

**MEETING OF THE
BOARD OF GOVERNORS
OF THE
STATE BAR OF ARIZONA
April 17, 2020
GoToMeeting**

BOARD MEMBERS PRESENT: Brian Y. Furuya, President, Flagstaff; Denis M. Fitzgibbons, President-Elect, Casa Grande; Jennifer Rebholz, Vice President, Phoenix; Jessica Sanchez, Secretary-Treasurer, Tempe; Sandra Bensley, Tucson; Sharon Flack, Prescott; Mark Harrison, Phoenix; Leticia Marquez, Tucson; Robert McWhirter, Phoenix; John Moody, Phoenix; David Rosenbaum, Phoenix; D. Christopher Russell, Sierra Vista; Samuel Saks, Phoenix; Dee-Dee Samet, Tucson; Jimmie Dee Smith, Yuma; Benjamin Taylor, Phoenix; Public Members: Robyn M. Austin, Tucson; John Gordon, Prescott; Jonathan Martone, Paradise Valley; and Anna C. Thomasson, Paradise Valley; and At-Large Members David K. Byers, Phoenix; Lori Higuera, Phoenix; and Doreen McPaul, Window Rock; Victoria Ames on behalf of Douglas Sylvester, Phoenix; Ex-Officio Members: Jeffrey Willis, Board Advisor; Dean Mark Miller, Tucson; Leah Won on behalf of Dean Mark Miller, Tucson.

EXCUSED ABSENCES: Hector Figueroa, Payson; Sara Siesco, Phoenix.

UNEXCUSED ABSENCE: Amanda Salvione, YLD President, Phoenix.

OTHERS PRESENT: Deanna Commack, Executive Assistant to CEO/Executive Director; Sarah Corpening, Membership Administrator & Services Manager; Lisa Deane, Chief Member Services Officer; Tim Eigo, Editor, *Arizona Attorney Magazine*; Joel England, CEO/Executive Director; Candice French, Human Resources Manager; Kathy Gerhart, Chief Financial Officer; Mauri Hawkins, Professional Development Director; Connie Hay, Board of Legal Specialization Administrator; Joe Hengemuehler, Chief Communications Officer; Lori Maxwell, Chief Information Officer; Richard Palmatier, Assistant General Counsel; Lisa Panahi, General Counsel; Amy Rehm, Deputy Chief Bar Counsel; Patricia Sequin, Legal Services Manager; Carrie Sherman, Director of Board Operations; Karen Van Allen, Administrative Assistant; Maret Vessella, Chief Bar Counsel.

GUESTS (identified): Diane Drain, Law Office of D L Drain PA; Nancy Greenlee, Phoenix; Debbie Weecks, Sun City; and Board Members-Elect: Kelsi Taylor Lane, Davis Miles McGuire Gardner PLLC; Ted Schmidt, Schmidt Sethi & Akmajian; Eric Ruchensky, Coconino County Attorney; and YLD President-Elect Jena Decker-Xu, Fragomen Del Rey Bernsen and Loewy LLP.

President Brian Furuya called the Board meeting to order at 8:30 a.m. and spoke about the protocol for a virtual meeting, e.g., send chat before speaking; stay muted until called upon to speak; and how to select the view to see the presenter(s).

President's Report – Brian Furuya

Bylaw 9.09 prohibits teleconferencing at Board meetings. The Board needed to suspend it in order to conduct business at this meeting, which is a forced virtual meeting due to COVID-19. This was previously implemented for the October 2019 meeting when the Board tested the virtual platform. A proposed permanent change to Bylaw 9.09 will be discussed later on the agenda.

MOTION: Robert McWhirter moved, Dee-Dee Samet seconded and the motion carried unanimously to suspend Bylaw 9.09 for this meeting.

President Furuya reported on the various law-related events, in which State Bar leadership participate, that have been cancelled due to COVID-19:

- ABA Bar Leadership Institute – Denis Fitzgibbons was to attend
- Western States Bar Conference
- ABA Day in Washington, D.C. – scaled back; virtual programming planned
- Listening Tours in Gila, Pinal, Navajo and Apache Counties. Flagstaff was the last focus group that President Furuya was able to facilitate.
- Investiture of Appellate Court Judge D. Steven Williams is being rescheduled

There is ongoing discussion about the Bar’s role in the pandemic - where can we be helpful and how can we help? The CEO’s report will outline efforts.

Pro hac vice: David Rosenbaum inquired about the processing of pro hac vice application forms. The application language states that the application must be notarized but the Rule states that the application be “verified.” Dave Byers reported that the Chief Justice has suspended notaries during the pandemic. If the notary language is in the Rule, the Bar can file a Rule Petition with the Court to eliminate the notary reference temporarily; otherwise the Bar can amend the application language independently. Staff reported that it has already published a Bar-wide notice temporarily eliminating the need for notarizing the application.

Denis Fitzgibbons attended the remote AJC meeting. It was a quick meeting; nothing to report that would affect the Bar.

Call to the Public – President Brian Furuya

President Furuya made a Call to the Public. Nancy Greenlee asked about the Task Force Petition and President Furuya indicated that the discussion would be held later on the agenda. Dee-Dee asked if there would be a vote today on a Comment. President Furuya indicated that if the Board agrees that the Bar will file a Comment, direction should be given to staff today as to what the Comment should include. Any vote on a proposed Comment would occur at the May meeting.

CEO’s Report – Joel England

Introduced Mauri Hawkins, Employee of the Quarter for Q1 2020. Ms. Hawkins is the Professional Development Director who has done an outstanding job juggling, rebooking and rescheduling calendared CLEs, and moving many to online platforms quickly for the members’ availability.

Pandemic: Activated the Bar’s Continuation of Operations Plan on March 12th with the entire staff moving to remote telework posture when it was learned that one employee, who was already teleworking, had tested positive for COVID-19. That employee has since returned to teleworking and is doing well. Recognized the I.T. Team who, in seven to ten days, deployed reconfigured laptops and trained staff on teleworking protocol and resources.

How the Bar continues to help members:

- Four free Friday CLEs on “running your law firm during a pandemic”

549 registered for April 10; 471 for April 17

- All CLE's, for the first time ever, have been moved to virtual platforms
- Bar's COVID-19 webpage updated regularly
- Drop-in virtual sessions on Thursdays provide stress-reducing techniques

How the Bar continues to help the public:

- Communications Team has partnered with the Arizona Bar Foundation for live Facebook sessions with the public regarding the pandemic; lawyers respond to their questions, which are shared more widely; and
- the Bar, Governor's Office, Foundation, legal services agencies and county bars are working to launch a disaster relief hotline supported by federal dollars.

Staff is assessing finances due to the pandemic, noting savings have occurred (cancelled conferences, travel, etc.) but potential impact on revenues could range from \$500K to \$750K.

POLICY DISCUSSION

Petition Filed by the Task Force on the Delivery of Legal Services

President Furuya reported that the 2nd Comment Period on this Petition will close on May 26th. The May Board meeting is May 22nd and any Comment filed would have to be voted on at that meeting.

The officers, at their March 24th meeting, agreed to ask the Court for a 60-day extension due to the complexity of the Petition and distractions caused by the pandemic. The Court denied the request. Today the Board's options are: 1) Should the Bar take a position and file a Comment; and, 2) If it does, what should the Comment contain?

Discussion ensued and some comments included:

- how is this all going to work; need more information about how it is going to work before approving it; can the business model be expanded; is there a way to address concerns without scrapping the whole thing; guidelines and protocol need to be analyzed; feels like it is being pushed through while people have been focused on other issues (COVID-19); needs a more focused pilot-type program
- the proposals will drive solo practitioners out of business; will non-lawyers represent in probate; certify people
- law firm ownership is the major concern; creation of non-lawyer owned entities and potential problems, the language needs to be reworked; don't see how having non-lawyers will lead to providing more services; how will the non-lawyers be regulated;
- creation of LLLP's and narrowing the scope; need a definite line between lawyers and non-lawyers; make sure the verbiage matches up
- roll out pilot projects; focus on family, landlord/tenant and bankruptcy law; study how ethics and business coalesce
- similar concerns about the harm to the members and the public when Admission on Motion was adopted by the Court; did not occur
- change is hard; the way is unfolding (LLLPs); the Task Force has done a thorough job of recommendations; it is the future, it is coming, and we should own it; support the Task

Force because change is coming; make it positive while continuing to look for other ways to provide access to justice; tell lawyers to start thinking about this now and how to leverage it;

- James E. Rogers College of Law has been involved with the Task Force – there is substantial experience outside of the country regarding the recommendations; high-level service is provided by non-lawyers; LLLP's in three-to-five years will be common; there is a failure on part of the profession to provide access to services; how do we embrace and guide these changes; failure to do this is out of step with history;
- take the lead; bring the members along; challenge is to remember that the State Bar serves the public, not just attorneys; town halls have been done around the state; owe it to the members and the public to take a position;
- the system resists; we are the system;
- most of Petition's proposals have merit; express concerns on specific recommendations to which members have voiced opposition; lawyers will not do more pro bono to close the access to justice gap; these proposed changes are already happening
- examples: real estate agents practice real estate law; this went to ballot in the 90s and the citizens approved it; look at Ontario for an example – it is the same as AZ's LDPs and has been in place for 10 years; it has been assimilated well; fears have not materialized where this has been implemented;
- ABA's new proposed rules – thinks the LLLP will do a great deal of good for the public and not affect anyone's pocketbook.

Joel England reported that the staff is reviewing the Petition with guidance to take a constructive approach; identify any concerns as best it can during the time allotted. Brian Furuya added that he and the CEO have been all over the state talking about the recommendations. Universally, lawyers are suspicious (no data, not enough time); membership overall opposes the changes. The obligation is to the mission (serve and protect the public). There is no data in AZ, but there is a lot of data. The problem won't be solved by pro bono. AZ has needs that are not being met.

MOTION: David Rosenbaum moved, Denis Fitzgibbons seconded and the motion carried to file a Comment on the Petition filed by the Task Force on the Delivery of Legal Services.

MOTION: Bob McWhirter moved and Chris Russell seconded the motion to oppose the entire Petition.

FRIENDLY AMENDMENT: Jennifer Rebholz offered a friendly amendment to oppose the two controversial parts, elimination of Rule 5.4 and the proposed LLLPs, and support the remaining eight recommendations in the Petition. Accepted.

Dee-Dee Samet noted that the Court declining to extend the Comment deadline indicates that the proposed changes are coming. The Bar's Comment needs to address how to make the changes more palatable with regard to the two controversial issues.

FRIENDLY AMENDMENT: Dee-Dee Samet offered a friendly amendment that if the Supreme Court intends to move forward with the recommendations in the Petition, that the Bar inform the Court of the troublesome issues and to provide proposed solutions as to how to address those issues.

RESTATED MOTION: Bob McWhirter moved to direct staff to draft a Comment on behalf of the State Bar, which would go to the Rules Review Committee, to the Petition filed by the Task Force on the Delivery of Legal Services opposing the two controversial recommendations (elimination of Rule 5.4 and creation of the LLLPs) and abstaining from the remaining eight non-controversial recommendations; and if the Supreme Court moves forward with the Petition's recommendations, to provide recommendations to address the two controversial issues. Motion passed 11-10.

The Rules Review Committee meeting is May 15th, and it is a public meeting.

Petition Revisited

Later during the meeting, Anna Thomasson asked to readdress the action taken on the Petition. There was no opposition. After addressing the Board,

MOTION: Ms. Thomasson moved, Mark Harrison seconded and the motion carried by a vote of 14-6 to direct staff to also prepare a Comment on behalf of the State Bar, which would go to the Rules Review Committee, in favor of the Petition's 10 recommendations and that also addresses necessary language clean up in the proposal. This request was based on the previous close vote of 11-10 on the Restated Motion by Bob McWhirter.

2020 Board Election Results – Brian Furuya

The 2020 Election of Board members was extended for three days until COB on Friday, April 10, 2020 due to COVID-19. The Executive Council confirmed that there is nothing to prevent this extension.

Certified Elections Results:

- District 1 – Eric Ruchensky, Coconino County Attorney's Office (newly elected)
- District 4 – D. Christopher Russell, The Russell's Law Firm PLC (reelected)
- District 5 – Ted Schmidt, Schmidt Sethi & Akmajian (newly elected)
- District 6 – Robert McWhirter, The Law Offices of Robert J. McWhirter (reelected)
Kelsi Taylor Lane, Davis Miles McGuire Gardner PLLC (newly elected)

The YLD president, Jena Decker-Xu (Fragomen Del Rey Bernsen and Loewy LLP), will also be a full voting member during her one-year tenure on the Board.

MOTION: Denis Fitzgibbons moved, Jessica Sanchez seconded and the motion carried unanimously to certify the results of the 2020 Board elections.

President Furuya congratulated each reelected and newly elected Board member, all of whom were present.

Proposed Bylaw Amendment re: Occasional Virtual Board Meetings – Brian Furuya

At the February meeting, the Board was presented with a proposed amendment to Bylaw 9.02, which would give the president the discretion to hold up to two virtual Board meetings each Bar year. At the March meeting of the Executive Council, with the pandemic on the rise, the officers directed staff to draft a second option to address situations when gathering in person is not feasible.

MOTION: After discussion, Chris Russell moved, Denis Fitzgibbons seconded and the motion carried unanimously to adopt the second option to amend Bylaw 9.02:

Article IX. Meetings. 9.02. Regular Meetings. The president shall determine the meeting schedule of the Board but shall convene a minimum of six (6) regular meetings each year. The Annual Meeting is one of the six Regular Meetings. At the president's discretion, up to two Board meetings in any given Bar year may be conducted in a virtual format, and Bylaw 9.09 will be suspended for any virtual meeting. In the event that gathering in person is not feasible due to a local, state, or federally declared emergency or similar circumstance, the two virtual Board meetings limit may be waived. Otherwise, all non-virtual meetings shall comply with Bylaw 9.09.

Consent Agenda – President Brian Furuya

- a) Approval of February 28, 2020 Board Meeting Minutes
- b) Approval of Resignations in Good Standing
- c) Approval of Reinstatements
 - i) Members Suspended for Non-Compliance with Annual Membership Fees and/or Trust Account Compliance (Rule 32(c)(10) and/or Rule 43, Ariz. R. Sup. Ct.)
 - ii) Members Suspended for Non-Compliance with MCLE Requirements (Rule 45, Ariz. R. Sup. Ct.)
- d) Fee Waiver Denials
- e) Reaccreditation of the NBTA to Certify Specialists in Family, Civil, and Criminal Law
- f) Proposed Comment to R-19-0045, Petition to Amend Rules 38 and 39, Ariz. R. Protective Order P.
- g) Proposed Comment to R-20-0002, Petition to Amend Rule 38, Ariz. R. Protective Order P.
- h) Proposed Comment to R-20-0021, Petition to Create a Rule to Apply Juries in a Contested Proceeding Upon Request of a Litigant After the Bench Trial
- i) Proposed Comment to R-20-0033, Petition to Amend Rule 44(a), Ariz. R. Fam. L. P.
- j) Proposed Comment to R-20-0006, Petition for Technical and Clarifying Amendments to Rules 7, 8.1, 16, 37, 55, and Rule 84 Forms 11(a), 12(a), 13(a), and 14(a), Ariz. R. Civ. P.
- k) Proposed Comment to R-20-0004, Petition to Amend Rules 3.2, 4.1, 41, and Forms 2(a) and 2(b), Ariz. R. Crim. P.
- l) Proposed Comment to R-20-0023, Petition to Amend Rule 404, Ariz. R. Evid.
- m) Proposed Comment to R-20-0015, Petition to Amend Rule 22.5 Ariz. R. Crim. P.
- n) Proposed Comment to R-20-0031, Petition to Amend Ariz. R. Crim. P.
- o) Proposed Comment to R-20-0026, Petition to Amend Rule 32, Ariz. R. Sup. Ct.

President Furuya asked if any item should be removed from the Consent Agenda. Dave Byers requested that item k), R-20-0004, be removed, there was no objection, and the item was moved to the Rules Review Committee report.

MOTION: Bob McWhirter moved, Jessica Sanchez seconded and the motion carried unanimously to approve the remaining matters on the Consent Agenda.

Rules Review Committee – Jennifer Rebholz
Proposed Revisions to Criminal Jury Instructions

The Committee unanimously recommended the adoption of the proposed revisions to the Criminal Jury Instructions finding nothing controversial. The Board of Governors has the ultimate authority to approve revisions to jury instructions.

MOTION: Bob McWhirter moved, Denis Fitzgibbons seconded and the motion carried unanimously to approve the Criminal Jury Instructions revisions.

Proposed Comment to R-20-0009, Petition to Amend Ariz. R. Sup. Ct. to Adopt New Rule 24

The Committee recommended continuing the Petition until August 2021 so stakeholders, including the Civil and Criminal Practice and Procedure Committees, can study how reforms can be most effective in achieving *Batson's* objectives in Arizona's trial courts.

MOTION: After discussion, Dee-Dee Samet moved, Leticia Marquez seconded and the motion carried unanimously to file the Committee's Comment with the Arizona Supreme Court for its consideration.

Proposed Comment to R-20-0012, Petition to Permanently Adopt Rules for the Fast Trial and Alternative Resolution Program

The Committee opposed the permanent adoption of the Fastar Rules encouraging the pilot project be extended three years. The pilot has only run in Pima County for two of the three program years and data on how it would work in other counties would be beneficial.

Question: Sharon Flack asked how Fastar affects compulsory arbitration. Jennifer Rebholz said that matters of \$1,000 or less goes to compulsory arbitration; those of \$1,000 - \$50,000 would go to Fastar.

MOTION: After discussion, Chris Russell moved, Jessica Sanchez seconded and the motion carried over one dissent to file the Committee's Comment with the Arizona Supreme Court for its consideration.

Proposed Comment to R-20-0014, Petition to Amend Rules 101 – 119 and Delete Rules 120 - 126, Rules for the Fast Trial and Alternative Resolution Program

The Committee opposed removing dispute resolution from the Fastar Rules but endorses the presumption of reasonableness of dollar amounts in the presentation of medical bills.

MOTION: After discussion, coming as a recommendation from the Committee requiring no second, the Board unanimously approved filing the Committee's Comment which opposes eliminating the arbitration process in the Fastar Rules and filing it with the Arizona Supreme Court for its consideration.

Proposed Comment to R-20-0013, Petition to Amend Various Rules of Procedure Related to Creating the Verbatim Record of Judicial Proceedings

The Committee recommended that the Court not modify the criminal and civil rules of procedure as well as the rules of the Supreme Court to permit electronic/digital recording in judicial proceedings and that certified reporters be required to record and transcribe all proceedings until such time as uniform standards for the technology and adequate safeguards for accuracy and timeliness are developed.

Comments were received from both the civil and criminal bars. The Committee recommends not adopting the proposal yet; the criminal bar indicates there are constitutional issues that require further study.

MOTION: After discussion, coming as a recommendation from the Committee requiring no second, the Board approved, over one dissent, filing the Committee's Comment as presented with the Arizona Supreme Court for its consideration.

Proposed Comment to R-20-0004, Petition to Amend Rules 3.2, 4.1, 41, and Forms 2(a) and 2(b), Ariz. R. Crim. P.

This item was pulled from the Consent Agenda. The Committee opposed the prohibition of an arrestee from posting the bond previously set by the magistrate who issued the arrest warrant *prior* to the arrestee's initial appearance before the Court.

MOTION: After discussion, coming as a recommendation from the Committee, the Board voted 11-7 to file the Committee's Comment as presented, which opposes the proposed Rule change, and submit it to the Arizona Supreme Court for its consideration.

Temporarily Amend Bylaw 1.07 re: Annual Meeting – Brian Furuya

In the Bylaws, the Convention is tied to the Annual Meeting. Now that the Convention has been rescheduled to December, Bylaw 1.07 must be temporarily suspended in order for normal year end activities, like the election of Board officers, to occur and a new Bar year to begin. The proposal in the Board's materials is for their consideration. A vote is scheduled at the May meeting as any proposed Bylaw changes must be, pursuant to the Bylaws, noticed 30 days in advance.

Nominating Committee – Jeffrey Willis

At the June 2019 Board meeting, the Board received the report and recommendation of the first Nominating Committee. The Board elected its officers at the meeting but also agreed that it wants to be able to approve the Nominating Committee's process and materials, thus formalizing the Committee's process before the next Committee undertakes its work. Said proposal was contained in the Board's materials and is scheduled for a vote at the May meeting. Board members' feedback in advance of the meeting was encouraged.

Awards Working Group – Denis Fitzgibbons

The Working Group met prior to the March 31 nomination deadline to review procedures and the description of each State Bar award. Nominations were being received and eight of the ten awards had at least one nomination. Due to the pandemic, the Convention has been rescheduled to December. The nomination deadline will therefore be extended to August with the Board scheduled to select the award winners at its September meeting.

Finance & Audit Committee – Benjamin Taylor and Kathy Gerhart

Chair Taylor presented a Q1 recap:

- \$4,703K revenues
- \$4,709K expenses
- Loss to date of \$6K
- See CEO's previous comment about staff assessment of finances due to pandemic.

Status Reports – Lisa Panahi, Joe Hengemuehler, Jessica Sanchez

- *Amicus Curiae* Matters – Lisa Panahi
 - *Jarchow* – Respondents' response to the petition for certiorari in the U.S. Supreme Court was filed on April 3rd; it has not yet been distributed for Court's conference;

- *Fleck* – U.S. Supreme Court denied *cert* March 9; petitioners filed for reconsideration on April 3rd; this is scheduled for the Court’s May conference;
- *Ninth Circuit Matters* – Oral argument in the two Ninth Circuit cases against the Oregon State Bar, in which we filed amicus briefs, is scheduled for May 12th by video.
- Legislative Update – Joe Hengemuehler
Legislature expected to reconvene at the end of April; no report at this time
- Strategic Planning Working Group – Jessica Sanchez
March 31 meeting - reviewed data collected; overarching themes to move the Bar forward were noted including support for lawyers (civility and wellness), public’s trust in and understanding of the legal system, continue to strive for organizational excellence

Correspondence/Reports

- Executive Council Minutes – February 7, 2020
- 2019 Rules Cycle Snapshot Report
- Feedback – Appointment to Rocky Mountain Mineral Law Foundation Trustees Council

Adjourned at 12:23 p.m.

Respectfully submitted,

Jessica Sanchez
Secretary/Treasurer