

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF THE MEETING OF THE HOUSE OF DELEGATES
JANUARY 28, 2005
MARRIOTT MARQUIS, NEW YORK, NEW YORK**

PRESENT: Alcott; Asarch; Ashcraft; Ayers; Bailey; Barney; Barson; M. Bartlett; R. Bartlett; Bauman; Berman; Bienstock; Blasi; Boyers; Bracken; Brown; Buzard; Campos-Galvan; Cantwell; Castillo; Chambers; Cheng; Cioffi; Clements; Cloonan; Coffey; Connors; Cops; Cyrulnik; D'Angelo; Davis; DiGiovanna; Doerr; Dominguez; J. Doyle; V. Doyle; Duffy; Edmunds; Enea; Fedrizzi; Fernandez; Ferrara; Fink; Fishberg; Flaherty; Flood; Franchina; Frederich; Freedman; Gacioch; Geoghegan; Gerstman; Getnick; Goldenberg; Golinski; Grays; Greenberg; Gregory; J. Gross; M. Gross; Grossman; Gutekunst; Haig; Hall; Hanna; Hans; Harren; Harris; Haskel; Hassett; Hayes; Hendricks; J. Higgins; S. Hoffman; Hollyer; Horan; Jackson; R. Jacobs; S. Jacobs; James; Kachadourian; Kamins; Karson; Katter; J. Kelly; M. Kelly; Kessler; Kiernan; B. King; Kossove; Krane; Kretser; Krooks; Kuntz; Labbe; Lau-Kee; Lawrence; Carolyn Lee; Chanwoo Lee; Charlotte Lee; Leinhardt; Lerose; Lesk; Levin; Levinsohn; Lewis; Lieberman; Lindenauer; Lytle; MacCrate; Madigan; Marwell; Matalon; McCarthy; McShea; Meyer; Miklitsch; Milito; M. Miller; Millman; Mitchell; Mitzner; Moore; Moreland; Moy; Murray; Myers; Nashak; E. Nathanson; M. Nathanson; Netter; Nizin; O'Leary; Ostertag; Paul; Peradotto; Perino; Perlman; Peterson; Pfalzgraf; Plevan; Price; Priore; Privitera; Pruzansky; Quinlan; Ramsey; Reimer; Reitzfeld; Reynolds; Richardson; Richman; Rifkin; Riley; J. Roberts; Romero; Rosner; Rothstein; Safer; Schraver; Seiden; Seitz; Seymour; Shaw; Sherman; Sherwin; Sherwood; Shulman; Silkenat; B. Smith; Smoley; Smolowitz; Sonberg; Spellman; Sperendi; Standard; Stenson; Sweeny; Tell; Terranova; Tharp; Tishler; Tyler; Wales; Walker; Walsh; Warner; Weinberger; Weinstein; Williams; Wilson; Wolford; Young; and Zeltner.

1. Approval of minutes of November 6, 2004 meeting. In a unanimous voice vote, a motion was adopted accepting the minutes as distributed previously.
2. Report of the Treasurer. The Treasurer's report for the preceding fiscal year, which had been presented by Treasurer James B. Ayers to members of the House at the Annual Meeting, was received with thanks.
3. Report of the Nominating Committee and election of officers and members-at-large of the Executive Committee. Steven C. Krane, Chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election to the indicated offices for the 2005-2006 Association year: President-Elect: Mark H. Alcott of New York City; Secretary: Kathryn Grant Madigan of Binghamton; Treasurer: James B. Ayers, Albany; and Vice-Presidents: First District - Stephen D. Hoffman and Bernice K. Leber, New York City; Second District - Barry M. Kamins, Brooklyn; Third District - Rachel Kretser, Albany; Fourth District - Cristine Cioffi, Niskayuna; Fifth District -

Michael E. Getnick, Utica; Sixth District - James C. Gacioch, Binghamton; Seventh District - C. Bruce Lawrence, Rochester; Eighth District - Sharon Stern Gerstman, Buffalo; Ninth District - Henry S. Berman, White Plains; Tenth District - Hon. Joel K. Asarch, Hempstead; Eleventh District - Seymour W. James Jr., Kew Gardens; and Twelfth District: Lawrence R. Bailey Jr., New York City. Nominated as members-at-large of the Executive Committee were: Donald C. Doerr, Syracuse; Vincent E. Doyle III, Buffalo; John H. Gross, Northport; Claire P. Gutekunst, New York City; Jay G. Safer, New York City; David M. Schraver, Rochester; and for the two newly added at-large positions under the Bylaw amendment approved in the Association special meeting in November, David L. Edmunds Jr. of Buffalo and Glenn Lau-Kee of White Plains.

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

4. President's report. The President reported on the following matters:
 - a. Judiciary budget. He will testify in support of the 2005-2006 judiciary budget proposal as fair and reasonable. The general fund budget of approximately \$1.45 billion, which includes the bargaining agreements between the state and nonjudicial personnel approved by the Legislature, reflects an increase of 4 percent. Discretionary expenses in the budget amount to 0.5 percent and seek to institutionalize various innovations, such as problem-solving courts.
 - b. Judicial selection. In a December conference call meeting concerning the proposed court rules circulated by the Chief Administrative Judge to establish district judicial election qualification commissions and require the electronic filing of campaign finance disclosure statements, the Executive Committee approved the recommendations of the Special Committee on Court Structure and Judicial Selection concerning these issues and provided additional points. The Committee urged broader representation of local bars on the commissions and procedures for candidates to appeal a decision of not qualified. The Committee Chair, the Hon. Richard D. Simons of Rome, presented the report during the conference call. The Association conveyed to the Office of Court Administration the Committee's report and the additional recommendations of the Executive Committee, including clarifying the lawyer/nonlawyer composition of the commissions, not allowing sitting judges to serve on the commissions, requiring a majority of the full commission for passage of votes on qualifications, evaluating all judicial candidates regardless of whether they agree to participate in a commission's review, keeping a not-qualified finding confidential until the candidate decides to run for office, and having the commissions take

into consideration the findings of local bars that conduct their own evaluations.

- c. Collateral consequences. Work is underway by his newly formed Special Committee on Collateral Consequences of Criminal Proceedings. The Committee is assessing whether or not relevant statutes and regulations effectively assist those released from prison to re-enter society, and is identifying obstacles such individuals and their families confront. The Committee is chaired by Peter J.W. Sherwin and includes a balanced membership of present and past federal and state prosecutors and defense counsel.
- d. Diversity initiatives. In November, the Association co-sponsored, with its Committee on Diversity and Leadership Development and Committee on Minorities in the Profession, and with The Fund for Modern Courts and New York County Lawyers' Association, a forum at the Bar Center on "Reflective Justice: Diversity on the Bench and in the Bar." In December, the President and President-Elect met with leaders of minority bar associations to discuss ways in which the associations can work together to assist the minority legal community and public. Also that month, he spoke at a reception hosted by the Chief Judge at the New York State Court of Appeals in honor of visiting ABA President Robert Grey Jr. The event was co-sponsored by the Association, together with its Committee on Diversity and Leadership Development and the Committee on Minorities in the Profession, and with the Albany County Bar Association, Capital District Black and Hispanic Bar Association and Albany Law School. The 2005 Annual Meeting began with a program on "The Value of Diversity: Creating a Win-Win Environment for Women and Minority Attorneys and Their Employers," presented by the Committee on Women in the Law and co-sponsored by the Committee on Diversity and Leadership Development and the Committee on Minorities in the Profession, followed by the second annual reception, "Celebrating Diversity in the Profession," co-sponsored by the above-referenced committees with the Committee on Membership in collaboration with Association sections and minority bar associations.
- e. FTC litigation – privacy notice. Argument has been scheduled for May 5, 2005 in the Circuit Court of Appeals for the District of Columbia Circuit on the Association's litigation challenging the Federal Trade Commission's application to attorneys of the Gramm-Leach-Bliley Act privacy notice requirements for financial institutions. The Association contended that the FTC acted arbitrarily and capriciously in refusing to exempt attorneys, who are already bound by stricter standards of professional responsibility, and that the measure violates states' rights under the Tenth Amendment. The FTC decided to appeal the decision of the U.S. District Court for the District of Columbia, which, in granting

summary judgment, found in favor of the Association and the other bar associations that subsequently pursued the litigation. The firm of Proskauer Rose is continuing to represent the Association pro bono in the matter and Morgan Lewis & Bockius is coordinating, also pro bono, with the American Bar Association in the preparation of an *amicus curiae* brief by bar associations.

- f. Cross border legal practice. He has established a Special Committee on Cross Border Legal Practice to examine, in light of increasing multi-national businesses, issues relating to practice across international borders and has appointed past President Steven C. Krane as Chair.
- g. Solo and small firm practitioners. He testified at the January 7, 2005 hearing of the Chief Judge's Commission to Examine Solo and Small Firm Practice. In his testimony, he discussed the concerns of solo and small firm practitioners identified by members in Association conferences and research, including law office economics, the impact of court rules, filing requirements and fee increases, heightened practice demands and erosion of quality of life. He informed the Commission of relevant committee and section reports and services and urged continued solicitation of bar association comment on proposed rule changes and other initiatives.
- h. Bar examination. The Association communicated to the New York State Board of Law Examiners the House position concerning the Board's planned increase in the passing score for the bar examination. The House opposed implementation of such an increase until relevant impact studies are completed; requested the Board to make public the record in support and opposition to the proposed increase; asked the Court of Appeals to work with the Board to address these concerns; and if the proposed increase is implemented, called on the Board to study the impact of the higher score on the diversity and competence of the bar and generate sufficient data to determine whether the change has had a disparate impact on protected classes on candidates. The Board has since released its report, which includes a background record related to its decision to raise the passing score, and has indicated its commitment to monitoring the impact as the change is phased in over the next several years. He is forming a committee to assess the function of the bar exam and to propose actions for the Association.
- i. Legislative reform. The Special Committee on State Constitution and Governance, chaired by Professor Michael J. Hutter Jr., is studying procedures of the Legislature, including the state budget process, with the objective of developing constructive recommendations to promote improvements. The Assembly, in January, adopted several reforms in its rules, including eliminating empty-seat voting, setting timetables for

budget decisions and hearings for public review of state agency compliance with the budget. The Senate is exploring similar measures.

- j. State of the State address. He attended the Governor's State of the State address with Executive Director Patricia K. Bucklin, Mr. Lefebvre and Ronald M. Kennedy, Associate Director of Governmental Relations. Among proposed measures, the Governor had indicated that he would seek to reduce the cost of Medicaid. President Standard said that the Association would continue to work with the Elder Law Section to review the Medicaid proposals to ensure that the rights of senior citizens are not impaired. Last year, based on the Section's recommendations, the Association successfully opposed such proposals.
 - k. Youth outreach. He is chairing his newly formed Special Committee on Youth Outreach. Serving as the Committee's departmental vice chairs are: First Department, Susan B. Lindenauer of New York City; Second, Manuel A. Romero of Brooklyn; Third, the Hon. Howard A. Levine of Albany; and Fourth, Paul Michael Hassett of Buffalo. The Committee is examining how the Association and lawyers can assist in enhancing educational opportunities for at-risk youth in poorer neighborhoods and will work with educational and other organizations in this endeavor.
5. Address by the Chief Judge. Chief Judge Judith S. Kaye addressed the House of Delegates on the status of Court System programs and plans for new and expanded initiatives. She described a new initiative funded by a United Way grant to assist residents in the vicinity of a Housing Court in the Bronx through screenings for legal and social services problems. The Chief Judge also reported progress in the implementation of the Court System's civil justice program to enhance the efficiency of civil case management. She gave an update on the work of Court System commissions concerning the jury system, fiduciary appointment process, judicial campaign procedures, and electronic access to court records.
 6. Presentation of the Ruth G. Schapiro Memorial Award. President Standard presented the annual Ruth G. Schapiro Memorial Award to Denise E. O'Donnell of Buffalo for her exemplary contributions in addressing the concerns of women in society. A practitioner in Buffalo who served as the first female U.S. Attorney for the Western District of New York, Ms. O'Donnell was cited for her efforts in enforcing statutes that promote and protect the civil liberties of women and others, her continued work with local agencies and community organizations to prevent housing discrimination against women, her mentoring of women in the profession, and her commitment to legislative initiatives that aid women and children.
 7. Report and recommendations of the Special Committee on Law Practice Continuity. The House was informed that the report and recommendations of the Committee on Law Practice Continuity had been withdrawn from action of the

House of Delegates at this time, to allow for additional time for review and comment by relevant entities.

8. Report and recommendations of the Working Group on the Definition of Pro Bono Services. A. Thomas Levin, Chair of the Working Group on the Definition of Pro Bono Services, updated the House on the Working Group's review of comments from sections, committees and local bars concerning its proposed expanded definition of pro bono services to reflect the broad range of essential legal services contributed by attorneys for the public good. To allow time to address this feedback, action on the proposal was deferred until the April meeting. It was emphasized that the primary focus of the proposal remains on the core mission of serving those in need. The Working Group has recommended a two-tier approach – (1) to continue the aspirational goal previously suggested by the Court System and the Association for 20 hours of free legal services for those of limited means and non-profit organizations that serve such persons and (2) to recognize pro bono legal services provided to other non-profit organizations that serve the public good, activities to improve the law or legal system, and financial contributions to nonprofits that aid persons of limited means. The Working Group presented a scheduling resolution to govern consideration of the proposal, which was adopted unanimously in a motion by voice vote, as follows:

RESOLVED, that the House of Delegates hereby adopts the following procedures to govern consideration at the April 2, 2005 meeting of the House, and any subsequent meetings as may be necessary, of the report of the Working Group on Definition of Pro Bono Service:

1. The revised report and recommendations of the Working Group and will be circulated to members of the House, sections and committees, county and local bar associations, and other interested parties on or about February 8, 2005.
2. **Comments or amendments/substitute resolutions:** Written comments on the Working Group's report and any proposed amendments to the Working group's proposals must be submitted to the Secretary of the Association at the Bar Center by March 8, 2005; otherwise they shall not be considered. All proposed amendments must be in the style used by the Working Group with deletions noted by strikeovers and new material by underscoring, and be accompanied by a brief explanation of the proposed changes. All comments or proposed amendments complying with this procedure shall be distributed to the members of the House in advance of the April 2, 2005 meeting.
3. **Consideration of report at April 2, 2005 and any subsequent meetings:** The report and all amendments will be scheduled for

formal debate and vote at the April 2, 2005 meeting and considered in the following manner:

- (a) The Working Group will be given an opportunity to present an overview of its recommendations.
- (b) The proponents of amendments will have three minutes to present them.
- (c) All those wishing to speak with regard to a particular amendment may do so only once for no more than three minutes, except the sponsor of any amendment may speak a second time for two minutes, and a representative of the Working Group will have two minutes to close.
- (d) A vote on each amendment will be taken, requiring a majority vote for adoption.
- (e) Procedural motions will be considered out of order until debate on all substantive amendments has been concluded.

4. A final vote will be taken to approve the recommendations, as may be amended, for transmission to the Administrative Board.

- 9. Report and recommendations of the Special Committee to Ensure Quality of Mandated Representation. Vincent E. Doyle III, Chair of the Special Committee to Ensure Quality of Mandated Representation, presented an informational presentation regarding the Committee's proposed standards for provider systems for indigent criminal defense. A number of counties are reviewing their provider systems in light of uncertainty about reimbursement under the new legislation that increased hourly rates of counsel and created a system of partial state funding of these added costs. The Special Committee standards, which take into account financial constraints of local governments, include provisions regarding professional independence, early entry of representation, client eligibility, circumstances for partial contributions for services, qualifications of counsel, training, workloads, support services and resources, performance, quality assurance, and compensation. The Committee is reviewing the comments received from sections, committees and local bars. The House is scheduled to take action on the report in April.
- 10. Report and recommendations of the New York County Lawyers' Association Task Force on Judicial Selection. Norman L. Reimer, President of the New York County Lawyers' Association, and Rita W. Warner, Chair of the Subcommittee on Economic Interest of the NYCLA Task Force on Judicial Selection, presented the report and recommendations concerning judges' disqualifying economic

interests. In September, subsequent to the issuance of the report, the Code of Judicial Conduct was amended to adopt a *de minimis* standard for determining disqualifying interests, as was urged by the Task Force. The report also recommended including a comment to provide guidance for judges in determining whether an interest is *de minimis*; requiring the parties to file a disclosure of any publicly owned parent company or affiliate; providing conflict software in clerks' offices and establishing an Office of Conflict Counsel in the Court System to assist judges in the conflict checking process; and considering any amendments to permit judges to exclude from disqualifying interests those investments made and managed in blind trusts. It was announced that by unanimous voice vote, the Executive Committee had adopted a motion endorsing the report for positive action of the House of Delegates. Upon discussion, a motion was adopted by voice vote approving the following resolution:

RESOLVED, that to assist in addressing issues of disqualifying economic interest for judges under section 100.0(d) of the Rules of the Chief Administrator Governing Judicial Conduct, the New York State Bar Association urges:

- a) that the New York State Office of Court Administration add a comment to the Rules of the Chief Administrator Governing Judicial Conduct to provide guidance to judges as to the factors to be considered in determining whether an economic interest is *de minimis*, including in particular (but without limitation) (i) the proportion a judge's shares bear to total outstanding shares, (ii) the dollar amount of the judge's holdings, and (iii) the potential for the relief sought to affect the value of outstanding shares;
- b) that judges notify parties when they have made a *de minimis* interpretation, including the amount and nature of any holding deemed *de minimis*;
- c) that in determining the existence of a disqualifying economic interest, a judge should consider stock ownership in a parent or affiliate of a party, although not named as a party;
- d) that the New York State Office of Court Administration make conflicts software available to judges to assist them in assessing whether disqualifying economic interest may be present;
- e) that the New York State Office of Court Administration establish an Office of Conflict Counsel for use by judges to ease the conflict check process;

- f) that parties be required to file disclosure statement at the time of commencement of actions to assist judges in determining whether a disqualifying economic interest may exist;
- g) that the New York State Office of Court Administration consider amendments to the Rules of the Chief Administrator Governing Judicial Conduct to give judges the option of placing their holdings in a blind trust to make disqualification based on economic interest unnecessary.

11. Report of the Chair. President-Elect Buzard gave the following report as Chair of the House:

- a. Delegates to ABA House. At the April 2, 2005 meeting, the House would be asked to elect five of the NYSBA's 11 delegates to the American Bar Association House of Delegates. The Nominating Committee had nominated the following individuals for those positions: Mark H. Alcott, New York City; Paul Michael Hassett, Buffalo; James C. Moore, Rochester; Kenneth G. Standard, New York City; and Lorraine Power Tharp, Albany.
- b. Memorial for past President. A memorial will be presented at the April House meeting for the Hon. Ellsworth Van Graafeiland, 1973-74 Association President and Senior Judge of the U.S. Court of Appeals for the Second Circuit, who passed away in November.
- c. Moment of silence. A moment of silence was observed by the House in memory of Thomas Elmer, who served on the House and passed away in December.

12. Report and recommendations of the Special Committee on Issues Affecting Same-Sex Couples. Michael Whiteman, Committee Co-Chair, presented the majority position, Committee member James B. Ayers discussed the view of the four members within the majority and Co-Chair A. Thomas Levin described the dissent on the report of the Special Committee on Issues Affecting Same-Sex Couples. Nine members concluded that, because of the differences in how the law treats same-sex and opposite-sex couples and the inability of same-sex couples to remedy those differences, the state Legislature should enact comprehensive legislation to extend to same-sex couples the rights now extended to opposite-sex couples. Of the nine, four members contended that selection of a particular option (domestic partnership, civil union or marriage) is a matter of public policy and should be considered by the Legislature; the other five recommended adoption of legislation expressly authorizing same-sex couples to marry under New York's civil marriage statute. Three members of the Committee dissented, stating that the Association historically has avoided taking

positions on questions of social or public policy and should not do so here; rather, the Association should call upon the Legislature to determine the appropriate public policy with respect to whether and to what extent such relationships should have legal recognition. The Committee is reviewing comments from sections, committees and local bars in advance of action on the issue, slated for April 2, 2005. The presentations were followed by questions and comments from the delegates.

13. New business. There was no new business raised at the meeting.
14. Date and place of the next meeting. President-Elect Buzard announced that the next meeting would be held April 2, 2005 in Albany.
15. Adjournment. There being no further business, the meeting of the House of Delegates was adjourned.

Respectfully submitted,

A handwritten signature in cursive script that reads "Kathryn Grant Madigan". The signature is written in black ink and is positioned to the left of a vertical line.

Kathryn Grant Madigan
Secretary