

President Pappas called the meeting to order at 9:30 a.m. on Friday, July 24, 2009 at the Michael Franck building in Lansing.

Commissioners present:

Danielle Mason Anderson
David Brake
Lori A. Buiteweg
Beverly Hall Burns
Laura Chappelle
B. D. "Chris" Christenson
Margaret A. Costello
Bruce A. Courtade, Treasurer
Richard L. Cunningham
Brian D. Einhorn
James N. Erhart
Elias J. Escobedo, Jr.
Robert K. Fergan
Julie I. Fershtman, Secretary
W. Anthony Jenkins, Vice President
Elizabeth M. Johnson

Katherine Kakish
David A. Kallman
Donald E. McGinnis, Jr.
Lambro Niforos
Edward H. Pappas, President
Eric J. Pelton
Victoria A. Radke
Michael J. Riordan
Donald G. Rockwell
Thomas C. Rombach
Kurt Schnelz
Richard J. Siriani
Julie A. Sullivan
Charles R. Toy, President-Elect
Gregory L. Ulrich

Commissioners absent and excused:

Commissioners Brake and Murphy were absent and excused.

State Bar Staff present:

Janet K. Welch, Executive Director
Marge Bossenbery, Executive Coordinator
Gregory Conyers, Director, Justice Initiatives
Candace Crowley, Manager, External Development
Dawn Evans, Director, Professional Standards
Cliff Flood, General Counsel
Mary Frook, Director, Human Resources
James Horsch, Director, Finance and Administration
Elizabeth Lyon, Director, Governmental Relations
Will Kramer, Director, Information Technology Services
Naseem Stecker, Manager, Media and Public Relations
Jalayne Sutherland, Receptionist
Kari Thrush, Manager, Membership Services and Events
Anne Vrooman, Director, Research and Development

Consent Agenda

Minutes

The Board received the minutes from the June 12, 2009 Board of Commissioners meeting.
The Board received the minutes from the June 9 and 23, 2009 Executive Committee meetings.

President's Report, Edward H. Pappas, President

The Board received a written report on the President's recent activities.

Executive Director's Report, Janet K. Welch, Executive Director

The Board received a written report on the Executive Director's recent activities.

Finance, Bruce A. Courtade, Chairperson

The Board received the FY Financial reports through May 2009 and the FY 2009 financial forecast.

Committee and Section Reports

The Board received the Annual Committee and Section Reports.

Section Bylaw Change

The Board received section bylaw changes from the Workers Compensation section and the Law Practice Management and Legal Administrators Merger

A motion was offered and supported to approve the consent agenda. Motion carried.

2009 Officer Elections

President Edward H. Pappas announced that President-Elect Charles R. Toy would succeed him as President of the State Bar of Michigan for 2009-10.

President Edward H. Pappas announced that Vice President W. Anthony Jenkins would be President-Elect for 2009-10.

A motion was made and supported to elect Ms. Fershtman to the Vice President position. Motion carried.

A motion was and supported to elect Mr. Courtade to the Secretary position. Motion carried.

In an election for the position of Treasurer, among candidates Mr. Einhorn and Mr. Rombach, Mr. Einhorn was elected Treasurer for 2009-10.

FY 2010 Budget

Ms. Welch and Mr. Horsch presented the FY 2010 budget to the Board. Motion was offered and supported to adopt the FY 2010 budget as presented. Motion carried.

COMMISSIONER COMMITTEES

Finance, Bruce A. Courtade, Chairperson

Mr. Courtade provided the Board with a financial update and financial forecast of the State Bar.

Audit Committee, Bruce A. Courtade, Chairperson

Mr. Courtade provided the Board with an Audit Committee report

Professional Standards, Julie I. Fershtman, Chairperson

Ms. Fershtman reported that a subcommittee was appointed to review the applicants for the vacancy on the Institute of Continuing Education (ICLE) Executive Board and on the Michigan Indian Legal Services (MILS) Board of Trustees.

Programs and Services, W. Anthony Jenkins, Chairperson

Legal Research Proposal

Mr. Jenkins described a proposal to enter into an online legal research contract with Casemaker. Motion offered and supported to adopt the proposal. Motion carried.

Insurance Update

Mr. Jenkins provided the Board with an update on the insurance issues with Blue Cross Blue Shield of Michigan.

Event Summaries

The Board received summaries of the 50-year honoree celebration, the Bar Leadership Forum, and the Upper Michigan Legal Institute.

Public Policy, Image and Identity, Charles R. Toy, Chairperson

Mr. Toy informed the Board that a conference is being held on August 14 to discuss Improving Public Defense: The Future for Michigan Defense Attorneys.

Justice Initiatives Report

The Board received a written report on Justice Initiatives activities.

The Board received a written legislative update from Governmental Consultants Services, Inc.

Mr. Toy informed the Board that the appointment of Commissioner Committees will be a two step process: commissioners will first be appointed to the commissioner committee and then, based on that appointment, liaison appointments will be made, so that liaison appointments fall within the purview of the commissioner committee.

Mr. Toy reminded the commissioners that they are invited by Cooley Law School to attend the August 7 Tiger game – Mr. Pappas will throw out the first pitch.

Court Rules

There were no court rules to consider.

Legislation

Proposed Changes to Disciplinary procedural rules – MCR 9.100, et seq

A motion was offered and supported to adopt the proposed changes to the disciplinary procedural rules. Motion carried.

Supreme Court Judicial Disqualification Proposals (ADM File No. 2009-04)

A motion to table the issue failed.

A motion to ask the Court for more time to comment failed.

(The Board returned for an afternoon session to discuss further.)

Public Defense Legislation

Ms. Lyon provided the Board on the developments concerning indigent criminal defense. Motion was offered and supported to Motion carried.

The Board meeting was suspended so that the Board members could attend a presentation honoring the past chairs of the Representative Assembly. The meeting resumed at 2:00 p.m.

LEADERSHIP REPORTS

President's Report, Edward H. Pappas, President

Judicial Crossroads Task Force

Mr. Pappas reported that the SBM is in the process of establishing a Judicial Crossroads Task Force to comprehensively review and evaluate our justice system and make recommendations on how the justice system can best meet the needs of the public and business in the face of the transformational changes underway in the state.

Executive Director's Report, Janet K. Welch, Executive Director

SBM Standing and Special Committees 2009-10 Resolution and Matrix

Ms. Welch presented the 2009-10 SBM Standing and Special Committee resolution and matrix, with an amendment that the Ethics Committee will be split in to two committees. Motion offered and supported to adopt the resolution and matrix as amended. Motion carried.

2009 John N. Cummiskey Award Nominee

Motion offered and supported to award the SBM 2009 John N. Cummiskey Award to Mr. Joseph Basta. Motion carried. Ms. Costello abstained from voting.

Representative Assembly Report, Katherine Kakish, Chairperson

Ms. Kakish provided the Board with an update on the issues that will be addressed at the September 17th meeting.

American Bar Association (ABA) Report, Reginald Turner, State Delegate

The Board received a written report on the ABA House of Delegates agenda, which will take place in August.

Mr. Jenkins announced to the Board that he will step down as a member of the ABA Board of Governors at the end of the 2009 ABA annual meeting. He is doing this to focus on his duties as State Bar President-Elect.

Mr. Jenkins informed the Board that anyone is interested in serving the remainder of his term on the Board of Governors should contact Mr. Turner.

Young Lawyers Section Report, Chris Christenson, Chairperson

Mr. Christenson provided the Board with a report on the Young Lawyers Section activities.

Supreme Court Judicial Disqualification Proposals (ADM File No. 2009-04) (continued)

The Board resumed its discussion of the proposals and reached the following decisions:

1) **The primary obligation to recognize the reason for disqualification should rest with the judge or Justice.**

The Board unanimously agreed with the Ethics committee that Michigan's disqualification rules should be clear that judges and Justices have a fundamental duty to recuse themselves if they cannot decide a case impartially, even if a party does not raise the issue. The Board's vote on this issue expressly did not encompass the question of whether there is a "duty to sit" or whether and when the "rule of necessity" applies.

2) **Disqualification decisions should be in writing.**

A majority of the Board agreed that disqualification decisions should be in writing.

- 3) **Dissents to a Justice's recusal decision should be allowed.**
The discussion acknowledged that such dissent holds the potential to undermine confidence in the judicial process, but there was a consensus that under our state constitution a Justice's prerogative to speak to issues before the Court cannot be circumscribed by court rule.
- 4) **Only a Justice or a party should be able to raise the issue of the Justice's disqualification.**
A majority of the Board believed that Justices should not have the authority to move for or otherwise initiate another Justice's disqualification. During the course of the discussion it was noted that a judge or Justice who is aware of serious ethical violations may have reporting obligations under the rules of professional conduct
- 5) **A Justice's recusal decision should be reviewable.**
By a narrow majority, the Board supported the reviewability of a Justice's recusal decision. Recognizing the potential for litigants' gamesmanship and obstruction associated with various methods of review, the Board deferred the question of the procedures for review for further discussion.
- 6) **The standard for bias should be "actual".**
- 7) **The criteria for disqualification of judges and Justices should not be limited to enumerated criteria.**
This position was adopted unanimously.
- 8) **The disqualification rules for judges and Justices should clearly state that disqualification is required if the judge or Justice cannot impartially decide a case.**
The Board unanimously supported this recommendation.
- 9) **The grounds for disqualification of judges and Justices should encompass appearance of bias, based on an objective standard.**
The Board supported adding an appearance of bias standard to the disqualification rules based on an objective or reasonableness standard. A significant minority of the Board expressed concern that, even with an objective or reasonableness standard, adding this ground would encourage inappropriate disqualification motions.
- 10) **Bias concerning an attorney should be grounds for disqualification of a Justice.**
A majority of the Board favored adding this criterion as a ground for disqualification of a Justice, as it currently is for judges. Prior to the vote it was noted that the bias standard should be actual, not an appearance of bias.
- 11) **That a Justice's previously presiding over the same case in another court should be grounds for disqualification.**
The Board unanimously supported adding this provision from the ABA model rule to disqualification rules for both judges and Justices.
- 12) **The two-year limitation on disqualification based on a former professional association with a party's lawyer should be retained in MCR 2.003 and applied to Justices.**
The Board preferred the two-year limitation over the model rule's open-ended disqualification provision concerning a judge's prior professional association with a party's lawyer.

The Board deferred the following questions for further deliberation and discussion:

- 1) Whether the grounds for disqualification of Justices and judges should be the same.
- 2) What the procedures for review of a Justice's recusal decision should be.
- 3) Whether a duty to sit should be included in the disqualification rule.
- 4) Whether a public statement by a Justice committing or appearing to commit to a particular result should be grounds for disqualification.
- 5) Whether a Justice's former service in governmental employment that involves the Justice's public, personal, substantial participation concerning the proceeding, or the Justice's public expression of an opinion concerning the merits of the matters in controversy, should be grounds for disqualification.

Comments or questions from Commissioners

There were none.

Comments or questions from the public

There were none.

Adjournment

The meeting was adjourned at 4:30 pm.