



# Staff Memorandum

**HOUSE OF DELEGATES  
Agenda Item #9**

Attached are comments received from the Committee on Legal Aid and the President's Committee on Access to Justice with respect to the report and recommendations of the Committee on the New York State Constitution.



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June 6, 2017

Kathleen R. Mulligan Baxter  
General Counsel  
New York State Bar Association  
One Elk Street  
Albany, NY 12207

Dear Ms. Baxter,

Attached is a report on the position of the Committee on Legal Aid, together with dissenting views, in response to the Report of the Task Force on the Constitutional Convention which will be presented to the House of Delegates at the June meeting. The vote of the CoLA membership was 20 in favor of the majority view that NYSBA should not support the call for a Constitutional Convention and 2 opposed to that position.

Respectfully,



Keisha A. Williams, Esq.  
Co-Chair Committee on Legal Aid



Sergio Jimenez, Esq.  
Co-Chair Committee on Legal Aid



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June 6, 2017

Kathleen R. Mulligan Baxter  
General Counsel  
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One Elk Street  
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Dear Ms. Baxter,

Attached hereto please find the comments of the President's Committee on Access to Justice, which voted by a majority against the Report of the Committee on the New York State Constitution, which recommended that the New York State Bar Association support the 2017 ballot question calling for a constitutional convention.

Kindest regards,

Edwina Martin, Esq.

Michael Miller

Edwina Martin, Esq.  
Co-Chair, President's Committee on Access to Justice

Michael Miller  
President-elect, New York State Bar Association  
Co-Chair, President's Committee on Access to Justice

## MEMO

Date: May 30, 2017  
To: Committee on the NYS Constitutional Convention  
From: PCAJ/CoLA Joint Subcommittee on the NYS Constitutional Convention  
Re: Comments to the Committee on the NYS Constitutional Convention's Report

Please find below a memo of a joint subcommittee of the Committee on Legal Aid and the President's Committee on Access to Justice. The subcommittee members are Ronald Tabak, Lillian Moy, Harvey Epstein, Sally Curran, Dennis Kaufman, Saima Akhtar, Susan Horn, Jeffrey Seigel, and Joseph Kelemen. All subcommittee members except for Lillian Moy and Saima Akhtar are of the majority position in opposition to a New York State Constitutional Convention.

### Majority Report

By Ronald Tabak

The report submitted to the House of Delegates in support of a resolution favoring holding a New York State constitutional convention is based on a number of premises that are so clearly incorrect that – even aside from other significant problems – we oppose the resolution.

The report asserts incorrectly that "the voters ... can reject any Constitutional changes that they view as improper." This statement could only be accurate if the constitutional convention – which under the New York State Constitution "determines the rules of its own proceedings" – decides to permit the electorate to vote separately on each proposed constitutional amendment. No prior convention has adopted such amendment-by-amendment voting. There is no provision for a limitation on or oversight of the convention's powers in this regard. Far more likely would be an all-or-nothing vote with regard to the entire panoply of all proposed changes, or perhaps voting on clumps of proposed changes.

The unlikelihood of separate voting on each proposed constitutional change is even greater than it might otherwise be because at least so far, there has not been an advance commission considering the merits or best practices of a convention. Moreover, it is considerably more likely than in the past that moneyed special interests would exert great influence at a convention (as well as in voting for delegates and on voting on a convention's proposals). They may find it to their perceived advantage for the convention to (a) combine in one ballot vote an otherwise unpopular amendment that the special interests favor with other provisions that are popular or (b) support a regressive amendment to the state constitution (such as a "tough on crime" measure, *e.g.*, putting the death penalty into the state constitution – as has happened elsewhere) – not because the special interests really care about it but in order to improve the chances of other regressive amendments, *e.g.*, barring state funding for civil legal services for immigrants and other poor people: these could be paired in a single ballot vote.

This leads us to focus on a second fundamentally flawed assumption underlying the resolution. The supporting report assumes that only changes that the State Bar would either support or not oppose will be proposed and voted on by the electorate and that they will be important enough to the electorate to attract voters to go to the polls and vote for these proposed changes in the 2019 election. However, although we favor all of the constitutional changes discussed in the supporting report, we are extremely dubious that they will attract large numbers of people to come out and vote in large enough numbers for these changes to win in the very low voter turnout general election year of 2019. In that year, there will be no presidential, gubernatorial, or New York City mayoral election. Higher turnout will occur in those places with hotly contested county or local elections – outside of New York City. Moreover, if, as is quite possible, regressive constitutional changes are on the ballot, they are likely to motivate more voters who favor them than those who oppose them – especially in

that election year, in which more progressive voters won't otherwise be voting in high numbers. So, regressive changes would have a substantial chance of winning – or depending on what the voters vote on, of causing the defeat of any positive changes.

History in elections and on referendums in New York and other states shows that people who, *e.g.*, favor more "gun rights," restrictions on women's right to choose, anti-immigrant proposals, and rollbacks of state constitutional rulings that are not mandated by the U.S. Constitution as interpreted by the Supreme Court, are more likely to vote than people motivated by things like court reforms.<sup>1</sup> Fortunately, New York is in general not a referendum state -- something that a convention could change.

To be realistic about the possible downsides of a constitutional convention, one should be cognizant of provisions in the existing constitution on its face – or as interpreted by the New York Court of Appeals -- that could be endangered by a constitutional convention or by a referendum system that a convention could introduce. These are ignored or severely downplayed in the supporting report's summary of arguments against. They include (among many other things) Court of Appeals decisions concerning free expression,<sup>2</sup> religious liberty<sup>3</sup> and the rights of criminal suspects and defendants,<sup>4</sup> in which the state constitution has been consistently interpreted more expansively than the Bill of Rights. Moreover, the state constitution provides for some rights on which the U.S. constitution is silent, including in the contexts of education, social welfare, public health, immigrants' rights and environmental conservation.

Finally, the report submitted to the House of Delegates largely overlooks the likely distorting effects of electing most constitutional convention delegates by at-large voting within gerrymandered State Senate districts – with the remaining 15 members being selected in at-large statewide voting. The use of at-large voting has often been found to dilute the voting impact of people of color. The selection system is vulnerable to a legal challenge that, if made, is unlikely to be adjudicated before a convention completes its work. For these various reasons, the selection system for delegates could greatly increase the risk of a convention's proposing at least some significant highly regressive measures.

In sum, the supporting report submitted to the House of Delegates is highly unrealistic and notable mostly for its omissions. If not considered carefully, it could lead State Bar delegates to vote in favor of a constitutional convention on the basis of an extremely skewed exercise in wishful thinking combined with downplaying the more likely scenarios of how a convention would play out.

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<sup>1</sup> There have been a number of examples elsewhere (such as California) of entrenched interests' relying on appeals to social conservatives to win elections – even where the entrenched interests did not really care about social conservative-attractive issues they used to win the elections.. This has happened in the context, *e.g.*, of retention elections for high state court judges --- where entrenched business interests focused their campaigns on things like the judges' death penalty decisions in order to get off the bench judges that these interests disliked because of pro-environment or pro-consumer rulings.

<sup>2</sup> The Court of Appeals requires more protection for opinions than the U.S. Supreme Court does under the First Amendment. New York law also provides journalists a qualified right to withhold sources, even where not gained in confidence. .

<sup>3</sup> While the Supreme Court allows restrictions on religious exercise where a prohibition is the effect of a generally applicable provision, New York uses a balancing test in which state interest is weighed against the incidental burden imposed on a free exercise right. And New York's constitution explicitly bars spending public dollars on religious education.

<sup>4</sup> New York law is more protective than federal law with regard to searches and seizures. Moreover, the New York Constitution specifies stringent requirements for waiver of a criminal jury trial and requires a 12-member jury in a felony case In addition, New York courts treat the right to counsel as being unwaivable in counsel's absence once the right attached and apply the right to post-conviction proceedings and to questioning on unrelated charges. The Court of Appeals has also been more protective of a defendant's right to effective assistance of counsel than the Supreme Court.

## Dissent

By Lillian Moy & Saima Akhtar

I respectfully dissent from the majority report. I voted to support the Report of the Committee on the New York State Constitution calling for the New York State Bar Association to support the 2017 ballot question calling for a constitutional convention. I am a lifelong legal aid lawyer and at my core, I think of myself as a hopeful and optimistic person. The Committee's report resonates with the hope and optimism that infuses my life's work. I support the Committee's report and hope that the Committee on Legal Aid and the President's Committee on Access to Justice will join in the report because a Constitutional Convention could create substantial new rights for our low income clients. As we have known for many years, the benefits of court reorganization alone would greatly simplify the rights of low income litigants. Multiple court appearances, multiple types of proceedings, make it extremely hard for a low-income person to participate in the justice system. No other solution has come to pass in spite of many years of support for court reform.

In addition, a constitutional convention provides an opportunity to establish new positive rights. With respect to access to justice, I am particularly thinking of establishing a right to counsel outside of the city of New York. This is a right that is unlikely to be developed or funded by local cities and towns outside of New York City. At the moment, there is no practical alternative for creating a civil Gideon in the rest of state and I believe the constitutional convention is our only hope for establishing this right outside of New York City in our generation. As the committee on the Constitutional Convention points out, there is no practical alternative to convention for enacting many needed and desired reforms.

Nor is there empirical evidence to believe that long held constitutional rights such as the "forever wild" clause and Article 17 protections for the poor and needy would be eliminated by Convention delegates. I agree with the committee that it is "unlikely constitutional delegates in sufficient numbers would roll back established rights, given the state's history and political demographics." Id. page 26. and any such unlikely attempted rollback would also have to be approved by the voters.

The report calls for NYSBA to "continue to urge to establish a preparatory commission, reform the delegate selection process and address the subject of dual compensation by delegates,..." See committee report, page 29. The State Bar should call for establishment of a preparatory commission as soon as possible, and "in any case, immediately following an affirmative vote on the November ballot question."

A constitutional convention is the one practical opportunity this generation of the Association has to modernize, clean up and restructure the Constitution. I hope the New York State Bar Association will join with the League of Women Voters, Citizen Union of the City of New York (<http://www.nydailynews.com/opinion/fix-government-vote-constitutional-convention-article-1.3180479>) as well as former Chief Judge Jonathan Lippman in voting for hope on behalf of low-income clients throughout the state and supporting a vote for a constitutional convention. I dissent from the subcommittee majority opinion and I hope the Committee on Legal Aid and Presidents' Committee on Access to Justice will support the Report and Recommendation of the Committee on the Constitution.