

June 5, 2018

To: Members of the House of Delegates

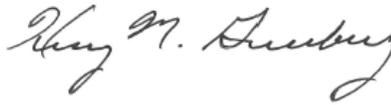
Re: June 16, 2018 meeting

Enclosed are the agenda and related background materials for the upcoming meeting of the House of Delegates scheduled to begin at **9:00 a.m.** on Saturday, June 16, 2018 at The Otesaga in Cooperstown, New York. The enclosed background materials cover agenda items 2, 3, 7 and 9. Also enclosed for your use is a roster of the members of the House of Delegates.

We look forward to seeing you in Cooperstown.



Michael Miller
President



Henry M. Greenberg
President-Elect



**NEW YORK STATE BAR ASSOCIATION
HOUSE OF DELEGATES
SATURDAY, JUNE 16, 2018 – 9:00 A.M.
THE OTESAGA, COOPERSTOWN, NEW YORK**

REVISED AGENDA

1. Call to order, Pledge of Allegiance and introduction of new members – Mr. Henry M. Greenberg 9:00 a.m.
2. Approval of minutes of April 14, 2018 meeting 9:10 a.m.
3. Report of Treasurer – Mr. Scott M. Karson 9:20 a.m.
4. Presentation of Root/Stimson Award – Mr. Michael Miller 9:40 a.m.
5. Installation and inauguration of Michael Miller as President – Ms. Maryann Saccomando Freedman and Hon. Sherry Klein Heitler 9:55 a.m.
6. Report of President – Mr. Michael Miller 10:10 a.m.
7. Report and recommendations of Criminal Justice Section and Committee on Mandated Representation – Mr. Norman P. Effman 10:25 a.m.
8. Address by Hon. Alan D. Scheinkman – Presiding Justice, Second Department 10:45 a.m.
9. Report and recommendations of New York City Bar Association – Mr. Roger Juan Maldonado 11:00 a.m.
10. Report of Committee on Continuing Legal Education – Mr. James R. Barnes 11:20 a.m.
11. Report of The New York Bar Foundation – Ms. Lesley Friedman Rosenthal 11:35 a.m.
12. Report re Nominating Committee – Mr. David P. Miranda 11:45 a.m.
13. Administrative items – Mr. Henry M. Greenberg 11:55 p.m.
14. New business 12:05 p.m.
15. Date and place of next meeting
Saturday, November 3, 2018
Bar Center, Albany, New York

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
BAR CENTER, ALBANY
APRIL 14, 2018**

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PRESENT: Abbott; Alcott; Alomar; Baum; Behrins; Bennett; Berman; Bonina; Bowler; Braunstein; Brown, T.A.; Burke; Chambers; Chang, V.; Christian; Clouthier; Cohen, C.; Cohen, D.; Cohen, O.; Connery; DeFelice; Denton; DiFalco; Disare; Doyle; Eberle; Effman; Fallek; Fay; Fennell; Fernandez; Finerty; First; Fishberg; Fox; Freedman, H.; Frumkin; Gaillard; Galligan; Gensini; Gerbini; Gerstman; Getnick; Gingold; Glover; Gold; Goldfarb; Grays; Greenberg; Grogan; Gutekunst; Gutierrez; Haig; Heath; Hetherington; Himes; Hyer; Jackson; Jagllom; James; Jones; Kamins; Karson; Kean; Kearns; Kelly; Kobak; Lamberti; Lanouette; LaRose; Lau-Kee; Lawrence; Levin Wallach; Levy; Madden; Mancuso; Mandell, Adam; Margolin; Marinaccio; Maroney; Martin Owens; Marin; Marotta; McCann; McNama, M.; Meisenheimer; Miller, M.; Millett; Millon; Minkowitz; Miranda; Moretti; Mosher; Moskowitz; Murphy; Napoletano; Nowotarski; Onderdonk; Ostertag; Owens; Parker; Perlman; Pleat; Poster-Zimmerman; Prager; Quist; Richman; Richter; Rivera; Rosriguez; Russell; Ryba; Samuels; Santiago; Schofield; Schrauer; Schriever; Sciocchetti; Scott; Sen; Shamoon; Champnoi; Sharkey; Sigmond; Silkenat; Singer, D.; Sonberg; Spicer; Spierer; Standard; Starkman; Stieglitz; Sullivan; Tarver; Tennant; Tesser; Triebwasser; Tully; Vecchio; Vigdor; Weigell; Weis; Weston; Whiting; Wildgrube; Williams; Witmer; Wolff, B.; Young; Younger.

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

1. The members of the House recited the Pledge of Allegiance and Michael F. Donegan, counsel at the New York State Commission of Correction, sang “God Bless America.”
2. Approval of minutes of January 26, 2018 meeting. The minutes were amended to note that the Chair thanked the presenters of Items 2, 6, 7, 10 and 13 and, as amended, were accepted.
3. Report of Treasurer. Scott M. Karson, Treasurer, reported that through February 28, 2018, the Association’s total revenue was \$13 million, a decrease of approximately \$5,400 over the previous year, and total expenses were \$4.7 million, a decrease of approximately \$365,000 over 2017. The Chair received the report with thanks.
4. Election of the Nominating Committee and NYSBA Delegates to the ABA House of Delegates. Glenn Lau-Kee, 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 2018-2019 Nominating Committee:

District members and alternates of the Nominating Committee: First – Adrienne Bth Koch, Stephen C. Lessard, Susan B. Lindenauer, Michael J. McNamara, John Owens Jr., Seth Rosner, Siana S. Sen, Lisa Stenson Desamours and Stephen P. Younger, with Vincent Ted Chang, First Alternate, Asha Susan Smith, Second Alternate, and Kaylin L. Whittingham, Third Alternate; Second – Andrew M. Fallek and Hon. Cheryl E. Chambers, with Barton L. Slavin as Alternate; Third – David W. Myers and Elena DeFio Kean, with Sandra Rivera as Alternate; Fourth – Michelle H. Wildgrube and Marne Onderdonk, with Jeremiah Wood as Alternate; Fifth – Karen Stanislaus and Michael E. Getnick, with Timothy J. Fennell as Alternate; Sixth – Bruce J. McKeegan and Alyssa M. Barreiro, with Christopher Denton as Alternate; Seventh – LaMarr Jackson and June M.

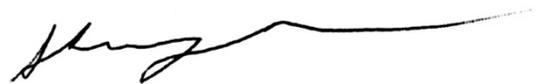
Castellano, with Amy L. Christenson as Alternate; Eighth – Vincent E. Doyle III and Kathleen Marie Sweet, with Oliver C. Young as Alternate; Ninth – Jessica D. Parker, Mark T. Starkman, and Kelly M. Welch, with Joseph J. Ranni as Alternate; Tenth – Ilene S. Cooper, A. Thomas Levin, Dorian Ronald Glover and Richard A. Weinblatt, with Rosemarie Tully, First Alternate, and Marian C. Rice, Second Alternate; Eleventh – Violet E. Samuels and Arthur N. Terranova, with Chanwoo Lee as Alternate; Twelfth – Carlos M. Calderón and Michael A. Marinaccio, with Samuel M. Braverman as Alternate; Thirteenth – Michael J. Gaffney and Robert A. Mulhall, with Orin J. Cohen as Alternate.

A motion to elect the foregoing was adopted.

- b. Election of Delegates to ABA House: A motion was adopted to elect the following for a two-year term commencing in August 2018: Sharon Stern Gerstman, Henry M. Greenberg, Kathryn Grant Madigan, David P. Miranda, and Kenneth G. Standard.
 - c. Election of Young Lawyer Delegate to ABA House: A motion was adopted to elect Natasha Shishov.
5. Report and recommendations of Criminal Justice Section. Leah R. Nowotarski, chair of the section's Town and Village Justice Courts Committee, together with past section chair Sherry Levin Wallach, outlined the section's report and recommendations with respect to counsel at first appearance, education and training, and consolidation. The section agreed to modify Recommendation 9 to recognize the existence of a current website and to recommend that it be made more publicly available. It agreed to amend Recommendation 10 to refer to "expanded use of courts of record." The section also accepted an amendment to the report to clarify that the State should bear any additional costs for implementation of the recommendations. After discussion, a motion was adopted to approve the report and recommendations, as amended.
 6. Report of the President. Ms. Gerstman highlighted the items contained in her written report, a copy of which is appended to these minutes and reflected on her two years of service as President-Elect and President and thanked the House members for the opportunity to serve. She also thanked the officers and the staff for their assistance during her term. She thanked the members of the House for their service.
 7. Report of Committee on Membership. Thomas J. Maroney, chair of the committee, updated the House with respect to membership initiatives, including cross-indexing addresses with OCA addresses, non-resident outreach, and regional meetings. The chair received the report with his thanks.
 8. Report and recommendations of Committee on Diversity and Inclusion. Lillian M. Moy, past chair of the committee, reviewed the results of the committee's biennial 2017 survey, comparing those results to the Committee's previous surveys, as well as the committee's recommendations with respect to ongoing efforts to further diversity in the Association. After discussion, a motion was adopted to approve the committee's report and recommendations.
 9. Report and recommendations of Committee on Families and the Law. Committee chair Susan B. Lindenauer, together with committee member Angela O. Burdon, reviewed the committee's report recommending that the State fund and oversee mandated representation provided to indigent parents in Family Court. After discussion, a motion was adopted to approve the report and recommendations.

10. Report of The New York Bar Foundation. John H. Gross, President of The New York Bar Foundation, reviewed the growth of The Foundation during his term as President, including an increase in the number of grants and increased section participation in providing grants and fellowships. The Chair received the report with his thanks.
11. New Business. Mr. Richman moved a proposed resolution with respect to Association endorsement of services that are endorsed by the National Rifle Association. The Chair ruled the motion out of order as premature and not germane to the work of the House. An appeal of the chair's ruling was upheld on voice vote. A motion by Mr. Tennant to request the Executive Committee, Finance Committee and Audit Committee to review the Association's relationship with vendors was then approved.
12. Administrative items. Mr. Miller reported on the following:
 - a. Motions to approve the designation of delegates filed by the county and local bar associations for the 2018-2019 Association year and to approve the filed roster of the members of the House for the 2018-2019 year were requested and approved.
 - b. He noted that this meeting represents his last as Chair of the House and thanked the House for the opportunity to serve. He thanked the departing members of the Executive Committee and the House for their service and thanked the staff for their support. He introduced Mr. Greenberg as the next Chair of the House and presented him with the House's gavel.
13. Date and place of next meeting. Mr. Greenberg announced that the next meeting of the House of Delegates would take place on Saturday, June 16, 2018 at The Otesaga in Cooperstown.
14. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,



Sherry Levin Wallach
Secretary

Sharon Stern Gerstman
President, New York State Bar Association

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**REPORT OF THE PRESIDENT
TO THE HOUSE OF DELEGATES
April 14, 2018**

GENDER DISPARITY IN THE COURTROOM AND ADR

In February, I was privileged to present a resolution to the ABA House of Delegates that outlined steps that law firms, the judiciary, clients, and Alternate Dispute Resolution (ADR) providers can take to address the underrepresentation of women attorneys in courtrooms and ADR settings. This resolution is based on the work of our Commercial and Federal Litigation Section and its Task Force on Women Initiatives, chaired by past president Bernice K. Leber. The full report prepared by the section, which was approved by our House of Delegates in November 2017, is available at <http://www.nysba.org/WomensTaskForceReport/>.

TASK FORCE ON SCHOOL TO PRISON PIPELINE

The Task Force, which I appointed last summer and is co-chaired by Sheila Gaddis and John H. Gross, is in the process of preparing its report, which will review current practices in and law relating to school discipline, and recommend policy and best practices in discipline and restorative justice in the school setting. The report will be released later this year for consideration by the House of Delegates.

LEGISLATIVE INITIATIVES

State

As you know, the Legislature passed all budget bills last week. The Judiciary budget was approved as submitted by the Office of Court Administration. Of note is funding for civil legal services and IOLA, as well as funding in excess of \$50 million for the Office of Indigent Legal Services to implement expansion of the settlement in *Hurrell-Haring v. State*. Issues that we were following but were not included in the budget bills are criminal discovery reform; bail reform; early voting; and the Child Victims Act. We anticipate that these issues may be revisited in the coming months.

Federal

Earlier this week, a number of our leaders participated in the annual ABA Day in Washington. The ABA's core issues that were addressed were funding for the Legal Services Corporation and public service student loan forgiveness. With respect to the LSC, Congress appropriated \$410 million for fiscal year 2018; we will seek \$482 million for fiscal year 2019. With respect to student loan forgiveness, the ABA supports the preservation of the federal Public Service Loan Forgiveness program (PSLF) as a vital source of immediate support to state, local, and tribal communities that enables them to provide critical services to their residents and opposes efforts to repeal or end the program.

Federal issues of particular interest to our Association include support for states' authority to regulate the tort system; opposition to proposed legislation to repeal New York's Scaffold Law; and support for the repeal of the Dickey Amendment, which prohibits the use of funds made available for study of injury prevention and control at the Centers for Disease Control to advocate or promote gun control.

OTHER ACTIVITIES

With respect to county and local bar outreach, I attended the Albany County Bar Association's annual Court of Appeals dinner and the Richmond County Bar Association's annual dinner. I spoke to attendees at our Bridge the Gap CLE programs in Buffalo and Albany, and last week I addressed attendees at the Young Lawyers Section's annual Trial Academy, held at Cornell Law School.

This is the last President's Report of my year in office. It has been a privilege to serve as your President, and I thank you for your participation and collegiality. To those who are leaving the House this year, thank you for your service.

Our next House of Delegates meeting will be held on June 16, 2018 at The Otesaga in Cooperstown. I look forward to seeing you there.

A handwritten signature in black ink, appearing to be "John J. ...", written in a cursive style.



Staff Memorandum

**HOUSE OF DELEGATES
Agenda Item # 3**

Attached for your reference are the Association's financial statements through April 30, 2018.

**NEW YORK STATE BAR ASSOCIATION
2018 OPERATING BUDGET
FOUR MONTHS OF CALENDAR YEAR 2018**

REVENUE

	2,018 BUDGET	ADJUST- MENTS	2018 BUDGET AS ADJUSTED	UNAUDITED RECEIVED 4/30/2018	% RECEIVED 4/30/2018	2017 BUDGET	UNAUDITED RECEIVED 4/30/2017	% RECEIVED 4/30/2017
MEMBERSHIP DUES	10,050,000		10,050,000	9,607,576	95.60%	10,925,000	9,729,197	89.05%
SECTIONS:								
Dues	1,341,574		1,341,574	1,252,506	93.36%	1,411,600	1,260,433	89.29%
Programs	2,894,561		2,894,561	1,507,133	52.07%	2,763,550	1,242,397	44.96%
INVESTMENT INCOME	477,000		477,000	50,046	10.49%	345,000	50,153	14.54%
ADVERTISING	296,000		296,000	59,137	19.98%	133,000	11,998	9.02%
CONTINUING LEGAL EDUCATION	3,635,000		3,635,000	1,519,798	41.81%	3,900,000	1,266,168	32.47%
USI AFFINITY PAYMENT	2,262,000		2,262,000	732,256	32.37%	2,269,000	734,985	32.39%
ANNUAL MEETING	930,000		930,000	842,403	90.58%	869,500	900,992	103.62%
HOUSE OF DELEGATES & COMMITTEES	211,500		211,500	36,286	17.16%	108,100	30,496	28.21%
PUBLICATIONS, ROYALTIES AND OTHER	296,500		296,500	60,542	20.42%	274,200	32,760	11.95%
REFERENCE MATERIALS	1,310,000		1,310,000	342,298	26.13%	1,350,000	231,924	17.18%
TOTAL REVENUE	23,704,135	0	23,704,135	16,009,981	67.54%	24,348,950	15,491,503	63.62%

EXPENSE

	2,018 BUDGET	ADJUST- MENTS	2018 BUDGET AS ADJUSTED	UNAUDITED EXPENDED 4/30/2018	% EXPENDED 4/30/2018	2017 BUDGET	UNAUDITED EXPENDED 4/30/2017	% EXPENDED 4/30/2017
SALARIES & FRINGE	10,105,550		10,105,550	3,036,288	30.05%	10,409,950	3,049,643	29.30%
BAR CENTER:								
Rent	287,000		287,000	82,137	28.62%	305,000	107,323	35.19%
Building Services	238,250		238,250	55,684	23.37%	283,250	59,863	21.13%
Insurance	142,000		142,000	58,449	41.16%	142,000	47,399	33.38%
Taxes	5,250		5,250	0	0.00%	5,250	24	0.46%
Plant and Equipment	904,600		904,600	271,781	30.04%	858,500	297,923	34.70%
Administration	607,600		607,600	181,474	29.87%	543,500	270,628	49.79%
SECTIONS	4,198,850		4,198,850	1,793,901	42.72%	4,171,175	1,808,093	43.35%
PUBLICATIONS:								
Reference Materials	389,050		389,050	55,322	14.22%	430,150	135,522	31.51%
Journal	378,200		378,200	144,142	38.11%	431,200	158,983	36.87%
Law Digest	187,800		187,800	60,438	32.18%	187,800	54,362	28.95%
State Bar News	242,300		242,300	71,063	29.33%	247,300	75,421	30.50%
MEETINGS:								
Annual Meeting	345,800		345,800	268,550	77.66%	348,200	337,245	96.85%
House of Delegates, Officers and Executive Committee	526,950		526,950	170,688	32.39%	520,600	230,555	44.29%
COMMITTEES:								
Continuing Legal Education	1,711,950		1,711,950	681,402	39.80%	1,767,875	611,185	34.57%
LPM / Electronic Communication Committee	72,800		72,800	34,188	46.96%	86,250	49,946	57.91%
Marketing / Membership	798,100		798,100	241,333	30.24%	971,200	248,560	25.59%
Media Services	98,900		98,900	18,783	18.99%	115,300	29,888	25.92%
All Other Committees and Departments	2,556,410		2,556,410	720,427	28.18%	2,489,075	850,277	34.16%
TOTAL EXPENSE	23,797,360	0	23,797,360	7,946,050	33.39%	24,313,575	8,422,840	34.64%
BUDGETED SURPLUS	(93,225)	0	(93,225)	8,063,931		35,375	7,068,663	

NEW YORK STATE BAR ASSOCIATION
STATEMENTS OF FINANCIAL POSITION
AS OF APRIL 30, 2018

<u>ASSETS</u>	<u>UNAUDITED</u> <u>4/30/2018</u>	<u>UNAUDITED</u> <u>4/30/2017</u>	<u>UNAUDITED</u> <u>12/31/2017</u>
<u>Current Assets:</u>			
General Cash and Cash Equivalents	12,810,703	12,372,088	13,900,890
Accounts Receivable	108,730	146,012	135,391
Prepaid expenses	775,574	610,456	1,212,640
Royalties and Admin. Fees receivable	160,771	151,062	710,605
Total Current Assets	13,855,778	13,279,618	15,959,526
<u>Board Designated Accounts:</u>			
<u>Cromwell Fund:</u>			
Cash and Investments at Market Value	2,330,264	2,175,658	2,365,477
Accrued interest receivable	0	0	0
	2,330,264	2,175,658	2,365,477
<u>Replacement Reserve Account:</u>			
Equipment replacement reserve	1,117,112	1,116,777	1,117,002
Repairs replacement reserve	794,042	793,804	793,964
Furniture replacement reserve	219,860	219,794	219,839
	2,131,014	2,130,375	2,130,805
<u>Long-Term Reserve Account:</u>			
Cash and Investments at Market Value	22,829,667	20,990,403	22,901,794
Accrued interest receivable	0	0	123,864
	22,829,667	20,990,403	23,025,658
<u>Sections Accounts:</u>			
Section Accounts Cash equivalents and Investments at market value	3,599,281	3,600,852	3,629,262
Cash	965,738	694,737	76,245
	4,565,019	4,295,589	3,705,507
<u>Fixed Assets:</u>			
Furniture and fixtures	1,415,856	1,340,918	1,377,127
Leasehold Improvements	1,368,781	1,368,781	1,368,781
Equipment	8,306,954	8,511,919	8,298,344
Telephone	107,636	107,636	107,636
	11,199,227	11,329,254	11,151,888
Less accumulated depreciation	8,945,286	8,655,769	8,839,286
Net fixed assets	2,253,941	2,673,485	2,312,602
Total Assets	47,965,683	45,545,128	49,499,575
<u>LIABILITIES AND FUND BALANCES</u>			
<u>Current liabilities:</u>			
Accounts Payable & other accrued expenses	735,891	686,046	1,247,871
Deferred dues	94	0	7,717,027
Deferred income special	846,153	1,076,922	923,076
Deferred grant revenue	34,010	33,575	34,630
Other deferred revenue	62,074	103,132	852,291
Unearned Income - CLE	21,388	19,478	47,819
Payable To The New York Bar Foundation	3,339	3,731	0
Total current liabilities & Deferred Revenue	1,702,949	1,922,884	10,822,714
<u>Long Term Liabilities:</u>			
Accrued Pension Costs	0	0	0
Accrued Other Postretirement Benefit Costs	7,651,026	7,312,723	7,551,026
Accrued Supplemental Plan Costs and Defined Contribution Plan Costs	120,000	135,085	309,739
Total Liabilities & Deferred Revenue	9,473,975	9,370,692	18,683,479
<u>Board designated for:</u>			
Cromwell Account	2,330,264	2,175,658	2,365,477
Replacement Reserve Account	2,131,014	2,130,375	2,130,805
Long-Term Reserve Account	15,058,641	13,542,595	15,041,029
Section Accounts	4,565,019	4,295,589	3,705,507
Invested in Fixed Assets (Less capital lease)	2,253,941	2,673,485	2,312,602
Undesignated	12,152,829	11,356,734	5,260,676
Total Net Assets	38,491,708	36,174,436	30,816,096
Total Liabilities and Net Assets	47,965,683	45,545,128	49,499,575

New York State Bar Association
Statement of Activities
For the Four Months Ending April 30, 2018

	<u>April 2018</u>	<u>April 2017</u>	<u>December 2017</u>
REVENUES AND OTHER SUPPORT			
Membership dues	\$9,607,576	\$9,729,197	\$10,053,580
Section revenues			
Dues	1,252,506	1,260,433	1,306,781
Programs	1,507,133	1,242,397	2,464,057
Continuing legal education program	1,519,798	1,266,168	3,154,300
Administrative fee and royalty revenue	783,545	762,805	2,475,953
Annual meeting	842,403	900,992	897,247
Investment income	135,238	128,817	1,034,947
Reference Books, Formbooks and Disk Products	342,298	231,924	1,204,335
Other revenue	149,040	84,439	167,602
	<u>16,139,537</u>	<u>15,607,172</u>	<u>22,758,802</u>
PROGRAM EXPENSES			
Continuing legal education program	951,091	830,628	2,449,563
Graphics	638,427	664,386	1,795,789
Government relations program	162,156	205,222	614,867
Law, youth and citizenship program	24,546	59,259	181,679
Lawyer assistance program	32,218	63,408	173,693
Lawyer referral and information services	42,809	56,183	173,154
Law practice management services	19,106	69,045	94,752
Media / public relations services	123,257	151,833	424,720
Meetings services	4,173	11,125	0
Marketing and Membership services	522,836	516,544	1,554,945
Pro bono program	80,492	61,224	222,562
Local bar program	35,416	27,223	103,500
House of delegates	153,142	211,897	480,754
Executive committee	17,547	18,658	57,647
Other committees	228,791	255,684	589,813
Sections	1,793,901	1,808,093	3,694,593
Section newsletters	57,389	53,817	144,813
Reference Books, Formbooks and Disk Products	237,022	346,161	965,600
Publications	275,643	288,766	789,495
Annual meeting expenses	268,550	337,245	338,205
	<u>5,668,512</u>	<u>6,036,401</u>	<u>14,850,144</u>
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	1,164,881	1,088,480	3,893,223
Pension plans and other employee benefit plan costs	217,207	221,610	651,939
Rent and equipment costs	309,716	320,493	1,047,999
Consultant and other fees	300,315	415,016	1,004,809
Depreciation and amortization	225,200	251,200	722,019
Other expenses	60,220	89,627	312,701
	<u>2,277,539</u>	<u>2,386,426</u>	<u>7,632,690</u>
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS			
Realized and unrealized gain (loss) on investments	8,193,486	7,184,345	275,968
	(517,833)	1,251,071	2,790,613
	7,675,653	8,435,416	3,066,581
Net assets, beginning of year	<u>30,816,103</u>	<u>27,749,522</u>	<u>27,749,522</u>
Net assets, end of year	<u><u>38,491,756</u></u>	<u><u>36,184,938</u></u>	<u><u>30,816,103</u></u>



Michael Miller

President

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**President's Report
to the House of Delegates
June 16, 2018**

We members of this great profession of ours, particularly the members of the organized bar, stand on the front lines protecting, defending - and yes, even expanding - our precious civil liberties and the administration of justice. Our emphasis at the State Bar in the coming year will be on a broad range of topics relevant to those liberties and the effective administration of justice which I will briefly describe. But first, I will provide a brief summary of actions and activities since the last meeting of the House of Delegates.

You may have read in the New York Times last week about the refusal to disclose the disciplinary records of the policeman who choked Eric Garner to death because of a previously obscure section of New York's Civil Rights Law, section 50-a. We have established a Working Group to explore whether that law should be amended, revised or revoked. Catherine Christian and NYSBA VP from the 8th Judicial District (Buffalo) Norman Effman will co-chair that effort. As a result of the Garner case, NYSBA's Media Law Committee and Civil Rights Committee had asked NYSBA's Executive Committee to adopt a legislative proposal to repeal Civil Rights Law §50-a. Our Executive Committee decided to create a Working Group with representation from the two committees and members from or collaboration with the Labor and Employment Law Section, the Criminal Justice Section, and the State and Local Government Law Section to examine the issues raised by the report and asked the two committees to refrain from issuing comments on the proposed legislation until the working group reports back to the Executive Committee.

NYSBA and the New York State Bar Foundation have joined forces to file an amicus brief in a case before the U.S. Supreme Court *Frank v. Gaos*, that challenges the award of cy pres funds in a class action to not-for-profits. We will

be challenging the argument that the settlements should not transfer money to charities and nonprofits that have not been injured by the conduct that sparked the lawsuit. An Executive Committee subcommittee consisting of William Russell, Erica Hines and Scott Karson will coordinate our efforts with the New York State Bar Foundation in preparing and filing an amicus brief concerning the challenge to cy pres distributions and the Nixon Peabody firm has generously agreed to represent NYSBA and the NYSBF pro bono.

In a substantial departure from past years, the annual Section Leaders Conference was held over a two-day period at the Bar Center in Albany instead of a one-day session at the Harvard Club in Manhattan. Also, in a departure from past years, I asked Jean Gerbini, the chair of the Section Leaders Conference, to co-chair the conference with me. The conference was well-attended by section officers and we provided a significantly more robust and in-depth curriculum for attendees. Additionally, attendees had meaningful opportunities to socialize and share common interests and challenges. An added fiscal benefit is that having our two-day program at the Bar Center where we served five meals and had a wonderful cocktail reception for attendees on our patio, compared to just breakfast and lunch at the Harvard Club, resulted in total savings of approximately \$22,000. While there are areas to be improved upon, I believe that by any measure, this conference was a significant success.

In previous years, New York State Bar Association section, committee and task force reports have been trusted and widely-used sources of insights and information, and have served as the basis for legislative and other proposals. The coming year will be no exception. Our emphasis in the coming year will be on a broad range of topics relevant to the effective administration of justice in the 21st century. We will focus on important criminal justice issues; explore the criteria and best practices for screening candidates for election to judicial office; discuss important law practice management matters; and address America's scourge of mass shootings, assault weapons and related legal issues. And we will take a look at how, through the law, we might assist our fellow Americans in Puerto Rico.

Personal attacks on members of the judiciary have increased exponentially and as you all know, the judiciary is constrained from responding. In order to help us respond more quickly and effectively during the 24-hour news cycle when judges are unfairly attacked, or other matters call for prompt response, we are establishing a **Rapid Response Advisory Group**, which will be led by NYSBA Past President David Miranda.

There is no more important pillar to the foundation of our justice system than the quality of our judiciary. It has long been the policy of NYSBA to advocate for the

selection of judges by appointment, rather than by election. However, as long as there are judicial elections, it is vitally important that the process of evaluation is fair and fosters the best judiciary possible. I have heard from the highest levels of the court system that there are significant concerns regarding the existing evaluation system. Therefore, we have established the **Task Force on the Evaluation of Candidates for Election to Judicial Office**, co-chaired by Robert L. Haig, and former Court of Appeals Judge Susan Phillips Read. This task force will review the various vetting structures that exist throughout New York and will propose best practices, guidelines and minimum standards for review of candidates for election to judicial office and will make recommendations to assist local bar associations and good government groups to ensure that we have the best possible judicial evaluation efforts throughout the State. The task force is already hard at work, developing surveys for current and former members of the Independent Judicial Election Qualifications Commissions as well as of elected judges; a questionnaire for bar associations, good government groups and others interested in judicial elections; public hearings and focus groups; and interviews and polls. Its first full meeting will be held on August 1.

A decade ago, former President Bernice Leber established the **Task Force on Wrongful Convictions** which, under the leadership of former Judge Barry Kamins, issued a truly ground-breaking report in 2009. Judge Kamins and former Court of Appeals Judge Robert Smith are co-chairing a newly empaneled task force to update the 2009 report with recommendations based upon new developments, technology, science, experience, and judicial decisions, and make affirmative recommendations to reduce the likelihood of wrongful convictions. The members of the task force include representatives from the legal aid society, the attorney general's office, the defenders office, law schools, the federal bench and district attorneys. Martin Tankleff, who spent 17 years in prison before his conviction for his parents' murders in Suffolk County [was overturned](#), will also serve on the task force.

To build upon the excellent work of our Special Committee on Re-Entry, we are establishing the **Task Force on Incarceration Release Planning and Programs**, which will be co-chaired by Scott Karson and Sherry Levin Wallach. This task force will conduct an investigation and recommend state and national policy changes and best practices to help better prepare those released from incarceration to re-enter the community and reduce the rate of recidivism.

Massacres at Columbine, Las Vegas, Orlando, San Bernardino, Sandy Hook, Parkland and so many others... the epidemic of mass shootings continues unabated. We have established the **Task Force on Mass Shootings and Assault Weapons**, co-chaired by former Criminal Court Judge Margaret Finerty and

NYSBA Past President David Schraver. This task force will consider the connection between mental health and mass shootings; the relationship between domestic violence and mass shootings; whether assault weapons belong in civilian hands; and will make appropriate recommendations.

In 1997, NYSBA issued guidelines for the use of paralegals -- a lot has changed since 1997. **The Task Force on the Role of Paralegals**, co-chaired by former NYSBA President Mary Ann Saccamando Freedman, Margaret Phillips and Vincent Chang, will update the 1997 report, explore relevant issues and make recommendations for best practices for the use of paralegals in the context of the modern 21st century law office.

There is a humanitarian crisis in Puerto Rico of historic proportions. We have established a **Working Group on Puerto Rico** to explore ways through enactment or modification of laws we might be able to assist our fellow Americans in Puerto Rico who are suffering so grievously. Because of the urgency of the situation, I will ask that they report to our Executive Committee as soon as possible with any affirmative recommendations. In the meantime, I have already begun to reach out to bar leaders throughout NY to join me in contacting NY's Congressional delegation to express our profound concern regarding the crisis in Puerto Rico.

All of these groups have hit the ground running, and they plan to report regularly to both the House and the Executive Committee throughout the year.

You often have heard me say, "All roads lead to membership." Our association's greatest strength rests with its diverse, engaged members. Increasing membership is a top priority for our officers and for me. In addition to the policy initiatives described above, we will also be focusing on a challenge that is shared by most voluntary bar associations – and indeed most professional associations – across the country: attracting new members and retaining existing ones. In the coming year, as we continue our work to improve membership development in all areas, we will embark on a vigorous campaign focusing on providing a more meaningful membership experience for our out-of-state members, who comprise almost one-fourth of our membership. I have asked our Membership Committee to develop new outreach programming for these members, in conjunction with functions being held by our sections outside New York State. In addition, I have asked the committee to consider other tools to meet the needs of this important constituency.

During the coming months, I plan to attend a number of section and local bar association meetings. I look forward to seeing many of you at these events.

I am deeply honored to serve as the president of the New York State Bar Association. Thank you for the opportunity to serve you and the State Bar.

A handwritten signature in black ink that reads "Michael Miller". The signature is written in a cursive style with a prominent underline for the first name.



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #7

REQUESTED ACTION: Approval of the report and recommendations of the Criminal Justice Section and the Committee on Mandated Representation.

Attached is a report from the Criminal Justice Section and the Committee on Mandated Representation recommending an increase in the rates paid to private attorneys assigned to represent litigants pursuant to Article 18-B of the County Law. As noted in the report, these rates were last adjusted effective January 1, 2004. Since that time, the Office of Indigent Legal Services (ILS) was established to monitor, study, and make efforts to improve services provided pursuant to Article 18-B, and New York State has provided in the state budget funding to reimburse counties and cities for improvements to the provision of indigent legal services. However, ILS is not authorized to alter assigned counsel rates.

The report then examines increases in compensation for the state judiciary and lawyers accepting assignments in federal courts. With respect to the latter, the report notes that the Judicial Conference is authorized to increase rates, and assigned counsel rates have been regularly adjusted since 2002.

In its *Standards for Providing Mandated Representation*, originally adopted in 2005 and last amended in 2015, NYSBA has recognized the necessity of adequate compensation for the representation of indigent clients in order to ensure the continued participation of competent attorneys accepting assignments.

Accordingly, the report recommends that County Law §722-b be amended to increase assigned counsel rates and to provide annual review and adjustment as needed of these rates. Such increases should not result in an unfunded mandate to counties and should be effected at state expense.

This report was posted for comment in May 2018. The Chief Defenders Association of New York has submitted a letter supporting the report but recommending that there be an immediate increase in rates to represent 90% of the currently effective rate under the Federal Criminal Justice Act. The Committee on Children and the Law has submitted a letter supporting the proposal and recommending that, in addition, Attorneys for the Child and assigned counsel appearing in Family Court be included in such a rate increase.

The report will be presented at the June 16 meeting by Norman P. Effman, past chair of the Committee on Mandated Representation.

**NEW YORK STATE ABAR ASSOCIATION
CRIMINAL JUSTICE SECTION
THE NEED TO INCREASE ASSIGNED COUNSEL RATES IN NEW YORK**

In 2000, the Honorable Juanita Bing Newton stated:

If we are to ensure New York's longstanding commitment to the principles of Gideon and access to justice, unquestionably the compensation rate for assigned counsel must be increased." see NYSBA Criminal Justice Journal/Summer 2000/Volume 8/Number 1/Page 15.

The Judge's words are again relevant, as fees implemented in 2004 have stagnated for fourteen years.

New York State, in addition to county public defenders and conflict defender offices, as well as contractual relationships by counties with legal aid societies, relies on assigned counsel programs as an indispensable part of its justice system. These programs provide the appointment of private counsel by the Court to represent litigants in thousands of cases each year in the criminal and family courts of New York, as well as in parole matters where counsel is mandated.

Article 18-B of the County Law establishes a compensation paid to attorneys for assigned counsel work. The original statute for assigned counsel fees was \$15 per hour for work performed in court and \$10 per hour for work performed out of court. In 1977, it was amended to \$25 per hour for work performed in court and \$15 for work performed out of court. In 1986, the Legislature amended the County Law for New York's assigned counsel fees to \$40 per hour for work performed in court and \$25 per hour for work performed out of court. This covered misdemeanors and felonies, although there were higher caps for felony cases.

In January of 2000, the Unified Court System published a report authored by then Chief Administrative Judge Jonathan Lippman and Deputy Chief Administrative Judge Juanita Bing Newton. That report, *Assigned Counsel in New York: A Growing Crisis*, noted that fewer and fewer attorneys in New York were willing to accept these assignments under the \$25 and \$40 rate, leading to a crisis in the Assigned Counsel Program. The reason for the crisis was clear: the compensation paid to attorneys for assigned counsel work was woefully inadequate. The report recommended the elimination of the differential rates for in court and out of court work. It further recommended the establishment of separate rules for felony and non-felony work and an increase of the rate levels. The report by Judges Lippman and Bing Newton also recommended the establishment of a commission to review assigned counsel rates. It further concluded that state government should share the cost of assigned counsel compensation, which imposes considerable fiscal burden on local governments.

Effective January 1, 2004, assigned counsel rates were increased to \$75 per hour in and out of court for all matters governed by County Law §722 except for fees of \$60 per hour in and out of court for representation of a person who was initially charged with a misdemeanor or lesser offense and no felony.

The \$75 per hour rate included:

- a. felonies,
- b. violations of probation (felony convictions),
- c. appeals,
- d. SORA hearings,
- e. parole representation,
- f. family court representation,
- g. post judgment motions, Writs of Habeas Corpus, and CPL Article 440 motions if counsel is assigned.

Statutory maximums were established at \$2,400 when the \$60 rate applied and \$4,400 when the \$75 rate applied.

Compensation in excess of these amounts was permitted under extraordinary circumstances.

THE EXTENSION OF THE HURRELL-HARRING SETTLEMENT REFORMS FOR INDIGENT DEFENSE

Quality criminal defense of individuals who cannot otherwise afford counsel has been called of paramount importance in complying with the United States Supreme Court decision in Gideon v. Wainwright. In 2014, the State of New York negotiated a settlement in the Hurrell-Harring case, described further infra, based upon the alleged failure to provide the necessary level of indigent defense services in the counties which were sued. To ensure the fair and equal representation for all New Yorkers, the fiscal year 2018 budget included necessary resources for the state to fund 100%, of the costs, implemented incrementally, needed to extend the reforms provided in the Hurrell-Harring settlement to all 62 counties in New York.

RECENT REFORMS AND STATE AID IN PROVIDING MANDATED REPRESENTATION IN CRIMINAL CASES TO COUNTIES

A. NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES

Executive Law Article 30, §832(1), which became law in 2010, establishes the Office of Indigent Legal Services to “monitor, study and make efforts to improve the quality of services provided pursuant to Article 18-B of the County Law.”

ILS established its statewide Implementation Unit. This unit was to reach out to public defense leaders and local officials in every county and New York City to advance the interim and long range planning for counsel at arraignment, caseload relief, and initiatives to improve the quality of indigent defense. The Executive Law provided that each county and the City of New York shall, in consultation with the office, undertake good faith efforts to implement the plans for each of the reforms. See Executive Law §832(4)(a)(iii), (4)(b)(iii), and (4)(c)(iv).

ILS is therefore charged with the statutory responsibility of using the monies available through the Hurrell-Harring expansion to all 62 counties to improve the quality of indigent defense.

B. THE HISTORY AND THE CREATION OF ILS IN NEW YORK (REFORM AFTER DECADES OF FAILURE)

In 2018, William Leahy, the Executive Director of the Indigent Legal Service Office (ILS) published an article in the Indiana Law Review which reviewed the right to counsel in New York and the reform achieved after decades of failure (Indiana Law Review, Vol. 51, No. 1 [2018] - 3/20/18 pg. 145-165). That article documents the failures of New York in providing competent mandated representation to the period of reform presently underway. Mr. Leahy notes that from its inception in 1965 when County Law Article 18-B was signed into law, the right to counsel in New York was mired in dysfunction. The Law Review article notes that in May 2003, the State Legislature increased assigned counsel rates, established a revenue screen for limited state funding of indigent defense, and created the Indigent Legal Service Fund from which to distribute those funds to the counties and New York City. Mr. Leahy also notes that in 2004, this association established a special committee to Ensure Quality of Mandated Representation, now the Committee on Mandated Representation, which created comprehensive standards for institutional and assigned counsel providers. Reform of indigent defense in New York State came about in part as a result of the Chief Judge Kaye's Commission on the Future of Indigent Defense Services report issued on June 18, 2006. It concluded that New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused.

C. HURRELL-HARRING SETTLEMENT

As noted above, in October 2014, a settlement in the Hurrell-Harring lawsuit mandated the state to remedy the four major areas of deficiency in the counties which were parties to that lawsuit.

That settlement acknowledged the state's responsibility to comply with Gideon. Mr. Leahy also notes in his law review article that the state vested the duty to implement the reforms of the settlement in ILS, which had the expertise and independence necessary to do the job.

On January 17, 2017, the Governor announced the extension of the Hurrell-Harring reforms throughout the state at the state's expense.

Approximately one year ago, again as reported by ILS Executive Director Leahy, the April 10, 2017 state budget contained statutory amendments which amended the County Law to specify that the cost of implementing the reform plans "shall be reimbursed by the state to the county or city providing such services." The Executive Law amendments included one which gave the ILS the authority to craft and implement plans for statewide implementation of the improvements mandated by the settlement. Nothing, however, authorized ILS to alter the legislatively imposed assigned counsel rates.

INCREASES IN COMPENSATION FOR THE STATE JUDICIARY AND FOR ATTORNEYS ACCEPTING ASSIGNMENTS IN FEDERAL COURT

a. Judicial Salary Increases

Beginning in June 2015, the New York State Commission on Legislative, Judicial, & Executive Compensation was given the task of evaluating and making recommendations with respect to compensation for New York State judges as well as other state officials. That commission, in the present fiscal year, approved a set of recommendations that would boost salaries for Supreme Court judges from what was \$174,000 a year to nearly \$193,000 a year beginning on April 1st.

The increase in salaries for Superior Court judges reflects the need for judicial compensation that attracts and retains qualified people. Similar efforts at the federal level have led to salaries of federal district judges of approximately \$208,000 per year.

Assigned state judges went without raises from 1999 until 2012 when their salaries were increased from \$136,700 to the previous amount of \$174,000.

b. Comparison to Federal Compensation and Expenses of Appointed Counsel

In non-capital federal cases, hourly rates to attorneys appointed in criminal matters have been adjusted regularly since 2002. The maximum hourly rates in federal cases are as follows:

May 1, 2002 through December 31, 2005	\$90.00
January 1, 2006 through May 19, 2007	\$92.00
May 20, 2007 through December 31, 2007	\$94.00
January 1, 2008 through March 10, 2009	\$100.00
March 11, 2009 through December 31, 2009	\$110.00
January 1, 2010 through August 31, 2013	\$125.00
September 1, 2013 through February 28, 2014	\$110.00
March 1, 2014 through December 31, 2014	\$126.00
January 1, 2015 through December 31, 2015	\$127.00
January 1, 2016 through May 4, 2017	\$129.00
May 5, 2017 through March 22, 2018	\$132.00
March 23, 2018 to present	\$140.00

(Chapter 2, §230: Compensation and Expenses of Appointed Counsel) (Guide to Judiciary Policy Volume 7: Part A)

In 1964 the Criminal Justice Act was enacted by Congress to establish a comprehensive system for appointing and compensating lawyers to represent defendants financially unable to retain counsel in federal criminal proceedings. The Criminal Justice Act was amended in 1970 to authorize districts to establish federal public defender organizations as an institutional provider for indigent defendants.

As noted in the chart above, private “panel” attorneys are presently paid an hourly rate of \$140 in non-capital cases. These rates include both attorney compensation and office overhead.

The federal system also provides case maximums for compensation presently set at \$10,900 for felonies, \$3,100 for misdemeanors and \$7,800 for appeals. As in New York, maximums may be exceeded when higher amounts are certified by the court.

Private attorneys are appointed to provide representation, and their compensation is made in accordance with Criminal Justice Act (CJA), 18 USC §3006A, and the Guide to Judiciary Policy. See: 18 USC §4109(a)(1).

Federal legislation provides a procedure for an annual review of appropriate federal rates. The Guide to Judicial Policy, Volume 7A, Ch 2; §23.20 provides as follows:

“§230.20 Annual Increase in Hourly Rate Maximums

Under 18 U.S.C. §3006A(d)(1), the Judicial Conference is authorized to increase annually all hourly rate maximums by an amount not to exceed the federal pay comparability raises given to federal employees. Hourly rate maximums will be adjusted automatically each year according to any federal pay comparability adjustments, contingent upon the availability of sufficient funds. The new rates will apply with respect to services performed on or after the effective date.”

NEW YORK MUST PROPERLY ADJUST ASSIGNED COUNSEL RATES TO ENSURE ADEQUATE COMPENSATION FOR ASSIGNED COUNSEL

Providing adequate compensation to the private Bar who participate in the Assigned Counsel Program is consistent with the New York State Bar Association’s standards for providing mandated representation which points out the advantages of assigned counsel:

“Although the County Law currently allows each county to devise its own configuration for a provider system, in a great majority of cases, a proper representation plan will establish a mixed representation system that integrates the use of institutional providers and assigned counsel. Such mixed representation systems can combine the advantages of institutional providers with the advantages of assigned counsel plans to engage a broad segment of the bar in achieving the objectives of the plan.” (See introduction New York State Bar Association Standards for Providing Mandated Representation approved as revised by the New York State Bar Association House of Delegates March 28, 2015).

The NYSBA standards recognize that adequate compensation is necessary to ensure the continued participation of quality, competent attorneys, willing to accept criminal assignments in our courts. See standards K-3 through K-5.

Justice Journal in September of 2000, argued that assigned counsel rates which were not in line with current economic realities create dire implications for access to justice in New York. The Judge was commenting on a mass exodus of attorneys from assigned counsel panels with fewer and fewer attorneys willing to take these assignments throughout the state. In that article, the Court documented the exodus of lawyers from the panels because of low assignment rates which resulted in an acute shortage of appointed counsel severely undermining the processing of criminal and family court cases. See Ensuring Equal Justice for all Demands an Increase in Assigned Counsel Rates; NYSBA Criminal Justice Journal/Summer 2000/Vol. 8/No. 1 page 17.

The federal system relies on a formula which automatically adjusts the assigned counsel rates based upon comparability to any federal pay adjustments. In New York, we have established a periodic review of judicial salaries to ensure appropriate compensation for our judges placing them almost on parity with the federal judicial system.

Legislation which would authorize an annual adjustment each year according to any judicial salary comparability would eliminate the need for any commission or other process for annual review of appropriate compensation.

New York has developed a similar formula with respect to the elected district attorneys' salaries. Judiciary Law §183-a provides that the district attorney of each county having a population of more than 500,000, exclusive of the boroughs of New York, shall receive an annual salary equivalent to that of a justice of the State Supreme Court for such additional compensation as the legislative body of such county may provide by local law. The legislation also provides a salary equal to that of a county judge in counties having a population of more than 100,000 and less than 500,000.

In order to avoid increase in salaries to district attorneys which would become an unfunded mandate upon the county, New York County Law §700(11)(b) provides in addition to other state aids provided additional state aid reflecting a percentage of the increase in salaries between January 1, 1999 would become state responsibility. The percentage of the difference ranges from 36% to 41% is dependent upon the county.

INCREASED COMPENSATION FOR ASSIGNED COUNSEL IN NEW YORK, THE MISSING LINK

Institutional providers of mandated services have seen an increase in state aid through the Indigent Defense Fund and the distributions and grants provided by ILS. Judicial salaries and district attorney salaries have been increased significantly over the past several years. Assigned counsel rates have remained stagnant for 14 years.

Article 18-B of the County Law §722-b established the present hourly rates for misdemeanors, felonies, and appellate representation. That statute must be amended to reflect appropriate compensation consistent with the increases that have occurred for the judiciary, elected district attorneys and compensation for assigned counsel in federal criminal cases. It is recommended

that annual review of these rates based on comparables, such as judicial and district attorney salaries, should be adopted to avoid the difficulties of regular legislative action to provide for any increase.

RESOLUTION

1. Legislation should be enacted to increase assigned counsel rates.
2. The rates of compensation should be comparable to the percentage increase of judicial and elected district attorney salaries.
3. The legislation should provide for an annual review and adjustment as needed of assigned counsel rates based on a formula using comparable compensation rates similar to the formula utilized by the Federal Criminal Justice Act.
4. The increase in rates should not result in an unfunded mandate to the counties and should be a state expense.

**HOUSE OF DELEGATES
AGENDA ITEM #7**

RESOLUTION

1. Legislation should be enacted to increase assigned counsel rates. This increase should apply to all assignments as defined under “ Definition” in the NYSBA 2015 Revised Standards for providing Mandated Representation, which reads:

Mandated Representation - Legal representation of any person financially unable to obtain counsel without substantial hardship who is (1) accused of an offense punishable by incarceration; (2) entitled to or is afforded representation under §249, §262 or §1120 of the Family Court Act; Judiciary Law §35 including child custody and habeas corpus cases; Article 6-C of the Correction Law; §407 of the Surrogate’s Court Procedure Act; §259-i of the Executive Law; or §717 of the County Law; or (3) otherwise entitled to counsel pursuant to constitutional, statutory or other authority.

2. The rates of compensation should be comparable to the percentage increase of judicial and elected district attorney salaries.
3. The legislation should provide for an annual review and adjustment as needed of assigned counsel rates based on a formula using comparable compensation rates similar to the formula utilized by the Federal Criminal Justice Act.
4. The increase in rates should not result in an unfunded mandate to the counties and should be a state expense.

Committee on Families and the Law

June 9, 2018

Hon. Mary Rita Connerton –Co-Chair

Susan B. Lindenauer- Co-Chair

Kathleen R. Mulligan Baxter

General Counsel New York State Bar Association

One Elk Street, Albany, New York 12207

Re: Proposal of the NYSBA Criminal Justice Section and Committee on Mandated Representation

Dear Kathy:

This letter is submitted by the NYSBA Committee on Families and the Law in support of the proposal made by the NYSBA Criminal Justice Section and the NYSBA Committee on Mandated Representation that NYSBA support an increase in the compensation rates for private lawyers who are members of the panels that, under 18-B of the County Law, provide representation to clients facing criminal charges, who are unable to afford private counsel.

This Committee fully supports the Report and the Accompanying Resolution. However, we urge that the action of the Executive Committee and the House of Delegates include assigned counsel appearing in Family Court under 18-B of the County Law. Counsel appearing in Family Court under 18-B of the County Law are providing constitutionally mandated representation and the impact of failure to increase the rates for these attorneys is similar to that described in the Report of the Criminal Justice Section. In April NYSBA adopted policy supporting state funding for parental representation. Including assigned counsel providing representation in Family Court in the increase in compensation rates is an essential next step. Both the NYSBA Criminal Justice Section and the NYSBA Committee on Mandated Representation approved this modification to their proposal at their last meetings on May 3, 2018 and May 4, 2018 respectively.

Sincerely, Susan B. Lindenauer

New York State Bar Association

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COMMITTEE ON CHILDREN AND THE LAW

DAVID J. LANSNER

Chair
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To: NYSBA Executive Committee
From: David Lansner, Chair
Committee on Children and the Law
Date: May 22, 2018
Re: Report regarding increasing the 18-B Rates

On May 16, 2018, the Committee on Children and the Law voted unanimously to support the Report by the Criminal Justice Section and the Committee on Mandated Representation that recommends raising the hourly attorney rate of pay pursuant to County Law Article 18-b. The Committee also voted to request that Attorneys for the Child and assigned counsel appearing in Family Court be included in such a rate increase.



CHIEF DEFENDERS ASSOCIATION OF NEW YORK

May 29, 2018

Kathleen R. Mulligan Baxter
General Counsel
New York State Bar Association
One Elk Street
Albany, New York 142207

Re: Criminal Law Section Resolution on Assigned Counsel Rate Increase

Dear Ms. Baxter:

As President of the Chief Defender's Association of New York (CDANY) I write to strongly support the resolution to be presented by the Criminal Justice Section to the House of Delegates on June 14, 2018 to increase and regularly review statutorily set assigned counsel rates in New York

CDANY is a membership organization of Public Defenders, Conflict Defenders, Executive Directors of non-profit Legal Aid Societies and Administrators of Assigned Counsel Programs throughout New York State. The members of CDANY are responsible for running the offices and programs that defend the vast majority of people facing arrest and child welfare allegations in New York State. Collectively, our members manage indigent defense programs that represented well over five hundred thousand individuals in 2017.

The report accompanying the resolution provides a thorough description of the growing concern with the inadequacy of assigned counsel rates and CDANY strongly supports the recommendations contained in the report. In particular, it is essential that Assigned Counsel Plan Attorneys (also referred to as 18b attorneys), be paid an hourly rate that is consistent with their exceedingly important mission of providing constitutionally mandated representation to people facing dire consequences.

We wholeheartedly adopt the report issued by the NYSBA Criminal Justice Section. We agree that adequate compensation is necessary to ensure the continued participation of good quality and competent attorneys in this vital function. The current rates, unchanged for over fourteen years, are not in line with current economic realities and have dire implications for access to justice in New York. We already see an exodus of attorneys from Assigned Counsel

Panels with fewer and fewer attorneys willing to take these assignments. We feel the passage of these resolutions will prevent this situation from becoming a crisis where some clients will have to wait weeks or months for an attorney to be assigned to them.

We do wish to address one issue regarding resolution number two.

Our concern is that while the report recommends increases that are automatic, it does not set a baseline hourly rate for an immediate, much needed increase. We believe the rates must be increased and then subject to automatic increases in the future.

We suggest that specific language be added to resolution number two so that it now would read:

“The rate of compensation should be set at 90% of the currently effective rate under the Federal Criminal Justice Act.”

(As of right now, the federal CJA rate is \$140.00 per hour. Ninety percent would be \$126 per hour.)

Once again, we thank the New York State Bar Association for bringing this critical issue to the floor of the House of Delegates. We hope that a resolution on this issue will gain traction with the governor and the legislature and help solve this critical problem facing the Assigned Counsel Programs throughout New York State.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Justine Luongo', with a stylized, cursive script.

Justine Luongo
Chief Defender's Association of New York

cc: Norman Effman, NYSBA Vice President,
Eight Judicial District



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #9

REQUESTED ACTION: Approval of the report and recommendations of the New York City Bar Association.

Attached is a report from the New York City Bar recommending support for legislation that permanently exempts Puerto Rico from the provisions of the Merchant Marine Act of 1920, 46 U.S.C. §§5501 et seq., commonly known as the Jones Act. The Jones Act requires that cargo shipped between two ports within the United States must be transported on ships that meet certain registration requirements. When enacted, the purpose of the Act was to ensure that domestic ships would be available to support the U.S. military during war.

According to the report, the application of the Jones Act to shipments to Puerto Rico results in increased costs to the people of Puerto Rico for their imports and causes Puerto Rico to import most goods from foreign countries rather than the United States. In addition, the Jones Act contains exemptions for other United States territories, including the Virgin Islands, American Samoa, and the Northern Mariana Islands. The report does not advocate for the complete repeal of the Jones Act.

The report notes that in the aftermath of Hurricane Maria, the Department of Homeland Security issued a 10-day waiver of the Jones Act; it does not believe this temporary waiver was sufficient.

This report was posted for comment in May 2018. You will be advised of any comments received with respect to the report.

The report will be presented at the June 16 meeting by Roger Juan Maldonado, President of the New York City Bar Association.

CONTACT

POLICY DEPARTMENT

MARIA CILENTI

212.382.6655 | mcilenti@nycbar.org

ELIZABETH KOCIENDA

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IN SUPPORT OF PERMANENTLY EXEMPTING
PUERTO RICO FROM THE JONES ACT**

This report is respectfully submitted on behalf of the New York City Bar Association (“City Bar”) concerning Congressional attempts to provide aid and relief to the people of Puerto Rico as they recover from the devastation of Hurricane Maria.¹ Specifically, we write to strongly encourage Congress to permanently exempt Puerto Rico from the requirements of the Jones Act, just as the U.S. Virgin Islands have been exempted from that law’s requirements. Because Puerto Rico is an island economy, the restrictions imposed by the Jones Act have had a uniquely negative impact on the people of Puerto Rico by substantially increasing the cost of basic goods such as food and electricity. Now that Congress has taken up the task of addressing an aid package to Puerto Rico, we respectfully urge that this permanent exemption be granted so that the people of Puerto Rico can rebuild their economy.

All of the independent studies that have examined the impact of the Jones Act on Puerto Rico have unanimously found that it has had—and continues to have—a substantial negative impact.² The Jones Act raises the price of energy on the island³ at a time when Puerto Rican families are suffering through an energy crisis, and it raises the price of food when over 44% of the island is living in poverty.⁴ Estimates indicate that the Jones Act costs the Puerto Rican economy hundreds of millions of dollars every year, and in 2010 alone cost \$537 million.⁵ Because of these substantial costs, a wide range of voices, on a bi-partisan basis, have

¹ Founded in 1870, the New York City Bar Association (the “City Bar”) is a voluntary association of lawyers and law students with over 24,000 members. The City Bar regularly reviews, and sometimes addresses, complex legal issues that transcend the boundaries of New York City. The City Bar formed a Task Force on Puerto Rico in October 2016 comprised of members of the City Bar’s Committees on Bankruptcy and Corporate Reorganization, Inter-American Affairs, International Human Rights and International Law, and has been active in relief efforts for Puerto Rico in light of its financial crisis and the catastrophic devastation caused by Hurricane Maria. Post-Hurricane Maria, the City Bar advocated for a 1-year exemption to the Jones Act (*see* http://s3.amazonaws.com/documents.nycbar.org/files/Jones_Act_Puerto_Rico_TASK_FORCE_9.27.17.pdf). Upon further study, the City Bar has concluded that a permanent exemption is warranted for the reasons described herein.

² See *infra* Section B.

³ Ori, Sam, *Puerto Rico’s Challenges After Hurricane Strengthen Case Against The Jones Act*, Forbes, Nov. 17, 2017, <https://www.forbes.com/sites/ucenergy/2017/11/07/puerto-rico-has-had-a-hard-time-getting-fuel-for-our-next-disaster-lets-fix-the-problem/#136f9ccf6646> (all websites last visited May 7, 2018).

⁴ United States Census Bureau, <https://www.census.gov/quickfacts/PR>.

⁵ Economic Impact of Jones Act on Puerto Rico’s Economy, <http://docplayer.net/494027-Economic-impact-of-jones-act-on-puerto-rico-s-economy.html> (see p.75/88).

consistently requested that Puerto Rico be exempted from the substantial burdens of the Jones Act.⁶ The time to listen to these voices is now.

I. THE SCOPE OF THE JONES ACT

a. The Creation of the Jones Act

The Merchant Marine Act of 1920, 46 U.S.C. §55101 et seq., also known as the “Jones Act,” was signed by President Woodrow Wilson shortly after World War I, at a time when the annual budget for the United States Navy was only \$628,726,000.⁷ Arizona had only recently been admitted as the forty-eighth state in the union, the non-contiguous territories of Alaska and Hawaii would not be added as states for another thirty-nine years, and the small island of Puerto Rico had only recently been acquired from Spain in the Spanish-American War of 1898.

Pursuant to the terms of the Jones Act, all goods shipped between two points within the United States must be transported on a vessel that meets certain federal regulatory requirements. Specifically, the vessels cannot transport shipments between two United States ports unless they meet certain registration requirements, and can demonstrate, *inter alia*, that (i) the company that owns the transporting vessel is comprised of at least 75% of United States citizens; (ii) the transporting vessel was not built or re-built in a foreign country; and (iii) at least 75% of the crew are United States citizens.

By having U.S. consumers indirectly subsidize the domestic shipping industry (in addition to direct subsidies by the U.S. Navy) through these restrictions requiring use of domestic rather than international vessels, Congress sought to bolster the creation of a domestic fleet of ships that could be made available to provide essential support to the U.S. military for transporting cargo by sea in times of war. In so doing, “the Jones Act effects a transfer from U.S. consumers of water transportation services to U.S. maritime carriers, with the result being that domestic shippers can charge rates substantially above comparable world prices, increasing the revenue of domestic shippers by billions of dollars a year.”⁸ The federal government continues to believe that having a marine reserve force on standby to call up in times of war is necessary for national security and war-readiness; indeed, we understand that U.S. commercial ships were used in substantial volumes during the Gulf War and in Iraq and Afghanistan to supply U.S. military personnel. However, we also understand that a portion of the Navy’s current budget goes toward subsidizing that maritime fleet.⁹

⁶ Exhibit 1 (List of Organizations That Have Supported Exempting Puerto Rico from the Requirements of the Jones Act in Whole or in Part); Exhibit 2 (Members of Congress That Have Supported Exempting Puerto Rico from the Requirements of the Jones Act in Whole or in Part).

⁷ Budget of the U.S. Navy, <https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/b/budget-of-the-us-navy-1794-to-2004.html>.

⁸ The Jones Act in Perspective: A Survey of the Costs and Effects of the 1920 Merchant Marine Act, <http://www.grassrootinstitute.org/2017/04/the-jones-act-in-perspective/>.

⁹ Notably, the United States Navy now has an annual budget of \$171.5 billion, only a limited portion of which is used for direct subsidies to U.S. merchant vessels, and is the most powerful fleet in the world. *See* FY 2018 Department of the Navy (DON) President’s Budget (PB) Summary, http://www.secnav.navy.mil/fmc/fmb/Documents/18pres/DON_PB_OVERVIEW.pdf.

Putting aside the question of whether the Jones Act is still needed to maintain national security and military readiness, we respectfully submit that exempting Puerto Rico from Jones Act restrictions would have little to no effect on the overall scope and purpose of the law and the ability of the U.S. to maintain an effective marine reserve force. Even if somewhat greater direct subsidies funded by all U.S. taxpayers became necessary as a result of exempting Puerto Rico from the Jones Act—as is not at all clearly the case—having this national military priority funded by all taxpayers seems preferable to having it funded disproportionately by residents of that currently highly distressed and economically disadvantaged territory as it is now.

b. The Jones Act Does Not Apply to Foreign Shipments

Importantly, these Jones Act restrictions do not apply to foreign shipments going into, or out of, the United States. The Jones Act only applies to shipments that go between two United States ports. What this means is that the Jones Act does not directly restrict trade between Puerto Rico and foreign countries, such as Mexico. Rather, what the Jones Act does is restrict trade between Puerto Rico *and the mainland United States*. It does so by imposing restrictions that raise the price of common goods, such as food and fuel, when they are shipped from the mainland United States to Puerto Rico. As is discussed in further detail below, this has two significant impacts: (i) it causes the people of Puerto Rico to pay increased costs for everything that they import; and (ii) it drives Puerto Rico to import the majority of its goods by volume from foreign countries rather than the mainland United States, even for goods that the mainland United States could have provided at a cheaper price.¹⁰

c. The Jones Act Already Has Substantial Exemptions

Not all territories within the United States are required to abide by the Jones Act. The United States Virgin islands are exempt. Similarly, the territory of American Samoa and the commonwealth of Northern Mariana Islands are also exempt. There are also partial exemptions for the territory of Guam, and the coastal town of Hyder, Alaska. Puerto Rico is the only non-contiguous territory not wholly or partially exempt.¹¹

II. THE IMPACT OF THE JONES ACT ON PUERTO RICO

a. The Jones Act Has Cost Puerto Rico Billions of Dollars

Every independent study—with no exceptions that we have found—indicates that the Jones Act is significantly harming the people of Puerto Rico. This is because Puerto Rico is an island economy that imports approximately 85% of its food, a percentage which is likely to

¹⁰ GAO, *Puerto Rico: Characteristics of the Island’s Maritime Trade and Potential Effects of Modifying the Jones Act*, at 11-12 (“Over the entire year 2011, 67 percent of the vessels that operated in the port of San Juan were foreign-flag vessels, while 33 percent were U.S.-flag vessels”), <https://www.gao.gov/assets/660/653046.pdf>.

¹¹ Marie Olga Luis Rivera, *Hard to Sea: Puerto Rico’s Future Under the Jones Act*, 17 Loy. Mar. L.J. 63 (2018)

increase after the decimation of 80% of its crop value post-Hurricane Maria.¹² In addition to food, Puerto Rico imports chemicals, oil, electrical appliances, machinery and equipment, transport vehicles, and plastics.¹³ Just about everything that the people of Puerto Rico need to survive is imported. And to the extent that Puerto Rico seeks to import any of those goods from the United States, it is required to pay substantially increased shipping costs.

Simply put, the increased shipping costs imposed by the Jones Act cause an increase in the cost of goods on the island. Although some reports are uncertain of the exact amount of damage caused to Puerto Rico by this law, and it is impossible to predict the damage with absolute precision, they are unanimous in finding that the Jones Act substantially impacts the cost of goods.¹⁴ For instance, a 2012 report from the Federal Reserve Bank of New York, titled “Report on the Competitiveness of Puerto Rico’s Economy,” found that the shipping cost for a twenty-foot container from the mainland United States to Puerto Rico was *twice* as much as the same container from the mainland United States to the Dominican Republic.¹⁵ Similarly, an International Trade Commission report on the Jones Act found that the law’s requirements are generally the equivalent of a 64.6% tariff on shipping services.¹⁶ In addition, in 2015, three former International Monetary Fund economists—Anne O. Krueger, Ranjit Teja, and Andrew Wolfe—issued a report titled “Puerto Rico -A Way Forward,” in which they noted that Puerto

¹² Robles, Frances and Ferré-Sadurní, Luis, *Puerto Rico’s Agriculture and Farmers Decimated by Maria*, The New York Times, Sept. 24, 2017, <https://www.nytimes.com/2017/09/24/us/puerto-rico-hurricane-maria-agriculture-.html> (“Puerto Rico already imports about 85 percent of its food, and now its food imports are certain to rise drastically as local products like coffee and plantains are added to the list of Maria’s staggering losses. Local staples that stocked supermarkets, school lunchrooms and even Walmart are gone.”).

¹³ Puerto Rico Imports, <https://tradingeconomics.com/puerto-rico/imports>.

¹⁴ The GAO, in particular, noted in its March 2013 report that any precise mathematical estimate of the benefits of an exemption for Puerto Rico would be very difficult to predict, because Congress has not signaled the precise way that the Jones Act would be modified. However, this abstract type of uncertainty—which is present in any kind of economic analysis—is no reason to discount the wide range of voices that have clearly explained that the Jones Act has had a substantial negative impact on Puerto Rico. See Section B, subsection a. Moreover, it appears that the GAO has modified its position in a May 9, 2018 report, in which it comments that the Jones Act “likely ha[s] a negative effect on Puerto Rico’s economy.” GAO, *Puerto Rico: Factors Contributing to the Debt Crisis and Potential Federal Actions to Address Them*, at 30 (“According to current and former Puerto Rico officials, and other experts on Puerto Rico’s economy, complying with this law raised the cost of goods and energy—given Puerto Rico’s reliance on importing oil to generate electricity—for businesses operating in Puerto Rico.”), <https://www.gao.gov/assets/700/691675.pdf>.

¹⁵ Report on the Competitiveness of Puerto Rico’s Economy, <https://www.newyorkfed.org/medialibrary/media/regional/PuertoRico/report.pdf>. One lobby group for Jones Act carriers has disputed the Federal Reserve’s finding, but has not cited any support other than self-selected “anecdotal evidence.” American Maritime Partnership, <https://www.americanmaritimepartnership.com/puerto-rico-service/>. Because this anecdotal account from a lobby group is not independent, and has not cited any support for its position, we continue to rely on the Federal Reserve report, along with the numerous other studies cited in this letter.

¹⁶ The Economic Effects of Significant U.S. Import Restraints, <https://www.usitc.gov/publications/332/pub3201.pdf> (see p. 98). Since the publication of this estimate, the ITC has clarified that it is unable to provide “an estimate of the welfare gains that would result from removing the [Jones Act]” because Congress has not yet clarified what additional laws it may seek to impose on foreign vessels operating in the Puerto Rico market. See *The Jones Act in Perspective: A survey of the costs and effects of the 1920 Merchant Marine Act*, <http://assets.grassrootinstitute.org/wp-content/uploads/2017/04/Jones-Act-Final-4-8-17.pdf>. However, a group of economists believes that, if anything, the ITC’s estimates are “conservative.” *Id.*

Rico has “import costs at least twice as high as in neighboring islands on account of the Jones Act,” and concluded as follows:

Exempting Puerto Rico from the US Jones Act could significantly reduce transport costs and open up new sectors for future growth. In no mainland state does the Jones Act have so profound an effect on the cost structure as in Puerto Rico. Furthermore, there are precedents for exempting islands, notably the US Virgin Islands....¹⁷

Other reports agree. In particular, two economists from Harvard and Brandeis have aggregated prior analyses, finding that the “Jones Act raises the cost of transporting goods between American ports,” acting as a “structural impediment” for Puerto Rico that has, for example, raised the price of liquefied natural gas “by as much as 30 percent.”¹⁸

A dramatic illustration of this impediment is found in a broad analysis undertaken by two economists who studied the effects of the Jones Act on Puerto Rico for each year between 1971 and 2010. By their estimates, the Jones Act has cost Puerto Rico billions of dollars in aggregate, imposing costs of more than \$537 million in the year 2010 alone.¹⁹

In short, the negative impacts of the Jones Act on Puerto Rico are undeniable.

b. The Jones Act Has Also Imposed Costs on the Mainland United States By Decreasing Trade Between the Mainland and Puerto Rico

Even though it was not the law’s original intention, the Jones Act has had the undeniable effect of discouraging trade between the mainland United States and Puerto Rico. As the United States Government Accountability Office (“GAO”) has acknowledged, “[f]oreign-flag carriers serving Puerto Rico from foreign ports . . . generally have *lower costs to operate than Jones Act carriers* have.”²⁰ These lower costs “lead companies to source products from foreign countries rather than the United States” and, as a result, “Puerto Rico imports more by volume from foreign countries than from the United States.”²¹

The Jones Act has depressed trade between the mainland United States and Puerto Rico, particularly in the “bulk shipping market,” because foreign imports are simply more cost-

¹⁷ Puerto Rico – A Way Forward, <http://www.gdb.pr.gov/documents/PuertoRicoAWayForward.pdf> (see p.8).

¹⁸ The Jones Act and the Cost of Shipping Between U.S. Ports, <http://econofact.org/the-jones-act-and-the-cost-of-shipping-between-u-s-ports>.

¹⁹ Economic Impact of Jones Act on Puerto Rico’s Economy, <http://econofact.org/the-jones-act-and-the-cost-of-shipping-between-u-s-ports>.

²⁰ Puerto Rico: Characteristics of the Island’s Maritime Trade and Potential Effects of Modifying the Jones Act, <https://www.gao.gov/products/GAO-13-260>.

²¹ GAO, *Puerto Rico: Characteristics of the Island’s Maritime Trade and Potential Effects of Modifying the Jones Act*, at 4, <https://www.gao.gov/assets/660/653046.pdf>.

effective. This is the case even when the goods come “from more distant foreign locations,” and even when the mainland United States might otherwise be able to offer similar goods and services at a lower price. A few examples from the GAO report help to illustrate the point, showing that everything from animal feed to jet fuel is affected by this law:

- **Animal Feed.** “[A]ccording to representatives of the Puerto Rico Farm Bureau, the rate difference between Jones Act carriers and foreign carriers has led farmers and ranchers on the island to more often source animal feed and crop fertilizers from foreign sources than from U.S. domestic sources, even though commodity prices were stated to be similar. They provided an example that shipping feed from New Jersey by Jones Act carriers costs more per ton than shipping from Saint John, Canada, by a foreign carrier—even though Saint John is 500 miles further away. According to the representatives, this cost differential is significant enough that it has led to a shift in sourcing these goods from Canada.”
- **Corn and Potatoes.** For other companies, “corn and potatoes [were] being sourced from foreign countries rather than the United States,” due to “the lower cost of foreign shipping.”
- **Jet Fuel.** “[R]epresentatives of airlines purchasing jet fuel for use in Puerto Rico told us that they typically import fuel to the island from foreign countries, such as Venezuela, rather than from Gulf Coast refineries. They do so because of difficulty in finding available Jones Act vessels to transport jet fuel and, when vessels are available, the high cost of such shipments compared to shipping the product from foreign countries.”
- **Petroleum.** “An oil and gas importer in Puerto Rico told us that the company makes purchasing decisions based on the total price of oil or gas—including any applicable duties or other charges—plus transportation costs. The company looks at total prices from numerous suppliers around the world—including U.S. suppliers—but generally does not purchase from U.S. suppliers because the total cost is higher as a result of the differential in transportation costs.”

This is just a small sampling of the costs imposed by the Jones Act and the impact on businesses operating within the mainland United States.

The costs described above are important, because they tell us that exempting Puerto Rico from the Jones Act’s requirements would be beneficial to American businesses and to the United States as a whole. It is important to emphasize that repealing the Jones Act’s restrictions on Puerto Rico would “not cost *anything* for U.S. taxpayers.” To the contrary, it would “*increase*[] imports from the U.S.” to Puerto Rico, directing approximately \$341 million towards U.S. companies annually, and would therefore generate approximately \$13.5 million in tax revenues as estimated by Empresarios Por Puerto Rico.²²

²² Empresarios Por Puerto Rico to The Congressional Task Force on Puerto Rico, Oct. 7, 2016, <https://www.finance.senate.gov/imo/media/doc/Entrepreneurs%20for%20Puerto%20Rico.pdf>.

c. The Jones Act Leads to Inefficiencies and Distorted Trade Routes

The requirements of the Jones Act result in costly market distortions. For instance, a foreign-flagged vessel might deliver goods from the Mexican port of Veracruz to the Texas port of Houston. That is perfectly legal under the law. That same vessel might unload its cargo in Houston, and then pick up American-made goods to ship back to Veracruz. That is also perfectly legal. However, the vessel in question is legally prohibited from shipping those same American-made goods from Houston, Texas, to San Juan, Puerto Rico. The Jones Act does not allow it, and anyone who seeks to do so would face substantial fines and regulatory action. This result seems unjust and inefficient.²³

d. The Jones Act Shipping Restrictions Have Been Abused

In addition to reaping the *legal* benefits of the Jones Act, shipping companies that are meant to serve the people of Puerto Rico have also resorted to *illegal* antitrust conspiracies to further take advantage of their captive market. By granting monopoly powers to such a small group of shipping companies, the Jones Act made it possible for these entities to engage in illegal price fixing.

During the period from 2011 to 2013, most of the cargo shipped between the mainland United States and Puerto Rico was carried by four Jones Act carriers. By 2013, all four of those major carriers had either pled guilty, or been found guilty, of antitrust conspiracies against the people of Puerto Rico.²⁴ *See, e.g., U.S. v. Peake*, No. 14-1088 (1st Cir. Oct. 14, 2015) (affirming the conviction and five-year sentence of former Sea Star LLC president Frank Peake “for participating in one of the largest antitrust conspiracies in the history of the United States”); *U.S. v. Crowley Liner Services, Inc.*, 12-CR-590 (D.P.R. July 31, 2012) (plea agreement where Crowley Liner Services admitted to a conspiracy between Crowley executives and other providers of Puerto Rico freight services, to illegally fix prices for Puerto Rico freight services; jointly recommending a criminal fine of \$17 million”); *In re Puerto Rican Cabotage Antitrust Litigation*, 815 F.Supp.2d 448, 453 & n. 1 (D.P.R. 2011) (Horizon Lines, LLC plead guilty to one count of price fixing in violation of the Sherman Act and five guilty pleas from former employees of the Horizon and Sea Star Defendants); *United States v. Horizon Lines, LLC*, No. 3:11-CR-0071, Second Amended Judgment, 2011 WL 1587062 (D.P.R., Apr. 28, 2011); *Rivera-Muñiz v. Horizon Lines*, 737 F.Supp.2d 57, 60 (D.P.R.2010); *United States v. Chisholm*, No. 08-cr-00353, Plea Agreement (M.D.Fla., Oct. 20, 2008); *United States v. Serra*, No. 08-cr-00349, Plea Agreement (M.D.Fla., Oct. 20, 2008); *United States v. Glova*, No. 08-cr-00352,

²³ It is also worth noting that American-made goods from Texas could be transported to other mainland United States destinations by land on railcars and trucks. The island of Puerto Rico does not have similar access.

²⁴ Those four carriers were Crowley Puerto Rico Services, Inc.; Horizon Lines, Inc.; Sea Star Line, LLC; and Trailer Bridge, Inc. As the GAO noted in 2013, an antitrust investigation “led to, among other things, the imposition of about \$46 million in criminal fines and guilty pleas in 2011 and 2012 by *three of the four major Jones Act carriers*.” *See also* “Florida-Based Crowley Liner Services Inc. Pleads Guilty to Price Fixing on Freight Services Between U.S. and Puerto Rico,” <https://www.justice.gov/opa/pr/florida-based-crowley-liner-services-inc-pleads-guilty-price-fixing-freight-services-between>. “Florida-Based Sea Star Line LLC Agrees to Plead Guilty to and Its Former President is Indicted for Price Fixing on Coastal Freight Services Between the Continental United States and Puerto Rico,” <https://www.justice.gov/opa/pr/florida-based-sea-star-line-llc-agrees-plead-guilty-and-its-former-president-indicted-price>. Trailer Bridge filed for bankruptcy, where it settled the antitrust claims for \$275,000.

Plea Agreement (M.D.Fla., Oct. 20, 2008); *United States v. Gill*, No. 08-cr-00351, Plea Agreement (M.D.Fla., Oct. 20, 2008); and *United States v. Baci*, No. 08-cr-00350, Plea Agreement (M.D.Fla., Oct. 20, 2008).

In addition to the criminal and regulatory actions discussed above, there have also been civil lawsuits and penalties. A group impacted by the restrictions of the Jones Act in the United States and Puerto Rico brought a class action suit for antitrust violations against a group of defendants controlling 86% of the Puerto Rico cabotage market, including Horizon Lines, Inc., Crowley Maritime Corp. and affiliates and Sea Star Line, L.L.C., and their affiliates. The case was settled in 2010 without going to trial, after the defendants agreed to pay over fifty million dollars. *In re Puerto Rican Cabotage Antitrust Litigation*, 815 F.Supp.2d 448, 454 (D.P.R. 2011).

People trying to operate competitive businesses in Puerto Rico have not been pleased with these developments. The Puerto Rico Food Marketing, Industry and Distribution Chamber, which represents the chain of food distribution and retail in Puerto Rico, noted that the “cost of maritime transportation is vital for the price and availability of food in the Island.”²⁵ Therefore, this group expressed special concern with the added “indirect costs caused by the lack of competition and the abuse of market power of the two main carriers.”

As long as the Jones Act remains in place, there will be a risk of further antitrust conspiracies. Although this conspiracy was discovered by law enforcement, the next one may not be.²⁶

III. THE JUSTIFICATIONS FOR IMPOSING THE JONES ACT RESTRICTIONS ON PUERTO RICO DO NOT OUTWEIGH THE SUBSTANTIAL COSTS

Although we do not purport to analyze the full scope and utility of the Jones Act writ large, it may be worth noting the widely-held understanding that the Jones Act remains law because a group of commercial interests have engaged in an extensive lobbying effort to support the law. The editorial board at *Bloomberg* summarized the issue as follows:

In truth, *the Jones Act survives because narrow commercial interests want it to*. A protectionist thicket has long surrounded U.S. commercial shipping and shipbuilding. It has gradually hardened into a *political wall impervious to economic reason*.

...
Those people are backed by a flotilla of senators and representatives who are failing to put the broader interests of voters

²⁵ Puerto Rico Food Marketing, Industry and Distribution Chamber to The Congressional Task Force on Economic Growth in Puerto Rico, Sept. 1, 2016, [https://www.finance.senate.gov/imo/media/doc/Puerto%20Rico%20Food%20Marketing,%20Industry%20and%20Distribution%20Chamber%20\(MIDA\).pdf](https://www.finance.senate.gov/imo/media/doc/Puerto%20Rico%20Food%20Marketing,%20Industry%20and%20Distribution%20Chamber%20(MIDA).pdf).

²⁶ In order to guard against anticompetitive behavior in Puerto Rico, we urge you to work with the Federal Maritime Commission, the federal agency that is charged to “protect the shipping public from unlawful, unfair and deceptive ocean transportation practices.” Federal Maritime Commission, 53rd Annual Report for Fiscal Year 2014, p. 3-4, <https://www.fmc.gov/assets/1/Page/53rdAnnualReport.pdf>.

first. They include the 60-odd members of the Congressional Shipbuilding Caucus, one of the bigger and more active of such legislative groups. Filling their coffers and bending their ears are the American Maritime Partnership; the Shipbuilders Council of America; other like-minded industry groups; and scores of individual shipbuilders, shipping lines and labor unions. In 2016, donors associated with sea transport coughed up more than \$10 million in campaign contributions -- the most since at least 1990 -- and spent almost \$25 million on lobbying.²⁷

The President himself has taken notice that “the shipping industry doesn’t want the Jones Act lifted for Puerto Rico.”²⁸ These same forces have not been open to any attempt to amend the Jones Act, even when faced with reasonably modest requests—like ours—to exempt only Puerto Rico from the requirements of the law.

To be clear, we do not wish the hard-working men and women of the maritime industry any harm, and believe that amending the Jones Act to exempt Puerto Rico—a territory that is roughly the size of Connecticut—will not cause the industry to suffer in any substantial way. Nonetheless, we analyze below the two primary justifications that we have seen these groups offer in the past when defending the application of the Jones Act more generally, and our reasoning for why an exemption for Puerto Rico would not adversely affect those goals.

First, these groups have defended the Jones Act more broadly on the premise that it is necessary for protecting national security. These groups, which include the United States Navy, believe that the Jones Act is necessary to ensure a viable merchant fleet ready to be called upon in times of war or natural disaster. Notably, however, we are not proposing a wholesale repeal of the Jones Act. Rather, we are merely proposing that the island of Puerto Rico be exempted from that law’s requirements.

To date, we have not seen any independent study indicating that an exemption that applies to Puerto Rico would be harmful. To the contrary, in light of the relatively small number of Jones Act shippers that service Puerto Rico compared to the total number of Jones Act vessels that would be available, we believe that limiting the Jones Act exemption to Puerto Rico would not harm national security. Moreover, as the GAO has found, the Jones Act ships currently carrying goods back and forth from Puerto Rico “are less useful for military purposes,” and “are generally considered of lesser military value because of their slow speed.” Exempting Puerto Rico from the Jones Act will not realistically affect our military readiness.²⁹

²⁷ The Editorial Board, *Still Playing Politics With U.S. Ports: The Jones Act survives only because of narrow commercial interests*, Bloomberg, Dec. 19, 2017, <https://www.bloomberg.com/view/articles/2017-12-19/still-playing-politics-with-u-s-ports/>.

²⁸ Siegel, Josh, *Trump: Shipping Industry Doesn’t Want Jones Act Lifted for Puerto Rico*, The Washington Examiner, Sept. 27, 2017, <https://www.washingtonexaminer.com/trump-shipping-industry-doesnt-want-jones-act-lifted-for-puerto-rico/article/2635827>.

²⁹ If Congress determines that exempting Puerto Rico would be harmful in any way, we respectfully suggest that the Navy work with Congress to recommend targeted appropriations as a remedy, rather than continuing to impose the Jones Act restrictions on Puerto Rico. An approach of targeted subsidies has been adopted in the past through the

Second, these groups have defended the Jones Act more broadly on the premise that it promotes American jobs. Again, however, we do not believe that exempting Puerto Rico—and only Puerto Rico—from the requirements of the Jones Act would be harmful in this respect. Although the GAO noted that the impact of exempting Puerto Rico from the Jones Act would be “uncertain,” and could lead to a significant reduction in the U.S.-flagged vessels that serve this trade between the mainland United States and Puerto Rico,³⁰ we are unaware of any estimates of how exempting Puerto Rico from the Jones Act would impact the shipbuilding industry. Nonetheless, we do expect that an exemption for Puerto Rico could mean that some crew members who currently serve this route would have to find new routes to serve. Any potential loss of jobs is unfortunate; although, as noted above (Part B(b), *supra*), any such losses would likely be more than offset by exponential gains to U.S. businesses on the mainland. In any event, it is our strong position that the uncertainty and potential adverse effect on a small segment of the shipping industry is absolutely necessary to provide relief—including American jobs—to the people of Puerto Rico who have been suffering through a prolonged recession over the past decade, a bankruptcy proceeding that has caused economic uncertainty, and an unprecedented Category 5 hurricane that has exacerbated all of these substantial difficulties. Moreover, we strongly believe that the maritime industry will survive this limited exemption, just as it has survived the fact that the U.S. Virgin Islands and American Samoa are exempt from the law’s requirements.

The Jones Act’s application to Puerto Rico seems to persist mainly because it spreads its costs out among weaker and less organized groups, while localizing the gains among certain commercial interests within the shipping industry that *Bloomberg* and President Trump have already noted. The economic analysis of the Jones Act that was performed by George Mason University summarizes the dilemma well:

The Jones Act is an example of a policy that persists even though it is wasteful for the nation as a whole. Total costs exceed total benefits, but the benefits are concentrated and the losses are diffuse. Beneficiaries are shipbuilders and their employees, members of seafarer unions, and carriers that are protected from competition. Carriers like Matson are in a complex situation in which they lose from paying more for American-built ships but they gain from being protected from foreign competitors. ***These groups know how they are affected by the law, and it is easy for them to organize and lobby for continued protection.***

use of Operating Differential Subsidies (ODS) and Construction Differential Subsidies (CDS) as well as the current Maritime Security Program (MSP). *See, e.g.*, MARAD: Maritime Security Program, <https://www.marad.dot.gov/ships-and-shipping/strategic-sealift/maritime-security-program-msp/>. We believe that *if* a limited Puerto Rico exemption were to be found harmful—despite no current evidence indicating that this would be the case—then a series of targeted subsidies selected by the Navy would be preferable to the current system that disproportionately burdens the people of Puerto Rico to create vessels of “lesser military value.”

³⁰ It should also be noted that, since the GAO report was issued several years ago, the shipping industry has touted the introduction of several new Jones Act vessels. If these ships are capable of providing competitive service to Puerto Rico, then they will be able to compete more effectively in an open marketplace when Congress grants Puerto Rico an exemption from the Jones Act.

Conversely, the costs of the Jones Act are spread across millions of Americans, most of whom have never heard of the act. The annual cost per person is small, even though the total cost summed over millions of consumers is large. The additional cost of transportation is not very visible to consumers because it is shifted forward at every link in the supply chain; for example, the additional transportation costs of energy are one reason why electricity costs in Hawaii are the highest among the 50 states. Hence, individual consumers have little incentive to learn about the Jones Act and to lobby in favor of its repeal. Consequently, *Congress has been more responsive to the well-organized beneficiaries than to the diffuse and poorly organized losers.*

It is ultimately not necessary to determine whether this is a fair assessment of the costs and effects of the Jones Act generally, or whether the Jones Act is justified entirely by the backstop military capability asserted to result from it. In either event, Puerto Rico's contributions toward the goals of the Jones Act are minimal in relation to the entire scope of subsidies generated by the law for upkeep of the merchant marine, while release of Puerto Rico's residents from the special burdens they shoulder to support the Jones Act's purposes would provide much-needed incremental relief to the people of Puerto Rico. We respectfully urge that this burden be removed from Puerto Rico in order to boost its efforts to rebuild its economy and infrastructure.

IV. THE BRIEF TEN-DAY WAIVER OF THE JONES ACT WAS INSUFFICIENT

On September 27, 2017, we wrote a letter to the U.S. Department of Homeland Security, urging the agency to issue a one-year waiver of the Jones Act in light of Hurricane Maria.³¹ They ultimately imposed a ten-day waiver.³² With due respect, this was simply not sufficient. As the Niskanen Center astutely observed, that was “a window that was too short to organize effective transportation of relief supplies by non-American ships.”³³ What's more, this ten day waiver took effect at a time when only a few of the island's 22 ports were usable, with literally “thousands of shipping containers” held up at San Juan due to the “heavy damage to roads, computer systems and other critical infrastructure” necessary to distribute goods from the ports to their ultimate destinations.³⁴ Nonetheless, even with this narrow window and these substantial

³¹ See http://s3.amazonaws.com/documents.nycbar.org/files/Jones_Act_Puerto_Rico_TASK_FORCE_9.27.17.pdf.

³² Department of Homeland Security Waiver of Compliance with Navigation Laws, https://www.dhs.gov/sites/default/files/publications/17_0928_AS1_Jones-Act-Waiver.pdf.

³³ Nolan, Ed, *It's Time to Do Something About the Jones Act*, Niskanen Center, Dec. 22, 2017, <https://niskanencenter.org/blog/notes/time-something-jones-act/>; see also Shackford, Scott, *Trump Waives Jones Act for Puerto Rico for Ten Days. That's Good, but it's Not Enough*, Reason, Sept. 28, 2017, <http://reason.com/blog/2017/09/28/trump-waives-jones-act-for-puerto-rico-f>.

³⁴ Page, Paul, and Hughes, Siobhan, *Puerto Rico Port Reopens But Relief Distribution Remains Slow*, Wall Street Journal, Sept. 26, 2017, <https://www.wsj.com/articles/puerto-rico-port-reopens-but-relief-distribution-remains-slow-1506446137>.

obstacles, eleven international vessels were able to come to Puerto Rico.³⁵ That is quite a feat, in light of the limited time they had to organize effective transportation.

Ultimately, however, granting a permanent exemption for Puerto Rico is a matter that must be decided by legislators, not by a federal agency that has limited powers in this regard. The impact of this narrow exemption is not the deciding factor.

V. A DIVERSE RANGE OF VOICES HAS CLEARLY CALLED FOR EXEMPTING PUERTO RICO

A diverse group of economists, Puerto Rican business organizations, human rights groups, political commentators, and consumer rights advocates have all called for exempting Puerto Rico from the restrictions on the Jones Act. We have compiled a representative list, attached as Exhibit 1 to this letter, but below is a small sample of the voices on this issue:

- **CATO Institute.** The Jones Act “reduces choice and competition among shipping providers, driving transportation costs higher” for the people of Puerto Rico, who “needlessly pay higher prices for the many goods and products they import from the rest of U.S., driving up their cost of living for the sake of protecting” the law’s beneficiaries.³⁶
- **The Economist.** The Jones Act “inflated transportation costs for imports [to Puerto Rico] to twice the level of nearby islands.” This is because territories “[l]acking overland routes such as Alaska, Guam, Hawaii and Puerto Rico are hardest hit” by the law’s requirements.³⁷
- **National Review:** “On the merits, the Jones Act is a bad law. It cost Puerto Rico \$17 billion in economic growth between 1990 and 2010.”³⁸
- **The New York Times.** “This is a shakedown, a mob protection racket, with Puerto Rico a captive market. . . . If the United States has any interest in the

³⁵ MAREX, *Foreign Flag Ship Carries American Aid to Puerto Rico*, The Maritime Executive, Oct. 22, 2017, <https://www.maritime-executive.com/article/foreign-flag-ship-carries-american-aid-to-puerto-rico#gs.HZAKNnk>.

³⁶ Grabow, Colin, *Jones Act Swamp Creature That’s Strangling Puerto Rico*, Cato Institute, Oct. 1, 2017, https://www.cato.org/publications/commentary/jones-act-swamp-creature-thats-strangling-puerto-rico?utm_source=Cato+Institute+Emails&utm_campaign=038226d358-Cato+Today&utm_medium=email&utm_term=0_395878584c-038226d358-144885949&mc_cid=038226d358&mc_eid=0c5288ec7c.

³⁷ *How Protectionism Sank America’s Entire Merchant Fleet*, The Economist, Oct. 5, 2017, <https://www.economist.com/news/finance-and-economics/21730034-jones-act-hurts-american-consumers-and-destroyed-countrys-shipping>.

³⁸ Kupfer, Theodore, *Waiving the Jones Act for Puerto Rico is the Right Step*, National Review, Oct. 5, 2017, <https://www.nationalreview.com/2017/10/waive-jones-act-help-puerto-rico-ending-it-totally-would-be-better/>.

hurricane-battered people of Puerto Rico, it needs to take the law off their necks — and now.”³⁹

- **The Washington Monthly.** “[T]he Jones Act is Robin Hood in reverse,” imposing “rent-seeking” on the people of Puerto Rico, and is only tolerated because “the people who benefit from the regulation have big economic stakes on the line, while those who pay the costs may not even notice the effect on their individual well-being.”⁴⁰

In addition, citizens and voters concerned with the fate of Puerto Rico have been closely watching this issue. For instance, one petition “to waive the Jones Act for Puerto Rico” gathered half a million signatures *in just five days*.⁴¹ We sincerely hope that DHS and Congress will listen to these voices.

VI. CONCLUSION

Exempting Puerto Rico from the Jones Act, much like the U.S. Virgin Islands, would be a way for Congress to help Puerto Rico’s economy at no additional cost to American citizens. The New York City Bar urges a permanent exemption to allow the global markets to help Puerto Rico and remove impediments to its economic growth. There is broad bi-partisan support for this exemption from the Jones Act.⁴² The time to take action to help those in Puerto Rico is now.

John S. Kiernan
President, New York City Bar Association

Roger Juan Maldonado
Chair, New York City Bar Association
Task Force on Puerto Rico

May 2018

³⁹ Denis, Nelson A., *The Jones Act: The Law Strangling Puerto Rico*, The New York Times, Sept. 25, 2017, <https://www.nytimes.com/2017/09/25/opinion/hurricane-puerto-rico-jones-act.html>.

⁴⁰ Lindsey, Brink and Teles, Steven, *Why the Jones Act is Robin Hood in Reverse*, The Washington Monthly, Oct. 2, 2017, <https://washingtonmonthly.com/2017/10/02/why-the-jones-act-is-robin-hood-in-reverse/>.

⁴¹ P. Jessica, *Waive the Jones Act for Puerto Rico to Help Rebuild its Infrastructure and Economy*, Change.org, <https://www.change.org/p/departament-of-homeland-security-waive-the-jones-act-for-all-cargo-at-ports-in-puerto-rico-to-aid-hurricane-maria-relief>.

⁴² Gardner, Timothy, *McCain Introduces Bill to Kill Puerto Rico Shipping Restriction*, Reuters, Sept. 28, 2017, <https://www.reuters.com/article/us-usa-puertorico-shipping-mccain/mccain-introduces-bill-to-kill-puerto-rico-shipping-restrictions-idUSKCN1C32ZL>.

EXHIBIT 1

List of Organizations That Have Supported Exempting Puerto Rico from the Requirements of the Jones Act in Whole or in Part

1. Alliance for Free Association (ALAS)
2. Asociación de Detallistas de Gasolina de Puerto Rico, Inc. (Puerto Rico Gasoline Detailers Association, Inc.)
3. Asociación Nacional de Tiendas de Autoservicio y Departamentales (ANTAD)
4. American Enterprise Institute
5. Cámara de Mercadeo, Industria y Distribucion de Alimentos (Puerto Rico Food Marketing, Industry and Distribution Chamber)
6. Campbell Soup Company
7. CATO Institute
8. Climate Justice Alliance
9. College of Certified Public Accountants of Puerto Rico
10. Empresarios Por Puerto Rico (Entrepreneurs of Puerto Rico)
11. Empire Gas Company, Inc.
12. Federal Reserve Bank of New York
13. Fundación Libertad Puerto Rico
14. Grassroots Institute of Hawaii
15. Hawaii Shippers Council
16. Heritage Foundation
17. Hispanic Federation
18. LatinoJustice
19. National Grocers Association
20. Pan American Grain
21. PathStone Corporation
22. Puerto Rico Bar Association
23. Puerto Rico Chamber of Commerce
24. Puerto Rico Community Pharmacy Association
25. Puerto Rico Electric Power Authority (PREPA)
26. Puerto Rico Small Business Owners
27. Puerto Rico Society of CPAs
28. Puerto Rico United Retailers Association
29. Puma Energy Caribe, LLC

EXHIBIT 2

Members of Congress That Have Supported Exempting Puerto Rico from the Requirements of the Jones Act in Whole or in Part

1. Rep. Andy Biggs (R-AZ)
2. Rep. Mike Bishop (R-MI)
3. Rep. Dave Brat (R-VA)
4. Rep. Mo Brooks (R-AL)
5. Rep. Ken Buck (R-CO)
6. Rep. Mike Coffman (R-CO)
7. Rep. Warren Davidson (R-OH)
8. Rep. Luis Gutiérrez (D-IL)
9. Rep. Karen Handel (R-GA)
10. Rep. Barry Loudermilk (R-GA)
11. Rep. Grace Meng (D-NY)
12. Rep. Gary Palmer (R-AL)
13. Rep. Bill Posey (R-FL)
14. Rep. Dana Rohrabacher (R-CA)
15. Rep. Mark Sanford (R-SC)
16. Rep. José Serrano (D-NY)
17. Rep. Darren Soto (D-FL)
18. Rep. Nydia Velázquez (D-NY)
19. Rep. Roger Williams (R-TX)
20. Sen. Jeff Flake (R-AZ)
21. Sen. James Lankford (R-OK)
22. Sen. Mike Lee (R-UT)
23. Sen. John McCain (R-AZ)
24. Sen. Marco Rubio (R-FL)

President
Michael J. McNameara

June 11, 2018

President-Elect
Stephen C. Lessard

Roger Maldonado
President, New York City Bar Association
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Vice President
Vircent T. Cheng

Secretary
Asia Smith

Treasurer
Adrienne D. Koch

Dear Mr. Maldonado:

**Immediate
Past President**
Carol A. Sigmond

Thank you for presenting on the New York City Bar Report By The Task Force on Puerto Rico in Support of Permanently Exempting Puerto Rico From the Jones Act (“Report”) at the Special Meeting of New York County Lawyers Association’s (NYCLA) Executive Committee on June 7, 2018.

Following your presentation, the Executive Committee discussed the Report and following discussion voted to support the Report. We understand that the Report will be on the agenda for the New York State Bar Association House of Delegates meeting on June 16, 2018 and our Association would like to be a co-sponsor of the Report.

Since its inception, NYCLA has worked to advance its mission to, among other things, promote the administration of justice and reforms in the law in the public interest, apply its knowledge and experience in the field of law to the promotion of the public good and ensure access to justice for all. We thank you for bringing this matter to our attention and look forward to our continued collaboration with your Association.

Sincerely,



Michael J. McNameara
President

cc: Brett Parker, Executive Director, New York City Bar Association



Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #9

To supplement the materials relating to this agenda item, attached are memoranda from the Committee on Legal Aid and the President's Committee on Access to Justice indicating support for the report and recommendations.

Date: June 1, 2018

From: Edwina Martin, Co-chair, President's Committee on Access to Justice

Subject: Report by the Task Force on Puerto Rico in Support of Permanently Exempting Puerto Rico from the Jones Act

The President's Committee on Access to Justice is in support of the of the Report by the Task Force on Puerto Rico in Support of Permanently Exempting Puerto Rico from the Jones Act.

Date: June 1, 2018

From: Sergio Jimenez, Chair, Committee on Legal

Subject: Report by the Task Force on Puerto Rico in Support of Permanently Exempting Puerto Rico from the Jones Act.

The Committee on Legal Aid is in support of the of the Report by the Task Force on Puerto Rico in Support of Permanently Exempting Puerto Rico from the Jones Act.

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
BAR CENTER, ALBANY
APRIL 13, 2018**

Present: Karina E. Alomar, Jonathan B. Behrins, Matthew R. Coseo, Norman P. Effman, Margaret J. Finerty, Michael L. Fox, Michael W. Galligan, Sharon Stern Gerstman, Sarah E. Gold, Henry M. Greenberg, Claire P. Gutekunst, Richard M. Gutierrez, Bryan D. Hetherington, Drew Jaglom, Scott M. Karson, Elena DeFio Kean, Stuart J. LaRose, Sherry Levin Wallach, Peter H. Levy, Michael Miller, Steven E. Millon, Domenick Napoletano, Bruce J. Prager, Sandra Rivera, William T. Russell, Jr., Carol A. Sigmond, David H. Tennant.

Guests: James R. Barnes, Sandra S. Baron, Mark A. Berman, Angela O. Burton, Robert M. Elardo, Erica M. Hines, Diego Alberto Ibarguen, Richard C. Lewis, Susan B. Lindenauer, Thomas J. Maroney, Edwina F. Martin, Lillian M. Moy, Karen L. Murtagh, Leah R. Nowotarski, Aimee L. Richter, Robert T. Schofield, IV, Rona G. Shamoan, Tucker C. Stanclift, Jean Marie Westlake.

Ms. Gerstman presided over the meeting as President of the Association.

The members were welcomed and Messrs. Berman, Lewis, Schofield and Stanclift, together with Ms. Hines, Ms. Richter, Ms. Shamoan and Ms. Westlake, were introduced as incoming Executive Committee members for the term commencing on June 1, 2018. It was noted that Evan M. Goldberg will serve as member-at-large; he was unable to attend the meeting.

1. Approval of minutes of meetings. The minutes of the January 25, 2018 meeting and the March 5, 2018 teleconference meeting were approved as distributed.
2. Consent calendar:
 - a. Amendments to name and stated purpose of Committee on Procedures for Judicial Discipline.
 - b. Memorandum of Understanding between NYSBA and Seoul Bar Association.

The consent calendar, consisting of the items listed above, was approved by voice vote.

3. Confirmation of presidential appointments to the House of Delegates. Mr. Miller reported that he had recommended the appointment of 12 delegates to further racial and ethnic diversity in the House and two non-resident members for the 2018-2019 Association year. After discussion, a motion was adopted to confirm the appointments.
4. Report of Treasurer. In his capacity as Treasurer, Mr. Karson reported that through February 28, 2018, the Association's total revenue was \$13 million, a decrease of approximately \$5,400 over the previous year, and total expenses were \$4.7 million, a decrease of approximately \$365,000 over 2017. The report was received with thanks.

5. Report of staff leadership. Pamela M. McDevitt, Executive Director, together with Daniel Weiller, Managing Director of Marketing and Communications and Jason Nagel, Managing Director of IT, updated the Executive Committee with respect to membership, open staff positions, delivery of NYSBA content to members, e-mail communications, and delivery of online CLE, and web development. The report was received with thanks.
6. Report of Executive Subcommittee on Association Publications. In his capacity as chair of the subcommittee, and together with Director of Marketing Adam Rossi, Prof. Fox provided an update on the subcommittee's work, including publications, an e-mail marketing plan, and a NYSBA blog. The report was received with thanks.
7. Report of Committee on Continuing Legal Education. Committee chair James R. Barnes, together with Senior Director Katherine Suchocki, provided an update on CLE programming and delivery. They discussed a one pass plan for obtaining CLE is in the works which will allow a member to get all of their CLE credits for a set price. The report was received with thanks.
8. Report and recommendations of Committee on Media Law and Committee on Civil Rights. Sandra S. Baron, chair of the Committee on Media Law, together with committee member Diego Alberto Ibarguen and Karen L. Murtagh, a member of the Committee on Civil Rights, presented a legislative proposal to repeal Civil Rights Law §50-a, relating to the confidentiality of personnel records. After discussion, a motion was adopted to create a working group with representation from the two committees which would include members from or collaboration with the Labor and Employment Law Section, the Criminal Justice Section, and the State and Local Government Law Section to examine the issues raised by the report and to ask the two committees to refrain from issuing comments on the proposed legislation until the working group reports back to the Executive Committee.
9. Update on legislative activities. In her capacity as chair of the Committee on State Legislative Policy, Ms. Rivera updated the Executive Committee on legislative activity, particularly with respect to the recently adopted state budget. The report was received with thanks.
10. Report of Vice Presidents and Executive Committee liaisons. Executive Committee liaisons reported on the activities of the following sections and committees: Mr. Galligan – the Trusts and Estates Law Section, the Committee on Legal Education and Admission to the Bar, and the Committee on LGBT People and the Law. Mr. Hetherington – the Committee on Association Insurance Programs. Ms. Kean – the Labor and Employment Law Section and the Committee on Leadership Development. Ms. Gutekunst – the International Section. In his capacity as Second District Vice President, Mr. Napoletano reported on bar association activities in Kings County. The reports were received with thanks.

11. Report and recommendations of International Section. In his capacity as past section chair, Mr. Jaglom reviewed the guidelines developed by the Section's Latin American Council to guide lawyers and law firms in best practices. After discussion, a motion was adopted to approve the guidelines subject to editing. Messrs. Galligan, Jaglom, and Prager and Ms. Gutekunst will serve as an editorial subcommittee.
12. Report and recommendations of Criminal Justice Section. Leah R. Nowotarski, chair of the section's Town and Village Justice Courts Committee, together with section chair Tucker C. Stanclift, outlined the section's report and recommendations with respect to counsel at first appearance, education and training, and consolidation. The section agreed to modify Recommendation 9 to recognize the existence of a current website and to recommend that it be made more publicly available. It also agreed to amend Recommendation 10 to refer to "expanded use of courts of record." After discussion, a motion was adopted to endorse the report and recommendations, as amended, for favorable action by the House.
13. Report of President. Ms. Gerstman highlighted the information contained in her printed report, a copy of which is appended to these minutes. She also reported on the large firm membership pilot project that Mr. Miller and she are pursuing, noting that the first large firm, Paterson Belknap, had agreed to participate and that they are identifying 19 other firms for participation.
14. Report and recommendations of Committee on Diversity and Inclusion. Lillian M. Moy, past chair of the committee, together with Diversity and Inclusion Specialist Minika Udoko, reviewed the committee's biennial Diversity Report Card, noting the need to increase the number of members who participate in the census. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House.
15. Report of Committee on Membership. Committee chair Thomas J. Maroney, together with Patricia K. Wood, Associate Director of Attorney Engagement and Retention, reported on membership statistics and efforts to renew members. The report was received with thanks.
16. Report and recommendations of Committees on Families and the Law. Committee chair Susan B. Lindenauer, together with committee member Angela O. Burdon, reviewed the committee's report recommending that the State fund and oversee mandated representation provided to indigent parents in Family Court. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House.
17. Proposed guidelines on media statements. Daniel Weiller, Managing Director of Communications and Marketing, outlined proposed guidelines to govern statements made on behalf of the Association or Association entities. The guidelines will be considered at the June Executive Committee meeting. The report was received with thanks.

18. Report and recommendations of President's Committee on Access to Justice. Edwina F. Martin, co-chair of the committee, together with committee member Robert M. Elardo, reviewed proposed guidelines for attorneys providing limited scope representation and guidelines for programs operating pursuant to Rule 6.5 of the Rules of Professional Conduct. After discussion, a motion was adopted to approve the guidelines.

16. New Business.

Ms. Gerstman observed that Alyssa Barreiro, Michael Galligan, Claire Gutekunst, Bryan Hetherington, Elena DeFio Kean, Stuart LaRose, Domenick Napoletano, Bruce Prager and Sandra Rivera are rotating off the Executive Committee and that this is their last meeting. She thanked them for their service and their participation. She thanked the officers, members of the Executive Committee, and staff for their assistance during her term as President.

17. Date and place of next meeting.
Thursday and Friday, June 14-15, 2018
The Otesaga, Cooperstown

18. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary

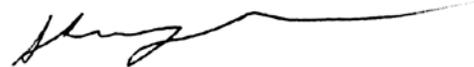
**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE
CONFERENCE CALL MEETING
JUNE 1, 2018**

Members Participating: Mark A. Berman, Earamichia Brown, Matthew R. Coseo, Margaret J. Finerty, Sharon Stern Gerstman, Sarah E. Gold, Taa R. Grays, Henry M. Greenberg, Erica M. Hines, Drew Jaglom, Scott M. Karson, Peter H. Levy, Michael Miller, Aimee L. Richter, William T. Russell, Jr., Robert I. Schofield, IV, Rona G. Shamoan, Carol A. Sigmond, Tucker C. Stanclift, David H. Tennant, Jean Marie Westlake.

Mr. Miller presided as President of the Association.

1. Establishment of task forces. Mr. Miller outlined a proposal for the establishment of the following task forces to pursue a series of initiatives: Task Force on Evaluation of Candidates for Election to Judicial Office; Task Force on Wrongful Convictions II; Task Force on Incarceration Release Planning and Programs; Task Force on Mass Shootings and Assault Weapons; and Task Force on the Role of Paralegals. After discussion, a motion was adopted to approve the appointment of the foregoing groups and their proposed mission statements.
2. Staff Update. Executive Director Pamela McDevitt reported that Victoria Shaw had been selected as Director of Attorney Recruitment and Engagement.
3. Amicus Curiae brief in *Frank v. Gaos*. Mr. Miller outlined the background of this brief, noting that in January 2017 the Executive Committee had approved submission of a brief in a similar Eighth Circuit case on the use of cy pres awards in class action cases. Ms. Gerstman reported that The New York Bar Foundation planned to submit a brief in *Frank v. Gaos*, given the importance of cy pre to The Foundation's work. After discussion, a motion was adopted to approve joining The Foundation in submission of a brief. Mr. Miller will appoint a subcommittee to review the brief. Mr. Tennant recused himself from participating in the discussion and vote.
4. New Business. Mr. Miller advised that he would like to appoint two working groups, one to review issues related to providing assistance to Puerto Rico in the aftermath of the 2017 hurricanes and one to serve as a rapid response advisory group. After discussion, a motion was adopted to approve the creation of the working groups.
5. Adjournment. There being no further business to come before the Executive Committee, the meeting was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary

Hon. Stewart D. Aaron

Fellow

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Hon. Lucy Billings

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Staff Memorandum

**HOUSE OF DELEGATES
Agenda Item #14
(New Business)**

REQUESTED ACTION: None, as the report is informational.

Attached is a proposed amendment to the *NYSBA 2015 Standards for Providing Mandated Representation*, a set of standards designed to apply to providers of mandated representation to ensure quality counsel to those who cannot afford representation. The standards originally were adopted by the House in 2005 and most recently amended in 2015. The Committee on Mandated Representation is proposing an amendment to the standards, as set forth in the attached memorandum. Due to the timing of the submission of this amendment, it is being presented to you on an informational basis at this meeting; it will be posted in the Reports Community and scheduled for debate and vote at the November 2018 House meeting.

A representative of the Committee on Mandated Representation will present the report at the June meeting.

**Memorandum in Support of an Amendment to the
NYSBA Standards For Providing Mandated Representation**

**New York State Bar Association
Committee on Mandated Representation
3/26/18**

The Committee on Mandated Representation urges the New York State Bar Association to adopt a Resolution revising Section B-1(a) of the NYSBA *2015 Revised Standards for Providing Mandated Representation* to provide: “Effective representation includes representation during both the pre- and post-petition stages of a Family Court case, including, but not limited to representation in emergency removal hearings and advocacy for the provision of social work, counseling, mental health, and other services”.

The objective of the *Standards for Providing Mandated Representation* issued by the NYSBA Committee on Mandated Representation is to ensure quality representation in both criminal and family court cases. Quality of legal representation at the pre-petition stage of child welfare cases is critical for the protection of the fundamental and due process rights of families. During the pre-petition period, life-altering decisions are made that can result in the traumatic separation of a child from his or her parent and possibly the permanent destruction of the parent-child relationship.

Research has shown a direct connection between such enhanced representation of parents and improved results leading to permanency for children. When parents’ attorneys provide representation early in the case, they are able to work closely with the family and the social services agency to identify and access appropriate services. Under such circumstances, parents have a better chance for keeping their children out of foster care by maintaining them safely in their care at home. In many New York State jurisdictions, millions in foster care costs can be saved by preserving the family.

The proposed revision seeks to provide the same emphasis on the importance of pre-petition representation of parents in child welfare cases as the NYS Office of Indigent Legal Services *Standards for Parental Representation in State Intervention Matters* and thereby lend much needed support to practitioners who routinely face vigorous opposition and even hostility when defending family rights.

For all of the reasons given above, the Committee on Mandated Representation enthusiastically supports this Resolution, respectfully requesting a revision of the New York State Bar Association’s *2015 Revised Standards For Providing Mandated Representation* providing for the pre-petition representation of parents to preserve the fundamental and due process rights of New York State parents.