

# Wyoming State Bar Board of Officers & Commissioners Meeting

January 11, 2019  
Worland Community Center  
Worland, Wyoming

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- In Attendance:** Weston T. Graham, President; Nathaniel S. Hibben, President-Elect (via phone); Billie LM Addleman, Vice President (via phone); J. Kenneth Barbe, Treasurer (via phone); Melinda S. McCorkle, First Judicial District Commissioner; Kelly M. Neville, Second Judicial District Commissioner; Jeremy K. Kisling, Fourth Judicial District Commissioner (via phone); R. Scott Kath, Fifth Judicial District Commissioner; James L. Edwards, Sixth Judicial District Commissioner; Shawn G. Wilde, Eighth Judicial District Commissioner; James T. Whiting, Ninth Judicial District Commissioner; Sharon Wilkinson, Executive Director; Mark W. Gifford, Bar Counsel and Cathy Duncil, Admissions Director
- Absent:** Robert C. Jarosh, Immediate Past President; Teresa S. Thybo, Third Judicial District Commissioner; Charles S. Chapin, Seventh Judicial District Commissioner and Rebecca S. Wright, Young Lawyers Section Chair
- Guests:** Wayne Herr, Partner at McGee, Hearne & Paiz, LLP
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President Weston Graham called the meeting to order at 1:17 p.m. on Friday, January 11, 2019.

## Approval of Agenda

Executive Director Sharon Wilkinson requested that two items be added to the agenda: a change to investment policy and a discussion regarding a bill the Legislature is considering. Commissioner Edwards made a motion to approve the agenda as amended. Commissioner McCorkle seconded the motion. The motion carried unanimously.

## Approval of Meeting Minutes

Commissioner McCorkle made a motion to approve the November 16, 2018, meeting minutes. Commissioner Kath seconded the motion. The motion carried unanimously.

## 2018 Audit Report

President Graham introduced Wayne Herr from McGee, Hearne & Paiz, LLP and welcomed him to the meeting. Mr. Herr distributed the 2018 audit report and discussed the various types of auditing procedures and the analysis his firm does during the audit. He thanked the staff for its hard work in preparation for the audit. He directed the Board's attention to the Financial and Compliance Report, including the independent auditor's report, the management representation letter, financial statements and required supplementary information, and internal control report.

Mr. Herr reported that the balance sheet looks different from prior years due to the Board's adoption of an Investment Policy in January 2018 and the resulting transfer of \$500,000 in cash reserves to a long-term investment portfolio. Also during 2018, significant improvements and renovations to the Bar office building were made, resulting in a substantial increase in the amount shown for property and equipment. He pointed out that prepaid expenses were up a bit because the Bar was required to pay a deposit on the 2019 Annual Meeting which will be in Jackson. On the liability side, Mr. Herr noted the substantial increase in accounts payable relates to expenses associated with the 2017 Annual Meeting which were not paid until after the beginning of the 2018 financial year. This item is also the reason for a corresponding increase in total liabilities. Mr. Herr explained the required adjustment for deferred pension liability, which resulted in a decline of \$58,000 in the Bar's total net position; without this adjustment, the Bar's net position would have increased by \$35,000. Mr. Herr shared that the Wyoming Retirement System enjoys a funding level of 76.35%, which is relatively strong for pension plans nationally. Some states have funding rates below 25%.

In summary, Mr. Herr reported that the balance sheet remains strong. With respect to the income statement, Mr. Herr shared that operating revenues and expenses were fairly consistent with prior years.

Mr. Herr explained the accounting for the Bar's long-term investment portfolio, which requires recognition of income from investments as well as adjustment for changes to the market value of the investment portfolio. Mr. Herr shared that many of the additional disclosure in the 2018 audit report compared with prior years relate to the Bar's adoption of an investment policy and the transfer of cash reserves to long-term investments. The Bar's investment policy establishes risk tolerances, a target allocation as well as an acceptable range for all investment categories and provides for investment in a diverse portfolio consisting of mutual funds, stocks and bonds.

Mark Gifford asked Mr. Herr about a \$117,000 increase in the amount reported as "payments to employees and benefits" on the statements of cash flows. Mr. Herr explained that his firm elected to change the accounting treatment of certain payments, reclassifying as "payments to employees and benefits" certain items that were previously treated as "payments to vendors." As a result of this change in accounting, though "payments to employees and benefits" increased by \$117,000, "payments to vendors" decreased by \$138,000. This change in accounting will be carried forward in future years.

Mr. Herr reported that the Bar's internal processes are sufficient to ensure adequate internal control. There were no deficiencies or material weaknesses discovered in the audit.

President Graham asked Mr. Herr if there were any issues he needed to discuss with the Board without the staff present. Mr. Herr said that was not necessary. He shared that during the audit he spoke individually with Executive Director Wilkinson, Mark Gifford, Cathy Duncil and President Graham to see if they had any concerns and there were none.

Commissioner Edwards made a motion to accept the annual audit report. Commissioner Neville seconded the motion. The motion carried unanimously.

### **Admissions**

Cathy Duncil reported that two applicants have recently been referred for hearings before the Character & Fitness Committee. Mark Gifford shared that the Committee has denied admission to two applicants in the last year. While applicants have the option to appeal the Committee's decision to the Wyoming Supreme Court, none have.

Ms. Duncil reported that she will administer the February Bar exam to 29 applicants and none have requested special testing accommodations.

### **Mandatory CLE**

Executive Director Wilkinson shared that January 15, 2019, is the deadline for members to submit their 2018 CLE credit. There are currently 235 members who are not in compliance. She reported that those who fail to report by the deadline will be assessed a \$300 delinquency fee and will have until March 1, 2019, to pay the fee and submit the credit. She shared that those who are still not in compliance by March 1<sup>st</sup> will be assessed an additional \$300 non-compliance fee. Those still not in compliance by March 15, 2019, will be turned over to the Wyoming Supreme Court and could possibly face a suspension of their licenses.

### **Office of Bar Counsel**

*Attorney Discipline*—Mark Gifford, Bar Counsel, shared that he received a total of 150 disciplinary complaints in 2018, which is down a bit from previous years. He reported that he currently has fewer than 60 active files, which is somewhat low, and five matters are currently in formal charge, which is somewhat high. Mr. Gifford shared that he has a three-day disciplinary hearing with the Board of Professional Responsibility next week in Casper.

*Fee Arbitration*—Mr. Gifford reported that Shannon Howshar, his assistant, does a great job running this program.

*Unauthorized Practice of Law*—Mr. Gifford reported that there is not a lot of activity in this area; however, he shared that there is one matter that is going to require quite a bit of his time.

*Client Protection Fund*—Mr. Gifford shared that the Bar continues to make payments as budgeted and so far, there have not been any new significant claims. President Graham asked Mr. Gifford if he felt it was necessary for the Board to replenish the fund anytime soon considering there was an approximate balance of \$36,000. Mr. Gifford did not feel it was necessary at this time.

### **Flood Marketing Rebranding Cost Negotiation**

Executive Director Wilkinson reminded the Board that it had approved a proposal from Flood Marketing out of Sheridan for the public awareness campaign outlined in the Strategic Plan. One phase of the proposal was for rebranding, and Executive Director Wilkinson reminded the Board that it had directed her to negotiate the \$15,000 cost. She reported that in her

discussion with Jonny Law from Flood Marketing, he indicated that he was unwilling to drop the cost for the rebranding. He shared that a rebranding always adds value to an organization, so his office stands firm on the \$15,000 price tag. Executive Director Wilkinson shared that she serves as an ex-officio member of the Equal Justice Wyoming Foundation Board and it has contracted with Flood Marketing for a rebranding of the Foundation, but the cost was lower than \$15,000. In her discussions with Mr. Law, he indicated that Flood Marketing gave the Foundation a 20% discount due to the fact that it is a non-profit, philanthropic organization. Mr. Law indicated to her that if the Board was not agreeable to the \$15,000, they would consider dropping the cost to \$12,000.

Commissioner McCorkle asked if the Bar could use one organization for the public awareness campaign and another for the rebranding, as she does not support spending \$15,000 on the rebranding. Commissioner Edwards expressed agreement with Commissioner McCorkle. Executive Director Wilkinson shared that she has not signed the contract with Flood Marketing yet, so she is willing to explore other options for the rebranding.

Commissioner Kath made a motion to move forward with Flood Marketing for the public awareness campaign and look into other options for the rebranding project. Commissioner Whiting seconded the motion. Commissioner Wilde shared that he does support the rebranding idea and thinks there is value to freshening up the image on the Bar. The motion carried unanimously. Executive Director Wilkinson shared that she will explore other options for discussion at the April meeting.

#### **Member Comments to Proposed Revisions to Bylaws of the Wyoming State Bar/Approval to Submit to Supreme Court**

Mark Gifford reminded the Board that the proposed amendments to the Bylaws of the Wyoming State Bar had been distributed to the membership for comment. He reported that he only received three comments and made a change as a result of one of those which dealt with collecting information on members being admitted in other jurisdictions. He requested approval to submit the proposed Bylaws to the Wyoming Supreme Court for adoption.

Commissioner McCorkle made a motion to approve Mr. Gifford's request and submit the proposed amendments to the Wyoming Supreme Court for adoption. Commissioner Kath seconded the motion. The motion carried unanimously.

#### **Client Protection Fund Long-Term Funding**

President Graham shared that the staff periodically requests additional funds for the Client Protection Fund account. He wondered if the Board should consider a long-term funding mechanism for this. He shared that 33 states assess a fee on their license fee statement to fund the client protection program. Executive Director Wilkinson shared that she is not in favor of assessing a fee to all members for this purpose. The Bar has the money to fund the program, and she feels that the system works effectively. Commissioner Edwards agreed with Ms. Wilkinson. President Graham agreed that the Bar has the money but wondered if we should invest some money now and put it in a more flexible investment schedule.

Commissioner Edwards shared that he feels we should leave well enough alone and not make any changes at this time.

### **Proposed Amendments to Rules of Professional Conduct & Rules of Disciplinary Procedure**

Mark Gifford reported that he has been working with the Board of Professional Responsibility (BPR) and the Review & Oversight Committee (ROC) on several necessary rule revisions.

In regard to the Rules of Professional Conduct, Mr. Gifford shared that the current rules indicate that if an attorney has money in his or her trust account and is unable to identify the owner of the funds, the attorney must turn the money over to the State Treasurer as unclaimed property. He shared that that requirement has proven to be unworkable in practice, as the State Treasurer requires that funds remain unclaimed for three years before they are turned over to the State. He reported that the proposed amendment would make the Client Protection Fund the recipient of such funds.

Mr. Gifford also shared that he is proposing a new rule to provide guidance to lawyers regarding the length of time they should keep their client files. He collected resources from other states to see how they handle this issue. The proposed rule is based on a similar rule recently adopted in Massachusetts.

Mr. Gifford reported that the American Bar Association (ABA) did a multi-year review of the model rules for advertising in order to make them more modern and more reflective of how lawyers market their services. The new rules came out in August 2018. He shared that what he is proposing make much more sense to lawyers and incorporates the changes to the ABA model rules.

Mr. Gifford requested approval to distribute the proposed amendments to the Rules of Professional Conduct to the membership for comment.

Commissioner Whiting made a motion to approve Mr. Gifford's request and seek member comments on the proposed amendment to the Rules of Professional Conduct. Commissioner Edwards seconded the motion. The motion carried unanimously.

In regard to the Rules of Disciplinary Procedure, Mr. Gifford shared that one change being proposed is to make files available to the public from the time a formal charge is filed. He reported that such a rule change would put Wyoming in the company of 42 other states. He shared that this same amendment was proposed to the Wyoming Supreme Court in 2015, but it denied the proposed change. Mr. Gifford explained that currently, he is prohibited from discussing any disciplinary cases until and unless there is a public sanction handed down. He shared that this proposed change would at least allow him to explain that the Bar is acting on an attorney's alleged conduct. He also shared that his colleagues in other states who have a similar rule report that it is rare to receive a request to review the files unless the case has already received a lot of publicity.

Mr. Gifford discussed another proposed change to the rules that stems from the challenge of having a quorum of the seven-member Board of Professional Responsibility for disciplinary hearings. The BPR is proposing an amendment that would expand the size of the BPR to nine (six lawyers and three non-lawyers) and would change the make-up of the hearing tribunal to panels of two lawyers and one non-lawyer. He is certain this would not only make scheduling easier, but it would also result in lower costs being assessed to the respondent.

President Graham asked Mr. Gifford if he was aware of whether or not the Commission on Judicial Conduct and Ethics (CJCE) was considering making a similar rule change in regard to judicial discipline being made available to the public. Mr. Gifford shared that the CJCE did recommend such a change to the Supreme Court a few years ago, but the Court denied the recommendation. Executive Director Wilkinson reminded President Graham that the Bar President is responsible for appointing the lawyer members of the CJCE and encouraged him to perhaps start the discussion with those lawyers.

After discussion, Mr. Gifford requested approval to distribute the proposed amendments to the Rules of Disciplinary Procedure to the members for comment.

Commissioner Whiting made a motion to approve Mr. Gifford's request and distribute the proposed rules to the members for comment. Commissioner Neville seconded the motion. The motion carried unanimously.

### **Investment Report**

Executive Director Wilkinson reported that Mike Merback, the Bar's financial advisor from RBC Wealth Management, prepared a memo for the Board as a result of the market fluctuating so much lately. Mark Gifford shared that as of close of market on January 10, 2019, the Bar's long-term investment portfolio was valued at \$494,103 (down 1.18%). Mr. Gifford shared that Mr. Merback believes this is a decent value considering the recent volatility in the market.

Director Wilkinson reported that a typographical error was recently discovered in the Bar's Investment Policy Statement (IPS) relating to acceptable investments in corporate notes and bonds. The IPS adopted by the Board in January 2018 provided that such investments must be "BBB or better," referred to Standard & Poor's rating system. The IPS should have provided for "BBB- or better," which equates with what investment managers consider to be investment-grade (as opposed to "junk") bonds. Upon discovery of this typographical error, the Investment Committee recently voted to amend the IPS to require that corporate notes or bonds be "investment grade" instead of "BBB or better."

### **President's Report**

**Volunteer Recruitment Fund** – President Graham shared that he would like to encourage members of the Bar to volunteer to help in the Bar office similar to how Pat Hand and Jack Speight have. He shared that what he is proposing for discussion is setting some money aside to recognize these attorneys and help recruit volunteers. The staff could then recruit as it sees fit.

Treasurer Barbe asked if President Graham was suggesting earmarking some in the Bar's reserves or actually put money in a separate account. President Graham clarified that it could be included in "earmarked reserves" on the financial statements.

Mark Gifford inquired as to why we have "earmarked" funds considering those amounts are noted on the financial statement but are not funds actually set aside for those purposes. An example he shared was the recent renovation of the Wyoming State Bar office. He reminded the Board that the renovation was paid from cash on hand; however, the "building maintenance fund" dollar amount never changed on the balance sheet. He wondered why we have these if we never use them. President Graham shared that he feels strongly that if the Board allocates these types of monies, the staff can determine plans to spend it.

Treasurer Barbe shared that he likes the "earmarked reserves" because they indicate that there is a plan for a certain project. He recommended including the proposed "volunteer recruitment fund" as a line item in the budget. President Graham disagreed and shared that if we budget for such a thing, we would need a plan in place in order to spend it.

After discussion, President Graham entertained a motion. No motion was made.

**Bar-Sponsored CLE Program Fees**—President Graham shared that his wife is the Chair of the Bankruptcy & Creditors' Rights Section, and following a CLE program sponsored by the section, he heard feedback from section members who wondered why they were charged a \$15 fee for the program. Mark Gifford reminded the Board that it had approved a budget for the 2018/2019 fiscal year and revenue generated from CLE programs was factored in. Executive Director Wilkinson echoed Mr. Gifford's statement and reminded the Board that during the budgeting process when there was a need to project more revenue, this was an area that was increased. She also shared that other section councils had inquired about charging for CLE programs but offering a discount for section members. Some felt this would be an effective way to recruit new members to the section. Cathy Duncil reminded the Board that the amount budgeted for CLE program revenue was equal to the projected expense of CLE programs, so the budget essentially provides for a "break-even" of the cost of putting on CLE programs.

After discussion, Commissioner McCorkle made a motion to allow section members to attend their respective CLE programs at no cost. Commissioner Wilde seconded the motion. The motion failed.

Treasurer Barbe shared that he thinks this is a budgeting matter and suggested revisiting this as we begin budgeting for the next fiscal year. Vice President Addleman shared that he voted against the motion because, anecdotally, as a past chair of the CLE Committee, when members speak at Annual Meeting, they are still expected to pay the registration fee to attend the conference.

**Judicial Advisory Poll**

President Graham shared that a Circuit Court judge in Sheridan did not fare well on the 2018 Judicial Advisory Poll. As a result, he encouraged a discussion about whether or not the poll is being run correctly. He reported receiving feedback about possibly reviewing the poll to determine whether or not it may have an unintended effect. Commissioner Kisling shared that he spoke with that particular judge in Sheridan and she shared that the Circuit Court judges are in favor of the poll.

Mark Gifford asked for clarification on what could be changed to improve the poll. He remarked that the two flaws in the poll are that 1) it is voluntary and 2) it is completely on the honor system, as members are only supposed to evaluate those judges whom they have been before in the past 24 months.

Executive Director Wilkinson reminded the Board that the purpose of the poll is to provide members of the public information as they go to the polls and vote on the retention of judges. She also provided some history on the poll, shared some past feedback from all types of judges through the years and reminded the Board that the Bar is not obligated to conduct the poll. She reported that in the past, she asked the Bench-Bar Relations Committee to review the content of the poll. She recalled one instance that resulted in a few changes but most recently, the Committee has indicated that the poll is adequate. Executive Director Wilkinson reminded the Board that there are both judges and lawyers on the Bench-Bar Relations Committee.

Commissioner Neville shared her concern that there is no other resource out there for the public in preparation to vote on judicial retention. She recommended putting an invitation out to the respective judicial conferences and ask each to submit feedback on any changes to the poll. Commissioner Edwards shared that he is planning to approach his constituents to see if they think the Bar should continue conducting the poll.

**Treasurer's Report**

Treasurer Barbe reported that the Bar remains financially sound. He mentioned that the Bar's investment account at RBC Wealth Management has gone down in value with all the recent turbulence in the stock market, but he reminded the Board that it is a 10-year investment plan. He shared that we are already at 80% of income for the year due to our license fee cycle. He reported that expenses are mostly on track with where they should be for this time of year, and he doesn't anticipate any cost overruns.

Commissioner Edwards made a motion to accept the Treasurer's Report. Commissioner Neville seconded the motion. The motion carried unanimously.

**President-Elect's Report**

President-Elect Hibben reported that he will be attending the Bar Leadership Institute (BLI) in March in Chicago and will look forward to providing a report at the April meeting.



### **Vice President's Report**

Vice President Addleman reported that he is unable to attend BLI. He also reminded the Board that he is the past chair of the CLE Committee and has helped Kara Ellsbury, the new chair, during the transition so she is aware of strategies and processes of that committee.

### **Executive Director's Report**

Executive Director Wilkinson reminded the Board that it approved Senator Affie Ellis's proposal to establish a Federal Indian and Tribal Law Section at the November 2018 meeting. She reported that there are currently 18 members of the section, and she and Brandi Robinson are currently working with Senator Ellis to recruit members to serve on the leadership council of the section.

Executive Director Wilkinson provided an update on the Bar's ongoing project with West Edge Collective to design a new membership database. She reported on some of the delays of the project, including personnel changes at West Edge Collective. She assured the Board that the project is still moving along.

Executive Director Wilkinson reported that she received over 60 resumes from those expressing interest in the Administrative Assistant/Receptionist position at the Bar office. She and other staff members interviewed ten candidates this week and she hopes to make an offer to their top candidate next week.

### **Commissioner Reports**

*First Judicial District* – Commissioner McCorkle reported that she has not heard much from her constituents other than an occasional thank-you regarding her recaps from the Board meetings.

*Second Judicial District* – Commissioner Neville reported that her constituents are pleased that there is still a mechanism in place for the peremptory challenge. She was also pleased to report that the Albany County Bar Association meets about once per month and does a CLE program.

*Fourth Judicial District* – Commissioner Kisling reported that he has received positive feedback on the volunteer reference attorney program being sponsored by Equal Justice Wyoming.

*Sixth Judicial District* – Commissioner Edwards reported that his district had a Christmas party and they had a great turn-out.

*Eighth Judicial District* – Commissioner Wilde reported that some counties in his judicial district are slowly reviving their county bar associations and are trying to meet periodically. He was also pleased to report that there has been a number of younger members moving into the area.

## **Board/Committee Liaison Reports**

*Bench-Bar Relations Committee* – Commissioner McCorkle shared that she has not done anything since she has been appointed to serve as the Board Liaison to the committee. Executive Director Wilkinson shared that Jim Lubing, Chair, contacted her to see what he and the committee should be doing. She informed Mr. Lubing that this committee really performs on an as-needed basis and indicated he should not to be alarmed if he does not get contacted.

*Diversity & Inclusion Committee*—President Graham reported that he is the new Liaison to this committee, and he is trying to get this committee off of center. He shared that the committee has another meeting soon and he will be able to report more in April.

*Juvenile Pattern Jury Instructions Committee*—Commissioner Whiting reported that he has not heard anything. Executive Director Wilkinson shared that Jill Kucera, past chair, went off the Committee in December and Kevin Taheri is the new chair of the committee. She will reach out to Mr. Taheri and get a call scheduled.

*Legislative Developments Committee* – Executive Director Wilkinson shared that the committee met today and has voted unanimously to oppose House Joint Resolution 3, which supports a Constitutional amendment to require Senate confirmation for all Supreme Court selections. She reported that Robert Tiedeken, Chair, suggests that President Graham contact Senator Nethercott, who is the only lawyer sponsor of the bill.

President Weston Graham adjourned the meeting at 6:00 p.m. on Friday, January 11, 2019.

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Minutes Submitted by:

Sharon Wilkinson  
Executive Director