

UTAH STATE BAR  
BOARD OF BAR COMMISSIONERS  
MINUTES

January 26, 2007  
SALT LAKE CITY, UTAH

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

**Excused:** Commissioners: Felshaw King and Lori W. Nelson. Ex-Officio Members: David Bird.

**Minutes:**

**1. PRESIDENT'S REPORT**

**1.1 Legislative Relations Report**

Gus Chin reported that Magistrate David Nuffer did a wonderful job with the legislative constitutional law class and that it was well attended. Scott Sabey also observed that legislators enjoyed the class and were very appreciative. Gus further reported that the legislative breakfast attendance was a little sparse but also went well. He then directed Commissioners' attention to the Bar's Policies and Procedures on Legislative Activity (behind Tab 1) and reminded them that no member or employee of the Bar should represent the Bar on legislative matters.

**1.2 President-elect Election and Bylaws Report**

Gus referenced the recent letter to Chief Justice Durham (behind Tab 2) and reported that Matty Branch had confirmed with the remaining justices that the Bar only had one qualified candidate for president-elect this election cycle. He inquired of Commissioners if there were any other nominations for president-elect for consideration. As there were no other candidates, **Scott Sabey made a motion to hold a retention election as outlined in Justice Durham's letter. Steve Owens seconded the motion. Nate Alder abstained from voting. There was no vote taken on this motion. Steve Owens then moved to petition the**

**Court to amend the Bar’s bylaws to provide for retention election where there is only one qualified candidate for president-elect and Scott Sabey seconded that motion.**

Discussion ensued over the motions. Herm Olsen inquired if it was necessary to amend the bylaws at this time since this is the first time for an uncontested president-elect election under the current provisions. Others noted that this situation may occur again, however, and we may need to accommodate it in the future. John Baldwin noted two aspects to address in the petition: (1) should Commissioners be involved in “drumming up” candidates if there is no real interest expressed in running for office; and (2) the Court’s previous direction to the Commission to conduct a contested election based on a populace notion. Charlotte Miller suggested advertising the opportunity earlier in order to increase awareness of the opening. She suggested sending notice to all local bars and “specialty” bars so that a real effort is made to solicit possible candidates. She further noted that not everyone who reads the *Bar Journal* sees the published notice and other do not read the *Journal* at all.

Gus responded that we rely on ex-officios to publicize the opening and that we do not want to “push” a disinterested person to run for office. John observed that it would be difficult if the only other candidate is someone with whom Commissioners are unable to work. Dean Hiram Chodosh opined that this issue strikes him as a non-issue if only Commissioners have run for president-elect in the past. Dean Kevin Worthen asked what it would take to reject a president-elect candidate. Katherine Fox said that of those voting, 30% would be needed for rejection according to past practice and the Court’s direction for the election process. **Steve Owens amended his motion to include that a majority of those voting would be needed to reject a candidate. Motion passed with Nate abstaining.**

**1.3 Commission Election Timetable Reminder**

Gus said February 10<sup>th</sup> is the deadline for the Commission openings. Scott Sabey’s and Yvette Diaz’ commissioner seats are up for election.

**NEW ITEM:**

Gus noted that an ABA Law Student Division reception is scheduled for February 23<sup>rd</sup> or 24<sup>th</sup>. The Bar is helping to sponsor the reception.

**NEW ITEM:**

Gus related that Elaina Maragakis had relayed to him that the Litigation Section will host a reception for 1<sup>st</sup> year law students from both of the in-state law schools on March 6 at 5:00 p.m. The reception will be held at the Law and Justice Center.

## **2. EXECUTIVE DIRECTOR'S REPORT**

### **2.1 December Financials**

John distributed the December financials and reported that we continue to maintain anticipated reserves. In response to questions, he replied that we are currently running a deficit for three primary reasons: (1) \$65,000 paid to Grant Thornton; (2) \$40,000 contribution to Access to Justice Council; and (3) cash lease payments for two new office copiers. Mary Kay Griffin inquired if the *Bar Journal* was actually \$37,000 over budget and John replied that timing would adjust those figures. The financials showed \$19,000 under projections but should be close to zero by the end of the fiscal year.

### **2.2 Casemaker Updates**

John reported that past legislative updates with Casemaker have not been timely. Casemaker has a service called "Super Code" which will enable quarterly updates now.

### **2.3 List of Bar Staff**

John reminded Commissioners that lunch today would be held with the Bar staff (see Tab 3 for staff changes and updates) and mentioned that Arn Birrell will be retiring this fall.

### **2.4 OPC Report Follow Up**

Billy Walker's annual meeting with the Supreme Court will be on February 14<sup>th</sup>.

### **2.5 Law and Justice Center Corporation Status**

John reported that the Law & Justice Center ("LJC") mortgage was recently paid off and by the end of the fiscal year, the LJC Corporation will be dissolved. Upon dissolution, there will no longer be a 501(c)(3) entity through which tax deductible contributions can be made. He continued that the Bar is a 501(c)(6) corporation and unfortunately, contributions are not tax deductible. Nate Alder opined that the Bar really should have a 501(c)(3) "arm" for tax purposes.

### **NEW ITEM:**

Paul Moxley explained the current status with the status of candidates for the office of president-elect of the ABA. He distributed an ABA State Delegates/Nominating Committee and a Members-at-Large Nominating Committee lists and explained how the process. Currently there are three

candidates (including Paul) running for president-elect but in the past, there have been very few contested elections.

**NEW ITEM:**

Charlotte Miller distributed a letter drafted by the ABA to Robert Gates, Secretary of Defense, which asked for Secretary Gates to take appropriate action against the remarks made by Deputy Assistant Secretary Charles Stimson on January 11<sup>th</sup>. Mr. Stimson had criticized the efforts of pro bono lawyers, some of whom are members of large and prestigious law firms that provide legal services to large corporations, for “representing terrorists at Guantanamo.” Dean Chodosh said that he and Dean Worthen had signed a national law school deans’ letter also objecting to Stimson’s remarks.

**3. ACTION ITEMS**

**3.1 Dorathy Merrill Brothers Award**

Gus announced the nominees for the Dorathy Merrill Brothers Award for the Advancement of Women in the Legal Profession. This year’s nominees include Kate Toomey, Christine Fitzgerald Solits, and Irene Warr in addition to last year’s nominees, Judge Carolyn McHugh and Julie K. Morriss. Discussion ensued over the candidates. **Christian Clinger nominated Irene Warr. Yvette Diaz seconded the nomination. A vote was taken and the award will be presented to Irene Warr during the Spring Convention.**

**3.2 Ray Uno Award**

Gus announced the nominees for the Raymond S. Uno Award for the Advancement of Minorities in the Legal Profession. This year’s nominees include Judge Glen K. Iwasaki and Sean D. Reyes in addition to last year’s nominee Douglas Matsumori. Discussion ensued over the candidates. **Nate Alder nominated Judge Iwasaki. Steve Owens seconded the nomination. A vote was taken and the award will be presented to Judge Glen K. Iwasaki during the Spring Convention.**

**3.3 Constitutional Law Section Bylaws**

Margaret Plane discussed the Constitutional Law Section’s bylaws behind Tab 6. She said there are currently about 50 members and they would like to “reactivate” the section. She further opined that this section excels at “meaty” CLE presentations which have been very successful. Kathryn Shelton asked that a “slash” mark be used between the words “paralegal” and “legal assistant” throughout the bylaws. **Steve Owens moved to adopt the bylaws. Scott Sabey seconded the motion which passed unopposed.**

### **3.4 Diversion Rule**

Discussion postponed as Lori Nelson was ill.

### **3.5 Insurance Disclosure Rule**

Yvette Diaz reported that the ABA's professional liability disclosure model rule was a catalyst in forming a subcommittee to study this issue. The subcommittee is currently leaning toward recommending the adoption of the South Dakota model. She recalled that when an e-mail was sent to out members, 700 responses were received, mostly from solo practitioners, with the main concern being over the cost of mandated insurance. On last year's licensing renewal form, lawyers were asked to voluntarily answer questions about their malpractice insurance coverage. Yvette opined that it was surprising that the survey reflected that a large number of members did not have insurance. From the format of the survey, however, it was unclear how many of those were corporate counsel or others who do not need private insurance. Yvette recommended that this year we should require members to report certain insurance information by amending Rule 1.4 of the Utah Rules of Professional Conduct.

Rod Snow proposed adopting the draft of an administrative rule (Tab 8) requiring that each active lawyer disclose whether they have malpractice insurance, the amount, the carrier, and other information. The rule would further require the Bar to release certain insurance information upon request from a client or potential client. Gus believes that if the rule is adopted the Bar should keep a record of such notifications.

Steve Owens opined that collecting this information is a good thing, but he is strongly opposed to any disclosure to clients or potential clients. He does not like the idea that a client could notify an insurer of a perceived potential problem. Moreover, he thinks that a majority of lawyers would be opposed. Steve Burt agreed with Steve's assessment and said that this burden should not be placed on the Bar. Herm Olsen observed that a potential client may want to know ahead of time whether or not a lawyer has insurance in order to choose among several lawyers.

Rob Jeffs reported that 76% of the survey responses were opposed to mandatory disclosure to clients. He further said Commissioners previously agreed that we would obtain better demographic information before instituting any disclosure rule because the results might dictate different approaches depending on the information gathered. Scott Sabey interjected that he is opposed to the entire concept. He stated that we started the study with making malpractice insurance mandatory, then we settled on mandatory disclosure. He believes the Commission is backing into a solution for a problem not yet clearly defined and that it is a mistake to go down a road we have not yet fully investigated.

Gus responded that the investigation already has been completed and we are now taking steps to make sure both clients and lawyers are protected. Rod added that we have done about as good as we could do with regard to gathering data and said that it appears that about 50% of Utah practitioners are uninsured. Although he does not anticipate very many client inquiries for this information, he thinks it should be available via this low-key approach. Katherine Fox reminded Commissioners that if an administrative rule is approved and if the required information is not supplied on the license renewal form, then the form will not be renewed and the lawyer will be suspended for failure to renew.

Dean Chodosh inquired what the empirical basis was for assuming that a problem existed because nothing has been said about the nature of the problem in the legal community which normally would prompt this type of action. He continued that perhaps we need a “research facility” to develop some good information on which to base any future action. He posed the question that if very few clients are going to request this information, then what is the actual benefit of mandatory disclosure outside just the appearance? He said that the two law schools could assist the Commission by conducting surveys and doing research.

Herm asked if the Supreme Court would mandate action if the Commission failed to adopt a rule now. Matty Branch responded that the Court had not had an in depth look at this issue but they are open to being further educated about it. There is, however, no sense of “we’ll do it if you don’t” at this point. Both Gus and Yvette indicated that there is much Court interest but no pressure *per se*. Steve Burt believes the issues are being mixed and that requiring licensing information and client disclosure should be separated. Lowry Snow said he supported Rod’s and Yvette’s work on the proposed rule.

**Rod moved to amend the proposed rule to disclose only the fact of insurance and the time period.** More discussion ensued. Rob Jeffs said we need sufficient data to identify the issues and not just act on limited information. He continued that we need: (1) more information on the administrative rule/mandatory disclosure (separate from public disclosure); or (2) a study group to gather better information. Ultimately, if the goal is to get lawyers insured, he would like to approach the issue in a more systematic way. Lowry observed that the discussion had moved from consumer based/consumer protection to gathering information and that he prefers Rod’s approach.

**Steve Owens made a substitute motion to require the following five questions on licensing form: (1) does the lawyer represent private clients; (2) does the lawyer currently carry malpractice insurance; (3) if yes, in what amount and who is the carrier; (4) how many years has the lawyer been in practice; and (5) the size of the law firm.** Lowry would also like to include a statement of why the Bar is collecting this information. Further discussion ensued over how the questions should read on the licensing form. Rob said he still prefers to authorized

a law school study but this step is more palatable and he will support it. **Herm Olsen seconded the amended motion. The motion passed with Scott Sabey opposed.** Discussion confirmed that Lowry and other would like a preface statement that the Bar encourages lawyers to have malpractice insurance.

## **4. INFORMATION ITEMS**

### **4.1 Grant Thornton Performance Review Report**

Thomas Green, Thomas A. McLaughlin and Thomas Eldredge of Grant Thornton presented salient highlights from the Commission governance report. Also in attendance for this portion of the meeting was Ray Westergard.

### **4.2 Self-Representation Subcommittee Report**

Nate Alder reported that Russell Minas has joined the Commission's Self-Representation Committee. Committee members discussed the court report on self-representation and met with Judge James L. Shumate. The court would like to institute a pilot program in the 2<sup>nd</sup> and 8<sup>th</sup> District Courts. This program would consist of a "help desk" to assist the public, court clerks, county bars and the Utah State Bar. The courts will need legislative support (financial) to institute the program. Rob Jeffs said Judge Shumate clearly articulated the difficulty judges and other court personnel experience with self-represented individuals. He believes it is possible to get representation at a lower cost using unbundled legal services and/or by instituting a "low bono" program which consists of a pool of attorneys who agree to provide low cost or limited services for a discounted fee. Rob and Nate both agree that more publicity is needed for the unbundling rules approved by the Court some time ago and what those rules now allow. Dean Chodosh said that access to justice does not necessarily mean just access to the courts. If we assume the concepts are identical, then people who are legally ill-equipped still aren't "playing the game" well. He suggested combining a "low bono" program with a mentoring program. Rob suggested using this concept as part of a long term plan and expand the impact for the community. Lowry said that Gus, John and he have talked about long range planning and would like to use it with new commissioners as part of their orientation.

### **4.3 Mentoring Subcommittee Report**

Rod Snow said that the mentoring subcommittee recently held its first meeting. They are assessing the needs of new lawyers by reviewing the results of a ABA mentoring survey. Margaret Plane is the co-chair of the committee and Curtis Jensen was added as a member. The group's next meeting is scheduled for February 6<sup>th</sup>.

### **4.4 Diversity Report**

Discussion postponed.

#### **4.5 CLE Status Report**

Connie Howard attended this portion of meeting and discussed the materials behind Tab 9 relating to CLE events for the previous six months. CLE highlights included: (a) the Fall Forum; (b) the Clarence Darrow program (which was very successful); (c) a lot of events on e-discovery and federal rules; and (d) NLCLE (which is on-going). John Baldwin said the following goals for CLE have been activated: (a) provide diverse subject matter; (b) continue to develop geographic access; (c) focus on qualified presenters; (d) expand into different technologies for dissemination; (e) understand the need for networking; (f) provide CLE hours at a lower cost (approximately \$25 per hour); and (g) continue to have the CLE budget break even if the trend has been to make money.

#### **NEW ITEMS:**

Gus called to Commissioners' attention to the following:

- (a) The consent agenda where the December minutes stand approved if there are no objections; and
- (b) the meeting in April will be in the Vernal area and he would like feedback from Commissioners on their commitment to attend. John Baldwin said he will e-mail Commissioners for feedback on the Vernal meeting. John will also contact D. Karl Mangum for meeting and accommodation details. It is possible that the Commission meeting will be on Friday at noon and the dinner that evening.
- (c) Gus noted that the Pete Suazo Award was present to UMBA and a banquet will be held on March 2<sup>nd</sup>.

**MEETING ADJOURNED AT 2:50 P.M.**

### **CONSENT AGENDA**

By policy, the December 1, 2006 minutes are approved without amendment.

#### **NEW HANDOUTS DISTRIBUTED DURING MEETING:**

- 1) Bar December financials.
- 2) ABA State Delegates/Nominating Committee and Members-at-Large Nominating Committee lists.
- 3) ABA Stimson letter.