

UTAH STATE BAR
BOARD OF BAR COMMISSIONERS
MINUTES

OCTOBER 24, 2008
LAW & JUSTICE CENTER
SALT LAKE CITY, UTAH

Present: President Nathan D. Alder and Commissioners: Steven R. Burt, Christian Clinger, Yvette D. Donosso, James D. Gilson, Mary Kay Griffin, Curtis M. Jensen, Felshaw King, Lori W. Nelson, Herm Olsen, Stephen W. Owens, Scott R. Sabey, Rodney G. Snow, and Rusty Vetter. Ex-Officio Members: Simón Cantarero, Julie Eriksson, Eve Furse, Karthik Nadesan, V. Lowry Snow and James Gordon (Interim Dean for J. Reuben Clark). Executive Director John C. Baldwin, Assistant Executive Director Richard Dibblee, General Counsel Katherine A. Fox, and Supreme Court Liaison Marilyn (Matty) Branch.

Excused: Commissioner: Robert L. Jeffs. Ex-Officio Members: Hiram E. Chodosh, Charlotte L. Miller and Paul T. Moxley.

Minutes:

Meeting with Supreme Court:

In attendance for this portion of the meeting were Rita Branch, Chief Justice Christine M. Durham, Associate Chief Justice Matthew B. Durrant; and Justice Jill N. Parrish. Nate Alder provided a few introductory remarks prior to the breakfast meeting with the Court. He also introduced Rita Branch, the new administrator of the Bar's New Lawyer Training Program. The agenda for this meeting included:

1. New Lawyer Training Program Mentor Recruiting;
2. 2007-2008 OPC Report;
3. 2007-2008 Summary of Bar Activities;
4. 2007-2008 Bar Operations Review;
5. 2008-2009 Bar Operations Review;
6. Legislative Relations and Session; and
7. Judicial Performance Evaluation Commission

Lowry Snow, Chair of the new Judicial Performance Evaluation Commission ("JPEC"), reported on the JPEC's progress. The group has held two meetings to date and reviewed over 80 applications for the position of the JPEC's Executive Director. The group wants to reduce the potential candidates to six or seven applicants to interview and will then designate an Executive Director from this group. The meeting to designate someone to

fill the position is currently slated for November 4. The new Executive Director will be in charge of soliciting RFP's to conduct the necessary judicial performance surveys and further develop the program. Lowry noted that there are growing concerns about the sufficiency of funding for the adequate development of this legislative charge. He closed his remarks by describing the current make-up of the JPEC which consists of three appointees from each branch of government.

Chief Justice Durham expressed the Court's appreciation for the quarterly meetings held with the Bar's President, President-elect and John Baldwin. The Court would like to institutionalize this practice as well as the yearly Commission breakfast meeting. She emphasized the Court's appreciation of the Commission's valuable contributions such as the new mentoring program which will serve the public interest. She also stressed the importance of periodic Bar operation reviews because it is essential that both the Court and the Bar be held accountable in various core areas as well as some discretionary programs.

Nate informed the Court that we will be publishing the summary of the 2007-08 Bar Operations review in the upcoming *Bar Journal*. He also discussed the new handout 2008-09 Bar Operations Review Committee Commission roster and the referenced 2007-08 Program Reviews binders.

Lori Nelson wanted the Court's input on ideas for recruiting mentors for the new NLTP program. Chief Justice Durham said the Court is interested in a full blown presentation to members of the judiciary so as to "recruit" judges who then hopefully would encourage volunteers. John Baldwin added that we have discussed the idea of a NLTP recruiting committee comprised partly of past Bar presidents to encourage volunteers. This group would travel to local bars for presentations. Rod Snow noted that the Court has tentatively scheduled a final discussion on the NLTP program for December 10th.

Nate then reported on the Commission's plans for the upcoming legislative session which will include a constitutional law presentation for new legislators. We will expand the Bar breakfast for lawyer legislators to include members of legislative leadership. Chief Justice Durham said the legislature has asked to cut 3% from the 2009 judicial budget and has also asked for a 4% judicial budget cut for 2010. She said the Judicial Council will be addressing this very difficult financial issue.

In response to Justice Parrish's inquiry, discussion ensued on increasing the number of potential legislators who are also lawyers. Demands on lawyers time while earning a living and lack of legislative civility contributes to the decreasing numbers of lawyer legislators. Scott Sabey opined that we need a lawyer legislator PAC. Chief Justice Durham observed that increasing the number of legislative lawyers is a problem because there are issues with: (1) the current economic structure of the practice of law (billable hours); (2) student debt; and (3) loss of global economic jobs. She suggested forming a coalition based on data related to women and minorities to help promote lawyer interest in serving in the legislature. We also need to sponsor more targeted CLE presentations to encourage lawyers to run.

1. PRESIDENT'S REPORT

1.1 Review Leadership Training Luncheon

Nate noted that we had a superb annual leadership training meeting in October.

1.2 Proposal to Reduce Convention Reimbursement

A new handout outlining a proposal to reduce Commission related convention reimbursement was distributed. Nate said we are trying to be more frugal with our travel. Rusty opined that as Bar leaders, we need to be more cognizant of current economics and obtain more value out of our meetings using a cost benefit analysis. He also said that we need more details related to Commission expenses for conventions, past president's dinners and the like in order to realize the actual expense. Nate said we will take action on this proposal in December after John Baldwin supplies additional financial information.

1.3 Review Legislative Session and Bar's Lobbying Timetable

A new handout outlining the upcoming legislative session and the Bar's lobbying timetable was distributed. Nate pointed out the highlights outlined in the handout and discussion ensued on scheduling and details.

2. EXECUTIVE DIRECTOR'S REPORT

2.1 Malpractice Insurance Survey Results

Materials relating to malpractice survey were included under Tab 1. Nate said that he would like to continue gathering malpractice insurance information on the yearly licensing form. Eliciting the information encourages lawyers to obtain insurance, thus protects the public. He continued there is no downside to continue eliciting this information.

2.2 Review Status of Real Property Tax Exemption Appeal

John reported that the additional real property tax payment of approximately \$30,000 is due on December 1, 2008. He said that we will pay the amount under protest and noted that our exemption appeal is ongoing.

2.3 Review Discussions with KCPW for Radio CLE

Nate said he is in favor of implementing this concept and John said we would have air time twice a month; one time would be topics of interest (panel) and the second time

would be a CLE presentation. We also can monitor the use. However, implementing and administering the program would be time consuming and would cut into CLE revenue. Scott said that he thought we had decided not to do this and inquired as to how we would fulfill our commitment of twice a month and how we would manage and ensure the quality of the participants. In response, Nate proposed someone like John Hafen or Karin Hobbs to be in charge and address these concerns rather than increasing Connie Howard's workload. Lori views the issue as one of free advertising for lawyers and fails to see how we can ensure the necessary quality because we cannot control what is being presented. Nate responded that it is a given that speakers will need to be vetted.

Eve Furse suggested that the Bar be a facilitator rather than "up-front face". Christian said that there will be inherent problems with quality control of program and because it is primarily a Salt Lake County program, it will be limited in scope. Jim Gilson said part of our charge is public outreach and we could delegate the details of the program to responsible people such as section chairs. He believes this could be positive idea if done correctly . Nate said John will gather more information for a discussion during the December meeting and asked that other Bar leadership be invited to attend this discussion.

2.4 Review Copyright Protection of "Utah State Bar"

Nate informed Commissioners that it will cost approximately \$10,000 to copyright (trademark) the "Utah State Bar" name. Katherine Fox then provided some details in response to questions. Steve Burt noted that this was really a matter of enforcement. **Steve Owens moved to approve Grant Clayton's \$10,000 bid. Lori Nelson seconded the motion which passed unopposed.**

2.5 Review Proposal to Clarify "Under 3 Year" Licensing Status

John said that the Utah Supreme Court previously has authorized the Bar to charge a reduced licensing fee to active lawyers who have been in practice for fewer than three years. There has been some confusion, however, in the bylaws and the policies and procedures regarding whether or not "under three years of practice" refers only to practice in the State of Utah or to years of practice as a licensed attorney in any other jurisdiction. Discussed ensued. **Lori moved to amend the bylaws to clarify that the term "under three years of practice" refers to the total years of practice in any jurisdiction. Steve Owens seconded the motion which passed unopposed.**

2.6 Discussion of Investment Policy and Liquid Asset Management

Nate introduced Doug Wright and Jason Williams, financial advisors from Zions Bank. Jeff Einfeldt was also in attendance for this portion of the meeting. A new Bar handout outlining the Lehman Brother bankruptcy issue was distributed as well as several Zions Bank documents including a "balance sheet classification" of Bar-held investments. Zions previously reported to the Bar on September 15th that Lehman Brothers had declared bankruptcy and that its creditors included the Bar with \$300,000 of senior debt securities with maturity dates of November 24, 2008. As of September 9, 2008 those debt

securities had been rated A+ but had fallen to a rating of CCC on September 15th when the bankruptcy was announced. The previous 2005 investment policy directive to Zions Bank allowing for acquisition of this holding was modeled after the State Money Management Act which governs the investment of public funds in Utah. This financial policy has, however, now been temporarily suspended. The Lehman debt represents approximately 30% of the Bar's \$1,000,000 reserve account. On September 19th, Zions Bank was instructed that upon the maturity of any current instruments in our portfolio to reinvest those funds in government backed securities and other instruments with an "absolute guarantee" of retention of principal.

Jason Williams then reviewed the salient features of the Zions handouts and noted that Primco, Fidelity and Vanguard were the largest shareholders in Lehman Brothers. He continued that Zions is still profitable and is a commercial (depository) bank versus an "investment only" bank like Lehman Brother and Merrill Lynch. Zions high credit rating remains unchanged and has a well capitalized rating. Jason further said that we are at a 79% cash equivalents position and as securities mature going to largest Goldman Sachs Financial Square account.

Rod Snow asked what responsibility Zions had in the Lehman loss and if there were other losses. Nate responded that the "Balance Sheet Classification" handout contains this information. Doug Wright said that the "marketable securities" section on the balance sheet reflects Bar holdings in: (1) Federal Home Loan Banks at no risk; (2) First Tennessee Bank which we could sell at a \$2,000 loss or hold until December (not insured); and (3) Zions Bankcorp which matures in March or we could sell it for less than a \$1,000 loss right now (not insured). By law, he emphasized, Zions cannot guarantee investments. Steve Owens said that we could get \$30,000 for Lehman stock right now (which is 10¢ on the dollar) or we can wait to see if it goes up. Jeff Einfeldt interjected that it is premature to determine what might be feasible later on and it is possible we may get up to 100%. Scott Sabey said there is no downside to selling because we will get our money back plus \$500. **Rod moved to sell the First Tennessee Bank holdings. Mary Kay Griffin seconded the motion which passed unopposed.**

Mary Kay said that as we move to cash investments, they are all insured by FDIC and we do not have any risk. In response to Scott Sabey's questions, Doug responded the we do not know when the Lehman Brothers liquidation will occur and we will be able to learn how much we get on our \$300,000. It may be at least a year or more. Zions is tracking the Wilmington Trust's bankruptcy website. Felshaw said this affects only our reserves, not our current operation budget. Steve Burt suggested moving the Zions Bankcorp holding to cash equivalent as well for \$1,000 government back securities. **Scott Sabey moved to sell our Zions Bancorp holding. Steve Burt seconded the motion which passed unopposed.**

Christian Clinger inquired if a policy is needed the Board be advised earlier of these types of financial matters and that the 2005 financial investment policy should be reviewed. John replied that our current financial policy is fairly conservative and it doesn't affect operations, but it may not capture the lost money. John concluded by stating that we will have a cash surplus at the end of the fiscal year.

Nate said that this information is public information because it is in the audit report. Scott believes the members should be expressly informed of the issue. He continued that we will stay with the more conservative investment policy during his tenure as President. Rod Snow suggested inserting a half page paragraph in the *Bar Journal*. Scott suggested also including it in the next E-bulletin. **Felshaw King moved to publish more information on this issue in the *Bar Journal* and in the E-bulletin. Scott seconded the motion which passed unopposed.** John said he will talk to Ralph Mabey relating to the Lehman bankruptcy issue and other financial advisors to gain more information about cash guaranteed equivalents.

3. ACTION ITEMS

3.1 Approve 2007-2008 Audit

Mary Kay distributed the draft management report from the auditors and reviewed portions of the financial statements. John said that Bar sections are continuously encouraged to spend their money; Jim Gilson suggested instituting a “use it or lose it” policy on section funds. Mary Kay responded, however, that she is not sure under non-profit accounting rules if we could institute such a policy. Discussion ensued on distributions from the Client Security Fund. Mary Kay said that overall the Bar is solid and is budgeted to break even although expenditures are a little higher. She continued that Note 9 (under the “Notes to Financial Statements”) is on a separate sheet of paper which she then distributed. She said that Note 9 reads the way it does because the audit reflects a finite period of time and the Lehman Brother bankruptcy occurred after this period. **Lori moved to approve the preliminary audit draft. Scott Sabey seconded the motion which passed unopposed.**

3.2 Select Awards Recipients

The Commission approved giving the **Community Member Award** to the **paralegals** who have made the most significant contributions to the success of the **YLD Wills for Heroes** project. They also decided to give a special award at a later time (perhaps Distinguished Service Award) to those lawyers who have made the project the success that it is.

The nominees for the **Pro Bono Lawyer of the Year** award are David Olsen, Ruth Lybbert and Paul Simmons from the Tibetan Buddhist Temple Project; Troy Booher; Jonny Benson; and Stephanie Pugsley, Michelle Allred, Rachel Terry and Emily Smith from the Wills for Heroes project. Discussion ensued. The award will be presented to **David Olsen, Ruth Lybbert and Paul Simmons.**

The nominees for the **Professionalism Award** are **Donald J. Winder and Ellen Maycock.** Discussion ensued. Both nominees will be presented with this award.

The nominees for the **Lifetime Service Award** are **J. Thomas Greene, Joseph Novak, Reed L. Martineau and M. Dayle Jeffs.** All four nominees will receive this award.

After discussion, **Troy Booher** will receive the **Heart and Hands Award**.

3.3 Petition Court to Require Disclosure of E-Mail in Licensing Process

Nate said that we are considering a new mandatory e-mail address requirement on the yearly licensing renewal form. He believes it will be cost efficient, cutting down costs related to mailings, and estimates we could save \$5,000-\$6,000 just on the Bar election process alone. We would need to emphasize that the e-mail addresses would be used for Bar purposes only and controls would be in place to ensure that. Scott Sabey said we need an allowance for members who do not have an e-mail address. Nate responded that members who do not have an e-mail account or if meeting this requirement presents a definable hardship on the member, the member can request an exemption from the Executive Director. **Curtis Jensen moved to approve a petition requesting Court approval to require the collection of member e-mail addresses along with the hardship exemption provision. Jim Gilson seconded the motion which passed unopposed.**

3.4 Require Malpractice Insurance on Find a Utah Lawyer Directory

Nate said we have not required malpractice insurance for attorneys who signed up for the Find a Utah Lawyer Directory. He would like to add this requirement as part of the new directory. He added that we previously required malpractice insurance with the Bar's former lawyer referral directory program so this would not be a new or unprecedented requirement. Nate said there are currently 600 participating lawyers and this new requirement would not go into effect until next the next licensing renewal cycle. Scott said this requirement would hamper 60% of solo and small firm practitioners who do not have or cannot afford insurance. Eve Furse said her understanding is that this is not a referral service, just a "directory," so the Bar's need for malpractice insurance is different from the previous lawyer referral service. John said we will verify coverage by obtaining proof of insurance from the attorney. Felshaw said he has serious reservations due to the impact it will have on solo practitioners who most need the legal work and he believes it defeats the purpose of program. Herm Olsen said if we adopt this requirement, we also need to require the insurance carrier to notify the Bar of a cancellation of an attorney's policy. He further stated that he has received a couple of complaints about the directory. One lawyer did not receive notification that his name had been added to the directory and another complaint was that the directory's voicemail box is full and you can not leave a message.

Felshaw objected that there are potential and unintended consequences with enforcement and monitoring of this requirement. Lori believes, however, that we have a duty to require proof of insurance to protect lawyers as well as the public. Curtis said that while he is in favor of this requirement, we should simplify the process. He inquired if we would mandate a minimum amount of coverage and Nate responded that the minimum amount of coverage should be \$100,000. Karthik Nadesan said the Minority Lawyer directory has a comprehensive disclaimer that users agree to before use. Scott questioned the substance current disclaimer on the directory and John replied that it is somewhat

abbreviated. Lowry said that in the original formatting of the directory with Lincoln Mead, when a client clicked on “find”, the disclaimer automatically “popped up” before client could proceed. Steve Burt inquired about the costs associated with implementing this requirement and Nate replied that there will be some administrative costs involved. Curtis said the bottom line is if you want to sign up for the program, you will have to provide proof of malpractice insurance.

Steve Owens moved to require a minimum of \$100,000 malpractice insurance coverage for lawyers requesting to be listed on the Find a Lawyer Directory and to “beef up” the disclaimer. Herm Olsen seconded the motion. The motion passed with Scott Sabey, Christian Clinger, Steve Burt and Felshaw King opposed and the remaining Commissioners, except for Rusty Vetter who was not in attendance for this portion of the meeting, in favor.

3.5 Petition Court to Require Permanent Malpractice Insurance Disclosure

Nate said the two year time frame for our pilot project on collecting malpractice insurance information from our members on the licensing form has expired and we want to “renew.” **Rod moved to renew the malpractice pilot project. Herm seconded the motion which passed unopposed.**

4. INFORMATION ITEMS

4.1 Discussion of Creating a Bar Awards Committee

Postponed.

4.2 Discussion of Open Meeting Act

Postponed.

4.3 Report on Meet the Bar at University of Utah

Postponed.

4.4 UMBA Report

Postponed.

5. CONSENT AGENDA

Eve Furse asked that the September 12, 2008 minutes be revised to reflect that WLU did not propose the resolution to add WLU and UMBA as voting commissioners. WLU should be deleted from the title of Section 4.1.

MEETING ADJOURNED AT 2:00 P.M.

NEW HANDOUTS DISTRIBUTED DURING MEETING:

- (1) Agenda for the Meeting with Utah Supreme Court;
- (2) 2008-09 Bar Operations Review Committees;
- (3) 2007-08 Utah State Bar Program Reviews Binder;
- (4) 2007-08 Summary of Utah State Bar Operations;
- (5) Proposal to Reduce Convention Reimbursement (Item #1.2);
- (6) Review Legislative Session and Bar's Lobbying Timetable (Item #1.3);
- (7) Review Proposal to Clarify "Under Three Year" Licensing Status (Item #2.5);
- (8) Investment Policy and Lehman Brothers Bankruptcy (Item #2.6);
- (9) Zions Bank handouts (3);
- (10) Preliminary Draft of Audit and Note 9 (Item #3.1); and
- (11) Commissioner Reference Guide.