



# Staff Memorandum

## **ANNUAL MEETING Agenda Item #5**

REQUESTED ACTION: Approval of Bylaws amendments proposed by the Committee on Bylaws.

Attached is a report by the Committee on Bylaws proposing amendments with respect to (1) a seat in the House of Delegates for a NYSBA member who is currently serving or has served as President of the American Bar Association and (2) extension of the diversity seats in the House and on the Executive Committee for an additional ten years. The Bylaws Committee was asked to prepare Bylaws amendments to address the following:

- Amendments to Article V (House of Delegates), sections 3 and 4, to provide a seat in the House of Delegates for a NYSBA member serving or who has served as President of the American Bar Association, with a life term.
- An amendment to Article V (House of Delegates), section 3, to extend the provision for twelve seats in the House to further racial and ethnic diversity for an additional ten years.
- An amendment to Article VII (Executive Committee), section 1(F), to extend the provision for two member-at-large selected to further racial and ethnic diversity for an additional ten years.

The proposal with respect to the ABA President was approved by the Executive Committee at its June 2013 meeting and was reported to the House at that time. The proposal with respect to the diversity seats was proposed by the Committee on Diversity and Inclusion and approved by the House at its June 2013 meeting. The reports containing the proposals are attached for your reference.

Pursuant to the procedures established in the Bylaws, the proposed amendments were subscribed to by a majority of all members of the House of Delegates at the November 2, 2013 House meeting. They must now be approved by the Association for inclusion in the Bylaws.

The report will be presented at the January 31 meeting by Eileen E. Buholtz, Chair of the Committee on Bylaws.

**COMMITTEE ON BYLAWS**

**EILEEN E. BUHOLTZ**

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October 15, 2013

**To: Members of the House of Delegates**

**Re: Report on Proposed Bylaws Amendments**

**INTRODUCTION**

Earlier this year, as reported to the House of Delegates at the June 22, 2013 meeting, the Executive Committee considered and approved a proposal to provide a seat in the House of Delegates for an Association member who is serving or has served as President of the American Bar Association. The House of Delegates approved a proposal from the Committee on Diversity and Inclusion to extend for an additional ten years the seats in the House of Delegates and on the Executive Committee to further racial and ethnic diversity. These actions by the Executive Committee and House of Delegates now require several Bylaws amendments in order to take effect.

For ease of reference, our proposed amendments are described in separate subsections of the report. Each subsection contains a discussion of the proposal, our committee’s analysis, and recommended Bylaws wording for your consideration. New language is indicated by underlining, and deleted language is indicated by strikethrough.

**HOUSE OF DELEGATES SEAT FOR ABA PRESIDENT**

Given the prominence of the ABA President, it would benefit the Association to have any NYSBA member who is serving or who has served as ABA President serve as a member of the NYSBA House. As is the case with NYSBA Presidents, this person would be entitled to a term for life. This requires an amendment to Article V, section 3 of the NYSBA Bylaws, which governs the composition of the House, as well as Article V, section 4, which governs terms in the House.

To incorporate this change in the Bylaws, we propose the Bylaws amendments set forth below:

**V. HOUSE OF DELEGATES**

\* \* \*

**Section 3. Composition.** The House of Delegates shall be composed of:

- A.** The officers of the Association;

B. The members-at-large of the Executive Committee;

C. Three members of the Association from each judicial district to be elected by the Association after nomination in the manner provided for herein, to be known as elected delegates;

D. The past presidents of the Association;

**E. Any member of the Association who is serving or has served as President of the American Bar Association.**

**E. F.** Representatives from each of the sections of the Association to be known as section delegates.

[Remaining sections to be relettered accordingly]

\* \* \*

#### **Section 4. Terms.**

A. Past presidents **and current or past presidents of the American Bar Association** shall serve as delegates for life. The President, President-Elect, Secretary and Treasurer shall serve as delegates during their terms of office.

### **EXTENSION OF DIVERSITY SEATS IN HOUSE OF DELEGATES AND ON EXECUTIVE COMMITTEE**

In 2004, based on a recommendation from the Special Committee on Association Governance, the Association Bylaws were amended to provide for two at-large seats on the Executive Committee and twelve members of the House of Delegates appointed by the President to further racial and ethnic diversity in each body. These Bylaws provisions contain a ten-year “sunset” clause by which, if no further action is taken, the provisions will be automatically removed from the Bylaws on November 6, 2014. The “sunset” provision was included on the premise that over the course of ten years, racial and ethnic diversity might increase to the point at which designated seats in the House and on the Executive Committee would no longer be necessary.

Since the the ten-year limit on these Bylaws provisions is approaching, the Committee on Diversity and Inclusion was asked to review these provisions and recommend whether they should be continued. The committee appointed a subcommittee to study this issue; the subcommittee analyzed demographic changes in the House and on the Executive Committee since the Bylaws amendments were adopted, reviewed legal issues with respect to the amendments, and reviewed other bar associations’ efforts with respect to diversity in their governing bodies. As a result of the subcommittee’s work, the committee recommended that the Bylaws provisions be continued for an additional ten years. In addition, the committee recommended that progress made toward furthering diversity goals be more closely monitored, with annual reports prepared for the Executive Committee and the House. This requires an amendment to Article V, section 3(G) and Article VII, section 1(F)(1).

To incorporate this extension in the Bylaws, we propose the Bylaws amendments set forth below:

## V. HOUSE OF DELEGATES

\* \* \*

**Section 3. Composition.** The House of Delegates shall be composed of:

\* \* \*

**G.** Twelve delegates to be appointed by the President then in office from a range of racial and ethnic minority groups identified by the National Association for Law Placement. At least two and no more than four of such delegates shall be appointed from each Judicial Department, and all appointments shall be subject to confirmation by the Executive Committee. ~~Delegates appointed in 2004 may serve for the balance of the Association year concluding May 31, 2005, and for the ensuing Association year concluding May 31, 2006, with such service to constitute a single year for purposes of calculating consecutive terms of service under Section 4(C) of this article. This subsection shall take effect immediately upon adoption by the Association and shall expire ten years from the date of adoption~~ **amendment** (November 6, 2004 **January 31, 2014**) and shall be removed from these Bylaws without further action of the Association. Notwithstanding such expiration, the final term authorized under this provision shall be for a full year, concluding May 31, ~~2015~~ **2025**.

[Note: if the bylaws amendments relating to the ABA President set forth above are approved, this provision will be relettered as "H."]

## VII. EXECUTIVE COMMITTEE

**Section 1. Composition.** The Executive Committee of the Association shall consist of:

\* \* \*

**F. 1.** Eight members-at-large who shall be members of the House of Delegates or section chairpersons at the time of selection, or who have served as members of the House of Delegates or section chairpersons within three years preceding the time of selection. Not less than two of the members-at-large shall be selected from the First Judicial District. Two of the members-at-large shall be selected to further ethnic and racial diversity and may not be drawn from the same Judicial District. ~~The Nominating Committee is authorized to make nominations for these two positions at any time up to December 31, 2004, for election at the January 2005 House of Delegates meeting. The initial term of service for the individuals selected to fill the latter two member at large seats shall commence on February 1, 2005, and conclude May 31, 2006, with such service to constitute a single year for purposes of calculating consecutive terms of service under Section 2 of this article. This subsection shall take effect upon adoption by the Association. Ten years from the date of adoption~~ **amendment** (November 6, 2004 **January 31, 2014**), the provision for the two members-at-large selected to further ethnic and racial diversity shall expire and be removed from these Bylaws without further action of the Association, and the number of **these** members-at-large on the Executive Committee shall revert to six. Notwithstanding such expiration, the final term authorized under this provision shall be for a full two-year term, concluding May 31, ~~2015~~ **2025**.

## CONCLUSION

Our committee believes that the foregoing amendments which we are recommending will provide appropriate representation in the House for current and former Presidents of the American Bar Association who are NYSBA members and will provide an appropriate extension of the term of the diversity seats in the House and on the Executive Committee. We commend them to you for your consideration and subscription at the November 2, 2013 meeting of the House of Delegates. If subscribed, the above amendments will be presented for discussion and adoption at the 2014 Annual Meeting.

Respectfully submitted,

### COMMITTEE ON BYLAWS

Eileen E. Buholtz, Chair  
James B. Ayers  
R. Nadine Fontaine  
LaMarr J. Jackson  
A. Thomas Levin  
Kathryn Grant Madigan  
Eileen Millett  
Jay G. Safer  
Oliver C. Young  
Executive Committee liaison: Glenn Lau-Kee  
Staff liaison: Kathleen R. Mulligan Baxter



**Kathleen R. Mulligan Baxter**, *General Counsel* • (FAX) 518/487-5694

May 29, 2013

**To: David M. Schraver, Esq.**

**Re: Proposed Bylaws Amendments – ABA Presidents**

Under the Association Bylaws, all past presidents of the Association are members of the House of Delegates for life. In addition, pursuant to amendments adopted in 2004, the ABA State Delegate and the New York State representative on the ABA Board of Governors are members of the House during their terms of service, provided that they are members of the New York State Bar Association. The purpose of these amendments was to facilitate communication with the ABA and give NYSBA leaders improved access to information about ABA activities.

Currently two former ABA Presidents are members of the House: Lawrence E. Walsh, who served as NYSBA President in 1966-67 and ABA President in 1975-76, and Robert MacCrate, who served as NYSBA President in 1974-75 and ABA President in 1987-88. Both are life members of the House by virtue of their service as NYSBA President.

This August, James R. Silkenat will become ABA President. Jim has been a member of our House in the past – as a delegate from the New York City Bar Association, as ABA State Delegate, and as one of the 11 NYSBA delegates to the ABA House. However, Jim has not served as NYSBA President and is not a current member of the House.

Given the prominence of the ABA President, it would be beneficial to the Association to have a New York lawyer serving (or having served) in that position as a member of the NYSBA House, provided that he or she is a member of NYSBA. As is the case with NYSBA Presidents, this person would be entitled to a term for life. This requires an amendment to Article V, section 3 of the NYSBA Bylaws, which governs the composition of the House, as well as Article V, section 4, which governs terms in the House. If approved by the Executive Committee, we would then ask the Bylaws Committee to prepare proposed amendments for subscription by the House at the November 2013 meeting and, if subscribed by the requisite number of House members, voted upon at the 2014 Annual Meeting.

Please let me know if you need any additional information.

Kathleen R. Mulligan Baxter

**NYSBA Committee on Diversity and Inclusion  
Report on the “Sunset” Provisions of NYSBA Bylaws Article V,  
Section 3(G), and Article VII, Section 1(F)**

**A. Introduction and Summary of the Committee’s Recommendations**

In November 2004, the Association’s Bylaws were amended to add two at-large seats to the Executive Committee and twelve members to the House of Delegates, each to be appointed by the President, to further racial and ethnic diversity in each body. These Bylaws provisions contain a ten-year sunset clause by which, if no further action is taken, the “diversity seats” now designated in Article V, Section 3(G), and Article VII, Section 1(F) of the Bylaws will expire on November 6, 2014. Because the ten-year limitation on these provisions is approaching, the Committee on Diversity and Inclusion (formerly the Committee on Minorities in the Profession) was asked to review the provisions and provide a recommendation as to whether they should be continued and, if so, for what additional period of time.

As discussed in greater detail below, significant diversity gains have been made in the House and on the Executive Committee as a result of these 2004 Bylaws provisions. Nevertheless, based on the recommendations of a subcommittee formed by the Committee on Diversity and Inclusion (the “Committee”), the Committee recommends that the existing Bylaws provisions designed to further racial and ethnic diversity in both the House and on the Executive Committee be continued for an additional period of ten (10) years. The Committee also recommends that progress made towards furthering these (and other) important diversity goals be more regularly monitored and evaluated by the Association in light of changing demographics and possible legal developments in this area. To this end, we recommend that annual reports be prepared and provided to the House and the Executive Committee on the impacts, if any, which these Bylaws provisions (and other diversity initiatives approved by the Association in recent years) are having on diversity in the House, on the Executive Committee, in the Sections, and within the Association overall.

The Committee’s recommendations are consistent with the March 2003 Report and Recommendations to the Executive Committee by a Special Committee on Matters of Association Governance (the “2003 Governance Report”), as a result of which the Bylaws provisions here in question were adopted. The Committee’s recommendations are also consistent with the Association-wide diversity policy approved by the Executive Committee and adopted by the House of Delegates in November 2003 (which was also a result of the 2003 Governance Report). In addition, the Committee’s recommendations are in keeping with the “long-standing priority of the State Bar . . . to ensure that our association reflects the diversity of our profession and our society,” a priority recently reaffirmed in an Amicus Curiae Brief filed by the Association on August 13, 2012 with the United States Supreme Court in *Fisher v. University of Texas at Austin*, No. 11-345, 2012 U.S. S. Ct. Briefs LEXIS 3303, \*\*20-21 (“NYSBA Amicus Brief”). A decision in *Fisher* is expected by the end of the Court’s term in June 2013.

The recommendation that the existing Bylaws provisions be continued for another 10 years reflects the continued hope (previously expressed by the House of Delegates when it approved the current provisions of Article V, Section 3(G) and Article VII, Section 1(F) of the

Bylaws) that, in another ten years, racial and ethnic diversity in the House and on the Executive Committee will progress even further than it has to date, to the point where the designation of such seats is no longer necessary. Based on a review of data currently available on diversity within the Association, however, the Committee believes there are still “Miles to Go” before levels of participation by racial and ethnic minorities in the House and on the Executive Committee are truly reflective of our profession and our society and in harmony with the Association’s long-standing commitment to achieving greater diversity, particularly in its leadership ranks.

## **B. Background and History of the Current Bylaws and “Sunset” Provisions**

As noted in the NYSBA Amicus Brief (Attachment 1 of this Report), “[t]he NYSBA has long recognized the need to increase diversity in the legal profession and has taken practical and creative steps to address this critical shortcoming . . .” NYSBA Amicus Brief, 2012 U.S.Ct. Briefs LEXIS 3303, at \*16.<sup>1</sup> To achieve these important goals, in November 2003, the House of Delegates adopted an Association-wide diversity policy, stating:

The New York State Bar Association is committed to diversity in its membership, offices, staff, House of Delegates, Executive Committee, Sections and committees and their respective leaders. Diversity is an inclusive concept, encompassing gender, race, color, ethnic origin, national origin, religion, sexual orientation, age and disability.

We are a richer and more effective Association because of our diversity, as it increases our Association’s strengths, capabilities and adaptability. Through increased diversity, our organization can more effectively address societal and member needs with the varied perspectives, experiences, knowledge, information and understanding inherent in a diverse membership.

This broadly defined diversity policy and several other pro-diversity recommendations, including a proposal to add the current minority seats to the House and the Executive Committee now found in Article V, Section 3(G) and Article VII, Section 1(F) of the Bylaws, were recommended by the Special Committee on Association Governance as part of its 2003 Governance Report. (Attachment 2 of this Report). Notably, the 2003 Governance Report also recommended: (a) creation of a standing Committee on Diversity; (b) designation of the Secretary of the Association as Diversity Chair and head of the newly proposed Diversity

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<sup>1</sup>The *Fisher* case involves a challenge under the Equal Protection Clause of the 14<sup>th</sup> Amendment to the University of Texas at Austin’s use of race (among other factors) in undergraduate admissions to promote diversity. Although the Committee is of the view that the NYSBA is a private, voluntary association and not a “state actor” subject to the dictates of the 14<sup>th</sup> Amendment, the impending decision in *Fisher*, like the Court’s 5-4 decision ten years ago in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the University of Michigan Law School’s consideration of race as a “plus” in the admissions process), while not expected to be binding on the Association, may very well provide guidance from the Court on the legality and permissible duration of voluntary affirmative action and pro-diversity initiatives (both in the educational context and otherwise).



Committee; (c) measuring the progress of diversity initiatives and the reporting of that information at least annually to the Association's officers and members; and (d) a process by which the number of added minority members in the House and on the Executive Committee could be adjusted periodically to reflect changes in the percentage of minority students at United States law schools as computed by the National Association of Law Placement ("NALP"). Though not all of these proposals were ultimately adopted, these recommendations were all "designed to enhance the governance of the NYSBA, . . . and expand opportunities for section officers, women, and those from racial and ethnic traditionally under-represented minority groups to rise to positions of leadership within the Association." Staff Memorandum to the House of Delegates requesting approval of the report and recommendations of the Special Committee on Association Governance (April 5, 2003).

The following year, in 2004, Kenneth G. Standard was selected as only the second State Bar President "of color" in the Association's history. As recounted in the NYSBA Amicus Brief in *Fisher*, the very first person of color to serve as Association President was Archibald Murray (born in Barbados), who was selected for the position in 1993, only twenty (20) years ago. NYSBA Amicus Brief, at \*17. The Association's current President, Seymour W. James, Jr., is only the third person of color ever to rise to this position, the highest leadership position within the Association, in almost 137 years.<sup>2</sup>

As also noted in the NYSBA Amicus Brief in *Fisher*, "[d]uring President Standard's tenure [from 2004-2005] reforms were made to the NYSBA's governance structure to open up leadership opportunities for attorneys of color." *Id.* at 18. More specifically, in January 2004, "[t]he Association's by-laws were amended to increase by two seats the size of its executive committee, going from 24 to 26 members, with those two additional seats dedicated for [minority] attorneys. At the same time, the NYSBA also added 12 minority seats to the . . . House of Delegates, expanding the number of seats from 283 to 295." *Id.*<sup>3</sup> "In recognition of these efforts, the NYSBA was awarded the ABA's Partnership Award in 2005." *Id.*

These diversity-related amendments to the Association's Bylaws were based on certain conclusions reached by the Special Committee on Association Governance in its 2003 Governance Report regarding "minority participation in the House of Delegates" and on the Executive Committee. At that time (in 2003), "there [were] comparatively few minorities in the House" and "the number of minority members available to participate in Association governance and to advance to higher office [was] small." 2003 Governance Report, p. 21. After considering a number of options other than the current diversity seats, and after noting that "much remains to be done if the Association is to reflect fairly the growing number of women in the legal

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<sup>2</sup>Glenn Lau-Kee, who is Asian, will become the Association's President-elect on June 1, 2013. Upon taking over as President, he will become only the fourth person of color, and the first person of Asian descent, to serve in this leadership position.

<sup>3</sup>As used in this report, the terms "minority" and "minorities" are given the same meaning these terms were given in the 2003 Governance Report, which explained that: "the terms 'minority' and 'minorities' refer to the following racial and ethnic traditionally under-represented groups identified by the National Association of Law Placement: (a) Hispanic/Latino; (b) Black/African American; (c) Asian/Pacific Islander; and (d) Native American/Alaskan." (2003 Governance Report, p. 5. These same definitions of the terms "minority" and "minorities" are incorporated by reference in the Bylaws provisions ultimately adopted by the House and approved by the Executive Committee.

profession” as well, the Special Committee on Governance determined that the then-proposed Bylaws provisions were the best and most effective way to address the particular problems faced by racial and ethnic minorities within the Association.

According to the Special Committee’s 2003 Governance Report:

[W]hile we can count more minority attorneys among our membership and in the House of Delegates than in earlier years, we are far from achieving levels of minority participation in which we can take pride. We must exert improved efforts . . . to become truly inclusive of members from all races, ethnic groups and other traditionally under-represented groups. One of our strongest assets . . . should be our diversity and we must take forceful steps if we are to improve beyond our current situation.

In recommending the existing Bylaws provisions, the Special Committee explained what was intended to be accomplished by adding designated diversity seats in the House:

[I]t is our belief that as the minority members become active in the House and demonstrate their leadership qualities, the county bar associations or Sections might select them to fill some of their delegate positions, or the Nominating Committee might see them as potential elected delegate candidates. In such a manner, the number of minority members can expand in addition to the 12 designated seats to be filled by the President.

For all of these reasons, the House adopted the Special Committee’s 2003 “diversity-seat” recommendations, resulting in the language now found in Article V, Section 3(G), and Article VII, Section 1(F) of the Bylaws, which provides as follows:

#### **ARTICLE V. HOUSE OF DELEGATES**

Section 3. Composition. The House of Delegates shall be composed of:

G. Twelve delegates to be appointed by the President then in office from a range of racial and ethnic minority groups identified by the National Association for Law Placement. At least two and no more than four of such delegates shall be appointed from each Judicial Department, and all appointments shall be subject to confirmation by the Executive Committee. Delegates appointed in 2004 may serve for the balance of the Association year concluding May 31, 2005, and for the ensuing Association year concluding May 31, 2006, with such service to constitute a single year for purposes of calculating consecutive terms of service under Section 4(C) of this article. This subsection shall take effect immediately upon adoption by the Association and shall expire ten years from the date of adoption [insert date] and shall be removed from these

Bylaws without further action of the Association. Notwithstanding such expiration, the final term authorized under this provision shall be for a full year, concluding May 31, 2015.

## **ARTICLE VII. EXECUTIVE COMMITTEE**

Section 1. Composition. The Executive Committee shall consist of:

F. [Six] Eight members-at-large who shall be members of the House of Delegates or section chairpersons at the time of selection, or who have served as members of the House of Delegates or section chairpersons within three years preceding the time of selection. Not less than two of the members-at-large shall be selected from the First Judicial District. Two of the members-at-large shall be selected to further ethnic and racial diversity and may not be drawn from the same Judicial District. The Nominating Committee is authorized to make nominations for these two positions at any time up to December 31, 2004, for election at the January 2005 House of Delegates meeting. The initial term of service for the individuals selected to fill the latter two member-at-large seats shall commence on February 1, 2005, and conclude May 31, 2006, with such service to constitute a single year for purposes of calculating consecutive terms of service under Section 2 of this article. This subsection shall take effect upon adoption by the Association. Ten years from the date of adoption [insert date], the provision for the two members-at-large selected to further ethnic and racial diversity shall expire and be removed from these Bylaws without further action of the Association, and the number of members-at-large on the Executive Committee shall revert to six. Notwithstanding such expiration, the final term authorized under this provision shall be for a full year, concluding May 31, 2015.

Significantly, as originally proposed by the Special Committee on Association Governance, there were no sunset provisions. However, during the discussion of the Special Committee's report and recommendations at the January 29, 2004 House meeting, the proposal was amended on motion to include the sunset provisions quoted above, predicated on the hope that in the ensuing ten years, diversity in the House and on the Executive Committee might increase to the point where designated seats were no longer necessary. The recommendation as amended was then forwarded to the Bylaws Committee, which developed the existing language set forth above.

As noted at the outset, absent further action by the Executive Committee and the House, the sunset provisions of the current Bylaws will take effect on November 6, 2014. If, on the other hand, the current Bylaws provisions are to be extended for any period of time, as

recommended by the Committee on Diversity and Inclusion, any amendments to the Bylaws so providing must be addressed at the Association's January 2014 Annual Meeting.

**C. There Are Still "Miles to Go" Before the Existing Bylaws Provisions Should Expire**

As was the case approximately nine and one-half years ago, in January 2004, when the House and Executive Committee approved the Bylaws amendments recommended by the Special Committee on Governance in 2003, it is the unanimous view of the Committee that there are still "Miles to Go" before levels of participation in the House and on the Executive Committee are achieved commensurate with the Association's long-standing commitment to diversity. *See Miles to Go in New York: Measuring Racial and Ethnic Diversity Among New York Lawyers* (NYSBA Committee on Minorities in the Profession) (September 2007) ("NYSBA Miles to Go Report").<sup>4</sup>

**1. Important Diversity Gains Overall in Association Membership, in the House and on the Executive Committee Since 2004**

An examination of available statistics, including but not limited to the Miles to Go Report and the NYSBA Diversity Report Cards produced in 2009 and 2011, is revealing in several respects. (The 2011 Diversity Report Card is Attachment 3 of this Report). These statistics show, among other things, that while there has, indeed, been progress in the House and on the Executive Committee since the "diversity" seats were established in 2004, the elimination and "sun-setting" of the current Bylaws provisions designed to further racial and ethnic diversity in both the House and the Executive Committee will likely have the effect of slowing, if not reversing, years of progress that has been made in achieving a more diverse and representative Association and NYSBA leadership.

In this latter connection, as recently recognized by Association President Seymour James and noted in the NYSBA Amicus Brief in *Fisher*, there is no doubt that "[w]e have been making steady progress" towards "ensur[ing] that our association reflects the diversity of our profession and our society." In fact, the Association's 2011 Diversity Report Card (the most recent such Report Card issued) shows that, in 2011, ethnic and racial minorities comprised 11.82% of the overall Association membership, up slightly from 11.38% in 2009, 10.78% in 2007 and 10.07% in 2005. 2011 Diversity Report Card, p. 14. It is thus clear, as explained in the NYSBA Amicus Brief in *Fisher*, that "[t]hrough . . . various diversity initiatives, the membership of the State Bar

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<sup>4</sup>In November 2007, the House adopted, with Executive Committee approval, the NYSBA Miles to Go Report issued in September 2007 by the former Committee on Minorities in the Profession. Among other things, the Miles to Go Report, cited frequently in the NYSBA Amicus Brief in *Fisher*, called for "increased self-study of diversity within the Association and among attorneys in the state," as well as a greater collection and reporting of demographic data on Association leadership, including members of standing committees, the House and the Executive Committee. *See* NYSBA Miles to Go Report, p. 26. But it has only been about five years since the Association began to monitor and report demographic trends based on voluntary reporting of gender, race and ethnicity by House and Executive Committee members, as well as of diversity within Sections, as part of its bi-annual Diversity Report Cards.

has become more diverse, with attorneys of color increasing from around 8 percent in 2003 to nearly 12 percent in 2012.” NYSBA Amicus Brief, at \*20.<sup>5</sup>

It is also clear that, since 2004, when designated diversity seats were added to the Bylaws, “steady progress” has been made in the racial and ethnic diversity of the House of Delegates, as well as on the Executive Committee, though the pace of progress has been greater for certain groups than for others, and non-existent for certain minority groups, including Native Americans. In the House, for example, since the Bylaws were amended in January 2004:

the overall number of racial and ethnic minorities in the House of Delegates has risen from about 15 (or 7.8% of all delegates in 2004) to 41 (or currently about 16.7% of all delegates in 2013);

the number of House members who have self-identified as Asian or Pacific Islanders has increased from 1 to 7 (or currently about 2.3% of the total number of delegates);

the number of House members identifying themselves as Black/African American has increased from 12 to 25 (or currently about 8.3% of all delegates);

the number of House members who identify themselves as Hispanic has risen from 1 to 9 (or currently about 3% of all delegates);

the number of House members who have identified themselves as either Native Americans and/or of Multiple Races has remained flat or shown little or no change;

the number of House members who have identified themselves as Caucasian/White has also increased from 188 to 203 (or currently about 67.6% of all delegates);

the number of female members of the House of Delegates has also steadily increased from 60 in 2004 to 93 in 2013 (or currently about 31% of all House members); and

the number of House members who have identified themselves as disabled has declined from 3 in 2004 to only 1 currently (after reaching a high point of 4 in 2009-2010 and 2010-2011).

Similar recent gains have also been seen on the Executive Committee in terms of greater diversity for traditionally underrepresented racial and ethnic minorities. Thus, since two

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<sup>5</sup>By contrast, in 2011 females comprised 34% of overall Association membership. 2011 Diversity Report Card, p. 9. With respect to Association members who identify themselves as either disabled, or as lesbian, gay, bisexual or transgendered (LGBT), in 2011, only 0.8% of all Association members surveyed answered yes to having a disability (*id.*, p. 16), while 2.7% of Association members identified themselves as LGBT (*id.*, p. 12).

diversity seats were added to the Executive Committee in January 2004, available statistics show, among other things, that:

the overall number of racial and ethnic minorities on the Executive Committee has increased from a total of 1 out of 20 in 2004 (or 5%) to a current all-time high of 10 of 27 (or 37%) in 2013;

currently, this includes 6 who have self-identified as Black or African American;

there have been comparatively few who have self-identified as Asian/Pacific Islander (2), Hispanic (2), and/or Multiple Races, and there have been none who have self-identified as Native American.

## 2. **What Would Happen Without the Existing Diversity Seats?**

Of course, the diversity gains reflected in these numbers for Asian/Pacific Islander, Hispanic and African American members in the House and on the Executive Committee, taken collectively, are promising and significant. However, when the available data are analyzed between 2005 and 2013 without including the diversity appointments to these bodies authorized by Article V, Section 3(G) and Article VII, Section 1(F), these promising and significant diversity gains are and/or will be reduced.

Thus, for example, without the existing seats dedicated for racial and ethnic minorities on the Executive Committee, the number of minorities would in all likelihood be reduced from its current level of about 37% to 32%.<sup>6</sup> A similar result would in all likelihood also occur in the House, where the current number of minority House members, without the existing 12 diversity seats, would be reduced from its current level of 16.7% to only about 13.25%. (See the comparative statistics contained in Attachment 4 of this Report.)

In other words, without the continuation of the existing Bylaws provisions, and a deferral of the current sunset clauses, the Association's efforts to increase racial and ethnic diversity among members of the House and the Executive Committee will in all likelihood not merely be halted in their tracks, but reversed. There is, likewise, the very real risk that the path or "pipeline" for racial and ethnic minorities to greater leadership opportunities on the Executive Committee, in the Sections, and within the Association may be blocked if the current sunset provisions in the Bylaws are not extended for an additional period of time, as recommended by the Committee.

Of note in this last regard is the fact that the Association's officers generally have had prior service on the Executive Committee. As a result, the Nominating Committee has been, and will continue to be, made more aware of potential diverse officer candidates by virtue of the

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<sup>6</sup> Effective June 1, 2013, when three more seats will be added to the Executive Committee in response to a request from the Section Caucus for more representation of Sections on the Executive Committee, the reduction in the number and percentage of minority members on the Executive Committee may be even greater, especially if provision for the existing diversity seats is allowed to expire in November 2014.

addition of the designated diversity seats to the Executive Committee. However, since implementation of the current Bylaws amendments in 2005, there have been only two persons of color elected as officers of the Association (i.e., Seymour James, who was elected Treasurer in 2008 and President-elect in 2011, and Glenn Lau-Kee, who was nominated President-elect in 2013).<sup>7</sup>

Finally, as this Association recently argued in its Amicus Brief to the Supreme Court in *Fisher*, “[a] commitment to diversity in the legal profession recognizes the undeniable fact that the demographics of the United States' population are changing - becoming more diverse racially and ethnically - and that institutions in the United States will lose credibility and effectiveness if they fail to adapt to these changes.” Indeed, although “[m]embership in the NYSBA remained 88% white in 2012,” given current population trends, “the United States is projected to be less than 50% white in 25 years or so.” NYSBA Amicus Brief, \*5.

Moreover, it remains the case that both “African-Americans and Hispanics remain seriously underrepresented in the legal profession relative not only to their numbers in the general population but also to their participation rates in other professions.” *Id.* at \*6 (noting that “[w]hile minorities comprised just under 10 percent of all lawyers in the United States in 2000, minorities represented 20.8 percent of accountants, 23.1 percent of computer scientists, and 24.6 percent of physicians”) (quoting the NYSBA Miles to Go Report, p. 6 n. 7). Thus, as made plain in the Association’s Amicus Brief in *Fisher*: “The very slow rate of entry into the legal profession by traditionally underrepresented minority populations coupled with rapid increases in racial and ethnic diversity in the general population will lead to a serious demographic disjuncture with potentially serious consequences for the administration of justice.” NYSBA Amicus Brief, \*7-8. Stated differently:

For the legal profession, the consequences of failing to become more diverse in a “majority-minority” America are profound. The legitimacy and effectiveness of our civil and criminal justice systems will be undermined if the profession does not reflect the changing demographics. The lack of diversity among lawyers and judges today fuels distrust of the legal system in many minority communities. Allowing such underrepresentation to persist while the society at large becomes increasingly diverse is untenable. It will lead to a stark racial divide that will only strengthen the distrust and disaffection among people of color and leave the majority of Americans to view the legal profession as an out-of-touch holdover from an earlier era.

*Id.*, at \*2-3.

The Committee, therefore, believes that extending the current Bylaws provisions in furtherance of achieving greater racial and ethnic diversity in the House and on the Executive Committee is necessary, as well as the right thing to do, if the Association is “to continue serving

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<sup>7</sup> Seymour James was a member of the Executive Committee, as a Vice President from the 11th District; however, Glenn Lau-Kee first served on the Executive Committee as a diversity member-at-large.

its vital mission in a ‘majority-minority’ America.” (*Id.* at \*2). Indeed, the members of the Committee unanimously believe that this is the only effective way of ensuring that both the House and the Executive Committee will someday soon, in 10 more years or less, not merely reflect the rich racial and ethnic diversity of our Association and our society, but also be truly inclusive.

Like the Special Committee on Governance which originally proposed adding diversity seats to the Bylaws in 2003, we also see “a need for the Association to become more diverse in its broadest sense, thereby being enriched by the contributions of those who have been traditionally underrepresented in the Association.” 2003 Governance Report, p. 3. And, like the Special Committee, “[b]y this statement, we do not mean to imply what has been perhaps the traditional meaning ascribed to diversity, that of including more women and minorities within the framework of the Association.” *Id.* Rather, as the Special Committee on Governance explained in its 2003 Governance Report, “[o]ur view is more expansive and contemplates individuals in those groups not only being part of, but being able to advance in our organization to top positions of leadership.” *Id.* The Committee maintains that continuation of the current diversity seats in the House and on the Executive Committee for an additional limited period of time is the best way, if not the only effective means, of achieving this critically important goal.

The only question remaining, addressed below, is “for how long” the existing Bylaws provisions should be extended.

**D. For How Long a Time Should the Existing Bylaws Provisions be Extended?**

Only ten years ago, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), Justice O’Connor, writing for the plurality, expressed the hope “that 25 years from now, the use of racial preferences will no longer be necessary.” *Id.* at 343. During oral argument in *Fisher* on October 10, 2012, the same issue appeared to take on critical importance for several of the Justices. For example, Justice Sotomayor, reflecting those concerns, observed: “I think the issue that my colleagues are asking is, at what point and when do we stop deferring to the University’s judgment that race is still necessary? That’s the bottom line of this case.” Transcript of Oral Argument, p. 49. Similarly, Chief Justice Roberts, in his questioning, posed the following question: “*Grutter* said that there has to be a logical end point to your use of race. What is the logical end point? When will I know that you’ve reached a critical mass?” *Id.* at 47.

While the Court in *Fisher* may very well shed some light on the answer to these questions in the educational context under the 14<sup>th</sup> Amendment’s Equal Protection Clause, the Committee is of the view that the current Bylaws provisions here in question should be extended for another 10 years, or until such time as there appears to be no need for so-called diversity seats based on a review conducted at least annually of the available demographic data.

A similar approach was previously adopted by the American Bar Association (“ABA”) back in 1995, when the ABA’s House of Delegates adopted portions of a 1995 ABA Governance Report which created designated at-large seats for minorities and women on the ABA’s Board of Governors and Nominating Committee. See ABA Constitution and Bylaws Article 7, Section 7.2 (composition of the Board), and Article 9, Section 9.2 (composition of the Nominating Committee). As initially adopted by the ABA House of Delegates, however, these diversity-



related provisions in the ABA Constitution were scheduled to be reviewed ten years later (in 2005), in accordance with Article 16, Section 16.1 of the ABA Constitution, providing, in relevant part, that:

Beginning in 2005 and once every ten years thereafter a review shall be conducted of the House of Delegates, the Board of Governors and the Nominating Committee. With respect to each body the review shall include an examination of its size and a consideration of its composition to ensure appropriate representation of constituencies. The review . . . shall include a consideration of whether at-large representation of women and minorities should be continued . . .

ABA Const., Art. 16, Sec. 16.1.

Pursuant to this Decennial Review provision adopted by the ABA's House in 1995, ten years later, in 2005, the 2005 Governance Commission recommended the continuation of the at-large seats on both the Nominating Committee and the Board. In its recommendations to the ABA's House of Delegates, the Commission recommended that the at-large diversity seats become permanent, eliminating the sunset provision. The House instead continued the sunset provision for another 10 years (or until 2015 and the conclusion of the ABA's Annual Meeting in that year). The Committee on Diversity and Inclusion is recommending a similar approach be taken by the NYSBA House and Executive Committee.

The approach taken by three other bar associations may also be considered. First, the Philadelphia Bar Association, effective 1997, designated seats with a five-year sunset; effective 2002, these seats were continued for an additional five years until they were discontinued in 2007. Currently, each year, the Chancellor of the Board, upon consideration of recommendations from the Committee on Diversity in the Profession, appoints as a Member of the Board a member of a racial minority who will serve for a three-year period. Second, the Illinois Bar Association, effective 2011 (to be evaluated in 5 years) designed seats for "underrepresented," as opposed to "minority" members, because the latter is a constantly changing term. Third, the New Jersey State Bar Association designated at-large seats on its Board of Trustees "to promote inclusion of as many underrepresented segments of the membership on the Board of Trustees as possible"; each year the Board designates the underrepresented groups; two-year terms; four up for election on even years, four up for election on odd years.

Under all of the circumstances discussed in this report, the Committee maintains that the existing Bylaws provisions here at issue should be extended for a period of 10 years, or for a total of 20 years from their initial adoption in 2004, similar to the at-large diversity seats for women and minorities first adopted in 1995 by the ABA's House of Delegates. As more recently explained in April 2010 by former ABA President Carolyn B. Lamm, on accepting the Report and Recommendations from the ABA Presidential Initiative Commission on Diversity, entitled "Diversity in the Legal Profession – The Next Steps":

Building a more diverse legal profession is not a quick-fix, short-term goal. It is an ongoing campaign, one in which the ABA has been engaged for decades. We are committed to continue it as long as it takes. We are committed to seeing a bench that reflects our population and a profession in which every lawyer has the opportunity to achieve all of which they are capable.

The Committee shares this commitment and long-range view of diversity and inclusion in the legal profession and within the NYSBA for racial and ethnic minorities, as well as for other diverse members of the Association. As noted at the outset of this report, the Committee also believes, however, that the continuing need for these diversity seats, and the impact which the current Bylaws provisions have on the furtherance of racial and ethnic diversity in the House and on the Executive Committee, if any, must be more regularly monitored and evaluated by the Association and the Committee on Diversity and Inclusion, along with an assessment of developments in the law in this important area. Towards this end, the Committee proposes that Association staff and the Committee on Diversity and Inclusion continue to track and report to the House of Delegates and the Executive Committee, on an annual basis, the Association's progress on these matters.

### **Conclusion**

Clearly, progress has been made, but there are still "Miles to Go" and we are still "far from achieving levels of minority participation" in the House of Delegates and on the Executive Committee "in which we can take pride." That was the case when the Special Committee on Association Governance recommended the existing Bylaws provisions (without the current November 6, 2014 sunset provisions) and, in the unanimous view of the members of the Committee, it remains the case today. Therefore, the Committee recommends that the current provisions of Article V, Section 3(G) and Article VII, Section 1(F), be extended for an additional period of 10 years from November 6, 2014, when these Bylaws provisions are now set to expire.