

NEW YORK STATE BAR ASSOCIATION  
MINUTES OF HOUSE OF DELEGATES MEETING  
MARRIOTT MARQUIS, NEW YORK CITY  
JANUARY 29, 1999

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PRESENT: Ambrosia; Anglehart; Ayers; Bailey; Baldwin; Barone; Bass; Batra; Bauman; Benesch; Bergen; Bohner; Bracken; Buzard; Campanie; Clements; Cloonan; Coffey; Cohen; Cohn; Cometa; Connery; Connolly; Contiguglia; Cooper; Copps; Corcoran; Cunha; DeCoursey; DiGirolomo; DiNardo; Dollard; Dwyer; England; Eppers; Farrell; Felder; Field; Fink; Fishberg; Flood; Franchina; B. Freedman; M. Freedman; Gacioch; Galloway; Gardella; Gerstman; Getnick; Gingold; Giordano; Glover; Goldstein; Golinski; Gorgos; Gregory; Gutleber; Haig; J. Hall; Hallenbeck; Halpern; Harris; Hassett; Hayes; Headley; Helmer; Heming; Hesterberg; Higgins; Hirsch; Hodges; Hoffman; Horan; Inclima; Jacobs; James; M. Jones; Kahn; Kamins; Kelly; Kendall; Kenney; Kenny; Kessler; Kilpatrick; Kilsch; M. Klein; Kougasian; Krane; Kretser; Lawrence; Leber; Levin; C. Levy; P. Levy; Lieberman; Lilly; Loengard; J. Longo; M. Longo; MacCrate; Madigan; Mandell; McCarthy; McGlinn; Midonick; Mihalick; Miklitsch; M. Miller; Miranda; Moore; A. Murray; K. Murray; Netter; Nussbaum; O'Connor; O'Leary; Ostertag; Palermo; M. Patterson; Peradotto; Pfalzgraf; Pfeifer; Pickholz; Porter; Pruzansky; Raylesberg; Reede; Reich; Reimer; Reizes; Reynolds; Rice; Richardson; Robinson; Roper; Rosner; Rothkopf; Rothstein; Rubin; Santemma; Schraver; H. Schumacher; Seymour; Shapiro; Snyder; Souther; Standard; Steiner; Stokes; Sunshine; Taylor; Terranova; Tharp; Thompson; Tishler; Trevett; D. Tyler; Vigdor; Vinal; Vitacco; Wales; M. Walsh; O. Walsh; Whalen; Williams; Witmer; Wolf; Wollman; Yanas; Yates.

1. Approval of minutes of November 7, 1998 meeting. The minutes were deemed accepted as distributed previously.
2. Report of Treasurer. The Treasurer's report for the preceding fiscal year, which had been presented by Treasurer Frank M. Headley, Jr. to the members of the House at the Annual Meeting of the Association, was received with thanks.
3. Report of Nominating Committee and election of officers and members-at-large of the Executive Committee. Maxwell S. Pfeifer, Chair of the Nominating Committee, reported that the committee had nominated the following individuals for election as officers and members-at-large of the Executive Committee for the 1999-2000 Association year:

**PRESIDENT-ELECT**

Paul Michael Hassett, Buffalo

**SECRETARY**

Lorraine Power Tharp, Albany

**TREASURER**

Frank M. Headley, Jr., Scarsdale

**DISTRICT VICE-PRESIDENTS**

**FIRST:**

Kenneth G. Standard, New York City

**SECOND:**

Edward S. Reich, Brooklyn

**THIRD:**

James B. Ayers, Albany

**FOURTH:**

Peter V. Coffey, Schenectady

**FIFTH:**

Dennis R. Baldwin, Syracuse

**SIXTH:**

Eugene E. Peckham, Binghamton

**SEVENTH:**

A. Vincent Buzard, Rochester

**EIGHTH:**

Joseph V. McCarthy, Buffalo

**NINTH:**

H. Glen Hall, Briarcliff Manor

**TENTH:**

A. Thomas Levin, Mineola

**ELEVENTH:**

Robert J. Bohner, Garden City

**TWELFTH:**

Steven E. Millon, Bronx

**AT-LARGE MEMBERS OF THE EXECUTIVE COMMITTEE**

Mark H. Alcott, New York City  
James F. Dwyer, Syracuse  
Sharon Stern Gerstman, Buffalo  
John J. Kenney, New York City  
Steven C. Krane, New York City  
Ellen Lieberman, New York City

There being no further nominations, a motion was made and carried that the nominations be closed. The Secretary then cast a single ballot for the officers and members-at-large of the Executive Committee.

Kay C. Murray expressed concern regarding the comparatively few women who had been nominated for elective office in the Association. She commended Mr. Moore for hosting a meeting earlier in the week with a group of active women members and leaders in the Association to explore the role of women in the Association and means

for enhancing leadership opportunities for them. She indicated that with the rising number of women entering the legal profession and joining the NYSBA, their share of leadership positions should increase, and the Association should be supportive of this growth to increase diversity and the strength of the organization.

Peter V. Coffey observed that while the percentage of women holding leadership positions in sections paralleled that of women members in the Association, he concurred in Ms. Murray's observation that there needed to be an increase in the number of women leaders at the Association level.

4. Presentation of Ruth G. Schapiro Award. Mr. Moore presented the seventh annual Ruth G. Schapiro Award to Anne F. Mead, a private practitioner in Bay Shore, and former Deputy County Executive for Suffolk County, former President of that county's Community Council, and past Chair of the New York State Public Service Commission. She was recognized for her many noteworthy, law-related contributions to address and enhance awareness of the concerns of women through her professional work and extensive volunteer activities, and for being a role model and mentor, encouraging others to enter the legal profession and become involved in community service. Ms. Mead addressed the House and expressed her appreciation to the Association for being honored with the Ruth G. Schapiro Award.

5. Report and recommendations of Task Force to Study "Pay to Play" Concerns. A. Thomas Levin, Chair of the Task Force to Study "Pay to Play" Concerns, summarized the task force's report and recommendations regarding "pay to play," which deals with issues surrounding law firms accepting municipal bond engagements if the firm or any of its attorneys make more than minimal contributions to the campaigns of public officials who award such work. He noted the lack of empirical evidence with respect to this practice, but indicated that the body of anecdotal evidence coupled with the public perception dictated that some remedial actions were warranted. He then summarized the task force's recommendations for addressing this area, including: (a) the adoption of legislation to clarify existing statutes that it is illegal to make or solicit contributions, or to provide or solicit anything of value, to public officials, candidates for public office, political campaign committees, or political parties, in exchange for a promise, express or implied, of designation or selection of any person or entity to provide any service to any public entity, or to be considered to provide any such service; (b) the adoption of an Ethical Consideration explaining that the practice of "pay to play" is improper and is prohibited by the Code of Professional Responsibility; (c) the Code of Professional Responsibility should not be amended to prohibit political contributions by any lawyer or law firm to an extent greater than those contributions may be restricted for any other person or entity, nor to establish any presumption that a contribution in excess of any specified amount is presumed to be for an improper cause; (d) until the Legislature has adopted meaningful campaign finance reform legislation, full disclosure should be made to the Office of Court Administration of all substantial contributions by lawyers or law firms to political candidates and should be applicable to "soft" as well as "hard" money; and (e) except in minor matters or where

compelling circumstances exist, legal counsel, and other professional services should be selected by governmental entities on the basis of merit and not on the basis of political activity or contributions.

Mr. Levin then noted revisions made to proposed Ethical Considerations and to the task force's proposed resolution based on comments received from interested groups, including the Executive Committee, to clarify that the prohibited contributions were for obtaining government legal engagements, and to the proposed resolution to incorporate the concept that a disinterested person would conclude that the conduct in question was intentional after considering the pertinent factors including those set forth in the proposed Ethical Considerations.

Discussion then ensued, following which the House recommended, and the task force accepted a revision to the language of the proposed Ethical Considerations to include political campaign committees or political parties among the groups referenced with respect to contributions. A motion was then adopted approving the following resolution:

**RESOLVED**, that the New York State Bar Association unequivocally condemns any arrangement under which the selection or consideration of a person or entity to be retained to provide services to public entities depends, in whole or in part, on whether the person or entity has made or solicited campaign contributions, and it is further

**RESOLVED**, that the New York State Bar Association supports, and urges the Legislature to enact at its 1999 session, legislation which would clarify that it is illegal for any person or entity to make or solicit contributions, or provide or solicit anything of value, to any candidate for public office, public official, political campaign committee, or political party, in exchange for a promise, express or implied, of designation or selection of any person or entity to provide any service to any public entity, or to be considered to provide any such service, subject to the proviso that a disinterested person would conclude that the alleged conduct was intentional, after considering the circumstances, including factors such as those set forth in EC 2-38 as contained in Proposal B annexed, and it is further

**RESOLVED**, that the New York State Bar Association hereby adopts Ethical Considerations EC 2-37 and EC 2-38, annexed to the Report of the Task Force to Study Pay to Play Concerns as Proposal B, and as amended January 28, 1999, and it is further

RESOLVED, that lawyers and law firms should continue to be permitted to make political contributions which are permitted to be made by any other person or entity, subject, however, to the requirements of the Code of Professional Responsibility as clarified by EC 2-37 and EC 2-38, and it is further

RESOLVED, that until such time as the Legislature has adopted meaningful campaign finance reform legislation, full disclosure should be required as to significant political contributions by lawyers and law firms to candidates, parties and other political bodies, such disclosures to be made to the Office of Court Administration in a form which permits the media and other interested persons to access the disclosure information in a meaningful manner, and it is further

RESOLVED, that the New York State Bar Association urges the State Legislature to enact legislation requiring, except in minor matters or where other compelling circumstances exist, that all State and local governmental bodies and entities with substantial population, and in any case where the prospective fees for services are reasonably anticipated to exceed a reasonable minimal amount, select persons to provide legal counsel, and other professional services, on the basis of merit, through the use of merit procurement procedures such as those recommended in the ABA Model Procurement Code, and not on the basis of political activity or contributions, and it is further

RESOLVED, that the officers of the New York State Bar Association are hereby empowered and directed to take such other and further action as may be required or deemed appropriate to achieve the implementation of the recommendations of the Task Force to Study Pay to Play Concerns.

6. Report of Special Committee on the Future of the Profession. Robert L. Ostertag, Chair of the Special Committee on the Future of the Profession, summarized the committee's report covering major trends and issues that will likely be of future concern to the legal profession so that the Association can prepare to meet those developments in a pro-active manner. He reviewed the topical areas considered by the committee: the future structure and composition of the profession; the rising economic pressures on tomorrow's lawyers and their effect on professionalism; practice modes of the future, including specialization and general practice; the future image of the profession, including educational and practice improvements; advertising and client solicitation; court/litigation/future bench-bar relations; future legislative/bar relations; and pro bono service to the poor-past, present and future. Mr. Ostertag noted that of the foregoing subjects, the committee considered the image of the profession, its future structure and composition, and pro bono service to be the most critical. He also referenced suggestions made by the committee for addressing

various of the issues in a constructive manner. The report was received with the thanks of the House.

7. Report of President. Mr. Moore advised that, as was done at previous meetings, to allow as much time as possible for the discussion of substantive items, he had furnished a detailed, written report to the members, and would provide only a brief oral summary of significant items. A copy of the written report is attached to these minutes. Mr. Moore then reported the following matters:

a) He was continuing his series of meetings with bar leaders statewide. Since his last report, he had met with local bar leaders in Albany, Long Island, and with board members in Nassau County. He noted his attendance at bar functions of the Westchester County, New York County and Wyoming County bars, and that member interest and participation remained high. Common themes at these meetings continued to be concern over inadequate 18-B fees, problems created by OCA's changes in matrimonial forms, mandatory continuing legal education, and the stress of practice. Mr. Moore stated that he was continuing his practice of meeting with legal services offices across the state, and since November had visited providers in Albany, Manhattan and Queens. He also noted his separate meeting earlier in the week with leaders of New York's minority bars and with women leaders of the NYSBA covering issues of concern as well as expanding opportunities for participation and leadership in the NYSBA.

He noted the earlier comments in connection with the report of the Nominating Committee about the comparatively few women reaching the upper levels of Association leadership and expressed his concern that progress needs to be made in this area.

b) The Special Committee on Multi-Disciplinary Practice and the Legal Profession had recently completed a report addressing the issues connected with multi-discipline practice, which involves members of multiple professions being grouped in a single firm to provide services to clients. He indicated that the Executive Committee earlier in the week had authorized circulation of the report for comment preparatory to the House taking the matter up later in the year.

c) The Committee on Alternative Dispute Resolution was nearing completion of its study of the various forms of alternative dispute resolution and anticipated submission of a written report for preliminary consideration by the House at the April meeting.

d) He was planning to meet later in the winter with Attorney General Spitzer and the Governor's Counsel to maintain communication with those two offices on matters of interest to the organized bar.

e) He had met recently with Chief Judge Kaye to discuss a number of matters including the concerns raised by a number of local bar associations regarding changes in administrative procedures governing matrimonial practice, including the new forms required by OCA. Mr. Moore indicated he had encouraged Judge Kaye to discuss these issues firsthand with local bar leaders.

f) He had participated in a conference titled "Independence of the Judiciary" sponsored by the American Bar Association and the Conference of Chief Judges.

g) At the invitation of the Union des Avocats, he had participated in a United Nations celebration commemorating the fiftieth anniversary of the Declaration of Human Rights.

h) On behalf of the officers and House of Delegates, he expressed appreciation to Kathleen M. Heider, the Association's Director of Meetings, for her efforts in organizing and staffing Annual Meeting functions, particularly section meetings, to handle the influx of attendees created by the mandatory continuing legal education requirements.

8. Report and recommendations of Commission on Providing Legal Services for the Middle Income Consumers. Paul Michael Hassett, Chair of the Commission on Providing Access to Legal Services for the Middle Income Consumers, and commission members Evan Davis and Frank M. Headley, Jr. summarized an affirmative legislative proposal to provide a procedure for the simplified resolution of cases under \$75,000. They indicated that the proposal stemmed from a recommendation contained in the commission's report as presented to the House of Delegates in 1996, and that it had been developed in consultation with other interested sections and committees. They explained the manner in which the process would function to provide a fair and voluntary means for resolving cases with the assistance of counsel which could not be resolved economically through normal civil trial procedures. Discussion then ensued during which members expressed concerns that while the simplified process provided a mechanism for the early resolution of disputed matters, it could deprive litigants of essential rights. A motion to approve the filing of the proposed legislation was then defeated by vote of the House.

9. Report on Status of Litigation Brought by the NYSBA against Attorney General Reno. Former Association President G. Robert Witmer, Jr. reported concerning the status of the litigation commenced in 1998 by the Association against Attorney General Reno challenging the constitutionality of Section 4734 of the Balanced Budget Act of 1997, which had prohibited lawyers and other professional counselors from advising clients on the lawful transfer of Medicaid assets. He indicated that the Federal District Court in 1998 had granted a preliminary injunction in favor of the Association, followed later in the year by a ruling that the statute was unconstitutional coupled with a permanent injunction against its enforcement. Mr. Witmer advised that the Attorney General had appealed this decision to the Court of Appeals for the Second Circuit on the theory that since the unconstitutionality of the statute had been conceded there was technically no case or controversy for resolution

by the District Court. Mr. Witmer indicated that in effect the Attorney General had converted the case from a constitutional challenge to a dispute under Article III based on the application of the Federal Rules of Civil Procedure. He indicated the Association would contest this position, and that arguments would likely be heard by the Second Circuit in late spring. He indicated that he would keep the Executive Committee and the House of Delegates informed concerning developments. The report was received with thanks and with an expression of appreciation by the House for the pro bono representation provided to the Association by Mr. Witmer and other members of his firm.

10. Report and recommendations of Task Force to Consider Tort Reform Proposals. John P. Bracken and David M. Gouldin, Co-Chairs of the Task Force to Consider Tort Reform Proposals, summarized the status of efforts by business groups to revise New York's tort laws and the activities of the task force in response. They reported that earlier in the year, The Public Policy Institute of New York State, Inc., had released a report titled, "An Accident and A Dream," and had urged reform legislation. They indicated that the task force had engaged Daniel J. Capra, Philip Reed Professor of Civil Justice Reform at Fordham University School of Law, to conduct a balanced assessment of the issues and arguments contained in "An Accident and A Dream." They stated that Prof. Capra's analysis had concluded that the major factual assertions in the Public Policy Institute report were unsubstantiated, misleading or incomplete, and that the suggestions for reform were unfair and ineffective. They stated that at its meeting on January 28, 1999, the Executive Committee had authorized distribution of the Capra analysis to the Legislature and to other interested groups. They indicated they would continue to keep the House apprised regarding significant developments.

11. Report of The New York Bar Foundation. Maryann Saccomando Freedman, President of The New York Bar Foundation, described the nature of the law-related projects being supported by The Foundation noting that approximately \$225,000 had been provided to various organizations. She urged the members to read The Foundation's 1998 annual report, which had been distributed earlier in the meeting, as it provided a summary of the charitable work being done by The Foundation in supporting law-related programs. She then introduced William J. Dean, Executive Director of Volunteers of Legal Service, who described that group's services to incarcerated mothers of young children in the New York City area. The report was received with the thanks of the House.

12. Report of Chair. Mr. Rice noted that in continuation of past practice, he had circulated a written report as Chair to allow additional time at meetings for the discussion of substantive items. A copy of the report is attached to these minutes. In addition, Mr. Rice made the following announcements:

a) At the April meeting, the House would be requested to elect five of the NYSBA's eleven delegates to the American Bar Association's House of Delegates. He stated that the Nominating Committee had reported the following nominees for those positions: Maryann Saccomando Freedman, Paul Michael Hassett, James C. Moore, M. Catherine Richardson and G. Robert Witmer, Jr.



b) The Special Committee on Election Law had completed its assigned responsibilities and, with the consent of its chair, was being discharged with the thanks of the officers.

c) The Executive Committee had authorized release of the report of the Special Committee on Multi-Disciplinary Practice and the Legal Profession for review and comment by interested groups. He noted that to allow ample time for review, formal action regarding the report would not take place until the June meeting of the House.

13. Date and place of next meeting. Mr. Rice announced that the next meeting of the House of Delegates was scheduled for Saturday, April 10, 1999 at the Bar Center in Albany, New York.

Respectfully submitted,

A handwritten signature in cursive script that reads "Lorraine Power Tharp". The signature is written in black ink and is positioned above the printed name and title.

Lorraine Power Tharp  
Secretary