

UTAH STATE BAR
BOARD OF BAR COMMISSIONERS
MINUTES

December 1, 2006
SALT LAKE CITY, UTAH

Present: President Gus Chin and Commissioners: Nathan Alder, Steven R. Burt, Christian Clinger, Mary Kay Griffin, Robert L. Jeffs, Curtis M. Jensen, Felshaw King, Lori W. Nelson, Stephen W. Owens, Scott R. Sabey, Rodney G. Snow and V. Lowry Snow. Ex-Officio Members: David Bird, Hiram E. Chodosh, David R. Hall, Charlotte L. Miller, Cheryl Miyuki Mori, Margaret Plane and Kathryn K. Shelton. Supreme Court Liaison Marilyn (Matty) Branch. Executive Director John C. Baldwin and General Counsel Katherine A. Fox.

Excused: Commissioners: Yvette D. Diaz and Herm Olsen. Ex-Officio Members: Paul T. Moxley and Kevin Worthen.

Also in Attendance:

Minutes:

1. PRESIDENT'S REPORT

1.1 Report on Status of 2006-2007 Commission Priorities

(a) Bar Performance Review: Gus announced that there would be a short presentation on the Bar Performance Review later in the meeting and noted that the report is still in the draft stage. A copy of the report will be sent out when it is finalized and a discussion will be scheduled to take place during a future Commission meeting.

(b) January Commission meeting: Gus indicated that the January meeting will last longer than the normal four hours because a number of action items will be on the agenda along with possibly lengthy discussions on the report on self-representation by the Commission subcommittee, the mandatory malpractice insurance disclosure, Yvette Diaz' diversity report and the Pro Bono Committee progress report.

(c) Relations with the Legislature and Judiciary: Gus reported that on January 4th a constitutional law class and dinner will be held for new legislators at 4:00 p.m. at the Capitol. On January 18th at 7:30 a.m., the Commission will have breakfast

with legislative leaders. Gus hopes to meet with Greg Curtis to remind him about the free CLE offer for lawyer legislators. Christian Clinger would like to include the Governor's office in the Bar's list of "Relations with the Legislature and Judiciary" so that more effort can be made with Michele Christiansen (Governor's General Counsel) and Mike Mower (Governor's spokesperson).

(d) Communications: In addition to the written materials in the packet, Gus noted the following items:

- Establishment of the law student division is underway;
- Bar member surveys were conducted;
- As far as member outreach, it would serve us well to interact with more attendees at Spring and Annual Conventions who are not our own constituents; and
- Commissioners always have an open invitation to write articles for the *Bar Journal*.

(e) Mandatory Disclosure of Malpractice Insurance Article for *Bar Journal*: Rod Snow said if the Commission approves the concept, the article will be ready to publish.

(f) Access to Justice: the Commission's Pro Bono Subcommittee is underway and Scott Sabey said the target date is March/April.

(g) Diversion Rule: The proposed disciplinary diversion program will be discussed later in the meeting. (See item 2.2)

1.2 Report on Meeting with Chief Justice Durham

Gus reported that Chief Justice Christine Durham would like to have the Commission's support for a proposed 11% annual increase to judicial salaries as well as enhanced funding for the Office of the Guardian ad Litem. The Bar recently conducted a survey for the AOC on the judicial application process and the Chief Justice would like the Bar to help with developing a public education program about the nominating process for judges and how the process works generally. (It may be possible that former members of judicial nominating commissions could conduct public education presentations.) She would also like to see more diversity in judicial applicants in addition to an increase in the numbers of overall applicants. Rob Jeffs suggested holding educational presentations with applicants, nominating commissions and the Governor's office and Lowry interjected that the Chief Justice also would like to see an article in the *Bar Journal* outlining statistical information of those individuals nominated and chosen over the past years. Gus then distributed a list of applicants for the Third and Fourth District nominating commissions for future consideration.

1.3 Report on Bar Leadership Conference

Gus reported that attendance was good at the conference and the question and answer session was exceptional. On a related note, Lowry added that he would like to allow more time for the open forum session next time.

1.4 Report on Status of South Dakota “JAIL” Referendum

Gus said that a recent referendum in South Dakota which involved a group of individuals who wanted to severely curtail powers of judiciary in wholly inappropriate ways was defeated. He reminded Commissioners of the need to be aware of the importance judicial independence and opined that the Bar will oppose any efforts to inappropriately curtail judicial independence.

1.5 Appoint Committee to Review Self-Representation Proposals

Gus reported that the Commission’s Self-Representation Committee initially will include Nate Alder as the chair, with Felshaw King, Rob Jeffs and Steve Burt as members. Lori Nelson will check with the Family Law Section for another possible member. The Committee will report to the Commission at the January meeting.

2. ACTION ITEMS

2.1 Litigation Section By-laws Amendment

Elaina Maragakis presented the Litigation Section’s proposed bylaw amendments. These amendments are necessary to: (a) update the bylaws for possible incorporation of a student section (along with legal assistants); (b) bring the bylaws into conformance with current actual practices of the section; and (c) keep the energy of this large group going, but streamline the ability of the executive committee to address issues that arise in a timely and effective manner.

Rob Jeffs observed that language from the Bar’s bylaws needs to be incorporated into section #4.7 to bring conformance with needing Commission approval on some items. Nate Alder had a number of questions relating to waiving fees for law students in section #2.1. Elaina responded that currently dues are \$25 but that she will bring a suggestion to waive dues to the section’s executive committee for further discussion. Scott Sabey said (referring to sections #3.1 and 4.3) that by eliminating the section’s annual meeting and having no clear election standards for officers, the section’s membership loses all control over how the section operates. Elaina responded that the section has not held an annual meeting for some time because currently the bylaws state this meeting is to be held in conjunction with the Bar’s Annual Convention which is always held out of town. The section officers have observed that the out of town location discourages attendance. Another problem, she noted, is with the large number of litigation

section members which makes holding an annual meeting expensive and cumbersome. In lieu of an annual meeting, quarterly lunches and e-mails are used to conduct section business.

Scott is concerned about accountability, however. For example, he explained, not all section members have e-mail and those who do not may be unaware of important section business. Elaina replied that the section is working on the e-mail issues and has even discussed the possibility of distributing hard copies of e-mails. She believes, however, that holding a special meeting during one of the quarterly luncheons in accordance to Charlotte Miller's suggestion would address these underlying issues. Nate then suggested designating a quarterly luncheon meeting as the section's annual meeting and expressed his thought that direct elections are not always necessary.

Steve Owens opined that it is difficult to run a election for this section due to the number of members and the expense. Dean Chodosh suggested conducting nominations from the floor at a designated meeting and then sending a confirmation opportunity to the membership. That way, if there is a potential problem, there would be an opportunity for membership to correct it. David Bird further refined this idea by suggesting that the section's executive committee present the nominations at a designated meeting, then approve and elect officers. The potential officers could be presented at the section's "annual meeting" (in whatever form this takes) for retention or confirmation. Elaina will take all these suggestions back to the section's executive committee for more discussion. She then asked the Commission about whether the section could donate the interest on their funds to Access to Justice and John Baldwin responded that Commission approval was unnecessary.

2.2 Diversion Rule Proposal

Lori distributed a revised and updated version of the proposed diversion rule and said the key issue is who will oversee the new process. The rule in its current form indicates that OPC and the Ethics and Discipline Committee (E&D Committee) would be in charge, but the E&D Committee has indicated that they would prefer to not be involved. In lieu of OPC conducting the oversight (which would create additional work and therefore expense), a possible solution would be to create a new "Diversion Committee" to institute the necessary oversight.

The following changes were then made to the revised copy distributed during the meeting: (1) on page 3, paragraph (a), remove reference to Rules 18 and 19; (2) on page 3, paragraph (b), add "when appropriate" before "All diversion contracts..."; and (3) on page 3, paragraph (b)(4), note the need to clarify where the paid costs should be allocated.

Lowry Snow inquired if OPC should have veto power in this new program. According to section (b) on page 3 as currently drafted, OPC does not have to

agree. Lowry suggested including a paragraph which states that “final discretion rests with the designated deciding body”. He also believes that the term “designee” needs to be defined in the last paragraph on page 1.

Rob Jeffs commented that there is obviously a need to create a subcommittee or new committee (as opposed to OPC or the E&D Committee) to administer this process and Charlotte believes the more separate this committee is from the Commission and Bar, the better it will be. Lori commented that this new group will participate in the drafting of the required diversion contract and will assist with monitoring the diversion requirements. Billy Walker explained how some details of the proposed process would work and noted that currently 10-20 informal diversions per year already occur. Typically, respondents do not readily reveal their substance abuse problems so a designated “deciding group” should be expected to develop expertise on these types of disabilities or conditions in his opinion. Gus said the composition of a separate, new committee will be more thoroughly addressed at the next Commission meeting.

2.3 Binding Effect of Ethics Advisory Opinions

Craig Mariger and Gary Sackett were in attendance for this portion of the meeting. Gary said historically (over the past 11 years) ethics advisory opinions were binding generally, and specifically binding on OPC. In the past, the Commission needed to approve every opinion before it was issued but Gary reminded those present that Commissioners grew weary of being lobbied for their approval (or disapproval) of opinions and did not have the time to devote to this process during regular meetings. At one point, he continued, the Commission decided to have the Ethics Advisory Opinion Committee (EAOC) directly issue the opinions.

Gary’s interpretation of the Chief Justice’s letter to the Bar is that her discomfort stems from having no specific provision for the Court to review ethics opinions and opined that if the Court is uncomfortable with having no explicit route of review, the Commission could adopt a rule that an aggrieved party, after going through the established reconsideration process, could bring a petition for review to the Court. There are additional “Possible Existing Avenues to Review” in Gary’s memo which set forth other options.

Craig Mariger said that he sees no reason still not to give lawyer a safe harbor via ethics opinions. He agreed with Gary that the issue is how the Court can review the binding opinions after they are issued. He would like to adopt a new provision which would provide a direct path to Court review.

Craig and Gary reported that Professor Linda Smith had law students survey 40 jurisdictions (some states do not issue ethics opinions). Nine states (Georgia, Kentucky, New Jersey, North Carolina, Rhode Island, Tennessee, Washington, West Virginia, and Utah) reported that their ethics opinions were binding. Six

states (Florida, Massachusetts, Montana, Oklahoma, Oregon, and Wisconsin) reported that their ethics opinions could be asserted as a defense, but are not conclusive in determining whether there was an ethics violation. Of the nine states reporting that they issue binding opinion, six of those states have no written review process and three of those states have procedures for review in place (e.g., Georgia – Petition to Supreme Court). Billy, however, disputes the research that was conducted and commented that it was not accurate.

Nate inquired if the Commission could bring a petition for review and Craig replied no, the Commission already has an avenue for reconsideration of opinions. The Commission agreed that the Supreme Court had absolute authority on its own motion to review ethics opinion at any time. Lowry said a problem may be whether an attorney will still have safe harbor if he/she has complied with an ethics opinion if the opinion is later overturned by Supreme Court. Consensus seemed to be that any changes would not be applied retroactively and a lawyer who relied on an ethics opinion would still be protected.

In response to the conducted research, Dean Chodosh opined that it is better to articulate what our goals are rather than focus on what other states do. He said that there is a deeper question where there is a safe harbor provision but believes it is still the lawyer's responsibility to accurately his own assess ethical conduct. He asked what contours should be put on the Supreme Court review so that it doesn't undermine the entire process. Craig said the EAOC's recommendation is to modify the current Enabling Rules as outlined in the memo and then submit the modification to the Supreme Court for approval. Craig observed that the Court would probably have a 45-day comment period for the proposed rule modification.

Felshaw moved to have the EAOC draft a proposed rule for the Commission's review. Steve Owens seconded the motion. Nate observed that we already have that the committee's recommendation and opposed the motion. The motion as stated passed with Nate opposed. Rob would like Court input either formally or informally before modifying the rule to be sure a change is necessary. Christian Clinger agreed with Rob's proposal. Steve Owens would like to see the phrase "within 30 days" stricken from page 7 so that the Court could review an opinion anytime by anyone seeking review. Gary responded that the reconsideration process in place should be followed. **Lori moved to "validate" the previous vote and send this suggestion along with a letter to the Court. Nate moved to adopt Lori's suggestion. Christian seconded the motion.** David Bird reiterated that we need to be careful to remember that it is the Commission exercising its discretion in sanctioning safe harbors from OPC prosecution for financial and other reasons. Scott Sabey wants to include the language "only to extent we make decision not to expend funds". **None opposed and the motion passed.**

2.4 Staff 401(k) Amendment to Add Roth Account

Katherine Fox presented the amendments made to the staff 401(k) plan which were approved.

2.5 Client Security Fund Committee Report

Katherine Fox made the CSF report presentation. Rob Jeffs questioned why certain claims are reduced by the CSF and requested that more information be provided when claims are not paid in full. **Nate Alder moved to approve the payout of \$31,150 from the Client Security Fund as outlined in the report. Steve Owens seconded the motion which passed with Rob Jeffs opposed on the grounds that more information about why claims are reduced should be provided.**

3. INFORMATION ITEMS

3.1 Mentoring Report

Alan Sullivan conducted a presentation on a comparison of training and accreditation of lawyers in the United States and the United Kingdom based on a discussion paper that he, the Hon. Antonin Scalia and the Hon. Deanell R. Tacha authored. Gus then summarized points of Alan's discussion paper on the United Kingdom's model of a mentoring program and suggested putting a committee together to review instituting a possible similar program. The committee will include Rod Snow (chair), Nate Alder, Christian Clinger, Dean Hiram Chodosh, David Hall, Cheryl Mori, Margaret Plane and possibly Dean Kevin Worthen.

Mary Kay Griffin moved to approve the formation and charge of the committee. Lowry seconded the motion which passed unopposed.

3.2 Report on Performance Review

Tom Green, the Performance Review Auditor from Grant Thornton, conducted a short presentation and distributed a new handout.

4. EXECUTIVE DIRECTOR'S REPORT

NEW ITEM:

John Baldwin referred Commissioners to Tab 18 in the packet for a list of lawyer legislators for contact purposes. Gus reminded Commissioners that the Governmental Relations Committee will meet several times throughout the legislative session via conference calls.

4.1 Report on Collection Law Presentation at Fall Forum

During the Collection Law presentation at the Fall Forum some disparaging comments were made. The Bar is currently working on negotiating a “settlement”.

4.2 Membership Statistics

John directed the Commission’s attention to the materials behind Tab 9.

4.3 Survey of Fall Forum and Bar Leadership Conference

Five hundred and thirty individuals attended the Fall Forum in November. Next year the location will be moved to the Salt Palace since the number of attendees keeps increasing and 2007 will be the larger of the two reporting cycles. Survey questionnaire results are behind Tab 10.

4.4 Commission Investment Policy

John directed the Commission’s attention to the materials behind Tab 11.

4.5 House Counsel Notice Plan

John directed the Commission’s attention to the materials behind Tab 12.

4.6 July 24, 2007 Bar Examination

John noted that the Executive Committee had authorized moving the July Bar Exam to the South Towne Expo Center due in part to the exam falling on the state holiday. The South Towne Expo Center has the additional advantage of plenty of parking in addition to providing a better electrical system to accommodate more laptops. Moreover, the facilities at the Bar are increasingly being strained with larger numbers taking the exam.

4.7 Criticism of Judges Policy

John directed the Commission’s attention to the materials behind Tab 13. Christian opined that we should do a newspaper article addressing the topic of why judges cannot speak on a number of matters that arise in the media.

4.8 Estate Planning Forms Revision

John directed the Commission’s attention to the letter (behind Tab 15) from the chair of the Estate Planning Section to Jeannine Timothy in response to her request that the probate forms the Bar sells be updated. Katherine added that she and others had long urged the section to revise the forms so that consumers could

rely on them and that the modification project began sometime ago. There was considerable discussion, including whether the forms should be posted on the Bar's website so that consumers could access them at no cost. The consensus was not to post the updated forms at this time with six Commissioners in favor of not posting the forms and four opposed.

4.9 Supreme Court Order on RLDD 7 and 8

John reported that along with revisions made to RLDD 7 and 8, the Court elected to prohibit the licensing department from collecting full-time judges' home address and telephone information.

4.10 October Financials

John directed the Commission's attention to the materials behind Tab 16.

4.11 Blomquist Hale Quarterly Report

John distributed a new Blomquist Hale report handout. He noted that 173 individuals sought service (consisting of 74 lawyers and 79 dependents in 114 households). The utilization rate is still low but increasing. John responded that Roger Cutler will obtain recent statistics for LHL pursuant to Felshaw's inquiry.

NEW ITEMS:

Gus responded to Rod Snow's inquiry about Commissioners' unfamiliarity with staff. Towards that end, we will invite staff to lunch during the next commission meeting. Lowry also suggested more comprehensive orientation for new commissions including a tour of the building. Last, we will begin to calendar dates for the Executive Committee meetings in the agenda calendar.

MEETING ADJOURNED AT 1:20 P.M.

CONSENT AGENDA

By policy, the September 21, 2006 minutes are approved without amendment.

NEW HANDOUTS DISTRIBUTED DURING MEETING:

- 1) Names of Third and Fourth District Nominating Committee Applicants.
- 2) Revised version of proposed Diversion rule.
- 3) Summary of Performance Review Report on Corporate Governance.

- 4) Delaware preceptor memo (mentoring program).
- 5) Blomquist Hale Third Quarter Report.