

UTAH STATE BAR
BOARD OF BAR COMMISSIONERS
MINUTES

July 15, 2009
SALON A, SUN VALLEY INN
SUN VALLEY, IDAHO

Present: President Nathan D. Alder and Commissioners: Steven R. Burt, Christian W. Clinger, James D. Gilson, Mary Kay Griffin, Robert L. Jeffs, Curtis M. Jensen, Felshaw King, Lori W. Nelson, Herm Olsen, Stephen W. Owens, Scott R. Sabey, Tom Seiler, Rodney G. Snow and E. Rusty Vetter. Ex-Officio Members: Michelle, Allred, Simón Cantarero, Charlotte L. Miller, Paul T. Moxley, James R. Rasband, Aaron Thompson, Lisa Yerkovich and V. Lowry Snow. Executive Director John C. Baldwin, and General Counsel Katherine A. Fox.

Excused: Commissioners: Yvette D. Donosso. Ex-Officio Members: Hiram E. Chodosh and Supreme Court Liaison Marilyn (Matty) Branch. Bar Staff: Assistant Executive Director Richard Dibblee.

Also in Attendance: Jeffrey Einfeldt, Evelyn Furse and Joni Dickson Seko

Minutes:

NEW ITEMS: None

1. PRESIDENT'S REPORT:

1.1 Welcome and Review Schedule

Nate Alder and John Baldwin reviewed information about the various meeting events.

1.2 National Uniform Bar Exam Proposal for Study

Nate reported that there is a national movement afoot to have more uniform admission examinations. There could be a national bar exam within 10 years. It is an exciting development with better questions, etc. Every state would still run its own administrative functions (e.g. character and fitness, special accommodations, etc.). Joni Seko added that if it is adopted, it essentially would be the same exam with a "portable" examination score among jurisdictions. Nate said more information will be available as progress is made over the next several years.

2. EXECUTIVE DIRECTOR'S REPORT

2.1 Investment Policy

John distributed a new handout with a proposed investment policy (which includes a comparison with the old policy). The new policy has more upside for income while still prudently protecting our investments. The proposed policy includes balancing liquidity and income potential. Jeff Einfeldt said that the proposed policy tightens up investments and allows no more than 5% of value in any one investment holding excepting U.S. Treasuries and federal agencies. The current cut off is 15%. John said the safest choice would be government backed securities but that option poses a bigger hit with investment potential. Mary Kay Griffin said that there are other options as well. One is a "big account" with about 2.3% interest called "C.D.ers". These vehicles are FDIC insured and it is a possibility to explore.

Rob Jeffs said the new policy decreases length of time any one investment is held and divides funds between accounts. Steve Owens opined that the new proposal makes a lot of sense and that we need a few new members on the Budget and Finance Committee, too. Nate added that more Commissioners should attend the Budget and Finance Committee meetings. Rusty Vetter asked about potential FDIC involvement to protect our investments. Jeff responded that FDIC doesn't extend protection with non-profits and interest bearing accounts. Charlotte inquired as to who is currently on the Budget and Finance Committee. The current members are: Jonathan K. Butler, Peter K. Ellison, Ray Westergard, Cynthia J. Crass, Louise T. Knauer, Marilyn M. Branch and Mary Kay Griffin. John and Jeff also sit on the Committee as a resource. **Lori Nelson moved to adopt the proposed policy. Scott Sabey seconded the motion which passed unopposed.**

2.2 Operations Reviews

2.21 Office of Professional Conduct

Jim Gilson reported on the OPC Review. He said that the committee met approximately eight times and sent a survey to the general membership and to those attorneys who were subject to discipline over the last two years. Out of 102 surveys sent out, 30 responses were received. The committee also interviewed John, Billy Walker, Katherine Fox, Jeannine Timothy, the various OPC staff members, and several respondent lawyer representatives.

The committee's general findings include nine broad aspects: (1) the OPC office is generally cohesive, stable, and the staff has gained experience through longevity and training; (2) the survey reflects that the staff is civil and professional; (3) there are no real complaints regarding the length of time a case takes to process; (4) those responding to the survey and interviews prefer the OPC

process to DOPL governance as an alternative; and (5) all written *notarized* complaints are reviewed by OPC.

Jeannine Timothy refers some CAP complaints to OPC when appropriate and vice versa. Other general findings include: (6) screening of complaints needs calibrated somewhat better and OPC should exercise more discretion to dismiss more cases; (7) is the role of a screening panel more one of a “grand jury” type function or a true screening group? (The committee recommends better screening panel training and more representation on panels from criminal law and solo practitioners); (8) need to clarify the burden of proof which currently is one of “probable cause”. (The Court’s Rules Committee has recommended “preponderance of evidence” standard which is higher. Need more training here, too); and (9) Court’s Rules Committee has also recommended expanded cross examination rights for respondents. While we don’t want to permit attacks on complainants, the respondent needs an opportunity to elicit more facts during the process.

Nate interjected that the Court’s Rules Committee is also looking at ethical issues relating to attorney advertising. This area is not a priority with OPC, but there are a number of complaints in this difficult area. Rob inquired if we are changing the intake process. Jim responded that the changes being recommended are just to make sure process has more uniform results. Lori said the may be we should have an “outside” senior lawyer to help OPC screen complaints from an experienced practitioner perspective. Rusty said that in the past Billy Walker talked to Commission periodically and we should include him for an annual presentation. Nate said Billy hasn’t done this for at least a year and we should schedule him to attend October meeting as it would be a good opportunity for Commission questions. Jim closed his presentation by saying that a written report will be issued soon.

2.22 Continuing Legal Education

Eve Furse was in attendance for this portion of the meeting and she reported on the CLE review. A number of recommendations include: (1) creating a standing CLE committee to oversee CLE and conventions for continuity and quality and the existing conventions, Fall Forum, and NCLE committees should become subcommittees of the CLE committee; (2) to increase the variety of CLE offered the Bar should require each section to offer one CLE a year minimum and one CLE at a Bar convention every 3 years. The Committee may grant exceptions to the Bar convention requirement for sections whose interest level will not like garner sufficient attendance at a convention CLE. To accommodate concerns about the expense of CLE, each section should offer at least one hour of free CLE, and the Bar should encourage sections to discount CLE for section members. Third, the Bar should raise prices of CLE given the prices charged by national and private CLE providers.

Fourth, the Bar should begin encouraging sections and other CLE providers to offer CLE on the elimination of bias in the profession. During the first year offering such CLE, the Bar should publicize its intent to ask the Supreme Court to require attorneys to get an hour of CLE on elimination of bias in the profession every 2 years. Following the first year of such offerings, the Bar should petition the Supreme Court for such a requirement. If the Court makes such a change, the change should be well-publicized prior to implementation and should be put in place at the beginning of the compliance year. Fifth, the Bar should ask the Supreme Court to require attorneys to get an hour of CLE on substance abuse/mental illness that impairs performance as an attorney every two years. If the Court makes such a change to CLE requirements, the change should be well publicized prior to implementation and should be put in place at the beginning of the compliance year. Sixth, the Bar should support Connie Howard's networking/investigation of CLE opportunities whether through memberships in national organizations or subscriptions to listserves, publications, etc. The Committee should advise on how to support Connie in this way. Seventh, on-line CLE should receive a more prominent display on the Bar's home page, and an article should run in the Bar Journal explaining the availability of on-line CLE and how it works.

The Bar should coordinate with the University of Utah to make its CLE library available to Bar members. Likewise, the Bar should inquire with BYU to determine if it has similar resources to share. Eve continued that there are a lot of misperception problems between MCLE and CLE which result in confusion. For instance, members don't seem to realize that MCLE is court governed and independent of the Bar's CLE office. Also, members don't appear to know about online CLE opportunities. We are in a transition period with CLE compliance periods. Proposed changes in CLE should accommodate the revisions over a period of time. Nate said that we will discuss in more detail whether to adopt/not adopt the reports in the August Commission meeting in order to move agenda along today. Scott, Nate and Lori agreed that we need to promote more and better section CLE. Eve observed that Connie needs to become better organized with speakers and content. We need to tap into "outside" CLE presenters like Association of Prosecutors, etc., to improve quality and quantity of our CLE.

2.23 Law and Justice Center

Christian Clinger reported on the Law and Justice Center review. He reported that the building appraisal is complete and that the Bar's facility rental rates are at market levels. The building use is near or at maximum capacity (with July as an exception) and lack of parking is a big issue. The building needs immediate updates (e.g., parking lot concrete base and front stairs). Cosmetic updates are also needed and these changes do not generate money back if we sell. He posed the difficult question: is the purpose and use of the building is purely office space or meeting space or both? Both office and meeting space is inadequate. Is it time to sell the building? Scott said that this issue should perhaps go to membership.

Nate said that 2015 will be the next time Commission goes to the Court for fee increases. So, for the next 5 years, we should stabilize our policies but in 2014, the Commission should begin to re-examine and address these issues. Lori inquired if we could truly continue to function for another five years and Christian responded that the facilities are inadequate. Most neighboring bars just have operations office space and events occur elsewhere.

2.24 Fee Dispute Resolution

Rusty Vetter reported on the Fee Dispute Resolution review. He referred to his written report in order to save time. There were no questions. **Steve Owens moved to adopt the report as written. Rob Jeffs seconded the motion which passed unopposed.**

2.3 Proposals for Fee Increases

As an introduction to the discussion on various fee increases Nate first opined that we'll need three separate petitions relating to each category of fee increase if the Commission adopts the increases. He also stated that the Commission needs to schedule a major review of licensing fees every five years.

2.31 Other License Fees

John provided some introductory material in the packets with charts related to the Bar's budget which is largely dependent on licensing fees. The materials illustrated that all ongoing programs (such as Blomquist Hale) rely on Bar funding, that we need to formally establish an operations reserve consisting of 1/3 of all programs and services expenses, and we need to formally establish a "sinking fund" for the building's and grounds increasing repairs and general upkeep. He noted that underlying the information in the financial forecast charts assumes that: (1) revenue will increase annually by 3%; and (2) there will be a 5% increase annually in operating expenses.

Scott interjected that he has a problem with taking money out of building reserves to offset increasing expenditures and that we need to transfer funds from operating reserves in order to force the Commission to address financial issues earlier. Felshaw wanted to know why the Court could not give the Bar authority to raise fees on its own initiative or put licensing fees on an automatic increase schedule. Both Katherine and Nate responded to Felshaw's inquiry as to why this method was unworkable, largely in light of previous history.

John then proceeded to discuss the various licensing categories and proposed fee increases as follows:

Under 3 Years	Currently \$190	Proposed Increase \$ 50
Inactive Full	Currently \$120	Proposed Increase \$ 25

Inactive NS	Currently \$ 80	Proposed Increase \$ 25
House Counsel	Currently \$350	Proposed Increase \$ 75
Late Fees	Currently \$ 50	Proposed Increase \$ 50
Reinstatement	Currently \$100	Proposed Increase \$100

After considerable discussion related to specific proposed fee increases, **Jim moved to increase the "active under 3" proposed increase from \$50 to \$60 and the "inactive full" from \$25 to \$30.** Rusty interjected that he was concerned that there was an insufficient basis to justify all these increases, but particularly for the lawyers on inactive status. He asked what it actually costs to maintain this Bar status and observed that DOPL does not charge other professionals for those holding a comparable "inactive status" license. Felshaw responded that the Bar does not operate under a municipal type system where there is a nexus between services provided and what it costs to provide those services. Jeff Einfeldt said that he had reviewed the proposed licensing increases as a "total package". For instance, he continued, he viewed whether the "inactive status" increase was reasonable compared to "active over 3" fee increase. (On April 24, 2009, the Commission previously approved a \$75 increase to the "Over 3 Years" licensing category from \$350 for a total of \$425.) He also added that we must look at not only direct, attributable costs related to a given category but indirect costs as well to determine whether an increase is reasonable. Scott supported Jeff's analysis by noting that the budget is currently in the "red" and that raising fees across the board proportionally is a reasonable response to that deficit. Simón Cantarero observed that from a Young Lawyers Division perspective, these increases are burdensome and Rusty again emphasized that we should be able to justify the proposed increases in each category.

Lori Nelson moved to adopt Jim Gilson's previous motion, stating that the categories of "active under 3" would then total \$250 and "inactive full" would then total \$150 and Herm seconded. Christian Clinger tried to amend the motion without support. Dean Rasband observed that the increase of \$60 from \$50 for "active under 3" did not seem proportional. **The motion passed with Rusty opposed and voting "nay."**

2.32 *Pro Hac Fees*

Currently the Bar charges \$175 per application/case per lawyer for *pro hac vice* admittance. The recommended increase for this fee is \$250 for a total of \$425 per application/case per lawyer. The philosophy behind the proposed increase is that the amount is the same increased fee (previously approved by the Commission) for lawyers on active status of \$425. Katherine Fox answered a number of questions about the *pro hac vice* process, e.g., how much time a "routine" application takes to process, etc. Commissioners also inquired as to what other jurisdictions charge. **After discussion, Scott Sabey moved to increase the fee by \$250 and Felshaw seconded the motion. Rusty Vetter said that in his opinion,**

there was an insufficient basis to justify the increase. The motion passed with Rusty opposed.

2.33 Admission Fees

The proposed fee increases to admissions provided in the packet were as follows:

Student Fee	\$450 to \$ 550
Attorney Fee	\$625 to \$ 850
House Counsel Fee	\$625 to \$ 850
Motion (Reciprocity)	\$625 to \$1,000
Reinstatement Fee	\$550 to \$1,000
Disbarred Attorney Fee	\$750 to \$1,500
ExamSoft Computer Fee	\$100 to \$ 150

Joni Seko contributed largely to this discussion. She said that her staff of two runs "very lean", especially in light of the increasing number of applicants. In referring to the admission related charts included in the packet, she observed that the admission budget's revenue versus expenditure lines are converging and beginning this past May, the office was running in the "red." Approved fee increases in admissions are similar to history in the licensing fee area. She assured Commissioners that staff had compared proposed fee increases to those in other jurisdictions and that the proposed increases were commensurate.

In response to questions, Joni continued that while student applicants constitute the largest number of applications overall, there also have been increases in the number of motion (reciprocity), attorney exam and house counsel applicants and that these groups cost more to investigate and process for a variety of reasons. She believes the larger proposed fee increases for these categories are justified by heavier processing expenditures. She said that motion applicants (those seeking admission via reciprocity) are particularly problematic as a group in that admissions is trying to assess a "clear and convincing" standard that these individuals have actually practiced law for the requisite period of time which is often a laborious process. In addressing the issue of costs, Joni said that admissions staff has increased over the years, (from one non-lawyer and part time assistant to a lawyer and two full time staff members) to handle the approximately 12% yearly increase in the number of applicants.

Joni also explained that there are more issues now in the character and fitness component of the process, especially with allegations of plagiarism in law schools. The numbers of applicants seeking special accommodations in compliance with the ADA has also exploded. In the past, approximately there were two to four applicants per examination with special needs. This July, admissions needed to make arrangements for 12 ADA approved applicants. Other factors include the fact that the building no longer accommodates the number of applicants taking the exam and the location has had to be moved. We currently

use either the Salt Palace or South Towne Mall. This has resulted in additional costs. The admission ceremony also has had to be moved from the Capitol or the Utah Supreme Court where costs were minimal to the Salt Palace at a cost of \$8,000. The costs of the exam questions that we purchase (MPT) has also increased and admissions would like to do additional training (which again, costs money) in the character and fitness and Bar exam areas (both grading and writing questions that we do not purchase). Finally, admissions would like to be placed on a regular five year review like the one being proposed to examine licensing fees.

Felshaw said that as a member of the Admissions Committee, he believes that the proposed increases will help admissions to pay for its operations. **He moved that the proposed increases be approved. Scott seconded the motion.** Discussion ensued. Scott opined that the fee for disbarred lawyers is insufficient to cover the costs of processing these individuals and that the fee needs to be more - \$5,000. Scott observed that the Bar is absorbing the significant costs for disbarred lawyers. Lowry Snow voiced his support for Scott's arguments that the Bar should not be "subsidizing" disbarred lawyers seeking re-admittance. There was more discussion related to disbarred lawyers versus those merely seeking "reinstatement."

Lori proposed an amendment to the motion to raise the reinstatement fee to \$3,500 and the disbarred attorney fee to \$5,000. Katherine Fox then explained the difference between those disbarred and those seeking "reinstatement." There are three different categories pertaining to the latter: (1) those who have been administratively suspended for non-payment (in which admissions does not play a role as they pay licensing "late fees"); (2) those lawyers who have resigned either before or after implementation of an admissions rule requiring those individuals to re-apply and take the examination; and (3) those lawyers seeking reinstatement after a disciplinary-related suspension (in which admissions again does not play a role). **Lori amended her amendment and moved to drop the reinstatement fee back to \$1,000 but retain the \$5,000 increase for disbarred attorneys. Herm seconded this amendment.** He also asked for more information from OPC in the next meeting related to disciplinary suspension and disbarment costs.

Nate said that in August we will schedule a discussion about disciplinary costs related to suspensions. In light of further discussion about impairment and substance abuse issues which afflict some attorneys, Charlotte interjected that she would like to hear another side of the issue from a disbarred attorney's lawyer. Rusty opined that admissions is one of the Bar's core functions and he would like to ask the Admission Committee co-chairs (Judge Davis and Steve Waterman) some questions to better understand why the admission process costs so much. He again stated that the Commission did not have adequate information to justify these fee increases. Steve Owens responded that Steve Waterman had already endorsed the proposals. Rusty indicated that he needed to leave the meeting at this point in the discussion but would vote against the proposed increases if present.

There was additional discussion. **The motion was re-stated: approve proposed increases except raise disbarred attorney fee to \$5,000. The motion passed unanimously (with Rusty absent).** Nate noted that the petition filing order should be as follows: Admissions first, *Pro Hac Vice* and then licensing fees by late November or December.

3. COMMISSION REORGANIZATION

3.1 Welcome New Commissioners

3.2 Appoint *Ex Officio* Members

The following *Ex Officio* members were proposed: Past President, Bar's ABA representative, Utah ABA representative, UMBA representation, Women Lawyers representative, Paralegal Division representative, BYU Law School Dean, U of U Law School Dean and Young Lawyers Division representative. **Lori moved to approve the aforementioned members. Scott seconded the motion which passed unopposed.**

3.3 Approve Executive Committee

Steve Owens selected the following individuals to serve on the Executive Committee: Rod Snow, Rob Jeffs, Lori Nelson, Christian Clinger and Steve Owens. **Jim Gilson moved to approve the aforementioned members. Mary Kay seconded the motion which passed unopposed.**

3.4 Adopt Resolution on Bank Signatures

Mary Kay moved to approve all Executive Committee members as bank signatures. Lori seconded the motion which passed unopposed.

3.5 Sign Conflict of Interest Disclosure

Those present were asked to sign and return the conflict of interest forms.

3.6 Review Calendar of 2009-10 Commission Meetings

3.7 Review Commission Position Description

3.8 Review Commission Reimbursement Policies

4. RECOGNIZE RETIRING COMMISSIONERS

5. CONSENT AGENDA

By policy, the May 29 & 30, 2009 minutes were approved by consent and without amendment (Tab 8).

**MEETING ADJOURNED AT 4:30 P.M.
EXECUTIVE SESSION HELD AFTERWARDS
NEW HANDOUTS DISTRIBUTED DURING MEETING:**

- 1) Proposed Investment Policy;
- 2) Draft copy of CLE Operations Review