

Florida Bar Board of Governors
March 25, 2011
Disney's Yacht & Beach Club Resort
Lake Buena Vista, Florida

1. Roll Call

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

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

Members Absent

Stephen H. Echsner, First Circuit
Murray B. Silverstein, 6th Circuit
Nancy W. Gregoire, 17th Circuit
Timothy A. Bailey, 17th Circuit
Scott W. Weinstein, 20th Circuit

2. Guests

Gigi Rollini, President, Florida Association for Women Lawyers
Victoria Mendez, President, Cuban American Bar Association

3. Staff in Attendance

John F. Harkness, Jr., Executive Director
Paul Hill, General Counsel
John Berry, Director, Legal Division
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
Rosalyn Scott, Assistant to the President
Gary Blankenship, Senior Editor, Florida Bar *News*

4. Invocation and Pledge of Allegiance

Board member Dan DeCubellis delivered the invocation and led the board in Pledge of Allegiance.

5. Appearance by Judge Alan Lawson

Judge Lawson, who serves on the Fifth District Court of Appeal, welcomed the board to Orlando

and noted the tough time the court system is having with its budget in the Florida Legislature.

6. Minutes Approval

The minutes from the board's January 28, 2011, meeting were approved. That included ratifying the actions by the Executive Committee since that meeting, as follows:

- On February 15, 2011, the Rules of Judicial Administration Committee, Criminal Procedure Rules Committee, Probate Rules Committee, Small Claims Rules Committee, Code and Rules of Evidence Committee, Appellate Court Rules Committee, Juvenile Court Rules Committee, and Family Law Rules Committee requested and were granted permission by a 12-0 vote to file out-of-cycle rule amendments concerning electronic court records and filings. The filings were in response to an August 4, 2010, request from the Supreme Court.

- On February 24, 2011, the committee granted permission by an 11-0 vote to the Health Law Section to co-sign a letter from the Florida Pediatric Society to state legislators questioning the merits of HB 155 and SB 432 which would limit or eliminate the ability of doctors to ask patients about their ownership of firearms.

- On March 3, 2011, the Rules of Judicial Administration and Family Law Rules committees requested approval to file a response requested by the Supreme Court. The committees concurred with the recommendation in the report of the Steering Committee on Families and Children to amend *Fla. R. Jud. Admin. 2.545(d)(2)* and *Fla. Fam. L.R.P. 12.010 (a)(1)* to add proceedings for temporary custody of minor children by extended family, under chapter 751, Florida Statutes, to the definition of family law proceedings. The committee voted 8-0 to approve the committees' request.

7. Consent Agenda

Board Review Committee on Professional Ethics Chair Carl Schwait announced that Advertising Appeal 11-01180 had been withdrawn at the request of the filer and the review of the Standing Committee on Advertising decisions in 11-01353 and 11-01632 were withdrawn from consent and would be presented during the board meeting. With the exception of those items, the board approved the consent agenda.

The consent agenda approval included appointing Hamden Baskin III as an attorney member to UPL Committee 6A, Pamela Joy Smith as an attorney member and Fred W. Sanford as a public member to UPL Committee 9A, Michele Bruner and Christine Stram as public members to UPL Committee 9B, Sara Macks and Michael L. Forte as attorney members to UPL Committee 13A, Marya Ufen as a public member to UPL Committee 17C, David Wayne Dyer as an attorney member to UPL Committee 18A, and Susan Stacy as an attorney member to UPL Committee 18B.

The consent agenda approval included final approval for:

- An amendment to Rule 1-3.7, Reinstatement to Membership: Within subdivision (f)(2), clarifies that any lawyer who has not actively practiced or been in a position requiring a law license for the entire period of inactive membership must complete the basic skills course and 30 hours of continuing legal education to become eligible. Terminology changed from "attorney" to "lawyer" throughout to conform to the Supreme Court of Florida style guide.

- An amendment to Rule 4-7.3, Voluntary Pro Bono Plan: Within subdivision (b), expands the number of committee members on the Standing Committee on Pro Bono Legal Service from 20 specifically designated members to 21 specifically required members plus 4 nonspecific, at-large members for a total of no more than 25 members. Expands eligible board member appointees from current to past or current board members. Adds YLD president or designee to the list of required members. Within subdivision (c)(2)(D) and (E), deleted extraneous language and reworded for clarity and consistency. Within subdivision (d), reworded for clarity and consistency.

- Amendments to bylaws of the Entertainment, Arts and Sports Law Section made pursuant to recommendations from The Florida Bar made in November 2008.

The consent agenda vote ratified refunds for Bar members who expressed opposition to Florida Bar legislative positions.

The vote approved replacing Jesse H. Diner with William J. Schifino, Jr., as a trustee for The Florida Bar Retiree Health Plan and Retirement Committee, the Fourth Amendment to The Florida Bar Employees' Pension Plan, and the Secretary's Certificate for the Fourth Amendment.

8. Public Reprimands

President Downs delivered four public reprimands.

9. Appearance by former Bar President Miles McGrane III

McGrane, chair of the Judicial Qualifications Commission, asked the board for help opposing proposed legislation that would make public complaints to the JQC either when charges are filed or no probable cause is found. The current constitutional confidentiality provisions protect judges who cannot comment on a complaint, encourage courtroom personnel and young lawyers to file complaints without fear of reprisal, and prevent unscrupulous parties from filing complaints to force the recusals of judges from their cases, he said.

10. Report of Real Property, Probate and Trust Law Section Chair Brian Felcoski

Felcoski said the section continues to provide high quality CLE programs, including quickly putting together a course on last year's Gulf oil spill disaster and on changes made at the end of 2010 to estate tax legislation. In compliance with the section's strategic plan, the section has reorganized its Executive Council and continued an outreach program to attract young lawyers.

11. Report of Health Law Section Immediate Past Chair Troy Kishbaugh

Kishbaugh said the section has focused on reaching out to members and overhauling its website and is working to allow members to attend CLE programs via telephone or the Internet to increase convenience and reduce costs. The section will be doing a joint seminar with the Elder Law Section on the new national health care law.

12. Budget Committee Report

Budget Committee Vice Chair William Schifino presented the 2011-12 Bar budget, which he said keeps all Bar programs intact although a few staff positions were eliminated. The \$39

million budget is balanced. The board unanimously approved the budget, and Schifino said the board will review any member comments at its May 25 meeting and then forward the budget to the Supreme Court.

13. Investment Committee Report

Chair Ian Comisky said the Bar's long-term portfolio continued to improve and is up 10.88 percent for the fiscal year. He said the committee has been following events in Japan and the Middle East but is not currently planning to make any changes in the Bar's investments as a result.

14 Special Committee to Study Mandatory Paralegal Regulation Report

Chair Scott Rubin reported that the committee found that the Supreme Court does possess the authority to regulate paralegals. The committee majority report recommends that lawyers not be allowed to call any nonlawyer employees "paralegals" unless they are Florida Registered Paralegals, although this would not affect how they bill for services provided by support staffers. The committee's minority report recommends that no change be made and that requiring all paralegals to be Florida Registered Paralegals would remove the special status of being a FRP. President Downs said the report was referred to the Program Evaluation Committee.

15. Executive Session

The board went into executive session to discuss disciplinary and other confidential matters. Board member Lisa Small was recused from disciplinary matters.

16. Legislation Committee Report

Chair Ed Scales, Chief Legislative Counsel Steve Metz, President Downs, and Bar Outside Counsel Barry Richard summarized several pending bills in the legislature that would affect the judicial branch and discussions that have been held with Speaker Dean Cannon's office. At the end of an extensive discussion, the board approved a motion that without further deliberate study, The Florida Bar should strongly oppose and advocate against the following bills:

- PCB CVJS 11-06 splitting the Supreme Court into separate civil appeals and a criminal appeals courts.
- PCB CVJS 11-07 which implements PCB CVJS 11-06.
- PCB CVJS 11-08 which eliminates The Florida Bar from the judicial nominating commission process.
- HJR 1094 removing judicial nominating commissions from the selection process for Supreme Court justices and district court of appeal judges.
- SJR 1672 and HJR 7039 which increase from 50 to 60 percent the percentage of votes necessary to retain a Supreme Court justice of district court of appeal judge in office.
- SB 7222 which substitutes the Attorney General for The Florida Bar in nominating to the governor a slate to fill four of the nine seats on each JNC.
- To oppose any legislature of a similar nature.

The motion recognized dialogue with legislative leadership, particularly the Speaker of the House, that indicated support of these modifications to the above proposals:

- Maintaining a single Supreme Court but expand the number of justices from seven to 10

and having permanent civil and criminal divisions.

- The governor would appoint the chief for each Supreme Court division, and those chiefs would rotate being the singular chief justice for the entire court and the administrative head of the court system.

- Expanding the ability of the Supreme Court to consider appeals by removing the requirement that opinions between the district courts of appeal “expressly and directly” conflict.

- Leaving rulemaking authority with the judicial branch.

- Allowing the Legislature to repeal a court rule by majority vote rather than two-thirds vote with a way to prevent the Supreme Court from immediately re-adopting the repealed rule.

- Leave the judicial nominating commissions provisions in the Florida Constitution unchanged but continue to pursue statutory reforms on JNC composition and operation.

- Allow Senate confirmation of appellate judges, with the appointment becoming automatically confirmed if the Senate failed to act within a limited time frame. That would include creating a way for confirmation to occur when the Senate is not in session.

- Providing the House of Representatives meaningful access to Judicial Qualification Commission records but providing for the continued confidentiality of those records unless the House initiates an impeachment proceeding.

- Leaving the current law on merit retention unchanged.

The Bar will continue discussions with lawmakers but from the the position that all legislation should further follow these principles:

- A stable, secure, adequate, and permanent source for funding of state courts.

- Continuing and improving the efficient, fair and impartial function of the courts and the administration of justice, with the recognition that the judicial branch is a third co-equal branch of government.

- Providing access to the courts and the availability of legal services for Floridians.

- Maintaining a continued and meaningful role for The Florida Bar in the judicial selection process.

In separate action, the board voted to oppose legislation that would amend the constitution to remove confidentiality from most JQC proceedings after the determination of whether to file formal charges. The Bar, though will support allowing the Speaker of the House to have meaningful access to JQC files and records as long as confidentiality is maintained, unless needed for an impeachment proceeding.

Board member Lisa Small was recused from all legislative-related votes.

17. Appearance by Supreme Court Chief Justice Charles Canady

Justice Canady updated the board on the shortfall in court revenues for the 2010-11 fiscal year, caused by a decline in foreclosure filings. He noted the courts had not overspent their budget, but rather foreclosure filings, because of paperwork problems, had dramatically declined and most of the court system’s funding came from those filings. He said legislative leaders had agreed on a plan that would fund the courts for the remainder of the year, but Gov. Rick Scott asked for more information and only approved funding until the end of April. The chief justice said he was optimistic the governor would authorize the rest of the funding when more information is

supplied. On the 2011-12 budget, Canady said he was concerned because the House preliminary budget cut judicial salaries by 8 percent but that Speaker Cannon restored those funds. He also said the budget cut 14 law clerks from the Supreme Court, which would make it very hard for the court to handle its caseload.

18. Appearance by Mark Schlakman

Schlakman, from the Florida State University Center for Advancement of Human Rights, presented a letter from former Supreme Court Justice Raoul Cantero. The letter and Schlakman asked the board to endorse a complete review of Florida's death penalty process, which could be done either by legislative committees of the Legislature's Commission on Capital Cases. President Downs referred the request to the Executive Committee.

19. Member Benefits Committee Report

Chair Brian Burgoon presented three new programs, which were approved by the board. They are:

- Medjet Assist, which provides insurance for medical evacuation both domestically and internationally.
- Sears Commercial Marketplace, which provides online shopping discounts for home and office products.
- Strategic Technology, Inc., Tabs 3, which is software to help lawyers, particularly in small firms, set up and maintain trust accounts.

20. Young Lawyers Division Report

YLD President Renée Thompson reported that more than 300 law students and lawyers turned out for the Law Student Division's recent Raising the Bar event. The division is participating in a conference with the General Practice, Solo and Small Firm Section, recently did a family law seminar and is participating in the U.S. 11th Circuit conference. The division also got involved in the effort opposing legislation to transfer to the Legislature from the Supreme Court oversight of court procedural rules.

21 Board Review Committee on Professional Ethics Report

The Board of Governors voted 21-15 to approve the recommendation of the Board Review Committee on Professional Ethics (6-1) to reverse the decision of the Standing Committee on Advertising in files 11-01353 and 11-01632, determining that the following use of plural pronouns in television advertisements in files 11-01353 and 11-01632 is false, misleading or deceptive in violation of 4-7.2(c)(1) because the filers are sole practitioners: "If you come see me or call me now, *we* will take a genuine interest and focus on you and your needs. . . . If you've been injured in an auto accident, on the job or due to someone's negligence, let *us* help you get the comp checks and settlement you deserve. [11-01353] You have the right to fight foreclosure, and you can stay in your home while *we* defend your rights. . . . If you want help or are not sure what to do, please call *us* to discuss your case at _____. [11-01632]"

The Board of Governors heard a report from BRCPE Chair Carl B. Schwait regarding Proposed Advisory Opinion 10-3. On June 25, 2010, the Professional Ethics Committee voted to request

that the Board of Governors permit the committee to adopt a proposed advisory opinion regarding disclosing confidential information of a decedent at the request of the personal representative of the decedent's estate. This question is frequently asked on the Ethics Hotline, so the committee believes the issue is one of importance to a significant number of Florida Bar members. Procedure 2(b)(2) permits the Professional Ethics Committee to issue a proposed advisory opinion at the request of the Board of Governors. On July 23, 2010, the Board of Governors voted to request that the Professional Ethics Committee issue a proposed advisory opinion on the issue of the ethical obligations of a lawyer who is asked to disclose confidential information of a decedent by the personal representative, beneficiaries or heirs at law of a decedent's estate, or their counsel. Proposed Advisory Opinion 10-3 was adopted by the Professional Ethics Committee at its September 24, 2010, meeting and published for comment by Florida Bar members in the October 15, 2010 Florida Bar *News*. After reviewing comments received by Florida Bar members, the Professional Ethics Committee revised Proposed Advisory Opinion 10-3 slightly. None of the Florida Bar members who commented requested Board of Governors review after being informed of the Professional Ethics Committee's revisions.

No action was taken by the BRC or Board of Governors, so the opinion is now final.

The Board of Governors heard an informational report from Chair Carl B. Schwait regarding proposed amendments to the lawyer advertising rules. He reported that the Board Review Committee on Professional Ethics met March 24, 2011, to review comments and make changes to proposals on the lawyer advertising rules and that the Board Review Committee on Professional Ethics will meet by conference call before the May Board of Governors meeting to make final changes to the draft rules. He reported that the Supreme Court of Florida has directed The Florida Bar to file proposed amendments on July 5, 2011. He urged Board of Governors members to read the proposed amendments before the May Board of Governors meeting and call with any questions or concerns.

22. Program Evaluation Committee Report

Chair Greg Coleman presented on first reading bylaws amendments for the Real Property, Probate and Trust Law Section and the Appellate Practice Section. He said the committee will review the report of the Special Committee to Study Mandatory Paralegal Regulation and would make recommendations to the board at its May meeting. He also said the committee was continuing its review of Bar professionalism operations.

23. Communications Committee Report

Vice Chair Greg Coleman reported the committee had approved an "app" for smart phones and PDAs that would allow downloading of the Bar *News*. That has now gone to the Budget Committee. The committee is also working with President-elect Scott Hawkins on his communications plans for next year.

24. Special Appointments

The board reappointed Jerry Newman for a four-year term on the Florida Patient's Compensation Fund Board of Directors. Frank Ashton, representing the jurisdiction of the First

DCA, Thomas E. Glick, representing the Third DCA, and Maria T. Fabre, representing the Fifth DCA, were named to four-year terms on the Statewide Nominating Commission for Judges of Compensation Claims. Anthony Andrews was chosen for a two-year term on the Supreme Court's Bar Admissions Committee. Winston W. Gardner, Jr., of Orlando, Steven S. Oscher of Tampa, and Marni F. Stahlman of Winter Park were selected as finalists to be the new public member on the Board of Governors, replacing Arnell Bryant-Willis, who has served the maximum two terms allowed in Bar Rules. The Supreme Court will make the final selection.

25. Disciplinary Procedure Committee Report

Chair Andy Sasso presented four items on first reading:

- Rule 3-6.1 Employment of Certain Attorneys and Former Attorneys; Generally - Prohibited Conduct: Adds new subdivision (d)(4) to prohibit suspended attorneys and former attorneys who have been disbarred, or whose disciplinary resignations or revocations have been allowed, from representing clients in administrative proceedings and before administrative agencies which allow non-lawyer agents or "qualified representatives" to represent clients in certain circumstances.

- Rule 3-7.1 Procedures; Confidentiality: Adds new subdivision (l)(3) to authorize release of confidential information on pending investigations upon receipt of a signed waiver by respondents who are applying for board certification to the Board of Legal Specialization and its committees; renumbers subdivision (l)(3) to (l)(4).

- Rule 3-7.10 Reinstatement and Readmission Procedures - (f)(3)(G) and Comment: Within subdivision (f)(3), clarifies that ordinary life activities do not constitute rehabilitation and that a showing of community and civic service is required. Within subdivision (f)(3)(G) defines community and civic service. Within the comment, provides discussion and case law discussing community and civic service required for reinstatement.

- Standing Board Policy 15.90 Review and Approval of Disciplinary Cost Payment Plans: Within subdivision (a), adds "due to the Bar" to the title. Deletes subdivision (a)(2), restitution. Within subdivision (a)(3), renumbers and lowers from 90 to 30 the number of days after which diversion fees are delinquent. Deletes subdivision (a)(4), fee arbitration awards. Adds new subdivision (b) stating that restitution or arbitration awards awarded by courts or arbitration panels not paid within 30 days after the award or court order is final are payment delinquencies. Within subdivision (e) [proposed subdivision (f)] and (h) [proposed subdivision (i)] adds that review of payment plans of duration longer than one year must be reviewed by the Disciplinary Review Committee subject to final approval by the board of governors. Renumbers subsequent subdivisions accordingly. Other editorial and style changes made.

26. Update on E-Filing for Courts

Board member Laird Lile reported that e-filing for the courts began in January and has slowly been increasing under the Florida Courts E-Filing Authority Board, which oversees the Internet portal that provides access to the e-filing system. The Florida Courts Technology Commission has been studying clerks' authority to reject filings where there are errors. He said a possible solution is to have clerks validate that the filing has been made and then contact the filer to have errors corrected.

27. President-elect's Report

President-elect Hawkins presented the schedule for the board's 2011-12 Bar year meetings.

28. President's Report

President Downs briefly reiterated the challenges the Bar and the court system face in the legislature.

29. Time and Place of Next Meeting

There being no further business before the board, President Downs adjourned the meeting at 4 p.m. The board's next meeting will be May 27 at the Westin Resort in Key West.

SUBJECT INDEX

APPEARANCE BY FORMER BAR PRESIDENT MILES MCGRANE III	4
APPEARANCE BY JUDGE ALAN LAWSON	2
APPEARANCE BY MARK SCHLAKMAN	7
APPEARANCE BY SUPREME COURT CHIEF JUSTICE CHARLES CANADY	6
BOARD REVIEW COMMITTEE ON PROFESSIONAL ETHICS REPORT	7
BUDGET COMMITTEE REPORT	4
COMMUNICATIONS COMMITTEE REPORT	8
CONSENT AGENDA APPROVAL	3
DISCIPLINARY PROCEDURE COMMITTEE REPORT	9
E-FILING REPORT	9
EXECUTIVE SESSION	5
GUESTS	2
HEALTH LAW SECTION REPORT	4
INVESTMENT COMMITTEE REPORT	5
INVOCATION AND PLEDGE OF ALLEGIANCE	2
LEGISLATION COMMITTEE REPORT	5
MEMBER BENEFITS COMMITTEE REPORT	7
MINUTES APPROVAL	3
PRESIDENT-ELECT'S REPORT	9
PRESIDENT'S REPORT	10
PROGRAM EVALUATION COMMITTEE REPORT	8
PUBLIC REPRIMANDS	4
REAL PROPERTY, PROBATE AND TRUST LAW SECTION REPORT	4
ROLL CALL	1
SPECIAL APPOINTMENTS	8
SPECIAL COMMITTEE TO STUDY MANDATORY PARALEGAL REGULATION REPORT	5
STAFF IN ATTENDANCE	2
TIME AND PLACE OF NEXT MEETING	10
YOUNG LAWYERS DIVISION REPORT	7