

NEW YORK STATE BAR ASSOCIATION  
MINUTES OF HOUSE OF DELEGATES MEETING  
MARRIOTT MARQUIS, NEW YORK CITY  
JANUARY 26, 1996

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PRESENT: Members: Abrams; Alcott; Amendola; Asarch; Ayers; Baldwin; Bass; Berlin; Birmingham; Bernis; Bohner; Bongiovanni; Bracken; Branca; Brenner; Burgman; Bums; Buzard; Chesler; Cioffi; Coffey; Cometa; Cooke; Cunha; D'Angelo; DaSilva; Davidson; Denton; DiNardo; Dollard; Drinkwater; Dwyer; Edmead; England; Eppler; Epstein; Fales; Farrell; Field; R.L. Fink; FitzGerald; Franchina; Freedman; Friedman; Gacioch; Gardella; Geltzer; Gingold; M.R. Goldstein; Gouldin; Grayson; Hall; Handschu; Hansen; Harris; Hartman; Hassett; Headley; Heming; Herold; Hesterberg; Hoffman; Horan; Horowitz; Jacobowitz; H. Jones; M. Jones; Juliano; Kahler; Kendall; Kennedy; Kenney; M. Kessler; S. Kessler; Kilsch; Kmiotek; Kougasian; Labaton; Landy; Lascurettes; Lawrence; Lazar; Lefkowitz; Leinhardt; Levin; Levine; Lilly; Longo; Lubell; Lucchesi; Madigan; Maldonado; Malito; Mandell; Maney; Manley; Markuson; Marten; Martusewicz; McCarthy; McClusky; McDonough; McGlinn; Meng; Miklitsch; M. Miller; Minardo; Moore; Murray; Naviasky; Netter; Nussbaum; O'Connell; O'Leary; Offermann; Oliver; Omansky; Osber; Ostertag; Ostrow; Palmer; Pearl; Peckham; Periconi; Pfalzgraf; Pfeifer; Picotte; Pollio; Porter; Pruzansky; Purcell; Quinlan; Reizes; Remo; Rice; Richardson; B. Robinson; E. Robinson; Roper; Rosenbloom; Ross; Rubin; Ruslander; Santemma; Santola; Schlesinger; Seymour; Sharkey; Souther; Spellman; Standard; Stave; Stokes; Sunshine; Tharp; Thomashower; Tishler; Torres; Tyler; Waldauer; Wales; Walker; Weaver; Williams; Witmer; Yanas; Zalayet; Zieselman.

1. Approval of minutes of November 4, 1995 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 Treasurer Thomas O. Rice to the members of the House at the Annual Meeting of the Association, was received with thanks.
3. Report of Nominating Committee and election of officers and members-at-large of the Executive Committee. John P. Bracken, Chair of the Nominating Committee, reported that the committee had nominated the following individuals for election to the indicated offices for the 1996-1997 Association year:

**PRESIDENT-ELECT**

Joshua M. Pruzansky, Smithtown

**SECRETARY**

Kathryn Grant Madigan, Binghamton

**TREASURER**

Thomas O. Rice, Brooklyn

**DISTRICT VICE-PRESIDENTS**

**FIRST:**

Arthur Norman Field, New York City

**SEVENTH:**

James C. Moore, Rochester

**SECOND:**

Gregory X. Hesterberg, Brooklyn

**EIGHTH:**

Joseph D. Bermingham, Jr., Buffalo

**THIRD:**

Miriam M. Netter, Troy

**NINTH:**

Frank M. Headley, Jr., Scarsdale

**FOURTH:**

Peter V. Coffey, Schenectady

**TENTH:**

Thomas J. Spellman, Jr., Smithtown

**FIFTH:**

Dennis R. Baldwin, Syracuse

**ELEVENTH:**

Robert J. Bohner, Rego Park

**SIXTH:**

Leslie N. Reizes, Ithaca

**TWELFTH:**

Hon. Alexander A. Delle Cese, Bronx

**AT-LARGE MEMBERS OF THE EXECUTIVE COMMITTEE**

A. Vincent Buzard, Rochester  
Paul M. Hassett, Buffalo  
A. Thomas Levin, Mineola  
Edward S. Reich, Brooklyn  
Kenneth G. Standard, Chappaqua  
Lorraine Power Tharp, Albany

There being no further nominations, a motion was made and carried that the nominations be closed. The Secretary then cast a single ballot for the election of the aforesaid officers and members-at-large of the Executive Committee for the 1996-1997 Association year.

4. Presentation of Ruth G. Schapiro Award. Mr. Pfeifer presented the fourth annual Ruth G. Schapiro Award to the Hon. Sondra Miller, Associate Justice of the Appellate Division, Second Department, for her many noteworthy, law-related contributions to remedying the concerns of women through her extensive leadership activities and efforts during her career in addressing such issues as breast cancer awareness, gender fairness in the courts, family violence, sexual harassment, and justice for children.

5. Report and recommendations of Special Committee to Review the Code of Professional Responsibility Steven C. Krane, Chair of the Special Committee to Review the Code of Professional Responsibility, summarized the committee's proposed amendments to the Code of Professional Responsibility to permit a lawyer or law firm to sell a law practice, including the goodwill of the practice. He explained that the committee's proposal was patterned on the pertinent ABA Model Rule, but reflected modifications to afford greater protection for client confidentiality, to provide a mechanism for detecting conflicts of interest at an early stage of the sale, to protect clients against unilateral fee increases, and to allow lawyers to sell a severable portion of a law practice. He reviewed the concerns that had been raised at the last meeting of the House and noted the modifications made in the proposal to address those issues, including the inclusion of a definition for "entire discrete practice area" and the inclusion of examples in proposed EC 2-34; the strengthening of provisions that permit sellers to provide prospective buyers with basic information necessary to evaluate the transaction without affecting significantly the duty to hold confidences and secrets inviolate; and the amplification of the rules regarding the nature of information about the sale to be given to clients. Mr. Krane also reviewed the more restrictive version of its proposal which the committee had prepared based on the view expressed by some House members that the rule should more closely parallel the ABA standard. He also outlined modifications made to the committee's restrictive version by the Executive Committee at the latter's meeting on January 25, 1996 in endorsing that proposal for passage by the House. After discussion, revision and vote, the House defeated the more liberal proposal drafted by the committee. After further discussion and the inclusion of minor changes, the following resolution was adopted on motion of the House, approving the more restrictive version of the proposed Code amendments (copy attached) reflecting the changes incorporated by the Executive Committee on January 25, 1996, for consideration by the four Appellate Divisions:

**WHEREAS**, the New York State Bar Association has adopted the Code of Professional Responsibility ("Code"), and

**WHEREAS**, the Special Committee to Review the Code of Professional Responsibility has proposed amendments to the Code to permit the sale of a law practice under specified circumstances;

**NOW, THEREFORE**, it is

**RESOLVED**, that the New York State Bar Association hereby approves the restrictive amendments to the Code offered by the Special Committee in its revised report dated January 26, 1996 as an alternative to its previously recommended amendments; and it is

**FURTHER RESOLVED**, that the Association hereby amends the Code to add a new Disciplinary Rule 2-111 and new Ethical Considerations 2-34 through 2-37, contingent upon the adoption by the Appellate Division of

State Supreme Court of amendments to Part 1200 of the court's rules consistent with the modifications to the Code approved by this House.

6. Report and recommendations of Review Committee on the Profession and the Courts. John J. Kenney, Chair of the Review Committee on the Profession and the Courts, summarized the committee's recommendations with respect to the report released by the Chief Judge's Committee on the Profession and the Courts ("Craco Committee"). He outlined the views of the committee with respect to the latter group's proposals in the areas of professionalism, client satisfaction, attorney discipline, and the improvement of court management. He indicated that the committee generally favored the recommendations developed by the Craco Committee, such as those relating to improved training for new lawyers, the implementation of mandatory continuing legal education, the establishment of an ethics institute and the adoption of standards for civility in litigation. Mr. Kenney, also noted areas where the committee suggested caveats be attached to the Craco Committee's initiatives, such as limiting the application of a statement of client's rights and responsibilities to individual clients. He also indicated that while the committee supported the concept of mediation of some attorney grievances, such a process would not be appropriate where there has been no violation of a disciplinary rule. He expressed the committee's support for the general concept of fee arbitration, but not for the specific proposal presented by the Craco Committee. Discussion then ensued during which the House adopted separate motions expressing opposition to the incorporation of Federal Rule 11 into New York practice; opposing the mandatory arbitration of fee disputes, but if considered, providing for trial de novo; supporting the use of engagement letters, with the caveat that the threshold amount be increased to \$5,000; and recommending that references to terminology of judge baiting be removed as a sanctionable event. A motion was then adopted approving the following resolution:

**RESOLVED**, that the New York State Bar Association hereby approves in principle the report and recommendations of the Review Committee on the Profession and the Courts, dated January 19, 1996, with the following exceptions:

- a) The Association opposes the incorporation of Rule 11 of the Federal Rules of Civil Procedure into New York practice;
- b) The Association opposes the mandatory arbitration of fee disputes between attorney and client;
- c) The Association recommends that if mandatory arbitration of fee disputes is adopted, such program should permit a right of trial de novo;
- d) The Association supports the use by attorneys of engagement letters for clients with the caveat that the threshold fee amount be increased to \$5,000;

e) The Association recommends that references to the terminology "judge baiting" contained in the report of the Committee on the Profession and the Courts be removed as a basis for the imposition of sanctions.

7. Report of President. In view of the length of time required to address the other agenda items, Mr. Pfeifer, in lieu of presenting the usual oral report, submitted the attached written summary to inform the House of significant activities and issues of relevance to the Association.

8. Report of Strategic Planning Advisory Committee. Claire P. Gutekunst, Chair of the Strategic Planning Advisory Committee, outlined the strategic planning process undertaken by the Association's Executive Committee in 1993, with participation by representatives of other relevant sections and committees, to formulate a set of attainable objectives to guide the future direction of the NYSBA. She then outlined the role of the Strategic Planning Advisory Committee in evaluating, refining and prioritizing initiatives which had been developed during the retreat process. Ms. Gutekunst stated that the committee's report was the product of that review, and that it resulted in the development of three major objectives with specific, related action steps designed to achieve those objectives. She indicated the objectives dealt with the expansion of the Association's leadership role in working toward positive changes in the law and legal system and in promoting public confidence in that system; maximizing the Association's communication with its members, sections and committees, including the development of a rapid response mechanism to facilitate the formulation of timely positions on significant issues; and improving the value of membership through new or enhanced services, as well as through increased outreach efforts to ensure the strength and diversity of the Association. Ms. Gutekunst advised that following approval of the committee's report by the Executive Committee last November, implementation efforts had begun, including the establishment of an Association presence on the Internet, as well as contact with relevant sections and committees to put in place the rapid response mechanism, and to gain their involvement in efforts to enhance the value of membership and the development of projects to improve the legal system. Ms. Gutekunst indicated the committee would continue to be involved in monitoring the implementation of those objectives as well as the development of longer term goals for the Association. The report was received with thanks.

9. Report and recommendation of Special Committee on Lawyer Advertising and Referral Services. Sharon Stern Gerstman, Chair of the Special Committee on Lawyer Advertising and Referral Services, summarized the committee's report and recommendations with respect to the issues associated with lawyer advertising, solicitation, and privately operated referral services. She reviewed the various categories of advertising, as well as relevant court decisions, statutes, court rules and Code of Professional Responsibility provisions. She also noted the committee's concerns about lawyer advertising and the need to be sensitive to constitutional limitations on the regulation of advertising in formulating any changes in the current disciplinary structure. Ms. Gerstman then reviewed the committee's recommendations for improvement in this area, including Code of Professional Responsibility amendments to address advertising and solicitation issues, and the establishment of

a Commission on Advertising to educate attorneys, the media and the public regarding lawyer advertising, provide advisory assistance to lawyers and help them correct inappropriate advertising. She noted the degree of interest in this subject expressed by other sections and committees, as well as the concerns set forth in the specific comments submitted by the Special Committee to Review the Code of Professional Responsibility and the Committee on Professional Ethics. She indicated that the request for approval of the proposals at this meeting had been withdrawn to provide the three groups with an opportunity to resolve the outstanding issues in advance of formal consideration of the report at the June meeting of the House. The report was received with thanks.

10. Report of Chair. Ms. Richardson reported the following matters:

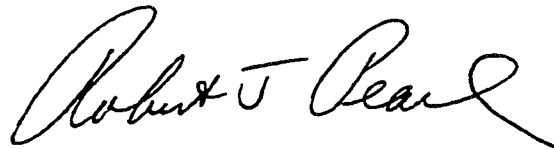
a) The Section on Health Law, as approved at the November House meeting, had been formed and was now operational.

b) At the April meeting, the House would be requested to elect six of the NYSBA's eleven delegates to the American Bar Association's House of Delegates. She stated that the Nominating Committee had reported the following nominees for those positions: John P. Bracken, Brian E. Logan (Young Lawyer Delegate), Archibald R. Murray, Robert L. Ostertag, Maxwell S. Pfeifer and Joshua M. Pruzansky.

c) She introduced and welcomed two new executives who had joined the Association staff: Anthony J. Cassino, Director of Pro Bono Affairs, and Ronald F. Kennedy, Associate Director of the Department of Governmental Relations.

11. Date and place of next meeting. Ms. Richardson announced that the next meeting of the House of Delegates was scheduled for Saturday, April 13, 1996 at the Bar Center in Albany, New York.

Respectfully submitted,



Robert J. Pearl  
Secretary

PROPOSED AMENDMENTS

1. Add a new DR 2-111 that provides as follows:

**DR 2-111 Sale of Law Practice**

- A. A lawyer or a law firm, or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including good will, to one or more lawyers or law firms, who may purchase the practice, if the seller ceases to engage in the private practice of law in the geographic area in which the practice has been conducted.
- B. Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:
  1. The client's right to retain other counsel or to take possession of the file;
  2. The fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;
  3. The fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer;
  4. Proposed fee increases, if any, permitted under DR 2-111(E); and
  5. The identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in the state, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to re-sell the practice.
- C. **Confidences and Secrets.**
  1. With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as a confidence or secret under DR 4-101.
  2. Notwithstanding DR 4-101, the seller may provide the prospective buyer with information as to individual clients:
    - a. concerning the identity of the client, except as provided in DR 2-111(C)(6);

- b. concerning the status and general nature of the matter;
  - c. available in public court files; and
  - d. concerning the financial terms of the attorney-client relationship and the payment status of the client's account.
3. Prior to making any disclosure of confidences or secrets that may be permitted under DR 2-111(C)(2), the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidences or secrets, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to DR 2-111(C)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless seller shall have obtained the consent of the client in accordance with DR 4-101(C)(1).
  4. Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.
  5. Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a waiver of the attorney-client privilege.
  6. If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes a confidence or secret in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.
- D. When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.



- E. The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

2. Add new ECs 2-34, 2-35 and 2-36 as follows:

**Sale of Law Practice**

**EC 2-34** Lawyers and law firms, particularly sole practitioners, should have the ability to sell law practices, including good will, provided certain conditions, designed primarily to protect clients, are satisfied. Where a lawyer is deceased, disabled, or missing, the sale may be effected by the lawyer's personal representative. Although the sale of a law practice should ideally result in the entire practice being transferred to a single buyer, there is no single-buyer requirement.

**EC 2-35** Notice to clients of the sale of the practice should be timely provided, preferably as soon as possible after an agreement has been reached by the seller and the buyer, and in any event no later than as soon as practicable after the day of closing. The sale of litigated matters does not relieve the seller of his or her obligations under DR 2-110 regarding withdrawal. To the extent that conflicts of interest preclude the buyer from undertaking the representation of any particular clients of the seller, the seller shall, to the extent reasonably practicable, assist such clients in securing successor counsel. If the client declines to engage successor counsel, and if the seller cannot properly withdraw from the representation under DR 2-110, the seller shall retain responsibility for the representation.

**EC 2-36** Information concerning client confidences and secrets should not be disclosed to prospective buyers except to the extent permitted by DR 2-111. To the extent disclosures are made, extreme care should be taken to ensure that client confidences and secrets are protected by all lawyers who become privy to such information in the course of examining the seller's practice for possible purchase. Sellers should consider requiring prospective buyers to execute written confidentiality agreements prior to affording them access to any information concerning client matters.

3. Amend EC 4-6 as follows:

EC 4-6 The obligation to protect confidences and secrets of a client continues after the termination of employment. ~~<Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets.>~~ A lawyer should also provide for the protection of the confidences and secrets of the client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to the client and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration. DR 2-111 sets forth the procedures for protecting confidences and secrets of clients in connection with the sale of a law practice.