Statement of the

THE NEW YORK STATE TRIAL LAWYERS ASSOCIATION

"Public Forum: A Lasting Blueprint for Judicial Diversity"

December 4, 2006

I am Joseph P. Awad, President of the New York State Trial Lawyers Association, and I appear here today on behalf of the NYSTLA Board of Directors and our 4000 lawyer members who practice in the trial and appellate courts throughout the state. We thank Minority Leader Malcolm Smith and Chairmen Breslin and Sampson for convening this forum, and for inviting us to address a very serious issue that affects all that seek justice in New York's court system.

I want to begin by acknowledging, on behalf of NYSTLA, the tremendous efforts of Chief Judge Kaye and Chief Administrative Judge Jonathan Lippman in working to make our justice system accessible and responsive to all New Yorkers. They have demonstrated a commitment to the American ideal of justice, where ordinary citizens, like the most powerful, will find in the courtroom a place where their pleas will be received with respect, and justice will be delivered in an open and transparent manner. Judge Kaye set out to elevate public trust and confidence in our courts and respect for the legal profession by educating the public on the critical role of the courts in protecting the rights of all citizens. She has also worked tirelessly in improving the experience of everyone who enters the courtroom door. She and Judge Lippman have made great strides in streamlining the judicial system and making the courts more open and friendly to families and the indigent. Many of the other reforms they have proposed, such as those relating to the selection of judges and the improvement of our Justice Courts, have sparked important discussions that assure further thoughtful improvements even beyond Judge Kaye's historic tenure. The State of New York owes a great debt of gratitude to Judge Kaye and Judge Lippman, and NYSTLA looks for opportunities such as this to publicly recognize that debt.

In her already celebrated dissent in the Hernendez same-sex marriage case, Judge Kaye responded to the majority's insistence that the issue was one for the legislature with a simple but profound statement that is very relevant to the topic we are addressing today. In the clearest possible words, she said, "It is uniquely the function of the judicial branch to safeguard individual liberties..." This has been her message since her appointment as Chief Judge, and her inspiration for demystifying the court system and letting the public know the courtroom belongs to them as a guarantor of their freedoms and equality under the law. It is the importance of this judicial function that has brought us together today, because everyone here understands that, in safeguarding individual liberties, it is imperative that the judicial branch is not hostage to unacknowledged bias. The best guarantee against this quiet and often very subtle impediment to justice is diversity on both the trial and appellate bench.

Fear of and resistance to diversity has been recognized time and again as the greatest threat to our American democracy. The belief that there is only one right way to live, one right way to worship, and only one correct political party was rejected by our founding fathers at this country's inception. Our heritage began with a rejection of rule by monarchy and from there our history as a nation has been to instill diversity in our government. In doing so, we employ the

best method for ensuring the protection of individual rights and the facilitation of the pursuit of individual liberty. Cultural pluralism is fundamental to our way of life. Today, there is no reason that these values of diversity and pluralism should not apply to and benefit the judicial branch of government.

It is naive to believe that our judicial system can or should depend on a cohort of judges that simply applies the law as written using formulaic legal reasoning outside the context of personal experience and values. Whether one considers the discourses of Plato (" ... good people do not need laws to tell them to act responsibly..."), or the speeches of the Reverend King ("Laws will not eliminate prejudice from the hearts of human beings") we agree that it is the spirit and not the form of law that keeps justice alive. In turn, the humanity of our jurists increases the public faith in the justice system. I am not saying that our judges should feel that it is their job to impose a certain morality on the law, quite the contrary. I am saying that biases are natural for all of us based on the limits of our life experiences and our incomplete understanding of views that are held in communities we have not been a part of. Judges are not exempt from these very human limitations.

It follows that the more the bench reflects the range of backgrounds and moral groundings of the population at large, the better equipped it is to dispense justice without the blind spots that our natural biases create. In the Judicial Branch of government, biases can affect findings of fact and assessment of credibility. Given the appropriate deference to jury findings, this is particularly important for courts that review both law and facts, which in New York includes both the trial court and our intermediate appeals court, the Appellate Division. It is also within the appellate courts that biases can be broken down through the kind of exchange and collegiality appellate panels famously enjoy despite profound philosophical differences. This atmosphere of collegiality and diversity works to preserve the transcendent values embodied in our Constitution.

Even aside from any question of bias, a diverse judiciary is an essential component in maintaining public confidence in the fairness of our system of justice. By reflecting the entire demographic of our citizenry, the court system demonstrates its acceptance of and respect for individual differences.

Senator Malcolm Smith and this committee have noted the disparity injudicial diversity between the trial courts and the appellate courts in this state. We share their dismay and concern. In fact, to my knowledge, NYSTLA was the only statewide bar association that publicly urged the reappointment of Judge George Bundy-Smith from among the exceptionally impressive slate of candidates for the position he was leaving. The loss of the only African-American from the state's highest court, a Judge with a strong record in the protection of individual rights, is a serious loss indeed, given the general lack of diversity on our appellate benches - and the ubscuce of transparency in the appointment process that might provide an explanation for this circumstance.

As trial attorneys, the N YSTLA membership is particularly aware of the role of the appellate courts in our work to obtain justice for the ordinary people we represent: immigrants who have

been injured or killed for lack of safety equipment at construction sites, families that have been destroyed by corporate wrongdoers, and patients who have suffered devastating medical harm due to medical errors that occur with startling frequency. Our hundreds of thousands of clients represent the full range of geographic, economic and social differences found in New York's population - as well as differences based on religion, gender, race, ethnicity, age, sexual orientation or disability. While decisions on their cases are first determined by a trial judge and jury, it is often the appellate court that reviews their unique facts and has the last word on their fate. Our Civil Procedure Law and Rules, CPLR Section 5501(c) grants the Appellate Division review of both questions of law and fact. Indeed, as Professor David Siegel points out, this power is extremely significant, with the appellate court having the same decision-making power as the trial court, with the ability to substitute its review of the facts for that of the trial court. While there is no way to know how a more diverse mix of judges might hold differently in any given case, the lack of diversity and pluralism provides reason for the public to be critical of the judicial system and to question the wisdom behind particular findings and decisions.

NYSTLA is appearing here today, not with a formal proposal for fixing the absence of diversity on our appellate bench, but with a strong endorsement for the work of finding solutions, and an offer of continued support and assistance as the dialogue progresses. We intend to listen, learn and reflect on the testimony given in this forum by others here today. I do offer a few preliminary thoughts, however. There is a need for greater outreach to the civil trial bar across the state in order to educate individual attorneys about judicial opportunities and cultivate organizational interest in playing a role in the nomination and appointment of judges. Within the civil trial bar, NYSTLA represents the greatest number, greatest diversity, and far and away the greatest trial and appellate experience serving individual New Yorkers in State Supreme Court. It is therefore difficult to understand why, given our wealth and depth of knowledge and experience, we have not been consulted on appointments to the appellate bench. We would welcome opportunities to participate in the screening and rating of nominees and otherwise assisting with the modernization of the selection process. We suggest that the devotion of NYSTLA members to representing all New Yorkers from all walks of life, in all communities, in civil matters in State Supreme Court, ensures diversity as an essential value.

Members of the State trial bar should be recognized as both the primary users of the justice system and as the officers of the court within the court system who are particularly in touch with the plight of the average citizen in seeking justice. There is no question in my mind that NYSTLA, with its 4,000 members throughout the state, is the single organization most aware of the diversity of citizens coming before the bench and most potentially affected by any lack of diversity. We respectfully seek and would readily commit to a regular role in the appointment of appellate judges as part of a program to increase diversity on the bench.

Finally, we urge that judicial pay be removed from the political system if diversity is to be served and we wish to continue to attract the best and brightest among the Bar. We agree with Judge Kaye and her plan and recommendations to separate the need for fair judicial compensation from the political process. At this moment it has been eight years since any judge elected to a court in the State of New York by the people of the State of New York has received a cost-of-living increase. This is ridiculous, and a sure recipe for future discouragement of diversity on the

bench. Attorneys who decide to perform public service by seeking election to the judiciary rarely do it for financial gain. The notoriety that has been created by the lack of judicial pay raises over so long of a period of time may create the appearance to the Bar at large that only the most privileged could withstand such a lack of financial security. The best and brightest legal minds who devote themselves to public service are also concerned about raising a family, paying a mortgage, and sending a child to college; it is easy to understand why they might be discouraged from pursuing the formidable responsibilities of a judgeship with the prospect that they and their colleagues will have to plead for reasonable pay increases, and, perhaps, work for years without receiving one.

I again thank you for the opportunity to testify here today, and, on behalf of NYSTLA, its Board of Directors and its members, I am grateful for the hard look you are taking at the need for greater judicial diversity in our state. I offer our assistance and support in the crafting of innovative and thoughtful approaches to this serious problem.

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