

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
APRIL 1, 2006
BAR CENTER, ALBANY, NEW YORK**

PRESENT: Adler; Alcott; Amuso; Asarch; Ayers; Barney; Barson; Bartlett, L.; Bartlett, R.; Berman; Beinstock; Boyers; Bracken; Buholtz; Burke; Buzard; Campanaro; Campos Galvan; Carlucci; Carmen; Castellano; Chambers; Cioffi; Clarke; Cloonan; Cohen; Cosgrove; Costello; Cummings; D'Angelo; Davidoff; Davis; Dietz; DiGiovanna; Dimon; Dixon; Doerr; Dolin; Doyle; Duffy; Edmunds; Fernandez; Flaherty; Flood; Frank; Gacioch; Gerstman; Getnick; Glanzer; Goldblum; Gorgos; Gouz; Grays; Green; Greenberg; Gross, J.; Gross, M.; Gutekunst; Harren; Harris; Haskel; Hassett; Hayes; Higgins; Hoffman; Hollyer; Horan; Jacobs, R.; Jacobs, S.; James; Kamins; Karson; Kelly, Matthew; Kiernan; Kinum; Klein; Kougasian; Krane; Kranis; Kretser; Lamantia; Lansner; Lau-Kee; Lawrence; Leber; Leinhardt; Lesk; Levin; Lieberman; Lindenauer; Longo; Madigan; Makofsky; Margolin; Martin; Martinelli; McCarthy, Jeremiah; McCarthy, Joseph; Meislahn; Meyer; Mitzner; Moore; Moreland; Moy; Myers; Nashak; Nathanson, E.; Nathanson, M.; Netter; Ostertag; Paul; Plevan; Potter; Priore; Privitera; Pruzansky; Purcell; Reimer; Reynolds; Richman; Rifkin; Rivera; Robertson; Romero; Rosenberg; Rothstein; Runes; Safer; Sandner; Santemma; Schraever; Schultz; Seiden; Seitz; Sherman; Sherwin; Shulman; Silkenat; Smoley; Sonberg; Sperendi; Standard; Stenson; Sunshine, J.; Sunshine, N.; Tell; Thompson; Thornton; Tishler; Tully; Tyler; Wachtler; Walsh, J.; Walsh, O.; Weinberger; Weinstein; Welby; Williams, B.

Mr. Alcott presided over the meeting as Chair of the House.

1. Approval of minutes of January 27, 2006, meeting. A motion was unanimously adopted accepting the minutes as previously distributed.
2. Report of the Treasurer. Mr. Ayers, Treasurer, reviewed the end-of-year 2005 operating budget, reporting that membership dues had increased \$421,000 with \$85,000 attributable to new members. CLE revenue decreased by approximately \$700,000 while total CLE expenses increased by \$971,000, with the decline in revenue having been anticipated by the Finance Committee as fewer attorneys are required to re-register and report CLE credits in odd-numbered years. There was an operating deficit for the year of \$909,000, primarily due to pension and post-retirement adjustments and an additional one-time adjustment for accumulated staff sick time; Mr. Ayers observed that the pension and post-retirement medical expenses are non-cash accruals and that decreases in long-term interest rates had driven the rise in projected future costs for these two items. Mr. Ayers noted further that the Association had earmarked the long-term reserve fund to assure sufficient assets to offset these future liabilities. With respect to the current year's financial statements, Mr. Ayers reported that total revenue through February 28, 2006 was \$11,995,000, approximately \$647,000 more than last year. Membership and section dues have increased by approximately \$700,000, while total expenses have increased by approximately \$328,000. He indicated that while still early in the year, financial performance is consistent with the budget projections developed by the Finance

Committee and that the Association remains in sound financial condition. The report was received with thanks.

3. Election of the Nominating Committee and NYSBA Delegates to the ABA House of Delegates. A. Thomas Levin presented the report of the Nominating Committee on behalf of the chair, Lorraine Power Tharp.

a. Election of members of the Nominating Committee. The following were nominated for service on the 2006-2007 Nominating Committee:

Members-At-Large: A. Thomas Levin as Chair and Kenneth G. Standard and Lorraine Power Tharp as members. A motion was adopted by unanimous voice vote to elect the members-at-large. Mr. Levin observed that in accordance with the Bylaws amendments adopted at the January 27, 2006 Annual Meeting, Steven C. Krane will serve as alternate member-at-large in the event a vacancy should arise.

District members and alternates of the Nominating Committee: First – Manuel Campos Galvan, Catherine A. Christian, Joel B. Harris, Ann B. Lesk, Gerald G. Paul, Edwin D. Robertson, James R. Silkenat, Lisa M. Stenson, and Susan J. Walsh, with Ellen Lieberman, First Alternate, Louis Crespo, Second Alternate, and Marilyn J. Flood, Third Alternate; Second – Lawrence F. DiGiovanna and Barton L. Slavin, with Rose Ann C. Branda as Alternate; Third – Hon. Gerard E. Maney and Miriam M. Netter, with Henry M. Greenberg as Alternate; Fourth – to be submitted; Fifth – James F. Dwyer and Ellen Stempler Weinstein, with Timothy A. Benedict as Alternate; Sixth – Mark S. Gorgos and David M. Gouldin, with Rosanne Mayer as Alternate; Seventh – June M. Castellano and G. Robert Witmer, Jr., with James C. Moore as Alternate; Eighth – Maryann Saccomando Freedman and James M. Shaw, with Hon. Erin M. Peradotto as Alternate; Ninth – Frank M. Headley, Jr., Catherine M. Miklitsch and Hon. Sam D. Walker, with Ira S. Goldenberg as Alternate; Tenth – John P. Bracken, Emily F. Franchina, Joshua M. Pruzansky and Jon N. Santemma, with Scott M. Karson as First Alternate and Peter H. Levy as Second Alternate; Eleventh – George J. Nashak, Jr. and Steven Wimpfheimer, with Arthur N. Terranova as Alternate; Twelfth – Steven E. Millon and Maxwell S. Pfeifer, with Daniel M. Chavez as Alternate.

A motion to elect the foregoing was adopted by unanimous voice vote.

b. Election of Delegates to ABA House: A motion to elect the following for a two-year term commencing in August 2006 was adopted by unanimous voice vote: A. Vincent Buzard, Steven C. Krane, A. Thomas Levin, Kathryn Grant Madigan, and Robert L. Ostertag. A separate motion was adopted by unanimous voice vote to elect Manuel Campos-Galvan as the Young Lawyer Delegate to the ABA House for a similar two-year term.

4. Report of the President. Mr. Buzard updated the House on the following developments and initiatives:
- a. He had recorded three public service announcements for broadcast on topics including lawyer advertising, the People's Law School, and the rule of law. The announcements were played for the House.
 - b. Fifteen newspapers are publishing the "Ask-a-Lawyer" column, and copies of columns published from December 2005 through March 2006 were distributed to the delegates.
 - c. The Task Force on Cameras in the Appellate Courts, chaired by Carolyn G. Nussbaum of Rochester, is expected to issue its final report for presentation to the House in June.
 - d. The report of the Task Force on Lawyer Advertising, adopted by the House in January, had been transmitted to the Presiding Justices and was under their consideration. He noted that he had informal contact with each of the Presiding Justices regarding the report.
 - e. The Task Force on Attorney-Client Privilege would present an interim report later in the meeting. A report that had been approved by the Executive Committee on March 27 and transmitted to the United States Sentencing Commission that same day was distributed to the House.
 - f. The Task Force on Eminent Domain would present its report later in the meeting, and he was in contact with legislative leaders regarding this topic.
 - g. He met with Senator Schumer regarding the Association's concerns about pending legislation on habeas corpus restrictions and the Lawsuit Abuse Reduction Act (LARA). With respect to habeas corpus, an "opt-in" provision was included in the Patriot Act and has little effect on New York matters. With respect to LARA, he noted a continuing need to remind lawyers that it would affect not only tort litigation, but commercial litigation as well.
 - h. He noted that the Federal "key contact" program was operational, and he invited House members who had not volunteered to serve as a Federal legislative "key contact" to do so.
 - i. He reported that the Federal Trade Commission did not submit an application for certiorari to the Supreme Court, thus concluding the litigation regarding the Gramm-Leach-Bliley Act. He thanked past president Steven C. Krane and his firm, Proskauer Rose LLP, for their pro bono work on the case.
 - j. With respect to the State Legislature, he had testified at the Judiciary Committee budget hearing in February and has met with key legislative leaders regarding

issue of interest to the Association. He reported on the legislative priorities that the Association is pursuing during the current legislative session:

- Judicial salary increases – Funds were included in the Judiciary budget for salary increases and there appears to be a sentiment that salaries should be increased. He reported that on March 31, the Executive Committee endorsed the Chief Judge’s legislative proposal for the establishment of a quadrennial commission to recommend salary increases for judges, legislative leaders, and Executive branch officials.
 - Videotape recording of custodial interrogations – The state budget includes funds for pilot projects in two counties. The focus will be on finding counties small enough to be able to work with the limited funding but large enough to demonstrate that videotaping is practicable
 - Funding for civil legal services – The Association is pursuing efforts to secure funding for targeted projects. In addition, as set forth in the report of the Special Committee on Funding for Civil Legal Services to be presented later in the meeting, cy pres funds may serve as a source. Finally, a pro bono conference is scheduled to take place in Rochester later in the month.
 - No-fault divorce legislation – The Association will continue to work with other groups to see whether concerns can be resolved and an acceptable bill adopted.
 - Equal legal rights for same-sex couples – The Legislature is waiting for a ruling from the Court of Appeals before considering legislative action.
- k. With respect to judicial selection, he has appointed former president G. Robert Witmer, Jr. to chair the Special Committee on Court Structure and Judicial Selection, and that committee will review the court’s decision in *Lopez Torres v. New York State Board of Elections* as well as the most recent report issued by the Chief Judge’s Commission to Promote Public Confidence in Judicial Elections to determine recommendations with respect to the judicial convention process.
- l. With respect to reports issued recently by commissions appointed by the Chief Judge, he has asked the Family Law Section to review the report of the Matrimonial Commission, the Committee on Court Operations to coordinate review of the report of the Commission to Examine Solo and Small Firm Practice, and the Special Committee on Fiduciary Appointments to review the report of the Commission on Fiduciary Appointments.
- m. Paul C. Saunders, Director of the New York State Judicial Institute on Professionalism in the Law, will chair a CLE program on professionalism on May 18, 2006 in New York City.

- n. The Association has entered into an arrangement with Loislaw by which members will be able to sign up to receive e-mail updates on selected areas of practice on a frequent basis. Samples were distributed to the House.
- o. The Committee on Law Practice Management sponsored a number of very successful programs on practice management during the Annual Meeting and continues to develop programs and materials to assist lawyers in this area.
- p. The Special Committee on Sarbanes-Oxley Issues, chaired by James B. Ayers, is in the process of reviewing the application of Sarbanes-Oxley reforms to not-for-profits and developing recommendations that the Association might adopt on a voluntary basis to assure a high level of fiduciary responsibility. The committee's report and recommendations are expected later this year.
- q. As part of outreach, regional receptions are being planned in the Fourth, Seventh, Eighth and Ninth Districts, following up on the successful reception held previously in the Sixth District. A luncheon is planned in New York City following the May 18 Professionalism program. He also noted that the use of e-mail messages has proven important in member outreach.
- r. He observed that this is the last meeting of the House that he will address as President, and he thanked the members of the House for their support and friendship.

5. Report and recommendations of Special Committee on Funding for Civil Legal Services.

C. Bruce Lawrence, co-chair of the special committee, reported on the use of cy pres awards – the residuary of funds not claimed by beneficiaries of class action lawsuits – to fund civil legal services. He noted that most civil legal service needs are not being met, and cy pres funds could serve as one source to fund those needs. While the committee has concluded that cy pres holds promise as a source, he noted that it will not meet all needs and that the Association should continue to pursue other funding options. The committee recommends (a) the creation of a cy pres manual to encourage awards; (b) educational programs for sections, committees, judges and lawyers; (c) identification of potential recipients and a mechanism to distribute funds, and (d) development of appropriate legislation or court rules with respect to cy pres. After discussion, the following resolution was unanimously adopted:

WHEREAS, the current sources of funding for civil legal services in New York State are inadequate to meet the civil legal needs of low-income persons; and

WHEREAS, courts across the country have begun to make cy pres awards to programs that provide free legal services to the poor; and

WHEREAS, the Association's Special Committee on Funding for Civil Legal Services has issued a report concluding that cy pres awards to civil legal services programs in New York is a promising concept and should be pursued by the Association, while continuing efforts to secure permanent, stable funding in recognition that cy pres awards will not meet the funding needs of civil legal services programs; and

WHEREAS, the Special Committee has proposed an action plan by which the Association would (a) develop a Cy Pres Manual for distribution to relevant segments of the bench and bar, (b) serve as a resource in providing information about cy pres and identifying appropriate groups to receive cy pres awards, (c) cooperate with The New York Bar Foundation to assist in the distribution of cy pres awards, and (d) undertake a study of potential legislation or court rules to govern cy pres awards;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby endorses the report of the Special Committee on Funding for Civil Legal Services; and it is further

RESOLVED, that the officers of the Association are hereby empowered to take such steps as they may deem warranted to implement this resolution.

6. Report and recommendations of Committee on Standards of Attorney Conduct. Steven C. Krane, chair of the committee, reported that in accordance with the scheduling resolution adopted at the November 5, 2005 meeting, his report would address the committee's recommendation that New York adopt the format of the Model Rules of Professional Conduct to replace the existing Code of Professional Responsibility. He noted that the change would provide attorneys with a more accessible source of guidance concerning ethics questions, would give lawyers access to a nationwide body of law, and would enable other jurisdictions to look to New York as a source of information regarding ethics. He also observed that most lawyers entering the profession since 1982 have had exposure to the Model Rules through law school and the Multistate Professional Responsibility Examination and that many Model Rules concepts already have been incorporated into the New York Code. After discussion, a motion was unanimously adopted on voice vote to approve the committee's recommendation that New York adopt the format of the Model Rules of Professional Conduct.

The following resolution was then moved and seconded:

RESOLVED, that the New York State Bar Association, in order to elevate awareness and foster discussion within the profession of the proposed New York Model Rules of Professional Conduct, fund educational fora and other appropriate programs that would be available at no cost to attendees and that such programs

commence immediately throughout New York State after the adoption of the proposed format change.

A motion to table failed, following which a motion to amend the resolution to change "fund" to "conduct" was approved by a standing vote of 82-38. As amended, the motion was then approved.

Mr. Krane reminded the House that the deadline for submission of comments on the rules scheduled for consideration at the June House meeting is May 26, 2006.

7. Report of Task Force on Eminent Domain. Jon N. Santemma, a member of the Task Force, presented the report on behalf of committee chair Patricia Salkin. He reviewed the Task Force's report analyzing the Supreme Court decision in *Kelo v. City of New London* and applicable New York law and noted the Task Force's conclusion that there has been little empirical research relating to the use of eminent domain, thus dictating a need for further study before changes to existing law are made. He also reported the Task Force's finding that the *Kelo* decision does not represent a radical departure from existing law, but is consistent with the mainstream view in both Federal and New York law concerning this area. He then outlined the eight recommendations made by the Task Force, including a proposal that a Temporary State Commission on Eminent Domain be established to study the complex legal, economic and constitutional issues surrounding eminent domain. The following resolution was then moved and seconded:

WHEREAS, the United States Supreme Court's decision in *Kelo v. City of New London*, which held that economic development is a valid public use for purposes of eminent domain, has generated extensive discussion and debate regarding the law of eminent domain; and

WHEREAS, seventeen bills have been introduced in the New York State Legislature to address various aspects of eminent domain reform, and both the Senate and the Assembly have held public hearings to gather information about the use of eminent domain; and

WHEREAS, the Association's Task Force on Eminent Domain has issued a report analyzing the law of eminent domain and the initiatives that have been proposed following the *Kelo* decision; and

WHEREAS, the Task Force has concluded that the *Kelo* decision does not represent a revolutionary departure from existing law but, rather, represents the mainstream view with respect to both Federal and New York law regarding eminent domain; and

WHEREAS, the Task Force has made eight preliminary recommendations with respect to eminent domain reform, as set forth in its report;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby endorses the report and recommendations of the Task Force on Eminent Domain; and it is further

RESOLVED, that in view of the recommendation that a Temporary State Commission on Eminent Domain be established to study the complex legal, economic and constitutional issues relating to eminent domain, no legislation restricting the purposes for which eminent domain may be exercised should be enacted pending the completion of such study; and it is further

RESOLVED, that the Association concludes that the intemperate criticism directed at the Supreme Court as a result of the *Kelo* decision is unwarranted and inappropriate; and it is further

RESOLVED, that the officers of the Association are hereby empowered to take such steps as they may deem warranted to implement this resolution.

A motion to amend the first "Resolved" clause to approve only recommendations 1 and 3 through 8 was defeated on voice vote, following which the resolution as set forth above was approved on voice vote.

8. Report of Special Committee on Unlawful Practice of Law. Harvey B. Besunder, chair of the Special Committee, reviewed the committee's work to date and recommendations for future activities, including informational public hearings; a canvass of local bar associations; outreach to Association sections; a review of cases relating to unauthorized practice; development of recommendations regarding the use of law students and paralegals; opening a dialogue with the Legislature, the Attorney General, and the Administrative Board; and development of standards and guidelines for permissible activities of suspended/disbarred attorneys. A recommendation that the report be revised at page 6 with respect to proposed legislation that would make unauthorized practice a felony was accepted by the committee. After discussion, the following resolution was unanimously adopted by voice vote:

WHEREAS, the Special Committee on Unlawful Practice of Law has been charged with making recommendations on issues of unlawful practice of law, rules, and means of enforcement for the protection of the public from the adverse effects of unauthorized practice; and

WHEREAS, the committee has concluded that there is a need to develop empirical evidence of the harm to the public caused by unauthorized practice, to examine efforts to enforce laws relating to unauthorized practice, and to continue efforts to educate the public about the importance of consulting an attorney when faced with legal problems; and

WHEREAS, the committee has made seven preliminary recommendations with respect to furthering these goals, as set forth in its report;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby endorses the interim report of the Special Committee on Unlawful Practice of Law; and it is further

RESOLVED, that the officers of the Association are hereby empowered to take such steps as they may deem warranted to implement this resolution.

9. Report of Task Force on Attorney-Client Privilege. Stephen D. Hoffman, chair of the Task Force, presented an informational report on the committee's activities to date regarding the practice of state and federal prosecutors/regulators to ask for waivers of the attorney-client privilege and work-product protection. He outlined the committee's report to the United States Sentencing Commission in response to a request for comment, recommending that the Commission delete from the Sentencing Guidelines the commentary relating to waiver of privilege and, instead, include an affirmative statement that waivers should not be considered as a factor in sentencing. Mr. Hoffman reported that because the deadline for comment was March 28, 2006, the report was considered and approved by the Executive Committee in a conference call meeting held on March 27, 2006. Going forward, he reported that the Task Force would interview prosecutors/regulators regarding their practices of requesting waivers and the circumstances that would give rise to such a request. In addition, the Task Force will interview defense counsel regarding their experience with this practice in order to ensure the development of a balanced perspective of the relevant issues. The report was received with thanks.
10. Report of The New York Bar Foundation. Robert L. Haig, President of the Foundation, presented an informational report on recent developments with respect to the Foundation, noting that in January 2006 the Foundation had awarded \$331,000 in grants. He also reported on continuing efforts with the Hurricane Katrina Relief Fund and the establishment of a Legacy Society for persons who intend a bequest of at least \$1 million to the Foundation. Finally, he announced the Foundation's new Website: www.tnybf.org. The report was received with thanks.
11. Remarks of the Chair. Mr. Alcott reported on the following:
 - a. The report of the Committee on Media Law, which had been planned for this meeting, was being deferred to allow further discussions among the interested parties to resolve outstanding concerns and will be considered at a later date.
 - b. Motions to approve the designation of delegates filed by the county and local bar associations for the 2006-2007 Association year and to approve the filed roster of the members of the House for the 2006-2007 year were requested and approved.

- c. He observed that this meeting represents the last House meeting of the Association year and noted that a number of House members were completing their terms, expressing appreciation for their service. He also expressed appreciation to Mr. Buzard for his innovative leadership as President of the Association. Finally, he noted that this meeting represents his last as Chair of the House and thanked the House for the opportunity to serve.
12. New business.
- Memorial to Hon. Matthew J. Jasen. Jeremiah J. McCarthy presented a memorial to Hon. Matthew J. Jasen, a retired Judge of the New York State Court of Appeals and member of the Association, who passed away in February 2006. A copy of the memorial is appended to these minutes.
13. Date and place of next meeting. Mr. Alcott announced that the next meeting of the House of Delegates would take place on Saturday, June 24, 2006 at The Otesaga in Cooperstown.
14. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,



Kathryn Grant Madigan
Secretary