THE STENOGRAPHIC RECORD

ALBANY, NEW YORK

January 17, 2001

11:05 a.m.

REGULAR SESSION

SENATOR RAYMOND A. MEIER, Acting President

STEVEN M. BOGGESS, Secretary

P R O C E E D I N G S

ACTING PRESIDENT MEIER: The Senate will come to order.

Will everyone please stand and repeat with me the Pledge of Allegiance.

(Whereupon, the assemblage recited the Pledge of Allegiance to the Flag.)

ACTING PRESIDENT MEIER: In the absence of clergy, may we bow our heads in a moment of silence.

(Whereupon, the assemblage respected a moment of silence.)

ACTING PRESIDENT MEIER: Reading of the Journal.

THE SECRETARY: In Senate, Tuesday, January 16, the Senate met pursuant to adjournment. The Journal of Saturday, January 13, was read and approved. On motion, Senate adjourned.

ACTING PRESIDENT MEIER: Without objection, the Journal stands approved as read.

Presentation of petitions.

Messages from the Assembly.

Messages from the Governor.

Reports of standing committees.

Reports of select committees.

Communications and reports from state officers.

Motions and resolutions.

Senator Skelos.

SENATOR SKELOS: Mr. President, may we adopt the Resolution Calendar at this time.

ACTING PRESIDENT MEIER: The question is on the adoption of the Resolution Calendar. All those in favor signify by saying aye.

(Response of "Aye.")

ACTING PRESIDENT MEIER: Opposed, nay.

(No response.)

ACTING PRESIDENT MEIER: The Resolution Calendar is adopted.

Senator Skelos.

SENATOR SKELOS: Mr. President, Senator Paterson would like to open up Resolution Number 198 for sponsorship. It concerns Black History Month.

So why don't we have everybody on

the resolution. If anybody wishes not to sponsor the resolution, they should so indicate.

ACTING PRESIDENT MEIER: All right. Anyone not wishing to be on the resolution, notify the desk. Otherwise, all members will be listed.

Senator Skelos, we have some substitutions. Would you like to do those now?

SENATOR SKELOS: Please make the substitutions at this time.

ACTING PRESIDENT MEIER: The Secretary will read the substitutions.

THE SECRETARY: On page 5, Senator Volker moves to discharge, from the Committee on Investigations, Taxation and Government Operations, Assembly Bill Number 64A and substitute it for the identical Senate Bill Number 134A, Third Reading Calendar 21.

And on page 5, Senator Goodman moves to discharge, from the Committee on Investigations, Taxation and Government Operations, Assembly Bill Number 65 and substitute it for the identical Senate Bill

Number 792, Third Reading Calendar 22.

ACTING PRESIDENT MEIER: Substitutions ordered.

Senator Skelos.

SENATOR SKELOS: Mr. President, if we could take up the noncontroversial calendar at this time.

ACTING PRESIDENT MEIER: The Secretary will read the noncontroversial calendar.

THE SECRETARY: Calendar Number 1, by Senator Skelos, Senate Print 58, an act to amend the Civil Practice Law and Rules, in relation to causes of action.

ACTING PRESIDENT MEIER: Read the last section.

THE SECRETARY: Section 2. This act shall take effect on the first day of October.

ACTING PRESIDENT MEIER: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 45.

ACTING PRESIDENT MEIER: The bill is passed.

THE SECRETARY: Calendar Number 2, by Senator Skelos, Senate Print 59, an act to amend the Criminal Procedure Law, in relation to evidence of identification.

ACTING PRESIDENT MEIER: Read the last section.

THE SECRETARY: Section 5. This act shall take effect on the first day of November.

ACTING PRESIDENT MEIER: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 45.

ACTING PRESIDENT MEIER: The bill is passed.

THE SECRETARY: Calendar Number 6, by Senator Marcellino, Senate Print 100, an act to amend the Penal Law, in relation to criminally negligent homicide.

ACTING PRESIDENT MEIER: Read the last section.

THE SECRETARY: Section 2. This act shall take effect on the first day of January.

ACTING PRESIDENT MEIER: Call the

roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 48.

ACTING PRESIDENT MEIER: The bill is passed.

THE SECRETARY: Calendar Number 9, by Senator Volker, Senate Print 135 -

SENATOR ADA SMITH: Lay the bill aside.

ACTING PRESIDENT MEIER: Lay the bill aside.

THE SECRETARY: Calendar Number 19, by Senator Alesi, Senate Print 290, an act to amend the Penal Law, in relation to including a public place.

ACTING PRESIDENT MEIER: Read the last section.

THE SECRETARY: Section 2. This act shall take effect on the first day of November.

ACTING PRESIDENT MEIER: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 47. Nays, 1. Senator Duane recorded in the negative.

ACTING PRESIDENT MEIER: The bill is passed.

THE SECRETARY: Calendar Number 21, substituted earlier today by the Assembly Committee on Rules, Assembly Print Number 64A, an act to amend the Tax Law, in relation to the imposition of sales and compensating use taxes by the County of Erie.

ACTING PRESIDENT MEIER: Read the last section.

THE SECRETARY: Section 4. This act shall take effect immediately.

ACTING PRESIDENT MEIER: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 46. Nays, 2. Senators Dollinger and Gentile recorded in the negative.

ACTING PRESIDENT MEIER: The bill is passed.

THE SECRETARY: Calendar Number 22, substituted earlier today by the Assembly Committee on Rules, Assembly Print 65, an act to amend the Tax Law, in relation to the imposition of sales and use taxes by the

County of Nassau.

ACTING PRESIDENT MEIER: Read the last section.

THE SECRETARY: Section 4. This act shall take effect immediately.

ACTING PRESIDENT MEIER: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 46. Nays, 2. Senators Dollinger and Gentile recorded in the negative.

ACTING PRESIDENT MEIER: The bill is passed.

Senator Skelos, that completes the reading of the noncontroversial calendar.

SENATOR SKELOS: Mr. President, if we could go to the controversial calendar.

ACTING PRESIDENT MEIER: The Secretary will read the controversial calendar.

THE SECRETARY: Calendar Number 9, by Senator Volker, Senate Print 135, an act to amend the Civil Practice Law and Rules, in relation to conducting depositions.

SENATOR DOLLINGER: Explanation,

please.

ACTING PRESIDENT MEIER: Senator Volker, an explanation has been requested of Calendar 9 by Senator Dollinger.

SENATOR VOLKER: Mr. President, this is a bill that has passed this house - in fact, it passed last year by a vote of 56 to 2.

I think the reason that there is some discussion this year is that after this bill has been around for about three or four years, for some -- well, the memo by the Trial Lawyers, they have never, to my knowledge, ever memoed against it before. But I guess someone must have said to them, "You know, this could create a problem."

What this does is, and the committee members in the past have agreed that -- and this time, that this really is a potential for some savings and for some facilitating the system. It permits a party to a lawsuit to agree to conduct depositions by telephone or other remote electronic means.

I think we all have -- those of us that have been lawyers realize that there's

some occasions, and it'd probably be rare occasions, where it would be wise to allow the taking of certain depositions and getting certain information by electronic means, especially in the age we're in.

I don't think it would be used a great deal. The problem with the argument, I think, by the Trial Lawyers is it assumes somehow that the judge is arbitrarily going to make a decision in some high-profile case or something of that nature. I'm not sure that that might in fact be a reason to potentially overturn the case, I guess, depending on how serious the issue was.

But I think that -- this bill, as I say, passed the Senate last year by 56 to 2; it passed the Senate I think almost unanimously the year before. I think that very possibly there's just some nervousness because someone must have pointed out, you know, someone could say that maybe this is going to create -- would create less court time. And that's true. And maybe that's something that we should really look to.

So I just think this is a logical

bill. This is a bill that I believe initially came from the OCA, if I'm not mistaken. The reason I say that is we have a number of bills now that we move every year because we know that the OCA is coming in later and if we wait for the OCA or these other groups to come in, we won't get them done until too late.

So I believe, and I'm 99 percent sure, that this is one of those bills. I know it's been around for quite a few years.

ACTING PRESIDENT MEIER: Senator Dollinger.

SENATOR DOLLINGER: Thank you, Mr. President. Would the sponsor yield for a question?

ACTING PRESIDENT MEIER: Senator Volker, do you yield for a question?

SENATOR VOLKER: I would.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DOLLINGER: I'm one of those, Senator Volker, who has voted for this bill in the past. And I'm looking at it with a new set of eyes this year.

My question is, what standards are

applied by the judge to determine upon application whether a deposition by telephonic means is appropriate?

SENATOR VOLKER: Well, you know that -- I think you are well aware that the standards that would be used are the normal standards where parties to a lawsuit are involved. Certainly the lack of -- as my counsel points out to me, the lack of prejudice and the normal arguments could be made.

I think that -- I suppose we could assume that some judge would be arbitrary. But as you and I know, in civil cases if that occurred, as I say, it would be under special circumstances. I suppose it would be one of the issues that could be involved for potentially an appeal.

I think that the reason, as I say, that -- the very reason that we want to speed up the process may be the reason why there's some objection here. And it just seems to me it's a logical kind of component to the system to allow this to occur. I know all the other stuff on billable hours and all that sort of

thing, but I just think it makes sense.

SENATOR DOLLINGER: Thank you, Mr. President. Just briefly, on the bill.

ACTING PRESIDENT MEIER: Senator Dollinger, on the bill.

SENATOR DOLLINGER: I don't dispute Senator Volker's characterization that this bill in many instances may make sense. I think it may also significantly reduce the cost of litigation and the cost of depositions.

But apart from what the Trial Lawyers say -- and I haven't even read their memo -- it seems to me that what we should have is some standard for allowing the telephonic recording of depositions.

I think our experience, Senator Volker, with videotaped depositions and other forms of electronic depositions proves that they are reliable, that they meet the test. But the question is this bill does not really say the circumstances under which, if there were an application filed for a telephonic deposition and the opposing party, plaintiff or defendant, said, "We don't want to do it

that way, we want to in essence require the live deposition and that the person to be deposed actually come to New York and be deposed there," there's no real standard for the court to decide the instances in which compelling circumstances, financial circumstances, scheduling difficulties -- all the reasons which would be appropriate, I think, to require telephonic depositions in some cases -- they aren't really contained in the bill.

So this bill says to the courts of this state upon an application and upon an opposing affidavit from a party -- it doesn't really give the court any guidance to determine the circumstances under which telephonic recording or telephonic depositions would be possible.

I would suggest if we're going to do this, we ought to do it with standards that give the judiciary guidance in deciding the appropriate instances in which a telephonic deposition would be permissible.

I know that there are trial lawyers, and I'm one of them, who believe that

not only the dynamics of litigation sometimes require that you bring other parties to New York, to force them to bear the cost of coming to New York, which is consistent with our "long arm statute" and our belief that people should come here to litigate if they want to do business here.

But the other thing is, quite frankly, that you really give up something in a telephonic deposition, or you can give up something, because you lose the ability to perceive the reactions of people who are in the room with you when you ask them questions.

So I would rather have a bill - although this talks about the protocol for how to do it, it doesn't really provide guidance to our courts on instances in which it would be appropriate. And in the absence of that, it just gives too much flexibility to the courts and doesn't really contain a clear, coherent message of what we want the courts to do in specific cases in which telephonic depositions might be appropriate.

I'll vote in the negative, Mr. President.

ACTING PRESIDENT MEIER: Senator Volker.

SENATOR VOLKER: Mr. President, I just want to point out two things.

One, that the Chief Judge of the Court of Appeals, Judith Kaye, just gave her State of the Judiciary address and talked about bringing New York courts from the 18th century into the 21st century. And she talked about all the new things that have occurred and the fact that we really have not brought our court system up-to-date. I think this is one of those types of things.

Let me point out to you, Senator Dollinger, the problem with putting standards in the bill, if you put all the so-called reasonable standards that are normally equated with this sort of situation, you will actually be limiting the scope of the judge in many cases.

It could be argued that you could be limiting, because those standards, whatever you put in the bill, then would become the - sort of the absolute standard. I think -- I don't think that that probably is a good idea.

I think that this would be operated on a very, very limited basis, because most judges clearly would operate in the normal processes. And it just seems to me that it's a logical extension of the kinds of things that we're trying to do to speed up the process in our courts.

ACTING PRESIDENT MEIER: Read the last section.

THE SECRETARY: Section 2. This act shall take effect on the first day of January.

ACTING PRESIDENT MEIER: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT MEIER: Senator DeFrancisco, to explain his vote.

SENATOR DeFRANCISCO: I just want to mention that my "no" vote is not that I don't want to go into the 21st century, because there are a lot of devices that are helpful to cut costs.

The problem is that when you do a deposition and you've never laid eyes on an individual before, what the person says is

maybe as important as to how the person says it. And a litigator has to be able to determine or make a judgment about credibility -- not only to try the case, if necessary, but also to determine whether or not to try to settle it in view of the manner as well as what the person says.

So I think it's -- if the attorneys want to stipulate to this type of method, both have made a reasoned judgement on behalf of their client. But to court-order this procedure when you lose so much I think is not a good idea.

ACTING PRESIDENT MEIER: Senator DeFrancisco will be recorded in the negative.

Announce the results.

THE SECRETARY: Those recorded in the negative on Calendar Number 9 are Senators DeFrancisco, Dollinger, Duane, Espada, Hassell-Thompson, Lachman, Montgomery, Paterson, Schneiderman, A. Smith, M. Smith, and Senator Stavisky.

Ayes, 45. Nays, 12.

ACTING PRESIDENT MEIER: The bill is passed.

Senator Skelos, that completes the controversial calendar.

SENATOR SKELOS: Mr. President, is there any housekeeping at the desk?

ACTING PRESIDENT MEIER: There is no housekeeping.

SENATOR SKELOS: Mr. President, on behalf of Senator Bruno, I'd like to hand up the following notice of leadership assignments and ask that they be filed in the Journal.

ACTING PRESIDENT MEIER: Those will be received and filed in the Journal.

SENATOR SKELOS: And also on behalf of Senator Bruno, after consultation with the Minority Leader, hand up the attached committee assignments and ask that they be filed in the Journal.

ACTING PRESIDENT MEIER: Those will also be received and filed in the Journal.

Senator Montgomery is asking to be recognized, Senator Skelos.

Senator Montgomery.

SENATOR MONTGOMERY: Yes, Mr.

President. I would like unanimous consent to be recorded in the negative on Calendar Number 19.

ACTING PRESIDENT MEIER: Without objection, Senator Montgomery will be recorded in the negative on Calendar 19.

Senator Hassell-Thompson.

SENATOR HASSELL-THOMPSON: Yes, Mr. President. I rise to request unanimous consent to be recorded in the negative on Calendar Number 2, Senate Print 59.

ACTING PRESIDENT MEIER: Without objection, Senator Hassell-Thompson will be recorded in the negative on Calendar 2.

Senator Paterson.

SENATOR PATERSON: Mr. President, with unanimous consent, might we record the Minority Leader in the negative on Calendar Number 9.

ACTING PRESIDENT MEIER: That was Number 9, Senator?

SENATOR PATERSON: Number 9.

ACTING PRESIDENT MEIER: Without objection, Senator Connor will be recorded in the negative on Calendar Number 9.

Senator Stachowski.

SENATOR STACHOWSKI: Mr. President, may I have unanimous consent to be recorded in the negative on Calendar 9.

ACTING PRESIDENT MEIER: Without objection, Senator Stachowski will be recorded in the negative on Calendar 9.

Senator Skelos.

SENATOR SKELOS: Mr. President, there being no further business to come before the Senate, I move we adjourn until Monday, January 22nd, at 3:00 p.m., intervening days being legislative days.

ACTING PRESIDENT MEIER: On motion, the Senate stands adjourned until Monday, January 22nd, at 3:00 p.m., intervening days being legislative days.

(Whereupon, at 11:25 a.m., the Senate adjourned.)