

**NEW YORK STATE BAR ASSOCIATION  
MINUTES OF HOUSE OF DELEGATES MEETING  
BAR CENTER, ALBANY, NEW YORK  
APRIL 5, 2003**

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**PRESENT:** Alcott; Amoroso; Asarch; Aydelott; Ayers; R. Bartlett; Berkowitz; Bracken; Buckley; Butler; Buzard; Chambers; Christian; Cioffi; Coffey; Defio; Doerr; Dollard; Doyle; J. Dwyer; Edmunds; Evans; Farrell; Fedorchak; Fedrizzi; FitzGerald; Flaherty; Flink; Franchina; Fredrich; Gacioch; Gerstman; Goldenberg; Goldstein; Golinski; Gordon; Graber; J. Gross; M. Gross; Gutekunst; Haig; Handlin; Hassett; Hayes; Heggen; Herold; Higgins; Hoffman; Ingrassia; Jaffe; James; Kamins; Karson; Kelly; Kilsch; B. King; Klein; Kougasian; Krane; Lawrence; Lerosé; Levin; M. Levy; P. Levy; Lindenauer; Longo; Lynch; Mandell; Maney; Manley; Matthews; Meislahn; Meng; M. Miller; Milonas; Minkowitz; Miranda; Mitzner; Monahan; Moore; Nashak; O'Donnell; O'Leary; O'Mara; Ostertag; Perlman; Peterson; Pfalzgraf; Plotsky; Purcell; Quattlebaum; Reimer; Rice; T. Richardson; Rifkin; Riley; Rizzo; Robertson; Rothstein; Russo; Safer; Schraver; Seiden; Sherwin; Silkenat; Standard; Stenson; J. Sunshine; N. Sunshine; Sweeny; Terranova; Tharp; Treece; Tully; Tyler; O. Walsh; R. Walsh; Weinberger; Wilensky; and Witmer.

1. Approval of minutes of the January 24, 2003 meeting. The minutes were approved as distributed.
2. Report of the Treasurer. Kenneth G. Standard, Treasurer, reviewed financial statements as of February 28, 2003 as distributed. Revenue was \$10,506,147, up 5 percent from 2002, reflecting increases in both Association and Section membership dues. Expenses totaled \$3,953,178 or 19 percent of the budgeted amount, up approximately \$126,000 from 2002, largely because of increased Section expenses for the Annual Meeting. The Association CLE program realized a strong performance in 2002 but is experiencing a decrease in revenue to date in 2003 revenue. The CLE and Finance committees are reviewing this service to identify means of increasing performance within cost efficiencies.

Mr. Standard also advised that the audit is complete and the report is being awaited. The audit will show a deficit of approximately \$337,000, including \$913,000 in losses on investments and \$209,000 investment income on the long-term reserve account. He noted that the Finance Committee is continuing to work to boost investment performance and, as authorized by the Executive Committee, plans are proceeding to transfer funds to Salomon Smith Barney to manage a portion of the investment portfolio.

Continuing his procedure of focusing at each meeting on a particular aspect of the financial operation, Mr. Standard reviewed the operation of the 2003 Annual Meeting, including attendance by members and others, programs and other events, the registration process, income, and elements of expenses. He reported that the Annual Meeting, which included a first-ever Presidential Summit, was successful, receiving positive feedback on programs and realizing increased revenue. He advised that in planning the 2004 Annual Meeting, work is under way to continue to provide quality programming while containing costs.

The Treasurer's report was accepted with appreciation. Mr. Standard, who is concluding his term as Treasurer on May 31, was thanked for his service to the Association in this capacity.

3. Report of the Nominating Committee. Thomas O. Rice, Chair of the Nominating Committee, reported on the Committee's nominations for members of the Nominating Committee and Delegates to the American Bar Association House of Delegates for 2003-2004.

- a. Election of members of the Nominating Committee. Nominated for service on the 2003-2004 Nominating Committee were the following individuals:

- Members-At-Large: Paul Michael Hassett as Chair; Maryann Saccomando Freedman and Steven C. Krane as Members;
- Alternate Member-At-Large: Thomas O. Rice.

Separate motions were adopted by unanimous voice vote electing: (1) the nominated chair and the members-at-large, and (2) the nominee for alternate member-at-large.

Mr. Rice then presented the Committee's nominations for district members and alternates of the Nominating Committee, as follows: First – Rosalind S. Fink, Peter M. Kougasian, Michael Miller, Hon. E. Leo Milonas, Barbara Berger Opotowsky, Gerald G. Paul, Norman L. Reimer, Edwin D. Robertson and James R. Silkenat, with Sue C. Jacobs, First Alternate, Lisa M. Stenson, Second Alternate, and Alan Rothstein, Third Alternate; Second – Gregory T. Cerchione and Nancy T. Sunshine, with Manuel A. Romero, Alternate; Third – Matthew J. Kelly and Miriam M. Netter, with Madeleine Maney Kennedy, Alternate; Fourth – Peter D. Fitzgerald and Hon. William H. Keniry, with Peter V. Coffey, Alternate. Fifth – James F. Dwyer and Nicholas S. Priore, with Timothy J. Fennell, Alternate; Sixth – Leslie N. Reizes and David A. Tyler, with Clover M. Drinkwater, Alternate; Seventh – June M. Castellano and James

C. Moore, with Michael T. Harren, Alternate; Eighth – David L. Edmunds Jr. and Joseph V. McCarthy, with Vincent E. Doyle III, Alternate; Ninth – Frank M. Headley Jr., Joseph F. Longo and Robert L. Ostertag, with Hon. Sam D. Walker, Alternate; Tenth – John P. Bracken, Robert W. Corcoran, Emily F. Franchina and Joshua M. Pruzansky, with Scott M. Karson, First Alternate, and Owen B. Walsh, Second Alternate; Eleventh – Catherine R. Glover and George J. Nashak Jr., with Steven Wimpfheimer, Alternate; Twelfth – Steven E. Millon and Robert S. Summer, with Roy J. Schwartz, Alternate.

A motion was adopted by unanimous voice vote electing the nominated district members.

- b. Election of Delegates to the ABA House. The report of the Nominating Committee for Delegates to the American Bar Association House of Delegates was given by Mr. Rice for the five positions up for election. He advised that the Delegates would serve two-year terms, commencing at the close of the ABA's Annual Meeting in August 2003. The NYSBA's 11 Delegates serve staggered terms. A motion was adopted unanimously in a voice vote electing the nominated delegates: Robert L. Haig of New York City, Paul Michael Hassett of Buffalo, James C. Moore of Rochester, Kenneth G. Standard of New York City, and Lorraine Power Tharp of Albany.

Mr. Rice expressed appreciation to the 2002-2003 Nominating Committee for its work.

4. Committee on Tort System. John P. Bracken and David M. Gouldin, Co-Chairs of the Committee on Tort System, summarized the Committee's examination of proposals to amend state statutes governing the tort system with regard to collateral sources, vicarious liability and the elimination of strict liability in "scaffolding" cases. The Committee, composed of plaintiff and defense counsel as well as corporate counsel, approached the project with the objective of taking a balanced perspective, promoting reasoned debate, assuring that the needs of all are considered, and recommending constructive improvements where appropriate. The Delegates were apprised that the Executive Committee had endorsed the report for positive action of the House.

The Committee supported a proposed amendment to Civil Practice Law and Rules (CPLR) 4545 to equalize treatment of collateral sources. Currently, while past and future awards in cases against private defendants may be reduced by collateral sources, in cases against public

employers, only past awards may be so reduced. The action would eliminate this anomaly.

The Committee also recommended endorsement of an amendment to the Vehicle and Traffic Law Section 388 to limit vicarious liability regarding leased motor vehicles where the lease is for one year or more. The current law provides that the owner of a vehicle is liable for injury, death or damage caused by the vehicle. The Committee observed that this creates an inequitable system as applied to leased vehicles, and saw the need to create a process that would compensate the victim while at the same time not penalizing the leasing companies for conduct that they cannot control and while holding drivers accountable for their actions. The measure would recognize that the transfer of possession for one year or more is de facto transfer of ownership.

In regard to a proposal to amend Labor Law Sections 240, 241 and 241-a to eliminate strict liability in "scaffolding" cases, the Committee concluded that the law should not be changed to diminish the duty of property owners and construction contractors to maintain safe construction sites, but did support in principle, subject to review of the language of such legislation, measures to codify the "recalcitrant worker" defense where, for example, the worker has refused direction to use safety equipment and safe conduct.

The Committee recommended maintenance of the Association's long-standing position in opposition to a proposal that would amend the CPLR by capping awards of non-economic damages at \$250,000. The Association position notes that such a cap would unjustly discriminate against the relatively small number of accident victims who suffer the most devastating physical and psychological losses and also observed that these awards protect innocent citizens by serving to deter corporate and governmental misconduct and unsafe conditions.

Further, the Committee called for continuation of the Association position in opposition to a proposed change in the CPLR that would eliminate joint and several liability. The Association contends that such action would be unfair to the injured plaintiff who would have to assume the risk that all wrongdoing defendants will be able to pay their share of the plaintiff's full recovery. Observing that proposals for piecemeal change are not useful, the Committee, however, was open to a full review of the doctrine.

In separate motions, the House approved the report, as follows: (1) The measure concerning collateral sources was adopted unanimously in a voice vote; (2) the proposed position on vicarious liability was adopted by a 77-25 margin; and (3) the proposal for codification of the "recalcitrant worker" defense in "scaffolding" cases was approved in principle by voice

vote. No action was needed on the recommendations for maintenance of the Association's positions opposing the proposed caps on non-economic damages and opposing the elimination of joint and several liability.

5. Report and recommendations of the Task Force to Review Terrorism Legislation. In an informational report, Vincent E. Doyle III, Chair of the Task Force to Review Terrorism Legislation, described the Task Force's analysis of state legislation that would create new terrorist crimes and broaden law enforcement authority for investigations and prosecutions of suspected terrorists. The report focused on the major components of a joint legislative proposal of the Governor and Attorney General that was passed by the Senate in February and was under consideration by the Assembly. The Task Force is pursuing meetings with lawmakers to discuss its analysis and recommended approaches.
6. Report of the President. President Tharp updated the House on the following issues:
  - a. Ruling on IOLTA program. In a 5-4 ruling on March 26, the U.S. Supreme Court upheld the constitutionality of the IOLTA program in the State of Washington. The NYSBA with other bar entities had filed an *amicus curiae* brief in support of the IOLTA program's position. In *Brown v. Legal Foundation of Washington* (previously referenced as *Washington Legal Foundation v. Legal Foundation of Washington*), the Washington Legal Foundation had challenged the IOLTA program, contending that the pooling of the miniscule amounts of interest generated by the money held for a short period by attorneys in such accounts for clients and the channeling of the money to organizations that provide legal services is an impermissible taking of property, even though the interest would be consumed by transactional costs of maintaining the individual accounts. The IOLTA program in Washington argued that there was no identifiable value lost to the clients.
  - b. Legal issues affecting same-sex couples. Consistent with a resolution of the House approved in January, she has appointed a Special Committee on Issues Affecting Same-Sex Couples, to examine considerations in various areas of law, including family, health, housing, and estate planning, and make recommendations for presentation to the House in November 2003. Michael Whiteman is chairing the Committee.
  - c. Legislative action and media communications. The legislative advocacy efforts of the Association are being increased, including development of advocacy plans for each of the legislative priorities of the Association, initiation of the member contact program with

legislators, coordinated media and public information outreach on these matters, posting of information on the Association website and installation of facilities to enable members to e-mail New York's United States Senators on tort issues, with this system to be expanded for use in regard to certain other issues at the federal level and state legislation. The legislative advocacy program is complemented by an increased presence in the media on these and other issues. The President has been meeting with newspaper editorial boards, participating in broadcast programs and interviews by reporters, and is submitting op-ed pieces for newspaper publication.

- d. Assigned counsel rates. Concerted efforts continue to seek legislation to increase the outmoded assigned counsel rates. In meetings with lawmakers and in media and public communications, the Association is calling for rates be set at constitutionally acceptable levels that ensure provision of adequate counsel to the indigent as stipulated by the United States Supreme Court in *Gideon v. Wainwright*, and endorsing the establishment of an Indigent Legal Services Fund, proposed by the Governor with the proposed \$50 increase of the attorney registration fee in the Budget, to be used in its entirety as a source of permanent funding for this Fund. Representatives of the Association and Criminal Justice Section participated in the Gideon Day meetings in Albany in March, urging increased rates. The Association also cited the New York County Lawyers' Association, as a co-sponsor of the Assigned Counsel Plan in the First Department, for bringing this matter to court. In *New York County Lawyers' Association v. The State of New York*, state Supreme Court Justice Lucindo Suarez set assigned counsel rates in New York City at \$90 per hour.
- e. State legislative hearings. In her testimony in February at legislative hearings in support of the Judiciary Budget, she also spoke in favor of the Chief Judge's plan to reorganize the trial courts; the creation of an Access to Justice Fund, financed through an expanded abandoned property fund, to support civil legal services; legislation for increased assigned counsel rates; reform of the mandatory drug laws; and preservation of the jury system as fundamental to civil justice.
- f. Advocacy in Washington. She will participate in the American Bar Association legislative program in Washington, DC on April 29, including speaking at the ABA program regarding the NYSBA litigation on the Federal Trade Commission privacy notice provisions, and meeting with lawmakers from New York about the

need for adequate funding for legal services, concerns on tort proposals, and other issues.

- g. Model Rules study. The Committee on Standards of Attorney Conduct is commencing a study to determine whether New York's Code of Professional Responsibility should be replaced with a Model Rules format. The Committee will be seeking the views of bar associations and others, with plans to present a report to the House at the close of 2004.
- h. Fiduciary rules. New court rules have been announced for appointment of fiduciaries. The Special Committee on Fiduciary Appointments commented on the proposed rules in a report approved by the House. The Special Committee, chaired by Joshua M. Pruzansky, is continuing to monitor and review the functioning of the new rules and will provide any further recommendations, as needed.
- i. Code of Judicial Conduct. The Executive Committee made plans to prepare an *amicus curiae* brief in a case concerning the Code of Judicial Conduct and also to conduct a study of the Code provisions. In *Spargo v. New York State Commission on Judicial Conduct*, the U.S. District Court for the Northern District of New York found prohibitions on judicial activity in the Code to be a prior restraint on protected First Amendment activities by judges and certain conduct provisions to be unconstitutionally vague. The decision is being appealed to the Second Circuit Court of Appeals. The NYSBA had proposed the Code in its present format for adoption by the Chief Administrator of the Courts. Proskauer Rose will serve as pro bono counsel, with Mr. Krane as principal author.
- j. Task Force on Gender Equity. The Task Force on Gender Equity is pursuing implementation of the recommendations proposed in the report of the Committee on Women in the Law to foster gender equity in the profession. The measures, based on findings of a survey commissioned by the Committee and approved by the House in June 2002, included procedures and resources for law offices, as well as steps to enhance opportunity for participation in the Association. Teams of Sections and Committees responsible for implementation of each recommendation have been identified and priorities set.
- k. Honors. Past President James C. Moore has been selected as the 2003 recipient of the Rodenbeck Award given by the Monroe County Bar Association for significant contributions to the

availability and administration of Justice. Delegates to the House congratulated Mr. Moore.

- i. Membership. As of March 31, 2003, Association membership had reached an all-time high level of 73,421. President Tharp discussed the Association's initiatives for enhanced membership development and efforts to encourage active involvement. The Committee on Membership was thanked for its work.
7. Report of The New York Bar Foundation. Hon. Richard J. Bartlett, President of The New York Bar Foundation, updated the Delegates on the grant awards and related work of The Foundation to facilitate delivery of legal services, increase public understanding of the law, enhance professional competence and ethics, and improve the justice system and the law. He reported that the Board of Directors is developing means by which The Foundation can be of greater service in these areas, as a statewide philanthropic resource of the profession, and to provide additional opportunity for members and others to support this work.

Following this presentation, Vice President Robert L. Haig spoke on behalf of The Foundation, thanking Judge Bartlett for his leadership in advancing these initiatives and presenting him with a memento of gratitude. Judge Bartlett will complete his term on May 31 and will be succeeded by Mr. Haig.

8. Report and recommendations of the Special Committee on Association Governance. Dennis R. Baldwin, Chair, together with members of the Special Committee on Association Governance, presented the report and recommendations intended to enhance the governance of the Association, improve communications within the Association and with other entities, and expand opportunities for participation and leadership, including Section officers, women, and those from racial and ethnic traditionally underrepresented minority groups.
  - a. Communications. Cristine Cioffi outlined the Committee's call for a series of initiatives to aid the Association in improving all facets of its communications, particularly those between the Association and its Sections and Committees, as well as among those groups, between the Association and its members, and between the Association and county, local and other bar groups.
  - b. Composition of the Executive Committee and Nominating Committee. Describing recommendations relating to the composition of the Executive Committee and Nominating Committee, Mr. Baldwin advised that the Committee proposes the expansion of the Executive Committee to 30 members through the



addition of two Vice-Presidents and four members-at-large; modification of the formula for allocating Section delegates to the House to increase representation in that body; and a suggestion that the Executive Committee add a meeting each year that could be rotated among the various regions of the state. The report also calls for expansion of the Nominating Committee to promote diversity and to achieve a composition that reflects more accurately the distribution of the resident Association membership among the various judicial districts.

- c. Diversity. Seymour W. James Jr. discussed measures to enhance diversity, including the adoption of a diversity policy by the Association, coupled with the designation of the Secretary as Diversity Chair, and the creation of a Committee on Diversity; and the addition of 12 seats to the House to provide representation for racial and ethnic traditionally underrepresented minority groups.
- d. Terms of office. Steven C. Krane explained proposals to shift the start of terms for Association officers, Committee Chairs, Section officers, Executive Committee members and the House of Delegates to February 1 of each year.
- e. Leadership development. Stephen P. Hoffman reviewed the recommendation to establish a Committee on Leadership Development to identify, encourage and mentor future leaders of the Association, to make recommendations concerning individuals to fill elective or appointive positions, and to further the goals of greater diversity and greater representation of former Section leaders among the leadership of the Association.
- f. Delegates to ABA. James R. Silkenat summarized the proposal to add two seats to the House for the Chair of the New York delegation to the ABA House (also designated as the ABA State Delegate from New York) and the New York representative on the ABA's Board of Governors.

The Delegates were advised that upon extensive discussion of the report, the Executive Committee determined to await discussion by the House. Discussion then commenced as to timing and procedures for consideration of the report by the House, including the proposed guidelines to govern consideration of the various recommendations set forth in the report.

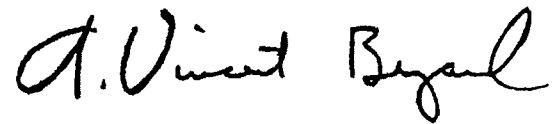
In debate on a motion to approve the proposed guidelines, an amendment was proposed to consider at the June meeting all topics except the Executive Committee and Nominating Committee measures, with those

two to be reviewed at the November meeting. The motion to amend did not prevail in a voice vote. Another motion to amend, calling for deferral until the June meeting, was adopted by a standing count of 45 to 42. The main motion approving the guidelines, as modified to provide for consideration in June, was then adopted by voice vote.

9. Report of the Chair. President-Elect presented the following matters:
  - a. Corporate governance. The Business Law Section had prepared a report, circulated to the Delegates, providing an update on the issues and developments resulting from the enactment of the Sarbanes-Oxley Act on corporate governance. The Association, with relevant Sections, and Committees, will continue to address these issues.
  - b. Designation of Delegates to the House. A motion was adopted unanimously by voice vote approving the designation of Delegates filed by local bar associations to serve for the 2003-2004 Association year beginning June 1, 2003.
  - c. Filing of the roster of the House. A motion was adopted unanimously by voice vote filing the roster of the House for 2003-2004.
  - d. Scheduling resolution for consideration of the report and recommendations of the Special Committee on Multi-Jurisdictional Practice. In a voice vote, the House adopted a motion unanimously approving a scheduling resolution for consideration of the report and recommendations of the Special Committee on Multi-Jurisdictional Practice at the June 21, 2003 meeting. The report is being circulated to Sections, Committees and local bar associations for comment. The scheduling resolution directs that these comments be submitted in writing no later than June 1 to provide opportunity for review by the Special Committee.
  - e. Appreciation for service. Appreciation was expressed to President Tharp for her leadership and advocacy on behalf of the Association. The House was informed that Ms. Tharp was presented with the Kate Stoneman Award by Albany Law School. The Award, in memory of the first woman to be admitted to the bar in New York State, recognized President Tharp for her contributions to the practice of law and fostering equity and opportunity in the profession. Outgoing members of the House were thanked for their service and collegial participation in addressing and resolving issues that have come before the House in the past year.

10. Date and place of the next meeting. President-Elect Levin announced that the next meeting of the House of Delegates was scheduled for Saturday, June 21, 2002 at The Otesaga Hotel in Cooperstown, New York.

Respectfully, submitted,

A handwritten signature in black ink that reads "A. Vincent Buzard". The signature is written in a cursive style with a large, prominent initial "A".

A. Vincent Buzard

