

**MEETING OF THE
BOARD OF GOVERNORS
OF THE
STATE BAR OF ARIZONA
October 23, 2020
Zoom**

BOARD MEMBERS PRESENT: Denis M. Fitzgibbons, President, Casa Grande; Jennifer Rebholz, President-Elect, Phoenix; Jessica Sanchez, Vice President, Mesa; Benjamin Taylor, Secretary-Treasurer, Phoenix; Sandra Bensley, Tucson; Jena Decker-Xu, President, Young Lawyers Division; Sharon Flack, Prescott; Mark Harrison, Phoenix; Kelsi Lane, Phoenix; Leticia Marquez, Tucson; Robert McWhirter, Phoenix; John Moody, Phoenix; David Rosenbaum, Phoenix; Eric Ruckensky, Flagstaff; D. Christopher Russell, Sierra Vista; Samuel Saks, Phoenix; Ted Schmidt, Tucson; Phoenix; Jimmie Dee Smith, Yuma; Public Members: Robyn M. Austin, Tucson; Anna C. Thomasson, Paradise Valley; At-Large Members Dave Byers, Phoenix, Lori Higuera, Phoenix and Doreen McPaul, Window Rock; and Ex-Officio Members Brian Furuya, Board Advisor and Dean Marc Miller, UA Law School, Tucson.

EXCUSED ABSENCES: Hector Figueroa, Payson; John Gordon, Prescott; Jonathan Martone, Paradise Valley.

OTHERS PRESENT: Deanna Commack, Executive Assistant; Sarah Corpening, Membership Administrator & Services Manager; Lisa Deane, Chief Member Services Officer; Tim Eigo, Editor; Joel England, CEO/Executive Director; Kathy Gerhart, Chief Financial Officer; Connie Hay, Board of Legal Specialization Administrator; Joe Hengemuehler, Chief Communications Officer; Lori Maxwell, Chief Information Officer; Elena Nethers, Diversity & Outreach Advisor; Lisa Panahi, General Counsel; Amy Rehm, Deputy Chief Bar Counsel; Carrie Sherman, Director of Board Operations; Roberta Tepper, Lawyer Assistance Programs Director; Karen Van Allen, Administrative Assistant; and Maret Vessella, Chief Bar Counsel.

GUESTS: Victoria Ames, Michael Crawford, Scott DeWald, Michael Farrell, Nancy Greenlee, Jill Hastings, Chuck James, Leah Won

President Denis Fitzgibbons called the virtual Board Meeting to order at 8:32 a.m. Meetings have moved to the Zoom platform; the previous protocols for virtual meetings still apply.

Call to the Public – President Denis Fitzgibbons

President Fitzgibbons made a Call to the Public and hearing nothing, moved on to the next item on the agenda.

President's Report – Denis Fitzgibbons

- Attended the virtual Bar Leadership Institute (BLI) retreat kickoff
 - These are young Bar leaders.
 - He would like a way for the Board to more fully appreciate this program.
- Attended the Arizona Judicial Council (AJC) meeting yesterday

- Mental Health and the Justice System Committee - final report is due on the 24th which should be posted on the Court's website.
- The Task Force on Countering Disinformation reported and had recommendations. We all have a duty to protect the integrity of the court.
 - David Byers: the disinformation is about the Bar's discipline system. Disbarred attorneys post erroneous information.
 - Mark Harrison: need to maintain integrity of court system and judges from political system.
 - Denis Fitzgibbons: recommends that the Bar look into this and protect the system and protect judges.
- The Code of Judicial Administration regarding the new ABSs and LPs has been approved.
- The Court's legislative package for next year is available for review on the court's website under AJC.

CEO's Report – Joel England

- The State Bar was recognized again by Phoenix Business Journal as one of the healthiest places to work. The Wellness Team is doing a great job.
- Mentor Program Update: Reminder that the Board, in adopting the recommendations of the Senior Lawyers Task Force, approved a structured mentor program with curriculum, a one-year commitment and expanded CLE credit hours for completion of the program. Expanded hours would require a Court rule amendment. Working with David Byers on a recommendation to have the Court approve the program on a pilot basis.
- The search continues for an HR Manager; interviews occurring next week.
- Registration is open for the virtual convention December 1-3. Great programming to be presented. We should know in a month or so how the registration numbers look. Lisa Deane will send an email to Board members early next week with registration details.
- Lori Higuera asked about the attendance at two of the largest Section conferences. Ms. Deane indicated that the Labor & Employment and the Worker's Compensation virtual conferences had attendance numbers comparable or higher than the previous in-person events.
- Work continues on the 2021 budget; Finance & Audit Committee and the HR Subcommittee had their first review; final draft presented at the December Board meeting.

Member Assistance Program (MAP) Task Force – Nancy Greenlee, Roberta Tepper

- Reviewed the work of the Task Force and its recommendations:
 - A State Bar MAP be mandated in Court rules.
 - One of the 15 MCLE hours be related to substance abuse disorders and mental health issues.
 - Amend Court rules to 1) provide confidentiality provision for those in MAP, and 2) any lawyer involved in MAP is not required by ER 8.3 to report misconduct of lawyers seeking MAP assistance.
 - Add opt-out provision on fees statement so lawyers can help fund the MAP with a \$5 or \$10 payment

- Through a RFP process, a third-party provider has been identified to facilitate member treatment as well as assist with obtaining insurance. The provider has physical locations in Phoenix and Tucson and a statewide network of treatment providers that offer telemedicine.
- Supportive comments from Board members included:
 - MAP would help to abort the discipline process
 - A good proposal and a way to improve all Bar programs
 - If the program needs to be funded, fund it; no opt-in/out provision
- Other comments:
 - No mandatory CLE (another such proposal is expected from another Bar group)
 - Offer the one-hour CLE free
 - Confidentiality is often an issue before someone asks for assistance with mental health issues.
 - Confidentiality is maintained now, and it is possible they can expand that because the person will be working with an actual provider.]
 - How can we get people into the program?
 - Outreach is done. Any member can call Roberta Tepper and a team member will reach out. There is no mention of who recommended the service; just to offer services.
 - People have to be ready. It is counterproductive to push someone into treatment that isn't ready. This is not compulsory. It has to be a member's decision to seek help. The Task Force wants to make it easier for a member
 - There are links to resources available if the person does not want to call the Bar.
- Discussion ensued about funding the MAP
 - Opt-in versus opt-out
 - Opt-in totals to support legal services has not had high participation
 - How much is needed?
 - Possibility of diverting, say \$1/member, from the Client Protection Fund contribution to fund the MAP; CPF currently has a large surplus
- Task Force to consider Board's comments, reassess and present final proposal for a Board vote at its December meeting.

Proposed Legal Paraprofessionals' Membership Fees – Joel England, Kathy Gerhart, Lisa Panahi

- With the Court's approval of the recommendations of the Task Force on the Delivery of Legal Services, Legal Paraprofessional (LPs) will be admitted by the Court to practice law in finite areas of the law.
- The LPs will therefore be regulated by the Lawyer Regulation Office.
- The Bar recommends members' fees to the Court which approves/sets said fees.
- For discussion today, what should those fees be? The LPs will be entitled to all the resources and benefits of being a member of the Bar.
- A vote regarding a fees structure is scheduled at the December Board meeting as the LPs can begin to be licensed in 2021

- Joel England reported that the Bar’s Delivery of Legal Services Implementation Team has interacted with the Court on this issue. Both the Executive Council and the Finance Committee have had discussions, and their initial thought is that the fees should be the same as an Active Member - \$505 - as a starting point.
- Discussion ensued:
 - General agreement with the Active membership fee since the LPs are entitled to all the same benefits and resources as Bar members
 - Depending on their numbers, a potential Board seat in the future
 - Welcome these new members and have appropriate CLEs readily available
 - LPs initial earning capacity? Tailor a gradual increase similar to that for young lawyers (\$345 for three years) since this is a new program and new relationship
 - Offer structured payments? Semiannual? Monthly (with imposed administrative fee)?
 - Bar’s current financial software/technology and process doesn’t support this type of payment system
 - Board has had this conversation before; now is the time to modify the accounting system and also look at the MCLE affidavit deadline to sync with deadline to pay membership fees (dates of both deadlines are set by Court rule)
 - **MOTION:** Samuel Saks moved and Kelsi Lane seconded the motion to create a task force to address the accounting software and stated deadlines issues
 - Several Board members thought a task force was unnecessary, but suggested that the Finance Committee address the issues and consider the pros/cons
 - Timing: Next Committee meeting focused on the 2021 budget; timing too aggressive to report back to the Board in December on restructuring fees payments and the fees/MCLE deadlines; issues can be addressed but would not meet the deadline to submit any rule changes by yearend
 - Samuel Saks withdrew his motion
 - Finance & Audit Committee Chair Benjamin Taylor said the Committee will look into these matters and report back to the Board.

State Bar of Arizona Strategic Plan (Final Draft) – Jessica Sanchez

- Almost 40 responses were received from members after the draft Plan was circulated. There is a mix of positive/negative feedback along with specific ideas related to implementation.
- Minor adjustments were made to the Plan when the Working Group met two days ago.
- Mark Harrison: add under Priority One, Supporting Activities, the “Discipline System Oversight Committee”.
- **MOTION:** The 2020-2023 Strategic Plan, with the one addition/amendment, was unanimously adopted by the Board. The Working Group, Brian Furuya and Joel England and their Listening Tour endeavors, ABA Consultant Jennifer Lewin and Bar staff were thanked for their efforts this past year in bringing the next Bar Plan into fruition. Work will continue on prioritizing implementation and establishing metrics.

Appointments Committee – Jessica Sanchez

- Committee on Character and Fitness and Committee on Examinations
 - Three additional applications were submitted on time but there was a processing challenge due to the mail/pandemic. These applicants were not screened at the Appointments Committee’s September meeting.
 - The Appointments Committee screened the three applicants at its October meeting and unanimously agreed not to alter its original slates of nominations for the Character and Fitness and Examinations Committees presented to the Board in September.
 - The Appointments Committee recommended that no Board action was required on this matter.
- The City of Phoenix Judicial Selection Advisory Board (JSAB)
 - A large number of applications were received.
 - The Phoenix City Council requests three nominations per opening.
 - The Committee’s recommendations are:
 - Mr. Javier Torres, Stinson Leonard Street LLP
 - Ms. Jessica Amanda Ross Thomas, Arizona State Retirement System
 - Mr. Ron Kilgard, Keller Rohrback LLP
 - **MOTION:** The motion to approve the Committee’s recommendations carried over one abstention.

Arizona Limited Liability Company (LLC) Act – Scott DeWald

- In 2019 the Board of Governors voted to endorse the AZ LLC Act – SB 1114 - and assign the Bar’s lobbyist to secure a sponsor and to shepherd the bill through the legislative process.
- The bill easily passed the Senate and is believed that it would have also easily passed in the House except that COVID put a hold on any “non-essential” legislation.
- The Business Law Section is now submitting two technical corrections - typo or stylistic changes that were requested by the Legislative Council.
- **MOTION:** Jennifer Rebholz moved, Chris Russell seconded and the motion carried over two abstentions to endorse the technical changes to the AZ LLC Act and to provide lobbying support to secure a sponsor and shepherd the bill through the upcoming legislative session.

Rules Review Committee – Jennifer Rebholz

- Preliminary Jury Instructions: proposed amendments to the Instructions were summarized
 - **MOTION:** Motion to approve the Rules Review Committee’s recommendation to approve the Preliminary Jury Instructions carried unanimously.
- Emergency Departments: Medical Negligence in Emergency Rooms
 - **MOTION:** Motion to approve the Rules Review Committee’s recommendation to approve the new instruction to add to the Medical Negligence Instructions carried unanimously.
- Proposed Petition to Amend Rule 68, Ariz. R. of Civ. P. with Appendices – Michael Farrell

- The Court asked the Civil Practice and Procedure Committee to look at Rule 68 again
 - alter the calculation of the sanction imposed by the Rule by making the sanction proportionate to the difference between the amount offered and the judgment;
 - disallow any sanction if the action seeks solely injunctive relief; and
 - allow the court to reduce or eliminate a sanction if the court finds that the offeree's rejection of the offer was reasonable.
- Brian Furuya: correction needed at g. Sanctions 4.i. – “assess” not “access”
- Discussion ensued:
 - This rule keeps changing; it's designed to promote settlements but adds uncertainty
 - Arizona has deviated from Federal Rule 8
 - What is the standard going to be?
 - Sanctions not high enough
 - The 10% sanction is kind of arbitrary; depends on how large the case is; how much difference between the offer and the judgment?
 - Look at expert fees
- There is time for the Rules Review Committee to revisit the proposal and for the Board to address at the December meeting, but the Board would have to vote against the proposal before sending it back to Rules and/or the Civil Practice & Procedure Committee.
- **MOTION:** The motion to approve the Rule 68 proposal before the Board failed by a vote of 7-15-1.
- Michael Farrell indicated that the Civil Practice and Procedure Committee undertook this issue at the request of the Supreme Court. Where does this leave the Bar in terms of a response?
- **MOTION:** Mark Harrison moved, Jessica Sanchez seconded and the motion carried by a vote of 22-2 to send the Rule 68 Petition back to Civil Practice and Procedure Committee with the Board's comments.
- Proposed Petition to Amend Rule 45(a)2, Ariz. R. of Sup. Ct. with Appendices
 - Graduates of the Bar Leadership Institute propose that one of the three required MCLE credit hours in professional responsibility be focused on diversity and inclusion. This would not alter the total number of MCLE hours – 15/year.
 - Ted Schmidt:
 - As chair of one of the subcommittees of the Task Force on Social Justice, Bias and Inclusion, his subcommittee's task is to suggest programs that the Bar might adopt.
 - Most important recommendation coming out of subcommittee is having CLE. Need to educate people on right/wrong.
 - Can't see another way to educate members of the Bar.
 - Recommends 1 hour of CLE focused on diversity and inclusion.
 - The Board concurred that this is a very important step to initiate.
 - Jimmie Smith: Would vote against the mandatory component unless it is free.

- David Byers:
 - Perhaps amend paragraph B. on page 7 and delete the specific protected groups before the word “persons” but keep “and the elimination of bias”; eliminate need to have to list all protected groups.
- Brian Furuya:
 - Remembers his first experience with racism (after high school).
 - The Board cannot make it more powerful except by offering it free.
 - On the record that he will make one hour of free CLE for the Board to distribute.
 - If the issue is that it adds a cost to the membership, eliminate the cost.
 - Make it mandatory; the Bar says, “to fulfill the requirement, here it is for free.”
- Lori Higuera:
 - Offer it because it is important.
 - If it is not required and free; preaching to the choir.
- Ted Schmidt: That is the recommendation of the subcommittee.
- Denis Fitzgibbons: Does the Board want to table this until it has the whole report of the Task Force in December?
- Jessica Sanchez:
 - Believes it is important, required, and should be free; backing up core values.
 - For newer members, it is an opportunity to create a Bar that is welcoming and professional.
 - Doesn’t want to wait until December.
 - Make the changes now in a climate that is ripe for it.
- Joel England:
 - CLE works through an online vendor partnership; there is a cost to the Bar; any profits are above this.
 - Not against free; Board should know cost when making a decision.
 - Can explore another way to provide it.
- Lisa Deane:
 - Arrangement is \$7.50/hr. per person; cost would be approximately \$150,000 for this one-hour “free” CLE.
 - Alternative is to have it as a Zoom meeting or possibly GoToWebinar but no automatic CLE tracking of attendance for our members.
- Samuel Saks:
 - Opposed to mandatory.
 - How do we present it to the public?
 - State Bar should provide this free to all members; need to back it up as the Bar.
 - Could also provide something over an hour with a cost.
 - Edit the language a bit; wants it to pass.
 - Put it on the website.
 - Must address the elimination of bias

- Lori Higuera: Elimination of bias is not the same as diversity and inclusion; diversity and inclusion is consistent with what the Bar said is important.
- Jennifer Rebholz:
 - Need to vote on it if it is going through this Rules cycle.
 - It changes the Rules as to what is required for CLE.
 - Please review it and be prepared to discuss it in December.
 - Can defer action today.
- General Counsel Lisa Panahi indicated that, to be consistent with previous action taken during the meeting, the Board should vote on the proposal and if it fails, a new motion would then be entertained.
- **MOTION:** David Byers moved, Jimmie Smith seconded and the motion to table this matter until December carried over two dissents.
- The Rules Review Committee can make any changes based on the discussion.

Consent Agenda – Denis Fitzgibbons

- President Fitzgibbon inquired if anything needs to be removed from the Consent Agenda and hearing nothing,
- **MOTION:** Jimmie Smith moved, David Rosenbaum seconded and the motion carried unanimously to approve the Consent Agenda:
 - a) Approval of September 25, 2020 Board Meeting Minutes
 - b) Approval of Resignations in Good Standing
 - c) Approval of Reinstatements
 - Reinstatement of Members Suspended for Non-Compliance with Annual Membership Fee and/or Trust Account Compliance (Rule 32(c)(10) and/or Rule 43, Ariz. R. Sup. Ct.)
 - d) Rules Review Committee
 - i. Proposed Petition to Amend Rule 37(b) and New Rule 37.1, Ariz. R. Fam. L.P. with Appendices
 - ii. Proposed Petition to Amend Rule 76.1, Ariz. R. Fam. L.P. with Appendices

Finance and Audit Committee – Benjamin Taylor and Kathy Gerhart

- The Bar has generated a surplus of \$182K, which is \$204K more than budgeted (favorable) as of September 30th:
 - Revenues: \$1,401K less than budgeted (unfavorable); significant factors:
 - Convention timing;
 - Reduced CLE revenue; anticipate some gains in the fall due to MCLE deadline change.
 - Expenses: \$1,606 less than budgeted (favorable); significant factors:
 - Convention timing;
 - CLE – reduced expenses due to cancellation of events;
 - Reduced section activity;
 - Travel, training & development dollars not spent.
- 2020 updated annual forecast as of September
 - \$146K loss for the year based on current trends.

- Significant Risk/Opportunity: member behavior regarding Convention registration and CLE performance with deferral of MCLE deadline to December 31st.

Status Reports

- Task Force on Social Justice, Bias & Inclusion – Lisa Deane
 - Three subcommittees: Bar Operations; Programs and Events; and Bar Leadership
 - Ted Schmidt:
 - In conjunction with the recommendation on CLE, he received a survey from the Maricopa Bar Association; recommended that the Bar circulate the survey. Topics include demographics, identity of types of problems.
 - Want to know what to include in the CLE.
 - Robert McWhirter:
 - His subcommittee suggests having some things featured in *Arizona Attorney Magazine*.
 - CLE and training focused.
 - Jessica Sanchez:
 - The Bar is doing a great job with recruitment; suggestion to formalize policies and procedures regarding hiring.
 - Create recommendations for vendors.
 - Track discipline to see if there are trends regarding bias.
- Delivery of Legal Services Implementation Team – Lisa Panahi
 - Developed a list of questions for the court.
 - Meeting next Monday to review guidance from the court.
 - Will know after the meeting if there are any obstacles to prevent implementation.

Correspondence/Reports

The following correspondence/reports were included in the meeting materials.

- a) Executive Council Meeting – September 11, 2020
- b) Executive Council Meeting – October 9, 2020
- c) AO 2020-153 Regulation Records Retention Schedule for Case Files
- d) Thank You from Justice John Lopez

Adjourned at 11:49 a.m.

Robert McWhirter gave a presentation on the history of “packing the courts” following the meeting.

Respectfully submitted,

Benjamin P. Taylor
Secretary/Treasurer