

President Rockwell called the meeting to order at 9:45 a.m. on July 27, 2018 in the Board Room of the Michael Franck Building in Lansing, MI.

Commissioners present:

Danielle Mason Anderson

David C. Anderson

Dennis M. Barnes, Vice-President

Aaron V. Burrell

Robert J. Buchanan, Secretary

Hon. Clinton Canady III

B.D. "Chris" Christenson

Richard L. Cunningham

Syeda F. Davidson

Shauna L. Dunnings

Andrew F. Fink III

Robert C. Gardella

Jennifer M. Grieco, President Elect

Edward L. Haroutunian

Krista L. Haroutunian

Kara R. Hart-Negrich

James W. Heath

Michael S. Hohaus

F. Thomas McCarthy Jr.

Joseph P. McGill

Hon. Maureen M. McGinnis

Shenique A. Moss

Hon. David A. Perkins

Daniel D. Quick

Victoria A. Radke

Hon. Michael J. Riordan

Donald G. Rockwell, President

Brian D. Shekell

Gregory L. Ulrich

Dana M. Warnez, Treasurer

Erane C. Washington

Commissioners absent and excused:

Joseph J. Baumann

Jules B. Olsman

State Bar Staff present:

Janet Welch, Executive Director

Marge Bossenbery, Executive Coordinator

Monique Brown, Lawyer Referral Coordinator

Gregory Conyers, Director, Diversity

Candace Crowley, Senior Consultant

Peter Cunningham, Assistant Executive Director and Director, Governmental Relations

Darin Day, Director, Outreach and Constituent Development

Danon Goodrum-Garland, Director, Professional Services Division

Kathryn Hennessey, Public Policy Counsel

James Horsch, Director, Finance and Administration Division

Robert Mathis, Pro Bono Service Counsel

Samantha Meinke, Communications Manager

Laurin Roberts Thomas, Public Services Counsel

Alecia Ruswinckel, Assistant Director, Professional Standards Division

Jeanette Socia, Human Resources Manager

Melissa Thouvenin, Licensing Services Specialist

Kari Thrush, Assistant Division Director, Member Services

Tish Vincent, Program Administrator, Lawyers and Judges Assistance Program

Anne Vrooman, Director, Research and Development

### Guests

David Watson, Executive Director, ICLE  
Timothy Denny, member  
Tracey Lee, member  
Chelsea Rebeck, SBM Finance Committee member

### Consent Agenda

Mr. Rockwell asked the Board if there were any items that needed to be removed from the consent agenda. Mr. Quick asked that agenda item 7 C, Religious Liberty Law section, be removed from the agenda. Mr. Ulrich asked that item 2 A, the minutes from the June 8, 2018 Board of Commissioners meeting, be removed from the agenda.

The Board received the minutes from May 22, 2018 Executive Committee meeting.  
The Board received the recent activities of the President.  
The Board received the recent activities of the Executive Director.  
The Board received Client Protection Fund Claims.  
The Board received Unauthorized Practice of Law Claims.  
The Board received the FY 2018 Financial Reports through May 2018.  
The Board received the SBM Section Annual Reports.  
The Board received Section Bylaw amendments from the Environmental Law, Insurance and Indemnity Law and the Solo and Small Firm Sections

A motion was offered and supported to approve the consent agenda as amended. The motion was approved.

### **June 8, 2018 Board of Commissioners Minutes**

Mr. Ulrich requested that the minutes be amended concerning a comment he made at the July Board meeting. A motion was made to amend the language concerning the comment to say: "Mr. Ulrich expressed concern that only "Nay" votes are called for when acting on motions before the Board, with no call for "Aye" votes." The motion was approved.

### **New SBM Section – Religious Liberty Law**

Mr. Rockwell introduced Mr. Timothy Denny and Ms. Tracie Lee, representing the proposed Religious Liberty Law section. They addressed the Board in support of the proposed section, and offered to respond to any questions.

Mr. Quick questioned the Bar's process for establishing sections. He inquired about the extent to which the Board, aside from ensuring that the group is meeting all of the requirements for a petition, has discretion to consider whether or not a section should be formed. He noted that there are administrative expenses not covered by section dues that the Bar incurs, and asked if there were any rules or guidelines, published or unpublished, that the Board should consider when a petition is brought to them.

Ms. Welch responded by saying that the rules for the creation of a section is in the SBM bylaws and that, within those rules, as a governmental agency and a mandatory bar, we cannot discriminate on who we offer our platform to. She stated that consistent with its mission as defined by the Supreme Court, the Bar could create rules or changes to the bylaws about what the requirements are to create a section, but the application of those rules would need to be applied evenhandedly and that each member must

be allowed to join any section. She stated that the Bar needs to live with the rules we have in place and cannot after the fact restrict or deny the formation of a section. To do so would expose the Bar to litigation.

Judge McGinnis made a suggestions that from an administrative perspective the Bar should review the current process in the future and determine what is the breaking point of the SBM as far as how many sections we can support.

A motion was offered and supported to approve the Religious Liberty Law section. The motion was approved. Mr. Quick abstained.

### **Janus and Fleck Decisions**

Ms. Welch provided the Board with an overview of the *Janus* and *Fleck* decisions along with a history of mandatory bar associations in the United States. A detailed memo and timeline were distributed to the Board members and Ms. Welch responded to questions from the Board.

She told the Board that the US Supreme Court will consider whether to grant cert in the *Fleck* case in September and that she will keep them informed as new developments arise.

Ms. Welch explained that if the SBM decides to submit an amicus brief that it should begin to consider the content now. She stated that an amicus brief was submitted by the State Bar in the *Keller* case and that some of the arguments that were made at that time were still applicable. She stated that it was too late to weigh in on the cert petition before the Court in September.

The Board members expressed their thoughts on the amicus brief including that if the SBM submitted an amicus brief, it should be on their own and not sign on to with other states, it would be irresponsible not to respond, that this might be an opportunity to inform the Court about the nature of a mandatory bar, and that caution should be used in drafting the content.

A suggestion was made to appoint a task force to monitor the issue and develop ideas about what an amicus would look like. The Board had differing opinions on the makeup of the task force and its focus, given the uncertainty of the time frame. Mr. Rockwell stated that he would begin to review the appointment process for a task force and welcomed any input from board members.

## **BOARD OFFICER ELECTIONS**

Mr. Rockwell announced that President-Elect Grieco succeeds him as president for 2018-2019.

Mr. Rockwell announced that Vice President Barnes succeeds Ms. Grieco as president-elect for 2018-2019.

A motion was offered and supported to elect Mr. Buchanan as vice president for 2018-2019. The motion to elect Mr. Buchanan as vice president was approved.

A motion was offered and supported to elect Ms. Warnez as secretary for 2018-2019. The motion to elect Ms. Warnez as secretary was approved.

Mr. Rockwell announced that Mr. Heath and Mr. Quick submitted letters of interest and résumés for the position of 2018-2019 Treasurer of the SBM in accordance with board procedure.

Mr. Quick reported to the Board that after consideration and acknowledging the credentials of Mr. Heath he is withdrawing his name from the race.

A motion was offered and supported to elect Mr. Heath as Treasurer for 2018-2019. The motion to elect Mr. Heath as Treasurer was approved.

## **COMMISSIONER COMMITTEES REPORTS**

### **Audit**, Dana M. Warnez, Chairperson

Ms. Warnez stated that there was no report, but reported that the staff will begin to meet with the auditors next week.

### **Finance**, Dana M. Warnez, Chairperson

Ms. Warnez provided the Board with the FY 2018 financial report.

### **Professional Standards**, Robert J. Buchanan, Chairperson

#### **Nominations for Michigan Indian Legal Services Board of Trustees**

A motion was offered and supported to reappoint Kendra K. Robbins and appoint Briana Green to the Michigan Indian Legal Services Board of Trustees. The motion was approved.

#### **Nominations for Institute for Continuing Legal Education Executive Committee**

A motion was offered and supported to re-appoint Miriam Blanks-Smart to the Institute for Continuing Education Executive Committee. The motion was approved.

#### **Regulatory Objectives Workgroup Report**

A motion was offered and supported to approve the recommendations received in the report from the regulatory objectives workgroup.

Mr. Quick expressed an interest in receiving more information about the background of the recommendations before the Board takes action on the report.

A motion was offered and supported to table this item. The motion was approved.

#### **Proposed Formal Ethics Opinion R-25**

A motion was offered and supported to adopt Proposed Formal Ethics Opinion R-25.

During discussion on the motion, Mr. Buchanan reminded the Board that this item was not adopted at a previous board meeting and that at the suggestion of the Board this opinion was posted for comment by all members. Those comments are included in today's board meeting materials. Mr. Buchanan referenced a letter from Mr. Ken Mogill and stated that because he had similar concerns to those expressed by Mr. Mogill expressed, he recommended that the opinion be sent back to the ethics committee for further review. Discussion followed.

A motion was offered and supported to table this item. A roll call vote was taken and the motion failed.

AYES: Anderson David, Barnes, Buchanan, Christenson, Davidson, Dunnings, Grieco, Hart-Negrich, Hohaus, Ulrich, Warnez, Washington

NAYS: Anderson Danielle, Burrell, Canady, Cunningham, Fink, Gardella, Haroutunian Edward, Haroutunian Krista, Heath, McCarthy, McGill, McGinnis, Moss, Perkins, Quick, Radke, Riordan, Shekell, Rockwell

The Board took a vote on the original motion and the motion to adopt Proposed Formal Ethics Opinion R-25 was approved. Mr. McGill abstained.

#### **Withdrawal of Outdated Ethics Opinion C-211**

A motion was offered and supported to support the withdrawal of outdated ethics opinion C-211. The motion was approved.

#### **Proposed Amendments of MRPC 1.1 and 1.6 to add a Comment on Technical Competence**

A motion was offered and supported to adopt the proposed amendments of MRPC 1.1 and 1.6 and to add a comment on technical competence. The motion was approved.

#### **Communications and Member Services, Dennis M. Barnes, Chairperson**

##### **Event Summary**

The Board received summaries from the BLF and UMLI events.

#### **SBM Endorsement Letter for MCCE Bid for National Mock Trial Finals**

A motion was offered and supported for the SBM to send a letter of support for the MCCE bid for the National Mock Trial Finals. The motion was approved.

#### **Public Policy, Jennifer Grieco, Chairperson**

##### **Court Rules**

#### **ADM File No. 2018-03: Proposed Amendments of Rules 3.201, 3.210, and 3.211 and Proposed Addition of Rule 3.222 and 3.223 of the Michigan Court Rules**

The proposed amendments of MCR 3.201, 3.210, and 3.211 and proposed addition of MCR 3.222 and 3.223 would integrate the collaborate law process designed under the Uniform Collaborate Law Act (159 PA 2014; MCL 691.1331-691.1354) into the state's trial court system for practical use, and would add a similar process for parties not represented by counsel who seek to submit a consent judgment.

A motion was offered and supported to support the proposed amendments of Rule 3.223 with additional language proposed by the Family Law Section to 3.223(D) that both parties be present to provide the court with verification that the agreement is by consent. The motion was approved.

#### **ADM File No. 2002-37/2018-20: Proposed Amendment of Rule 2.002 of the Michigan Court Rules**

The Court is considering two different proposals regarding fee waivers for indigent individuals. Alternative A is a version prepared internally in anticipation of implementation of a statewide e-Filing system. Alternative B is a proposal submitted by the State Bar of Michigan. The two versions are similar in some respects, but have significant differences. For example, the Bar's version would establish a standard for indigency as living in a household whose gross household income is under 200% of the

federal poverty level, would create a status of “financial hardship,” would allow the court to conduct further inquiries if necessary to determine whether a party is indigent, and would create a right to request a hearing if a petition for indigency is denied. The alternative version does not include such provisions.

A motion was offered and supported to support Alternative C proposed by the Consistent Fee Waiver Workgroup with the amendments presented. The motion was approved.

**ADM File No. 2017-16: Proposed Amendment of Rule 6.302 of the Michigan Court Rules**

The proposed amendment of MCR 6.302 would require a trial court judge to advise a defendant that if a plea is accepted, the defendant will give up the right to appeal issues that might have been available after the conclusion of a trial.

A motion was offered and supported to support the proposed amendment to Rule 6.302. The motion was approved.

**ADM File No. 2013-05/2014-46: Proposed Amendment of Rule 6.502 of the Michigan Court Rules**

The proposed amendments would make several substantive changes in MCR 6.502 regarding post judgment relief from judgment motions. First, the proposed new language in MCR 6.502(G)(2) would insert an “actual innocence” waiver provision similar to that in MCR 6.508(D)(3). Further, MCR 6.502(G)(3) would be added to clarify that shifts in science are included in the definition of “new evidence” for purposes of the exemption from the successive motion limitation.

A motion was offered and supported to support the amendments MCR 6.502 as amended below:  
(3)(a) in a field of scientific knowledge, including shifts in scientific consensus or the emergence of differing or contradictory scientific theories that were not previously available to the defendant. The motion was approved.

**Rule 3.8 of the Michigan Rules of Professional Conduct**

new language would be added to MRPC 3.8 to require certain actions by a prosecutor who knows of new, credible, and material evidence creating a reasonable likelihood that defendant did not commit the offense of which defendant was convicted, or who knows of clear and convincing evidence that shows defendant did not commit the offense. The proposed additional language of MRPC 3.8 is taken from the ABA Model Rules of Professional Conduct 3.8.

A motion was offered and supported to support the amendments MPRC 3.8 as drafted. The motion was approved.

**ADM File No. 2017-20: Proposed Amendment of Rule 7.202 of the Michigan Court Rules**

The proposed amendment of MCR 7.202 clarifies what constitutes a final post judgment order in a domestic relations case for purposes of appeal by right. This issue was raised in *Marik v Marik*, docket 154549, during oral arguments held earlier this term.

A motion was offered and supported to support the amendments MCR 7.202 as drafted. The motion was approved. The motion was approved.

**ADM File No. 2017-29: Proposed Amendment of Rule 4.4 of the Michigan Rules of Professional Conduct**

The proposed amendment of MRPC 4.4 would define the responsibilities of a lawyer who receives a document that was inadvertently sent. This proposal was submitted by the State Bar of Michigan. Note that the Court adopted MCR 2.302(B)(7) in 2008 to address the issue of discovery material inadvertently transmitted, and that rule requires the inadvertent recipient to return or destroy the alleged protected material, and may promptly submit the material to the trial court for a determination of the claim. To the extent that the final paragraph of the proposed new comment language apparently leaves such a decision to the discretion of the lawyer, this proposed new language may conflict (or at least exist in tension) with the existing language in MCR 2.302(B)(7).

Support what position already taken and pass along comments.

A motion was offered and supported to support the amendments MCR 4.4 as drafted and support the Professional Ethics Committee response to the Court's staff comment. The motion was approved.

**ADM File No. 2017-25: Proposed Amendment of Rule 7.1 of the Michigan Rules of Professional Conduct**

The proposed amendment of MRPC 7.1 would restrict and regulate the use of the terms "retired" or "former" for a justice, judge, referee, or magistrate who returns to the practice of law. This proposal is a narrower version than the one submitted by the State bar of Michigan Representative Assembly.

A motion was offered and supported to support the proposed amendment to MCR 7.1. The motion was approved.

Legislation

**HB 5386** (LaSata) Human services; other; eligibility requirements for Medicaid and supplemental nutrition assistance (SNAP) programs; enhance. Creates new act.

A motion was offered and supported to table this item. The motion was approved.

**Jurisdiction for Prosecution**

**SB 0951** (Gregory) Criminal procedure; jurisdiction; jurisdiction for prosecution for delivery of a controlled substance causing death; modify. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 5a to ch. II.

**SB 0952** (Zorn) Criminal procedure; jurisdiction; venue for prosecution of delivery of a controlled substance causing death; modify. Amends sec. 317a of 1931 PA 328 (MCL 750.317a).

A motion was offered and supported that the two pieces of legislation are Keller permissible in that it affects the functioning of the court. The motion was approved.

A motion was offered and supported to support this legislation. The motion approved. Mr. Quick abstained.

**HB 5396** (Lucido) Civil procedure; evictions; proceedings to recover possession of premises because of assault, battery, or unlawful drugs; modify to require a conviction. Amends sec. 5714 of 1961 PA 236 (MCL 600.5714).

A motion was offered and supported that this legislation is not Keller permissible. The motion was approved

**HB 6096** (Lucido) Property; other; entry by owner to evict; modify process. Amends sec. 2918 of 1961 PA 236 (MCL 600.2918).

A motion was offered and supported that this legislation is not Keller permissible. The motion was approved

### **Young Lawyers Section**

#### **“A Way Forward: Transparency in 2018” by Law School Transparency (Iowa State Bar Association Young Lawyers Division)**

The report recommends that the American Bar Association and law schools take steps to improve legal education: (a) young lawyer representation in accreditation; (b) increased data transparency; (c) user-friendly data presentation; (d) disclosures at time of admission; and (e) voluntary disclosures by law school.

A motion was offered and supported to table this item to allow time to solicit input from Michigan law schools. The motion was approved.

## **SBM STRATEGIC PLAN – STEERING COMMITTEES**

**Communications and Member Services Steering Committee**, Dennis M. Barnes, Chairperson  
Mr. Barnes reported that there was nothing new to report.

**Implementation and Innovation Steering Committee**, Dana M. Warnez, Chairperson  
Ms. Warnez reported that there was nothing new to report.

**Professional Standards Steering Committee**, Robert J. Buchanan, Chairperson  
Mr. Buchanan reported that there was nothing new to report.

**Public Policy Steering Committee**, Jennifer M. Grieco, Chairperson  
Ms. Grieco noted that some of the changes to the Public Policy web site that were recommended by the steering committee have been implemented. She stated that the changes make it easier for SBM members to weigh in on public policy issues.

## **LEADERSHIP REPORTS**

**President’s Report**, Donald G. Rockwell, President  
***In Memoriam* policy for *Michigan Bar Journal***

Mr. Rockwell reported that each month in the *Michigan Bar Journal* there is an *In Memoriam* section, which lists members who have passed away. In a recent edition, a former member, who happened to be a judge who was removed from the bench and disbarred, was listed. The State Bar received a few comments about the appropriateness of this listing. Current practice is to include in the *In Memoriam* notice any person who is in our membership database and who we learn has passed away, even if the



person has been removed from membership by disbarment. Staff is looking for guidance on future practice.

A motion was offered and supported to continue the current practice. The motion was approved.

### **Michigan Indigent Defense Commission (MIDC) Re-Appointment**

A motion was offered and supported to recommend the reappointment of Ms. Nancy Diehl to the Governor's office as a representative of the State Bar on the MIDC. The motion was approved.

### **Executive Director's Report, Janet K. Welch, Executive Director FY 2019 Proposed Budget**

Ms. Welch asked Mr. Horsch to provide the Board with an overview of the FY 2019 Proposed Budget. Mr. Horsch stated that the budget was reviewed by the Finance Committee on July 11 and was approved to move forward for Executive Committee and the Board for review. A motion was offered and supported to adopt the FY 2019 Proposed Budget as presented, with a reduction of \$35,000 for IT telephone expense proposed by staff. The motion was approved.

### **SBM Standing and Special Committees 2018-2019 Resolution and Matrix**

Ms. Welch asked Ms. Crowley to explain the process that was used to prepare and develop the standing and special committee resolution and matrix for 2018-2019. Ms. Crowley described the changes and stated that the proposed changes represent a determination about the best way to proceed in accomplishing the strategic plan.

Proposed changes include eliminating the strategic plan steering committees and forming a new Strategic Planning Commissioner Committee, eliminating the Delivery of Legal Services for All special committee currently in place, transforming the Access to Justice and Affordable Legal Services Initiatives into standing committees, and the Lawyer Referral Service Initiative has been converted into the Online Legal Resource and Referral special committee.

A motion was offered a motion and supported to approve the SBM Standing and Special Committee 2018– 2019 Resolution and Matrix. The motion was approved.

### **Commissioner Committee and Liaison Appointment Process**

Ms. Ruswinckel described the commissioner committee and liaison appointment process. She informed the Board that they would receive an email next week describing the method they should use to indicate their preferences to serve as a section liaison and on a commissioner committee.

### **LRS Update**

An update will be provided at the September Board meeting.

### **Receivership Workgroup Update**

An update will be provided at the September Board meeting.

### **ABA Appointment**

Ms. Welch reported that she has been appointed as a member of the American Bar Association's Standing Committee on Bar Activities and Services.

### **Detroit Satellite office**

Ms. Welch stated that the lease agreement with University of Detroit Mercy Law School for a SBM Satellite office has been signed.

### **Introduction of new SBM staff**

Ms. Goodrum Garland introduced Ms. Melissa Thouvenin, Licensing Services Specialist to the Board and Ms. Roberts Thomas introduced Ms. Monique Brown, Lawyer Referral Services Coordinator.

### **Representative Assembly (RA) Report**, Joseph P. McGill, Chairperson

Mr. McGill reported that the RA officers and chairs continue to move forward with the introspective analysis of the RA and are in the process of reviewing the Permanent Rules of Procedure in an effort to reinvigorate the RA and make it more nimble and responsive. He stated that they are focusing on outreach to the general membership, sections, geographic bar associations, and specialty bar associations asking how the RA can be more responsive to each of them.

Mr. McGill stated that plans are underway for the September meeting, where agenda items may include discussion and action on the use of cell phones in the courtroom, attorney receiverships, proposed revisions to the Permanent Rules of Procedure, and the retention of an outside consultant. He reported that awards will be given to Judge Victoria Roberts and Ms. Michelle Fuller, and that staff will give a presentation on governance issues.

Mr. McGill informed the Board that there will be a contested election for the 2018-19 RA Clerk.

### **Other Reports**

#### **American Bar Association (ABA) Report**

Mr. Ulrich mentioned that the ABA is struggling with a decrease in memberships and is looking at ways to address that issue.

#### **Young Lawyers Section (YLS) Report**, Syeda F. Davidson, Chairperson

Ms. Davidson provided the Board with an update on recent activities of the YLS.

## **FOR THE GOOD OF THE PUBLIC AND THE PROFESSION**

### **Comments or Questions from Commissioners**

Ms. Grieco suggested that if they have not already done so, Board members should listen to the SBM "On Balance" podcasts as they provide useful information.

### **Comments or Questions from the Public**

There were none.

### **Adjournment**

The meeting was adjourned at 2:45 p.m.