

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
APRIL 4, 2009
BAR CENTER, ALBANY, NEW YORK**

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PRESENT: Abernethy; Abramowitz; Alcott; Alden; Bailey; Baum; Behrins; Berke-Weiss; Bonina; Brown, G.; Brown, T.; Buholtz; Burns, S.; Buzard; Byrne; Castellano; Chang; Chapman; Chin; Christian; Clarke; Coffey; Convissar; Costello; Cusano; Davis; DeFio Kean; Dohn; Doyle; Draper; Edmunds; Egan; Eppler; Farley; Fennell; Fernandez; Ferradino; Finerty; Fisher; Flood; Fox; Franchina; Freedman; Gall; Gann; Gesinsky; Getnick; Gigliotti; Goldberg; Goldenberg; Golinski; Greeley; Greenthal; Gutekunst; Haig; Hartnett; Hassett; Hawkins; Hayes; Herman; Hernandez; Higgins, J.; Higgins, P.; Hollyer; James, D.; James, S.; Kamins; Kanter; Kennedy; Kretser; Kurland; Kurs; Lagonia; Lally; Larose; Lau-Kee; Lawrence; Leber; Leo; Lesk; Levy; Lewis; Liebman; Lindenauer; Lonuzzi; Luskin; Makofsky; Martin; Marwell; Masley; May; Meislahn; Meyer; Mihalick; Millett; Miranda; Mitchell; Moore; Morgan; Morril; Moy; Nathanson; Netter; O'Donnell; Onderdonk; O'Neill; Ostertag; Pechenik; Pellow; Porcellio; Prowda; Purcell; Rankin; Reed; Roberts-Ryba; Robinson; Rodriguez; Romero; Rosenthal; Rosner; Rothstein; Safer; Salkin; Schlenker; Schneider; Schofield; Schraver; Schultz; Selinger; Sen; Silkenat; Smith, G.; Smith, T.; Spelfogel; Standard; Stanislaus-Fung; Sterrett; Subjack; Sunshine, J.; Sunshine, N.; Tennant; Terranova; Tesser; Torrey; Tyler; Vigdor; Virkler; Vitacco; Wachtler; Wallach; Walsh, O.; Weinberger; Williams; Wilson; Wimpfheimer; Winkler; Witmer; Yavinsky; Young; Younger; Zulack.

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

1. Approval of minutes of January 30, 2009, meeting. A motion was unanimously adopted accepting the minutes as previously distributed.
2. Report of the Treasurer. Mr. James, Treasurer, reviewed the end-of-year 2008 operating budget, reporting that total revenue was \$24.9 million, an increase of \$1.3 million over 2007, and total expense was \$25.7 million, an increase of \$2.8 million from 2007. The operating deficit was \$770,000, a decrease of \$1.5 million over 2007. He then reviewed revenue and expenses for the first two months of 2009, reporting that total revenue was \$13.1 million, an increase of \$10,000 over 2008, and total expense was \$4.3 million, a decrease of \$13,000 over 2008. He also provided a six-year comparison of CLE revenue and expense, a report on long-term reserve investments, and a report on pension and post-retirement expense. The report was received with thanks.
3. Election of the Nominating Committee and NYSBA Delegates to the ABA House of Delegates. A. Vincent Buzard, chair of the Nominating Committee, presented the report of the Nominating Committee.
 - a. Election of members of the Nominating Committee. The following were nominated for service on the 2009-2010 Nominating Committee:

Members-At-Large: Mark H. Alcott as Chair and A. Vincent Buzard and Kathryn Grant Madigan as members. A motion was adopted by unanimous voice vote to elect the members-at-large.

District members and alternates of the Nominating Committee: First – Stewart D. Aaron, Catherine A. Christian, Ernest J. Collaza, Hon. Margaret J. Finnerty, James B. Kobak, Jr., Ann B. Lesk, Ellen Lieberman, Edwina Frances Martin, Lisa Stenson Desamours and Jay G. Safer, with Pui Chi Cheng, First Alternate, Marilyn J. Flood, Second Alternate, Janiece Brown Spitzmueller, Third Alternate, and Alan Rothstein, Fourth Alternate; Second – Rose Ann C. Branda and Diana J. Szochet, with John A. Lonuzzi as Alternate; Third – Hon. Rachel Kretser and James B. Ayers, with Hon. Gerard E. Maney as Alternate; Fourth – Nicholas E. Tishler and Peter V. Coffey, with Mark M. Rider as Alternate; Fifth – David M. Pellow and Karen Stanislaus-Fung, with Stuart J. Larose as Alternate; Sixth – Shirley K. Egan and Patricia A. Cummings, with Christopher Denton as Alternate; Seventh – Eileen E. Buholtz and G. Robert Witmer, Jr., with Michael T. Harren as Alternate; Eighth – Paul Michael Hassett and Sharon Stern Gerstman, with Hon. Erin Peradotto as Alternate; Ninth – Joel H. Sachs, Catherine M. Miklitsch and Conal E. Murray, with Arlene A. Gordon-Oliver as Alternate; Tenth – James R. Winkler, Barry M. Smolowitz, A. Thomas Levin, and Emily F. Franchina, with Jon N. Santemma, First Alternate and Derrick J. Robinson, Second Alternate; Eleventh – Arthur N. Terranova and Steven Wimpfheimer, with Catherine Lomuscio as Alternate; Twelfth – Steven C. Krane and Maxwell S. Pfeifer, with Steven E. Millon as Alternate; Thirteenth – To be submitted.

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

- b. Election of Delegates to ABA House: A motion to elect the following for a two-year term commencing in August 2009 was adopted by voice vote: Mark H. Alcott, Bernice K. Leber, Kenneth G. Standard, Stephen P. Younger.
5. Memorial to David Sterling Williams. House member Harry P. Meislahn presented a memorial to David Sterling Williams, president of the Association in 1981-1982, who passed away in November 2008. A moment of silence was observed out of respect for Mr. Williams' memory and his contributions to the Association and the legal profession. A copy of the memorial is appended to these minutes.
6. Report of the President. Ms. Leber provided a written report on recent initiatives, a copy of which is appended to these minutes, and in oral remarks summarized the significant items set forth in the written statement. In addition, newly-recorded non-commercial sustaining announcements, which will be broadcast on New York radio stations, were played for the House. Ms. Leber welcomed new House members Claudia O. Torrey of Nashville, Tennessee and Michael A. Kurs of Hartford, Connecticut, whom she had appointed as non-resident members in accordance with the Bylaws amendment adopted

in January 2009. She observed that this is her last meeting as President, and thanked the members of the House, the officers and the staff for their support and participation.

7. Report of Special Committee on Solo and Small Firm Practice. Robert L. Ostertag, chair of the Special Committee, outlined the committee's interim report, which discusses the challenges and issues confronting solo and small firm practitioners and recommends ways in which courts, bar associations and other entities can better assist these practitioners. He noted that the committee is in the process of reviewing the recently-released status report from the Office of Court Administration regarding the implementation of recommendations from the 2006 report of the Chief Judge's Commission on Solo and Small Firm Practice in New York and that the committee would present its final report to the House at the June 2009 meeting. The report was received with thanks.
8. Presentation of Trial Lawyers Section National Trial Advocacy Awards. Together with Evan Goldberg, Chair of the Trial Lawyers Section, and Prof. Travis H.D. Lewin from Syracuse University College of Law, Ms. Leber presented the Trial Lawyers Cup and Scholarship to Syracuse University College of Law as winner of the National Trial Advocacy Competition for Region II. Plaques were awarded to team members Hayley J. Campbell, Sugam Langer, Jimmie C. McCurdy, and Ravi J. Patel, with Meghan C. Reardon being recognized as overall best advocate.
9. Report and recommendations of Task Force on Wrongful Convictions. Hon. Barry Kamins, chair of the Task Force, presented the Task Force's findings with respect to the causes of wrongful convictions and recommendations to prevent them from occurring. After discussion, the following resolution was adopted on voice vote:

WHEREAS, the wrongful conviction of individuals in New York State undermines the public's faith in the criminal justice system and undermines the assumption that the system sufficiently protects the innocent and convicts the guilty; and

WHEREAS, the New York State Bar Association's Task Force on Wrongful Convictions was appointed to identify the causes of wrongful convictions and to recommend appropriate reforms to reduce the risk of convicting the innocent and increasing the likelihood of convicting only the guilty; and

WHEREAS, the Task Force carefully reviewed 53 cases in which convictions were judicially overturned, and, based on this study, identified six significant causes of wrongful convictions; and

WHEREAS, the Task Force held public hearings in New York City and Albany to obtain additional information, and heard from witnesses including prosecutors, defense lawyers, and wrongfully convicted individuals; and

WHEREAS, the Task Force has made a series of recommendations with respect to government practices, identification procedures, forensic evidence, false confessions,

jailhouse informants, defense practices, all aimed at reducing the risk of convicting innocent persons, and has made additional recommendations related to compensation of those wrongfully convicted;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby approves the report and recommendations of the Task Force on Wrongful Convictions; and it is further

RESOLVED, that the Task Force is hereby continued and directed to take all appropriate steps toward the implementation of its recommendations; and it is further

RESOLVED, that the officers of the Association are directed to make wide distribution of this report to policy makers, government agencies, the judiciary, the prosecution and defense bars, bar associations, and other interested parties for their consideration; and it is further

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

10. Report and recommendations of Committee on Attorneys in Public Service. Committee chair Prof. Patricia E. Salkin, together with Hon. Catherine M. Bennett and Hon. James T. McClymonds, co-chairs of the committee's Subcommittee on Administrative Law, outlined the committee's proposed Code of Conduct for Administrative Law Judges, which if adopted would be used as a model for state agencies in developing agency codes of conduct. After discussion, the following resolution was adopted on voice vote:

WHEREAS, the Committee on Attorneys in Public Service has issued a report proposing a Model Code of Judicial Conduct for State Administrative Law Judges, designed to provide guidance to administrative law judges and, if adopted by disciplinary agencies, to provide a structure for regulating conduct;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association approves the proposed Model Code of Judicial Conduct for State Administrative Law Judges; and it is further

RESOLVED, that the officers of the Association are directed to distribute the Model Code to the Governor and state agencies to be used as a model for the development of codes of conduct; and it is further

RESOLVED, that the Committee on Attorneys in Public Service is authorized to provide guidance to state agencies in the development of individual agencies' codes of conduct and to work with those agencies to conduct appropriate educational programs; and it is further

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

11. Report and recommendations of Task Force on Global Warming. Prof. Michael B. Gerrard, chair of the Task Force, presented the Task Force's recommendations with respect to steps that can be taken in New York in a timely and cost-effective manner to reduce greenhouse gas emissions and prepare for the impact of climate change. After the resolution offered by the Task Force was moved and seconded, a motion to amend the resolution to replace the word "approves" with "accepts with appreciation" failed by a standing vote of 75-57. After discussion, the following resolution was adopted on voice vote:

WHEREAS, New York State is particularly vulnerable to climate disruptions, including rising sea levels, higher temperatures, extreme weather events, and increased precipitation; and

WHEREAS, the State has already taken a number of steps to address climate change, but lacks a comprehensive climate change strategy that has a specific, measurable and binding reduction target; and

WHEREAS, the New York State Bar Association's Task Force on Global Warming was appointed to make specific proposals that the State can implement in a timely and cost-effective manner to reduce greenhouse gas emissions and prepare for the impacts of climate change; and

WHEREAS, the Task Force has completed a report entitled *Taking Action in New York on Climate Change*, which contains a series of recommendations that can be implemented in a timely and cost-effective manner; and

WHEREAS, effective policies to address global warming will require significant emissions reductions at the federal and international levels, in addition to state-wide action; and

WHEREAS, state-wide, national and world greenhouse gas emission reductions will require significant capital flows to finance emission reduction technology development and implementation; and

WHEREAS, New York's capital markets position New York to play a unique role in developing state, national and world-wide carbon markets to facilitate the necessary flow of capital to achieve significant emissions reductions;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby approves the report of the Task Force on Global Warming; and it is further

RESOLVED, that the officers of the Association are directed to make wide distribution of this report to policy makers, government agencies, and other interested parties for their consideration; and it is further

RESOLVED, that the Association undertakes to support efforts to enact federal and international greenhouse gas emissions reduction programs and the development of carbon markets in New York through lobbying and other appropriate means; and it is further

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

Messrs. Kurs, Marwell, Meislahn, Miranda, Schrauer and Witmer and Ms. Burns abstained from participating in the discussion and vote pursuant to Rule 6.4 of the Rules of Professional Conduct.

12. Report and recommendations of Task Force on Privacy. Alison Arden Besunder and Kelly M. Slavitt, co-chairs of the Task Force, accompanied by Task Force members Paul Ashway Gillan, Jr., Dennis A. Lalli, Malvina Nathanson, and Grace Sterrett, outlined the Task Force's report which identifies privacy issues impacting lawyers and their clients and measures that can be taken to protect against unauthorized access and disclosure. After discussion, the following resolution was adopted on voice vote:

WHEREAS, the mission of the Privacy Task Force was to: (1) identify discrete areas of privacy for lawyers and those they represent (businesses and individuals) concerning the Internet, health and financial information; (2) review the laws, statutes and rules in these areas; (3) propose procedural and substantive changes where necessary; (4) provide opportunities to educate the profession and the public on privacy with the aim of ensuring that our laws, policies and practices are designed to reduce the risk of violations of privacy; (5) review and report on the current remedies/compensation available to those whose data have been seized for illegitimate purposes; and (6) prepare a report which covers the current state of the law and shall recommend any appropriate reforms, both by statute, policy and practice, to the Executive Committee and the House of Delegates; and

WHEREAS, the Privacy Task Force fulfilled its mission and prepared such report, inviting input from all Sections as well as from specialty, local, and county bar associations and privacy experts; and

WHEREAS, the Privacy Task Force held a Privacy Summit in New York City where experts in privacy law identified some of the most pressing areas in privacy law at this time; and

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association approves, with its thanks, the Report of the Privacy Task Force; and it is further

RESOLVED, that the Association endorses certain best practices set forth in the Report: (1) that web site owners should include the provisions on pages 40-43 of the Report in their Terms of Use; (2) that web site owners should include the provisions on pages 46-47 of the Report in their Privacy Policy; (3) that lawyers should take steps to avoid or mitigate the risk that client information obtained in the course of their legal practice, the privacy of which is protected by federal, state or local law, will be accessible to unauthorized persons (see pages 49-60); (4) that lawyers should treat health information obtained in the course of their legal practice with the appropriate standard of care to meet the privacy protections required by applicable law (see pages 77-125); (5) that lawyers should take reasonable steps to protect medical records and other health information obtained in the course of their legal practice from destruction or inadvertent disclosure, theft or other security breach (see pages 102-106); (6) that discovery request respondents should seek to address reasonable privacy concerns in responding to discovery requests (see pages 209-221); and (7) that agencies should strive to commit adequate resources to enforce compliance with existing privacy laws; and it is further

RESOLVED, that the Association reaffirms its commitment to the goal of providing opportunities to educate the profession and the public on privacy and suggests interdisciplinary CLE programs be conducted to address the following areas identified by the Task Force and experts in privacy law as some of the most pressing areas in privacy law at this time:

1. Medical Information Technology: (a) agency and government enforcement of privacy regulations for compliance and funding to permit smaller organizations to become compliant without oppressive financial cost; (b) the effectiveness and enforcement of penalties for poor or breached security; (c) assistance to covered entities to implement internal controls, including education of medical personnel to ensure proper, secure, and compliant use of information systems; (d) whether there should be private rights of action for breaches of medical security; (e) whether patients should be able to opt-out of having their records in a national healthcare database and the implications of such; and (f) whether information voluntarily submitted to medical databases (e.g., Google Health) should be subject to new privacy protections and regulations that arise out of the recently enacted stimulus legislation.
2. Employment: The extent to which an employer may access and use information (both employment and non-employment related) about an employee or potential hire, including information about the individual posted on the Internet that cannot be readily verified and material posted on social networking sites.
3. Record Retention and Destruction: The disposal, destruction, and maintenance of client files (both paper and electronic) by lawyers and law firms, including whether there should be a “catch-all” period for mandatory destruction of all records containing non-public personal information of consumers;

4. Bankruptcy Issues: The ability and preconditions to sell private consumer information in bankruptcy proceedings as an asset of the bankruptcy estate (for example, when a privacy notice says that the bankrupt company does not share information);
5. Social Security Numbers: The use of Social Security numbers as an identifier for any purpose, with a specific focus on: (a) how to prevent future use of Social Security Numbers as common identifiers; (b) how to remedy past and present abuses; (c) what is an appropriate alternative for authenticating identity (e.g., biometric identity cards);
6. Uniformity in Breach Notification Laws: Whether there should be a national standard for data breach notification;
7. Enforcement and prosecution: How to enforce and prosecute data breaches and privacy violations such that the risk of inadequate data security and privacy violations are more than merely a “cost of doing business”; and
8. Technology Standards: Whether a baseline can be established as to the minimum level of technological protection an attorney must use in protecting client information and the attorney-client privilege;

and it is further

RESOLVED, that the officers of the Association are hereby empowered to take such other and further steps as they may deem warranted in order to implement this Resolution.

13. Report of Task Force on the State of Our Courthouses. Task Force co-chairs Gregory K. Arenson and Sharon M. Porcellio reviewed the results of a survey conducted by the Task Force regarding courthouse conditions and provided a status report on the Task Force’s work to date. The Task Force plans to present its final report to the House at the June 2009 meeting. The report was received with thanks.
14. Report and recommendations of Special Committee on Federal Legislative Priorities. Stephen P. Younger, chair of the Special Committee, presented the Special Committee’s recommendations for the Association’s legislative activity at the Federal level, including the appointment of a standing committee that would work with existing staff and leadership to address legislative issues. After discussion, the following resolution was adopted on voice vote:

WHEREAS, the New York State Bar Association ("Association") has long played an active role regarding state legislative matters, taking positions on legislation of interest to New York lawyers; and

WHEREAS, although the Association has historically taken positions on federal legislation, and its Sections and Committees are active in the federal arena, the Association's advocacy on federal issues has been infrequent compared to its action on state issues; and

WHEREAS, State Bar President Bernice Leber created the Special Committee on Federal Legislative Priorities ("the Special Committee") in June 2008 and asked it to report on the role the State Bar ought to play in federal legislative advocacy on behalf of its members; and

WHEREAS, the Special Committee has met with members of the New York Congressional Delegation, their staffs, D.C. lobbyists, not-for-profit advocacy organizations, and others knowledgeable about the federal legislative process; and

WHEREAS, the Special Committee has issued a report ("the Report") concluding that the Association can play an important and productive role in the federal legislative process and effectively advocate on behalf of the Association's membership and in furtherance of its mission;

NOW, THEREFORE, IT IS

RESOLVED, that the Association hereby creates a new standing Committee on Federal Legislative Priorities that shall act in concert with the existing Committee on Legislative Policy and is directed to carry out all of the functions recommended in this report; and it is further

RESOLVED, that the Chairs of both the Committee on Legislative Policy and the new Committee on Federal Legislative Priorities (or their designees) shall be members of each other's committee, thereby encouraging coordination of state and federal advocacy; and it is further

RESOLVED, that the Chair of the Committee on Federal Legislative Priorities shall serve as a member of the Association's Steering Committee on Legislative Priorities; and it is further

RESOLVED, that the Finance Committee shall, in the Fall of 2009, review staffing levels and expenses of the new Standing Committee on Federal Legislative Priorities in connection with the State Bar's overall budget process; and it is further

RESOLVED, that the Committee on Federal Legislative Priorities shall annually develop recommended federal legislative priorities for consideration and approval by the Association's Steering Committee on Legislative Priorities and the Executive Committee; and it is further

RESOLVED, that the Committee on Federal Legislative Priorities shall work with existing Association staff and leadership to determine the best way for the Association to address federal legislative issues in the current environment and in the future; and it is further

RESOLVED, that the Association's leadership shall review the full workings of the Committee on Federal Legislative Priorities at an appropriate time after its formation

to review the overall efficiency and organization of the effort so as to ensure that staffing levels are still appropriate and that the structure for approving priorities works effectively, and to revisit any issues relating to staffing, structure and resources as deemed necessary.

15. Report and recommendations of Dispute Resolution Section. Section chair Simeon H. Baum, together with Section members Sherman W. Kahn, Carroll E. Neeseman and John Wilkinson, presented the Section's report recommending a set of "precepts" to guide arbitrators in determining the scope of discovery during arbitrations. After discussion, the following resolution was adopted on voice vote:

WHEREAS, arbitration offers parties the freedom to design a dispute resolution process that fits their needs and expectations, balancing due process with efficiency; and

WHEREAS, the New York State Bar Association Dispute Resolution Section has completed a study of the use of discovery in domestic commercial arbitration matters; and

WHEREAS, the Section has developed a report containing a series of Precepts which are intended to assist arbitrators handle discovery in domestic commercial cases in a cost-effective and fair manner, consistent with the expectation of the parties who selected the arbitration process;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby approves the report of the Dispute Resolution Section; and it is further

RESOLVED, that the Section is authorized to distribute the report to arbitration organizations, arbitrators, and other interested parties for their information and use; and it is further

RESOLVED, that the officers of the Association are hereby authorized to take such other and further action as they may deem warranted to implement this resolution.

Mr. Schraever abstained from participating in the discussion and vote pursuant to Rule 6.4 of the Rules of Professional Conduct.

16. Report of The New York Bar Foundation. John R. Horan, President of The New York Bar Foundation, announced that Hon. Lewis A. Kaplan, judge of the U.S. District Court for the Southern District of New York, had named The Foundation as a recipient of a cy pres award in the amount of \$1.2 million for use in funding civil legal services. The report was received with thanks.
17. Administrative Items. Mr. Getnick reported on the following:

- a. Motions to approve the designation of delegates filed by the county and local bar associations for the 2009-2010 Association year and to approve the filed roster of the members of the House for the 2009-2010 year were requested and approved.
 - b. A motion to ratify the Executive Committee's confirmation of the appointment of David M. Hayes (chair), James B. Ayers, Lesley Friedman Rosenthal, Richard P. Wallace, and Seymour W. James, Jr. (ex officio) as members of the Association's Audit Committee was requested and approved.
 - c. He announced that the Committee on Diversity and Leadership Development would hold a Leadership Institute to enhance participants' leadership skills and enable them to excel in service to the profession and the community on May 29-31 and encouraged interested members to register.
 - d. 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 Ms. Leber for her 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.
18. Date and place of next meeting. Mr. Getnick announced that the next meeting of the House of Delegates would take place on Saturday, June 20, 2009 at The Otesaga in Cooperstown.
19. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,



C. Bruce Lawrence
Secretary