

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Transcript of the Expert Forum of the
CHARTER REVISION COMMISSION
held on Monday, March 7, 2005
Queens Borough Hall, Room 213
Borough of QUEENS

TANKOOS REPORTING COMPANY, INC.
305 Madison Avenue 142 Willis Avenue
Suite 449 P.O. BOX 347
New York, N.Y. 10165 Mineola, N.Y. 11501
(212)349-9692 (516)741-5235

1 Meeting convened at 4:30 p.m.

2 P R E S E N T

3 DR. ESTER FUCHS, Chair

4 COMMISSIONERS:

5 ROBERT ABRAMS

6 CURTIS ARCHER

7 LILLIAN BARRIOS-PAOLI

8 AMALIA BETANZOS

9 STEPHEN FIALA

10 DALL FORSYTHE

11 ANTHONY CROWELL

12

13

14

Also Present:

15

TERRI MATTHEWS, Executive director

16

BRIAN GELLER, Analyst

17

18

19

20

21

22

23

24

25

1 CHAIRPERSON FUCHS: Good afternoon. Welcome
2 to the March 7, 2005 session of the Charter Revision
3 Commission's first expert forum. Later this evening,
4 we'll also be holding our first public hearing, and I
5 want to take this opportunity to introduce myself to the
6 community, as well as our Commissioners, as well as our
7 expert speakers today.

8 My name is Ester Fuchs and I'm Chair of the
9 New York City Charter Revision Commission and I'd like
10 to introduce to you the members of the Commission, most
11 of whom will be here, some of whom are here already.

12 On my right is the Vice Chair of the
13 Commission, Dall Forsythe, who is the chief
14 administrative officer of the Episcopal Diocese of New
15 York. He is former budget director for New York State
16 and the New York City Board of Education.

17 On my left is Steven Fiala, who is the
18 Secretary of the Charter Commission. He is the County
19 Clerk and Commissioner of Jurors for Richmond County and
20 he is a former member of the New York City Council.

21 On my far left is Amalia Betanzos, who is
22 the president of Wildcat Service Corporation, a
23 not-for-profit employment program. Formerly, Amalia was
24 a Commissioner of the Department of Youth Services and
25 executive secretary to Mayor John Lindsay and a member

1 of two previous Charter Revision Commissions.

2 On my far right is Anthony Crowell. Anthony
3 Crowell, a special counselor to Mayor Michael Bloomberg
4 and former executive director and legal advisor to
5 several previous Charter Revision Commissions. He is an
6 associate professor at Brooklyn and New York Law
7 Schools.

8 Joining us later this evening will be Robert
9 Abrams, a partner in Stroock, Stroock & Lavan. And he
10 was former New York State Attorney General and was
11 Borough President of the Bronx and also was a member of
12 the New York State Assembly.

13 Curtis Archer, who is the executive director
14 of the Rockaway Development and Revitalization
15 Corporation and is a former Director of Small Business
16 Development for the Upper Manhattan Empowerment Zone.

17 Dr. Lillian Barrios-Paoli is senior vice
18 president and chief executive for the agency services --
19 she was senior vice president chief executive for agency
20 services for United Way, and she is currently, has a
21 different position, which I will correct and add to the
22 record. She served as Commissioner of New York City's
23 Human Services Administration, Department of Housing
24 Preservation and Development and the Department of
25 Personnel and the Department of Employment of the City

1 of New York.

2 David Chan, who is the executive director of
3 the Chinese American Planning Council, is also the
4 founding Chairman of the Board of Chung-Pac Local
5 Development Corporation.

6 Stanley Grayson is the president and chief
7 operating operation of M.R. Beal & Company. He was a
8 former managing director of Prudential Securities Public
9 Finance Department, and prior to that Mr. Grayson also
10 held several senior positions in New York City
11 Government, including Deputy Mayor for Finance,
12 Executive Director and Chief Executive Officer of the
13 New York City Industrial Development Agency.

14 Dr. Mary McCormack, who is president of the
15 Fund for the City of New York was also a special
16 assistant to New York's Deputy Mayor for labor relations
17 and personnel and a professor at Columbia University.

18 Stephanie Palmer is currently executive
19 director of the New York City Mission Society and is a
20 former executive director of the Human Services Council
21 of New York City.

22 Jennifer Raab, finally, is President of
23 Hunter College and former Chair of the New York City
24 Landmarks Preservation Commission.

25 They'll all be joining us shortly.

1 The topic for this afternoon is
2 administrative judicial reform. This is one of the
3 three topics that the Mayor asked us to consider when he
4 initially convened this Commission. And we begin this
5 afternoon with the expert forum, and as you know, the
6 public is most welcome to listen to the discussion
7 between the Commissioner and the experts, but this part
8 is not a public hearing. The public hearing at which
9 the public may testify to the Commissioners begins at
10 6 p.m.

11 At the expert forum, members of the expert
12 panel are invited to make a statement if they wish and
13 then engage in a discussion with the Commissioners about
14 the topic of administrative judicial reform, and we have
15 asked the panelists to share their thoughts on the
16 issues raised by Deputy Mayor Carol Robles-Roman at the
17 January 19th meeting of the Charter Commission as well
18 as any other ideas that they may have on the topic of
19 administrative judicial reform.

20 And we are indeed most fortunate today to
21 have a panel of very distinguished experts on this
22 topic, and I will introduce them to you one at a time.
23 I'll begin with Mr. James Brown.

24 Mr. Brown handles labor and employment law
25 matters for the law firm of Brown & Gropper. He has

1 been practicing law for nearly twenty years and has
2 represented numerous labor unions in the building
3 service, construction, airline transportation industries
4 and in federal municipal and private sectors. Mr. Brown
5 was the attorney of record in Rogers v. NYU, a federal
6 appeals court case affirming a union member's right to
7 file discrimination claims in court.

8 He's lectured widely and has published many
9 articles on labor and employment law. He is the author
10 of a monthly column entitled "Know Your Rights" which
11 appears in the Civil Service newspaper, The Chief.

12 Thank you very much and I want to thank the
13 whole group of expert panels for their patience in
14 getting started today.

15 I who grew up in Queens have no problem
16 finding my way here, but apparently it's a little slower
17 for others, so we begin auspiciously and we're very
18 really delighted to have you all with us today.

19 Mr. Brown.

20 MR. BROWN: First let me thank the
21 Commission for inviting me. I've drafted a few brief
22 comments I'm prepared now to read as part of an opening.

23 I appear before you as an advocate for
24 employees, in practice for nearly twenty years, who has
25 much experience at one particular administrative

1 tribunal, the New York City Office of Administrative
2 Trials and Hearings, otherwise known as OATH. In my
3 capacity as outside Council to District Council 37, the
4 City's largest municipal union and in my representation
5 of other municipal unions, I have regularly appeared at
6 OATH to defend City employees against disciplinary
7 charges of misconduct or incompetence.

8 I'm here today to support the notion of an
9 Administrative Justice Coordinator and to suggest that
10 the rules governing OATH, which are largely effective,
11 would serve well any coordinated approach for the City's
12 administrative tribunals.

13 I would like to address what I consider to
14 be some of OATH's successes, from an employee advocate's
15 perspective. As you know, Constitutional due process
16 rights which attach to Government employees makes a
17 forum such as OATH both inevitable and indispensable.
18 OATH has its rules, which supplement those set forth in
19 the 1988 City Administrative Procedure Act, between the
20 two sets of rules and including certain provisions of
21 the New York State Civil Service Law; the framework for
22 insuring due process is well-established. In other
23 words, the rules insure that employees charged with
24 discipline proceed to hearing at which they can present
25 evidence and cross-examine witnesses who are placed

1 under oath.

2 Now, aside from these codified rules, in
3 practice, OATH serves a very valuable function by
4 successfully creating an appearance of unbiased
5 adjudication. I state "appearance of unbiased
6 adjudication" not to draw any distinction between
7 appearances and reality, but rather to underscore how
8 important appearances are to those who come before any
9 administrative tribunal. Clearly, the adjudicatory
10 process works best if the participants believe it to be
11 fair.

12 In all of my years practicing at OATH, never
13 has a client questioned the fairness of the forum.
14 Though most are often confused and dumbfounded by the
15 limited remedial power of the judges to only recommend
16 penalties, which we can thank Civil Service Law Section
17 75 for, which of course would be the topic of another
18 different forum.

19 To the extent that employees perceive OATH
20 judges to be fair and unbiased, this may be because OATH
21 judges are appointed for a term of five years and such
22 longevity and security is likely to contribute to the
23 independence shown by OATH judges.

24 By contrast, we could look at how
25 non-Mayoral agencies, such as the Housing Authority and

1 the Off Track Betting Corporation conduct their Civil
2 Service Law Section 75 disciplinary hearings. Said
3 hearings are not conducted at OATH, but rather by
4 hearing officers who receive their assignments and are
5 paid directly by the employer. In my practice
6 representing New York City employees facing discipline,
7 my own confidence in the independence of non-OATH
8 Section 75 hearing officers has from time to time been
9 tested. These non-OATH hearing officers essentially
10 serve as contractors or vendors at the pleasure of only
11 one of the two parties, to the disciplinary proceeding,
12 namely, the employer.

13 In any effort to coordinate the function and
14 operation of the City's various administrative
15 tribunals, consideration should also be given to the
16 largely successful pretrial conference procedure
17 employed at OATH. OATH's rules address in some detail
18 the OATH pretrial conference. In practice, the pretrial
19 conference serves as an extremely effective tool to
20 achieve settlements in matters which would otherwise
21 proceed to trial.

22 The conference judge is not the same person
23 as the trial judge and the conferences are not reported.
24 The parties can therefore speak forthrightly without
25 fear of prejudicing their cases at trial. In a series

1 of caucuses with one side only, a conference judge can
2 usually solicit the strengths and weaknesses of a
3 party's cases in the interests of reaching a settlement.

4 As someone who strongly believes that full
5 blown evidentiary hearings are not needed in the vast
6 majority of disciplinary cases, especially where the
7 administrative tribunal is staffed with experienced
8 judges and many of the cases are rather routine in
9 subject matter, the pretrial conference used at OATH is
10 an invaluable tool.

11 When considering any coordination of
12 administrative tribunals, I'm here to say that OATH can
13 and should serve as a model for all administrative
14 tribunals in the City of New York. Thank you very much.

15 CHAIRPERSON FUCHS: Thank you, very much,
16 Mr. Brown. That was extremely helpful.

17 Commissioners, do you have any questions?

18 Commissioner Abrams, welcome.

19 COMM. ABRAMS: Thank you. The panel very
20 much appreciates your comments and your praise for the
21 OATH process. I'm sure it's not a perfect system, so
22 how can it be improved?

23 MR. BROWN: I have found more often than not
24 in my practice that the judges with experience, and this
25 just would apply I think to virtually any forum, perform

1 very well, and almost consistently well. I think the
2 problem for OATH may have something to do with the
3 shortness of the term. I think it's important to have a
4 fixed term, but in this case its five years and what
5 that means there's going to be from time to time
6 turnover or new judges who are inexperienced, just by
7 the mere fact that they're new.

8 And so I think that that sometimes creates a
9 problem in the administrative forum where there are just
10 judges you witness sort of on the learning curve. But
11 the rules at OATH provide for discovery, which is very
12 useful for employee advocates. The rules at OATH are
13 very clear in terms of how the proceedings operate. I
14 find that OATH has very few flaws as a forum for
15 resolving disputes.

16 Now, having said that, I've already observed
17 that one of the problems has nothing to do so much with
18 the way that the rules have organized OATH, but rather
19 the way that the Civil Service Law operates and what I
20 mean by that is, as some of you may know, Civil Service
21 Law Section 75 only allows these very same OATH judges
22 to make recommendations with regard to findings of fact
23 and penalties, and I think that that's an area that
24 certainly needs attention and needs reform. I've
25 written about the subject in the New York Law Journal

1 last year advocating reform. But I really do truly
2 believe as someone who has been involved with
3 contractual arbitration and in all kinds of
4 administrative proceedings that OATH can and should be
5 used as a model.

6 COMM. ABRAMS: And what's your impression of
7 the quality of the men and women who serve as the
8 Administrative Law Judges?

9 MR. BROWN: Some of them are just so first
10 rate. I'm reluctant to name them by name, because I
11 wouldn't want to leave anyone out, but there are some
12 judges there that are very, very impressive, truly
13 knowledgeable. They have a very good group of people
14 working there. They really do.

15 CHAIRPERSON FUCHS: Any other questions for
16 Mr. Brown? Commissioner Crowell.

17 COMM. CROWELL: You only have experience at
18 OATH, but being part of a community of lawyers who
19 appear before tribunals, what are some of the things you
20 hear about other tribunals, if you could share that and
21 relate it to your perspective. I know that you're
22 taking the things other people are saying, but it is
23 helpful for us in terms of getting what the community of
24 lawyers who appear before the tribunals feel.

25 MR. BROWN: You know, I wish I could draw

1 those comparisons. In my own practice, I've never
2 appeared before the Taxi and Limousine Commission or
3 Parking Violations Bureaus or these other administrative
4 bureaus, so I have no practical experience. My practice
5 is limited to labor and employment law.

6 I sometimes get a sense, just generally
7 speaking, that individuals who appear sometimes in these
8 other forums are not necessarily as impressed by the
9 impartiality of the decision makers, and that may have
10 something to do more with the fact that they serve to
11 some degree in a collection function. There are issues
12 concerning fines and penalties, so there's going to be
13 an association between the decision maker and the agency
14 at which they work.

15 I think one of the terrific things about
16 OATH is that the judges who render decisions who appear
17 there really truly come across as impartial, and yet
18 they work for the City. And I think, you know, from an
19 employee advocate's point of view, where sometimes our
20 clients are suspicious, feel as though they haven't been
21 given proper due process, the first thing sometimes you
22 expect them to complain about is that the system is
23 rigged, the judges aren't fair.

24 I don't get that from the employees that I
25 represent at OATH. Some of it has to do with the

1 trappings, the fact the judges do appear in robes, they
2 appear on a bench, there are certain formalities that
3 are engaged in, which I think are advisable that should
4 be continued.

5 For example, we stand when the judges enter
6 the room and all those sort of trappings I think sort of
7 help contribute to an air of fairness, that you're
8 almost as if you were in a court of law. So, I have --
9 I really don't have any personal basis for drawing any
10 comparison between OATH and other agencies, but, again,
11 my sense is there's often a sense that perhaps in some
12 of the other tribunals the decision makers, there's not
13 enough separation, distinction drawn between the
14 decision makers and the agencies at which they work.

15 CHAIRPERSON FUCHS: Thank you.

16 I'm going to ask Mr. Preston Niblack to
17 testify next. I'd like to introduce him to our
18 community and to the Commissioners.

19 Preston Niblack is deputy director at the
20 Independent Budget Office, fondly known as IBO,
21 responsible for the areas of housing, transportation,
22 environment and uniform services and for capital budget
23 program and financing. Before joining IBO in 1998,
24 Mr. Niblack was senior associate for economic policy at
25 the Academy of Leadership's National Issues Project at

1 the University of Maryland, and prior to this he was a
2 senior analyst in the tax and economic policy office of
3 the District of Columbia's Office of Tax and Revenue.

4 For ten years he was an analyst with the
5 Rand Corporation in Santa Monica, California and
6 Washington, D.C. and he also taught graduate level
7 courses in public finance at the University of Maryland.
8 Mr. Niblack directed preparation of the IBO's report "Is
9 Everything Going To Be Fined." How clever. An overview
10 of New York City's fine revenue and collection.

11 Please welcome Mr. Niblack. We look forward
12 to hearing your testimony.

13 MR. NIBLACK: Thank you, Madam Chair and
14 Commissioners. I can't take credit for having invented
15 the title of that report, I'm glad to be able to say.

16 I think I'm the only non-lawyer on the panel
17 today, and so maybe I come at this with a little bit
18 different perspective. Specifically, what we learn in
19 the preparation of that report which is really about the
20 process of enforcement of the City's laws and
21 regulations, and we were looking at the effectiveness of
22 that enforcement, so I'm going to talk about
23 administrative law, the administrative tribunals, the
24 adjudication process in that context.

25 The effectiveness, unfortunately, is a

1 function of two things: The likelihood you're going to
2 get caught and the likelihood you will be punished if
3 you are caught, pay some kind of penalty, so that led us
4 to make some kind of distinction between what we call
5 the front end of enforcement and the back end of
6 enforcement.

7 The front end is what the City employs to
8 detect violations of law and regulation, public health,
9 sanitariums, health inspectors, traffic enforcement
10 agents with whom you must have had contact at one point
11 or another, and then on the back end is really the part
12 where once you've been caught, it's really about the
13 likelihood of being punished for that and that involves
14 the adjudication function and the collection function.

15 One of the things that we observed was that
16 there were different types of violations that suggested
17 different strategies for dealing with them. We had kind
18 of two models. One I'll call a parking ticket model and
19 the other that I'll call the environmental model. The
20 parking ticket model is really intended to punish and
21 deter violations that are usually self-correcting and
22 transitory, so when you double park your car and you get
23 a ticket, you're going to move your car, you're not
24 leaving it there. This isn't something that's going to
25 require some remediation on your part, and really what

1 you're doing here is you're punishing the violator in
2 the hopes that that will discourage them from doing it
3 again in the future. This also applies to, for
4 instance, putting your recyclables in with your trash
5 and other kinds of quality of life sorts of violations
6 like that.

7 The environmental model is one where the
8 violation actually requires sort of positive action on
9 the part of the violator to correct, and that may
10 require some cost on his or her part. So the model here
11 of enforcement is really more often a compliance
12 strategy, where you're working out very often some kind
13 of solution with the violator that will lead to a
14 resolution of the violation, and it's very often not
15 accompanied by a fine or other penalty, as long as the
16 corrective action is actually taken. So adjudication
17 always recognizes, needs to recognize and usually does
18 recognize this distinction.

19 There are, as you know, a large number of
20 adjudicatory forums in the City. ECB is the most
21 prominent, but certainly Consumer Affairs, Health, each
22 have tribunals of their own, administrative tribunals,
23 Taxi and Limo Commission, et cetera.

24 Some we found were more effective than
25 others. Effective adjudication really requires the

1 ability to impose a penalty, to enter a judgment and
2 then to be able to enforce that judgment. In some
3 cases, City agencies have to go to court to obtain a
4 judgment. This is particularly the case with Housing
5 Code violations. So there are literally hundreds of
6 thousands of outstanding Housing Code violations that
7 may still be in fact violations that exist or may have
8 just sort of gone away in the course of some normal
9 maintenance and repair on the part of the landlord, but
10 in order to get any kind of judgment for any kind of
11 housing court violation, no matter how small, you have
12 to go to court.

13 Consumer affairs has to go to court in order
14 to take action, bring actions against non-DCA licensed
15 businesses. Going to court is, of course, more
16 expensive, more time consuming and we notice it was very
17 clear that relative to the number of violations that
18 were placed, the amount of violations that were resolved
19 and the amount of penalties that were collected were
20 lower in those two instances.

21 Another issue is about the levers that
22 agencies have for collection, for really enforcing. One
23 action or lever that agencies have is the ability to
24 deny something of value, for instance, a business
25 license. So if you don't pay outstanding violations of

1 some kind or another, you wouldn't be able to receive a
2 license to do business in the City. And that was
3 actually one of the goals of the consolidation project
4 in 1995 or '96, was to actually bring together
5 adjudication and enforcement and collection and the
6 licensing activities so that you could integrate those
7 functions better. It ultimately was not successful,
8 I'll talk about that briefly in a second.

9 Judgments create liens usually, but not all
10 violations are lienable. For instance, the Department
11 of Health if it places a fine for, for instance, a
12 rodent infestation in a building, does not create a
13 lien, and a lien, it's not clear always what a lien
14 means. A lien against real property, the owner, may not
15 have any effect because they don't become part of the
16 City's tax lien sales, for instance, so really until a
17 property changes hands, the lien may just sit there and
18 there's no further action that the City really has the
19 ability to take.

20 One of the issues that the consolidation
21 project ran up against in the mid-'90s was the
22 difficulty of integrating all of these different kinds
23 of violations and finding a common violator, because
24 it's very often difficult to identify who the final
25 owner of record is of a business and then to be able to

1 cross check that against parking tickets or some other
2 kind of violation that may exist, so that was, actually
3 I think one of the bigger problems, technical problems,
4 technological problems.

5 The Department of Finance is now in the
6 process of putting a lot of money into the creation of a
7 system that's intended to have some of this capability,
8 but it really has been a technological hurdle that's
9 been very difficult to surmount.

10 So I think the work that we did suggests a
11 couple of roles for an Administrative Justice
12 Coordinator. One would be to review the fine structure
13 that the City has in place. In theory, we posited that
14 fines are optimally structured to recapture the social
15 costs they impose, which is a lot easier to say in
16 theory than to establish in practice, but also to make
17 the costs of the violation greater than the benefit to
18 the violator. That actually turns out to be somewhat
19 difficult also.

20 If you're Fed Ex, getting parking tickets is
21 part of your cost of doing business and you go every
22 quarter to the Department of Finance and you work it
23 out. If you're the rest of us getting a \$115 parking
24 ticket probably is more than the cost of doing business
25 and may actually have an impact on your decision the

1 next time.

2 So we found there was really a wide range
3 nonetheless, there was a wide range of fine amounts that
4 didn't always seem to correspond to the deterrent effect
5 that they might have, and one of my favorites was, there
6 was a fine, if I can remember now, there was a fine for
7 inappropriate attire of taxi drivers that was the same
8 as the fine for some relatively important Housing Code
9 violation that was a genuine threat to health and
10 safety.

11 So at the moment there's no mechanism for
12 looking across the agencies, and in fact I'm not even
13 sure there's a good mechanism within agencies all the
14 time to look at the fines that they charge and whether
15 they're really structured in a way that achieves the
16 ends of enforcement.

17 The second thing that I think the
18 coordinator might undertake is to look at the power of
19 the tribunals that exist now and to do a fairly
20 comprehensive assessment of whether they all have the
21 powers that they need, whether there are reforms that
22 could be taken more broadly citywide to give them what
23 they need in order to do a better job of enforcing their
24 judgments.

25 Department of Consumer Affairs I know is,

1 for instance, now undertaking a Charter, changing the
2 Charter to allow them to take actions in their
3 administrative tribunals against businesses that they
4 don't license.

5 And then finally, how you go about enforcing
6 these judgments across a wide variety of different
7 categories of violations and whether there is now the
8 possibility of creating some better technological fix to
9 being able to integrate better some of these enforcement
10 and administrative functions.

11 Thank you.

12 CHAIRPERSON FUCHS: Any questions for
13 Mr. Niblack? Thank you very much.

14 Commissioner Fiala.

15 COMM. FIALA: Thank you for your testimony.
16 I've had the privilege of working with you a few years
17 back when I was on the Council and I appreciate all the
18 good work you and your colleagues do. There seems to be
19 some consistency in a desired outcome here. I take it
20 IBO believes, as many of us do, that there are inherent
21 inefficiencies in the existing model as relates to the
22 administrative tribunals in the City of New York
23 vis-a-vis technology and the application of best
24 practices, and that the next logical step would be the
25 appointment by the Mayor of an Administrative Justice

1 Coordinator to essentially coordinate all of those
2 efforts?

3 MR. NIBLACK: When we were preparing this
4 report -- as a matter of policy, we generally don't make
5 policy recommendations.

6 COMM. FIALA: I'm trying to get you to go on
7 record.

8 MR. NIBLACK: If we had made a policy
9 recommendation, I think that a coordinator was something
10 that we certainly discussed. The lack of a kind of
11 citywide overview, or anybody with the authority to look
12 across or the ability to really do the kinds of best
13 practices that I know you all have talked about in
14 considering this, and to look more comprehensively at
15 where there are possibilities for learning from each
16 other or for synergies -- I shouldn't use that word
17 "synergies," but for cooperation in enforcement efforts,
18 I certainly think that that would be a major function of
19 the coordinator, that would be first up on his or her
20 plate.

21 COMM. FIALA: Very good, thank you.

22 CHAIRPERSON FUCHS: Commissioner Crowell.

23 COMM. CROWELL: I have -- one of the
24 questions is, what would IBO recommend in terms, if
25 you're in a position to even say, in terms of going

1 forward and what this Commission may want to consider
2 going with what is in its powers. A lot of what you
3 talked about is great, but it requires a lot of State
4 action, you know, from the State Legislature.

5 What sort of would be your priorities in
6 terms of getting the tribunals in a better position than
7 that which can be achieved by Charter revision?

8 MR. NIBLACK: If you wanted to go -- and I'm
9 not prepared to do this myself now -- I think it would
10 take a lot of work, but if you wanted to undertake some
11 of this review now of the Powers of the tribunals and
12 make some recommendations about how they might be more
13 effective when they're not, I think that would probably
14 be a useful outcome. Some of this does require, there
15 are various routes, I guess, to changing the Charter, so
16 some of this would require State action and some of it
17 wouldn't. I can't tell you, I don't know enough about
18 that to really know.

19 I don't know how far you want to go in
20 tackling some of the more controversial ones like the
21 Housing Code, where there are interests on both sides of
22 the Housing Code cases that actually are preferred in
23 the current system. For tenants, it's a way of legally
24 being able to withhold rent. So, I mean, there are
25 advantages to being able to go to court sometimes for

1 parties.

2 COMM. CROWELL: Seems a lot of each one of
3 the tribunals in its own way has its own constituency
4 and community and culture that surrounds it, hence why
5 you would have trouble doing a consolidation? It's
6 certainly not in this Administration's agenda to have a
7 consolidation, but other jurisdictions; District of
8 Columbia, Chicago, have been moving towards a more
9 centralized model, which does build in efficiencies, but
10 yes, I do think there's an enormous amount of challenges
11 related to the State Legislature for us to make more
12 broad changes.

13 MR. NIBLACK: I think -- just to comment for
14 a moment on the consolidation project, I actually think
15 that that, I think it's wise not to have that on the
16 Commission's agenda, because it didn't work for a
17 reason. As you say a lot of it had to do with the fact
18 that there were different constituencies for different
19 tribunals and there was concern about a kind of perhaps
20 even an abuse of power in some kind of mega tribunal,
21 and that said, I think there's a long ways you could go
22 by looking at the powers of the current tribunals as
23 stand-alone entities, and to have a coordination
24 function rather than trying to merge them all.

25 COMM. CROWELL: That was my next question to

1 you. What was your thinking or IBO's thinking on the
2 idea of a coordinator which was first introduced back
3 with the 2003 Commission and put on the ballot?

4 MR. NIBLACK: I think, my personal
5 conclusion from this was that some form of coordination
6 was probably more likely to be successful and some, if
7 there's going to be centralization what would really be
8 useful is to have somebody who could look across all of
9 them and learn from them and make some recommendations
10 about how to improve the functioning of each of them
11 rather than pushing towards centralization of some kind.

12 CHAIRPERSON FUCHS: Thank you very much.

13 We'll proceed with our third expert, Betsy
14 Plevan. Betsy Plevan joined Proskauer Rose in 1974 and
15 has built her practice handling all types of labor and
16 employment litigation, as well as counseling clients in
17 employment matters. Named by New York Magazine as one
18 of the 100 best lawyers in New York -- that's no mean
19 feat -- Betsy was also listed by the National Law
20 Journal as one of the best labor and employment lawyers
21 in the country.

22 In addition to maintaining her active
23 practice, she now serves as President of the Association
24 of the Bar of the City of New York. Her practice
25 includes representing clients in such diverse industries

1 as banking and finance, health care, entertainment,
2 publishing and consumer products. Ms. Plevan has
3 handled both single plaintiff and class action suits
4 involving issues of discrimination, harassment and
5 employee benefits matters. She has successfully tried a
6 number of jury and non-jury cases in New York and
7 elsewhere in the U.S.

8 Her trial work has been recognized by her
9 induction as a fellow of the American College of Trial
10 Lawyers. Ms. Plevan has also argued more than fifty
11 appeals in State and Federal Courts and she has been
12 elected a member of the American Academy of Appellate
13 Lawyers.

14 Thank you so much for joining us today to
15 offer your expert testimony.

16 MS. PLEVAN: Well, thank you, and I'm
17 delighted to be here today before the Charter Revision
18 Commission to present the views of the Association of
19 the Bar of the City of New York.

20 My expertise, I think it's fair to say, is
21 derivative in nature and I am really presenting the
22 views as expressed and developed by our Committee on
23 Administrative Law and Committee on New York City
24 Affairs, who have developed our recommendation that the
25 position of Civil Legal Justice Coordinator be created

1 within the City Government.

2 The creation of such an office with
3 oversight jurisdiction of New York City administrative
4 tribunals, we believe would improve the overall
5 effectiveness and fairness of the City's administrative
6 justice system. Thousands of administrative hearings
7 are conducted annually by New York City and its agencies
8 in a variety of specialized tribunals established by
9 both State and local laws. These tribunals employ
10 approximately five hundred Administrative Law Judges and
11 hearing officers, many on a per diem basis. We are
12 advised that the annual operating cost of these
13 tribunals, which mostly adjudicate violations as well as
14 handling disciplinary matters, is in excess of \$22
15 million. We are further advised that the revenues
16 collected by these tribunals, including taxes, fees and
17 fines is projected at more than \$600 million for fiscal
18 year 2004.

19 While the proper functioning of these
20 tribunals is essential to the City's administrative
21 justice system, there is no means now to insure uniform
22 standards that would enhance due process and the
23 delivery of justice. There is no formal standard Code
24 of Conduct governing hearings, a matter of special
25 concern where many of the litigants are appearing pro se

1 and are not familiar with the rules of the agency before
2 which they are appearing.

3 There are also no uniform standards for
4 hiring, training and compensating hearing officers;
5 certifying their continuing legal education requirements
6 and insuring their independence. Moreover, there is no
7 central source of information concerning the quality of
8 hearings and their timeliness and outcome.

9 We propose the creation of the post of Civil
10 Legal Justice Coordinator to be appointed by the Mayor.
11 The coordinator would be the analog to the Criminal
12 Justice Coordinator, and would advise and assist the
13 Executive Branch in planning for increased coordination,
14 cooperation and information sharing with respect to
15 administrative tribunal policy, management, technology,
16 enforcement and the establishment of uniform standards.

17 The coordinator also would review budget
18 requests from all agencies for programs related to
19 administrative tribunal management. In addition to the
20 quality of justice, among the benefits that could result
21 from centralized coordination would be a better
22 understanding of how individual agencies are using
23 technology; whether targets for case dispositions, but
24 not outcomes are being met, and rates of collection for
25 fines. Assemblage of such information inevitably would

1 allow for targeted management improvement strategies and
2 increased efficiency for the public.

3 Enforcement problems can arise due to the
4 lack of central coordination. For example, currently
5 there is no established means by which one City Agency
6 can be informed of findings of violations by other
7 agencies, and the identities of those who have failed to
8 pay fines imposed by other agencies. If all the records
9 of violations and their results were linked, respective
10 agencies could be more aware of adjudications by other
11 departments. Hopefully, that would allow for greater
12 collection and enforcement and parties not qualified
13 would not be able to obtain undeserved licenses or
14 permits.

15 The Civil Legal Justice Coordinator would be
16 responsible for effecting coordination of administrative
17 justice proceedings among the departments. The
18 coordinator could fashion centralized standards and lead
19 the implementation of a Code of Professional Conduct or
20 ethics. We believe that such coordination would enhance
21 accountability and advance the professionalization of
22 Administrative Law Judges and Hearing Officers.

23 In some way we believe the coordination this
24 office can provide is analogous to that provided by the
25 Office of Court Administration, which was created in

1 1977 to coordinate the administration of a very
2 disparate court system and like the court system the
3 various administrative agencies must deal with common
4 problems that would greatly benefit from coordination,
5 such as those mentioned above, as well as the more
6 general problems of serving a population with diverse
7 language needs and overcoming the perception that the
8 administrative tribunals are not user friendly.

9 We believe the position of Civil Legal
10 Justice Coordinator may be but need not be the subject
11 of Charter revision. The Mayor currently has the
12 authority to establish such a position, as does the City
13 Council by Local Law. We see no reason to wait until
14 November to effectuate this necessary change.

15 The Association would also welcome the
16 opportunity to work with you to implement this important
17 proposal. We look forward to working with this
18 Commission as it pursues its work. We look forward to
19 providing further input and to have the opportunity, as
20 would the rest of the City, for a full and unhurried
21 debate on any preliminary proposals that this Commission
22 issues.

23 Again, thank you for the opportunity to
24 present this testimony.

25 CHAIRPERSON FUCHS: Thank you very much.

1 Any questions for Ms. Plevan? Thank you.

2 Commissioner Abrams.

3 COMM. ABRAMS: First of all, Ms. Plevan,
4 thank you very much. I thought that was outstanding
5 testimony. It might be helpful for the Commission if
6 you could submit to us a copy of your comments.

7 CHAIRPERSON FUCHS: Everybody will be
8 submitting their testimony.

9 MS. PLEVAN: We will.

10 COMM. ABRAMS: From my days -- this goes
11 back I guess 200 years -- my days in the Legislature, I
12 remember the value of the Association of the Bar of the
13 City of New York's committees making recommendations to
14 deliberative bodies, to the Legislature, to the City
15 Council, here now to a Charter Revision Commission. So
16 I think we could benefit enormously from the creative
17 thinking of your respective committees that have purview
18 in the areas that we are considering.

19 So if your committees have further thoughts
20 or want to amplify anything that you have said there, I
21 know that it would be extremely helpful to us, because
22 we know the source from which it will flow. These are
23 public spirited lawyers, working pro bono with
24 tremendous expertise and high talent to go with it. And
25 tremendous integrity in terms of the intellectual

1 thinking that goes into the recommendations.

2 So if you got anything further to add along
3 the way, we'll be deliberating over the next several
4 months, I'm sure it will be extremely helpful.

5 MS. PLEVAN: We will be happy to maintain
6 contact with you and your staff so we can continue to
7 provide input into issues you're dealing with.

8 COMM. CROWELL: One of the things that I
9 think may be very helpful is Deputy Mayor Robles-Roman's
10 office is currently working with the tribunals and
11 they've established three different committees; one on
12 technology, one on ongoing training for the ALJ's
13 themselves and one on a Code of Ethics that's sort of
14 working -- in addition to the Charter revision process,
15 working outside of the process, but I think it would be
16 very helpful for those working groups if you could
17 identify some people who appear before the tribunals
18 rather than us asking the ALJ's for recommendations as
19 to who should be spoken to.

20 It would be helpful if you provided names
21 perhaps to the Deputy Mayor's office of people that they
22 my want to contact to help serve as an outside advisory
23 group for those perspectives. Because your membership
24 is vast and I think it would be very beneficial for the
25 overall objective research they're doing in terms of

1 making recommendations, which this Commission hopes to
2 receive from them soon.

3 MS. PLEVAN: We would be happy to do that.

4 COMM. CROWELL: Thanks.

5 CHAIRPERSON FUCHS: Commissioner Fiala.

6 COMM. FIALA: Thank you very much.

7 I just want to associate my remarks with
8 Commissioners Abrams and Crowell. One of the hats I
9 wear is Clerk of the Supreme Court and I'm very glad you
10 brought up OCA. The question I have relates to the Code
11 of Judicial Conduct that you alluded to. I know this is
12 very difficult, too, but if you had to weight it -- I'm
13 looking at it from this perspective. There are roughly
14 I believe 3 million cases a year that are opened in New
15 York State, handled across the board. There are 13
16 million summonses that are dealt with just in the City
17 of New York. Therefore, potentially, 13 million
18 adjudications could happen, if everybody decided to
19 challenge.

20 How important an element is the Code of
21 Conduct in your eyes and the Association's eyes or lack
22 thereof? It seems to me that New York State along with
23 the rest of the country has been steadily moving towards
24 this notion of standardizing across, whether it be
25 civil, criminal, surrogate or family, so as to insure

1 that the integrity of the judicial system, both real and
2 perceived, is there. How important do you think that is
3 in the civil end on the administrative tribunal end?

4 MS. PLEVAN: I think for me, it might be a
5 toss-up to the access issue of the public, which I'll
6 come back to as to which is the most important, but
7 certainly I think a Code of Conduct is extremely
8 important. Sadly, this is still an issue we're
9 grappling with in our courts and elsewhere, and we need
10 to insure that our institutions have credibility and
11 that people who come there to have their disputes
12 resolved have confidence that it is being done in a fair
13 manner, and this is, you know, an aspect of the system
14 that can be dealt with without cost, really, and which
15 will raise the standards of what we do and what the
16 agencies do and the judges and help to create a public
17 perception that this is a Government that is serving the
18 people, not someone else's self interest.

19 As I said, I think the other issue that we
20 have worked on a lot with the Court system is an issue
21 of access based on language in particular and insuring
22 the adequacy of interpreters and so forth and that's
23 another issue which certainly the court system is
24 grappling with, but does so more effectively because of
25 a centralized administration than an agency could do,

1 I'm sure, just operating by itself.

2 COMM. FIALA: Thank you.

3 COMM. CROWELL: One of the things I have
4 long thought is that -- harking back to what Mr. Brown
5 was saying, that certainly at OATH and probably at other
6 tribunals and I know at other tribunals, that the judges
7 are of very high quality. To what extent when the
8 Association of the Bar works on judicial screening
9 activities do they look to Administrative Law Judges to
10 see that they're being brought up into the State Court
11 system?

12 MS. PLEVAN: Well, our process is one where
13 we are evaluating whoever the nominees are or the
14 candidates are, so we don't recruit, but if any
15 candidate who comes through, whether it's the Mayor's
16 committee as a nominee, and I'm sure there are many who
17 come through the process that way, they are evaluated
18 and we find the right people to talk to and insure that
19 those who are capable are considered.

20 COMM. ABRAMS: You evaluate candidates for
21 administrative --

22 MS. PLEVAN: Not for administrative. I'm
23 just saying if that was their background, they would be
24 considered.

25 COMM. CROWELL: Some of my thinking has been

1 there's such a rich amount of skill in the tribunals
2 that they should really be trying to advance people
3 through their careers, trying to attract people and
4 create opportunities for growth among the more junior
5 ALJ's and then attract some of the more senior ALJ's
6 into the State Court system since they have that really
7 fine experience and they're ready for an appointment.

8 MS. PLEVAN: We run a program every year to
9 encourage judicial service that is open to anybody who
10 wants to participate. It's done on a Saturday and it
11 rotates around the boroughs. So that's another way that
12 people who are interested can participate.

13 COMM. ABRAMS: That was a thought of mine.

14 What is the size of the Association of the
15 Bar these days?

16 MS. PLEVAN: 22,000.

17 COMM. ABRAMS: It's a big reservoir. What's
18 the salary of an Administrative Law Judge these days?

19 COMM. CROWELL: It depends on the tribunal.
20 They could go anywhere from like 60,000 to 110,000.
21 There's a range of salaries, and then there's per diems.

22 COMM. ABRAMS: And what percent of the ALJ's
23 are per diem? I heard there are 500.

24 COMM. CROWELL: A good number are per diem.

25 COMM. ABRAMS: That was my perception.

1 COMM. CROWELL: A significant number.

2 COMM. ABRAMS: The thought was if somehow we
3 could further advertise within the Association of the
4 Bar membership alone, it's a modest stipend, but it's
5 another form of pro bono service.

6 MS. PLEVAN: I think that is something that
7 we could do more about, and I'll talk to our Committee
8 on Administrative Law about that.

9 COMM. CROWELL: That's a great idea.

10 CHAIRPERSON FUCHS: I think that's a
11 fascinating idea.

12 Well, thank you very much. We're going to
13 move on to our final expert and, by the way, we will
14 have offered the Commissioners an opportunity to ask
15 everyone questions at the end of all the testimony. We
16 just felt it would be useful following each of our
17 experts' testimony to offer the opportunity for
18 questions. So we won't cut you short, Mr. Goldbrenner,
19 you'll have your personal opportunity here, too.

20 Ronald Goldbrenner is presently in private
21 practice in New York City where he has practiced for
22 over 35 years. As an ex-taxi driver and an ex-auto
23 owner in New York -- okay -- he has had personal as well
24 as professional experience with the City 's
25 administrative tribunals. He was most recently General

1 Counsel of the Promotion Marketing Association and
2 before that, he served as associate general counsel of
3 Lorillard.

4 Mr. Goldbrenner holds both Bachelor of Law
5 and Master of Law degree from New York University School
6 of Law and on October 2004 he co-chaired an Association
7 of the Bar day long continuing legal education seminar
8 on administrative law entitled, "Federal, New York State
9 and City Administrative Law: A Primer on Current
10 Concerns. How to Challenge Agency Action and Protect
11 Your Client."

12 I'm sure that is a very useful document to
13 most people in the City of New York today. Welcome.

14 MR. GOLDBRENNER: Thank you very much.

15 First and foremost I want to compliment the
16 Commission on what I think has been an excellent job on
17 studying these problems and then moving them to action,
18 and if anything can be the highlight of my testimony it
19 would be that I urge you to move this proposal for a
20 coordinator to action as quickly as possible.

21 I'm probably -- I should issue a disclaimer
22 that I'm not the kind of expert that we've heard from so
23 far. My expertise is probably greatest in being a
24 citizen of New York City, because I grew up here and was
25 educated entirely at New York schools, at City College

1 and NYU law school, so I've not only studied the
2 problems, but seen them in operation in my lifetime.

3 One of the things that I learned in law
4 school, and that I learned from Mayor Koch's pooper-
5 scooper law, is the immense value of this compact
6 between the citizen and Government. The law has to work
7 right, it has to work fairly and they have to perceive
8 that it does, and as Mr. Brown mentioned, the reality of
9 fairness and the appearance of fairness are both really
10 essential, and I think that what you're doing is working
11 to provide both of those in very strong content, and as
12 Mr. Brown pointed up, the introduction of OATH has done
13 that for us in a number of ways, and not just in
14 appearance, but in reality, too.

15 I think the proposals with respect to
16 technology, training and ethics that were mentioned
17 before in terms of training Administrative Law Judges
18 brings both of those aspects more to reality. Both the
19 reality of fairness and the appearance of fairness, and
20 I think that in all things that we do, particularly a
21 panel like yourselves, you have to evaluate the
22 difference between studying the problem properly, for a
23 long enough period of time, making sure you've covered
24 everything and that you don't make mistakes in what you
25 do with the reality of the need of implementing this

1 reform.

2 There is always a need for haste, for
3 getting the thing to work better for the public as soon
4 as possible, and in my judgment from reading
5 particularly Ms. Robles' remarks and the work you've
6 done, you've done all of that, it's time to go forward
7 and implement this. I think you have done more than
8 enough appropriate study. You have a minimum critical
9 mass, that is, you have enough supporting the
10 coordinator in terms of experiences with other examples
11 and in terms of what the coordinator could do, that you
12 could go forward on that alone. There may be many other
13 things a coordinator could do, but I think you've
14 developed enough minimum aspect that would serve the
15 public well that there's no reason to put off the
16 decision and that it would be much in the public
17 interest for you to go forward.

18 Just as a side note, a footnote to what
19 Betsy said about the Bar Association, a good many of the
20 people who attended that CLE forum were Administrative
21 Law Judges who were trying to get just the kind of
22 training and information that this coordinator would
23 provide for them. So not only do you have a good
24 competent staff, but you have a very ambitious staff who
25 wants to do a good job and this is going to help them do

1 it, and I would urge you to implement it as quickly as
2 possible. Thank you.

3 CHAIRPERSON FUCHS: Thank you very much.

4 Any questions for Mr. Goldbrenner, first?

5 Well, we appreciate your testimony and we
6 appreciate your support and we also hear very clearly
7 your call to action, and that's exactly what we hope to
8 be doing. We're just trying to figure out at this point
9 just what kind of action should we be taking. So why
10 don't I open up the questions to all of our expert
11 panels and why don't I start.

12 It's very clear from the testimony we've
13 just heard that this is an idea whose time has come,
14 probably many years ago, and we're delighted, I think,
15 to be in a position now to do something constructive and
16 real about it. The Mayor is somebody who values
17 coordination and particularly understands how technology
18 can improve the way we manage and also citizen access,
19 and this is one area in which we think there is a great
20 deal that can be done through technology, but we also
21 understand that we need this coordinator position to
22 make this happen.

23 Do any of you see an advantage in having
24 this as a ballot initiative? I'm not asking anybody to
25 move forward by saying either/or. I think there are

1 things we can do both ways through other means versus --
2 and also through the ballot initiative. But I'd like to
3 get some sense from the experts in the room about the
4 value of the ballot initiative, because I heard two
5 things, that there are things we have to do in reality
6 as well as in appearances, and sometimes from a symbolic
7 politics point of view changing the Charter may be a
8 very, very important way to go, even though we can
9 accomplish it in other ways.

10 So that's one of the questions we're
11 grappling with at this point, and we would like to hear
12 from you.

13 MR. GOLDBRENNER: I don't have any comment
14 on what you should do with respect to the Charter, but
15 my comment would be don't let your concern for what to
16 do with the Charter stop you from implementing the
17 administrative reform, having the Mayor simply appoint a
18 coordinator who could do all these things. Because
19 again, you have more than enough to justify the
20 coordinator in terms of him taking on the technology,
21 training and ethics jobs that we saw, and each one of
22 them alone, I think, will justify the appointment of the
23 coordinator. When taken together, I think they
24 certainly justify, and I think all of them are a good
25 part of his portfolio to begin with.

1 What you then look at and say, okay, what
2 more can we do, what more is necessary through the
3 Charter, I think that is up to you. I don't have any
4 comment on that, but I would urge that you not let that
5 cloud the decision or the immediacy of the decision on
6 appointing the coordinator.

7 MS. PLEVAN: Or her.

8 CHAIRPERSON FUCHS: Thank you.

9 MS. PLEVAN: I think I agree with all of
10 that, and although I would also recognize that at some
11 point there may be, it may be desirable to insure the
12 permanence of the role through a ballot initiative, but
13 perhaps that will be more expedient or easier to
14 accomplish after the role was already in existence and
15 operating in a way that the public generally could
16 understand or a story could be told to the public about
17 the importance of it, because now it's sort of an
18 abstraction if you're trying to persuade people to vote
19 for it, whereas in the future you could be talking about
20 its accomplishments.

21 CHAIRPERSON FUCHS: Any other questions for
22 our panel?

23 COMM. FIALA: Just throw this as a followup
24 to both your comments, because we do wrestle with these
25 things and your point is well taken. Not everything is

1 worthy of going on the ballot for the Charter, but there
2 are things that are worthy of it, and insuring the
3 permanency of this type of reform is something that I
4 think a number of us feel very strongly about.

5 I would point to the ups and downs or the
6 political football nature of the judicial screening
7 process, for example. Ed Koch really took some very
8 bold steps in advancing and cleaning up a very corrupt
9 and broken system, and Mayor Bloomberg has taken on that
10 and enhanced that.

11 Is there anybody here who would disagree
12 with the notion that this is one of those issues that
13 does rise to the level of importance that would warrant
14 it going before the voters? In other words, this is
15 worthy of our attention as a Charter body and it's
16 worthy of the public's deliberation? Is there anybody
17 who disagrees with that notion?

18 I take that as a yes -- as a no. So that's
19 good.

20 MR. NIBLACK: I'm just going to state that I
21 don't agree or disagree.

22 CHAIRPERSON FUCHS: So noted.

23 MR. NIBLACK: Silence does not deem consent.

24 CHAIRPERSON FUCHS: Any other comments from
25 Commissioners that they'd like to put to our expert

1 panel?

2 I just have to say that this was really an
3 extraordinary expert panel. This is not an issue that I
4 was familiar with before I started in this role as Chair
5 of the Charter Commission. Our staff has done some very
6 extraordinary work and we've worked with the Deputy
7 Mayor, Carol Robles-Roman and her staff and the
8 Commissioners have focused on this in a very intense way
9 and we're serious about figuring out how to move forward
10 on this issue in a way that we can get some action.

11 The Mayor has really determined that there's
12 need here and that we should be fixing this problem,
13 that there's no reason at this point in time that we're
14 still in the state that we're at, and the comments from
15 all the experts today I think were particularly helpful
16 and we will be contacting all of you for further
17 assistance on this issue, because I for one and I know
18 the Commissioners as well, really found the testimony
19 extremely helpful.

20 Thank you for coming out to Queens today,
21 for joining us for this part of our hearing for the
22 expert forum, and what I will do now is adjourn the
23 expert forum and we will reconvene at 6:00 with our
24 public hearing. Thank you.

25 (Time noted: 5:41 p.m.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, LINDA FISHER, a Shorthand Reporter and a
Notary Public, do hereby certify that the foregoing is a
true and accurate transcription of my stenographic
notes.

I further certify that I am not employed by
nor related to any party to this action.

LINDA FISHER,
Shorthand Reporter