restrictive alternative in light of all relevant circumstances, as it would still permit an attorney to receive full professional fees for services performed on behalf of an estate. After discussion, the following resolution was approved on motion of the House by a vote of 93-14:

**RESOLVED**, that the New York State Bar Association hereby disapproves proposed SCPA Section 2313 as drafted by the EPTL-SCPA Legislative Advisory Committee and requests interested groups to work with the Advisory Committee to develop solutions to the issues which the Advisory Committee has identified.

12. Joint statement by New York County Lawyers' Association and the Insurance, Negligence and Compensation Law Section regarding Workers' Compensation Board Study. Mr. Witmer advised that following the preliminary presentation at the January meeting of the New York County Lawyers' Association's report and recommendations with respect to the Workers' Compensation Board, the matter had been reviewed by the Insurance, Negligence and Compensation Law Section. He indicated that following discussion, the two groups had issued the following joint statement concerning the nature of a joint study they would be undertaking of the workers' compensation system in New York:

The New York County Lawyers' Association and the New York State Bar Association INCL Section have agreed to jointly fund a study to review New York workers' compensation system issues including the following substantive law issues and related matters:

(1) The administrative process - can the process be improved by changes in legislation, rules and regulations, and caselaw, so as to remove needless obstacles to prompt decision making?

(2) National health care - does managed care under the New York Workers' Compensation Law fit into a national health perspective?

(3) Occupational disease - what are the current issues facing the workers' compensation system in dealing with trends in occupational disease claims?

(4) Coverage - are there gaps in New York coverage that should be addressed?

Mr. Witmer stated that the House would be kept apprised of developments regarding the study.

13. Report of Chair. Mr. Witmer reported the following matters:

a) In his capacity as President-Elect during the coming year he planned to reach out to and meet with county, local, women's and minority bar associations in an effort to improve communications and cooperation among the various elements of the organized bar.

b) Relevant sections and committees of the Association were in the process of reviewing legislation extending the statute of limitations for attorney malpractice to six years. He indicated that the House would be kept informed as to developments in this area.

14. Date and place of next meeting. Mr. Witmer announced that the next meeting of the House of Delegates will be held on Saturday, November 6, 1993 at the Bar Center in Albany.