

President Pappas called the special meeting to order at 9:30 a.m. on Friday, August 21, 2009 at the State Bar of Michigan.

Commissioners present:

David Brake

Lori A. Buiteweg

Laura Chappelle

Margaret A. Costello

Bruce A. Courtade, Treasurer

Richard L. Cunningham

Brian D. Einhorn

James N. Erhart

Robert Fergan

Elias J. Escobedo, Jr.

Julie I. Fershtman, Secretary

Elizabeth M. Johnson

Katherine Kakish

David A. Kallman

Donald E. McGinnis, Jr.

Lambro Niforos

Edward H. Pappas, President

Eric J. Pelton

Michael J. Riordan

Thomas C. Rombach

Julie A. Sullivan

Charles R. Toy, President-Elect

Gregory L. Ulrich

Commissioners absent and excused:

Commissioners Mason Anderson, Hall Burns, Christenson, Jenkins, Murphy, Radke, Rockwell, Schnelz and Siriani were absent and excused.

State Bar Staff present:

Janet K. Welch, Executive Director

Marge Bossenbery, Executive Coordinator

Dawn Evans, Director, Professional Standards

Cliff Flood, General Counsel

Elizabeth Lyon, Director, Governmental Relations

President's Report

Mr. Pappas reported to the Board that the Michigan State University Law School held its orientation program on Thursday, August 19 and that the professionalism portion was well received.

Mr. Pappas advised the Board that the State Bar had submitted a letter to the Michigan Supreme Court on July 31, 2009, which provided comment on several key questions regarding ADM File No. 2009-04: Proposals Regarding Procedure for Disqualification of Supreme Court Justice, based on the Board's votes at the July 24 Board meeting. The purpose of the special meeting is to address the remaining issues in order to respond to the Supreme Court prior to the Court's September 2, 2009 administrative public hearing.

The Board proceeded to address the remaining questions, in the following order:

1. What the procedures for review of a Justice's recusal decision should be.

The Board supported the reviewability of recusal decisions at the federal level, per Caperton, in addition, favored the creation of an independent panel to review decisions at the state level. The Board acknowledged that there may be constitutionality questions about establishment of an independent state panel under the current state constitution, and believed that if necessary a constitutional amendment should be sought to achieve the creation of the independent panel. The Board discussed options for the composition of an independent panel but made no recommendations concerning how an independent review panel would be constituted. A small minority of the Board opposed this recommendation.

2. Whether a duty to sit should be included in the disqualification rule.

The Board of Commissioners unanimously recommended adopting the ABA model rule language, “A judge shall hear and decide matters assigned to the judge, except when disqualification is required by [the disqualification rule] or other law,” with the understanding that the rule is intended to mean that the duty to sit is trumped where grounds for disqualification exist.

3. Whether a public statement by a judge or Justice that commits the judge or Justice to a particular result should be grounds for disqualification.

The Board of Commissioners supported the following modified version of ABA model rule 2.11(A)(5) as a grounds for disqualification: When a “...judge, while a judge or judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy” should be grounds for disqualification. A single Board member supported including the words “or appears to commit”, which are contained in the ABA model rule.

4. Whether a judge or Justice’s former service in governmental employment that involves the judge or Justice’s public, personal, substantial participation concerning the proceeding should be grounds for disqualification.

A narrowly divided Board (13-9) voted to support the following modified version of the ABA model rule language of 2.11(A)(6)(b): When a judge or Justice has “served in government employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding” that should be grounds for disqualification. Those opposed to the adoption of this criterion for disqualification expressed concern with its vagueness and its potential chilling effect on public officials considering a judgeship.

5. Whether the grounds for disqualification of Justices and judges should be the same.

The Board unanimously voted that the grounds for disqualification of Justices and judges should be the same. The Board also agreed that in a provision of the disqualification rule addressing actual bias, the Board interprets the words “actual” and “personal” to be the same, pursuant to the decision in Cain v Michigan Department of Corrections, 451 Mich 470, 494-495 (1996).

Questions Not Reached by the Group and Not Previously Discussed by the Board

1. Whether a replacement Justice should be added to the Court if a Justice is recused.
2. Whether a party’s or a lawyer’s contribution to a judge/Justices campaign should be grounds for disqualification.
3. Whether there should be an affirmative duty to be informed about personal and economic interests
4. Whether domestic partners and others residing in a judge/Justices home should be included in the rule

A motion was offered and supported to take no action on these issues. The Board referred these issues back to the Public Policy Committee for further consideration and recommendation.

Mr. Pelton asked to revisit the issue of the “whether the grounds for disqualification should encompass the “appearance of bias”. A motion to modify the Board’s position by including a reference to Caperton failed, 12-10.

Comments or questions from Commissioners

Mr. Courtade complimented the Board members for their extensive and thoughtful engagement with the recusal issue.

Comments or questions from the public

There were none.

Adjournment

The meeting was adjourned at 11:10 a.m.