

Florida Bar Board of Governors
December 7, 2012
Ritz-Carlton Hotel
Amelia Island, Florida

1. Roll Call

Gwynne A. Young, President
Eugene K. Pettis, President-elect
Stephen H. Echsner, 1st Circuit
Lawrence E. Sellers, Jr., 2nd Circuit
William H. 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
Carl B. Schwait, 8th Circuit
Mary Ann Morgan, 9th Circuit
Paul Louis SanGiovanni, 9th Circuit
Scott R. McMillen, 9th Circuit
C. Richard 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
John H. Hickey, 11th Circuit
L. Norman Vaughan-Birch, 12th Circuit
William J. Schifino, Jr., 13th Circuit
Lansing C. Scriven, 13th Circuit
Margaret Diane Mathews, 13th Circuit
Michael S. Hooker, 13th Circuit
John W. Manuel, 14th Circuit
Gregory W. Coleman, 15th Circuit
Michelle R. Suskauer, 15th Circuit
Gary Shepard Lesser, 15th Circuit
Edwin A. Scales, III, 16th Circuit
Walter G. Campbell, Jr., 17th Circuit
Adele I. Stone, 17th Circuit
Lorna E. Brown-Burton, 17th Circuit
Jay Cohen, 17th Circuit
John M. Stewart, 19th Circuit
Laird A. Lile, 20th Circuit
Marcy L. Shaw, 20th Circuit
Richard A. Tanner, Out of State

Ian M. Comisky, Out of State
Eric L. Meeks, Out of State
Brian D. Burgoon, Out of State
Paige Adonna Greenlee, Young Lawyers Division President
Melanie Shoemaker Griffin, Young Lawyers Division President-elect
Anthony Holloway, Public Member

Members Absent:

Sandra C. Upchurch, 7th Circuit
Juliet M. Roulhac, 11th Circuit
David C. Prather, 15th Circuit
Timothy L. Bailey, 17th Circuit
O. John Alpizar, 18th Circuit
Winston W. Gardner, Jr., Public Member

2. Guests

Laura Wendell, Florida Association for Women Lawyers
Aramis Ayala, Virgil Hawkins Florida Chapter, National Bar Association

3. Staff in Attendance

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

4. Invocation and Pledge of Allegiance

Board member Michael Tanner delivered the invocation and led the board in the Pledge of Allegiance.

5. Florida Lawyers Assistance, Inc., Report

Executive Director Michael Cohen discussed the cooperation between FLA, Inc., and the Bar on addressing the needs of aging lawyers and reviewed the work of his agency in helping lawyers with mental and substance abuse problems. He added that the Bar and FLA's approach to addressing those problems is considered a model for the nation.

6. Appearance by Fourth Circuit Judge Brian Davis

Judge Davis welcomed the board to Amelia Island and expressed gratitude to the Bar for its merit retention voter education program and for opposing constitutional Amendment 5 on the November general election ballot.

7. Moment of Silence for Allen Martin

President Young talked about Allen Martin's career at the Bar as finance director and led the board in a moment of silence for Martin, who died unexpectedly the previous week.

8. President's Report

President Young followed up on Judge Davis' comments by recounting the Bar's efforts through its merit retention voter education program. She noted the Bar distributed 366,000 voter guides, that she visited 14 newspaper editorial boards, and that lawyers spoke to numerous civic groups around the state as part of the campaign. Young noted that 10 percent more voters cast ballots in the Supreme Court merit retention races than in 2008 and that despite active opposition to the three justices on the ballot, all the justices and district court of appeal judges on the merit retention ballot were easily retained.

9. Minutes Approval

The board approved the regular and grievance minutes from its October 5, 2012, meeting. The vote included ratifying actions taken by the Executive Committee at an October 22, 2012, meeting. Those actions were:

- Allowing the Family Law Rules Committee to file two out-of-cycle rule petitions, one on forms 12.900(h), Notice of Related Cases, and 12.928, Family Court Cover Sheet, and the second to amend Rule 12.285, Mandatory Disclosure, to replace "serve" with "produced."
- Allowing the Criminal Procedure Rules Committee to file an out-of-cycle rule amendment to conform to legislative changes made in 2011 to F.S. § 92.561.
- Allowing the Traffic Court Rules Committee to file an out-of-cycle rule amendment to provide a model colloquy for traffic court hearings to inform defendants of their right to remain silent.

10. Consent Agenda

The board approved the consent agenda. That included:

- Appointing Norma Lopez as a public member to UPL Circuit Committee 6A, John David Fernandez as an attorney member and Mary C. Driscoll as a public member to UPL Circuit Committee 6B, Kjell Purnell and Ron Ciariavella as public members of UPL Circuit Committee 12, Stanton T. Cooper as a public member of UPL Circuit Committee 18A, Lisa V. Vessels as a public member of UPL Circuit Committee 11C, and Jeff S. Carter and Donna J. Vincent as attorney members of UPL Circuit Committee 14.
- Approving an amendment to CSF Regulation B 5 Claim Prerequisites: New regulation setting forth what may be considered as proof of payment for a Clients' Security Fund claim.
- Approving an amendment to CSF Regulation C 3 Claims Ordinarily Denied (Comment): Adds comment to regulation C3 explaining that where there is no attorney-client relationship, the claim will be denied.
- Approving widespread changes to the Criminal Law Section Bylaws.
- Approving the legislative consulting contract between The Florida Bar and Metz, Husband & Daughton, P.A.
- Approving the legislative consulting contract between the Workers' Compensation Law Section and Fausto Gomez.
- Approving the restated University of Central Florida Student Prepaid Legal Services plan and then approving the amended plan.

11. Investment Committee Report

Chair Ian Comisky reported that as of November 30, the Bar's investments had increased 6.5 percent for the year. Since 1999, the investment program has averaged a 4.7 percent annual return compared to a 1.7 percent return for the S&P 500. In accordance with Bar policies, the committee is conducting a comprehensive review of Bar investments, including looking at the one, three, five, seven, and 10 year returns on the funds it is invested in. Comisky also said the committee has approved, at the recommendations of the Bar's investment advisor, increasing the investment in commodities and international stocks by 1 percent each.

12. Code and Rules of Evidence Committee Report

Chair Tom Shults gave a history of the evolution of the committee and the evidence code and rules. He presented the committee's recommendation to adopt the expert witness provision in F.S. § 766.102(12) as a rule of procedure to the extent it is procedural. He said the committee had withdrawn its recommendation to also adopt the expert witness certificate statutes codified at F.S. § 458.3175, F.S. § 459.0066 and F.S. § 466.005 as procedural, because the committee now believes those statutes are substantive rather than procedural. The board approved 36-5 a motion from board member Scott McMillen to recommend the Supreme Court reject F.S. § 766.102(12) as a rule of procedure because it is unconstitutional, will have a chilling effect on the ability to get expert witnesses for both sides in a medical malpractice case, and is prejudicial to the administration of justice. The motion also directed that a report be written for submission to the court giving the board's objections to the committee's recommendations. The board also received a statement from the Trial Lawyers Section about the rule recommendation, and that statement is attached to these minutes as Appendix A.

13. Alternative Dispute Resolution Section Report

Section Chair Chuck Chance said the section has grown to nearly 900 members and has an annual budget of around \$30,000. The section is publishing a newsletter and working on several issues, including reviewing the arbitration code which has not been updated in more than 20 years. The section is also looking at the overlapping jurisdictions of the Supreme Court's Dispute Resolution Center, which regulates both lawyer and nonlawyer mediators, and the Bar, which regulates lawyers. That includes whether the two entities should have separate certifications for mediators.

14. Board Review Committee on Professional Ethics Report

Committee Chair Carl Schwait presented Proposed Advisory Opinion 12-1 (Criminal Pleas) and reported that the BRCPE voted 7-0 to recommend that the Board of Governors affirm the opinion. The opinion concludes that a criminal defense lawyer has a conflict of interest that prevents the lawyer from advising a client whether to accept a plea offer that requires the client to waive any claims for past or future ineffective assistance of counsel by that lawyer and any prosecutorial misconduct, and that it is impermissible for a prosecutor to make such an offer because it creates a conflict of interest for the criminal defense lawyer and is prejudicial to the administration of justice. The Board of Governors approved the recommendation by voice vote.

Schwait presented Proposed Advisory Opinion 12-2 on E-Portal Use and reported that the BRCPE voted 7-0 to recommend that the Board of Governors affirm the opinion. The opinion

was adopted by the Professional Ethics Committee at its September 21, 2012 meeting in response to a request from the Board of Governors, which concludes that lawyers may permit non-lawyers under their supervision to use the lawyers' access credentials for filing documents with a court using the E-Portal at the lawyers' direction, but the lawyers remain responsible for the work and must adequately supervise the nonlawyers. The Board of Governors approved the recommendation by voice vote without objection.

Schwait also reported to the Board of Governors that the Board Review Committee on Professional Ethics continues to review the report of the Lawyer Referral Service Special Committee and plans to make recommendations to the Board of Governors for first reading at either the board's February or April 2013 meeting.

15. Appearance By Senator Rob Bradley

Senator Bradley, chair of the Senate Criminal and Civil Justice Appropriations Subcommittee, reported that state finances are improving but uncertainty remains because of two issues. One is the challenge, pending in the Supreme Court, to the recent requirement that state employees contribute 3 percent of their salaries to their pensions. The state could have to repay that money with interest depending on the court's ruling, Bradley said. The second issue is the "fiscal cliff" federal budget issue which if unresolved could cost many jobs in Florida, which in turn would affect sales taxes and other issues. Senator Bradley said Senate leaders are not interested in pursuing any radical changes to the court system and like him respect the judiciary as a third branch of government. He said he is interested in reviewing the state's corrections operations in an attempt to reduce the 30 percent recidivism rate to state prisons.

16. Legislation Committee Report

Chair Laird Lile reported that the committee recommended and the board approved declaring moot and retiring the Bar's position in opposition to Amendment 5 which appeared on the November 6, 2012 General Election ballot. Additionally, pursuant to Standing Board Policy 9.20, the board followed the committee's recommendation and approved by the required votes the following new legislative positions of The Florida Bar on:

1. Opposes amendments to the Florida Constitution that would alter the authority of the Supreme Court of Florida to regulate the admission of persons to the practice of law or the discipline of persons admitted.
2. Supports adequate funding of the state courts system, state attorneys' offices, public defenders' offices, court-appointed counsel, and the offices of the clerks of the circuit and county courts performing court-related functions.

Also, the board approved by the required votes these legislative positions of the Code & Rules of Evidence Committee of The Florida Bar:

1. Supports amendments to F.S. §§90.202(9) & 90.205 regarding judicial notice, to modernize language.

2. Supports an amendment to F.S. §90.406 regarding relevance to conform to Fed. R. Evid. 406 and to codify Florida common law.
3. Supports amendments to F.S. §§90.603-90.607 regarding witnesses to make provisions consistent with other statutes and federal rule counterparts, to clarify that a child testifying must understand both the need to tell the truth and the duty not to lie, and the standard for determining the need for an interpreter and to ensure that the interpreter is properly qualified.
4. Supports revisions to four subdivisions of F.S. §90.803 regarding hearsay to make usage/grammatical/punctuation changes and to conform to the Federal Rules of Evidence.
5. Supports amendments to F.S. §90.951 regarding contents of writings, recordings, and photographs to modernize language by adding new technology such as magnetic resonance imaging (MRI).
6. Supports amendments to F.S. §§458.3175(2)(b), 459.066(2)(b) & 466.005(2)(b), to add "if otherwise qualified under Chapters 90 and 766" at the end of each subdivision so that existing language is not construed as overriding detailed predicates for expert testimony contained in Chapter 766 and general expert qualifications in Chapter 90 – with the further understanding that The Florida Bar considers F.S. §766.102(12) to be unconstitutional.

17. Rules Committee Report

Chair Margaret Mathews presented on first reading an amendment to Rule 4-5.5, Unlicensed Practice of Law; Multijurisdictional Practice of Law: Adds language to comment to clarify what constitutes a regular presence for the practice of law in Florida.

18. Audit Committee Report

Chair Clay Schnitker presented the report from Carr Riggs & Ingram, the Bar's auditors, which gave the Bar a clean audit for fiscal year 2011-12 for the Bar budget and its health insurance, retirement, and deferred compensation programs. The board voted to accept the report.

19. Member Benefits Committee Report

Board member Clay Schnitker, liaison to the committee, presented two hotel programs for inclusion in the Bar's Member Benefits Program. One provides discounts for Bar members at the Walt Disney World Swan and Dolphin resorts, and the second provides discounts at the 13 hotel chairs that are part of Wyndham Hotels. The board approved adding both to the program.

20. Executive Session

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

21. Budget Committee Report

Chair Lanse Scriven presented four amendments, which were approved by the board: \$4,583 for monitoring the Bar's Facebook activities; \$17,958 for software to bring the Bar into compliance

with the ADA when it electronically files documents; and \$5,403 for a speaker for a training program for the Constitutional Judicial Committee.

22. Communications Committee Report

Chair Mary Ann Morgan said the committee will concentrate in the coming year in helping Bar members with technology matters. The committee's consultant has reviewed the Bar's first portable device app and is recommending changes. A subcommittee has been appointed to take recommendations from the Bar's sections and committees on the Bar's social media policy. The committee is also looking at developing two new apps. One would make the top five items used by members from the Bar's website available through that app and the second would be on the Annual Convention, including such things as directions to events and biographies of speakers. Morgan reported that the committee recommended, and the board approved, allowing the Consumer Protection Law Committee to conduct a pilot program on using the Twitter message system to put out consumer information. The board also approved the committee's recommendation to put a link on the Bar's website to the FloridaProBono.org website with information about the One pro bono program. Morgan said the Communications Committee received a report from the Constitutional Judicial Committee about its program to educate adults about courts, their functions, and how to evaluate judges. At the board's February 1 meeting, the committee plans to present recommendations on communications-related aspects of the Hawkins Commission report on the Bar's grievance program.

23. Disciplinary Procedure Committee Report

Chair Dennis Kainen said the committee will present recommendations at the board's February 1 meeting on a procedure to allow clients to access their monies held in the trust accounts of emergency suspended lawyers. Under current rules, those funds are frozen. Kainen said the committee discussed current policies on disciplinary case respondents and their counsel contacting designated reviewers regarding their cases and decided no board policy change is necessary. The committee is also working on an amendment to allow a disciplinary diversion to Bar education programs more than once every seven years if the diversions are in areas unrelated to earlier cases. The committee also discussed with Florida Lawyers Assistance, Inc., Executive Director Michael Cohen the monitoring and reporting process for lawyers admitted conditionally to the Bar because of substance abuse problems.

24. Program Evaluation Committee Report

Chair John Stewart reported that the committee rejected a proposed name change for the Elder Law Section to the Elder and Disability Law Section, but did authorize the section to create a disability law subcommittee. The committee is reviewing the proposed Senior Lawyers Section and plans to report on that to the board at its February 1 meeting. It is also reviewing the proposed Bar Leadership Academy and may also report on that on February 1. Stewart said the committee is continuing its evaluations of the Bar's Henry Latimer Center for Professionalism and the Bar's diversity and inclusion efforts, which includes the Equal Opportunities Section.

25. Special Appointments

The board appointed Mayanne Downs of Orlando and Alan Bookman of Pensacola to six-year terms and Michele Kane Cummings of Ft. Lauderdale to a two-year term on the Judicial Qualifications Commission. The board named Thomas Meeks of Miami to a four-year term on

the U.S. 11th Circuit Judicial Conference. Dannielle Murray of Altamonte Springs was appointed to a three-year term on the Florida Rural Legal Services, Inc., Board of Directors. Kerry Ann Schultz of Navarre, Mercedes Gonzales Hale of Wesley Chapel, Thomas D. Wright of Marathon, Gary J. Nagle of Juno Beach, and G. Thomas Ball of Orlando were appointed to two-year terms on the Florida Realtor-Attorney Joint Committee.

26. Young Lawyers Division Report

YLD President Paige Greenlee said the division continues to get positive feedback for its resident law program, with 50 to 60 lawyers indicating they are interested in participating. The YLD is preparing a webinar on the subject. The YLD will have its annual Affiliate Outreach Conference January 17-19 and Greenlee invited board members to attend. She also said the annual Raising the Bar event with the division's Law Student Division will be February 23.

27. Certification Plan Appeal Committee Report

Chair Steve Echsner reported the committee heard an appeal of an applicant's rejection by the Board of Legal Specialization and Education for certification, and upheld the BLSE. The appeal, he said, will likely come to the board. He also said the committee is looking at improving the processing of peer review responses and ways to improve the appeal process for those denied certification or recertification because of peer reviews.

28. Rules of Judicial Administration Committee Report

Board member Andy Sasso, liaison to the committee, presented the out-of-cycle report on changes to rules 2.515 and 2.516 to clarify issues related to electronic filings and electronic service. The amendments clarify that electronic signatures may be used only in cases with electronic filing, that parties can agree to service and exchanging information by means other than email, that a separate pleading is not necessary when an attorney designates an email address for accepting case documents, and clarify the computation of time standards. The board recommended approval of the amendments to both rules 28-0.

29. President-elect Report

President-elect Gene Pettis reported on his proposed Leadership Academy and said he and former YLD President Reneé Thompson are working to address questions raised in the Program Evaluation Committee. The academy, he said, will train lawyers for participation and leadership in the Bar.

30. Time and Place of Next Meeting

There being no further business before the board, President Young adjourned the meeting at 2:47 p.m. The next board meeting is February 1 at the Hotel Duval in Tallahassee.

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**Trial Lawyers Section Executive Council Statement Against
Adopting Florida Statutes Section 766.102(12) as a Rule of Evidence**

The Trial Lawyers Section of the Florida Bar opposes the adoption of Florida Statutes section 766.102(12) as a rule of evidence. In furtherance of our commitment to preserving access to courts for all Floridians, in accordance with Article I, Sec. 21 of the Florida Constitution, and interpretative Supreme Court precedent, we oppose the adoption of this statute as a rule of evidence. The effect of the legislation is to create a procedural restriction on the ability of litigants in Florida courts to obtain highly qualified experts to testify regarding matters that by law and often by necessity require expert explanation. Medical malpractice practitioners on both sides of the bar seek qualified experts to explain complicated medical issues to Florida juries. Often the only qualified expert willing or available to testify is out of state.

The effect of Florida Statutes section 766.102(12), and in turn any rule of evidence related thereto, is to unconstitutionally restrict access to courts by limiting the ability of litigants to retain qualified experts. The law requires that all out of state experts be subject to the disciplinary powers of the Florida Board of Medicine regarding their opinions. This creates a chilling effect on the willingness of out of state experts to testify in Florida medical malpractice cases.

The chilling effect is one that troubles both sides of the bar. Plaintiff and defense attorneys in medical malpractice litigation face the same reality: they and their clients will be restricted, and often times foreclosed, in their ability to present their case, secure justice, and to have their day in court. A plaintiff cannot initiate a case without an expert, and certainly cannot get to the jury without one. A defendant cannot defend without an expert. One or the other of the parties faces no access, restricted access, or restricted ability to advocate their case due to this procedural requirement.

The law provides no benefit to litigants, only restrictions. The law also strips the courts of a function that, heretofore, was uniquely the role of the judiciary: regulating the propriety and qualifications of expert testimony to be presented at trial. There is no need for section 766.102(12) as the courts have historically done an acceptable job regulating the evidence admissible before them. Section 766.102(12), lacking a compelling need, restricting access to courts, and providing no commensurate benefit, is constitutionally infirm.

Consistent with the Trial Lawyers Section's mission to advance and advocate the constitutional right of access to courts, we urge the Code & Rules of Evidence Committee to recommend against the adoption of a rule relating to section 766.102(12). In the alternative, we urge the Court to reject the Committee's recommendation in the event the Committee proposes adoption of such a rule.