North Carolina Bar Association Committee on Judicial Independence

Friday, April 27, 2018, 10:30 a.m.
NC Bar Center, Cary, NC

Meeting Minutes

Member Attendees: Justice Rhoda Billings, Judge Allen Cobb, John Culver, Jake Epstein, Jon Heyl (Chair), Judge Hugh Lewis, Judge John Martin, Peter Pappas, Gavin Parsons, Dewey Wells, John “Buddy” Wester, Bill Womble, Jr.

Attendees by Phone: Wade Barber, Tony Hornthal, Catherine Lee, Harrison Lord

NCBA Officers, Staff, and Other Attendees: Russell Rawlings (Staff Liaison)

Chair Jon Heyl convened the meeting at 10:30 a.m.

The minutes of the February 23, 2018 meeting were approved by voice vote.

Status Report: Multiple Items

Heyl reported that he and Bill Womble, Jr. had attended the Board of Governors meeting on April 13-14, 2018 in New Bern. There were not items addressed directly relating to the Committee, other than the announcement that Committee member Karen Rabenau has been nominated to sit on the next Board of Governors.

Heyl noted an upcoming panel on judicial selection held by the John Locke Foundation on May 7, 2018, which Heyl said he would plan to attend.

Heyl reminded the Committee that the Administration of Justice Committee had reached out to us and Bench-Bar Liaison re executing on some of the recommendation in the Chief Justice’s final report from the North Carolina Commission on the Administration of Law & Justice. That is likely an initiative for the next Bar year.

Heyl stated that, pursuant to the resolution passed at the last meeting, he had designated a “rapid response team” that could assemble quickly and pass a recommendation to the Board if any legislation emerged. That team consists of Tony Hornthal, Wade Barber, Justice Rhoda Billings, John Culver, Brandon Robinson, Hank Van Hoy, and Buddy Wester.

Heyl stated that Gavin Parsons had agreed to assume the co-chair position on the Grassroots subcommittee, following Matt Martin’s resignation to become U.S. Attorney for the Middle
District. Tony Hornthal will remain on as the other co-chair. The Grassroots subcommittee will continue its previously decided strategy of being on standby in the event it is needed to react to something.

Heyl stated that the Eckel & Vaughan media relations firm, which produced our video earlier in the year, has continued to engage with us and work on potential longer-term plans.

**Legislative Update**

Heyl stated that the Joint House/Senate Select Committee on the Judiciary had scheduled a meeting at the same time as JI’s meeting. Caryn McNeill, Jackie Grant, Jason Hensley, and Michelle Frazier were all attending that meeting and would let the JI Committee know of any developments as they occurred via text messaging.

Heyl noted that the agenda for the Joint Select meeting had come out the previous evening, with the items for discussion being judicial redistricting, HB 240, and HB 241. HB 240 would put the power of appointing district court vacancies in the General Assembly (rather than the governor), and HB 241 would do the same in regard to special superior court vacancies. Both bills passed the House in spring 2017 and crossed over. Thus, both could be passed by the Senate, or they could be amended substantively to cover different or additional items not currently contained in the bills.

The Committee discussed both bills. Tony Hornthal noted his objection that this would put legislators in charge of choosing judges who would pass on the legislature’s laws. Wade Barber noted that the North Carolina Constitution of 1868 took the power of appointment from the legislature and put it in the governor; the governor serves all the people of the state, whereas each legislator represents only a small portion. Hornthal noted that the Brennan Center has opposed legislative selection. Only two states (Virginia and South Carolina) utilize that system. Gavin Parsons stated that the governor, being one person, can act much more quickly than a body, and he expressed concern about the possibility of deadlock in the legislature, similar to what has occurred in New Jersey. Judge Cobb noted that any judge that serves statewide, such as special superior court judges, should be appointed by an official who is elected statewide. John Culver observed that he believed at one time South Carolina’s entire supreme court was composed of former legislators. Peter Pappas said that the legislature’s proposal would result in an inconsistent system, with some judicial vacancies filled by the legislature and some by the governor. Justice Billings spoke to separation of powers and the principles behind the concept; she said that the governor cannot pass laws, but can only carry them out as they are interpreted. Judges interpret them. Only the legislature can make the laws. We should not have the branch who makes the laws choosing the judges who will interpret them. Having the “non-lawmaker” branch be the branch that appoints judges provides some level of insulation. Buddy Wester said that, even though HB 240 and 241 might not go forward in their present form, JI should state its position on both to the Board of Governors.

A motion was made, seconded, and passed by voice vote to communicate to the Board that JI would recommend opposing HB 240 and HB 241 in their current form and that JI would
recommend opposing legislative appointment in general, for the reasons stated by Justice Billings and others as noted above.

Standing Committee

Heyl reminded the Committee of the history of the proposal by the JI Committee for a Standing Committee to evaluate appellate judicial candidates. It had been presented to the Board in early 2016, but effectively tabled while the Chief Justice’s Commission worked on completing its report. The Committee voted to re-submit it to the Board at our November 3, 2017 meeting; Heyl raised it at the November 8, 2017 special Board meeting, but it was likely overshadowed by the full merit selection proposal we presented to the Board at that time. The Committee voted in the February 23, 2018 meeting to ask the Board to consider it at the spring Board meeting and, if it did not, to provide us the reasons why.

Heyl passed that resolution on to leadership following the February 23, 2018 meeting. Leadership met and discussed the Standing Committee, then called a meeting of the Executive Committee of the Board to discuss it at length. Leadership then invited a delegation from JI to come to the Bar Center to discuss the outcome.

Bill Womble, Jr., Buddy Wester, Peter Pappas, and Heyl met with Caryn McNeill (president), Jackie Grant (president-elect), and Jason Hensley (NCBA executive director) at the Bar Center on April 5, 2018. McNeill said the Board had decided to defer consideration of the Standing Committee past the April and June 2018 meetings, but wanted to honor JI’s request of receiving the reasons why the Board was not adopting or actively considering it.

Heyl stated that he would relay to JI the list of Board concerns communicated by leadership in that meeting, which he had subsequently confirmed in a separate, more recent telephone call with McNeill. Heyl stated that while the Committee members would disagree with some, this forecast of concerns that we could expect to get from the full Board was extremely valuable, as it was essentially providing us the questions we would need to answer and allow us to think through and formulate responses to each ahead of the time when we might present a revised proposal to the full Board.

Heyl stated that the concerns revolved around four main areas: Timing, Policy, Design, and Implementation.

**Timing.** The Board’s first stated concern, although not the only or primary concern, related to timing. Based on the strategy that the Board has chosen to employ throughout the year in regard to a number of legislative issues, the Board believes now is not the appropriate time to consider whether to pursue a Standing Committee.

**Policy.** The Board has a list of questions that are applied to any proposal submitted. These questions are designed to thoroughly and carefully vet proposals, as we are no longer in a time when the Bar Association is able to run with all of the proposals, regardless of merits, made by members. These four questions are: (1) Is the proposal consistent with our mission? (2) Is it
consistent with our strategic priorities? (3) Is there a need for what is being proposed? Is this otherwise right for us? Is it the kind of thing we do well, or tend to avoid? (4) Can we afford it?

(1) As to the first question, the Board believes that the Standing Committee is probably consistent with our mission.

(2) As to the second question, the Board noted that the Bar Association has limited bandwidth and resources and thus can only take on so much at any one time. The Standing Committee is obviously not currently a strategic priority, as it has not been adopted. The Bar Association has identified a number of other current priorities that are fully utilizing available resources.

(3) As to the third question, there was some concern as to the need. The concern was raised that the proposal seems to assume that the public wants this information on appellate judicial candidates, and they want it from the Bar Association. Some thought that when the public asked “us” for information on judicial candidates, they were asking individual lawyers, whom they knew and trusted; that does not mean that they would find the opinion of the “Bar Association” equally helpful.

The Board felt that we must consider the fact that any statement by an organization in today’s climate will automatically be seen as having an agenda behind it. Would this be seen as a partisan endeavor, given some people’s impression of the Bar Association generally? When the Standing Committee was first proposed in 2016, elections were non-partisan, which would have alleviated this concern. But with elections partisan now, some are concerned that people would read a partisan bias into the results based on how the recommendations happened to shake out between “Ds and Rs”. It was noted that other specialty bars might rate judges based specifically on items of interest to that subgroup; while there is nothing wrong with that, it was unclear how we would be distinguished from all the other groups who rate judges and are likely seen as having a specific “agenda.”

Related to the preceding point, there was concern about the potential effect on membership. One of the Board members relayed a story of a senior partner in a firm who had discouraged all other members from joining the ABA for years based on how the ABA had rated a judicial candidate he knew. It was stressed to us that it matters greatly to the Bar Association whether some action it takes is likely to alienate a significant portion of the membership. Our membership is crucially important, as our size, strength, and diversity are what give us the ability and the resources to accomplish all of the things that we want to accomplish as an organization. Negatively impacting membership negatively impacts the Bar Association in everything it wants to do.

The questions were raised as to what the Chief Justice thinks of the proposal, and what sitting judges think of it.

There were also concerns expressed as to the justification that the ABA has rated judges for a number of years. As noted above, there is clear concern as to the impact that can have on membership, and it was noted that the ABA’s membership declined 4% last year.
(4) As to the fourth question, affordability, that was discussed in the context of implementation below.

**Design.** Among those who supported the proposal in concept, there were some concerns as to design. It was first noted that the proposal differs from the ABA model, as the ABA model results in a more “preliminary” recommendation that then receives ample additional vetting by a judiciary committee and the full Senate.

There were some concerns as to whether there might be perceptions of unfairness. There was also the concern that any candidate who foresaw getting a “not qualified” rating would withdraw, which would leave the committee rating everyone either “Well Qualified” or “Qualified.” That raised the question of how much the ratings would mean.

Technical questions included how many members of the committee were necessary to constitute a quorum; why the committee makeup did not include academics / law school personnel; how diversity would be handled; and how comments from the public and attorneys would be reviewed.

A “macro-level” concern regarded governance generally. The Board read the proposal to have the Standing Committee operating almost independently of the Bar Association, yet it would have the Bar Association’s name on it. That meant that all decisions would be imputed to the Bar Association, and the Bar Association would take the criticism. The Bar Association is presumably also being asked to fund the proposal, but would have no ability to “look behind it.” The concern was stated that the Bar Association does not have any other programs with those characteristics. The question was raised whether the Bar Association was the optimal home for this program, or whether other funding bodies might be better suited.

**Implementation.** A primary concern in this area was how the program would be staffed if Bar Association staff are expressly precluded from being involved. Given what appear to be significant amounts of administrative work required, it would seem there would need to be at least an executive director and some support staff hired to exclusively administer the program.

There was also concern about how much time would be required by the volunteers who made up the Standing Committee, as it was thought that was something potential volunteers would want to know. The Board also read the proposal as suggesting that NCBA volunteers could not be Standing Committee members, and thus expressed concern that we would be seeking volunteers from people whom we do not even know. (It was noted at the meeting that the proposal did not intend to exclude NCBA volunteers and that language could be clarified.)

There were questions about the out-of-pocket costs for materials, research, and other things. It was suggested that a complete “Business Plan” would need to be researched and drafted to be provided to the Board in advance of any further presentation of the proposal that the Board might entertain.
Another concern was funding, as this is not a project that anyone can assume will be funded by the Bar Foundation’s Endowment. The Bar Association is completely and strategically re-thinking its Endowment policy, and it is unlikely that this is the type of program that would fall within the Endowment’s strategic goals.

There were questions about how long it would take to get the program up and running, and what the “to do” list looked like. How would volunteers be recruited? It was noted that it appeared it would take at least twelve months to get any program moving.

There were also questions as to whether other states’ bar associations had done any programs like this. If so, are they voluntary bar associations, or mandatory? (If the latter, they do not have to be concerned with effect on membership). Questions were asked as to what issues other states have had with similar programs, and whether there have been threats of lawsuits or liability.

Heyl stated that he had been asked to make clear that while we are free to continue working on the proposal, it is “in no way a slam dunk.” In other words, aside from the timing considerations, there are substantial policy concerns and reservations anticipated from the Board during any future consideration. The Board will be glad to consider a revised proposal, but “there are no guarantees here.”

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After Heyl finished relaying the concerns and questions of the Board, there was discussion among the Committee about how to go forward. Buddy Wester noted that when the proposal was made to the Board in early 2016, he thought the reception was very positive; Bill Womble agreed, but stated that it might have been a reception more to the concept at that point, whereas the current comments dealt with the proposal more concretely. Several Committee members noted that some of the Board’s concerns seemed substantial, and questioned whether they could be addressed.

Justice Billings moved that a Standing Committee subcommittee be appointed, to include Buddy Wester, to continue working on the proposal in light of the Board’s concerns. John Culver seconded. The motion passed, and the chair was given the authority to appoint the members. Heyl noted that Mark Henriquez had been unable to attend the meeting but had volunteered in advance to serve on any such subcommittee.

There was discussion as to the order in which the subcommittee should address the concerns raised, and whether it should devote time and resources to re-drafting “design” elements before determining what options there might be for funding. Several funding options were discussed, including various foundations around the state. It was decided that the subcommittee could determine its priorities.
Heyl pointed out that the Board had suggested that our Committee might be interested in doing a voter guide since we were not going forward with the Standing Committee at this time. Heyl noted that the Board understood that there had been a voting guide in the past but it had been discontinued; however, Heyl researched and discovered that the Board of Elections intends to publish a voter guide in 2018. After discussion, including as to time requirements and likely impact, the Committee chose not to pursue working on a voter guide.

**Announcements**

At the conclusion of the meeting, Heyl announced that his term as chair would end with the current Bar year in June 2018. He thanked the Committee for allowing him to serve as chair for the preceding two years. Bill Womble expressed the Committee’s thanks.