

NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
MARRIOTT MARQUIS, NEW YORK CITY
JANUARY 29, 1993

PRESENT: Members Adler; Anderson; Ange; Ayers; Baker; Baldwin; Banner; Barnett; Barnosky; Beckerman; Berman; Bermingham; Besunder; Brachtli; Bracken; Brenner; Breslin; Buzard; Cashman; Cedarbaum; Ciulla; Clements; Coffey; Cohn; Collier; Cometa; Connolly; Corcoran; Cyrulnik; Daly; D'Angelo; Davidson; DeLuca; Deptula; DiFede; Dowling; Doyle; Egelfeld; Eiber; Eisenhauer; Elmer; Eppler; Fales; Farrell; Feerick; Feigenbaum; Ferguson; Field; Fink; Forger; Friedman; Frye; Galloway; Geltzer; Goldblum; Goodstein; Greisler; J. Gross; M. Gross; Grossman; Haig; Halpern; Handschu; Hart; Haskel; Hassett; Heming; Hesterberg; Jacoby; Jaffe; H. Jones; M. Jones; Juliano; Kahler; Kahn; Kamins; Karan; Kelly; Kennedy; Kenney; Kessler; Labaton; Lagarenne; Lashley; Lee; Levin; Levine; Lindenauer; Madigan; Mahoney; Malito; Markuson; Marlow; Martusewicz; McCarthy; McDonald; McDowell; Meyer; Miklitsch; E. Miller; M. Miller; Millon; Minardo; Moore; Moreland; Morris; A. Murray; K. Murray; Nobile; O'Brien; Offermann; O'Keefe; Okin; Opatowsky; Ostertag; Palermo; Patrick; Pearl; Peckham; Pfeifer; Picotte; Pisani; Plotkin; Pool; Pruzansky; Purcell; Rachlin; Raysman; Reich; Reilly; Reiniger; Reizes; Richardson; Ritholz; Robfogel; Robinson; Roper; Rothstein; Rybak; Sachs; Santemma; Schaab; Scheindlin; Schumacher; Seward; Seymour; Sklarin; Smith; Spellman; Standard; Steflik; Stevens; Strauss; Sunshine; Swartwood; Tharp; Tomaselli; Triebwasser; Troeger; Vigdor; Vitacco; Wales; C. Walker; J. Walsh; Weinberger; Weiner; Weiss; D. White; R. White; Williams; Windstein; Witmer; Yanas; Zalayet; Zurlo.

1. Approval of minutes of November 7, 1992 meeting. The minutes were approved as distributed.

2. Report of Treasurer. The Treasurer's report for the preceding fiscal year, which had been presented by Finance Committee Chair Thomas O. Rice to the members of the House at the Annual Meeting of the Association, was received with thanks. In addition, Mr. Rice reported that, based on a recommendation by the Finance Committee, the Executive Committee had approved participation by the Association in a Software Defined Network ("SDN") program offered by AT&T. He explained that by allowing the Association to act as an umbrella for the firms of members participating in the SDN program, AT&T would be able to offer them substantial discounts for long-distance telephone service. Mr. Rice also stated that the Association would realize a fee from the program to offset its administrative expenses. He indicated that in addition to an initial \$10,000 fee payable to AT&T, the program did present some potential liabilities, as the Association would incur financial penalties if a minimum annual level of long-distance usage of 5 million minutes were not reached, as well as bear the ultimate responsibility for any uncollected monthly bills of participating members. Mr. Rice advised that to safeguard against these liabilities, the Executive Committee had conditioned approval of the SDN program on letters of commitment being obtained from sufficient firms to

meet the annual minimum traffic threshold, and had recommended that all revenues net of taxes be retained in a funded reserve for the first five years of the program to offset any defaults by participating members. He stated that payments by participants would be carefully monitored, and those in arrears for sixty days would be dropped from the program. Mr. Rice noted that further developments with respect to the implementation of the SDN plan would be reported to the House.

3. Report of Nominating Committee and election of officers and members-at-large of the Executive Committee. John J. Yanas, Chair of the Nominating Committee, reported that the committee had nominated the following individuals for election to the respective offices as indicated:

President-Elect: G. Robert Witmer, Jr., Rochester
Secretary: Lawrence E. Lagarenne, Monticello
Treasurer: Thomas O. Rice, Brooklyn

District Vice-Presidents:

First: Arthur Norman Field, New York City
Second: Joseph H. Farrell, New York City
Third: Thomas P. Connolly, Albany
Fourth: David R. Seward, Gloversville
Fifth: M. Catherine Richardson, Syracuse
Sixth: Kathryn Grant Madigan, Binghamton
Seventh: Robert J. Pearl, Rochester
Eighth: Joseph D. Bermingham, Jr., Buffalo
Ninth: William J. Daly, Ossining
Tenth: Edward T. Robinson, III, Oyster Bay
Eleventh: Wallace L. Leinhardt, Kew Gardens
Twelfth: Maxwell S. Pfeifer, Bronx

At-Large Members of the Executive Committee:

Robert L. Geltzer, New York City
Robert L. Haig, New York City
Muriel S. Kessler, New York City
James C. Moore, Rochester
Francis J. Offermann, Jr., Buffalo
Joshua M. Pruzansky, Smithtown

There being no further nominations, a motion was made and carried that the nominations be closed. The Secretary then cast a single ballot to elect the officers and members-at-large of the Executive Committee for the 1993-94 Association year.

4. Report and recommendation of Committee on Professional Ethics concerning proposed amendments to the Code of Judicial Conduct. Marjorie E. Gross, a member of the Committee on Professional Ethics, reported that the committee had recently released its revised report and recommendations concerning proposed amendments to the Code of Judicial Conduct. She noted that the most recent draft reflected comments which had been received from interested groups, including Association sections and committees, as well as county and local bar associations. Ms. Gross advised that

view of these revisions and the recent circulation of the amended draft, as well as the desire to afford adequate time for review to all interested parties, the Committee on Professional Ethics was seeking approval of a revised scheduling resolution to supplant that which had been approved by the House of Delegates at the June 1992 meeting. After discussion, the following resolution was adopted on motion of the House:

RESOLVED, that the House of Delegates hereby adopts the following procedures to govern consideration at the April 3, 1993 meeting of the report of the Committee on Professional Ethics ("Committee") and amendments proposed to the Code of Judicial Conduct ("CJC"):

1. Any amendments to the Committee proposals or to the CJC must be submitted in writing to the Secretary of the Association at Bar Headquarters on or before March 1, 1993 and be in the style used by the Committee 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 prior to the April 3 meeting.
2. At the April 3 meeting, consideration of the Committee's proposals and other amendments shall be as follows:
 - a. The Committee will be given the opportunity to provide a brief overview of its report and recommendations.
 - b. The Committee will make a presentation of each section of the CJC in the following order: Preamble, Terminology, Canon 1 through Canon 5, and Application. Following the Committee's presentation of each section, amendments to the Committee's proposals will be considered seriatim.
 - c. All those wishing to speak with regard to a particular amendment may do so only once for no more than three minutes, except the sponsor of any amendment may speak a second time for two minutes, and a representative of the Committee will have two minutes to close.
 - d. A vote on each amendment will then be taken, requiring a majority vote for adoption.
 - e. Procedural motions will be considered out of order until debate on all substantive amendments has been concluded.
 - f. A final vote will be taken to approve the CJC, as amended, for transmittal to the Chief Judge and the Chief Administrator of the Courts.
5. Report and recommendations of Special Committee on AIDS and the Law. Hon. Renee A. White and Steven L. Kessler, Co-Chairs of the Special Committee on AIDS and the Law, summarized the report of the committee with respect to the legal issues

associated with AIDS. They outlined relevant medical information as well as the recommendations formulated by the committee to address AIDS-related issues in the fields of criminal justice, health law, housing, insurance, labor and employment, matrimonial law, and trusts and estates law. Because of the complexity and sensitivity of this area, they noted that 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. They noted that in anticipation of the presentation of the matter to the House, the Executive Committee had endorsed and approved the report with the deletion of the health law recommendation set forth at page 21 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, and with the further deletion of the recommendations with respect to domestic partnerships contained in the trusts and estates and real property segments of the report. They advised that the discussion with the Executive Committee as well as with several of the substantive sections and committees had indicated that further study by the latter groups was warranted. Judge White and Mr. Kessler stated that to allow for this additional review, they were requesting that formal consideration of the committee's report be tabled, with the understanding that in the future the committee would bring particular legislative proposals before the Executive Committee or the House of Delegates for approval after conferring with the appropriate sections or committees. As requested by the committee, the House then adopted a motion tabling formal consideration of the report.

6. Report and recommendations of New York County Lawyers' Association regarding electronic recording of court proceedings. Michael Miller of the New York County Lawyers' Association summarized that organization's report regarding the electronic recording of court proceedings. He outlined the developments connected with the implementation of a limited program by the Chief Administrator to substitute electronic recording for court reporters in Surrogate's Court and the Court of Claims, and the controversy which had ensued, including the institution of litigation by several Surrogates. He reviewed the experience with electronic recording in certain of New York's courts, such as the Civil Court of the City of New York and the Family Court, and also noted the impact which electronic recording could have on the rights of the parties in different proceedings. He concluded that given the disparate views which exist regarding electronic recording, the New York County Lawyers' Association had recommended that the best approach for addressing these issues would be through the appointment by the Chief Judge and the President of the New York State Bar Association of a joint commission to conduct an evaluation and make recommendations with respect to the electronic recording of court proceedings. Following discussion, a motion was adopted approving the report and authorizing the President to communicate with the Chief Judge regarding the appointment of a joint commission, or to take such other action as may be deemed appropriate.

7. Report of Committee on Association Insurance Programs. James C. Moore, Chair of the Committee on Association Insurance Programs, summarized the status of the sponsored insurance program and explained the oversight function performed by the committee. He reviewed the nature and performance of the various plans which comprise the program, as well as the role of the Bertholon-Rowland Corp.

administering the program. He described the royalty and administrative services agreements between the NYSBA and Bertholon-Rowland, as approved by the New York State Insurance Department, which permit the Association to receive compensation from the administrator. Mr. Moore reported the results of an evaluation of the program and its administration performed in 1992 by Buck Consultants. He indicated the study had concluded that while the program was generally sound, competitive and well-managed, recommendations also had been made to improve the program and Bertholon-Rowland's administration. He stated that the committee was in the process of pursuing these measures. Mr. Moore also noted the shift in carriers which had been made to strengthen the disability plan during the past year and the efforts being made to address the impact of the new community rating laws on health care coverage. Mr. Moore advised that he would report to the House regarding developments as warranted. The report was received with thanks.

8. Report and recommendation of Special Committee on Biotechnology and the Law. Grace Marie Ange, a current member and former Chair of the Special Committee on Biotechnology and the Law, summarized the committee's proposed amendment to Section 73 of the Domestic Relations Law to address parental status in surrogacy situations. She noted that the proposal represented a redraft of the statute which the House had found unclear and had recommitted for further study in June 1992 when it accepted the committee's report on the legal significance of gestation in assisted reproduction. She explained that in response to the concerns raised at the earlier meeting, the committee had added language to the effect that any child born by means of *in vitro* fertilization would be deemed the child of the woman who had provided the ovum as well as the child of the woman giving birth. Discussion then ensued, during which concern was expressed that by conferring rights on two women in surrogacy situations, confusion could be created in other areas of the law, such as rights of inheritance in cases of intestacy. After further discussion, a motion to approve the proposed legislation was defeated by vote of the House by a 50 to 82 margin.

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

a) With the approval given by the House of Delegates in April 1992, the Committee on Lawyer Alcoholism and Drug Abuse had pursued with the four Appellate Divisions amendment of DR 1-103(A) of the Code of Professional Responsibility to ensure the confidentiality of communications to and among members of lawyer assistance committees administered by the state and local bar associations. He indicated that the courts had agreed to amend the Code in this regard and were in the process of executing the necessary joint order. He noted that the committee was also in the process of pursuing with the Legislature a comparable amendment to Section 499 of the Judiciary Law.

b) Consideration of the merit selection proposal developed by Action Unit No. 4, which was to have been considered at this meeting, had been put over until April. He indicated this had been done to permit the action unit to complete a series of regional meetings with bar leaders, as well as afford an adequate opportunity for the county and local bars, as well as other interested sections and committees, to review and comment on the proposal. Mr. Bracken encouraged participation by the members of the House

and other interested groups to ensure an informed discussion of the relevant concept at the next meeting.

c) On December 9, 1992 he had met with representatives of the Office of Court Administration to discuss matters of mutual interest. He indicated that the subjects addressed had included the judiciary budget, judicial salary increases, the court system management study being conducted by OCA, the functioning of the Individual Assignment System, courthouse facilities, the electronic recording of court proceedings, voluntary *pro bono*, and the activities of the gender bias committees in addressing the bias issues set forth in the report of the Task Force on Women in the Courts. With regard to the foregoing items, Mr. Bracken elaborated on the following points:

i) Judiciary budget. He advised that under the current 1992-93 budget, the court system was 180 support positions below where it expected to be at this juncture, and that the cumulative total of judicial vacancies now numbered 40. He indicated that OCA continued to cope as well as it could with the resources at its disposal. Mr. Bracken stated that he would be testifying in favor of the proposed 1993-94 budget at upcoming legislative hearings.

ii) Electronic recording of court proceedings. He stated that OCA would be continuing to monitor its experimental program and did not anticipate any substantial changes being made until data has been analyzed at the conclusion of the present two-year trial period. Mr. Bracken advised, that as authorized earlier in the meeting, he would be contacting the Chief Judge regarding the designation of a joint study commission.

iii) Court management study. He noted that OCA anticipated that its committee which was evaluating the court system would complete its work by late February.

iv) Courthouse facilities. He reported that concerns raised by the State Division of the Budget with respect to the bonding plan to fund courthouse construction and renovation in New York City had been resolved, and this would allow the city authorities to proceed with the courthouse improvements agreed to with OCA.

v) Gender bias. He stated that OCA will be implementing various measures, including newsletters, to heighten awareness regarding gender bias in the court system and to better coordinate efforts to address this issue.

d) On November 25, 1992 he had testified before the Temporary Commission on Judicial Compensation in support of judicial salary increases. Mr. Bracken also noted that following the release of the commission's report he had written to the Governor and the legislative leaders conveying the Association's opposition to increasing court fees and the biennial attorney registration fee as a means for funding salary increases, as had been proposed by the commission.

e) In furtherance of the report to the House at the last meeting with respect to court management studies, he had appointed a special committee, with John R. Horvath as Chair, to develop a proposal for the retention of a consultant who will plan for a study

of the court system designed to respond to the need to increase the public's confidence in the courts; to coordinate the Association's committees and sections in their cooperation with such a study; and to monitor the activity of the court system and constitute a resource for the bar and the public when information is needed.

f) He had appointed a Committee on Long-range Planning with former Association President Robert L. Ostertag serving as Chair. He noted that the committee would be examining a variety of areas of importance to the Association, including service to the profession and quality of life; service to the public; the governance and operation of the Association; relationships with other associations; relationships with the Judicial Branch and its operation; relationships with the Executive and Legislative Branches; professionalism and competence.

g) Effective January 1, 1993, OCA had adopted a series of changes to the Individual Assignment System designed to promote flexibility and to provide judges with greater case management powers. He indicated that Action Unit No. 6 would be providing a detailed report on this subject later in the meeting.

h) Within the next few months, the Membership Committee would be conducting a survey of the Association's membership. He advised that to measure the level of satisfaction with present services and to gain an understanding of future expectations, a variety of methods would be employed to gather information, including mail surveys, telephone contacts and focus groups. Mr. Bracken encouraged the members of the House to cooperate if they were contacted as part of this process so that the Membership Committee might obtain as complete and accurate a view of the membership as possible.

i) Based on the recommendations of the Ad Hoc Committee on Annual Meeting, chaired by former Association President Angelo T. Cometa, a number of significant changes had been made to improve the Annual Dinner, including elimination of the dais and the formal dress requirement, reducing the honored guest list, hosting a general cocktail reception for all guests preceding the dinner, shifting the presentation of the Fifty-Year Lawyer Award to another function, and providing headline entertainment for the dinner attendees.

j) The Governor had indicated he was desirous of having tort reform and products liability legislation enacted during the 1993 legislative session. Mr. Bracken indicated that the appropriate committees and sections would be monitoring this area so that the Association could provide timely and effective input.

k) With the assistance of DRT Systems International, the Association had completed an extensive study of the computer, word processing and typesetting systems used at the Bar Center. He indicated that with the approval of the Finance Committee, outmoded equipment would be replaced and new hardware and software would be introduced to improve the quality and breadth of services provided to members.

l) John E. Berry, the first full-time Executive Director of the Association, who had served for 30 years, had passed away recently. A moment of silence was observed

out of respect for Mr. Berry's memory and in recognition of his contributions to the Association.

10. Report and recommendations concerning judicial salary increases. John J. Kenney, a member of the House and the New York County Lawyers' Association, summarized the report of that organization with respect to salary increases for state court judges. He reviewed the 1988 findings and recommendations of the Temporary Commission on Executive, Legislative, and Judicial Compensation, and the recent report of the Temporary Commission on Judicial Compensation. Mr. Kenney also summarized comparative data with respect to judicial salaries and noted that New York's judges had last received a raise in 1987. After discussion, the following resolution was adopted unanimously on motion of the House:

RESOLVED, that the New York State Bar Association strongly urges that the compensation of the judges of the State of New York be increased as proposed in the 1993-1994 judiciary budget.

In making this recommendation we also endorse, recognize and support the concern for judicial salary increases as expressed by the New York County Lawyers' Association in its report to this House on January 29, 1993 and by other bar groups across the state.

11. Report of Action Unit No. 6. Maxwell S. Pfeifer, Chair of Action Unit No. 6, summarized the action unit's report with respect to the changes implemented by OCA to improve the functioning of the Individual Assignment System. He outlined the modifications made regarding motion practice, adjournments and preliminary conferences in the various districts and described the manner in which the new procedures were intended to function.

He also reported on the creation of four commercial parts in New York County to facilitate the handling of complex commercial litigation. Mr. Pfeifer advised that many of the changes reflected suggestions made by the organized bar, including the action unit, and that it was OCA's intent to maintain this open communication to allow for further dialogue regarding IAS. Mr. Pfeifer invited the members to submit any comments or concerns they might have to the action unit so they might be addressed and conveyed to OCA.

12. Report of the New York County Lawyers' Association regarding the Workers' Compensation Board. Mark C. Williams of the New York County Lawyers' Association summarized that organization's report concerning the Workers' Compensation Board. He advised that the report had been developed based on an evaluation of the board's funding, the composition of its staff, and the facilities and other resources at the board's disposal. Mr. Williams reviewed the conclusions which had been reached as to the condition of the facilities occupied by the board, as well as the inadequacy of the salaries paid to Workers' Compensation Law Judges. He also noted the recommendations which had been made for a review of the exempt and non-competitive staff positions associated with the board, and for a review of the role of lay representatives in the claims process.

Mr. Murray noted that formal action would not be taken with respect to the report to afford reasonable time for interested Association committees and sections, particularly the Insurance, Negligence and Compensation Law Section, to submit views with regard to the report.

13. Report of Chair. Mr. Murray reported that the Nominating Committee had nominated the following individuals for election at the April meeting of the House to serve a two-year term as delegates to the American Bar Association House of Delegates: Angelo T. Cometa, Ralph L. Halpern, Maryann Saccomando Freedman, Charles E. Heming and Susan S. Robfogel.

14. New business.

a) Marjorie E. Gross, Chair of the Special Committee to Review the Code of Professional Responsibility advised that effective January 1, 1993 the four Appellate Divisions had amended DR 9-102 of the Code of Professional Responsibility in connection with the "Dishonored Check Notice Rule" pursuant to which banks dishonoring a check drawn on an escrow/trust account will provide notice of such dishonor to the Lawyers' Fund for Client Protection, with notice in turn being given to the appropriate disciplinary committee if the overdraft was not due to bank error. She explained the specifics of the Disciplinary Rule changes, including the designation of escrow/trust accounts and the requirement that such accounts may be maintained only with those banking institutions which have agreed to report dishonored checks to the appropriate entities. Ms. Gross noted that since it was necessary for the Association conform its version of the Code to the Disciplinary Rules adopted by the Appellate Divisions, it would facilitate matters in the future if a resolution were adopted which would automatically conform the NYSBA's Code to uniform amendments enacted by the four Appellate Divisions. Discussion then ensued during which some members suggested it would be preferable for the House to adhere to its prior procedure of conforming the Code each time changes were adopted by the Appellate Divisions. A motion to this effect was made and defeated by vote of the House. After further discussion the following resolution was adopted on motion of the House:

WHEREAS, the Appellate Divisions of the New York Supreme Court have jointly promulgated Disciplinary Rules which are applicable to all attorneys admitted to practice in New York State; and

WHEREAS, the Disciplinary Rules also appear in the CPR adopted by the New York State Bar Association;

NOW, THEREFORE, BE IT RESOLVED that the New York State Bar Association hereby approves amendment of the Disciplinary Rules of its Code of Professional Responsibility to conform to any Disciplinary Rules adopted or amended from time to time by all Appellate Divisions.

b) Mr. Vigdor reported that the Governor's proposed budget for fiscal year 1993-94 had eliminated funding for the Law Revision Commission and the Conference on Uniform State Laws. He reviewed the beneficial function performed by both entities

and noted the support given by the Association to both groups in the past. After discussion, the following resolution was adopted on motion of the House:

WHEREAS, the National Conference on Uniform State Laws was organized in 1892 "to promote uniformity of state law on all subjects where uniformity is desirable and practicable"; and

WHEREAS, the Law Revision Commission was formed in 1934 and is charged with "discovering defects and anachronisms in the law" and recommending reforms to bring civil and criminal law "into harmony with modern conditions"; and

WHEREAS, both groups have worked to advance jurisprudence and to enhance legal standards; and

WHEREAS, the beneficial impact of those works on the people of New York and the status of New York as a legal, banking and commercial center has been invaluable; and

WHEREAS, the Governor's proposed budget eliminates all funding for both Commissions;

NOW, THEREFORE, BE IT RESOLVED, that the New York State Bar Association urges the Governor and the Legislature of the State of New York to preserve the existence of both Commissions and to restore their funding in the fiscal 1993-1994 budget of the State of New York.

c) Mr. Halpern advised that with Super Bowl XXVII in the offing, it would be appropriate for the Association to express support for the Buffalo Bills as a New York team. The following resolution was adopted on motion of the House:

WHEREAS, the Buffalo Bills are the only professional football team playing in Super Bowl XXVII even remotely connected with the State of New York, now, therefore, it is

RESOLVED, that the New York State Bar Association endorses the efforts of the Buffalo Bills in their endeavor on Sunday, January 31, 1993 to defeat the Dallas Cowboys on the football field known as the Rose Bowl located in Pasadena, California; and it is further

RESOLVED, that the appropriate officers of this Association transmit these resolutions to the appropriate officials of the Buffalo Bills.

15. Date and place of next meeting. Mr. Murray announced that the next meeting of the House of Delegates will be held on Saturday, April 3, 1993 at the Bar Center in Albany, New York.