

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
MARRIOTT MARQUIS, NEW YORK CITY
APRIL 6-7, 1990**

PRESENT: Adler; Agress; Albert; Amrod; Ange; Barbash; Barnett; Barthold; Basch; Baxter; Bergen; Birmingham; Besso; Bohner; Bracken; Brand; Brenner; Brevorka; Bucki; Buzard; Clarke; Cometa; Connolly; Cooke; Cregg; Davidson; DelleCese; Demaio; DiLorenzo; Dollard; Dwyer; Dyer; Eiber; Elmer; Emerson; Eppler; Esteve; Fales; Farrell; Ferguson; Fitzgerald; Foote; Frank; Freedman; Geltzer; Gershon; Gibbons; Ginsberg; Goldblum; Gordon; Greisler; Grogan; Haig; Hall; Halpern; Harley; Hart; Headley; Heming; Horan; Hurd; Hyman; Jaffe; Jones; Kahn; Kaufman; J. Kenney; T. Kenney; Klein; Lamb; Liebschutz; Lowe; Luther; Madigan; Markuson; Marrero; Martusewicz; McDonald; McGlinn; McGoldrick; McGuirk; McMahan; Meng; Mercorella; Miller; Millon; Minardo; Moore; Morris; Murphy; A. Murray; C. Murray; K. Murray; Neimeth; Netter; Oberman; Offermann; O'Leary; Oliensis; Ostertag; Palermo; Pearl; Penzel; Perles; Perrin; Pfeifer; Porter; Pruzansky; Pugh; Pulley; Reilly; Reizes; Rice; Riley; Ritholz; Rosiny; Rothstein; Rybak; Santagata; Santemma; Schapiro; Schell; Schiller; Schnall; Schumacher; Seward; Seymour; Sherwood; Simberkoff; Small; Souther; Spellman; Stark; Stave; Sussman; VanStrydonck; Vitacco; Wagner; Wanderman; Weinberger; Witmer; Wolf; Yanas; Zinni.

1. Approval of minutes of January 19, 1990 meeting. The minutes were approved as distributed.

2. Report of Treasurer. Mr. Gershon summarized the Treasurer's report covering the period January 1 to March 31, 1990. He reviewed the major items of income and expense as set forth on the balance sheets, and indicated that the Association remained in sound financial condition at the close of the first quarter of the fiscal year. He noted that the Bar Center expansion was proceeding toward completion on schedule, and indicated that with the approval of the officers, part of the funded depreciation item established to cover the costs of acquiring new furniture and equipment would be used to furnish a portion of the office spaces in the new construction. He explained this would relieve The New York Bar Foundation of that expense without affecting the Association's operating budget. The report was received with thanks.

3. Consideration of proposed plan drafted by the Special Committee to Consider Mandatory Continuing Legal Education in New York State. Mr. Cometa summarized the action taken by the House of Delegates at the January 1990 meeting in adopting a position in favor of the concept of mandatory continuing legal education, and the process utilized subsequent to that meeting by the Special Committee to Consider Mandatory Continuing Legal Education in New York State to develop draft No. 3 of a proposed plan and to invite comment and suggested revisions from interested individuals and groups. After discussion and amendment, the following resolution was adopted on motion of the House to govern consideration of the committee's report and recommendations and all amendments proposed by other interested groups and individuals:

RESOLVED, that the House of Delegates hereby adopts the following procedures to govern consideration at the April 6-7, 1990 meeting of the plan for mandatory continuing legal

education ("MCLE Plan") prepared by the Special Committee to Consider Mandatory Continuing Legal Education in New York ("Committee") and amendments proposed thereto:

1. Any amendments to the MCLE Plan must be submitted in writing to the Association on or before 2:00 p.m. on April 6, 1990 and be set forth with deletions denoted by strikeovers and new material by underscoring, and be accompanied by a brief explanation of the proposed change. All amendments shall be distributed to the members of the House at the April 6-7 meeting.

2. At the April 6-7 meeting, consideration of the MCLE Plan proposed by the Committee and proposed amendments shall be as follows:

a) The Committee will be given the opportunity to provide a brief overview of its report and recommendations.

b) That thereafter consideration will be given to the following conceptual issues connected with the proposed MCLE Plan: restructuring of the certification process to be one of self-certification; deleting the requirement for approval of sponsors and activities during the first three years of implementation; eliminating the mandate for a Commission, leaving the mechanism for interpretation to the Administrative Board; changing the number of required hours from the 24 proposed by the Committee; incorporating a sunset provision.

c) The various sections of the proposed MCLE Plan shall be considered seriatim.

d) A Committee representative shall have three minutes to present the Committee's views with respect to each section. The proponents of amendments to each such section shall have three minutes to present them.

e) All those wishing to speak with regard to a particular amendment may do so only once for no more than two minutes, except the sponsor of any amendment may speak a second time for one minute, and a representative of the Committee will have one minute to close.

f) A vote on each proposed amendment will then be taken, requiring a majority vote for adoption.

g) The foregoing procedure will be repeated with respect to each proposed amendment.

h) Procedural motions will be considered out of order until debate on all substantive amendments has been concluded.

i) A final vote will be taken by 5:00 p.m. on April 6, 1990 or between the hours of 9:00 a.m. and 1:00 p.m. on April 7, 1990 to approve the MCLE Plan, as it may be amended, and to submit same to the appropriate implementing authorities in the State of New York.

Robert L. Ostertag, a member of the Committee, then provided an overview of the Committee's report and proposed MCLE Plan.

Pursuant to the foregoing resolution, the five conceptual issues referred to in paragraph 2(b) thereof were addressed with action taken by the House as follows: (a) By a vote of 86-41, the House determined that there should be self-certification whereby attorneys, as part of their biennial registration, attest to the number of hours and relevance of continuing legal education courses taken. (b) By a 60-64 margin, a proposal to delete the requirement for approval of sponsors and activities during the first three years of implementation failed to gain sufficient votes for passage. (c) By vote of 60-65, a proposal to eliminate the mandate for a Commission, and leave the mechanism for interpretation to the Administrative Board failed to gain sufficient support for adoption. (d) By a vote of 57-54, a motion was adopted to substitute 18 hours of continuing legal education in each biennial reporting period for the 24 hours proposed by the Committee. (e) By voice vote, the House endorsed the concept of adding a sunset provision, with the specific details to be determined during the discussion of the appropriate sections of the proposed MCLE Plan.

In keeping with the foregoing resolution, the House then addressed the proposed MCLE Plan and after discussion adopted amendments to Section 1. Following the consideration of the individual amendments to Section 1, the House, by a vote of 79-28, approved that section as amended. Further action with regard to the balance of the proposed MCLE Plan was deferred until the June meeting.

4. Election of Nominating Committee and NYSBA Delegates to ABA House of Delegates. Charles E. Heming, Chair of the Nominating Committee, reported that the committee had nominated Maryann Saccomando Freedman, Henry L. King and John A.R. Walsh as members at large of the Nominating Committee, and Ms. Freedman as its Chair for the 1990-91 Association year. A motion was adopted electing said Chair and members.

The following members from each Judicial District, as selected by the vice-president and elected delegates from the respective districts, were nominated as members of the Nominating Committee for the 1990-91 Association year:

First District:	Eugene P. Souther, Renee A. White
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A motion was adopted electing said members.

Mr. Heming reported that the Nominating Committee had nominated T. Richard Kennedy, Henry G. Miller, Archibald R. Murray, Robert L. Ostertag and Justin L. Vigdor as NYSBA delegates to the ABA House of Delegates for a two-year term commencing in August 1990. A motion was adopted electing said delegates.

Mr. Heming reported further that the Nominating Committee had nominated David Lee Reed as the young lawyer delegate to the ABA House of Delegates for a two-year term commencing in August 1990. A motion was adopted electing Mr. Reed.

Mr. Heming advised that the Nominating Committee had nominated Susan S. Robfogel to fill the second year of Ralph L. Halpern's term as a delegate to the ABA House of Delegates due to ineligibility based on the Bylaws provisions which limit the number of consecutive years a member may serve in the House. A motion was adopted electing Ms. Robfogel.

5. Report and recommendations of Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts. Hon. Hugh R. Jones, Chair of the Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts, summarized the committee's report and recommendations with respect to sanctions as a means for controlling frivolous litigation in state courts. He outlined the procedures utilized by the committee for gathering information from judges, other bar associations, and relevant groups within the New York State Bar Association. He reviewed the conclusions reached by the committee and its proposal that Part 130 of the Uniform Rules for the New York State Trial Courts be recast as a rule imposing costs for abusive conduct in civil litigation, and that the present clause allowing the levying of sanctions for filing a frivolous claim be deleted to avoid inhibiting access to the courts, especially in situations involving innovative claims or defenses. Judge Jones noted that the committee further recommended the removal of the current \$10,000 cap on fines, but with a caveat that the courts be required to set forth in writing the particulars of both the abusive conduct and the amount of costs being awarded. Following discussion, the House revised the text of the proposed modification to section 130.1.1(C) of the Uniform Rules for the New York State Trial Courts to incorporate the term "unreasonably" in the description of abusive conduct to clarify that to fall within the meaning of the rule, the action or omission in question must delay or prolong unreasonably the resolution of litigation. The following resolution was then adopted on motion of the House:

RESOLVED, that the House of Delegates of the New York State Bar Association hereby accepts in principle the report of the Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts; and it is further

RESOLVED, that the House of Delegates hereby endorses the revisions to Part 130 of the Uniform Rules for the New York State Trial Courts as proposed in the aforesaid report and recommends them to the Office of Court Administration for favorable consideration and adoption.

6. Presentation of Trial Lawyers Section National Trial Advocacy Competition Awards. In cooperation with Anthony J. DeMarco, Jr., Chair of the Trial Lawyers Section Trial Advocacy and Scholarship Competition Committee, Messrs. Yanas and Cometa presented the Trial Lawyers Cup and Scholarship to Hofstra University School of

Law as the law school from New York State placing highest in the National Trial Advocacy Competition. Syracuse University College of Law was recognized for its second place finish among New York law schools in the competition. Messrs. Yanas and Cometa also presented the Trial Lawyers Section with a plaque awarded by the Texas Young Lawyers Association honoring the section for its support of the National Trial Advocacy Competition.

7. Report and recommendations of Family Law Section with respect to irreconcilable differences legislation. Mr. Cometa advised that due to the press of other business, the report of the Family Law Section with respect to pending legislation to establish irreconcilable differences as a ground for divorce would not be presented. He noted that the section's position had been endorsed by the Executive Committee at its April 6, 1990 meeting. Following discussion, a motion was adopted to schedule the matter for consideration at the June House meeting to allow an opportunity for review and comment by Association sections and committees as well as other interested organizations. It was the consensus that in the interim, the Family Law Section could communicate its views to interested groups with the clear understanding that such would be considered the position solely of the section and not the official view of the Association.

8. Report of President. In view of the time required to complete the other agenda items, Mr. Yanas advised that he would forego presentation of the usual oral report, and submitted the attached written summary for incorporation with these minutes to apprise the members of significant matters.

9. New business. Mr. Cometa advised that the Governor and the Legislature were considering a reduction of approximately \$45 million in the proposed 1990-91 Judiciary budget. He noted that this would have a severe adverse impact on the operation of the court system by causing the closure of some courts and the discharge of essential personnel. He reported that the Executive Committee on April 5 had endorsed a resolution supporting restoration of the Judiciary budget to the level as proposed in the Unified Court System Budget Request. After discussion, the following resolution was adopted unanimously on motion of the House:

WHEREAS, the Judiciary is charged with the preservation of the Rule of Law and serves the public by providing a just and timely means of dispute resolution; and

WHEREAS, the Judiciary is a co-equal branch of government which relies on the Executive and Legislature to provide adequate funding for the administration of justice; and

WHEREAS, the drastic funding reductions which are currently under discussion would gravely affect the operation of the court system by causing the closure of certain courts and the discharge of court personnel; it is hereby

RESOLVED, that the New York State Bar Association urges the restoration of funding to the level established in the Unified Court System budget Request for fiscal year 1990-91.

10. Date and place of next meeting. Mr. Cometa announced that the next meeting of the House of Delegates was scheduled for Saturday, June 23, 1990 at The Otesaga, Cooperstown, New York

JOHN J. YANAS
President
90 State Street
Albany, NY 12207
518/462-5301

New York State Bar Association[®]

May 7, 1990

TO: Members of the House of Delegates

RE: President's Report in Connection with the April 6-7, 1990 House Meeting

As those members who attended the April 6-7 meeting of the House in New York City already know, the time required to complete the other agenda items precluded my giving the usual President's report. I felt it was important that sufficient time be allotted to the balance of the agenda items without my detracting from that time. Consequently, in place of that oral report, I am submitting the following summary of significant items for your information, as I believe the Association is involved with a number of topical issues which you should find of interest.

1. Office of Court Administration. The Association's quarterly meeting with the Office of Court Administration took place on March 13, 1990 in New York City. Among the items discussed were the following:

a) Judiciary budget. Judge Wachtler underscored the need to support the 1990-91 Judiciary budget as submitted by the Office of Court Administration including the request for additional judges if the court system is to meet the ever-increasing caseload demands at all levels. I have testified in favor of the budget at legislative hearings, and at the April meeting, the House of Delegates unanimously adopted a resolution supporting the restoration of full funding to the Judiciary budget.

b) Governor's proposal to increase court fees. Consistent with our concern regarding reductions in the Judiciary budget, I advised Chief Judge Wachtler that the Association had gone on record opposing an increase in court fees to reduce the state's fiscal deficit. He shares our view that higher fees will impact most severely on poorer litigants, and restrict their access to the justice system.

c) Task Force on the Appellate Divisions. We discussed the status of the study of Appellate Division caseloads being conducted by the Task Force on the Appellate Divisions, which had been established jointly by the Chief Judge and the Governor. We advised Judge Wachtler that our Committee on Courts of Appellate Jurisdiction would be submitting written comments to the Task Force to assist its deliberations regarding options such as adding justices to the four Appellate Divisions, redistricting the existing departments, or creating new ones.

d) Mandatory pro bono. We advised the Chief Judge that consistent with the action taken by the House last October in approving the "State Bar Plan" for enhanced voluntary pro bono service, a Committee on Access to Justice had been appointed with Joseph S. Genova (who also heads the Committee on Legal Aid) as chair. During the coming months, this new committee will coordinate and oversee the Association's efforts as we seek to provide higher levels of pro bono assistance to those indigent New York residents who sorely need civil legal assistance.



2. **IOLA.** Consistent with the resolution adopted by the House this past January in opposition to the diversion of IOLA funds for purposes other than the support of civil legal services programs, we have communicated our position to the Governor. In the coming weeks, we will continue to maintain a strong opposition to any measures which seek to decrease the funds available through IOLA to support civil legal services programs.

3. **New York State Bar Journal Board of Editors.** Former Court of Appeals Associate Judge Francis Bergan recently retired from the Board of Editors of the New York State Bar Journal after thirty years of distinguished service. In recognition of this dedicated service to the Association and the Journal, the Executive Committee has conferred on Judge Bergan the title of Editor Emeritus. I am pleased to report that to succeed him, the Executive Committee confirmed the appointment of Hon. Judith S. Kaye, Associate Judge of the Court of Appeals. The Association has been fortunate to have the active participation of distinguished and talented individuals such as Judges Bergan and Kaye, and I am sure you join me in extending our sincere appreciation to both of them.

4. **Court facilities.** With the state facing a significant budget deficit, the Governor has proposed that money intended for the designated fund for the improvement of court facilities be placed instead in the general fund. In view of the desperate need for expanded and renovated courthouses in most areas of the state and the years of delicate negotiations which led to the funding plan to improve the courts, the Association is opposing any transfer or decrease in the agreed upon funding.

5. **Sales tax on legal services.** Also stemming from the state budget crisis, the Legislature is considering imposing a sales tax on legal and other professional services to generate additional revenues. As of this writing, a formal bill has yet to be filed. However, through our Committee on Legislative Policy and Department of Governmental Relations, we are monitoring this issue closely so that we will be able to take timely action to oppose any bills which may be introduced. We recognize the detrimental impact that a sales tax will pose for clients, especially poorer ones, and I assure you that the Association will make its position clear should the need arise.

6. **Code of Evidence.** The Governor has announced that he is proposing legislation to establish a Code of Evidence for the State of New York. Based on a preliminary review of the document by our Trial Lawyers Section, much of the current proposal tracks an earlier code proposal which was submitted to the Legislature in 1982. In 1982 and 1983, a number of Association committees and sections analyzed that earlier draft. Their efforts culminated in the submission of comments to the House of Delegates which in 1984 adopted a position in favor of codification of the evidence rules. We see a similar interest on the part of our committees and sections in the new bill, and will be appointing a new special committee to review and report its findings to the Executive Committee and the House.

7. **Family Court.** Last June, the Committee on Juvenile Justice and Child Welfare reported to the Executive Committee concerning the need for additional resources in Family Court to deal with the drug-related rise in cases which that court is experiencing. Since then, the committee has been gathering data to substantiate this need, and in late January joined with the Committee on Family Court and Family Law of the Association of the Bar of the City of New York to hold a public hearing on the crisis in Family Court. The two committees recently released a compendium of the testimony gathered at that hearing. During the coming months, our committee will be gathering additional information and will report its findings to us.

8. Code of Professional Responsibility. The four Appellate Divisions recently issued a joint order adopting amendments to the Disciplinary Rules of the Code of Professional Responsibility. These will become effective September 1, 1990. The new rules promulgated by the Appellate Divisions are based on the proposed revisions to the Code which the House approved for transmittal to the four departments in 1987. The new rules are being reviewed by our Special Committee to Review the Code of Professional Responsibility, which is chaired by Hon. Hugh R. Jones. We anticipate that the committee will be in a position to report at the June House meeting concerning any changes which need to be made to the NYSBA draft to conform it to the action taken by the four departments.

9. General Meeting. We met recently with representatives of the Nassau and Suffolk County Bar Associations to refine plans for the 1991 Association General Meeting which will be held on Long Island in the spring of 1991. I am pleased to report that the bar associations in Kings and Queens counties also will be joining in the planning. We anticipate that the meeting will be comparable to past General Meetings in terms of scope and content. When the arrangements are in place, we will provide you with detailed information so that you might make your plans to attend.

10. Section Leadership Conference. On March 22, we held a Section Leadership Conference involving the current and future officers of our twenty sections. We had a productive session which addressed a number of topics of interest to our section leaders, including section management, administrative support and acting effectively on substantive issues.

11. April 5-6, 1990 Executive Committee meeting. At the Executive Committee meeting which preceded our most recent House session, actions were taken with respect to a number of significant items presented by various sections and committees of the Association. These included the following:

a) **International Law and Practice Section.** At the request of the section, the Executive Committee endorsed U.S. ratification of the United Nations Convention on the Limitation Period in the International Sale of Goods. Ratification will aid in removing uncertainty for U.S. importers and exporters as to when legal claims stemming from foreign transactions become unenforceable due to the passage of time by utilizing uniform standard akin to that which exists in the U.S. under the Uniform Commercial Code.

b) **Criminal Justice Section.** Based on a report by the section, the Executive Committee adopted a resolution of concern over the effect on the attorney-client privilege and client confidences of IRS regulations which require attorneys to identify clients who pay legal fees exceeding \$10,000 in cash. The Justice Department has been asked to delay enforcement of this regulation, and the Criminal Justice Section will work with the appropriate governmental agencies to change procedures to protect the attorney-client relationship as well as other fifth and sixth amendment rights.

The Executive Committee also endorsed a report by the section which calls for the Legislature to examine sting operations in the courtroom, as it is felt their impact on the justice system is such that sting tactics should be permitted only under compelling circumstances where there is no other acceptable investigative procedure available.

Acting on a third matter raised by the Criminal Justice Section, the Executive Committee took a position that federal government attorneys should not be

permitted to ignore state ethical rules prohibiting ex parte contacts with individuals known to be represented by counsel.

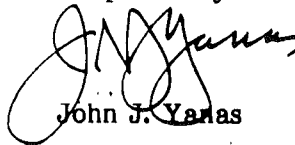
c) Business Law Section. At the request of the section, the Executive Committee endorsed the inclusion of a new Article 4A in the Uniform Commercial Code to cover electronic funds transfers. In a second matter presented by the section, the Executive Committee endorsed U.S. ratification of the United Nations Convention on International Bills of Exchange and International Promissory Notes. This convention will not only promote international commerce, but will encourage the use of uniform standards to govern bills of exchange and promissory notes which circulate among nations with differing commercial standards.

d) Mortgage-related documents. Based on a joint report by the Business Law Section, the Executive Committee has approved the filing of a bill by the Association to address the problems caused by delays in obtaining the delivery of mortgage-related documents by providing for the imposition of monetary penalties and by allowing for the filing of attorney affidavits in lieu of mortgage papers in some instances.

e) Funding for attorney discipline. The Committee on Professional Discipline will be examining the level of funding currently provided for the attorney discipline system in New York State to assess its adequacy and to determine whether increased support is warranted.

As evidenced by the foregoing summary, the Association continues to be involved in a variety of topical issues. This is possible due to the commitment to the NYSBA made by our members, especially those taking an active part in our sections and committees. As I near the end of my term as President, I would like to thank all who have given so generously of their time and talent that the Association might remain at the forefront of the legal profession. Serving as your President this past year has been the high-point of my professional career. It has been a privilege and a pleasure and I shall never forget the support you gave me, without which I could not have fulfilled my responsibilities as your President.

Respectfully submitted,



John J. Yanas