

**MEETING OF THE
BOARD OF GOVERNORS
OF THE
STATE BAR OF ARIZONA
April 19, 2019
Phoenix, AZ**

BOARD MEMBERS PRESENT: Jeffrey Willis, President, Tucson; Brian Y. Furuya, President-Elect, Flagstaff; Lori Higuera Vice President, Phoenix; Denis M. Fitzgibbons Secretary-Treasurer, Casa Grande; Geoffrey Balon, President, Young Lawyers Division; Tyler Carrell, Phoenix; David Engelman, Phoenix; Hector Figueroa, Payson; Sharon Flack, Prescott; Robert McWhirter, Phoenix; Jennifer Rebholz, Phoenix; Samuel Saks, Phoenix; Dee-Dee Samet, Tucson; Jessica Sanchez, Tempe; Sara Siesco, Phoenix; Jimmie Dee Smith, Yuma; Benjamin Taylor, Phoenix; Gaetano Testini, Phoenix; Public Members Robyn M. Austin, Tucson, Jason Cobb, Phoenix, John Gordon, Prescott, and Anna C. Thomasson, Phoenix; At-Large Members Dave Byers and Paul Senseman, Phoenix; Ex-Officio Member Alex Vakula, Immediate Past President.

EXCUSED ABSENCES: Patrick Greene, Tombstone; Dean Marc Miller, Tucson; Dean Douglas Sylvester, Tempe; Dean Penny Willrich, Phoenix.

OTHERS PRESENT: Dean Victoria Ames for Dean Douglas Sylvester; Matt Campbell, System Administrator; Sarah Corpening, Membership Administrator & Services Manager; Lisa Deane, Chief Member Services Officer; Rick DeBruhl, Chief Communications Officer; Tim Eigo, Editor, *Arizona Attorney Magazine*; Joel England, CEO/Executive Director; Martin Gaxiola, Accounting Manager; Kathy Gerhart, Chief Financial Officer; Ann Leslie, Executive Assistant; Hon. John R. Lopez, IV, Arizona Supreme Court Liaison; Lori Maxwell, Chief Information Officer; Rick Palmatier, Deputy General Counsel; Lisa Panahi, General Counsel; Amy Rehm, Deputy Chief Bar Counsel; Patricia Seguin, Legal Services Manager; Carrie Sherman, Director of Board Operations; Shama Tanti, Tiffany & Bosco PA; Maret Vessella, Chief Bar Counsel; Assistant Dean Leah Won for Dean Mark Miller.

President Jeffrey Willis called the Board meeting to order at 8:30 a.m.

Call to the Public

President Willis made a Call to the Public and, hearing nothing, proceeded to the next agenda item.

President's Report – Jeffrey Willis

- Attended the Arizona Supreme Court's retreat in Sedona along with the other officers and the CEO. Listened to the presentations on the changing practice of law and the Task Force on the Delivery of Legal Services. Discussed over lunch with the justices the following topics:
 - Senior Lawyers Task Force
 - the Bar's strategic planning
 - lawyer wellness CLE
 - affiliate relationships with the Bar.

- Attended the Western States Bar Conference (WSBC) along with the CEO and the immediate Past president. Participated on a panel on challenges to the integrated bars.
- Accepted the State Bar of Texas' invitation to attend its annual meeting in Austin in June.

CEO/ED Report – Joel England

- Reported that he had reviewed 211 fee waiver requests and denied 20 which were on the Consent Agenda.
- Attended:
 - ABA's Bar Leadership Institute with President-Elect Brian Furuya
 - the WSBC with President Jeffrey Willis
 - Veterans Legal Services Summit on March 22nd coordinated by the Bar's Public Service Center
 - ABA Day in D.C.; addressed the need for continued funding for the Legal Services Corporation
- Gave a presentation to the Coconino County Bar Association on the "History and Mission of the State Bar: A Call to Action and How the Bar Can Help"
- Continues search for HR Director and Chief Communication Officer

10 Minute Topic – Robert McWhirter

Due to the long agenda, Mr. McWhirter's presentation "from where do courts come?" was deferred to the May meeting.

Appointments Committee – Lori Higuera

Pursuant to amended Rule 32, the Court will now make the appointment of four public governors whereas the Board did so in the past. The Appointments Committee undertook its established process to advertise, recruit, screen applications and interview candidates. Seven applications were received but one applicant was deemed ineligible due to her professional employment vis-à-vis Rule 32(e)(4)(A): *The public governors must not be members of the State Bar and must not have, other than as consumers of legal services, a financial interest in the practice of law.* Following their interviews with the Committee, the remaining six applicants were deemed qualified to serve as public governors. The full Board interviewed the six candidates individually.

Executive Session – 10:00 a.m.

MOTION: Dee-Dee Samet moved, Hector Figueroa seconded and the motion carried unanimously to go into Executive Session to discuss the qualifications of the six candidates. The Board reconvened in Open Session at 10:28 a.m.

Open Session – 10:28 a.m.

MOTION: Dave Byers moved, Jason Cobb seconded and the motion carried unanimously to rank the three incumbent public members seeking reappointment as tied as the #1 candidates. Those candidates in alpha order are Robyn Austin, John Gordon and Anna Thomasson.

MOTION: Dave Byers moved, Paul Senseman seconded and the motion carried unanimously for Board members to cast one vote for one of the remaining three candidates, with the candidate receiving the highest number of votes to be recommended to the Court to fill the fourth public member seat. Following the vote, the candidates were ranked as follows:

Stephen Bernard – 14 votes
Jonathan Martone – 5 votes
Boyd Kraemer – 0 votes

Finance and Audit Committee – Denis Fitzgibbons and Kathy Gerhart

Q1 Financials

Secretary/Treasurer Denis Fitzgibbons reported on the first quarter financials:

- Bar's income statement generated a loss of \$136K excluding sections. The loss year-to-date is \$401K less than budgeted. This is due to \$134K more in revenues and \$267K less in expenses. Current revenue and expense variances relate to timing differences in actual vs. budgeted amounts.
- Sections Activity reported a surplus of \$117K compared to a budgeted surplus of \$71K.
- Significant Variances
 - Dues Penalties: \$45K less than budget due to less members paying late fees. (2019 budgeted late fees are based on 2018 actual late fees).
 - Pro Hac Vice Fees: \$41K more due to an increase in applications during the quarter compared to budgeted amounts.
 - Contract Services: \$76K less related to timing differences between actual expenses incurred vs. budget.
 - Professional Services: \$108K less related to timing differences between actual expenses incurred vs. budget.

2018 Audit - Consolidated Financial Statements of the State Bar of Arizona and the Client Protection Fund

Included in the materials is a draft of the 2018 audited financial statements. The bar received a clean opinion on the audit. The Financial Accounting Standards Board issued new reporting standards to improve the presentation of financial statements for not-for-profit entities which have been implemented for this audit. The final issued report will be provided at the May Board meeting.

Reserve Account Allocation – 2018 Annual Cash Surplus

The Board reviewed a handout containing the Finance and Audit Committee's recommendation to allocate 2018 cash surplus to both the Capital and Dues Reserve Accounts.

MOTION: Tyler Carrell moved, John Gordon seconded and the motion carried unanimously to allocate \$619,610.00 to the Capital Reserve and \$100,747.00 to the Dues Reserve as presented.

Consent Agenda – Jeffrey Willis

- a) Approval of February 22, 2019 Board Meeting Minutes
- b) Approval of Resignations in Good Standing
- c) Approval of Reinstatements
 - i) Approval of Reinstatements of Members Suspended for Non-Compliance with MCLE Requirements (Rule 45, Ariz. R. Sup. Ct.)

- ii) Approval of 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) Hardship Waiver Denials - Membership Fees
- e) Proposed Comment to R-19-0005, Petition to Amend Rules 32(c) and (d), Ariz. R. Sup. Ct.
- f) Proposed Comment to R-19-0001, Petition to Amend Rule 68(g), Ariz. R. Civ. P.
- g) Proposed Comment to R-19-0003, Petition to Amend Rule 5.4, Ariz. R. Civ. P.
- h) Proposed Comment to R-19-0020, Petition to Amend Rules 123, 124, 125, and 126, Ariz. Justice Ct. R. Civ. P.
- i) Proposed Comment to R-18-0038, Petition to Amend Rule 17.4(a), Ariz. R. Crim. P.
- j) Proposed Comment to R-19-0008, Petition to Modify Rules 18.5, 22.5, and 32.1, Ariz. R. Crim. P.
- k) Proposed Comment to R-19-0012, Petition to Amend Rule 32, Ariz. R. Crim. P.
- l) Proposed Comment to R-19-0013, Petition to Modify Rules 5.4, 7.2, and 7.4, Ariz. R. Crim. P.
- m) Proposed Comment to R-19-0016, Petition to Modify Ariz. R. Crim. P. by Integrating Victims' Rights and Repeal Rule 39, Ariz. R. Crim. P.
- n) Proposed Comment to R-19-0025, Petition to Amend Rule 20(b), Ariz. R. Crim. P.
- o) Receipt and Certification of the 2019 Board of Governors Election Results

President Willis asked if there was anything that needed to be removed from the Consent Agenda. Upon request, items f., i. and o. were removed from the Consent Agenda. The Petition under item f. was moved to the Rules Committee report on the agenda; the Petition under item i. had been withdrawn so the matter was moot; the item under o. would be addressed later in the meeting.

MOTION: Denis Fitzgibbons moved, Jason Cobb seconded and the motion carried unanimously to approve the Consent Agenda except for items f., i. and o.

Proposed Changes to MCLE Regulations – Lisa Deane and Sarah Corpening

The last revision to the MCLE Regulations was done in 2014, with an effective January 1, 2015.

New MCLE Model Rules were approved by the American Bar Association (ABA) House of Delegates in February 2017. The ABA encouraged jurisdictions to review and consider the adoption of some or all provisions of the MCLE Model Rule. In 2018, the MCLE Committee (then in existence) began a review of the current MCLE Regulations, taking the ABA's MCLE Model Rules into consideration and began developing recommendations for revisions to the Regulations. The Bar's current MCLE Regulations, in most areas, meet or exceed the ABA Model MCLE Regulations.

On August 28, 2018, the Court amended the MCLE Rule (Rule 45, Ariz. R. Sup. Ct.) with an effective date of January 1, 2019. The MCLE Committee was sunset by the State Bar with an effective date coinciding with the effective date of the revision to Rule 45. Among other changes, the amended rule eliminates references to the MCLE Committee.

Staff continued the work started by the MCLE Committee to revise the Regulations consistent with amended Rule 45.

Staff have drafted the proposed revisions to the MCLE Regulations as presented. Outside of the changes required by amended Rule 45 which eliminated the references to the MCLE Committee, many of the other revisions do not change the intent of the current regulations, but rather have been reformatted or re-worded for clarification.

At the October 19, 2018 Board of Governors' Meeting, Lisa Deane and John Phelps discussed a proposal to "pre-certify" State Bar CLE programs and Section CLE programs. Members who would use State Bar pre-certified CLE programs to meet their MCLE requirements would not be required to maintain records for those programs for audit purposes. This proposal is incorporated in the revised MCLE Regulations – see Regulation 107 (B) – Audits

If approved by the Board of Governors, the revised MCLE Regulations would be effective for the 2019-2020 MCLE Educational Year – July 1, 2019 through June 30, 2020.

Following a lengthy discussion,

MOTION: Sam Saks moved, Jennifer Rebholz seconded and the motion carried to approve the proposed changes to the MCLE Regulations subject to the following modifications:

- Approach Civil Jury Instructions Committee to determine if that Committee's activities are equivalent to those of the Criminal Jury Instructions Committee and therefore should qualify for CLE credit
- Arbitrators can take up to five (5) CLE hours if they don't take their stipend
- Expand the definition of "interactive programs" to include "association of lawyers".

Rules Committee Report – David Engelman

New Proposed Civil Jury Instruction – Spoliation

Following the Rules Committee report on the topic,

MOTION: Coming as a motion from the Rules Committee with no second required, the motion carried over one dissent to approve the new proposed Civil Jury Instruction on spoliation.

Proposed Comment to R-19-0031, Petition to Amend Rule 45(a)(2) and (b)(1), Ariz. R. Civ. P.

The Rules Committee chair reported that, although there are valid reasons to modify Rule 45(a)(2), the Committee recommended that the State Bar not take a position on whether the Court should adopt Petition R-19-0031; however, if the Court is inclined to adopt the proposed amendments, it should modify the proposed language so that it more closely tracks the language of federal Rule 45. After discussion,

MOTION: Dee-Dee Samet moved to amend the Committee's comment, seconded by Paul Senseman, to remain neutral regarding the proposed rule amendments but to add language to the comment which brings to the Court's attention the fact that the Legislature has imposed a statutory fee to cover the issuance of a subpoena. The amendment to the proposed comment carried unanimously.

Proposed Comment to R-19-0030, Petition to Amend Rule 43, Ariz. R. Sup. Ct.

Concerns were expressed that the proposed changes to the rule governing lawyers trust accounts were unnecessary, added extra burdens to practicing attorneys and eroded consumer protections. A recommendation was made to have a task force study the trust account rules. Following discussion,

MOTION: Dee-Dee Samet moved, Tyler Carrell seconded and the motion carried unanimously to approve the proposed comment to the petition but add language that proposed changes to this rule require further study before amending the rule.

Proposed Comment to R-19-0001, Petition to Amend Rule 68(g), Ariz. R. Civ. P.

This matter had been pulled from the Consent Agenda for discussion. The Goldwater Institution's petition limited comment regarding the language in the abrogation of Rule 68. The Rules Committee and the Board of Governors had previously voted against abrogation. Following discussion,

MOTION: A motion to file the proposed comment to the petition opposing the Goldwater Institute's changes to Rule 68 passed.

Senior Lawyers Task Force Report and Recommendations

Hon. Patricia Norris (ret.), chair of the Senior Lawyers Task Force, was unable to attend the Board meeting but the following individuals reported on behalf of the Task Force:

- James O'Sullivan and Jacob Jones, Mentoring Subcommittee members
- Laura Zeman-Mullen, Chair, Transition from Practice Subcommittee
- Chas Wirken, Chair, Pro Bono Subcommittee

Since its appointment in October 2018, the Task Force has been studying the status and development of future programs and services directed to senior lawyers. Areas of review included:

- mentoring
- pro bono and other access to justice opportunities
- the transition from the active practice of law

The Task Force members summarized its recommendations:

- establish a Mentoring Advisory Council to develop and then implement in calendar year 2021 a voluntary mentoring pilot program lasting for two years. The mentor program, administered by dedicated staff, will use a curriculum that will lay the groundwork for the activities and discussions between senior and newer lawyers about the basic precepts of law practice, practical skills and ethics and professionalism.
- support the Attorney Regulation Advisory Committee petition to amend Arizona Supreme Court Rule 38. This change would revise the process of approving legal services organizations (LSOs) and encourage retired and inactive lawyers to provide volunteer pro bono services under LSO supervision. As an incentive to participate, the petition recommends that retired and inactive lawyers be exempt from paying annual fees if they provide a minimum of 10 hours of pro bono legal services during the preceding twelve-month period. It also obliges any such LSO to offer appropriate training for its volunteer lawyers. Other recommendations include coordinating pro bono efforts, training, promoting participation and recognize and reward pro bono service.
- creation of a senior lawyer division to address issues and provide resources to senior lawyers. This division would go beyond providing information regarding transitioning from practice to address topics such as financial preparation for retirement, how to occupy time formerly

filled by practicing law and maintaining mental and emotional fulfillment and satisfaction in life after retirement. Additionally, the senior lawyer division could be a conduit for encouraging participation in the mentor program or pro bono service.

The Board thanked the Task Force members for their considerable and thoughtful work over the past six months. Since some of the recommendations have a financial impact on the organization, the Board will consider the Task Force report and recommendations more fully in the future.

Legislative Report – Janna Day

Lobbyist Janna Day reported on the number of new legislators this session and the turnover of leadership in both Houses. The legislature has experienced distractions due to ethics complaints and investigations about some of its members. The Tax Conformity issue has yet to be resolved.

HB 2569 passed regarding professional licensures which provides reciprocity between states. It does not effect lawyers but does effect court reporters. SB 1141 passed regarding distracted driving.

Awards Working Group – Brian Furuya

Several Board members requested that a specific award be removed from the recommended slate of award winners for discussion. Those awards were:

- Award of Appreciation
- Award of Special Merit
- Diversity and Inclusion Leadership Awards
- Tom Karas Criminal Justice Award

MOTION: The Board then unanimously approved the remaining slate of recommended 2019 award winners:

- Hon. John R. Sticht Disability Achievement Award – Bridget O’Brien Swartz
- James A. Walsh Outstanding Jurist Award – Hon. W. Scott Bales
- Member of the Year Award – Hon. Patricia Norris (ret.)
- Michael C. Cudahy Criminal Justice Award – Ryan Patrick Green
- Outstanding In-House Counsel of the Year Award – Nona Lee
- Sharon A. Fullmer Legal Aid Attorney of the Year Award – Deonissa Cañez-Anderson

Award of Appreciation (non-lawyer)

After discussion,

MOTION: Dee-Dee Samet moved and Tyler Carrell seconded to present the Award of Appreciation to the Coconino County Board of Supervisors and CCO Rick DeBruhl. The motion failed by a vote of 7-14.

MOTION: Jimmie Smith moved and Guy Testini seconded to present the Award of Appreciation to Rick DeBruhl. The motion failed.

MOTION: Coming as a motion from the Awards Working Group, requiring no second, the motion to present the Award of Appreciation to the Coconino County Board of Supervisors carried over two dissents.

Award of Special Merit

President Jeffrey Willis recused from the discussion and vote on this matter.

Executive Session – 1:25 p.m.

MOTION: Brian Furuya moved, Tyler Carrell seconded and the motion carried unanimously to move into Executive Session to discuss the nominees. The Board reconvened in Open Session at 1:32 p.m.

Open Session – 1:32 p.m.

MOTION: Jason Cobb moved, Lori Higuera seconded and the motion carried unanimously to present the Award of Special Merit to Hon. Dan Slayton.

Diversity and Inclusion Leadership Award

The request to discuss the Awards Working Group’s recommendation with regard to this award was withdrawn.

MOTION: Coming as a motion from the Awards Working Group, requiring no second, the recommendation to present the Diversity and Inclusion Leadership Award to co-recipients Judge Randall Howe and James P. O’Sullivan carried unanimously.

Tom Karas Criminal Justice Award

Following a presentation on Thomas Crowe’s 50-year legal career and accomplishments,

MOTION: Jimmie Smith moved and Denis Fitzgibbons seconded the motion to present the Tom Karas Criminal Justice Award to Thomas Crowe. The motion failed.

Following a presentation on Dwane Cates’ illustrious legal career and accomplishments by Benjamin Taylor,

MOTION: Tyler Carrell moved, John Gordon seconded and the motion to present the Tom Karas Criminal Justice Award to co-recipients Thomas Crowe and Dwane Cates passed.

Status Reports

Fleck Case – Lisa Panahi

- The Board was reminded that it had delegated authority to the Executive Council to determine whether to join an amicus brief.
- After receiving the report from the Amicus Working Group, the Executive Council authorized joinder subject to two amendments:
 - the “government institutions” language is changed to “created by state governments”
 - Arizona’s portrayal in the Arizona summary is changed back to the original proposed wording.
- These two amendments were incorporated into the brief and the brief was filed on April 5th
- Oral argument is set for June 13th.

Supreme Court’s Task Force on Delivery of Legal Services – Robyn Austin and Guy Testini

A report and recommendations are due on the following areas of study:

- Prohibition on fee sharing
- Law students practicing law
- Approved areas of practice for “limited license legal technicians”
- Expanded powers for Arizona Supreme Court’s Certified Document Preparers

2019 Board of Governors Election Results – Jeffrey Willis

This matter was removed previously in the meeting from the Consent Agenda.

President Willis reported that the five-day period wherein a candidate may contest the Board election had not yet passed. Therefore the election results are scheduled to be certified at the Board’s May meeting.

Correspondence/General Reports

- Executive Council Minutes – February 8, 2019
- Executive Council Minutes – March 8, 2019
- 2018 Rules Cycle Snapshot Report

Adjourned at 1:58 p.m.

Respectfully submitted,

Denis Fitzgibbons
Secretary/Treasurer