

The Florida Bar Board of Governors
July 23, 2010, 8:30 a.m.
Sarasota Ritz Carlton
Sarasota, FL

1. Roll Call

Mayanne Downs, President
President-elect Scott G. Hawkins
Stephen H. Echsner, 1st Circuit
Lawrence E. Sellers, Jr., 2nd Circuit
William H. "Bill" Davis, 2nd Circuit
Clay A. Schnitker, 3rd Circuit
S. Grier Wells, 4th Circuit
John J. Schickel, 4th Circuit
Denise A. Lyn, 5th Circuit
Andrew B. Sasso, 6th Circuit
Murray B. Silverstein, 6th Circuit
Sandra C. Upchurch, 7th Circuit
Carl B. Schwait, 8th Circuit
Mary Ann Morgan, 9th Circuit
Daniel L. DeCubellis, 9th Circuit
Scott M. McMillen, 9th Circuit
C. Richard "Rick" Nail, 10th Circuit
David Rothman, 11th Circuit
Leslie J. Lott, 11th Circuit
Michael J. Higer, 11th Circuit
Dennis G. Kainen, 11th Circuit
Juliet Roulhac, 11th Circuit
John H. Hickey, 11th Circuit
Dori Foster-Morales, 11th Circuit
L. Norman Vaughan-Birch, 12th Circuit
William J. Schifino, Jr., 13th Circuit
Lansing C. Scriven, 13th Circuit
Gwynne Alice Young, 13th Circuit
Michael S. Hooker, 13th Circuit
John W. "Jay" Manuel, 14th Circuit
David C. Prather, 15th Circuit
Gregory Coleman, 15th Circuit
Michelle R. Suskauer, 15th Circuit
Edwin A. Scales, 16th Circuit
Walter G. "Skip" Campbell, 17th Circuit
Nancy W. Gregoire, 17th Circuit
Eugene K. Pettis, 17th Circuit
Jay Cohen, 17th Circuit

Timothy A. Bailey, 17th Circuit
Clifton A. McClelland, Jr., 18th Circuit
John M. Stewart, 19th Circuit
Laird A. Lile, 20th Circuit
Scott W. Weinstein, 20th Circuit
Richard Arthur Tanner, Out of State
Ian M. Comisky, Out of State
Eric L. Meeks, Out of State
Brian D. Burgoon, Out of State
Renée Thompson, Young Lawyers Division President
Sean T. Desmond, Young Lawyers Division President-elect
Arnell Bryant-Willis, Public Member
Alvin V. Alsobrook, Public Member

Members Absent:

Ramon A. Abadin, 11th Circuit
Lisa S. Small, 15th Circuit
Timothy A. Bailey, 17th Circuit

2. Guests

Manuel A. Garcia-Linares, President, Cuban American Bar Association
Gigi Rollini, President, Florida Association for Women Lawyers
Deana H. Ingraham, President Virgil Hawkins Florida Chapter, National Bar Association

3. Staff in Attendance

John F. Harkness, Jr., Executive Director
John Berry, Director, Legal Division
Paul Hill, General Counsel
Ken Marvin, Director, Lawyer Regulation
Allen Martin, Director, Finance and Accounting
Lori Holcomb, Unlicensed Practice of Law Counsel
Elizabeth Tarbert, Ethics and Advertising Counsel
Mary Ellen Bateman, Division Director, Ethics and Advertising, UPL, and Special Projects
Francine Walker, Director, Public Information
Roselyn A. Scott, Assistant to the President
Gary Blankenship, Senior Editor, Florida Bar *News*

4. Invocation and Pledge of Allegiance

Governor Vaughn-Birch delivered the invocation and led the board in the Pledge of Allegiance.

5. Appearance by 12th Circuit Chief Judge Lee Haworth

Judge Haworth urged the board to “mitigate” efforts in the Legislature to reduce judicial pensions. He also asked for support for the court system budget, updated the board on

effort to handle the glut of mortgage foreclosure cases, and spoke against allowing pro se litigants to have access to the new court e-filing system, saying the potential for abuse was too great.

6. Appearance by Sherri Johnson, President, Sarasota Bar Association

Johnson, who previously held an ex officio board seat representing FAWL, welcomed the board to Sarasota. She also praised the Bar's new diversity grant program for local bars.

7. Introduction of New Board Members

President Downs introduced the new members of the Board of Governors: William Davis, 2nd Circuit; Sandy Upchurch, 7th Circuit; Rick Nail, 10th Circuit; Leslie Lott, 11th Circuit; Michael Hooker, 13th Circuit; Jay Manuel, 14th Circuit; Michelle Suskauer, 15th Circuit; Sean Desmond, YLD president-elect.

8. Introduction of Citizens' Forum Members

Citizens' Forum members attending the board meeting were recognized: Connie Reeves Bookman, Nancy E. Biesinger, Mary Gardiner Evertz, Stanley I. Foodman, Shirley Gooding-Butler, Carlos Halley, Marty Huegel, Ronald J. Lebio, and Marni F. Stahlman.

9. Workers' Compensation Section Annual Report

Section Chair Rick Thompson reported that legislation passed in 2003 made it harder for injured workers to get lawyers and as a result the number of cases has fallen 44 percent, the number of petitions 55 percent, and the section's membership is off 18 percent. The section is countering that with improved CLE and inviting nonlawyers involved in workers' comp to participate in those CLEs.

10. Young Lawyers Division Report

YLD President Renée Thompson reported the division is beginning its new programming for Practicing With Professionalism and that its law student program is growing. The division will be making presentations this fall at all 11 law schools in the state. The section is also recruiting volunteer lawyers for its disaster response problems and working with the toiletries for tots program with various local charities.

Members of the YLD Board of Governors, also meeting at the hotel, introduced themselves.

11. Approval of Minutes

The board approved the minutes from its May 28 meeting in Key West. Included in that approval were minutes from six Executive Committee meetings:

- On May 28, 2010, the committee considered eight proposed resolutions and decided (a) the proposed resolutions be referred to a committee for initial resolutions consideration, and for a full and complete analysis and a report back to the Executive Committee, including consideration of whether any or all of the resolutions are an attempt to change the Bar's bylaws or rules and thus an attempt to bypass established procedures, and (b) further, that the resolutions should not be approved or disapproved

until the resolutions have been fully vetted and considered, including any budget or financial impact; and (c) and further, that once the resolutions have been fully vetted and reported on, they should be set for determination at the next-scheduled Board of Governors meeting.

- On June 8, 2010, the committee approved these circuit UPL committee appointments: Scott Michael Dressler, Elizabeth Rose Blandon and Jeremy A. Schnider to serve on the 17"A" circuit committee and Samuel H. Applebaum to serve on the 17"A" circuit committee as a public member; Shaun T. Plymale to serve on the 19th Circuit committee; and Russell T. Kirshy to serve on the 20th Circuit committee.

- On June 17, 2010, the committee approved these circuit UPL committee appointments: Patricia Moring to serve on the 5th Circuit committee, Therese Ann Pike to serve on the 15"B" committee, Evan Brett Klinek and Algeisa Maria Vazquez to serve on the 17"C" circuit committee and Mark McCarthy to serve as a public member on the 17' committee.

- On June 18, 2010, the committee agreed not to oppose the following emergency legislative position of the Real Property, Probate and Trust Law Section: Supports repeal F.S. §689.262(2008), providing for disclosure of windstorm mitigation rating, including supporting an override of the veto of HB 545.

- On July 2, 2010, the committee approved these circuit UPL committee appointments: Eddie Williams III to serve on the 2nd circuit committee; John Andrew Crawford to serve on the 6"A" circuit committee; Cherie Fine to serve on the 8th circuit committee; Ray Hinton and Maggie Chumbley to serve on the 13"A" circuit committee as public members and Megan Duffey to serve on the 13"B" circuit committee as a public member; Daniel P. Hrabko to serve on the 15"A" circuit committee as a public member; and Dorsey Columbus Miller III to serve on the 17"C" circuit committee. The committee also approved the nomination of William Henry Burgess to serve as an attorney member of the UPL Standing Committee. The nomination requires Supreme Court approval.

- On July 1, the committee voted to name Timothy N. Thomes of Key Largo to replace David Paul Horan of Key West on the list of six lawyers nominated to the governor to serve on the 16th Circuit Judicial Nominating Commission.

12. Approval on Consent Agenda

The board, with one objection, approved the consent agenda. Legislation Committee Chair Ed Scales reported that agenda items (d)(i)(1) and (5) were removed from the consent agenda.

The vote included approving the appointment of Norman Johnson Stewart as an attorney member to UPL Circuit Committee 6"B", Kenneth J. McKenna as an attorney member to UPL Circuit Committee 9"B", and N. Abraham Issa as a public member to UPL Circuit Committee 11"A". The board also nominated Dia Kuykendall as a public member of the Standing Committee on UPL.

On item 5b(i), The Board Review Committee on Professional Ethics voted 6-1 to recommend that the Board of Governors affirm the Standing Committee on Advertising decision in Advertising Inquiry 29337 that a lawyer's listing inclusion in Million Dollar

Advocates Forum in an advertisement violates Rule 4-7.2(c)(1)(F), which prohibits communications that refer to past results, because membership in Million Dollar Advocates Forum is based solely on the criteria that members have either had a jury verdict or settlement of one million dollars or more, which is a specific past result. The Board of Governors voted to affirm the Standing Committee on Advertising decision on the consent calendar.

The approval included these rules on second reading:

- Rule 3-7.4, Grievance Committee Procedures: Deletes subdivision (p) to eliminate redundancies. Incorporates all information regarding filing of formal complaints into subdivision (i).
- Rule 4-1.6, Confidentiality of Information; Rule 4-1.10, Imputation of Conflicts of Interest; General Rule; Rule 4-1.11, Special Conflicts of Interest for Former and Current Government Officers and Employees; Rule 4-1.17, Sale of Law Practice: Housekeeping edits throughout rules conform rules to prior amendments to rule 4-1.9. Changes or adds reference to new subdivision (c) of rule 4-1.9 regarding disclosure of confidential information of former clients within: rule 4-1.6 commentary, subdivisions (b) and (c)(2) and commentary of rule 4-1.10, subdivision (a)(1) of 4-1.11, and commentary to rule 4-1.17.

The board endorsed the reactivation of numerous legislation positions from the 2008-10 legislative biennium for the 2010-12 biennium for the Administrative Law, Appellate Practice Law, Business Law, Criminal Law, Elder Law, Entertainment, Arts and Sports Law, Family Law, Government Lawyer, Health Law, International Law, Public Interest Law, Real Property, Probate and Trust Law, Tax, Trial Lawyers and Workers' Compensation sections and the Out of State and Young Lawyers divisions.

The board action approved the contract between the Business Law Section and legislative consultant William B. Wiley.

The vote also included that the board agreed not to oppose six new legislative positions for the Elder Law Section:

- Supports legislation that would increase and enhance the rights of residents of any long term care facility and which would restrict the use of over-burdensome and onerous provisions in admissions contracts used by long term care facilities.
- Supports public access to long term care insurance at reasonable and affordable costs with adequate and reasonable benefits.
- Supports adequate funding for programs that allow Florida's seniors to age in place and opposes reduction or elimination of funding for programs that allow Florida's seniors to age in place.
- Opposes the expansion of creditors' rights beyond the current statutory and common law rights available to creditors under Florida law.
- Supports legislation that exempts the addresses and telephone numbers of long term care ombudsmen volunteers from public records laws.

- Supports legislation that aligns state law with Veterans Administration Federal Law, with regard to the treatment of low income pension with Aid and Attendance and opposes legislation that impoverishes spouses of veterans living in the community.

That action included approving amendments to the following prepaid legal service plans:

1. Firefighters' Legal Services Plan (Standard);
2. Firefighters' Legal Services Plan A/B
3. Firefighters' Legal Services Plan – 02;
4. Firefighters' Legal Services Plan 10-20;
5. Firefighters' Legal Services Plan – 06.

13. Disciplinary Procedure Committee Report – Agenda Item 13

At the recommendation of committee Chair Andy Sasso, the board approved minor amendments to Rule 3-7.4. Sasso and John Berry, director of the Bar's Legal Division, reported the committee is working on a trust account reporting rule amendment to reflect the reality that in large firms, many lawyers don't know the detailed status of the firm trust accounts.

14. Board Review Committee on Professional Ethics Report – Agenda Item 20

- Proposed Advisory Opinion 09-1: Discussion of Proposed Advisory Opinion 09-1 was deferred by the Board Review Committee on Professional Ethics at the request of several government lawyer groups who wish to have the opportunity to draft revisions for the Board of Governors' consideration.

- Request to adopt proposed advisory opinion by the Professional Ethics Committee: The Board Review Committee on Professional Ethics voted 8-0 to recommend that the Board of Governors request that the Professional Ethics Committee issue a proposed advisory opinion on the issue of the ethical obligations of a lawyer who is asked to disclose confidential information of a decedent by the personal representative, beneficiaries or heirs at law of a decedent's estate, or their counsel. The Board of Governors voted to approve the recommendation of the Board Review Committee on Professional Ethics by voice vote.

- Review of Lawyer Advertising Regulations – Information Report: The Board Review Committee on Professional Ethics chair, Carl B. Schwait, gave an informational report to the Florida Bar Board of Governors, expressing the committee's commitment to complete a contemporary study of lawyer advertising and marketing, the lawyer advertising regulation program, using the goals adopted by the Board of Governors as guidelines by the May 2011 Board of Governors meeting. The committee will make a report with any recommendations at that time. The chair reported that the committee will make interim reports to the Board of Governors throughout the fiscal year.

15. President's Report – Agenda Item 6

President Downs announced that immediate Past President Jesse Diner will be leading a Bar effort to protect adequate funding for the judicial system, including judicial pensions. She also said the Bar is forming the Past President's Advisory Council to assist on several issues, including legislative efforts.

16. Rules Committee Report – Agenda Item 12

On the recommendation of committee Chair Nancy Gregoire, the board:

- Approved amendments to Rule 4-1.5, Fees and Costs (Medical Lien Resolution): Creates new subdivision (E) to subdivision (1)(4) and commentary indicating that the lawyer in a personal injury or wrongful death case charging a contingent fee must include in the fee contract information about the scope of the lawyer's representation relating to subrogation and lien resolution services, that the lawyer shall not charge any additional fee to the client for providing such services. If all fees for the personal injury matter plus lien resolution exceed the contingent fee schedule, that extraordinary services for subrogation and lien resolution may be referred to another only with the client's informed consent, that additional fees by the other lawyer must comply with all provisions of the fee rule [and that the lawyer providing the extraordinary subrogation and lien resolution services may not divide fees with the lawyer handling the personal injury or wrongful death claim]. Commentary further explains what lien resolution services are required as part of the original fee contract, what extraordinary services entail. Adds commentary that other ancillary services such as estate planning, bankruptcy, financial planning, public benefit planning, tax planning, real estate transactions, and Medicare set-asides are not considered part of the personal injury or wrongful death matter are not considered part of the representation as part of the original contingent fee contract in a personal injury or wrongful death case, but that the lawyer should clearly indicate in the contract whether the lawyer intends to provide such ancillary services as part of the representation.

- Waived second reading and approved amendments to Rule 1-8.4, Clients' Security Fund: Deletes "by a member of The Florida Bar" and "that comes into the member's possession or control" to conform with rule 7-1.1.

- Reviewed on first reading amendments to Rule 4-3.4 Fairness to Opposing Party and Counsel (Paying Witnesses): Within subdivision (b), provides that a lawyer may pay a witness a reasonable amount to compensate for the witness' time in preparing for, attending, or testifying at proceedings.

- Waived second reading and approved amendments to Rule 14-6.1 Binding Nature; Enforcement; and Effect of Failure to Pay Award: Within subdivision (c), changes "90 days" to "30 days" as the time period after a fee arbitration award becomes final and the Bar member falls to pay the award that the Bar member will be delinquent.

Chair Gregoire reported the Rules Committee also completed a procedural review on Rule 6-3.2 Certification Committees, which allows different size committees for different certification areas, and Board of Legal Specialization and Education Policy 4.04, which increases the appeal filing fee from \$125 to \$500.

17. Budget Committee Report – Agenda Item 14

Committee Chair Dan DeCubellis presented several amendments, all of which were approved by the board:

- For the 2009-10 budget, \$54,910 from the Certification Fund for certification contract salaries.

- For the 2009-10 budget, \$35,011 from the Business Law Section budget for various section expenses.
- A budget reappropriation for the 2010-11 budget of \$226,071 from the Building Reserve Fund for Tallahassee headquarters air conditioning repairs.
- A budget reappropriation for the 2010-11 budget of \$493,160 from the Building Reserve Fund for exterior painting of the headquarters buildings.
- A budget reappropriation for the 2010-11 budget of \$4,106 from the General Fund for the UPL Institute.
- A budget reappropriation for the 2010-11 budget of \$27,000 from the General Fund for Lawyer Regulation's Grievance Institute.
- A budget reappropriation for the 2010-11 budget of \$9,000 from the General Fund for desks and credenzas for Lawyer Regulation.
- A budget reappropriation for the 2010-11 budget of \$4,000 from the General Fund for a LOMAS CLE project.
- A budget reappropriation for the 2010-11 budget of \$22,600 from the General Fund for contract services for Lawyer Advertising.
- A budget reappropriation for the 2010-11 budget of \$49,537 from the General Fund for Public Information for the Justice Teaching program. (The money originally came from a Florida Bar Foundation grant.)
- \$88,100 for new computer monitors.

On other matters, Chair DeCubellis reported the committee has approved \$10,000 for the new Alternative Dispute Resolution Section with the expectation it will be repaid when the section is up and running and has income. He also said the committee is reviewing the Bar's expenses for outside legal services.

18. Clients' Security Fund Procedures Committee Report – Agenda Item 25

Chair Greg Coleman reported the committee is continuing to examine ways of educating Bar members about trust account matters as a way to reduce future claims on the fund.

19. Unlicensed Practice of Law Report – Agenda Item 17

Bar UPL Counsel Lori Holcomb reported that the ABA Commission on Ethics 20/20 has requested input about three recommended changes to the ABA Model Rules. Approving the recommendations of the Standing Committee on UPL, the board voted to oppose allowing lawyers licensed in foreign countries to appear pro hac vice in this country or to be in-house counsel. On the third issue of allowing foreign lawyers to practice under multijurisdictional practice rules, Holcomb noted that is already addressed in Bar MJP rules.

20. Program Evaluation Committee Report – Agenda Item 13

Chair Greg Coleman recommended and the board approved amendments to Rule 6-3.2, Certification Committees: Divides current rule into two subdivisions and adds titles; subdivision (a) establishes and provides criteria for initial certification committee appointments and membership terms; new subdivision (b) proposes an alternative

membership range of 5 to 15 members for established committees and provides for staggered terms.

Coleman recommended and the board approved amendments for BLSE Policy 4.04, Filing fee: Housekeeping edit within subdivision (c), Increases the filing fee for appeals from \$125 to \$500 for consistency with the previously approved amendment to BLSE Policy 2.04.

Representing the committee, board member Jake Schickel recommended and the board approved creation of the new Alternative Dispute Resolution, with annual dues of \$35.

Coleman recommended and the board approved a special nine-member committee, to be appointed by President Downs, to study the mandatory regulation of registered paralegals.

Coleman announced in the coming year the PEC will review the registered paralegal program, the applications and appointment forms the Bar, committees, and judicial nominating committees use on the Bar's website, continue its review of the fee arbitration program, look at ways to help lawyers impacted by the current economy, and examine various Bar, Supreme Court, and local bar professionalism programs.

21. Legislation Committee Report – Agenda Item 21

Chair Ed Scales recommended and the board approved legislative consulting contracts between the Family Law Section and Nelson Diaz and the Trial Lawyers Section and Bob Harris. Scales recommended and the board approved sunsetting all Bar and Bar committee legislative positions from the 2008-10 biennium. He said the committee will recommend renewing some Bar positions at the board's December meeting.

22. Family Law Rules Committee Fast-Track Amendments – Agenda Item 26

Chair Steven Combs presented amendments to conform with 2010 legislative enactments on child support guidelines. The board recommended approval of the amendments 35-0.

23. Family Law Rules Committee Three-Year Cycle Amendments – Agenda Item 29

Chair Combs presented the three-year cycle rules, which included clarifying conflicts on diligent search requirements and setting out guidelines for collaborative law cases. The board recommended approval of the amendments 36-0.

24. Investment Committee Report – Agenda Item 15

Chair Ian Comisky recommended and the board approved a reallocation of the Bar's long-term investment portfolio to allow for new fund categories approved by the board at its May meeting. Comisky recommended and the board approved hiring fund managers for four of the new five funds. Comisky recommended and the board approved authorizing Executive Director John F. Harkness, Jr., to execute the paperwork necessary to carry out the new investment policies and hire the new fund managers.

25. Appellate Court Rules Committee Three-Year Cycle Rules – Agenda Item 27

Board member Gregoire presented the three-year cycle rule amendments. The board recommended approval of the amendments 36-0.

26. E-filing, E-Services and Electronic Access to Court Records Report – Agenda Item 23

Board member Murray Silverstein and Paul Regensdorf, a member of the Rules of Judicial Administration discussed several rules that have either been approved or are being proposed to help implement electronic filing, electronic service, and electronic access to court records. That includes the recently approved Supreme Court Rule 2.236 which put the Florida Courts Technology Commission in the Rules of Judicial Administration, and Rule 2.420, which becomes effective October 1 and makes lawyers responsible for preventing sensitive and confidential information from their clients getting into publicly-accessible court records. Regensdorf said the board will shortly be getting Rule 2.525, which updates the e-filing rule, and rule 2.516, which will mandate e-service for all service and exchange of documents.

27. Rules of Judicial Administration Committee Three Year Cycle Rules – Agenda Item 28

Board member Silverstein reported the five amendments are relatively minor. The two main changes required attorneys to provide a client's phone number when withdrawing from a case and requiring attorneys to provide their official Bar address and e-mail in court filings. The board recommended approval of the amendments 33-0.

28. Communications Committee Report – Agenda Item 18

Committee Chair Silverstein recommended and the board approved the policy of not allowing Bar members to list a rating by any rating service on their member profile page on the Bar's website. Aside from the committee, Silverstein said the Citizens' Forum also endorsed that policy. Silverstein also reported that several improvements have been made to the Bar's website and several more are planned in the coming months. He said the committee is exploring requiring Bar members to certify that the information they provide on the website profile pages is accurate. The committee is also studying guidelines for lawyers on using social networking websites.

29. Executive Director's Report – Agenda Item 8

Executive Director Harkness discussed with the board issues relating to public records access and the Bar's having e-mail addresses for its members. Harkness also reported that the Bar expects to save \$250,000 in printing and postage costs by providing electronic copies of CLE course materials and only providing printed copies on request. He noted at a recent seminar, only 11 of the 300 attendees requested paper copies. Electronic copies also have the advantage of being electronically searchable. The Bar also expects to save about \$40,000 on postage by sending e-mail notifications to Bar members pertaining to Bar business, such as being late paying annual membership fees. Harkness also said the

Bar is working on a free CLE program available on the Bar's website for members on complying with Rule 2.420 on handling confidential information in court filings.

30. Time and Place of Next Meeting

The board meets again October 1 at The Roosevelt Hotel in New Orleans, LA. There being no further business before the board, President Downs adjourned the meeting at 3:02 p.m.

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