

THE FLORIDA BAR BOARD OF GOVERNORS

Regular Minutes

December 5, 2003
The Ritz-Carlton
Amelia Island, Florida

Pursuant to notice, the regular meeting of the Board of Governors of The Florida Bar was called to order at 9 a.m. on Friday, December 5 at the Ritz-Carlton, Amelia Island, Florida, with President Miles A. McGrane, III presiding.

1. Roll Call

Board members present:

Miles A. McGrane, III President
Kelly Overstreet Johnson, President-elect
Alan B. Bookman, First Judicial Circuit
Lawrence E. Sellers, Jr., Second Judicial Circuit
Gregory S. Parker, Third Judicial Circuit
S. Grier Wells, Fourth Judicial Circuit
Henry M. Coxe, III, Fourth Judicial Circuit
William H. Phelan, Jr., Fifth Judicial Circuit
Louis Kwall, Sixth Judicial Circuit
Murray B. Silverstein, Sixth Judicial Circuit
Chobee Ebbets, Seventh Judicial Circuit
Robert A. Rush, Eighth Judicial Circuit
Mayanne Downs, Ninth Judicial Circuit
Warren W. Lindsey, Ninth Judicial Circuit
Robert M. Brush, Tenth Judicial Circuit
David Rothman, Eleventh Judicial Circuit
Jennifer R. Coberly, Eleventh Judicial Circuit
Sharon L. Langer, Eleventh Judicial Circuit
David W. Bianchi, Eleventh Judicial Circuit
Kimberly A. Bald, Twelfth Judicial Circuit
Timon V. Sullivan, Thirteenth Judicial Circuit
Gwynne A. Young, Thirteenth Judicial Circuit
Rob Blue, Jr., Fourteenth Judicial Circuit
John G. White, III, Fifteenth Judicial Circuit
Jerald S. Beer, Fifteenth Judicial Circuit
Michael T. Kranz, Fifteenth Judicial Circuit
Alan C. Brandt, Seventeenth Judicial Circuit
Nancy W. Gregoire, Seventeenth Judicial Circuit
Henry Latimer, Seventeenth Judicial Circuit
Jesse H. Diner, Seventeenth Judicial Circuit
Frank C. Walker, II, Seventeenth Judicial Circuit
Clifton A. McClelland, Eighteenth Judicial Circuit
J. Christopher Lombardo, Twentieth Judicial Circuit
A. Lawrence Ringers, Twentieth Judicial Circuit
Richard Tanner, Out of State
Ian M. Comisky, Out of State
Gary J. Leppla, Out of State
Brian D. Burgoon, Out of State

Mark Romance, YLD President
Michael J. Faehner, YLD President-elect
Solomon L. Badger, III, Ed. D., Public Member
Vivian Hobbs, Ph.D., Public Member

Board members absent:

Michael J. Glazer, Second Judicial Circuit
Russell W. Divine, Ninth Judicial Circuit
Francisco R. Angones, Eleventh Judicial Circuit
Ervin A. Gonzalez, Eleventh Judicial Circuit
Don L. Horn, Eleventh Judicial Circuit
Steven E. Chaykin, Eleventh Judicial Circuit
John F. Rudy, II, Thirteenth Judicial Circuit
Amy Smith, Fifteenth Judicial Circuit
James S. Lupino, Sixteenth Judicial Circuit
Harold G. Melville, Jr., Eighteenth Judicial Circuit

Staff attending the meeting:

John F. Harkness, Jr., Executive Director
Tina Ruffin, Assistant to the President
Paul Hill, General Counsel
Dana Riggs, Secretary to the Board of Governors
Lori Holcomb, Unlicensed Practice of Law Counsel
Gary Blankenship, Senior Editor, Florida Bar News
Allen Martin, Division Director Finance and Accounting
Tony Boggs, Director Legal Division
Mary Ellen Bateman, Director, Ethics, Advertising and Professionalism Division
Ken Marvin, Lawyer Regulation
Dawna Bicknell, Director of Legal Specialization and Education
Francine Walker, Director of Public Information

2. Guests

In addition to other individuals indicated hereafter, the following guests were present during the Board meeting:

Dinita James, President of Florida Association for Women Lawyers
Thomas M. Ervin, Jr., Board Legal Specialization and Education Counsel
Jeff Cohen, Chairman of Board Legal Specialization and Education

3. Invocation and Pledge of Allegiance

Past President John DeVault offered the invocation and led the Board of Governors in the pledge of allegiance.

4. Greetings and Other Guest Appearances

Board member Alan B. Bookman introduced State Representative Holly Benson, who spoke briefly on the Article V funding issue.

5. Non-Roll call Grievance Agenda Items

Board member Jay White gave the Non-Roll call Grievance items as numbers 7, 10, 16, 21-27 and 13 to be removed from the consent calendar.

6. Non-Roll call Advertising Appeal Agenda Items

Board member Henry Latimer reported the non-roll call advertising appeal item was 04-00072.

7. APPROVAL OF MINUTES and EXECUTIVE COMMITTEE ACTION

The following minutes and summaries of Executive Committee actions were approved as submitted.

A. Regular Minutes October 3, 2003, meeting

B. Grievance Minutes October 3, 2003, meeting

C. SUMMARY OF EXECUTIVE COMMITTEE ACTION TAKEN

- 1) October 29, 2003 emergency legislative action regarding Tax Law Section
Pursuant to Standing Board Policy 9.21(d) President Miles A. McGrane, III considered emergency action as to a proposed legislative position of the Tax Law Section, relating to Subsection 6694(a) of the Internal Revenue Code of 1986.
Emergency action was deemed necessary because hearings by the Senate Finance Committee on the Tax Shelter Transparency Act were ongoing.
President McGrane determined that, pursuant to Standing Board Policy 9.21(d), the issue could not have been reasonably submitted for consideration to the board of governors or the executive committee. Policy states that when an emergency exists, and it is not feasible for the executive committee to act, then the president, upon consultation with the president-elect and the Legislation Committee chair, if possible, may act upon requests for action on a pending or proposed legislative issue.
After consideration of the request, President McGrane singularly determined that the proposal complied with applicable policies regarding section lobbying, and agreed to not prohibit the Tax Law Section's advocacy of these matters. The section's position will be officially published as follows:
 2. Supports amending Subsection 6694 (a) of the Internal Revenue Code of 1986 by deleting its current behavioral standards and substituting in their place the behavioral standards currently set forth in Subsection 6662 (d) of the Code.
- 2) November 12, 2003, Amicus filing by the Real Property, Probate and Trust Law Section
One matter needing Executive Committee consideration was forwarded to committee members by email on November 10, 2003 for review and vote by return fax or email ballot. A quorum was reached on November 12, 2003 with the following members participating: Miles McGrane, Kelly Overstreet Johnson, Alan Bookman, Robert Rush, Hank Coxe, Mike Glazer, Mark Romance and Richard Tanner.
The Real Property, Probate & Trust Law Section requested authorization to file an amicus brief that had already been submitted to the Florida Supreme Court. SBP 8.10 governs amicus filings. The RPPTL Section sought to appear in the Florida Supreme Court's review of Blanton v. City of Pinellas Park, Case No. 2D02-1307, a matter involving whether the Marketable Record Title Act (MRTA) applied to statutory ways of necessity. Section representatives had been faithfully sharing developments in this case with staff since late September. Staff opted to await RPPTL's finished brief rather than asking for conditional / conceptual approval of this filing. Unfortunately, a service deadline necessitated that RPPTL file their brief prior to Executive Committee review.
The case involves the following certified question from the 2nd District Court of Appeal: Does the Marketable Record Title to Real Property Act, Chapter 712, Florida Statutes, operate to extinguish an otherwise valid claim of a statutory way of necessity when such claim was not timely asserted under the provisions of that act?
RPPTL's brief suggested that this question be answered in the negative. The section argues that the 2nd DCA read controlling Supreme Court case law on ways of necessity too broadly, and that statutory ways of necessity should be favored in public policy. RPPTL's brief otherwise notes that MRTA should not, and does not, appropriately apply against such statutory ways of necessity.

After consideration, the Executive Committee voted 8-0 to approve the section's filing of an amicus brief in Blanton v. City of Pinellas Park.

8. Consent Calendar

The Board of Governor's approved the following consent calendar items as submitted:

- A. UPL Circuit committee nominations
 - 1) December 2003
 - a. George C. Psetas, Attorney member, Sixth Judicial Circuit
- B. Fee Arbitration committee nominations
 - 1) November 2003
 - a. Albert Tarvin, Attorney Member, First Judicial Circuit
 - b. Rayne Suarez, Attorney Member, Second Judicial Circuit
 - c. Amy Hendry, Attorney Member, Third Judicial Circuit
 - d. Joseph Brown, Attorney Member, Third Judicial Circuit
 - e. Larry Emanuel, Attorney Member, Fourth Judicial Circuit
 - f. Barney Spurlock, Attorney Member, Fourth, Seventh, and Ninth Judicial Circuits
 - g. Charles Samarkos, Attorney Member, Sixth Judicial Circuit
 - h. Mark Stevens, Attorney Member, Ninth Judicial Circuit
 - i. Thomas Moore, Attorney Member, Ninth Judicial Circuit
 - j. Michael Peterson, Attorney Member, Ninth Judicial Circuit
 - k. Barry Rigby, Attorney Member, Ninth Judicial Circuit
 - l. Dale Clemens, Attorney Member, Ninth Judicial Circuit
 - m. Charles Cacciabeve, Attorney Member, Ninth Judicial Circuit
 - n. Ainslee Ferdie, Attorney Member, Eleventh Judicial Circuit
 - o. Richard Dewitt, Attorney Member, Eleventh Judicial Circuit
 - p. Roger Welcher, Attorney Member, Eleventh Judicial Circuit
 - q. Kurt Lee, Attorney Member, Twelfth Judicial Circuit
 - r. Lula Banks, Attorney Member, Thirteenth Judicial Circuit
 - s. Tomas Allison, Attorney Member, Thirteenth Judicial Circuit
 - t. Garry O'Donnell, Attorney Member, Fifteenth Judicial Circuit
 - u. Branda Nagel, Attorney Member, Fifteenth Judicial Circuit
 - v. Iris Robinson-Griffin, Attorney Member, Fifteenth Judicial Circuit
 - w. Paul Tuck, Attorney Member, Fifteenth Judicial Circuit
 - x. Ronald Anania, Attorney Member, Seventeenth Judicial Circuit
 - y. Misty Wheeler, Attorney Member, Seventeenth Judicial Circuit
 - z. Gloria Battle, Attorney Member, Seventeenth Judicial Circuit
 - aa. Michail Fingar Attorney Member, Seventeenth Judicial Circuit
 - bb. Abby Milton, Attorney Member, Eighteenth Judicial Circuit
- C. Rules, Bylaws & Policies
 - 1) Rule 1-3.6 Delinquent Members
Consistent with related amendments proposed for rule 1-7.3 deems as delinquent those members who are delinquent in the payment of monitoring fees, practice and professionalism enhancement program registration fees, and fee arbitration awards.
 - 2) Rule 1-7.3 Membership Fees
Consistent with related amendments proposed for 1-3.6, expands subdivision (a) to include as delinquent members those who are delinquent in the payment of monitoring fees, practice and professionalism enhancement program registration fees, and fee arbitration awards.
 - 3) Rule 3-2.1 (n) Generally (Definition of Staff Counsel)
Modifies rule 3-2.1(n) to provide that staff counsel is a lawyer employee of The Florida Bar designated by the executive director and authorized by the rules to approve formal complaints, conditional guilty pleas for consent judgements, diversion recommendations,

and make appointment of bar counsel.

4) Rule 3-3.4 Grievance Committees

Within subdivision (d), clarifies that a committee member whose term has expired may nevertheless participate in the disposition of cases pending at the time their term expired, but shall not be counted as a committee member for purposes of calculating the minimum required number of public members on the committee.

5) Rule 3-7.2 (j)(3) Procedures Upon Criminal or Professional Misconduct (interim suspension)

Within subdivision (j), creates a new (3) to provide a process for interim suspension when a member has submitted a disciplinary resignation or otherwise surrendered a license to practice law in lieu of disciplinary sanction, or has been disbarred or suspended from the practice of law by a court or other authorized disciplinary agency of another state, or by a federal court.

6) Rule 3-7.6 Procedures Before a Referee

Within subdivision (k), deletes the current requirement that the referee serve a copy of the record on bar counsel with the report, and that bar counsel make such copy available to other parties on request upon payment of the cost of reproduction.

7) Rule 4-3.4 Fairness to Opposing Party and Counsel

Conforms rule 4-3.4(e) and comment to existing case law to provide that a lawyer may state a personal opinion about the credibility of a witness in certain circumstances (when statement is supported by records and/or authorized by law or rule).

8) Family Law Section Proposed Bylaw Changes

Within Article III (Officers) increases the elected number of executive council members from 24, to 32, and alters the number of such members from 6 to 8 in the four separate subgroups of the council which allow for staggered terms of the body; within Article VII (Committees) deletes selected standing, special, and ad hoc committees.

D. Board Review Committee on Professional Ethics

- 1) Advertising Appeals 03-02005, 03-02006, 03-02007, 03-02008 and 03-02009
Advertising Appeals 03-02005, 03-02006, 03-02007, 03-02008, and 03-02009 concerns application of the rule prohibiting misleading statements, in violation of Rule 4-7.2(b)(2) to television advertisements. Staff rendered an opinion on April 28, 2003, that the language "I will schedule all of your appointments for you, absolutely free of charge" has the potential to be misleading because it implies that there will be no fees or costs charged for the representation, in violation of Rule 4-7.2(b)(2). The Standing Committee on Advertising upheld staff's opinion on June 27, 2003. The attorney subsequently requested Board of Governors review.
The BRC voted 4-0 to recommend that the board affirm the Standing Committee on Advertising decision.
- 2) Advertising Appeal 03-02201
Advertising Appeal 03-02201 concerns application of the direct mail rules to an advertisement sent to accountants who are prospective referral sources. Staff rendered an opinion on May 22, 2003, that the direct mail communication did not comply with numerous advertising rules, including the rule prohibiting language creating unjustified expectations (4-7.2(b)(1)(B)), the rule prohibiting advertising past results (4-7.2(b)(1)(B)), the rule requiring that the first page and envelope of all direct mail communications be plainly marked "advertisement" in red ink, and the rule requiring that all direct mail communications include written information detailing the background, training, and experience of the lawyer or law firm. The Standing Committee on Advertising upheld staff's opinion on September 5, 2003. The attorney subsequently requested Board of Governors review.
The BRC voted 4-0 to recommend that the board affirm the Standing Committee on Advertising decision.

- 3) Advertising Appeal 03-02456
Advertising Appeal 03-02456 concerns a direct mail letter sent to accident victims. Staff rendered an opinion on July 3, 2003, that the direct mail would be impermissible if it violated the state statutes regarding use of accident reports, F.S. §§ 119.105 and 316.066. The Standing Committee on Advertising upheld staff's opinion on September 5, 2003. The attorney subsequently requested Board of Governors review. The BRC voted 4-0 to recommend that the board affirm the Standing Committee on Advertising decision.
 - 4) Advertising Appeal 04-00072-withdrawn from consent
- E. Legislative Committee review
- 1) New section legislative position requests for the 2002-2004 biennium
 - a) Real Property, Probate & Trust Law Section
 - i) Supports legislation amending §733.212, Florida Statutes, to include reference of the deadline for filing a claim to exempt property and the deadline for filing an election to take an elective share.
 - ii) Supports legislation to repeal §734.1025, Florida Statutes, because the dollar amount for summary administrations found in §§ 735.201-2063, Florida Statutes, has been increased thus, making §734.102, Florida Statutes, duplicative.
 - iii) Supports legislation creating §744.462, Florida Statutes, and amending §737.2065, §744.331(6) and §744.441(11), Florida Statutes, to permit a court-appointed guardian of the property to contest the ward's revocable trust or trust amendment if the court in the guardianship proceeding first finds that such an action appears to be in the ward's best interests.
 - iv) Supports legislation to amend §201.02, Florida Statutes, to clarify and better define the circumstances under which the documentary stamp tax will apply to instruments conveying real property to and from various entities.
 - v) Supports legislation to amend §689.07, Florida Statutes, to add "nor the trust is identified by title or date" to clarify that a deed to "X, as Trustee of the XYZ Trust dated 1/1/01" does not convey title to X individually, contrary to the interpretation in re Raborn, 16 Fla. L. Weekly Fed. D 257 (S. D. Fla. 2003).
 - vi) Supports legislation to amend §558.001, Florida Statutes, relating to construction defects, to make compliance requirements more practical, clarifying vague provisions, and maintaining consistency with similar statutes enacted in other states.
 - vii) Oppose legislative restrictions on condominium associations' rights to govern themselves and their own documents, but do not oppose further disclosure requirements to a purchaser concerning rental provisions.
 - viii) Supports legislation that will move §689.26, Florida Statutes, and §689.265, Florida Statutes, to Florida Statutes Chapter 720, Homeowners' Associations, to eliminate existing confusion over whether those Sections apply to properties other than residential parcels in "communities" as defined in Florida Statutes Chapter 720.
 - ix) Opposes proposed §518.117, Florida Statutes, and related amendments abrogating a trustee's duties of loyalty and duties of full and fair disclosure in connection with affiliated investments by a corporate trustee.
 - b) Family Law Section
 - i) Supports amending Chapters 61 and 742, Florida Statutes, to make it clear that the court has the appropriate discretion and authority to, upon good cause shown by a party, modify temporary support orders on a retroactive basis, even in the absence of a showing of a substantial change in circumstances.

9. Young Lawyers Division Report

President Mark Romance reported that at the Young Lawyers Division October Board meeting in Tampa, Florida an Affiliate Outreach conference was held. Over 20 affiliates attended to present their programs and ideas. They were able to recruit 2 new affiliates from Marion and West Pasco counties who are attempting to assist young lawyer groups throughout the state in forming young lawyer organizations. The Young Lawyers Division reported that they solicited nominations for awards for programs by local Bar affiliates that promote or satisfy the needs of children. They received over ten program nominations. The winner was the Sarasota County Bar Association's Big Brother, Big Sister program. The program requires each lawyer participating to make a one year commitment to local children. The annual government symposium will be held at the Contemporary Hotel in Orlando, Florida, January 23, 2004. The focus will be Article V, Revision 7, funding. The panelists will include of Supreme Court of Florida Chief Justice Anstead and Representative Holly Benson. It will be moderated by Representative Dudley Goodlette. Tax Watch has agreed to unveil the results of their study of the effects of Article V on businesses at the symposium. President Romance reported on the following items:

A. Items for final reading-**Approved**

1) Rule 6-12.3 Basic Skills Course Requirement Rule-Requirement

Regarding the course components of the basic skills course requirement in subdivision (a), codifies that the practicing with professionalism program shall be 1 day in length, and reduces the number of basic elective continuing legal education programs from 2 to 3; regarding the time for completion of the basic skills course requirement in subdivision (b), increases the time for advance completion of the Practicing with Professionalism program from 8 to 12 months prior to admission to The Florida Bar; conforms other references to basic CLE requirements in subdivision (b) to reflect the proposed change in (a); consistent with related amendments proposed for rule 6-12.4

2) Rule 6-12.4 Basic Skills Course Requirement Rule- Deferment and Exemption

Consistent with related amendments proposed for rule 6-12.3, substantial editorial reorganization of the rule to reflect elimination of the government lawyer deferment from the Practicing with Professionalism course program; adds a requirement for members to provide written notice to the bar of the expiration date of their deferment; restructured rule otherwise maintains the current government lawyer deferment from the basic elective CLE course requirement.

10. Rules Committee Report

Chairman Vivian Hobbs reported on the following items:

A. Item on first reading

1) SBP 5.10 - Standing Committees

Conforms name changes, additions, or deletions of various committees as necessary.

11. Multijurisdictional Practice of Law Report

Chairman John Yanchunis gave the report of the Special Commission on the Multijurisdictional Practice of Law 2002. The commission believes that the following rule amendments strike the balance between protecting the public and recognizing the realities of the multijurisdictional nature of the modern practice of law. The board approved the following amendments, to be sent to the Florida Supreme Court.

A. Items for final action

1) Rule 1-3.10 Appearances by Non-Florida Lawyers

Within rule and subdivision (a) titles, amends verbiage to specify that provisions address appearances "in a Florida court"; also within (a), adds requirement that any such non-Florida lawyer be "currently eligible to practice" in another state; in (a)(2), deletes language authorizing judicial discretion to allow additional appearances beyond 3 in a 365-day period and allowing appearance in related litigation; deletes (a)(4)'s prohibitions on inactive, new (b); creates new subdivision (b), setting forth specific prohibitions on appearances by non-Florida lawyers; within new (c) - former (b)- rearranges content of verified motion for leave to appear, to track language of

- Fla. R. Jud. Admin. 2.061 and adds requirements for disclosure of all bar admissions and any pro hac vice appearances in Florida within the preceding 5 years; also adds non-refundable filing fee of \$250 for all such motions, and requirements for the movant's verification, and the signatures of any Florida Bar members associated for purposes of the representation.
- 2) Rule 1-3.11 Appearances by Non-Florida Lawyers in an Arbitration Proceeding in Florida
New rule patterned after proposed amendments to rule 1-3.10, setting forth guidelines and procedures for a non-Florida lawyer to appear in an arbitration proceeding in Florida, provided that the appearance is for a client who resides or has an office in the lawyer's home state, or the appearance arises out of or is reasonably related to the lawyer's practice in another state in which the lawyer is admitted; allows lawyers submitted in a non-United States jurisdiction to appear in arbitration proceedings; waives filing fee, 3 time presumption and filing of verified statement in matters of international arbitration; defines international arbitration in comment; limits disclosure of information if otherwise confidential.
 - 3) Rule 3-2.1 Generally
Creates new subdivision (q), defining "final adjudication" as a decision by an authorized disciplinary authority or court issuing a sanction for professional misconduct that is not subject to judicial review except by direct appeal to the U.S. Supreme Court.
 - 4) Rule 3-4.1 Notice and Knowledge of Rules
Adds title language and rule language to clarify that rule provides for disciplinary jurisdiction over attorneys of other states and foreign countries; deletes limiting verbiage in last sentence and adds new rule text to confirm such jurisdiction and authority of an attorney "who provides or offers to provide any legal services in this state."
 - 5) Rule 3-4.6 Discipline by Foreign or Federal Jurisdiction
Expands current rule verbiage - retitles as subdivision (a), "Disciplinary Authority"- to additionally specify that an attorney may be subject to discipline in Florida regardless of where the attorney's questionable conduct may have occurred, and to clarify that the attorney may be subject to discipline in more than 1 jurisdiction; within new subdivision (b), adds choice of law provisions, and labels such subdivision accordingly; similarly adds choice of law language to rule title.
 - 6) Rule 3-7.2 Procedures Upon Criminal or Professional Misconduct; Discipline Upon Determination or Judgement of Guilt of Criminal Misconduct
Within subdivision (j), adds further requirement that notice of a disciplinary sanction from another jurisdiction be provided to the executive director of The Florida Bar in addition to that already furnished to the Supreme Court of Florida.
 - 7) Rule 4-5.5 Unlicensed Practice of Law
Substantially amends rule title, text, and comment to allow for the multijurisdictional practice of law in limited circumstances and on a temporary basis.
 - 8) Fla. R. Jud. Admin. 2.061 Foreign Attorneys- In connection with proposed amendments to R. Reg.Fla.Bar 1-3.10, 1-3.11, 3-4.1 & 3-4.6, limits the number of appearances by a foreign attorney to 3 appearances in a 365-day period; requires the payment of a non-refundable \$250.00 filing fee to The Florida Bar; requires the use of a form motion; and includes form motion.

12. Code and Rules of Evidence Committee Report

Board member Rob Blue reported that the Code and Rules of Evidence Committee approved amendments to the following rules: 90.104, 90.6063, 90.803, 90.902 and 90.5035 to bring the statutory code and court rules into agreement and thereby avoid the problem of determining which portions of these statutory code provisions are procedural and which are substantive. The board voted 32-0 in favor of the changes.

13. Report of Board Review Committee on Professional Ethics

Chairman Henry Latimer reported on the following items:

- A. Advertising Appeal 04-00072
Advertising Appeal 04-00072 concerns application of two rules to a newspaper advertisement: (1) Rule 4-7.2(c)(1), prohibiting illustrations that are not directly related and objectively relevant to the selection of an

attorney in a specific matter; and (2) Rule 4-7.2(b)(1)(B), prohibiting statements that create unjustified expectations. Staff rendered an opinion on July 18, 2003, that a photograph of a child was not relevant to the selection of an attorney in an advertisement for bankruptcy services, in violation of Rule 4-7.2(c)(1). The staff opinion also stated that the language "Do you want to stop your creditors from harassing you?" created unjustified expectations, in violation of Rule 4-7.2(b)(1)(B). The Standing Committee on Advertising upheld staff's opinion on September 5, 2003. The attorney subsequently requested Board of Governors review.

The BRC voted 4-0 to recommend that the board affirm the Standing Committee on Advertising decision that the photograph violates rule 4-7.2(c)(1). The BRC voted 3-1 to reverse the Standing Committee on Advertising decision as to the language "Do you want to stop your creditors from harassing you," finding the language permissible. The board concurred in the recommendations of the BRC.

B. Standing Committee on Advertising Request for Guidance 24427, 03-01167, and 03-01854

The Standing Committee on Advertising requests guidance from The Florida Bar Board of Governors concerning the definition of "prior professional relationship." If there is a "prior professional relationship" between an attorney and another person, the prohibition against direct, in-person solicitation in Rule 4-7.4(a) does not apply to any communication between the attorney and the person. The committee has received several recent inquiries regarding the issue. In response to one inquiry, the committee voted on March 12, 2003, to inform the inquiring attorney that several types of relationships met the definition of "prior professional relationship" and therefore not be subject to the prohibition against direct solicitation, including the following: fellow officers, directors or members of professional organizations related to the attorney's legal practice (trade organizations, e.g.), former coworkers of the attorney, former employees of an attorney's corporate client, fellow members of boards of directors, fellow officers, directors or members of charitable organizations, members of other professions if the attorney uses them in their professional capacity as the attorney's own professional (such as investment advisor, insurance agent, or medical provider), and professionals the attorney has met at meetings and seminars. The committee voted to reconsider its opinion on April 16, 2003, but deferred a vote on the merits. The committee voted to request guidance on the issue in the above inquiry and two others at its June 27, 2003 meeting.

The BRC voted 4-0 to recommend that the board refer the issue to the appropriate committee for additional study, as the committee was unable to reach a consensus on an appropriate definition. The board concurred in the recommendation.

C. Ethics Appeal - Proposed Advisory Opinion 02-9

On July 2, 2002, an attorney requested a written staff opinion regarding including a clause in the inquiring attorney's fee contract requiring arbitration of disputes between the attorney and client. Staff denied an opinion on the basis of a Professional Ethics Committee policy not to review specific contracts and a lack of direct Florida precedent. On July 19, 2002, the attorney requested Professional Ethics Committee review of the staff opinion. Official notice of the committee's intent to consider rendering an opinion on this issue was published in the November 15, 2002 issue of The Florida Bar News. The Professional Ethics Committee adopted Proposed Advisory Opinion 02-9 at its meeting of March 7, 2003. Proposed Advisory Opinion 02-9 concludes that an attorney may include a clause in the attorney's fee contract requiring mandatory arbitration of disputes between the attorney and the client. Official notice of the Professional Ethics Committee's adoption of Proposed Advisory opinion 02-9 was published in the April 1, 2003 issue of The Florida Bar News. The Professional Ethics Committee reconsidered Proposed Advisory Opinion 02-9 at its June 27, 2003 meeting in light of comments received by Florida Bar members and affirmed the proposed advisory opinion. One of the Florida Bar members who timely filed comments on Proposed Advisory Opinion 02-9 subsequently requested Board of Governors review. The attorney request review believes the opinion should limit the arbitration clause to fee and malpractice disputes only.

The BRC voted 4-0 to recommend that the board withdraw Proposed Advisory Opinion 02-9. The board concurred in the recommendation.

14. Audit Committee Report

Vice chairman Warren Lindsey reported that Rick Weidner of Carr, Riggs & Ingram, audited The Florida Bar for the time period of July 2002 through June 2003. The Auditors found the records to be in good shape. There were no

adjusting entries.

The auditors will report to the committee at its January 2004 meeting on suggestions on how the Bar can best comply with the spirit of Sarbain-Oxley legislation.

The committee recommended the retaining of Carr, Riggs and Ingram on a 3 year contract for the fiscal years ended June 30, 2004, 2005 and 2006. The committee motion was unanimously approved.

15. Unlicensed Practice of Law Report

Lori Holcomb reported on the following rule on second reading: Rule 4-8.4 (c) allowing a lawyer to participate in undercover investigations. Board Member Lindsey moved to amend the commentary to the rule by removing the last sentence which reads “For the purposes of this chapter, undercover investigations involve, but may not be limited to obtaining information by misrepresenting one’s identity and/ or purpose.” The board adopted the amendment to the rule and approved the rule as amended 24 to 10.

16. Program Evaluation Committee Report

Chairman Hank Coxe reported on the following items:

A. Reconsideration of proposed rule changes- Approved

1) Rule 6-9 Standards For Certification Of A Board Certified Real Estate Lawyer-as amended

- a. Rule 6-9.1 Generally
Adds to purpose of standards the criteria of “character, ethics and reputation for professionalism”; also adds language to address uniqueness of Florida real estate law and necessity for applicants to demonstrate knowledge and experience in Florida real estate law and transactions.
- b. Rule 6-9.2 Definitions
Expands definition of real estate law to include matters relating to ownership and rights, examination of titles, real estate conveyances and other transfers, sales and other transactions, property owner associations and planned developments, regulation in land use and zoning.
- c. Rule 6-9.3 Minimum Standards
Within subdivision (a), requires applicants to demonstrate experience with Florida real estate law for at least 3 of the 5 years of law practice before filing an application; within subdivision (b), requires applicants demonstrate experience and involvement with Florida real estate law and transactions; within subdivision (c), requires at least 3 references to be licensed to practice law in Florida or alternatively authorize references from non-Florida lawyers, judges, and others; within subdivision (d), authorizes establishment of policies by BLSE to provide guidance on CLE accreditation.
- d. Rule 6-9.4 Recertification
Within subdivision (a), eliminates “continuous and substantial” as criteria for involvement in real estate law since last date of certification; within subdivision (b), provides BLSE with authority to establish policies to govern CLE credit allocations; within subdivision (c), requires 3 of the 5 references to be licensed to practice law in Florida and adds “character, ethics and a reputation for professionalism” as criteria for recertification.

B. Review of the Certification Appeals Process-Approved

Chairman Hank Coxe reported that the committee looked at the issue and recommended returning to the BLSE’s starting position. CPAC would do a procedural due process review and would not be involved in a actual review of the peer review. The board approved the proposal which adds a new subsection to BLSE policy 2.13, which says that the BLSE’s action on an appeal shall close the application and peer review evaluation process. It also clarifies another subsection on appealing to CPAC and the board by saying those appeals can deal only with procedural issues.

C. Special Committee to Review Lawyer Advertising Rules- Approved

Chairman Hank Coxe reported that the committee approved the creation of a special committee to review Lawyer Advertising Rules. In January 2004 President-elect Kelly Overstreet Johnson will appoint 13 to 15 people to this committee.

17. Report of the Special Committee to Review the ABA Model Rules 2002

Chairman Adele Stone reported that the committee analyzed the rule changes adopted by the American Bar Association and compared them to The Florida Bar rules. Ms. Stone read the recommended changes, which were treated as if they were on first reading. The committee interim report is on The Florida Bar web site.

18. The Florida Bar Foundation Report

Executive director Jane Curran reported some rule changes and amendments to the Foundations Articles of Incorporation. The general intent is to broaden the Foundation's base of political and financial support by eliminating the qualification that only members of The Florida Bar can be Foundation members. The board approved the amendments.

Ms. Curran reported that the Dade County Fellows had 236 new members, which adds \$236,000 to the endowment over the next 5 years. The Fellows recruitment drive will possibly be moving to Clearwater, Collier County, Bradenton and then on to St. Petersburg.

19. Investment Committee Report

Chairman Ian Comisky reported that The Bar portfolio has had a 16% increase since last year. The committee recommended that the board shift \$1.507 million from Putnam Mutual to Henderson Global. The committee's motion was unanimously approved.

20. Budget Committee Report

Chairman Jesse Diner reported on the following items:

- A. The committee approved all of the budget amendments which are:
 - \$3,000 for The Florida Bar FICPA Committee Seminar; \$22,342 for Lawyer Regulation Special Commission study; \$8,963 for Executive committee consultant for long range planning; \$10,200 for the Advertising review committee. The amendments were approved by the board.
- B. A motion was made and seconded to approve the pension plan amendment proposed by The Bar's pension counsel. The motion was unanimously approved by the board.

21. Special Commission on Lawyer Regulation

Chairman Hank Coxe reported that the Special Commission on Lawyer Regulation has met twice at the Tampa Airport Marriott. They have received feedback from many different groups due to the public notice of this commission. The Commission has decided to conduct several surveys throughout the state. They will survey all judges who have been a referee in the last three years, all attorneys who have been a respondent, and all Florida Bar staff counsel.

22. Legislation Committee Report

Chairman Alan Bookman reported on the following items:

- A. Florida Bar legislative position request for the 2002-2004 biennium-Approved 37-0
 - 1) Supports increasing the criminal penalty for the unlicensed practice of law within §454.23, Florida Statutes, from a first degree misdemeanor to a third degree felony.
- B. Reconsideration of Florida Bar legislation position for the 2002-2004 biennium-Approved 35-1
 - 1) Retired Florida Bar legislation position # 8, which is as follows:
 - Supports a merit-based selection process for Florida judges made up of nominating commissions that are comprised of one-third directly appointed by the Governor, one-third directly appointed by The Florida Bar, and one-third jointly chosen by the appointees of the Governor and The Florida Bar.
- C. Section Legislative Consultant Contract-Approved
 - 1) Family Law Section - Fred Dudley
- D. Entertainment Arts and Sports Law Section Resolution-Approved
 - 1) Supports full and complete state funding for the arts and the arts education programs in Florida, as well as the continued existence of the Corporations Trust Fund, and urges the Florida legislature to continue and increase the funding of these arts programs and organizations.

Board member Bookman reported that President McGrane had presented Senator Rod Smith and Representative Holly Benson with The Florida Bar Presidential Awards the night before. He reported that Senator Smith spoke to the legislation committee for nearly two hours during their regularly scheduled meeting. President McGrane will be presenting Senator Alex Villalobos with a Presidential Award at the Dade County Bar Association meeting held on December 18, 2003.

Steve Metz, The Florida Bar's Chief Legislative Counsel, reported that there are presently 51 pending ballot initiatives to amend the Florida Constitution. He discussed how this would affect the courts as well as businesses if the ballot initiative process was not changed. In closing he reported on who the anticipated leaders of the Florida House and Senate will be until 2008. In the House, following Speaker Byrd will be Representative Bense, and then Representative Rubio. In the Senate, following President King will be Senator Lee, and then Senator Pruitt.

23. Health Law Committee Report

Chairman Christine Whitney reported that most people aren't sure what Health Lawyers do. She gave the example of an investor interested in purchasing a medical facility, a health lawyer would be able to advise the client of the liability involved. They also represent hospitals and patients when there is a question of health care insurance or Medicare/ Medicaid coverage.

Members of the Health Law section met with a facilitator to discuss what the Health Law section could do to help implement part of President McGrane's "For the Children" program. They determined that they could advertise the Health Law sections availability to counsel those with needs in specific areas, such as children's health issues or living wills.

24. Certification Plan Appeals Committee Report

Chairman David Rothman reported that the Certification Plan Appeals Committee and the Board of Legal Specialization and Education worked out a compromise concerning the certification appeals process. The board heard the compromise on first reading, which adds a new subsection to BLSE policy 2.13, that says that the BLSE's action on an appeal "shall close the application and peer review evaluation process." It also clarifies another subsection on appealing to CPAC and the board by saying those appeals can deal only with procedural issues.

25. Criminal Procedure Rules Committee Report

Board liaison David Rothman reported that the Criminal Procedure Rules committee was comprised of 1/3 defense attorneys, 1/3 prosecutors and 1/3 judges and law professors. The committee is usually chaired by a judge or law professor. Rothman introduced Chairman Judge Olin Shinholser to take questions, however none were asked. The committee recommended the approval of the committee's two-year-cycle amendments. The recommendation was moved and the board concurred 33-0.

26. Board of Legal Specialization and Education Policies

Chairman Jeff Cohen reported on the following items - Approved

- A. Proposed rule changes for final action
 - 1) Rule 6-22.1 Standards for Certification of a Board Certified Antitrust and Trade Regulation Lawyer - Generally
Adds text to emphasize that applicants shall be required to establish they have a special ability as a consequence of broad and varied experience in antitrust and trade regulation law.
 - 2) Rule 6-22.2 Standards for Certification of a Board Certified Antitrust and Trade Regulation Lawyer - Definitions
Within subdivision(d), refines definition of "contested matters" to reference matters that were adversarial and binding, and in which an applicant had a significant responsibility and personal involvement in either reaching an adjudicated decision or settlement; adds new subdivision (e), to define "adjudicated decisions" and clarify their applicability as contested matters if arising from any single case within a 3-year period.
 - 3) Rule 6-22.3 Standards for Certification of a Board Certified Antitrust and Trade Regulation Lawyer - Minimum Standards

- Within subdivision (a) (1), revises discussion of “minimum period of practice” consistent with definition of trade regulation law in rule 6-22.2(b); within subdivision (a)(2), adds satisfactory completion of certain nationally recognized trial advocacy courses as possible substitute for minimum number of matters necessary for certification; revises subdivision (a)(3)’s discussion of “substantial involvement” consistent with definition of trade regulation law in rule 6-22.2(b); adds new subdivision (e), to provide a limited exemption from examination for selected applicants who have been substantially involved in antitrust and trade regulation law for a minimum of 20 years.
- 4) Rule 6-22.4 Standards for Certification of a Board Certified Antitrust and Trade Regulation Lawyer - Recertification
- Within subdivisions (a) & (b), revises discussions of “substantial involvement” and “minimum number of matters” consistent with definition of trade regulation law in rule 6-22.2(b); within subdivision (e), expands provisions to allow the committee to waive the required number of contested matters in an applicant has been certified at least 14 years or has, since their most recent certification, become an officer in any judicial system or within other selected offices, or for good cause shown.

27. Traffic Court Rules Committee Report

Board liaison Jerry Beer reported that the Traffic Court Rules committee recommends the approval of the committee’s two-year-cycle rules amendments. The recommendation was moved and the board concurred 30-0.

28. Juvenile Court Rules Committee Report

Chairman Jennifer Parker reported that the Juvenile Court Rules committee recommends the approval of the committee’s two-year-cycle rules amendments. The recommendation was moved and the board concurred 31-0.

29. Appellate Court Rules Committee Report

Siobhan Shea reported that the Appellate Court Rules committee recommends the approval of the committee’s two-year-cycle rules amendments. The recommendation was moved and the board concurred 29-0.

30. Workers’ Compensation Rules Committee Report

President McGrane reported that due to a dispute over jurisdiction between their rules committee and the Department of Administrative Hearings, the rules will go to the Supreme Court of Florida. They will decide who has the jurisdiction to move amendments.

The board did not vote on this issue.

31. Judicial Administration Rules Committee Report

Board liaison Frank Walker reported that the Judicial Administration Rules committee recommends the approval of the committee’s two-year-cycle rules amendments. The recommendation was moved and the board concurred 27-0.

32. President-elect Report

President-elect Kelly Overstreet Johnson reported that the composition of the Strategic Planning committee will be made up of members of the Executive committee, as well as the chair-elects of the Legislation, Budget and Communications committees, and the President-elect designate. The Advertising review committee will be appointed in January, consisting of 13-15 people. President-elect Johnson intends to appoint both people who do advertise and people who don’t advertise. She will be meeting with Barry Richard to research if the Bar can constitutionally require an advertisement to be approved by the Bar, before it is run.

President-elect Johnson will be participating in a joint press conference in January with the President of the Florida Medical Association. They will be discussing living wills and distributing the living will forms to doctors’ and attorneys’ offices.

President-elect Johnson plans to have a ski retreat during her tenure as President and is looking at Beaver Creek, Snow Mass and Deer Valley.

33. Disciplinary Procedures Committee Report

Vice chairman Greg Parker reported on the following items:

- A. Items on first reading
- 1) Rule 1-3.8 (e) Right to Inventory
Creates new subdivision (e) which would require each member of the bar who practices law in Florida and who is the only lawyer responsible for protecting the interests of the member's clients to identify another member who is willing to serve as inventory attorney in the event of any need for such; clarifies that the designated member is under no obligation to serve in that capacity.
 - 2) Rule 3-5.1 (c) Types of Discipline; Probation
Within subdivision (c), clarifies that a failure to comply with terms of probation or a finding of probable cause for misconduct during probation may be prosecuted as contempt and processed as other contempt proceedings elsewhere; additionally confirms that any order of sanctions for contempt hereunder may also terminate probation previously imposed; also within subdivisions (g) & (j), revises the term "disciplinary resignation" throughout, to read "disbarment on consent"; additionally within (j), streamlines verbiage to reflect that disbarment by consent shall have the same effect as and shall be governed by the same rules as provided for disbarment, and that matters involving disbarment by consent shall be processed in the same manner as conditional guilty pleas for consent judgment.
 - 3) Rule 3-7.10 (h) Reinstatement and Readmission Procedures (prompt hearing; report)
Within subdivision (h), deletes language that requires the referee to copy The Florida Bar with the referee's report as to reinstatement; also consistent with proposed changes in rules 3-5.1, 3-6.1 & 3-7.2, adds verbiage within subdivision (n) to make this rule applicable to an attorney who has been "disbarred on consent".
 - 4) Rule 4-5.8 Procedures for Lawyers Leaving Law Firms and Dissolution of Law Firms
New rule, which sets forth guidance for allowable client contact by lawyers and law firms when a lawyer is leaving a law firm or when a law firm is being dissolved.
 - 5) SBP 15.10 Waiver of Disqualification as Attorney for Respondents
Within subdivision (b), revises current prohibition against a member of board member's law firm representing a respondent in a disciplinary proceeding, and specifies those circumstances under which the board may grant a waiver for such representation.
 - 6) SBP 15.30 Executive Committee Actions on Disciplinary Matters
Within subdivision (b), clarifies existing policy for the disposition of unopposed reinstatement matters, to allow agreements or stipulations for reinstatement to be treated the same as consent judgments which do not require board or executive committee review.
 - 7) SBP 15.55 Deferral of Disciplinary Investigation During Civil or Criminal Proceedings
New policy in furtherance of rule 3-7.4(e), to provides additional guidance for deferral of the investigation of a disciplinary complaint that may have been initiated to influence a separate civil or criminal proceeding.
- B. Items for final action- Approved
- 1) Rule 4-1.5 Fees for Legal Services
 - a) Rule 4-1.5 Fees for Legal Services - Alternate Billing Methods
Within comment, adds language to suggest that lawyers should discuss with the client, where appropriate, other alternate billing methods beyond an hourly or fixed fee rate.
 - b) Rule 4-1.5 Fees for Legal Services - Reasonable Costs
Within subdivision (b) and comment – affecting other related revisions pending with the Supreme Court – adds as an additional factor in determining reasonable costs the relationship and past course of conduct between the lawyer and the client; adds further language in comment, that costs appearing in sufficient detail on closing statements and approved by the parties to a transaction should meet the requirements of the rule.
 - 2) Rule 4-5.4 Professional Independence of a Lawyer-Board did not consider.
 - 3) Disbarment on Consent Rules-Board did not consider.
 - a) Rule 3-5.1 Generally

- b) Rule 3-6.1 Generally
- c) Rule 3-7.2 Procedures Upon Criminal or Professional Misconduct; Discipline Upon Determination or Judgement of Guilt of Criminal Misconduct
- d) Rule 3-7.10 Reinstatement and Readmission Procedures
- e) Rule 3-7.12 Disciplinary Resignation from The Florida Bar

34. Communications Committee Report

Robert Rush reported that the Communications committee video taped the entire Board of Governors meeting and will place clips on The Florida Bar web site. The Young Lawyers Division has requested that their Symposium at the Contemporary Hotel in Orlando on January 23, 2004 be video taped and to place on their web site. The Florida Bar will place clips on The Florida Bar website.

The Committee approved a request of the Broward County Bar Association for a \$1,267 Florida Bar Communications Grant for a media relations program to be held in February. The program is titled "Creating Meaningful, Productive Communication between the Media and the Legal Community."

The committee discussed joining the Florida Medical Association to have members of both associations distribute Living Will forms as provided in F. S. 765.303.

35. Special Appointments

- A. Florida Realtor-Attorney Joint Committee-Approved
 - 1) Denise Lowry Hutson
 - 2) David R. Carter
 - 3) Robin A. Lukacs
 - 4) John R. Banister
 - 5) Frederick W. Jones
- B. Florida Rural Legal Services, Inc. Board of Directors-Approved
Owen L. Luckey, Jr.
- C. Eleventh Circuit Judicial Conference-Approved
E. Lanny Russell
- D. Greater Orlando Area Legal Services, Inc. Board of Governors-Approved
Mark Johnson

36. Time and place of the next meeting

The next Board of Governors meeting will be held January 28 through January 30, 2004 at The Florida Bar Annex, Tallahassee, Florida.

There being no further business to discuss, the Board of Governors meeting adjourned at 3:13 p.m.

Respectfully submitted,

Dana M. Riggs
Secretary to the Board of Governors

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