

NEW HAMPSHIRE BAR ASSOCIATION
BOARD OF GOVERNORS MEETING
Thursday, March 17, 2022
4:00 PM

**LIVE WITH REMOTE OPTION
MINUTES**

Present for all or part of the meeting were:

Abby Sykas Karoutas
Cathy Shanelaris
Chrissy Hanisco
Christopher T. Regan
Donald H. Sienkiewicz
James Shepard
Jason B. Dennis
Jesse W. Friedman
Jonathan M. Eck
Kathleen M. Mahan
Lindsay B. Courtney
Paul B. Kleinman
Richard Guerriero
Scott J. Whitaker
Susan Aileen Lowry
Vanessa Wilson

Viktoriya A. Kovalenko
Michael J. Iacopino, ABA Assoc. Delegate
Jennifer Parent, ABA State Delegate

Justice Gary Hicks, NHSC Liaison
George R. Moore
Mary Jenkins
Paula Lewis
Lynne Sabeau
Deborah Hawkins
Allison Borowy

Guests:
Kathy Fox, NHBA Lobbyist
Geoffrey Gallagher, Ethics Committee

A meeting notice reminder, a link to the agenda and related materials were emailed to all governors on March 14th. The agenda is duplicated below in the order of consideration of agenda items. Unless otherwise noted, all motions reported are deemed to have been appropriately proposed, seconded, and voted upon by those present.

A. Call to Order Richard Guerriero

President Richard Guerriero called the meeting to order at 4:04 p.m.

REGULAR BUSINESS – CONSENT ITEMS

B. Membership Status Changes for February 2022 Paula Lewis

The status changes are attached as a permanent part of these minutes.

C. Minutes of February 17, 2022 Meeting Susan Aileen Lowry

ACTION

On motion to approve the consent agenda. Passed unanimously, with one abstention, Scott Whitaker.

PRESENTATION / DISCUSSION / ACTION ITEMS

D. NHBA Legislation Committee Recommendations (Part 2) – ACTION item

Michael Iacopino, Chair
Kathy Fox, NHBA Lobbyist

1. Review and Action on positions

Chair Iacopino discussed HB 1343 – (Allowing limited legal services to be provided by certain paraprofessionals) and noted that it passed the House and is on its way to the Senate. The other bill that the NHBA is watching closely, HB 1073- (Modifying attorney exemptions under RSA 91-A) was amended by the House. Mike read the amended version, which added language that modified the attorney exemption to read “ Section XII. Records protected under the attorney-client privilege or the attorney work product doctrine *consistent with the public’s right to know*. It will now be considered by the Senate.

He went on to discuss HB 1396 (relative to the payment of child support). The Legislation Committee is recommending a position of Support for this bill. This bill was submitted to correct confusing language in the current statute. The court plans to implement the changes even if the bill does not pass. Chair Iacopino noted that the rest of the bills to be considered by the board today have recommended positions of information or no position. The board had no further questions or discussion on the slate of bills.

ACTION

On Motion to adopt the recommended Legislation Committee positions on the bills as presented. Passed.

2. Return of paraprofessional bill (HB 1343) in the Senate

Richard Guerriero asked about the current status of this bill. Lobbyist Kathy Fox said that it will be referred to the Senate Judiciary Committee for consideration and recommendation. She noted that the board could decide to take a position and testify when the bill comes before the Senate.

E. Request from NHBA Ethics Committee re: Rule 8.4 (g)

Richard Guerriero

Richard received a request from the Ethics Committee for approval to submit a rule change for the March meeting of the NHSC Advisory Committee on the Rules. After conferring with the board by email, it was decided to take this matter up at today’s meeting so the board would have an opportunity to discuss it more fully. Richard then gave background on this proposed rule change. As noted in a discussion at the November 2021 board meeting, the Attorney Discipline Office (ADO) and the NHBA Ethics Committee got together to discuss the proposed rule change and worked out the agreed upon language. As a part of the change, they decided that they needed to define “primary purpose” as follows:

Rule 1.0 (o) “Primary purpose” means the principal, dominant or leading basis for the conduct engaged in, which may be inferred from the circumstances, without regard to any potential or

actual secondary purposes for or effects of such conduct. Primary purpose does not mean the sole or only reason for the conduct.

ACTION

On Motion: to approve the proposed rule change as negotiated and agreed upon by the Attorney Discipline Office and the NHBA Ethics Committee. Passed with one abstention, Scott Whitaker.

Board member and Advisory Committee on the Rules member Susan Aileen Lowry noted they received an extension from the NHSC Rules Committee. This matter will be on the Rules Committee agenda for June.

1. Ethics Committee Proposal to revise NH RPC 3.8

Geoff Gallagher, Member,
Ethics Committee

President Richard Guerriero gave some background on this proposal, which was included in the board meeting materials for today. He noted that this has been controversial in the past. The rule addresses what a prosecutor should do if they receive evidence that someone was wrongly convicted. The Ethics Committee proposal is intended to proactively provide guidance to prosecutors regarding their obligations regarding post-conviction evidence. They are not suggesting there is any existing deficiency in how New Hampshire prosecutors presently conduct themselves.

Ethics Committee Member Geoff Gallagher spoke about the Ethics Committee Proposal. He says it tracks the language of the ABA model rule with one difference. The Ethics Committee used “reasonable probability”; the ABA used “reasonable likelihood” language.

Geoff explained that the committee thinks reasonable probability is better language as it will key people to look at the case law. The Ethics Committee thinks the prosecutor has an ethical responsibility and this change will help the prosecutor navigate his or her obligations. The current rule is silent on this point. There are 22 states that have adopted the rule in some form. Most have adopted the suggested language. The committee doesn’t want to fault a prosecutor if they acted in good faith and made an error, so they included language in their proposed change to protect against this.

Geoff shared that the Ethics Committee met with Attorney General and the US Attorney’s office when working on this revision. He noted that the Ethics Committee tried to engage with all those that are concerned with this issue, and he feels it was a better process because of that effort.

The purpose of the comment in the proposal is to help explain the suggested change. Some prosecutors felt they were being attacked. The Ethics Committee’s goal is to help to maintain the integrity of the prosecutorial bar in NH. Few things are worse than a wrongful conviction. It undermines public faith in the justice system. Some in the prosecutorial bar have suggested we don’t need this change as we don’t have a suppressed evidence problem in NH. Geoff thinks the cost of a wrongful conviction where exculpatory evidence is withheld is so high that this change is warranted.

They recognize that it does place a burden on the prosecutor but feel this is appropriate. It adds an ethical obligation that tracks the legal obligation under the Rules of Criminal Procedure.

The board discussed the proposed rule change. NHBA Executive Director George Moore felt there is no downside to adopting this rule. Geoff shared personal experiences of discovery problems, which were dealt with appropriately, but stressed there is currently no rule to guide prosecutors in this instance. The board discussed delaying action. Geoff responded the Ethics Committee felt that delaying would make things worse.

The Ethics Committee thinks the steps that should be taken are spelled out in their added language. The questionable evidence could always be filed under seal, so only the judge would know the content.

Mike Iacopino added that this would give political cover to our line prosecutors, the county attorneys who are elected. They might not want an unintentional error brought to the court's attention in a public manner, especially if prior to election season. This is a positive note to why this revision should be supported. The discovery of such a prosecutorial error is rare.

There was discussion about why this is not addressed in the criminal procedural rules rather than the Rules of Professional Conduct. Geoff responded it is part of these rules, however it is also an ethical obligation. Violations of criminal procedure rules may not rise to an ethical violation. The NH Rules of Professional Conduct are specifically geared toward ethical conduct.

Clear and convincing evidence is compelling evidence. President Richard Guerriero added that he thinks that there is not a rule of criminal procedure when these things occur after the trial is over. There is not a constitutional provision for something that happens after conviction.

ACTION

On Motion: To adopt and approve the NHBA Ethics Committee recommended change to NH Rules of Professional Conduct rule 3.8. Passed, unanimously with one abstention, Scott Whitaker.

F. Interim Report from the Judicial Candidate Screening Subcommittee Sandra Cabrera

President Richard Guerriero reported on behalf of subcommittee chair Sandra Cabrera, who could not attend the meeting today. The committee is looking closely at how the ABA vets nominees. Changes under consideration include finding a way to have more time to vet nominees, assigning one board member to be lead "investigator" for each nominee, requiring a minimum number of inquiries per nominee, providing a procedure to insure a nominee has a chance to respond to any negative information, changing the possible recommendations that might be made, and changing the notice process regarding our recommendations. This is just an interim report. No action needed today.

It was shared that the board has vetted 19 nominees in 14 months.

G. Treasurer's Report

Chris Regan/Paula Lewis

Treasurer Chris Regan stated that all have a copy of Paula's narrative, and he recommends reading it. This financial statement goes through the end of the January. He shared some highlights:

Revenues - Most membership dues are received in the first quarter of the fiscal year, and, per Generally Accepted Accounting Principles (GAAP), the revenue must be reported over the course of the fiscal year. Therefore, 1/12 of the total membership dues billed on June 1 each year is recognized as revenue monthly over the course of the fiscal year resulting in a declining balance in Deferred Revenue each month until the membership dues revenue is reported in full at fiscal year-end.

Expenses – There continue to be lower personnel costs due to some vacant positions and attrition. Most have been filled.

LRE costs are starting to ramp up again after being dormant due to covid.

Director of Business Operations Paula Lewis added that there is very little change overall between last month and this month.

H. Revisit Protocol for Return to Live CLE and Section Programs

Mary Jenkins

Director of Professional Development Mary Jenkins noted that the board wanted to revisit this protocol monthly, when adopted in February. The CLE Committee met Tuesday and have not made further recommendations beyond their initial one, which is to follow CDC guidance and state and local laws and regulations.

Mary stated that the CDC has dropped mask and social distancing recommendations. Merrimack County currently has a low transmission rate. She adds that if the Board of Governors decides to lessen restrictions, she would like to maintain the liability waiver, release of claims and acknowledgments. This is especially so if we are going to increase the capacity of each room, Mary would prefer that the capacity be raised partway and state that masks are recommended, and we reserve the right to change things if the situation changes. Several of the members of the CLE committee suggested the registration capacity be increased from 30 to 60 initially (full capacity is 90).

George referenced an email from Peter Hutchins, member of the CLE committee and a frequent CLE presenter, suggesting that we drop the safety concerns noted above. We also have a request from the Judicial Conduct Committee (JCC) to begin meeting here with no safety requirements. President Richard Guerriero added that the Federal Court has dropped masking requirements as of yesterday.

There was discussion about the proposal. Many board members felt that things have changed and the bar should drop constraints. People will choose to attend online for convenience, not necessarily due to safety concerns. There was discussion about the building air exchange which

is good on the 3rd floor. There are also added air filter and flow machines for the lower-level seminar room.

There was discussion about the responsibility of the board today. The board can decide policy for public meetings at the Bar Center. It was suggested we follow CDC guidelines and can adjust our policy as needed.

Board member Chris Regan suggested considering 3 factors – how close people will be, will there be masks and the duration of time people are next to each other. Mary responded that at capacity of 90, people are close together at tables. The CLE time duration is ½ day or full day. The offsite CLE's will have no web option.

ACTION

On Motion: To revise the bar policy for onsite CLE and meetings to follow CDC guidelines and to reserve the right to make modifications to the rules if determined necessary. NHBA reserves the right to make rules that are more stringent than at present, if, in the judgment of the management, such changes as are prudent. Passed 11-5.

I. Executive Director's Report

George Moore

1. Board Election Slate

George shared that we thought we had someone interested in running for the Hills North position, but that didn't work out. No one submitted a petition. Both this seat and the Strafford County seat will be a board appointment until the next election.

ACTION

On Motion: To put a write-in option (in the absence of a petition being submitted) for both Hills North and Strafford on the ballot. Passed, unanimously.

2. Committee on Cooperation with the Courts - Bench Bar Conference Plans - June 10, 2022

We are engaged in planning this conference. It will be a diversified group with a good number of participants being judicial officers as well as practitioners, whose task will be to tackle some of the larger issues in the court system. It will be held at The Executive Court Banquet facility in Manchester.

3. Other

The NHBA has started a podcast – Bar Discourse, which will be linked on our website, and publicized through our social media. The first one was on the topic of international law and the second one is an interview with Mike McCann at UNH law on the topic of how the environment has changed sports.

J. President's Report

Richard Guerriero

1. The officers went over to the Supreme Court recently for their periodic meeting with the justices. They had a very good meeting, reviewed the MYM and other issues with the court. They will continue quarterly meetings with the court.

K. Items for Review Requiring No Action

1. Ethics Corner Article - Withdrawal Obligations with Respect to Client Lies or Fraud – Part 3

L. Adjournment - The meeting adjourned at 5:35 p.m.

Respectfully Submitted,

Deborah J. Hawkins

Deborah J. Hawkins for Susan Aileen Lowry, Secretary

Membership Status Changes

Presented to the Board of Governors March 17, 2022

Active to INACTIVE:

- 268412 Sheng, Charles, Burlington, MA (Effective February 8, 2022)
274499 DeGoosh-DiMarzio, Eric, Cranston, RI (Effective February 11, 2022)

Active to INACTIVE RETIRED:

- 13106 Miller, William, Hudson, NH (Effective February 24, 2022)
2169 Roberts, Sanford, Kittery, ME (Effective February 28, 2022)
1643 May, Mark, Deerfield, NH (Effective February 28, 2022)
2433 Steere, Douglas, Groton, CT (Effective January 12, 2022)

Active to FULL-TIME JUDICIAL:

- 17177 Zaino, Michael, Hampton, NH (Effective November 10, 2021)
1853 Murray, Scott, Barrington, NH (Effective July 14, 2021)

Active to DECEASED:

- 2816 Chisholm, Anne, Byfield, MA (Effective December 29, 2021)

Inactive to ACTIVE:

17450 Dingley, James, Manchester Center, VT (Effective February 22, 2022)

Inactive to FULL-TIME JUDICIAL:

20558 Swegart, Daniel, Concord, NH (Effective November 10, 2021)

Suspended to DISBARRED:

6035 Introcaso, Julie, Merrimack, NH (Effective February 25, 2022)

Military Active to INACTIVE:

19476 Cohen, Jack, East Palestine, OH (Effective February 16, 2022)