

NEW HAMPSHIRE BAR ASSOCIATION
BOARD OF GOVERNORS SPECIAL MEETING
May 26, 2022
4:30 PM
REMOTE ONLY
MINUTES

Present for all or part of the meeting were:

Abby Sykas Karoutas
Cathy Shanelaris
Chrissy Hanisco
Christopher T. Regan
Heather A. Cherniske
James Shepard
Jonathan M. Eck
Leslie C. Nixon
Lindsay B. Courtney

Monique Schmidt
Paul B. Kleinman
Richard Guerriero
Sandra L. Cabrera
Vanessa Wilson

George R. Moore
Sarah Smart

This special meeting was called for the sole purpose of finalizing a new Judicial Screen Procedure introduced at the May 19, 2022 board meeting.

President Richard Guerriero called the meeting to order. He spoke about his concern that a small number of board members were able to attend this meeting, and his desire to have the entire board vote on this procedure. After some discussion, the board decided to conduct a vote by email after this meeting to assure that all board members have had a chance to weigh in on the proposed process. The document drafted at this meeting will be sent by email to all board members with a vote requested by Tuesday, May 31, 2022.

Richard also shared that the NHSC is on board with the NHBA being involved in doing peer review on judicial candidates and will help facilitate communication and cooperation with the Governor. Richard has also spoken with Chuck Douglas, chair of the Judicial Selection Commission. Chair Douglas welcomes the participation of the Board of Governors, and the inclusion of the NHBA in the judicial selection process. He is willing to connect the work of the Judicial Selection Commission with the NHBA Board of Governors' process for judicial vetting. Richard states that this is an opportunity for the NHBA to modify our procedure and be included as a recognized player in the process. Therefore, we will have more opportunity to comment on those nominated to the bench.

Executive Director George Moore added that board and subcommittee member Chris Regan had some good suggestions about tweaks to the procedure. George shared his opinion that we could make a procedure that would be acceptable to all stakeholders in the process. Under the new procedure, the board would be conducting a peer review that is recognized by all involved, which is a giant step forward from the past.

President-Elect Sandra Cabrera presented the plan for today's meeting. There will be motions on six discrete issues that were discussed extensively at the last two board meetings. She asked members to be brief in their remarks and speak if they have something new to add to the discussion. President Guerriero

suggested that a final policy will be agreed upon at this meeting and it will be put to the entire board for an email vote by May 31st.

The board discussed the first suggested motion regarding the number of calls and agreed that aiming for 10 calls is optimal, but there should be a floor of at least 5 calls made. It was noted that sometime there is difficulty getting input on some nominees. There will be an explanation added to the communication to the Governor and the Executive Council if the board is unable to get the prescribed number of calls. A friendly amendment was accepted to set an aspirational goal of 10 calls but have there be a minimum of 5 calls made.

ACTION

On motion to set an aspirational goal of 10 calls but must make minimum of 5. Passed 13-0.

President Richard Guerriero shared his opinion that the requirement of written summaries (the second suggested motion) makes him the most nervous about potentially having to share this information. Vice President Jonathan Eck agrees. Board and subcommittee member Jim Shepard thought the board could consider changing the bylaws that to say notes from an executive session are confidential. He also would ask to add “if practicable” to the motion. There are times when the calls are being made hours before the meeting. Others agreed with the addition. Those that are in favor felt it was important the board members had time to review the information in advance and digest it. This allows for a more thorough process and increased quality.

ACTION

On motion for the procedure to call for written summaries of each call be shared with the board 24 hours before the meeting. Failed 3 – 9 with one abstention, Paul Kleinman.

The third suggested motion made was for the procedure to require adverse information that may bear on the candidate’s rating to be shared with the nominee at the interview to the extent necessary to put the nominee fairly on notice of the adverse information.

President-Elect Sandra Cabrera noted that the Court was interested in having this requirement be part of the procedure. The board discussed this suggested motion at length. It was suggested that the language be added to the extent practicable. The concern was that the board may find out adverse information after the nominee is interviewed. President Richard Guerriero added he has been able to disclose adverse information to the board while protecting the confidentiality of the source. He proposed a friendly change to the original amendment: “to the extent necessary to put the nominee fairly on notice of the adverse information”. The aim is to be fair to the nominee, our members, and the sources. By putting this in, we are introducing a fairness standard. This motion is about due process for the nominee. Strafford County Governor Abby Sykas Karoutas suggested the motion be amended to say will share to the extent possible to achieve the goal, rather than requiring it. Vote on this friendly amendment failed 5- 7. Vice President Jonathan Eck feels this is the most important part of the procedure. A vote was taken on Abby’s amendment. There were multiple amendments and versions of the motion. Board and subcommittee member Chris Regan suggested that this be worked on further no matter what is decided today. All stakeholders should be comfortable with the final product.

President Richard Guerriero submitted the following motion for consideration: Adverse information *shall be* shared with the nominee to the extent that the board believes fairness requires disclosure. He is

trying to put together something that recognizes that the Court would like us to disclose this information, but it is going to be a judgement call every time. The board continued discuss wording of the motion.

ACTION

On motion that adverse information *shall be* shared with the nominee to the extent that the board believes fairness requires disclosure. Passed 10 – 3.

The board discussed the fourth proposed motion, that the finding of qualified with reservations be removed from the procedure. President-Elect Sandra Cabrera noted that this aspect of the procedure is very important to the Court. The board discussed this motion. It was shared that the Court and others view the ABA vetting process as a good one, and it doesn't include this rating. The board wants to be able to have nuanced ratings, such as well qualified and qualified. In reality, Sandra feels, a candidate is either qualified or not, so this rating is unnecessary, she feels. Board members felt that the ABA and the NH process are different. The board has only used this rating once in the past two years. Sandra shares that there have been concerns expressed about the NHBA procedure for judicial vetting. President Richard Guerriero noted if we take away this rating, the vote will be unqualified, rather than qualified with reservations.

ACTION

On motion to remove qualified with reservations from the ratings. Passed 12-1.

The board also discussed the use of the well qualified rating.

ACTION

On motion that the rating of well qualified be kept. Passed 12-1.

President Richard Guerriero shared that he thought the research that the subcommittee did was good, and the old existing criteria was vague. He is in support of the new criteria.

ACTION

On motion to accept the new rating criteria and guidance. Passed 11 – 1.

The board then discussed the suggested motions regarding timing of notification to the nominee of the board's rating. Merrimack County Governor Heather Cherniske shared her opinion that out of collegiality and due process concerns, and fairness to our members that are required to be a part of this association, we allow nominees the chance to know what our decision is going to be, and give them a chance to withdraw from the process if needed.

ACTION

On motion to adopt option C (Notify the nominee of his or her rating, if practicable, before the EC and Governor's office, but in no case shall such advance notice be greater than 24 hours advance notice.) Passed. 13-0.

The board then discussed the last proposed motion to accept the remaining proposed procedure except as otherwise amended here. Some felt it is difficult to vote without having a clear sense of what are voting on. President Richard Guerriero shared that the plan is if this group approves everything, the whole revised procedure decided on tonight will be put to a vote by the entire Board of Governors by email.

This would give board members a chance to vote against the overall procedure if they still had concerns. Vice President Jonathan Eck expressed his concern about two aspects that have not been discussed – Item 8D that requires the bar president and/or any investigators to conduct additional inquiry to follow up on any adverse information, and Item 8E that says one person should be designated to read all writing samples and provide a written summary. These are two examples of substantive matters that haven't been discussed. President-Elect Sandra Cabrera responded that 8E uses the language should, rather than shall. It was expressed that the “should” language establishes a duty. Sandra walked the board through the procedure and discussed areas that had been modified. Paragraph 1 states the purpose. Paragraph 2 was designed with the hope to give the board more time to complete the process. Paragraph 3 was added so the President is given more help and flexibility. Paragraph 8 contains many of the changes about confidential information and how it is used. There was additional discussion about section 8D, which is virtually identical to the ABA procedure. 8E assumes the writing samples are provided to the board, and often this is not the case. 8F requires disclosure to all parties of when the procedure cannot be followed and the reasons why, and why the board felt it could provide a rating under these conditions.

There was further discussion about 8D – to some this section seems ambiguous in just what “additional inquiry” means. Jonathan felt if we add things to the procedure they create a duty to do them. President Guerriero suggested deletion of 8D – since we have made a commitment to advise the nominee of adverse information.

ACTION

On motion to delete 8D – If the President and/or any investigators obtain any adverse information about the nominee from their inquiries, the President and/or any investigators must conduct additional inquiry to follow up on any such information. This may include additional inquiries of people who know the nominee, beyond the recommended ten (10). Passed 12-1.

President-Elect Sandra Cabrera continued to summarize the rest of the procedure changes. There was discussion about modifying section 10 of the procedure. There was also discussion about changing section 8C.

Merrimack County Governor Heather Cherniske proposed leaving in the writing sample paragraph but removing the written summary language. In addition, Sandra would like to change the language to say the summary may be provided, rather than should be provided.

ACTION

On motion to leave 8C in the procedure but take away the written summary language, and change the language to say the summary may be provided, rather than should be provided. Passed 10 – 2.

The discussion returned to Paragraph 10 of the proposed procedure.

ACTION

On motion to remove paragraph 10 from the procedure. (While confidentiality is an essential part of this evaluation process, the NHBA recognizes, at the same time, that the Board must also be fair to the nominee with respect to adverse comments that are received during the investigation. This is why the Board will afford the nominee an opportunity to discuss or rebut adverse information during his or her interview. The Board will not disclose the identity of a source providing information concerning the candidate. Instead, the Board may disclose to the nominee as much of the underlying basis and context of

the adverse comments as reasonably possible, consistent with the promise of confidentiality made to sources. The Board shall also discuss with the nominee any adverse comments that are a matter of public record or otherwise already known by the nominee. If disclosure of the substance of an adverse comment would necessarily compromise the promise of confidentiality given to the source of the comment, it will not be reported by the investigator to the nominee, nor revealed to, or considered by, the Board in its evaluation and rating of the nominee.) Passed. (no vote was recorded)

President Richard Guerriero made the above motion. President-Elect Sandra Cabrera shared her preference would be to modify rather than eliminate paragraph 10.

ACTION

On motion to accept the procedure as modified. Passed. 9-2. However, it was felt that this vote wasn't really necessary as the procedure will be sent out to the whole board via email with a request to vote.

President Richard Guerriero commented that the purpose for today was to put together the procedure and send it out to the whole board for a vote. He feels we need to have a vote of every member of the board, due to the importance of the subject. Executive Director George Moore added that the corrected procedure will be sent to NHBA staff tomorrow (Friday, 5/27) who will send out to the board for a vote by Tuesday, May 31st at 5:00 p.m.

The meeting was adjourned at 6:15 p.m.

Respectfully Submitted,

Deborah J. Hawkins

Deborah J. Hawkins for Susan Aileen Lowry, Secretary