

NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
BAR CENTER, ALBANY, NEW YORK
NOVEMBER 6, 1993

Present: Adelman; Anderson; Ange; Ayers; Baldwin; Baum; Berman; Bermingham; Besuner; Bohner; Bracken; Brenner; Breslin; Buzard; Cedarbaum; Coffee; Cohn; Cometa; Connolly; Corcoran; Cyrulnik; D'Angelo; Daly; Davidson; DelleCese; DeLuca; Denton; Dixon; Dorsey; Edwards; Eisenhauer; Epstein; Farmer; Farrell; Feerick; Fetter; Field; R.S. Fink; Fishberg; Fishell; Floyd; Freedman; Frye; Gardella; Geltzer; Gibbons; Goldstein; Goodstein; Gouldin; M. Gross; Haig; H.G. Hall; Hart; Hartman; Hassett; Headley; Heming; Hesterberg; Hoffman; Jacoby; H. Jones; M. Jones; Kahler; Kamins; Karson; Kelly; Kennedy; Kenney; Kessler; Kilsch; Lagarenne; Lamb; Lawrence; Lee; Leinhardt; Levin; Lindenauer; J. Longo; M. Longo; Lovejoy; MacCrate; Madigan; Mahony; Maldonado; Maney; Marangos; Martusewicz; McArdle; McCarthy; McDonald; McDowell; Meng; Meyer; Miklitsch; E. Miller; M. Miller; Millon; Mitchell; Morris; A. Murray; K. Murray; Netter; Nobile; Offermann; Okin; Ostertag; Oswald; Palermo; Patrick; Pearl; Peckham; Penzel; Pfeifer; Picotte; Plotkin; Pool; Pruzansky; Raysman; Reich; Rice; Richardson; Robinson; Roper; Rothstein; Ruslander; Santemma; Scheindlin; Schumacher; Sharkey; Sienko; Souther; Standard; Steflik; Stern; Strauss; Sunshine; Taisey; Terranova; Tharp; Tishler; Torres; Trueheart; Vigdor; Vitacco; Waldauer; C. Walker; S. Walker; Williams; Windstein; Witmer; Zalayet; Zurlo.

1. Approval of minutes of June 26, 1993 meeting. Mr. Witmer noted that the first sentence in item 13(b) of the minutes of the June 26, 1993 meeting of the House should be revised to read: "Relevant sections and committees of the Association were in the process of reviewing legislation maintaining the statute of limitations for attorney malpractice at three years." A motion was adopted approving the foregoing amendment. A further motion was then adopted approving the minutes as amended.
2. Report of Treasurer. Mr. Rice summarized the Treasurer's report covering the period January 1 to September 30, 1993. He reviewed the major income and expense items contained in the budget, and noted that most of them remained within anticipated ranges for this period of the year. He indicated that membership dues income, while slightly more than the previous year, still remained below budget forecasts due principally to the current economic climate. He stated that due to the strength of the Association's reserves, the Finance Committee had elected to pay for the installation of a new computer system and repairs to the Bar Center from a combination of withdrawals from reserves and expenses added to the current year's operating budget. Mr. Rice advised that this approach, while it would create a year-end deficit of approximately \$150,000, would enable the Association to avoid substantial interest expenses. He stated that the strength of the reserves would enable the Association to absorb these expenses in the short-term and, for this reason, the deficit would not be a long-term concern. He indicated that the Association

remained in sound financial condition at the close of the third quarter of the fiscal year. The report was received with thanks.

3. Report and recommendations of Finance Committee.

a) Continuation of affordable dues program.

Richard Raysman, Chair of the Finance Committee, summarized the affordable dues program which had been initiated by the House of Delegates in 1989 for a two-year trial period and had been extended for a like period in 1991. He advised that the purpose of the program since its inception had been to assist those undergoing financial hardship to remain Association members by affording them a waiver of dues at levels varying from twenty-five to one hundred percent. He reviewed the utilization of the program over the past four years and reported the Finance Committee's recommendation that it be continued for a further two-year period due to the current economic climate and to permit the Association to gather more detailed data regarding the usage of the program through its new computer system. A motion was adopted extending the affordable dues program for an additional two years.

b) Approval of proposed 1994 income and expense budget. Mr. Raysman then summarized the major components of the Association's proposed income and expense budget for 1994. Following discussion, a motion was adopted approving the budget as submitted by the Finance Committee.

4. Report and recommendations of New York County Lawyers' Association regarding Judicial salary increases. Mr. Witmer advised that at its November 5, 1993 meeting, the Executive Committee had considered the report by the New York County Lawyers' Association recommending that the New York State Bar Association support legislation which will provide a mechanism for automatic judicial salary increases linked to objective criteria. He stated that after reviewing this recommendation, the Executive Committee was proposing that the House adopt a resolution which recognizes the need for the periodic review of judicial salaries and, to accomplish that review, recommends the establishment of a permanent commission on salaries for judicial officers to review judicial salaries on a regular basis and make appropriate recommendations to the Governor and the Legislature. Following discussion, a motion was made and adopted, by a vote of 66 to 59, to table further consideration of this item.

5. Report and recommendations of New York County Lawyers' Association concerning the award of punitive damages in arbitration proceedings. Joseph B. Russell of the New York County Lawyers' Association summarized that organization's proposal that arbitrators be empowered to award punitive damages in situations where a court or jury would be entitled to make such an award. He stated that after studying this subject, the New York County Lawyers' Association had concluded that legislation was required to set aside current caselaw prohibiting the award of punitive damages in order to safeguard the rights of parties in arbitration to have available the same range of relief as would be available in court proceedings. He indicated further that the proposal sought to balance the concerns expressed on both sides of the issue. Harry P. Trueheart, III, past Chair of the Commercial and Federal Litigation Section, summarized that section's study of the subject. He noted that the section committee which had conducted the study had been divided almost equally on the merits of

allowing punitive damages to be awarded in arbitration proceedings. He then outlined the arguments on both sides of the issue to assist the House in its deliberations. Following discussion, a motion to approve the report and recommendations as submitted by the New York County Lawyers' Association was defeated by voice vote of the House.

6. Report and recommendations of Trial Lawyers Section regarding Court of Claims Jurisdiction. Maxwell S. Pfeifer, Chair of the Trial Lawyers Section, summarized the section's report in opposition to the Governor's 1993 program bill proposing legislation for a constitutional amendment to permit actions against municipalities to be adjudicated in the Court of Claims. He explained that the legislation failed to provide for additional judges for the Court of Claims, which would experience a substantial caseload increase. He noted further that many claims against municipalities also involve private parties, whose cases would have to be tried in Supreme or County Court, as the legislation did not include such defendants in the expanded Court of Claims jurisdiction, thus necessitating two trials in such instances. Mr. Pfeifer advised that the bill would also deprive litigants of their right to a jury trial because of the non-jury format of the Court of Claims. After discussion, the following resolution was adopted on motion of the House:

IT IS RESOLVED, that the New York State Bar Association hereby disapproves the proposed legislation which would authorize actions by and against municipalities to be adjudicated in the Court of Claims.

7. Presentation of Ruth G. Schapiro Memorial Award. Mr. Murray advised that due to illness, Fern Schair Sussman, this year's recipient of the Ruth G. Schapiro Memorial Award, was unable to attend the meeting, and that presentation of the award would be deferred until the January 1994 meeting of the House.

8. Compensation of executors.

a) Preliminary report by Ad Hoc Committee on Fiduciary Compensation.

b) Preliminary report by New York County Lawyers' Association.

Mr. Witmer stated that the presentation of the two reports would be put over until the January 1994 meeting as the Ad Hoc Committee on Fiduciary Compensation was in the process of finishing its study. He indicated the officers felt that the best approach for dealing with the issues related to the compensation of executors would be to defer House consideration of the matter until the committee's report was in final form.

9. Report concerning rules governing lawyer conduct in matrimonial actions. Mr. Murray summarized the process followed by the Association in reviewing the rules issued by the Chief Judge and the Appellate Divisions to implement the recommendations contained in the report of the Chief Judge's Committee to Examine Lawyer Conduct in Matrimonial Actions. He noted these activities included detailed review of the rules and the submission of comments by interested sections and committees to the Office of Court Administration, as well as efforts by the officers to obtain as much time as possible for bar groups to comment. Mr. Murray advised that the Association had also cooperated with local bar associations in the review process,

including the preparation of views by the New York State Conference of Bar Leaders. He indicated that in October, following a special meeting to review the comments by interested groups, the Executive Committee had developed the position submitted in the letter to the Chief Judge which had been furnished to the members of the House. Mr. Murray then reviewed the major changes to the rules which had been incorporated by OCA following the receipt of comments, including removal of the requirement that bar associations administer fee arbitration programs. He advised that the Association would continue to monitor the experience under the new rules and submit recommendations for appropriate improvements to OCA. He indicated that the House would be kept apprised of developments with respect to this matter.

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

a) Based on the action taken at the June House meeting supporting amendment of the Immigration and Nationality Act to establish a new non-immigrant visa category for household caregivers, the NYSBA and the New York County lawyers' Association, together with other bar groups, had sponsored a resolution adopted by the ABA in August 1993 supporting this legislative change. He indicated the ABA's resolution had then been communicated to the U.S. Senate for consideration.

b) To reduce delay and streamline the management of both civil and criminal cases in Supreme Court, Chief Judge Kaye and Chief Administrative Judge Milonas were proceeding with initiatives in two areas. The first consists of a re-examination of felony case processing in conjunction with the IAS Review Committee's ongoing evaluation of the case management reforms instituted in the civil terms, while the second consists of the appointment of the following four committees to strengthen the case management role of judges and build on earlier civil case reforms: Case Management Committee, Automation and Technology Committee, Case Management Education Committee, and Jury Selection Uniformity Committee.

c) As endorsed by the House of Delegates in 1992, legislation had been adopted providing strict confidentiality and immunity from civil liability for lawyers serving in bar association-sponsored alcohol and drug intervention programs.

d) In September he and Mr. Witmer had met with county and local bar leaders from the Third and Fourth Districts to discuss matters of mutual interest, including the new matrimonial rules, the delivery of legal services to the indigent, court administration, and NYSBA services available to local bar associations.

e) At the request of the Committee on Professional Ethics, the Executive Committee had authorized the filing of an *amicus curiae* brief in the Court of Appeals in *Matter of Cooperman*, a case in which the Appellate Division, Second Department, had held it was professional misconduct *per se* for an attorney to use a nonrefundable retainer. He indicated there was concern that the Appellate Division's decision was in conflict with other court rulings and ethics opinions in this area. He stated that the House would be kept advised of developments with respect to this case.

f) On November 18, 1993, the Committee on Women in the Law, in co-sponsorship with several other groups, would be presenting a program at the Bar Center entitled, "The Road to the Judiciary, Navigating the Judicial Selection Process."

He noted that the Chief Judge would serve as moderator for the panel discussion on procedures for seeking judgeships in state and federal courts. Mr. Murray encouraged the members of the House to attend this program.

g) The Association's Committee on Judicial Selection had met in October to consider the qualifications of the nominees chosen by the State Commission on Judicial Nomination to fill the court of Appeals vacancy which will arise at the end of the year by virtue of the retirement of Hon. Stewart F. Hancock, Jr. He indicated that the findings of the NYSBA committee had been communicated to Governor Cuomo to assist him in the appointment process.

h) In September, he and Mr. Witmer had met with Chief Judge Kaye and senior OCA officials to discuss matters of mutual interest. He reported that the topics covered had included the new matrimonial rules, the electronic recording of court proceedings, the Chief Judge's initiatives to reduce case delay, courthouse facilities, the caseload problems being experienced by the Appellate Division, Second Department, the Jury Project Committee appointed by the Chief Judge, and the study being undertaken by the NYSBA's Special Committee on Commerce and Industry to make New York more competitive in the business field.

11. Report of Special Committee on AIDS and the Law. Steven L. Kessler, Co-Chair of the Special Committee on AIDS and the Law, summarized the committee's report with respect to the legal issues associated with AIDS in the fields of criminal justice, health law, housing, insurance, labor and employment, matrimonial law, and trusts and estates law. He noted that because of the complexity and sensitivity of this subject, many of the proposals had been developed in consultation with other interested committees and sections of the Association, and that these recommendations were intended to educate the legal profession, the Legislature and the public regarding the legal aspects of AIDS. Mr. Kessler stated that when the Executive Committee had endorsed the report in January 1993, it had been with the exception of those recommendations in the health law segment that the courts and the Legislature refrain from requiring that HIV positive health care workers or employees engaged in potentially high risk occupations inform their patients or clients of such HIV status, as well as those recommendations with respect to domestic partnerships contained in the trusts and estates and real property segments of the report. He indicated that based on that qualified endorsement and the discussions at the January 1993 House meeting when the report was last considered, the Special Committee on AIDS and the Law had conferred further with relevant groups within the Association, particularly the Trusts and Estates Law Section, and had deleted these recommendations from the current version of the report. Discussion then ensued concerning the report and the recommendations as presented. Based on comments by members of the House, Mr. Kessler consented to remove the final paragraph of section I(G) of the Health Law Section at pages 75 and 76 of the report with respect to the disclosure of HIV status. At page 91 of the report in the introductory paragraph of section XI(A) of the Health Law Section dealing with the duty of health care workers to inform their patients of HIV status, the House adopted a motion to rephrase the second sentence and the initial portion of the third sentence to read as follows: "Mandatory notification is not required by the New York State courts. The reasons for voluntary but

not mandatory disclosure are numerous:..." A motion was then adopted to approve the report, as amended, in principle.

12. Report of Committee on Membership regarding member survey. Eric R. Roper, Chair of the Committee on Membership, and Kathryn Grant Madigan, Executive Committee liaison to that committee, presented an informational report concerning the membership survey which had been conducted earlier in the year in consultation with the Center for Organization Development. They reviewed the methodology used in the development and conduct of the survey to collect data from samplings of members, non-members and lapsed members. Mr. Roper summarized the responses which had been received and the cross-tabulation process used to refine the information. He noted that while the overwhelming majority of members were satisfied with the Association and its programs, and were likely to remain members, the Membership Committee had noted several areas deserving of attention. These included the concern of many younger members that the Association be more attuned to their needs, the desire of a significant number of respondents that there be a greater emphasis on local programming, and the belief of many members that more resources should be allocated to the sections. Mr. Roper advised that the survey results reflected the diversity and breadth of interests which exist in the Association. He explained that this factor would cause the committee to consider carefully any major changes in Association structure or programming so they would prove of constructive value to significant portions of the membership. He stated that during the coming months, the Committee on Membership would be coordinating with the Executive Committee and the Committee on Long-Range Planning to develop short and long-term initiatives in response to the survey results. Mr. Roper indicated the House would be kept apprised of developments in this area. The report was received with thanks.

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

a) Two members of the House, Jules Ritholz and Florence L. Simberkoff, had passed away recently. A moment of silence was observed in honor of their memory and their contributions to the House of Delegates and the legal profession.

b) The Committee on Juvenile Justice and Child Welfare had requested that it be permitted to change its name to the Committee on Children and the Law to reflect more accurately its work and goals, with the following as its stated purpose:

The Committee on Children and the Law is charged with the duty to study and render information and guidance on the effect of existing laws of the state and pending legislative action relating to legal issues impacting children and to the administration of juvenile justice and child welfare. It also may examine, study and prepare reports on issues related to the rights and interests of children, particularly those involved in court proceedings.

A motion was adopted approving the change in name and stated purpose of the committee.

c) The Committee on Lawyers and the Community had compiled a list of public service projects undertaken by lawyers throughout the state. He indicated the

listings had been set forth in two volumes left at each member's place, with the first volume containing public service activities conducted by various NYSBA sections and committees, and the second setting forth activities developed by county, local, and regional bar groups throughout the state. He commended these volumes to the members as a source of ideas for further projects in their own geographical areas.

d) The Corporate Counsel Section had deferred consideration of its report concerning a model engagement letter for legal services to corporations until the January meeting to allow for additional discussion with interested sections and committees.

e) With the adoption of the merit selection plan by the House in April, Action Unit No. 4, which had been established to address reform in the judicial system through court merger and merit selection, had been discharged. He indicated that to pursue effectuation of the House resolution, a new Special Committee to Implement Merit Selection had been appointed with former Association President John P. Bracken as Chair.

f) The Task Force on Simplification had completed its assigned tasks and had been discharged.

g) Since major Bar Center repair and expansion projects are now handled through joint committees of the Association and The New York Bar Foundation, the standing House Committee was no longer necessary. A motion was adopted discharging the Association House Committee with thanks.

h) In coordination with Mr. Murray, he had met with several county and local bar associations to discuss items of mutual interest with them and to learn of their concerns firsthand.

14. New business.

a) Arthur Norman Field, Chair of the Ad Hoc Committee on the Jury System, advised that he had reported to the Executive Committee on the previous day concerning the study undertaken by the Chief Judge's Jury Project Committee and the timetable on which it was operating. He noted that this timetable precluded the normal, in-depth review which interested NYSBA committees and sections would perform prior to the submission of comments to the Office of Court Administration. He indicated that in view of the seriousness and complexity of the problems in the jury system, the Association should bring its concerns to the attention of the Chief Judge's committee. He explained a resolution which had been submitted by the Ad Hoc Committee based on the knowledge and experience of its members, and which had been endorsed by the Executive Committee for passage by the House. He noted that the resolution emphasized not only the seriousness and complexity of the problems, but also their varied and localized nature which did not make them susceptible to quick solution. He indicated the resolution stressed the need for local experimentation to develop solutions, and the need for a continuing system to monitor the efficiency of the jury system and the proper utilization of jurors. Mr. Field also advised that the Ad Hoc Committee and the Executive Committee had underscored the value of a lawyer-

administered *voir dire* system, and that any proposal to alter this approach warranted careful study.

After discussion, the language in subparagraph (E) of the resolution limiting the *voir dire* concerns to civil cases was deleted by consent, as it was felt the cautions expressed therein were equally applicable to criminal cases. As amended, the following resolution was then adopted on motion of the House:

RESOLVED, that the New York State Bar Association respectfully offers the following observations with respect to the Jury Project of the Chief Judge based upon the study of our own Ad Hoc Committee on the Jury System and the experience of our members:

(A) The Problems are Serious - There are a variety of serious problems involving jury service. We applaud the Chief Judge's Jury Project. Both this Association and the county bars are anxious to cooperate with the Courts in working to solve these problems.

(B) The Problems are Varied and Localized - We believe that the problems are not the same statewide and are not the same on the civil and criminal sides. Thus, the best solutions are likely to be local ones.

(C) The Problems are Complex - As with many processes involving many participants, each participant may see the other as the bottleneck. The best answer is likely to be found by a careful analysis of the problem followed by local experimentation as to solutions. The problems are too complex and too serious to permit "quick fix" solutions.

(D) The Problems are Likely to Change - We believe that a continuing system needs to be established to periodically monitor the efficiency of the jury system and the proper utilization of jurors. No report now will avoid breakdowns in the system in the future. We need to assure that the juror's role is, and will be, appropriately respected now and in the future.

(E) Value of Lawyer Administered *Voir Dire* - An overwhelming majority of trial lawyers in the state firmly believes that lawyer administered *voir dire* provides the fairest trial system and that it does not slow the trial process. Because these lawyers put such a very high value on lawyer-administered *voir dire*, and believe that it is such an important element in the jury trial system, any proposal to alter lawyer-administered *voir dire* requires the most careful analysis and consideration.

(F) The State Bar Volunteers - The State Bar volunteers to (a) undertake continuing educational programs at all levels and (b) organize and support ongoing county bar efforts to periodically monitor the productivity of the jury selection process and juror satisfaction. In addition, the State Bar stands ready to make the experience and energy

of the Bar available to efforts to deal with these serious problems on an expedited basis.

b) A concern was raised regarding whether the Association was making any significant response to the recent episodes of lawyer-bashing which had appeared in various news articles and television programs. Mr. Murray advised that he had recently published an article contesting these negative attitudes, and that the Association had prepared public service advertisements and other materials to counteract this adverse publicity. He indicated he had also appeared on a number of television and radio programs to present the Association's position in this area. He encouraged the members of the House to become involved with this subject in order to defend the reputation of the legal profession from unwarranted criticism.

15. Date and place of next meeting. Mr. Witmer announced that the next two meetings of the House of Delegates were scheduled for Friday, January 28, 1994 at the Marriott Marquis in New York City, and Saturday, April 16, 1994 at the Bar Center in Albany.

