

Florida Bar Board of Governors
March 23, 2012
Hilton Hotel
Pensacola Beach, Florida

1. Roll Call

Scott G. Hawkins, President
Gwynne A. Young, President-elect
Stephen H. Echsner, 1st Circuit
William H. "Bill" Davis, 2nd Circuit
Clay A. Schnitker, 3rd Circuit
S. Grier Wells, 4th circuit
Michael G. Tanner, 4th Circuit
Lawrence Scott Kibler, 5th Circuit
Andrew B. Sasso, 6th Circuit
Sandra Fascell Diamond, 6th Circuit
Carl B. Schwait, 8th Circuit
Mary Ann Morgan, 9th Circuit
Paul Louis SanGiovanni, 9th Circuit
Scott R. McMillen, 9th Circuit
C. Richard "Rick" Nail, 10th Circuit
Ramon A. Abadin, 11th Circuit
Dori Foster-Morales, 11th Circuit
Michael J. Higer, 11th Circuit
John H. Hickey, 11th 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
David C. Prather, 15th Circuit
Gregory W. Coleman, 15th Circuit
Edwin A. Scales III, 16th Circuit
Walter G. Campbell, Jr., 17th Circuit
Jay Cohen, 17th Circuit
Timothy L. Bailey, 17th Circuit
Clifton A. McClelland, Jr., 18th Circuit
Laird A. Lile, 20th Circuit
Richard A. Tanner, Out-of State
Eric L. Meeks, Out-of-State
Brian D. Burgoon, Out-of-State
Sean T. Desmond, YLD President
Paige Adonna Greenlee, YLD President-elect
Winston W. Gardner, Jr., Public Member
Alvin V. Alsobrook, Public Member

Members Absent:

Lawrence E. Sellers, 2nd Circuit
Sandra C. Upchurch, 7th Circuit
Leslie J. Lott, 11th Circuit
Dennis G. Kainen, 11th Circuit
Juliet M. Roulhac, 11th Circuit
L. Norman Vaughan-Birch, 12th Circuit
Michelle R. Suskauer, 15th Circuit
Gary Shepard Lesser, 15th Circuit
Adele Ilene Stone, 17th Circuit
Eugene K. Pettis, 17th Circuit
Timothy L. Bailey, 17th Circuit
John M. Stewart, 19th Circuit
Scott W. Weinstein, 20th Circuit
Ian M. Comisky, Out-of-State

2. Guests

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

3. Staff in Attendance

John F. Harkness, Jr., Executive Director
Ken Marvin, Director, Lawyer Regulation
Allen Martin, Director of Finance and Accounting
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
Rosalyn A. Scott, Assistant to the President
Gary Blankenship, Senior Editor, Florida Bar *News*

4. Invocation and Pledge of Allegiance

The invocation was delivered by board member Steven Echsner, who also led the board in the Pledge of Allegiance.

5. Appearance by Escambia-Santa Rosa Bar Association Vice President Jeremy C.

Branning

Branning welcomed the board to the Pensacola area and recounted some of the area's history and attractions.

6. Approval of Minutes

The board approved the minutes of its January 27, 2012, meeting in Tallahassee. That approval included ratifying actions taken by the Executive Committee or President Scott Hawkins since the board's January meeting. Those include:

• On February 6, 2012, President Hawkins gave emergency consideration to four proposed legislative positions from the Family Law Section and one from the Health Law Section. He determined the Bar should not prohibit the Family Law Section from taking these positions:

- Supports the codification of existing case law providing that retroactivity as to modification or termination of alimony awards shall be discretionary with the trial court.
- Supports the amendment of F.S. §61.08, to allow the court to consider adultery in determining the amount of alimony based upon specific findings that the adultery caused a significant depletion in the marital assets or caused a significant reduction in income
- Opposes bifurcation of dissolution of marriage actions except with a reservation of jurisdiction in exceptional circumstances when it is clearly necessary for the best interests of the parties or their children.
- Supports the codification of existing case law relating to the modification or termination of alimony awards consistent with *Pimm v. Pimm*, 601 So.2d 534 (Fla. 1992).

President Hawkins also determined the Bar should not prohibit the Health Law Section from taking the following position: Opposes SB 208, SB 1316 & HB 653 (2012) and any other legislation that seeks to expand the reach of F.S. §456.0635 regarding the sanction or disqualification of licensed health care professionals who plead no contest, plead guilty, or are convicted of certain enumerated crimes, by restricting a licensing board from using its discretion to determine who should maintain a license and under what conditions.

• On February 14, 2012, President Hawkins gave emergency consideration to 13 legislative positions proposed by the Family Law Section. He determined the Bar should not prohibit the Family Law Section from taking these positions:

- Opposes legislation that would change the definition of "abandonment" under Chapter 63, Florida Statutes.
- Opposes amendments to Chapter 63, Florida Statutes, relating to adoption proceedings which contradict or conflict with Chapters 39 and/or 742, Florida Statutes, relating to paternity proceedings.
- Opposes amendments to the definition of unmarried biological father under Chapter 63, Florida Statutes.
- Opposes amendments to Chapter 63, Florida Statutes relating to the date the birth mother identifies the putative father.
- Opposes any amendments to the definition of "parent" under Chapter 63, Florida Statutes.
- Opposes removing or eliminating any requirement that a party search the putative father registry.
- Opposes excepting "safe haven" adoptions from DCF investigation.
- Opposes any amendments eliminating or reducing DCF's responsibility to investigate any possible abuse, abandonment or neglect of a child.
- Opposes removing the court's discretion to order scientific testing.
- Opposes any amendments reducing a father's opportunity to establish his legal rights to a child.
- Opposes any requirement which reduces an identified putative unmarried biological father's right to due process under Chapter 63, Florida Statutes.
- Opposes legislation that would seek to limit, to remove or to prohibit a party's right to contract where no violation of the public policy of this state exists.

- Supports amending Section 61.30(11), Fla. Stat. to allow for the consideration of the parenting plan, court-ordered timesharing schedule or the particular timesharing schedule exercised by formal or informal agreement of the parties when the Court is determining whether to deviate from the Child Support Guidelines pursuant to Section 61.30(a)(1 0) or adjust child support pursuant to Section 61.30(b), Fla. Stat.

- On February 22, 2012, President Hawkins gave emergency consideration to a proposed legislative position from the Workers' Compensation Section. He determined the Bar should not prohibit the section from taking this position: Opposes any legislation that abolishes the statewide nominating commission for judges of compensation claims.

- On February 23, 2012, the Executive Committee voted 12-0 to allow the Family Law Section to amend its budget and donate \$75,000 to The Florida Bar Foundation to fund a children's legal services attorney position.

- On February 29, 2012, the Executive Committee voted 11-0 to recommended approval of amendments proposed by the Rules of Judicial Administration Committee and the Criminal Procedure Rules Committee to Rules 2.525, 3.030, and 3.090 in response to the Supreme Court's order in Case Nos. SC10-2101 (email service) and SC11-399 (e-filing).

- On March 5, 2012, the Executive Committee approved the hiring of the Moore Consulting Group in Tallahassee with a budget of \$300,000 to assist the Bar in its program this year to educate voters about Florida's merit selection and retention system.

7. Consent Agenda

Board Review Committee on Professional Ethics Chair Scott McMillen announced that agenda item 5b(i), Advertising Appeal 12-00819, was being withdrawn from the consent agenda and would be presented during the BRCPE's regular report. With that change, the board approved the consent agenda as presented. That approval included the appointment of Latisha Garrison-Fulwood as an attorney member and Dwayne E. Clark and Lashonda Holloway as public members of UPL Circuit Committee 4; Sharon Feliciano as an attorney member of UPL Circuit Committee 7B; Karla E. Valladares as an attorney member of UPL Circuit Committee 9B; and Rita Noelle Charlet as an attorney member of UPL Circuit Committee 20.

8. Legislation Committee Report

Committee Co-chair Ray Abadin said the Bar had a successful legislative session, including helping get a no-cuts \$446 million budget for the court system and \$2 million for the Florida Access to the Civil Legal Assistance Act. The courts also got an extra \$4 million and court clerks \$2 million to address the backlog in foreclosure cases.

9. Budget Committee Report

Committee Chair Bill Schifino presented two items which were approved by the board. One for a amendment to the 2011-12 budget appropriates \$4,000 to conduct a survey to support the Bar's proposed amendment to advertising rules to prevent the use of authority figures in lawyer ads. The second is an amendment to Bar Rule 1-7.3(c) which allows Bar members a third option for selecting payment of annual membership fees in installments by citing undue hardship. The amendment also sets no limit on the number of times a Bar member can opt to pay his or her annual membership fees in installments. Vice Chair Lanse Scriven presented the proposed 2012-13 Bar budget, which has \$38.757 million in revenues, \$38.745 million in expenditures, and no

increase in annual membership fees. The board unanimously approved the budget and will consider comments from members at its May meeting.

10. Investment Committee Report

Committee Vice Chair Clay Schnitker reported that the Bar's investments continue to perform well and its long term fund has \$36.7 million, only a few hundred thousand dollars from its all time high. At the moment, the Bar's advisers do not recommend any changes in Bar investments.

11. Communications Committee Report

Committee Chair Greg Coleman said the committee is still reviewing software that would meet public records requirements and allow the Bar to have a presence on Facebook and similar social media. The committee recommended and the board approved a policy that all marketing to the public from the Board of Legal Education and Specialization on the Bar's certification program must be reviewed and approved by the Communications Committee.

12. Merit Selection and Retention Education Program Report

Board member Sandra Diamond, who heads the steering committee overseeing the voter education program on merit selection and retention, reported that the program will kick off with events timed to coincide with Law Week. The Bar has hired Moore Consulting Group from Tallahassee to help design the program. Initial surveys and focus groups show 90 percent of the public do not know what merit retention is and hence the Bar's efforts will stress judicial merit retention. The Bar will publish a voters' guide on the judges and justices up for merit and print around 250,000 copies. It will also work with the Florida League of Women Voters on their fall voters' guide, which will have about one million copies printed. The Bar will be looking to work with other organizations, including local bars, and also will have an electronic presence, including online outlets and social media.

13. Commission on Review of the Discipline System Report

Board member Greg Coleman, vice chair of one of the commission's three subcommittees, reported the three subcommittees are making their recommendations which are being drafted into a final report for consideration by the full commission. Recommendations will deal with issues from the effectiveness of grievance diversion programs to keeping judges informed on grievance cases they refer to the Bar.

14. Executive Session

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

15. Board Review Committee on Professional Ethics Report

- On Item 5(b)(i), which was removed from the consent calendar, Chair Scott McMillen reported that the committee voted 6-0 to recommend that the Board of Governors reverse the Standing Committee on Advertising decision in advertising file 12-00819. The SCA held that the website address AbogadosconResultados.com (English: AttorneyswithResults.com) appearing in a radio advertisement impermissibly refers to past results or successes in violation of Rule 4-7.2(c)(1)(F). The BRCPE found that the website address is permissible because the website address does not refer to any particular result and because the term is neutral. The Board of Governors voted to approve the BRCPE on voice vote.

- The Board of Governors revisited Advertising Inquiry 30479 from the January 27, 2012 Board of Governors meeting. McMillen reported that the BRCPE voted 5-1 to recommend that the Board of Governors inform the inquirer that it is impermissible for the inquirer to use a proposed illustration on his business card used to promote his practice in seeking appointment to perform private trial resolution. The illustration is a silhouette of a faceless person in judicial robes on a bench. The BRCPE found it is misleading under Rule 4-7.2(c)(1) in that it implies that the inquirer is a sitting judge. The Board of Governors voted to approve the Board Review Committee on Professional Ethics on voice vote. The BRCPE voted 5-1 to recommend that the Board of Governors inform the inquirer that he may use the following statement in advertisements: “John Doe, available to serve as private trial resolution judge” because the statute allowing private trial resolution requires that an eligible lawyer be appointed in each individual matter and does not provide for an ongoing status as a private trial resolution judge. The Board of Governors voted to approve that recommendation on a voice vote. The BRCPE voted 6-0 to recommend that the Board of Governors decline to respond to the inquirer’s February 8, 2012, additional inquiry regarding whether he may sign an order or judgment “Trial Resolution Judge X” when serving in a voluntary trial resolution proceeding because it is a matter of court procedure and law, not an issue to be decided under the lawyer advertising rules. The Board of Governors voted to approve the recommendation on a voice vote.

- The BRCPE voted 6-0 to recommend that the Board of Governors defer the issue of whether to direct the Professional Ethics Committee to issue a formal opinion on whether and under what circumstances lawyers may permit lawyer’s support staff to use the lawyer’s log-in name and password for the e-portal to file documents in the Florida court system as the E-Portal Authority Board is continuing to address issues relating to the function of the e-portal. The Board of Governors voted to approve the recommendation on a voice vote.

- The BRCPE voted 6-0 to recommend that the Board of Governors affirm the denial of a staff opinion regarding the inquirer’s ethical responsibility when the inquirer has been ordered by a state court to withdraw in a pending federal case because of an agreement the inquirer signed in a state court case, while the federal court has denied the inquirer’s motion to withdraw. The staff opinion held the request involves questions of law and court procedure that are outside the scope of an ethics opinion. The BRCPE also learned from the inquirer at its meeting that the matter is now moot the federal court has now entered an order allowing the inquirer to withdraw in the federal case. The Board of Governors voted to approve the BRCPE recommendation on a voice vote.

16. Program Evaluation Committee Report

Chair Jay Cohen recommended approval of bylaw amendments for the Entertainment, Arts and Sports Law Section to allow email voting during Executive Council meetings. The board approved the amendment by voice vote. Cohen presented the committee’s recommendations on its study of a possible nonvoting seat on the Board of Governors for a government lawyer. He said the committee concluded that the matter, as well as the concerns from any group of lawyers that feels underrepresented in Bar matters, could be best handled under existing Standing Board Policy 1.2(f). That finding required no action by the board. Finally, Cohen said the committee had six recommendations to address the perceived underrepresentation of section members on

procedural rules committees and problems of communications between sections and the rules committees. The board approved the six items, which are:

- Provide the president-elect during the committee appointment process a list of rules committee membership, including the number of section executive council members on each committee.
- Develop a tracking process for rules, and keep sections informed on pending amendments.
- Use the annual Section Leadership Conference to educate section leaders about the rules process and how section executive council members can apply for rules committees.
- Improve communications between the Bar and Supreme Court rules steering committees, and share that information with sections.
- Work to post matters pending at rules committees and Supreme Court steering committees on the Bar website to get feedback from all Bar members.
- Continue efforts to limit the size of all rules committees with the goal that no committee have more than 40 members.

Cohen said the committee expects to report on its evaluations of the Young Lawyer Division's SCOPE program and the Lawyer Referral Service Committee at the board's May meeting.

17. Disciplinary Procedure Committee Report

Chair Clif McClelland presented two items for final action, both of which were approved by the board:

- Rule 3-7.2, Procedures Upon Criminal or Professional Misconduct; Discipline Upon Determination or Judgment of Guilt of Criminal Misconduct; Suspension by Judgment of Guilt: Within subdivision (f), allows the bar and the respondent to file an immediate consent judgment for disbarment or for disciplinary revocation if the respondent wishes to resolve the matter immediately following a judgment of guilt in a felony case.
- Rule 5-1.2(b) and (c), Trust Accounting Records and Procedures (Responsibility of Lawyers for Firm Trust Accounts and Appendix of Trust Accounting Forms): sets forth records requirements for wire transfers. Adds a new subdivision (c) to delineate each lawyer's responsibility within a firm relating to the trust account and requires the firm to have a plan distributed among firm attorneys describing which lawyers handle trust account responsibilities. Reletters subdivisions accordingly. Within new subdivision (d), clarifies that if the lawyer fails to file the trust accounting certificate, the lawyer will be deemed a delinquent member and ineligible to practice law.

McClelland reported the committee is studying an amendment to SBP 15.55, Deferral of Disciplinary Investigation During Civil, Criminal, and Administrative Proceedings. The change would end deferrals of investigations involving misappropriation of funds by lawyers from the lawyers' own clients or from fiduciary accounts such as trusts or estates, even though these cases may also be pending in civil or criminal courts. The investigation could be deferred if the Bar's actions would substantially impair the concurrent civil or criminal cases.

18. Rules Committee Report

Chair Steve Echsner presented seven rule changes and one Clients' Security Fund revision on first reading:

- Rule 4-1.6, Confidentiality of Information: Within subdivision (c)(5), changes "Rules of Professional Conduct" to "Rules Regulating The Florida Bar."
- Rule 4-1.7, Conflict of Interest; Current Clients: Adds the title "informed consent" to subdivision (b) to conform with the style guide. Within subdivision (d), changes "upon consent by the client after consultation regarding the relationship" to "with the client's informed consent, confirmed in writing or clearly stated on the record at a hearing." Within the first paragraph of the comment under "Conflict in Litigation," adds "(b) and" before "subdivision (c)."
- Rule 4-1.9, Conflict of Interest; Former Client: Within the fourth paragraph of the comment, deletes the sentence, "For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce."
- Rule 4-1.10, Imputation of Conflicts of Interest; General Rule: Within the third paragraph under "Confidentiality" in the comment to the rule, adds the word "relevant" before "protected by rules 4-1.6 and 4-1.9(b)."
- Rule 4-2.4, Lawyer Serving as Third-Party Neutral: Within the second paragraph of the comment, changes "Society of Professionals in Dispute Resolution" to "Association for Conflict Resolution."
- Rule 4-4.2, Communication With Person Represented by Counsel: Within subdivision (a), changes "adverse party" to "person."
- Rule 4-8.6 Authorized Business Entities: Within subdivision (c), clarifies that nonlawyer may not serve as officer with policy making function, regardless of whether the nonlawyer is engaged in the practice of law.
- CSF Regulations: Within (A)(2) Claims Processing, deletes obsolete language and clarifies the recommendations that may be made on claims.

19. Certification Plan Appeals Committee

Vice Chair Dori Foster-Morales reported on one appeal of a certification revocation. The committee recommended and the board approved by a voice vote denying the appeal.

20. Young Lawyers Division Report

YLD President Sean Desmond reported that the division will be putting on its new basic skills level practice development course on May 16 in Tampa, which will look at everything from time management to trust accounting to cultures within law firms.

21. Rules of Judicial Administration Report

Board member Andy Sasso presented the proposed amendment to Rule 2.140(a), which provides for better organization of rules committees and provides a procedure for handing joint committee referrals. The board recommended approval of the amendments by a 28-0 vote.

22. Special Committee on Lawyer Referral Services Report

Chair Grier Wells reported the committee is continuing its work and consulting with outside Bar Counsel Barry Richard on whether the Bar can constitutionally prohibit lawyers from belonging to private referral services that also refer callers for other types of professional services.

23. Public Member Screening Committee Report

Chair Michael Higer reported the committee had reviewed 23 applicants and conducted interviews with seven. The committee recommended that Connie Bookman of Pensacola, Anthony Holloway of Belleair, and Lawrence Tyree of Key West be nominated to the Supreme Court to fill the upcoming public member vacancy. Ronald Lebio of Dunnellon was nominated from the floor. By ballot, the board nominated Bookman, Holloway, and Tyree.

24. Special Appointments

The board reappointed John B. Bowman of Ft. Lauderdale for a two-year term on the Supreme Court's Bar Admissions Committee and appointed Pauline Robinson to fill a vacancy on the Florida Rural Legal Services, Inc., Board of Directors for a term expiring December 31, 2013.

25. Executive Director's Report

Executive Director John F. Harkness, Jr., noted the passage in the state budget with \$2 million for the Florida Access to Civil Legal Assistance Act and asked board members to urge Gov. Rick Scott to not veto the appropriation. He also reported on the Bar's series of free online CLE courses for members, which have been downloaded more than 30,000 times in the past 18 months.

26. President's Report

President Hawkins again noted the Bar's upcoming voter education program on merit selection and retention and asked board members to get involved in the effort.

27. Time and Place of Next Meeting

There being no further business, President Hawkins adjourned the meeting at 2:03 p.m. The board's next meeting is May 18, 2012, at the Ritz-Carlton in Naples.

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