

NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
BAR CENTER, ALBANY, NEW YORK
MARCH 31, 2001

PRESENT: Adler; Agress; Alcott; Anglehart; Asarch; Auspitz; Aydelott; Ayers; Bailey; Baker; Barasch; Batra; Bergen; Bing; Bohner; Bowler; Bracken; Buckley; Buzard; Cashman; Chambers; Christian; Clements; Cloonan; Connolly; Copps; Darche; Denton; Dietz; DiGirolomo; Doerr; J. Dollard; K. Dollard; Dorsey; Doyaga; J. Dwyer; M. Dwyer; Eisman; Eisman; Eppers; Evanko; Fennell; Field; Finerty; Fisher; Flink; Flood; B. Freedman; H. Freedman; Friedberg; Galloway; Gardella; Gerstman; Getnick; Gingold; Giordano; Glover; Goldstein; Graber; Gross; Gutleber; Handlin; Harren; Harris; Hartman; Hassett; Headley; Heller; Herold; R. Hoffman; S. Hoffman; Hoye; Jacoby; Jaffe; James; Karson; Kelly; Kendall; Kennedy; Kenny; S. Kessler; D. Klein; M. Klein; Kougasian; Krane; Kretser; Lagarenne; Lawrence; Leber; Levin; Lieberman; Lindenauer; Longo; MacCrate; Mandell; Maney; Matthews; Mawhinney; Mayer; McCarthy; Meng; Mettler; Miklitsch; Millon; Minkowitz; Moore; Morse; Murray; Nashak; Netter; O'Brien; O'Donnell; O'Keefe; Omansky; Opotowsky; Ostertag; Paul; Peckham; Pierro; Priore; Pruzansky; Purcell; Reich; Reizes; Reynolds; Rice; Richardson; Rifkin; Rosenstein; Safer; Samel; Schumacher; Shapiro; Silkenat; Sloan; Sperendi; Standard; Steinman; Stenson; J. Sunshine; N. Sunshine; Swidler; Terrelonge; Tharp; Tippins; Tishler; Trevett; Tully; Uebelhoer; Walker; O. Walsh; Webb; Wimpfheimer; Zube.

1. Approval of minutes of January 26, 2001 meeting. The minutes were deemed accepted as distributed previously.

2. Report and recommendations of Special Committee on Cameras in the Courtroom.

A. Vincent Buzard, Chair of the Special Committee on Cameras in the Courtroom, summarized the report and recommendations of the Special Committee with respect to the audio-visual coverage of trial court proceedings. He described the methodology employed by the Special Committee in conducting its study, which included a careful review of the Association's previous positions regarding this issue, a study of the statutes and procedures utilized in other jurisdictions, as well as extensive interviews of judges and attorneys involved with televised trials. Mr. Buzard also outlined the Special Committee's analysis of the issues connected with audio-visual coverage of trials including consent of the parties; adequacy of notice; applications for coverage; appellate procedures; safeguards for witnesses, children and the victims of domestic violence or sexual assault; and protection of the identity of jurors. He stated that the Special Committee recommended the enactment of legislation authorizing audio-visual coverage of trials for a two-year experimental period with the conditions and safeguards set forth in the report, but without requiring that there be consent given by the parties.

Special Committee member Martin B. Adelman presented a dissent in which he urged that the House include a consent requirement as part of its resolution, similar to the position that had been taken on previous occasions by the House.

Discussion then ensued regarding the merits of the Special Committee's position, during which various members expressed support for the proposed recommendations as presenting a balanced approach to the relevant issues which would be fair and workable to all concerned, while others expressed the view that a consent requirement was necessary to safeguard the rights of the parties.

On behalf of the Criminal Justice Section, Mr. Adler offered a motion to the effect that television coverage of trial and pretrial proceedings be had only with the consent of counsel for all parties and that any proposed legislation to implement audio-visual coverage contain a three-year sunset provision. He explained that such a proviso would fairly balance the right to a fair trial and the obligations of counsel with the rights of public access to court proceedings. Discussion ensued during which divided opinions were expressed by commenting members, with some supporting the amendment and others stating that the proposal as offered by the Special Committee presented a fair balance of the interests of all concerned. Following conclusion of this discussion, Mr. Adler's proposed amendment failed by a vote of 69 members in favor and 73 opposed. A motion was then adopted approving the following resolution offered by the Special Committee:

WHEREAS, the President of the New York State Bar Association appointed a Special Committee on Cameras in the Courtroom pursuant to a resolution adopted by the House of Delegates on June 24, 2000; and

WHEREAS, the Special Committee has issued its final report; and

WHEREAS, the Special Committee communicated with every Bar Association in the country to obtain reports or studies on the issues relating to cameras in the courtroom; and

WHEREAS, all of the studies provided to the Special Committee by Bar Associations and other professional groups from other states favor cameras in the courts; and

WHEREAS, the Special Committee surveyed the laws of the other states with regard to cameras in the courtroom and found that 33 states currently permit cameras in the court under conditions similar to those which the Special Committee proposes, but the Committee proposal contains safeguards present in no other state; and

WHEREAS, the Special Committee undertook to interview lawyers and judges with actual experience with cameras in the courtroom in New York during the ten year experimental period, and based upon those interviews found that there is no pattern of specific harm in specific cases and no substantial evidence that cameras adversely affect the outcome of trials; and

WHEREAS, the Special Committee concluded that cameras or televised trials can aid the public in understanding the legal system and the lawyer's role in it, and that public understanding and trust is fundamental to our system of justice and our ability to function as lawyers,

NOW, THEREFORE, BE IT RESOLVED, that the recommendation that cameras be returned to the courtrooms of this state under the limitations, safeguards and conditions set forth in the report of the New York State Bar Association Special Committee on Cameras in the Courtroom, and that the report hereby is adopted as the position of the New York State Bar Association.

3. Report and recommendations of Criminal Justice Section and New York County Lawyers' Association re: moratorium on executions. Vincent Edward Doyle, III, Chair of the Criminal Justice Section, summarized the report and recommendations submitted jointly by the section and the New York County Lawyers' Association in support of a moratorium on capital punishment until appropriate studies confirm that policies and procedures are in place to ensure that the death penalty is administered fairly and impartially, in accordance with due process and without risk that innocent persons may be executed. In support of this position, he outlined data with respect to death penalty cases in other jurisdictions that cast doubt on the reliability of the process by which guilt and punishment are determined in capital cases. He reported that based on this information, the American Bar Association as well as major state and local bar associations in various parts of the country had called for a moratorium on administration of the death penalty until the defects that undermine the fairness of capital prosecutions can be remedied. He further indicated that information compiled thus far suggested New York suffered from the same problems with the death penalty as other states. Mr. Doyle also noted that the proposed moratorium did not address the moral and political issues associated with the death penalty; rather, it was confined to the legal debate surrounding the validity and effectiveness of the procedures by which capital punishment is administered. On behalf of the New York County Lawyers' Association, Hon. Margaret J. Finerty pointed out the impetus for a moratorium is premised on the fundamental flaws, with disturbingly high error rates, in capital cases coupled with decided racial imbalances in those tried, convicted and executed. She noted that implementation of a moratorium would permit reforms to be enacted resulting in the correction of errors that would lead to a fair death penalty system.

Mr. Hassett assumed the position of Chair for the balance of the discussion and vote concerning this item. Mr. Krane then offered a substitute resolution on behalf of the Executive Committee calling on the executive and legislative branches of the New York State government to enact measures and take steps to ensure that death penalty cases are administered fairly and impartially, in accordance with the highest standards of due process to minimize the risk of executing an innocent person. He stated that the specific parameters as well as the results to be derived from the proposed studies were uncertain and open-ended. He also suggested that as described, the moratorium could still be viewed as a referendum on the merits of the death penalty. Mr. Krane indicated that the proposed substitute resolution could permit a strong position to be taken on the fairness

of the death penalty system without being drawn into a debate on the policies underlying capital punishment.

Discussion then ensued during which various members expressed the view that the substitute resolution failed to go far enough in referencing the actual problems associated with the administration of capital punishment and providing guidance as to the necessary process for identifying, verifying and remedying the perceived problems. The proposed substitute resolution was then defeated by vote of the House.

A motion was then offered by Mr. Fisher to delete the sixth, eighth and tenth whereas clauses, the second resolved clause, and to modify the first resolved clause as contained in the resolution proposed by the Criminal Justice Section and the New York County Lawyers' Association. He explained that these changes might address the concerns expressed by Mr. Krane. After discussion, the proposed amendment was defeated by vote of the House.

A motion was then offered by Ms. Netter to postpone further consideration of the matter until the June meeting to permit further study of the issues, particularly the impact of the Legislature's failure to incorporate all of the recommendations made by the Association when the death penalty legislation was enacted. This motion was defeated by vote of the House.

After further discussion, a motion was adopted approving the following resolution as proposed by the Criminal Justice Section and the New York County Lawyers' Association:

WHEREAS, in September, 1995, New York re-instituted the death penalty as an appropriate punishment for certain specified homicide crimes; and

WHEREAS, since that time many groups and individuals have identified serious flaws and omissions in New York's death penalty legislation and questioned whether the law could be administered with fairness and consistency, and without risk to the innocent;

WHEREAS, events subsequent to the enactment of New York State's death penalty legislation have demonstrated clearly that in other states the death penalty has been imposed upon innocent people, as well as persons who were youths at the time of the offense, and mentally impaired individuals;

WHEREAS, on June 12, 2000, there was release of a study entitled "A Broken System: Error Rates in Capital Cases 1973-1994" authored by James S. Liebman, Jeffery Fagan and Valerie West (hereinafter the "Liebman Report"); and

WHEREAS, the Liebman Report, which represented a statistical study of this nation's capital appeals, demonstrated that appellate review found reversible error in 68% of capital sentences nationwide, and that in 82% of

the cases retried after reversal a sentence of death did not result -- with 7% found not guilty of the capital crime; and

WHEREAS, a report by the United States Department of Justice entitled "The Federal Death Penalty System - A Statistical Survey (1998-2000)," released on September 12, 2000, documented numerous racial and geographical disparities in the federal death penalty system, including the following:

- from 1995 through July 2000, U.S Attorneys forwarded for review the cases of 682 defendants who faced capital charges: 20% whites; 80% minorities
- U.S. Attorneys recommended the death penalty for 183 of them: 26% whites; 74% minorities
- The Attorney General approved seeking death sentences for 159: 28% whites, 72% minorities
- 20 defendants were sentenced to death: 20% whites, 80% minorities, and

WHEREAS, the State of Illinois has suspended executions because several people on death row in that state have been found to be actually innocent of the crimes for which they have been convicted; and

WHEREAS, the American Bar Association has adopted a resolution calling for a moratorium on the implementation of the death penalty unless certain steps have been taken, and an abolition of the execution of mentally retarded persons and persons who are under the age of 18 at the time of their offenses; and

WHEREAS, the following governmental entities and bar associations have issued resolutions calling for a moratorium on executions in their respective jurisdictions: Board of Aldermen of the Town of Carrboro, North Carolina; Council of Town of Chapel Hill, North Carolina; Charlottesville Albermarle Bar Association; City of Durham, North Carolina; Illinois State Bar Association; Orange County, North Carolina; Virginia College of Defense Attorneys, Inc.; Connecticut Bar Association; Ohio State Bar Association; Pennsylvania Bar Association; Chicago Council of Lawyers; Philadelphia Bar Association; New Jersey State Bar Association,* and

WHEREAS, it is clear that there must be further review and deliberation of the processes by which the death penalty is determined and implemented both in New York and across the country and that such study should be undertaken prior to the implementation of any death sentence; and

* This listing of entities calling for a moratorium on executions is non-exhaustive, as the list continues to grow with ever increasing disclosures that the American capital punishment system is flawed.

WHEREAS, the fair, just and moral determination and implementation of the ultimate penalty is an issue of the highest priority to the organized bar,

IT IS HEREBY

RESOLVED, the New York State Bar Association calls upon the executive and legislative branches of the New York State government to enact and adopt legislation imposing a moratorium on executions until such time as the State can undertake an appropriate study and deliberation in order to implement policies and procedures to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with highest standards of due process and, (2) implement every reasonable precaution to avoid the risk of executing an innocent person; and it is further

RESOLVED, the New York State Bar Association calls upon the states and the federal government not to carry out any execution unless and until all jurisdictions can ensure that capital punishment can be administered fairly and impartially and with every reasonable precaution to avoid the risk of executing an innocent person and with guarantees that no person who has committed the subject offense while under the age of 18 or while suffering from mental impairment shall be subject to the death penalty, and it is further

RESOLVED, the President of the New York State Bar Association shall transmit this resolution to all appropriate authorities, including the Governor of the State of New York, and the leaders of the New York State Legislature.

Members of the Judiciary who are members of the House, as well as Ms. Kretser and Mr. Rifkin, who are Assistant Attorneys General, abstained from participation in the discussion and vote concerning this item.

4. Report of Chair. Mr. Krane announced the following matters:

a) Bar associations entitled to delegates to the House of Delegates had filed their designations of delegates for the 2001-2002 Association year. On motion, said designations were approved as filed, and a further motion was adopted approving the filed roster of members of the House as the official list for 2001-2002.

b) Hon. Hugh R. Jones, retired Associate Judge of the New York State Court of Appeals and a past President of the Association, had passed away earlier in the month. Mr. Krane advised that a memorial to Judge Jones would be presented at the June House meeting. A moment of silence was then observed out of respect for Judge Jones' memory and his contributions to the legal profession.

c) The Trial Lawyers Section National Trial Advocacy Awards, which are usually presented at the spring meeting of the House, would not be given this year due to the proximity of the competition to the earlier House meeting date.

d) He recognized the retiring members of the House and expressed appreciation to them for their service, support and civility during the course of the meetings over the past year. He expressed similar gratitude to the members of the Executive Committee and to Mr. Hassett for his leadership of the Association during the past year.

5. Report of Treasurer. Mr. Hadley summarized the Treasurer's report covering the period January 1 - February 28, 2001. He reviewed the major income and expense items contained in the budget and noted that they were consistent with the Finance Committee's overall estimates for the initial two months of the fiscal year. He observed, in comparison with 2000, that investment losses were greater due to the decline experienced by the stock market during the first part of the year. Mr. Headley stated that through careful management by United States Trust Company, the Cromwell and Reserve Funds had both lost only approximately 10 percent, which was below the general market decline. He indicated that unrealized losses were approximately \$50,000 higher than for the previous year at this point. He reported, however, that with the anticipated recovery by the market later in the year, these losses should reverse. Mr. Headley reported further that the Association had completed the 2000 fiscal year with an unaudited surplus of \$1.3 million, if realized and unrealized gains and losses on investments were excluded, or \$510,000 if they were included. He stated that the Association remained in sound financial condition and, as required under the Bylaws, the audited report for the 2000 fiscal year would be presented at the June House meeting. The report was received with thanks.

6. Election of Nominating Committee and NYSBA delegates to ABA House of Delegates. Joshua M. Pruzansky, Chair of the Nominating Committee, expressed appreciation to the members of the House for their good wishes during his recovery from bypass surgery. He then reported that the committee had nominated James C. Moore, Maryann Saccomando Freedman and Thomas O. Rice as members-at-large of the Nominating Committee and Mr. Moore as its Chair for the 2001-2002 Association year. A motion was adopted electing said Chair and members. Mr. Pruzansky then reported that the Nominating Committee had selected Maxwell S. Pfeifer to serve as an alternate at-large member. A motion was adopted electing Mr. Pfeifer to that position. Mr. Pruzansky next reported that the vice-presidents and elected delegates from each district had nominated the following individuals to serve as members and alternates of the Nominating Committee from their respective districts for the 2001-2002 Association year:

FIRST DISTRICT

EVAN A. DAVIS
ROSALIND S. FINK
PETER M. KOU GASIAN
CRAIG A. LANDY
MICHAEL MILLER
ELIZABETH D. MOORE
GERALD G. PAUL
SUSAN PORTER
EUGENE P. SOUTHER
NORMAN L. REIMER, FIRST ALTERNATE
BARBARA BERGER OPTOWSKY, SECOND ALTERNATE
ALAN ROTHSTEIN, THIRD ALTERNATE

SECOND DISTRICT

DAVID J. DOYAGA
LYNN R. TERRELONGE
MARIAM CYRULNIK, ALTERNATE

THIRD DISTRICT

RACHEL KRETZER
MIRIAM M. NETTER
MADELEINE MANEY KENNEDY, ALTERNATE

FOURTH DISTRICT

HON. WILLIAM H. KENIRY
NICHOLAS E. TISHLER
PAUL L. WOLLMAN, ALTERNATE

FIFTH DISTRICT

DAVID M. HAYES
M. CATHERINE RICHARDSON
NICHOLAS S. PRIORE, ALTERNATE

SIXTH DISTRICT

LISLIE H. REIZES
DAVID A. TYLER
CLOVER M. DRINKWATER, ALTERNATE

SEVENTH DISTRICT

CAROLYN G. NUSSBAUM
G. ROBERT WITMER, JR.
CHARLES P. INCLIMA, ALTERNATE

EIGHTH DISTRICT

SHARON STERN GERSTMAN
ERIN M. PERADOTTO
GRACE MARIE ANGE, ALTERNATE

NINTH DISTRICT

HENRY S. BERMAN
MARY ELLEN MANLEY
ROBERT L. OSTERTAG
HON. SAMUEL D. WALKER, ALTERNATE

TENTH DISTRICT

HARVEY B. BESUNDER
ROBERT W. CORCORAN
SCOTT M. KARSON
JOHN N. SANTEMMA
EMILY F. FRANCHINA, FIRST ALTERNATE
EUGENE J. O'BRIEN, SECOND ALTERNATE

ELEVENTH DISTRICT

CATHERINE R. GLOVER
SEYMOUR W. JAMES, JR.
GEORGE J. NASHAK, JR., ALTERNATE

TWELFTH DISTRICT

LAWRENCE R. BAILEY, JR.
ROBERT S. SUMMER
ROY J. SCHWARTZ, ALTERNATE

A motion was adopted electing the foregoing district representatives and alternates.

Mr. Pruzansky then reported that the Nominating Committee had selected the following individuals to serve a two-year term commencing in August 2001 as delegates to the House of Delegates of the American Bar Association: Paul Michael Hassett, James C. Moore, M. Catherine Richardson, Lorraine Power Sharp and G. Robert Witmer, Jr. A motion was adopted electing said individuals.

7. Report of Special Executive Director Search Committee. Mr. Hassett, in his capacity as Chair of the Special Executive Director Search Committee, summarized the committee's efforts to secure a suitable successor to retiring Executive Director William J. Carroll. He described the methodology employed by the committee in conducting a nationwide search which drew submissions from some sixty qualified applicants. Mr. Hassett noted that from these, an interview pool of eighteen highly qualified applicants had been interviewed, then reduced to four finalists. He reported that after careful deliberation, the committee had chosen Patricia K. Bucklin, the current Director of Public Affairs for the New York State Office of Court Administration, as Executive Director. Mr. Hassett noted that Ms. Bucklin's selection had been endorsed by the Executive Committee on March 30, 2001. A motion was then adopted unanimously approving the following resolution:

WHEREAS, the forthcoming retirement of William J. Carroll on June 1, 2001 makes it appropriate that the procedure for selection and retention of the Executive Director and a statement of the powers and duties of the position be restated by the House of Delegates;

NOW, THEREFORE, at a regular meeting of the House of Delegates held at the Bar Center on March 31, 2001, on motion duly made, seconded and carried, it is hereby

RESOLVED, that the Executive Director of the New York State bar Association shall be the chief administrative official of the Association, having direct charge of all administrative and staff operations. Under the direction of the officers and the Executive Committee, the Executive Director shall be responsible for implementing the policies of the Association, as determined by the Executive Committee or the House of Delegates; shall keep the officers and others informed of developments affecting the practice of law and the legal profession and the activities of other bar associations relating to such developments, and advise the officers and others as to the establishment of Association objectives and policy; and shall interpret programs and policies to the headquarters staff and members of the Association. Without limiting the generality of the foregoing, the Executive Director's powers and duties shall include:

- (a) Exercising exclusive jurisdiction over the hiring, assignment, training and discharge of all employees of the Association, provided that the hiring of professional and support staff shall take place only when the particular positions have been authorized by the Executive Committee or the Finance Committee;
- (b) In accordance with published Rules of the Finance Committee, directing the tentative preparation of and participating in the formulation of the Association's annual budget, and administering the Association's affairs in accordance with such budget after its adoption by the House of Delegates, or as amended;
- (c) Preparation of agenda and minutes of meetings of the Association, the House of Delegates, the Executive Committee and the Finance Committee, and, on request of The New York Bar Foundation, those of The Foundation and its Board of Directors;
- (d) Advising and assisting the President of the Association in all respects toward the President's discharge of the duties of the office, and advising the President-elect on the prospective appointment of committees;
- (e) Providing staff and liaison assistance to the committees, sections and task forces of the Association;
- (f) Carrying out such other, specific duties as may be directed by the Executive Committee or the House of Delegates; and it is further

RESOLVED, that the compensation of the Executive Director shall be in an amount fixed by the Finance Committee and included in the annual budget of the Association; and it is further

RESOLVED, that pursuant to delegation of authority by this House, the report of the Special Executive Director Search Committee as approved by the Executive Committee, at its meeting of March 30, 2001, designating Patricia K. Bucklin of Slingerlands, New York as the Executive Director of this Association as of June 1, 2001, hereby is approved.

Ms. Bucklin then addressed the House, expressing her appreciation to the members for their approval and confidence in her, and noted her goal of carrying forward the standards of excellence established by Mr. Carroll.

8. Report of President. Mr. Hassett advised, that to allow maximum time for the discussion of the major substantive items contained on the agenda, and in lieu of the usual oral President's report, he would transmit a written summary of his major activities with the minutes of this meeting. He did, however, note the following limited items:

a) Based on his attendance at numerous section meetings, he was impressed with the breadth and depth of section activities and the commitment of time given by their members to further the work of the sections.

b) He also outlined his participation at various county and local bar association functions during his term and expressed thanks for the enthusiastic response he had been given, as well as the opportunity to meet personally with hundreds of members statewide.

c) Mr. Hassett expressed appreciation to the members of the House for their encouragement and cooperation during his tenure as President, and acknowledged the other officers, staff and Executive Committee for their counsel and support. The House members acknowledged Mr. Hassett's service with a standing ovation.

d) Mr. Hassett then congratulated William J. Carroll, on the successful completion of his career as Executive Director, and thanked him for the leadership he had provided to the staff over the past twenty-three years, as well as the counsel he had provided to the officers, sections and committees during this period. The House members acknowledged Mr. Carroll with a standing ovation. Mr. Carroll expressed appreciation to the members, and acknowledged former presidents, officers, members and staff who had been supportive during his career.

9. Preliminary report by Health Law Section re: proposed amendments to Section 73 of the Domestic Relations Law. Robert N. Swidler, past Chair of the Health Law Section, summarized the section's affirmative legislative proposal to amend Sec. 73 of the Domestic Relations Law. He explained that this statute presently provides for the legitimacy of a child born to a married woman by means of artificial insemination, and that the proposed revisions would lend similar certainty to the parentage of children born

through other assisted reproductive techniques, such as egg or embryo transfer. He noted that the application of the amendment was limited to married couples and did not create the ambiguities attached to a more expansive proposal involving gestational surrogacy that the House had disapproved in 1993. Mr. Swidler also advised that the proposal coming before the House reflected revisions and improvements suggested by the Executive Committee.

He invited comments from interested members and indicated that the proposal would be scheduled for formal consideration at the June meeting in Cooperstown. The report was received with thanks.

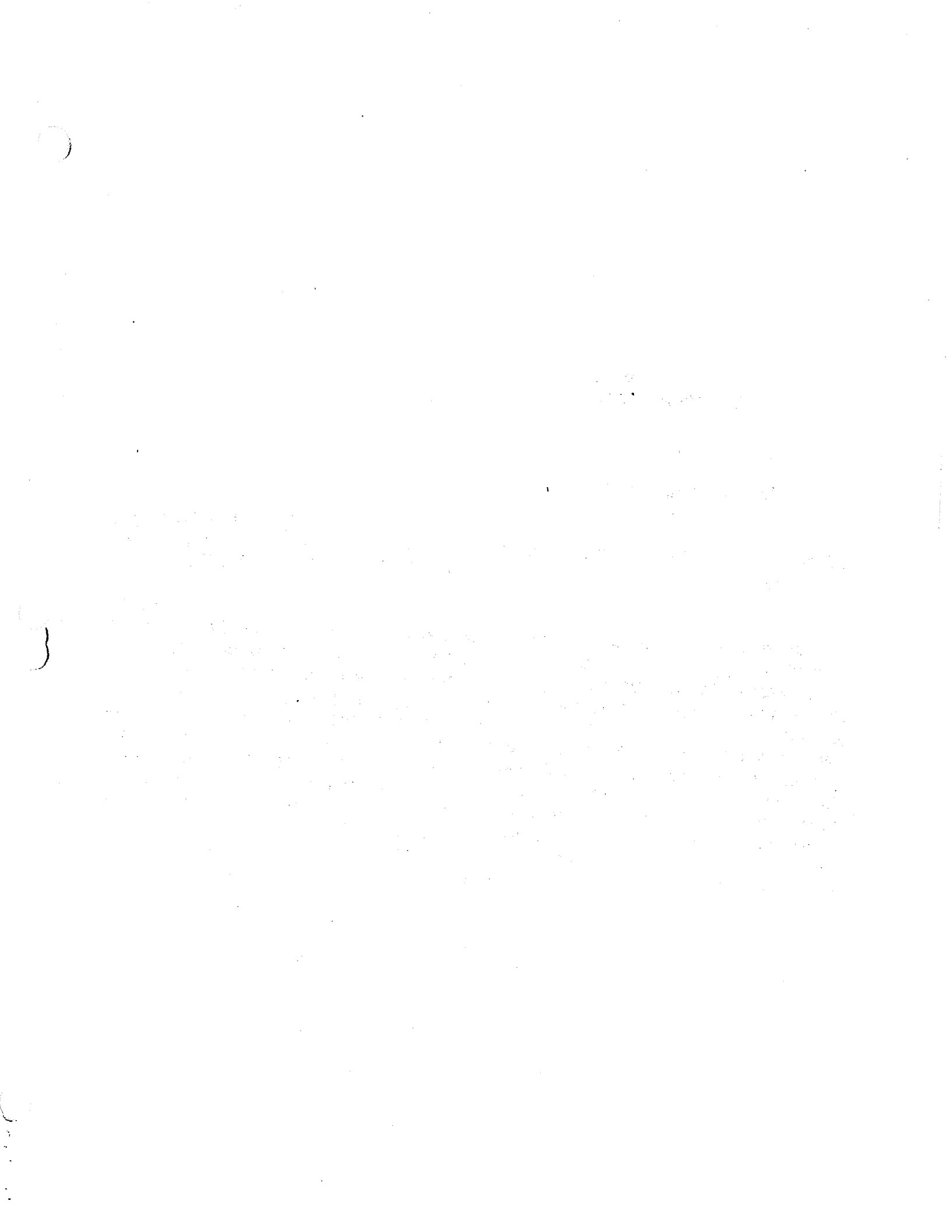
10. Report of The New York Bar Foundation. Hon. Richard J. Bartlett, President of The New York Bar Foundation, advised that The Foundation's annual report for the year 2000 was available and contained detailed information regarding the organization's activities during the previous calendar year in furtherance of its objectives of facilitating the delivery of legal services, improving the justice system and the law, enhancing professional competence and ethics, and increasing public understanding of the law. Judge Bartlett indicated that in pursuing these goals in 2001, The Foundation had awarded some 47 grants totaling approximately \$385,000. He noted that a past grant had assisted the Bar Association of Erie County in developing an outstanding educational film on trust accounting for newer attorneys. Judge Bartlett expressed appreciation to the members of the House for their past generosity in supporting the work of The Foundation and encouraged their continued support in the future. The report was received with thanks.

11. Date and place of next meeting. Mr. Krane announced that the next meeting of the House of Delegates was scheduled for Saturday, June 23, 2001 at The Otesaga, Cooperstown, New York.

Respectfully submitted,



Lorraine Power Tharp
Secretary





New York State Bar Association

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May 31, 2001

To: Members of the House of Delegates

Re: President's report in connection with
March 31, 2001 meeting

As those who attended the last meeting of the House in Albany know, after completing the important items on the agenda little time remained and I chose to limit my remarks to a brief valedictory in order to assure a timely adjournment. In lieu of that report, I am providing the following summary of significant items for your review.

a) **Meeting with Chief Administrative Judge Lippman.** On April 5, 2001, I met with Judge Lippman in the latest of our regularly scheduled meetings. We covered a number of issues of significance to both the Bar and the court system, including 18-B panel fees, mandatory fee arbitration, fiduciary appointments, the recommendations by the Committee on Public Trust and Confidence in the Legal System, the Chief Judge's Commission on Alcohol and Substance Abuse in the Legal Profession, and the functioning of various elements of the mandatory CLE rule. I am pleased to announce that our relations with Judge Lippman remain cordial and productive. He is receptive to our concerns and suggestions, and is willing to consider issues that we raise in a constructive manner. We can look forward to having an open avenue of communication with OCA that should prove positive and beneficial in the future.

b) **Multidisciplinary/multijurisdictional practice.** As I reported to you in January, based on the action taken by the House at the November meeting, we have transmitted the Code of Professional Responsibility amendments dealing with multidisciplinary practice to the four Presiding Justices of the Appellate Division. The four departments, through their Interdepartmental Committee on the Code of Professional Responsibility, now have the Disciplinary Rules that we proposed under study. We have advised the Interdepartmental Committee that we are available to assist this review and to discuss any questions they may have regarding our proposals. In fact, Steven Krane and Bob MacCrate, who chairs the Special Committee on the Law Governing Firm Structure and Operation, met recently with the Interdepartmental Committee and we anticipate the Appellate Divisions will complete their review during the coming weeks.

On a related point, you may recall that part of the resolution adopted by the House, based on the report of the Special Committee on the Law Governing Firm Structure and Operation, urged modernization of the standards governing unlawful practice of the law. I am pleased to report that our

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Committee on Unlawful Practice of Law has undertaken this assignment and plans to report to the Executive Committee and the House of Delegates later this year.

With regard to the related topic of multijurisdictional practice by attorneys, the American Bar Association has designated a Commission on Multijurisdictional Practice to examine issues, including those involving unlawful practice of the law, connected with attorneys and law firms practicing in multiple states. I reported in January that the ABA Commission had planned to complete its information-gathering process and to present a report to the ABA's House in 2001. However, given the complexity of the issues and the need for more time to study them, a number of state bars including the NYSBA, asked the ABA to lengthen its timetable. The ABA has acceded to this request and will defer the matter until 2002. We will be appointing a special committee to study MJP and will advise you of its progress.

c) **18-B panel fees.** We continue to press for a much-needed increase in the statutory compensation rates paid to 18-B panel attorneys and to law guardians. On March 20, the NYSBA, particularly through the Criminal Justice Section, participated with other groups in Gideon Day, commemorating the U.S. Supreme Court decision on right to counsel in Gideon V. Wainwright, in lobbying the Legislature for an increase in 18-B rates. The Governor's commission on this issue, consisting of Criminal Justice Coordinator Katherine Lapp, Senate Judiciary Committee Chair James J. Lack, and Assembly Judiciary Committee Chair Helene Weinstein, continues to study the funding problem and is expected to report this session. In a related vein, the Administrative Board of the Courts has amended the Rules of the Chief Administrator of the Courts to clarify the process and standards of review for applications seeking compensation above the statutory limits for 18-B attorneys and law guardians.

I am pleased to report that an article which appeared in the May 8, 2001 issue of the *New York Law Journal* stated that, at least conceptually, the political leaders in Albany had agreed that compensation levels for assigned counsel should be raised with the state assuming at least some of the cost of the increase. Exact figures were not provided as to the contemplated level of the fee increase or to the total costs involved. The commitment to provide some state funding represents a major breakthrough in the impasse which has existed for so many years. I should point out, however, there are still unresolved issues to be dealt with before matters are finally resolved. It is our understanding that with state funding will come some level of accountability to assure the proper expenditure of the money. New York's present structure for providing legal representation at the local level through a variety of assigned counsel, public defender and legal aid offices suggests problems regarding the equality of distribution of state funding. During the coming weeks, we will continue to remain involved in the process with the goal of securing the necessary rate increase but in a manner that is fair to all concerned including localities and existing programs.

d) **Appellate Division Appointments.** Earlier this spring, the Governor announced appointments to the Appellate Divisions. He named Lawrence J. Bracken, a longtime member of the NYSBA's Committee on Courts of Appellate Jurisdiction, as Presiding Justice in the Second Department. Governor Pataki also elevated Supreme Court Justices Thomas A. Adams, Barry A. Cozier, Stephen G. Crane and Sandra L. Townes to the Second Department bench. In the First Department, Justice George D. Marlow was appointed to the Appellate Division. With these appointments, only one vacancy remains in the Second Department, and one each in the Third and Fourth Departments.

e) **Special Committee on Public Trust and Confidence in the Legal System.** At the January House meeting, when we approved the report of the Special Committee on Public Trust and Confidence in the Legal System, we deferred action regarding the recommendation to permit earlier public access to attorney discipline proceedings after probable cause has been established. This was done to allow time for further study of this issue by the Special Committee in concert with the Committee on Professional Discipline. The latter group subsequently raised concerns about the earlier opening of the discipline process which the Special Committee has under review. Consequently, we anticipate that consideration and resolution of the issues by our two committees may take some time before any proposal is brought to the House of Delegates. We feel it is essential for our two groups to explore this matter in depth and arrive at well-reasoned conclusions before the House is asked to take up this subject.

f) **Fee arbitration program.** This past January, Chief Judge Kaye announced that effective June 1, 2001, the court system would institute an Attorney Fee Dispute Resolution Program. The current matrimonial fee dispute program will be phased out so that all fee disputes are handled under the new rules. The program covers legal representations, but will not apply to criminal matters, disputes involving less than \$1,000 or more than \$50,000, claims involving substantial legal questions, or claims for damages or relief other than adjustment of the fee. We were advised recently that the start of the program has been deferred until January 1, 2002.

When a fee dispute arises, the client has the option to resolve it under the new program. Once the client so opts, participation becomes mandatory for the attorney. It is not mandatory for the client unless the parties have agreed beforehand in the retainer. An attorney cannot commence an action to recover fees without first giving the client notice of the right to arbitrate. The plan provides an option for de novo review following conclusion of the fee dispute process.

The program is administered by an 18 member board of governors consisting of 12 lawyers and six non-lawyers. The board is charged with setting policy and adopting necessary guidelines and standards. It is contemplated that local bar associations will provide the day-to-day resolution services, with the board establishing methodologies for those areas lacking an approved local provider.

During the winter, we surveyed county and local bar leaders regarding existing fee dispute resolution programs so that we might gain a clear understanding of the extent of programs already in place. OCA's board of governors for the program conducted a series of local meetings with bar associations this spring. I am on the Board of Governors and have consistently advocated for maximum flexibility in program design and administration.

g) **MCLE credits.** In March, OCA announced that effective January 1, 2001, experienced attorneys may earn a maximum of six CLE credit hours per reporting cycle for their participation in accredited trial advocacy programs. A maximum of three CLE credit hours per reporting cycle may be earned by experienced attorneys for participation in trial advocacy programs at the high school and college level. Also, CLE credit is limited to programs that do not involve actual pending cases. OCA states it will provide additional information during the coming weeks.

On the related issue of awarding CLE credits to attorneys who perform pro bono legal services, our Special Committee to Review the Mandatory CLE Proposal, the President's Committee on Access to Justice and the Committee on Legal Aid cooperated in drafting suggested regulations to govern this area. We have submitted our proposal to Judge Lippman and the CLE Board for their

consideration and will pursue this topic at future meetings with him to ensure that fair, reasonable and workable rules are put in place to govern the awarding of CLE credits.

h) **Legal Services Corporation v. Velazquez.** In June 2000, the Executive Committee authorized the filing of an amicus curiae brief in the United States Supreme Court in the case of Legal Services Corporation v. Velazquez. That case challenged funding restrictions that precluded the LSC from funding groups that join in class actions and lobby legislators or local legal aid groups that challenge welfare laws. The NYSBA's position was that such restrictions were violative of First Amendment rights. In a 5-4 decision, the Supreme Court has ruled that the restrictions were unconstitutional and prohibited speech upon which the courts depend in order properly to exercise judicial power.

i) **Special Committee on the Workers' Compensation Board.** The Special Committee on the Workers' Compensation Board, chaired by Mark W. Hamberger from Buffalo, which has been performing a follow-up to the Special Committee on Administrative Adjudication's study of the Workers' Compensation Board, has provided a final report. The Special Committee met in January and again in February and its sessions have included appearances by representatives of both the Workers' Compensation Board and the Injured Workers' Bar Association. The Special Committee advises that many of the recommendations made in the past by the NYSBA have been implemented. These include: i) pre-screening improvements for cases; ii) adopting a multi-track calendar system to separate simple and complex cases; iii) setting up work groups of claims examiners and administrative law judges; iv) making the Law Judge positions civil service; v) expanding the motion calendar; vi) reforming the benefits structure; and vii) use of telephones or other media to take testimony of doctors or conduct depositions.

Based on the recent discussions with Workers' Compensation Board officials, the Special Committee is able to report that the Board is in the process of upgrading facilities statewide and is committed to working with the Bar to improve communications. The Board has a strong desire to work with us to improve the quality and productivity of the adjudication process.

j) **Executive Committee.** At its March 30, 2001 meeting, the Executive Committee addressed a number of topical issues. Two of the major items, audio-visual coverage of trial court proceedings and a proposed death penalty moratorium, came before the House the next day. In addition, based on a recommendation by the Real Property Law Section, the Executive Committee authorized the filing with the Legislature of a residential property disclosure bill. During last year's session a controversial measure was passed but later vetoed by the Governor based on serious defects identified by the Real Property Law Section. We are hopeful this year that we can secure passage of a balanced bill that avoids the pitfalls of last year's legislation.

I am also pleased to report that the Executive committee endorsed legislation proposed by the Business Law Section to clarify technical aspects of the Limited Liability Company Law. We also approved proposed rules drafted by the Committee on Professional Discipline to govern the reinstatement of suspended and disbarred attorneys. The draft rules have been transmitted to the Appellate Division in each of the four departments, where they are presently under consideration.

Timothy J. O'Sullivan, the new Executive Director of the Lawyers' Fund for Client Protection, joined us for part of the meeting. He updated us regarding the Fund's activities, and we expect to enjoy a positive and productive relationship with the Fund during the coming months.

K) NYSBA Web site. I am pleased to report that at its spring meeting, the Finance Committee appropriated funds for the Association to engage the services of an outside consulting firm to assist us in modernizing and upgrading our Web site. In addition, the committee authorized the staff to hire a fulltime content editor for the Web site. We anticipate that the revamping of the Web site, coupled with the hiring of a content editor, will enable us to provide our members with an enhanced site that is dynamic, interactive, user-friendly, as well as being easily navigated and searchable. We are also seeking to provide sections and committees with an easier means for placing substantive information on the Web site, in turn providing greater value to our members. If all proceeds smoothly, we anticipate having the new Web site ready for the 2002 Annual Meeting.

As is evident from the foregoing items, the Association is involved with a number of diverse and complex issues which currently confront the legal profession. We should take pride that we are part of an organization that is making such a constructive contribution to the betterment of law and society.

These are but a few of the diverse and complex issues which continue to confront the legal profession. Your Association is very much involved in all of these issues and I am confident that we are making a constructive contribution to the improvement of the profession and of society in general. During the last two years, I have had the opportunity to meet literally thousands of our members and the memory of the fellowship and comradery that I have shared will remain with me for the rest of my life. I have been humbled by the dedication and effort of so many of our members who give so freely of their time and talent on our behalf. One of the most important perquisites of the office of president is lifelong membership in the House of Delegates and so I look forward to sharing your company for many years to come. I thank you for your courtesy and your hard work and your dedication to the Association, to the lawyers of this state and to their clients whom we serve.

Respectfully submitted,



Paul Michael Hassett
President

