

The Florida Bar Board of Governors
July 29, 2011
The Breakers Hotel
Palm Beach, Florida

1. Roll Call

Scott G. Hawkins, President
Gwynne A. Young, President-elect
Stephen H. Echsner, 1st Circuit
Lawrence E. Sellers, 2nd Circuit
William H. “Bill” Davis, 2nd Circuit
Clay A. Schnitker, 3rd Circuit
S. Grier Wells, 4th circuit
Michael G. Tanner, 4th Circuit
Lawrence Scott Kibler, 5th Circuit
Andrew B. Sasso, 6th Circuit
Sandra Fascell Diamond, 6th Circuit
Sandra C. Upchurch, 7th Circuit
Carl B. Schwait, 8th Circuit
Mary Ann Morgan, 9th Circuit
Paul Louis SanGiovanni, 9th Circuit
Scott R. McMillen, 9th Circuit
C. Richard “Rick” Nail, 10th Circuit
Ramon A. Abadin, 11th Circuit
Dori Foster-Morales, 11th Circuit
Leslie J. Lott, 11th Circuit
Michael J. Higer, 11th Circuit
Dennis G. Kainen, 11th Circuit
Juliet M. Roulhac, 11th Circuit
John H. Hickey, 11th Circuit
L. Norman Vaughan-Birch, 12th Circuit
Lansing C. Scriven, 13th Circuit
Margaret Diane Mathews, 13th Circuit
Michael S. Hooker, 13th Circuit
John W. Manuel, 14th Circuit
David C. Prather, 15th Circuit
Gregory W. Coleman, 15th Circuit
Michelle R. Suskauer, 15th Circuit
Gary Shepard Lesser, 15th Circuit
Adele Ilene Stone, 17th Circuit
Jay Cohen, 17th Circuit
Clifton A. McClelland, Jr., 18th Circuit
John M. Stewart, 19th Circuit
Laird A. Lile, 20th Circuit
Scott W. Weinstein, 20th Circuit
Ian M. Comisky, Out-of-State

Eric L. Meeks, Out-of-State
Sean T. Desmond, YLD President
Paige Adonna Greenlee, YLD President-elect
Winston W. Gardner, Jr., Public Member
Alvin V. Alsobrook, Public Member

Members Absent

William J. Schifino, Jr., 13th Circuit
Edwin A. Scales III, 16th Circuit
Walter G. Campbell, Jr., 17th Circuit
Eugene K. Pettis, 17th Circuit
Timothy L. Bailey, 17th Circuit
Richard A. Tanner, Out-of State
Brian D. Burgoon, Out-of-State

2. Guests

Victoria Mendez, President, Cuban American Bar Association
Susan Healy, President, Florida Association for Women Lawyers
C. SháRon James, President, Virgil Hawkins Florida Chapter, National Bar Association

3. Staff in Attendance

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

4. Invocation and Pledge of Allegiance

Board member David Prather delivered the invocation and led the board in the Pledge of Allegiance.

5. Appearance by 15th Circuit State Attorney Michael McAuliffe

McAuliffe talked about the special prosecutor program he created which brings in private attorneys to handle misdemeanor criminal matters for free, which has helped his office cope with the state's budget crisis. He also encourages his attorneys to join the Palm Beach County Bar Association and be active in local and state bar activities.

6. Appearance by Palm Beach County Bar Association President John Howe

Howe welcomed the board to Palm Beach County, and recognized President Hawkins as a member of the Palm Beach County Bar Association.

7. Swearing in of New Members

President Hawkins swore in new and reelected board members who were unable to attend the General Assembly at the Bar's June Annual Convention.

8. Recognition of Citizens Forum Members

President Hawkins recognized members of the Bar's Citizens Forum who were attending the meeting: Stan Foodman, Paulita Kundid, Marni Stahlman, Martha Bogdan, Michael Guccione, Shirley Gooding-Butler, Ron Lebio, Marty Huegel, Mary Gardiner Evertz, and Lauren Anzaldo.

9. Approval of Minutes

The board approved the minutes from its May 27, 2011, meeting in Key West. The vote included ratifying Executive Committee actions taken since the last board meeting, including:

- At a May 26 meeting, the Executive Committee approved retroactively the Elder Law Sections request to file a joint amicus brief with the Academy of Florida Elder Law Attorneys in *Whiley v. Scott*, pending at the Florida Supreme Court.
- At a June 16 meeting, appointed Min Cho to replace Jose F. Diaz as the Bar's under-35-delegate to the ABA House of Delegates for a term to expire August 2012. The action was prompted by Diaz' June 8 resignation.
- At a July 14 meeting approved partial annual fee refunds to two bar members who objected to Bar legislative positions 16, 17, and 18 as noticed in the April 15 *Bar News*.

10. Approval of Consent Agenda

Board Review Committee on Professional Ethics Chair Scott McMillen announced that the advertising appeals on agenda items 5(b)(i) and 5(b)(ii) were being withdrawn from the consent agenda and would be presented to the board during the committee's report. With those exceptions, the board approved the consent agenda. That approval included:

- Appointing Scott Douglas Foeller and Robert S. Stroud as attorney members to UPL Circuit Committee 12; Peter J. Sweeney, Jr., as an attorney member to UPL Circuit Committee 19; Merrick Lawrence Gross, Johnette L. Hardiman, Yanette M. Moyano, Benjamin Lawrence Reiss, Sintia Sarahi Saenz, and Richard Alyn Schurr as attorney members, and Joel N. Goren as a public member to UPL Circuit Committee 11A; Alan H. Aronson, Lisa M. Berlow-Lehner, Daniel D. Dolan II, William K. Hill, Jeffrey M. Kolokoff, and George G. Mahfood as attorney members and Susan Gold, Michele Merilus, and Mayda Nahhas as public members to UPL Circuit Committee 11B; Franklin Gordon Cosmen, Jr., Allan Bennett Kaiser, Rebecca Wilson Ribler, and Ricardo Ruz as attorney members and Karen George, Henry J. Haegele, and Howard J. Schneider as public members to UPL Circuit Committee 11C; and Sandra Murado, Nicolas A. Olano, and Stephanie Silver as attorney members and Elle Bertoli, Ana Crucet, Deirdre Mirmelli, and Linda Nottstadt as public members to UPL Circuit Committee 11D.
- Not opposing the Real Property, Probate, and Trust Law Section taking the following legislative positions:
 - Supports amendment of F.S. §718.403 to permit the addition of proposed phases to a condominium beyond 7 years from the recording of the declaration of condominium upon association membership approval and recorded amendment to the declaration of condominium.

- Supports amendment of F.S. §734.301 to use the defined term ‘parents’ as the natural guardians of a minor child, and to change the current references to ‘custody’ to ‘parental responsibility.’

- Not opposing the Business Law Section taking the following legislative position:

Supports proposed updating and clarifying Uniform Law Commission / NCCUSL amendments to Article 9 UCC/FS Ch. 679.

- Approving the legislative consultant contract between the Business Law Section and William B. Wiley.

- Approving the legislative consultant contract between the Family Law Section and Nelson Diaz, Edgar Castro, Bernie Friedman, Yolanda Cash Jackson, and Cedric McMinn.

- Approving the legislative consultant contract between the Trial Lawyers Section and Bob L. Harris, Mark Herron, and Marlene Falmlen.

- Approving the legislative consultant contract between the Real Property, Probate and Trust Law Section and Peter M. Dunbar.

- Approving the Fifth Amendment to The Florida Bar Employees’ Pension Plan which allows, at the discretion of the Board of Governors, the reappointment of employee members of the pension plan committee.

11. Appearance by Chief Justice Charles Canady

Chief Justice Canady warned that despite a \$54 million loan to start the 2011-12 fiscal year, Florida state courts are in danger of running out of money because foreclosure filings – which play a major part in court system funding – have not increased as much as predicted. The courts are working with legislative leaders and the governor’s office in case an additional loan is needed. Canady, calling the current situation intolerable, said the courts will be working for a permanent, stable source of funding in the next legislative session.

12. Public Reprimands

President Hawkins administered public reprimands to five attorneys and an admonishment to one attorney.

13. Young Lawyers Division Report

Members of the YLD Board of Governors introduced themselves, and YLD President Sean Desmond reported on the division’s activities. Desmond said the YLD works to carry out the goals of the Bar Board of Governors, and this year will focus on communicating the many programs of the Bar to its membership, including those to help lawyers in their practice and promoting pro bono.

14. Family Law Section Report

Chair David Manz reported the section had a successful year in the Legislature and set up new committees to help manage the section, including on long-range planning, technology, and finance. Manz said a theme of his year will be helping practitioners balance their professional and personal lives, noting that burnout is a problem for family practitioners. He also said the section has projects to improve diversity and also help train guardians ad litem.

15. Legislation Committee Report

Chair Ray Abadin said the committee is already working on plans for the 2012 legislation session, noting committee meetings start in September. Jim Daughton, partner of Legislative Consultant Steve Metz, said the Legislature's priority will be on reapportionment, but court funding, funding the Civil Legal Assistance Act, and judicial nominating commissions are also expected to be issues. Abadin reported the committee had a presentation from Mark Schlakman from the FSU Center on the Advancement of Human Rights who requested the Bar support calling for a study on death penalty procedures in Florida. The committee took no action, but anticipates further consideration of the issue, Abadin said. The committee recommended that the Bar allow the Legal Needs of Children to lobby for the review of juveniles sentenced to lengthy prison sentences, including life terms, for non-capital offenses. Abadin noted it would be a committee, not a Bar, position. The board found the issue within the purview of the Bar and voted to allow the committee to pursue the issue.

16. Environmental and Land Use Law Section Report

Chair-elect Martha Collins said the section has begun webcasts of CLE programs and continues its quarterly journal and is also publishing a monthly newsletter. It also spends \$18,000 a year for scholarships and fellowships and its June retreat had the largest attendance in several years.

17. Executive Session

The board went into executive session to discuss disciplinary and other confidential matters.

18. Board Review Committee on Professional Ethics Report

Chair Scott McMillen reported on the following issues:

- The Board Review Committee on Professional Ethics voted 6-1 to recommend that the Board of Governors defer action on Advertising Appeal 11-01180 until the Supreme Court of Florida rules on the pending petition to amend the lawyer advertising rules, at the request of the filer. Advertising Appeal 11-01180 concerns application of Rule 4-7.2(c)(2), prohibiting statements that characterize the quality of legal services to statements in a magazine advertisement ("very talented," "respect in the legal community," "respect of his peers," "leading national treatise," and "unique. . . prospective" [sic]). Rule 4-7.2(c)(2) is a rule that the Bar has requested be amended. The motion passed 38-1

- The BRCPE voted 6-1 to recommend that the Board of Governors affirm the Standing Committee on Advertising decision in Advertising Appeal 11-02634, finding that the website address, www.LawAce.net, which appears in the advertising lawyer's direct mail advertisement, characterizes the quality of legal services, in violation of Rule 4-7.2(c)(2). The Board of Governors voted 21-9 to approve the BRC motion.

- The BRCPE voted 7-0 to recommend that the Board of Governors notify the U.S. Attorneys for the Southern, Middle and Northern Districts of Florida that no waiver is required under Bylaw 2-9.4 because the bylaw is inapplicable as the U.S. Attorney's Office has only asked to provide information to the Professional Ethics Committee. The U.S. Attorneys for the Southern, Middle and Northern Districts of Florida requested that the Board of Governors grant a waiver under Bylaw 2-9.4 to permit the U.S. Attorneys to file comments on a request for an ethics advisory opinion from the Professional Ethics Committee by a criminal defense lawyer, notwithstanding the fact that two Assistant U.S. Attorneys employed by the Southern District of

Florida sit on the Professional Ethics Committee. The Board of Governors voted 32-0 to approve the BRC motion.

- The BRCPE voted 7-0 to recommend that the Board of Governors not endorse proposed amendments to the ABA Model Rules of Professional Conduct on technology and confidentiality under consideration by the ABA Commission on Ethics 20/20 as recommended by the Professional Ethics at its June 24, 2011 meeting. The BRCPE also voted to recommend that the Board of Governors direct staff to communicate the following concerns with the proposals: Key terms that are proposed to be added are not defined (such as “monitoring”), the proposed amendments require lawyers to “monitor” people or entities who are not chosen by the lawyer and over whom the lawyer has no authority, amendments place cost over ethics, and amendments at lines 444-448 do not reflect the Bar’s position on metadata. However, the committee believes that proposed amendments changing the term “documents” to “information” are appropriate. The Board of Governors approved the recommendation on a voice vote.

- The BRCPE voted 7-0 to recommend that the Board of Governors not endorse proposed amendments to the ABA Model Rules of Professional Conduct on outsourcing under consideration by the ABA Commission on Ethics 20/20 as recommended by the Professional Ethics at its June 24, 2011 meeting. The BRCPE also voted to recommend that the Board of Governors direct staff to communicate the concern that the proposals are counter to the principles set forth in Florida Ethics Opinion 07-2 on outsourcing in that the proposed amendments lessen the supervisory responsibilities of the lawyer. The Board of Governors approved the recommendation on voice vote.

19. Unlicensed Practice of Law Report

Bar UPL Counsel Lori Holcomb presented recommendations from the Standing Committee on the Unlicensed Practice of Law on preliminary proposals made by the ABA Commission on Ethics 20/20, as follows:

- The standing committee recommended against, and the board agreed, a proposal to allow attorneys applying to join the Bar or to be authorized house counsel to work in Florida as lawyers or house counsel, for a period to be determined by the Supreme Court, while their applications are pending. The committee thought that was too open ended.

- The standing committee recommended against, and the board agreed, a proposal to allow foreign attorneys to work as authorized house counsel as long as they work exclusively for their employer and comply with CLE requirements. The committee felt that although that is allowed for out-of-state lawyers, there is too much variation in education and training among attorneys from other nations.

- The standing committee recommended against, and the board agreed, a proposal to allow foreign attorneys to practice pro hac vice in Florida. The committee cited the same reasons as for authorized house counsel. An exception, the standing committee said, would be on foreign attorneys practicing in administrative law venues where the hearing officer determines who is qualified. Foreign attorneys can already practice there if allowed by the hearing officer.

- The standing committee recommended in favor of, and the board agreed, an amendment to allow foreign attorneys to come into Florida and practice on a limited and temporary basis. The committee noted this already is allowed in the Bar’s multijurisdictional practice rules.

20. Florida Bar Foundation Report

Foundation President Michele Cummings told the board that continuing record low interest rates have cut Foundation IOTA revenues by 88 percent in recent years. With no forecasted interest rate increases in the next couple years, she said the Foundation is looking at other alternatives and said the Foundation expects to use the last of its reserves before rates increase. The Foundation is exploring working with banks or other funding sources that might loan money to the Foundation in anticipation of eventually higher interest rates as a way to forestall or minimize expected cuts to legal aid providers, Cummings said. In the meantime, the Foundation is promoting its Fellowship program to help raise money.

21. Budget Committee Report

Vice Chair Lanse Scriven presented three rollover budget amendments from the 2010-11 budget and three amendments for the 2011-12 budget. The rollover amendments are: \$18,000 for the Bar's diversity grants program, \$80,000 for an IT consultant, and \$185,000 from the building reserve fund for air conditioning work at the Bar's headquarters building. The three 2011-12 budget amendments are: \$31,500 for a service to shred old records, \$48,000 to develop an "app" for the Bar *News* to make it available on portable digital devices, and \$10,000 for the Bar's annual Reporters' Workshop. The board approved all of the amendments.

22. Juvenile Court Rules Committee Report

Immediate past Chair William Booth presented the committee's three-year cycle rule amendments. He said there were five proposed changes for delinquency rules, 10 for dependency rules and 18 amendments to legal forms. The board endorsed the recommended changes by a 41-0 vote.

23. Investment Committee Report

Chair Ian Comisky reported the Bar continued to do well on its long-term portfolio, which was up 3.5 percent for the quarter and 18 percent for the year. He said the Investment Committee, along with its advisors, was closely monitoring federal debt ceiling negotiations and would meet again the following Monday if it looked like no agreement would be reached.

24. Appearance by Former Bar President Herman Russomanno on Behalf of the ABA Commission on Ethics 20/20

Former President Russomanno talked about the work of the commission, of which he is a member. He said the panel is actively seeking input and will not make any final recommendations until next May for consideration by the ABA House of Delegates at its August 2012 meeting. The commission is looking at the impact of technology on the profession, as well as outsourcing and economic impacts on the practice of law.

25. Appearance by Supreme Court Justice Jorge Labarga

In brief remarks, Justice Labarga endorsed Chief Justice Canady's comments about the judicial branch's budget and praised the collegiality of the court.

26. Civil Procedure Rules Committee Report

Chair Kevin Johnson presented out-of-cycle rule amendments dealing with discovery of electronic information. He noted it was the first time procedural rules addressed electronic

discovery and said the Florida rules were based on federal rules with appropriate changes to accommodate recognized state precedents and legal practices. The board recommended approval of the amendments by a 38-0 vote.

27. Program Evaluation Committee Report

Chair Jay Cohen presented two items on first reading:

- Subchapter 6-11, Standards for Board Certification in Workers' Compensation: Revised rule title and verbiage to identify standards for board certification in workers' compensation, rather than as standards for a board certified workers' compensation lawyer and made non-substantive changes to conform to the Supreme Court style guide. Within 6-11.2, subdivision (e), substantial equivalent, adds that a substantial equivalent may be a trial and submission to the trier of fact of any workers' compensation issues before any judge other than a Judge of Compensation Claims (JCC). Within 6-11.3, subdivision (a)(2), substantial involvement, removes allowing a trial advocacy course to substitute for a case. Within 6-11.5, subdivision (b), trial requirement, removes restriction that hearings and/or trials outside the jurisdiction of the Florida Office of the Judges of Compensation Claims, and appeals of these matters (including, but not limited to, rule nisi, federal workers' compensation matters, Federal Longshore and Harbor Workers' Compensation Act matters, and other circuit court actions, etc.) cannot be used to meet the trial, protracted litigation, or substantial requirements.

- BLSE Policy 3.06, Applicant Procedural Requirements: Within subdivision (b), replaces certified specialists with lawyers seeking certification or recertification and adds that the information will be reported within the application for certification or recertification; within the listing of the information that must be provided, adds that the lawyer must disclose whether the lawyer seeking certification or recertification has either withdrawn an application for certification or recertification by The Florida Bar or had certification denied or revoked by The Florida Bar; and adds that the applicant shall have procedures in place to revoke lawyer certification in instances of denial or revocation of certification by The Florida Bar.

In the coming year, Cohen said the PEC will look at Bar programs that promote the accomplishments and public perceptions of attorneys and judges, the Bar's Lawyer Referral Service Committee, the Prepaid Legal Services Committee, and how court procedural rules committees interact with other committees and sections. The PEC will also examine the Young Lawyer Division's SCOPE program and how that can fit into the Bar's lawyers-helping-lawyers initiatives. The PEC plans to revisit the Entertainment, Arts and Sports Law Section and the Animal Law Committee to see how they are faring with past PEC recommendations. The PEC, Cohen said, is examining a proposed name change for the Judicial Independence Committee and is looking at the possibility of a nonvoting seat on the Board of Governors, or some other form of enhanced presence, for government lawyers.

28. Communications Committee Report

Chair Greg Coleman said the committee has several initiatives aimed at making Bar communications effective, efficient, timely, concise, and relevant. He noted President Hawkins recorded a short video message which was sent to all Bar members and has been posted on the Bar's website. He said the tentative plan is to have such a message sent out quarterly. The committee is looking at improving the effectiveness of its communications with Bar sections and committees and with voluntary bar associations and is working on coming up with a legislative

communications protocol to keep both board and Bar members informed during volatile legislative sessions. The committee is also, Coleman said, working on external Bar communications, where the Bar president is the main spokesperson for The Florida Bar. Another task for the committee is examining how technology is affecting the practice of law.

Coleman presented two action items to the board. One was to allow lawyers, as part of their profile on their Bar website members pages, to include if they are a civil law notary. Civil law notaries are allowed to assist the Hague Convention on issues worldwide. The second was to allow lawyers to list on their profile that they are certified in civil trial or family law by the National Board of Trial Advocacy. (A request to allow NBTA certification in criminal law is still pending before the Board of Legal Specialization and Education.) The board approved both items.

Board member Alvin Alsobrook reported on activities of the Citizens Forum, which discussed referrals from the Program Evaluation Committee regarding the name of the Judicial Independence Committee and the terms "unauthorized" and "unlicensed" as they pertain to the Bar's UPL function. They also received briefings by Bar staff on the proposed new advertising rules and on the Clients' Security Fund.

29. Traffic Court Rules Committee Report

Board member Scott Kibler presented the three-year-cycle rule amendments for the committee, which affect Rule 6.340 and Rule 6.600. The board recommended approval of the amendments 30-0.

30. Disciplinary Procedure Committee Report

Chair Clif McClelland reported that the DPC is working on a trust accounting rule change requiring law firms to have a written policy delineating which attorneys in the firm are responsible for the trust account. He said the committee is looking for sample policies now used by firms before bringing the rule to the board.

31. Criminal Procedure Rules Committee Report

Board member Dennis Kainen presented the committee's 11 three-year cycle rule amendments, most of which were technical or made to comply with various court rulings. The board recommended approval of the amendments 31-0.

32. Executive Director's Report

Executive Director John F. Harkness, Jr., reported that nearly 3,500 people took the July bar exam this year, about 500 more than in the past couple of years. Between 75 to 78 percent are expected to pass and join the Bar. He said the Bar had been getting around 2,000 new members a year, but now that has increased to 2,500. He also said that fewer older members are opting to retirement, which is contributing to the fast growth of Bar membership.

33. President's Report

President Hawkins reported that he had received a letter from Charles Trippe, general counsel for Gov. Rick Scott, telling him that the governor had rejected the Bar's slate of nominees for the

17th Circuit and Fourth District Court of Appeal judicial nominating commissions. (One member of the 17th Circuit slate was appointed, but for a 2010 vacancy.) Hawkins said the Bar will readvertise for applicants and the Executive Committee will send a new slate to the governor. The president also told the board he is thinking about establishing minimum standards for board of governors' members' performance, such as requiring each governor to give two speeches a year to non-legal groups. He invited board input on that idea.

34. Time and Place of Next Meeting

There being no further business before the board, President Hawkins adjourned the meeting at 3:07 p.m. The next board meeting will be October 21 at the Charleston Place hotel in Charleston, S.C.

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