

The Florida Bar Board of Governors  
March 11, 2016  
Ritz-Carlton Hotel  
New Orleans, LA

**1. Roll Call**

Ramon A. Abadin, President  
William J. Schifino, Jr., President-elect  
Stephen H. Echsner, 1st Circuit  
Fred D. Franklin, Jr., 4th Circuit  
Michael G. Tanner, 4th Circuit  
Renée Elise Thompson, 5th Circuit  
Andrew B. Sasso, 6th Circuit  
Sandra Fascell Diamond, 6th Circuit  
Sam Nicholas Masters, 7th Circuit  
Carl B. Schwait, 8th Circuit  
Paul Louis SanGiovanni, 9th Circuit  
Wayne L. Helsby, 9th Circuit  
C. Richard Nail, 10th Circuit  
Roland Sanchez-Medina, Jr., 11th Circuit  
Dori Foster-Morales, 11th Circuit  
Leslie J. Lott, 11th Circuit  
Dennis G. Kainen, 11th Circuit  
F. Scott Westheimer, 12th Circuit  
Thomas Roe Bopp, 13th Circuit  
Lansing C. Scriven, 13th Circuit  
Michael S. Hooker, 13th Circuit  
John W. Manuel, 14th Circuit  
Ronald Peter Ponzoli, Jr., 15th Circuit  
Michelle R. Suskauer, 15th Circuit  
Wayne LaRue Smith, 16th Circuit  
Walter G. Campbell, Jr., 17th Circuit  
Lorna E. Brown-Burton, 17th Circuit  
Adam Glenn Rabinowitz, 17th Circuit  
John M. Stewart, 19th Circuit  
Marcy L. Shaw, 20th Circuit  
Edward Duffy Myrtetus, Out of State  
Eric L. Meeks, Out of State  
Brian D. Burgoon, Out of State  
Gordon J. Glover, YLD President  
Katherine Hurst Miller, YLD President-elect

**Members Absent**

Lawrence E. Sellers, Jr., 2nd Circuit  
William H. Davis, 2nd Circuit

Bruce W. Robinson, 3rd Circuit  
Mary Ann Morgan, 9th Circuit  
Michael J. Higer, 11th Circuit  
Steven W. Davis, 11th Circuit  
John H. (Jack) Hickey, 11th Circuit  
Margaret Diane Mathews, 13th Circuit  
David C. Prather, 15th Circuit  
Gary Shepard Lesser, 15th Circuit  
Diana Santa Maria, 17th Circuit  
Jay Cohen, 17th Circuit  
O. John Alpizar, 18th Circuit  
Laird A. Lile, 20th Circuit  
Ian M. Comisky, Out of State  
Lawrence Worley Tyree, Public Member  
Anthony Holloway, Public Member

## **2. Staff in Attendance**

John F. Harkness, Jr., Executive Director  
John Berry, Director, Legal Division  
Elizabeth Clark Tarbert, Ethics Counsel  
Terry Hill, Director, Programs Division  
Rosalyn A. Scott, Assistant to the President  
Jan Pudlow, Senior Editor, *Florida Bar News*

## **3. Guests**

Kristin Ann Norse, President, Florida Association for Women Lawyers  
Javier Lopez, Cuban American Bar Association  
Carlos Martinez, Government Lawyers Representative

## **4. Invocation and Pledge of Allegiance**

The invocation was delivered by Father Lawrence Moore, dean of the Loyola University College of Law. Amanda Schifino led the board in the Pledge of Allegiance.

## **5. Appearance by Mark Cunningham, President, Louisiana State Bar Association**

President Cunningham noted the shared history of Louisiana and Florida, including that both states have extensive Spanish heritages and both states have been heavily damaged by hurricanes. He praised and thanked Florida lawyers who helped New Orleans and Louisiana after Hurricane Katrina. He praised President Abadin for his leadership in addressing the changes affecting the profession, including from technology. He talked about the state's budget crisis, which is particularly hitting public defenders hard and most public defender offices in the state will stop taking new cases later this year.

## **6. Special Committee on Legal Education Report**

Chair Debra Moss Curtis, Florida Board of Bar Examiners Vice Chair Scott Richardson, FBBE Executive Director Michele Gavagni, and board members discussed the work of the special committee. The committee, composed of board members, law school deans, Supreme Court

justices, and FBBE members, is looking at a variety of issues related to legal education. Those include speeding background checks for law students seeking to be certified legal interns and reducing the number of subjects covered in the bar exam to encourage students to devote more time to clinical programs. Curtis, President Abadin, and Richardson said no recommendations have been made or conclusions reached but all sides are committed to an open and thorough discussion of the issues.

### **7. Disciplinary Review Committee**

Chair Michelle Suskauer reported the committee had no roll call items and moved approval of the committee's consent agenda. The board unanimously approved the agenda.

### **8. Minutes Approval**

The board approved the minutes from its January 29, 2016, meeting in Tallahassee. That approval included ratifying the emergency legislative action taken on February 29, 2016. On that date, President Abadin, President-elect Schifino, and Legislation Committee Chair Michael Tanner agreed not to prohibit the International Law Section from taking the following legislative position: Support amending certain provisions of F.S. Chapter 663 in order to clarify ambiguities existing in the current legislation which regulates international trust company representative offices ("ITCRO's").

### **9. Consent Agenda Approval**

The board approved the consent agenda, including:

- Appointing Tara R. Price as an attorney member and Eric R. Hamilton as a public member of UPL Circuit Committee 2.
- Approving on second reading Rule 3-2.1(i) Definitions (Defining inquiry): Amends Rule 3-2.1 to add subpart (i) defining "inquiry" as used in chapter 3 regarding opening a Bar discipline investigation after an inquiry is made. Subsequent subdivisions are renumbered.
- Approving on second reading amendments to Bylaws - General Practice, Solo and Small Firm Section (Name change): The General Practice, Solo and Small Firm Section by-laws are amended throughout to reflect a new section name change, in which "General Practice" is removed from the section's name.
- Approving pro rata refunds of annual membership fees used for legislative activities for two Bar members who objected to the Bar's legislative position on term limits for appellate judges and who had not previously objected to a Bar legislative position.

### **10. Budget Committee Report**

Chair Dori Foster-Morales presented two amendments for the Bar's 2015-16 budget, both related to the Annual Convention. The first request was for the expense for the Media Law Conference lunch of \$2,710 for the conference at the Annual Convention. The original request had included funding a luncheon for \$7,000 but the Budget Committee rejected that. Forster-Morales said the Bar's policy is not to have the Bar pay for such lunches at the convention. The second amendment lowered the budget revenue by \$68,000 to reflect current projections. The new hotel hosting the convention can only accommodate 55 exhibitors instead of the anticipated 70 and because fewer sponsors than anticipated have contributed to the Judicial Luncheon. The board unanimously approved the amendments. Budget Committee Chair-elect Paul SanGiovanni presented the proposed Bar budget for the 2016-17 fiscal year. He noted the proposed budget has

a projected deficit of \$2.9 million, which is down from the \$4.5 million deficit in the first draft of the budget. He said the deficit is largely due to less revenue than expected from investment income and increased spending on new computer systems. The Budget Committee has been working since last year on ways to reduce the deficit. The new budget projects revenues of \$40.6 million and expenditures of \$43.6 million. The board unanimously approved the budget, which will be published in the *Bar News* for member comment. For the 15<sup>th</sup> year, the budget keeps annual membership fees at \$265 for active members and \$175 for inactive members. The budget will be back before the board, along with any member comments, for final approval at the May 20 meeting.

### **11. Public Member Screening Committee Report**

Committee member Lansé Scriven reported that 15 people applied to replace outgoing public board member Anthony Holloway, who has served the maximum two terms allowed in Bar rules. The committee interviewed six of those who applied and recommended as the three finalists Judy Doyle of Orlando, Sharon Middleton of Ponte Vedra Beach, and Herbert E. Polson of St. Petersburg. The board approved that recommendation and forwarded the three names to the Supreme Court, which will make the final appointment.

### **12. Program Evaluation Committee Report**

Vice Chair Michael Tanner presented several items on first reading:

- Rule 6-4.2 Definitions, (Civil Trial Certification Rule Amendments): This amendment adds the definitions that were previously in the Civil Trial certification policies.
- Rule 6-4.3 Minimum Standards, (Civil Trial Certification Rule Amendments): This amendment better defines a trial and what constitutes other considerations for trials.
- Rule 6-4.4 Recertification, (Civil Trial Certification Rule Amendments): This amendment better defines a trial and adds waiver of compliance for the following: substantial involvement; trial education and peer review criteria for an applicant who is an officer of the judicial system; trial criteria for an applicant who has been continuously certified as a civil trial lawyer for 14 years or more; substantial involvement for an applicant serving as mediator, referee, master or magistrate and is actively involved in civil trial law; and trial and substantial involvement criteria for an applicant not able to meet requirements due to health reasons.
- Rule 6-28.2 Definitions, (Adoption Law Certification Rule Amendments): The proposed amendments reflect the definitions from the adoption law certification policies that will be removed from the policies with the approval of this amendment. This includes the following definitions: adoption placements; contested adoption proceedings; adoption appeal; and substantial involvement (also moved from 6-28.3).
- Rule 6-28.3 Minimum Standards, (Adoption Law Certification Rule Amendments): The proposed amendments, within subdivision (a), provide a reduction of the substantial involvement requirement from 50 percent to 40 percent. The Adoption Law Certification Committee adds definitions pertaining to the practice of adoption law and clarifies the minimum standards that are in the current Adoption Law Certification Committee Standards.
- Rule 6-28.4 Recertification, (Adoption Law Certification Rule Amendments): The proposed amendments provide a reduction of adoption placements for recertification from 50 to 30 and reduces the required CLE hours from 75 to 50 and adds requirements for substantial involvement that currently are in the Adoption Law Certification Committee policies.

- Rule 6-31.1 Standards for Board Certification in International Litigation and Arbitration: Adopts new subchapter 6-31.1, establishing a new area of certification in international litigation and arbitration.
- Rule 6-31.2 Definitions: Adopts new subchapter 6-31.2, setting forth definitions for a new area of certification in international litigation and arbitration.
- Rule 6-31.3 Minimum Standards: Adopts new subchapter 6-31.3, setting forth minimum standards for a new area of certification in international litigation and arbitration.
- Rule 6-31.4 Recertification: New subchapter 6-31.4, setting forth recertification standards for a new area of certification in international litigation and arbitration.
- Rule 8-5.1 Generally, (Deleting LRS Committee): Amendments delete references to the Lawyer Referral Service Committee.

Tanner presented evaluation reports prepared by PEC subcommittees on certification exams, the Board of Legal Specialization and Education and the Certification Plan Appeals Committee, the approval process for Bar and procedural rules, and the Lawyers Advising Lawyers program. He said the reports are being presented on first reading and require no action from the board.

### **13. Legislation Committee Report**

Chair Michael Tanner noted the Legislature's annual regular session was scheduled to adjourn that day, which will end the 2014-16 legislative biennium. He said board members would be receiving a final summary on the session later that afternoon. He reminded the board that all Bar, committee, and section legislative positions will expire over the summer. He said the session was mostly positive for the legal profession and the courts with the proposal for a constitutional amendment to impose appellate court term limits – which the Bar opposed – was never considered in the Senate although it cleared the House. With the budget, most judicial branch priorities were funded, particularly capital projects. Funds were included for mental health diversion programs, drug courts, and similar programs. However, the trial courts operating budget was cut \$2.7 million, there were no judicial pay raises, and no salary increases for court and state employees. Additionally, the Legislature addressed the recent U.S. Supreme Court ruling striking Florida's death penalty sentencing law, by approving a new statute.

### **14. Juvenile Court Rules Committee and Appellate Court Rules Committee Joint Report**

Matthew Wilson, a member of the Juvenile Court Rules Committee, presented recommendations from the two committees. He said the Supreme Court formed the Select Committee on the Claims of Ineffective Assistance of Counsel in Termination of Parental Rights Proceedings to address the court's concerns expressed in *J.B. v. Florida Department of Children and Families*, 170 So. 3d 780 (Fla 2015). The select committee recommended rules addressing indigent parents with court appointed counsel. The Appellate Court Rules Committee endorsed those rules, while the Juvenile Court Rules Committee drafted broader rules that apply to all ineffective assistance of counsel claims in parental rights cases by removing the requirements of indigency and court appointment before raising such a claim. The two committees consulted the court, which requested that both versions of the amendment be submitted. The board voted 17-11 to endorse submitting both rules to the court.

### **15. Out of State Division Report**

Division President Christopher Marquardt noted that the Bar has almost 15,000 out-of-state members and 900 are active in the division. The division works to keep out-of-state members in contact with the Bar, offer networking opportunities, and see that in-state and out-of-state Bar members are treated equally. He said the division has established a new subcommittee to see that members are being served and to ensure the division continues to grow.

#### **16. Board Review Committee on Professional Ethics**

Chair Carl Schwait presented proposed amendments to Rule 4-7.22 (Lawyer Referral Services) and 4-7.23 (Lawyer Directories) on first reading. He reported the BRCPE voted 9-0 to recommend that the Board of Governors approve amendments to Rules 4-7.22 and 4-7.23, the lawyer referral service and lawyer directory rules. The proposed amendments delete Rule 4-7.23 (lawyer directories) in its entirety, because the definition of a “qualifying entity” in Rule 4-7.22 is broadened to encompass lawyer directories. Overall, the rule has been broadened to include more “qualifying entities” that must comply with the rule’s requirements in order for lawyers to participate. To offset the issues that arise with that broad definition, the amendments delete some of the current restrictions in the rule imposed on lawyer referral services. For-profit lawyer referral services are prohibited in many states, so being considered a “lawyer referral service” creates issues for some entities that operate nationwide. The BRCPE and Technology committees therefore determined a broad term “qualifying providers” should replace “lawyer referral service” in the rule. The BRC and Technology committees also focused on deciding the minimum requirements in order to ensure lawyers abide by their professional obligations, while omitting restrictions that create problems for entities that do not consider themselves lawyer referral services. Most of the recommended amendments to Rule 4-7.22 that were previously filed with the Supreme Court of Florida are not included in the rule as approved by the BRCPE. Restrictions being omitted include: a requirement that all ads and communications with the public state that the entity is a lawyer referral service; a requirement that all ads state that lawyers pay for referrals; a requirement for malpractice insurance coverage by either participating lawyers or the service; and a requirement that the service provides the Bar quarterly with the names of all persons authorized to act on behalf of the service.

A requirement that the service provide the Bar with the names of all participating lawyers was changed from quarterly to annually.

Requirements retained include that all communications to the public by the provider comply with the Rules Regulating The Florida Bar; that the lawyer not divide fees with the provider unless the provider is The Florida Bar’s authorized lawyer referral service or a recognized nonprofit lawyer referral service that is part of a voluntary bar; that the service only matches consumers with persons authorized to provide the legal services in Florida; the provider responds to official Bar inquiries within 15 days; the provider does not state or imply it is Florida Bar endorsed unless it is the Bar’s own lawyer referral service or a service connected to a voluntary bar association approved by the Bar; and the provider uses its actual or a registered fictitious name.

Requirements added include that the lawyer may not participate with a qualifying entity unless the provider: does not require or pressure the lawyer to provide cross referrals; provide the lawyer with documentation that the provider complies with Bar rules; affirmatively disclose the lawyer’s location by city, town or county when the referral is made, and does not use a name or otherwise imply to the public that the qualifying provider can practice law or directly provide legal services.

The BRCPE also voted to change the provision about a lawyer's obligation to find the lawyer responsible for the qualifying provider's conduct if the lawyer did not engage in due diligence in agreeing to participate or if the Bar notified the lawyer that the qualifying provider was not in compliance with the rules and the lawyer did not stop participating with the provider and notify the Bar with documentation of that action within 30 days.

Commentary was added to clarify that the Bar hopes that qualifying providers will provide a public service and promote access to the justice system; that an improper division of fees includes a percentage of the lawyer's fee, a fee based on the success or perceived value of the case being referred, or where the qualifying provider directs, regulates, or influences the lawyer's independent professional judgment. Commentary also provides examples of steps lawyers can take to conduct due diligence before agreeing to participate with a qualifying provider.

For numerous reasons, the BRCPE also voted 7-0 not to include the Supreme Court's requested requirement, that lawyer referral services be owned or operated by a Florida Bar member.

Schwait reported on proposed amendments to Rule 4-7.14(a)(4) - Advertising of Specialization and Expertise. In response to the September 30, 2015 order in *Searcy v. Florida Bar* (case number 4:13cv664-RH/CAS), the BRCPE voted 6-1 to recommend that the Board of Governors approve amendments to Rule 4-7.14(a)(4) that permit a lawyer to claim specialization or expertise if the lawyer can objectively verify the lawyer's specialization or expertise, but to require a disclaimer that the lawyer is not board certified by The Florida Bar or another accredited entity if the lawyer is not certified and the area of claimed specialization is or falls within an area of board certification under Chapter 6 of the Rules Regulating the Florida Bar. The Board of Governors accepted the proposals as first reading.

Schwait presented advertising inquiry 35636 concerning application of Rules 4-7.22 and 4-7.23. The inquirer, who represents another member of The Florida Bar, requests an advisory advertising opinion on whether the Avvo Advisor function of the Avvo website meets the definition of a lawyer referral service and therefore requires Avvo Advisor's compliance with the requirements of Rule 4-7.22(a) for lawyers to participate. If not, the inquirer asks whether the Avvo Advisor function is a lawyer directory under Rule 4-7.23. This inquiry was placed directly on the Board Review Committee on Professional Ethics agenda because it is related to its ongoing consideration of on-line matching services. This item is being deferred because it is part of the on-going discussion of on-line matching services by BRCPE and the Technology Committee.

### **17. Young Lawyers Division Report**

President Gordon Glover encouraged board members to get involved in the Take an Hour Mentoring Campaign as part of its March mentoring activities. He presented a mentoring video prepared by the YLD and noted that the division is creating a new website – *startmyfloridalawfirm.com* – to help young lawyers setting up their own practices. He reported President Abadin was scheduled to do a webinar on professionalism later in March. Glover discussed continuing ramification from a YLD survey that showed new women lawyers still encounter gender bias on the job. The YLD is providing several seminars and training on the issue, including a presidential showcase seminar at the Annual Convention. Kristin Norse, Florida Association for Women Lawyers President, noted that President Abadin prepared a PowerPoint presentation on the issue and delivered it at the Central Florida Association for

Women Lawyers. She said it's important to find ways to get male lawyers to view that presentation and attend the related seminars. Abadin said he would be repeating the presentation at FAWL branches around the state and encouraged board members to get male lawyers to attend.

### **18. Elections Committee Report**

President-elect Schifino reported on the committee's review of the voluntary "pledge agreement" for Bar presidential and Board of Governors campaigns, and board policies aimed at allowing lawyers to seek those posts without excessive electioneering. Candidates who take the pledge were given some assistance with Bar resources. The policies were sunset in 2010 and replaced with a pledge agreement, which has been negotiated and revised election to election. The Election Committee is looking at drafting a more lasting pledge agreement that could be adopted by the board and used in future elections. The goal is to prevent over intrusive campaigning, limit costs, and present a level playing field to candidates. Schifino presented a draft pledge agreement to the board and solicited members' feedback on issues of when exploring a candidacy should start, should candidates be permitted to fundraise, and related matters. He said the final pledge agreement would be presented to the board for a vote at its May 20 meeting. Several board members discussed the issue, including the efficacy of time limits and prohibition of accepting campaign contributions.

### **19. Communications Committee Report**

Chair Renée Thompson reported that the Citizens Advisory Committee will soon have four vacancies and invited board members to suggest new members. The committee is continuing with its plans for voter education about the upcoming Constitution Revision Commission, including a training seminar for lawyers to conduct public education programs. She reported that Francine Walker, director of the Bar's Public Information and Bar Services, was elected to the Board of Directors of the Florida Court Public Information Officers, Inc., which is implementing the court's strategic plan. That appointment means the Bar will be coordinating with the court on that important issue. She noted the *Bar News* will be running a series of articles about various Bar departments, which began with stories about the grievance process. She noted the Bar's new app, #JustAdulting, about the rights and responsibilities for new adults. The app has received widespread coverage, including on social media. Thompson also noted the widespread coverage about the survey of young women lawyers and their experiences with gender bias, including the PowerPoint program developed to address that issue.

### **20. Rules Committee**

Chair-elect Roland Sanchez Medina presented two amendments to Standing Board Policies for first reading:

- SBP 1.30 Meetings of Executive Committee, (nonmember attendance at conference calls): Within subdivision (b), removes the requirement that Bar members attending an Executive Committee conference call do so at the office of an Executive Committee member.
- SBP 9.20 Action by Board, (deleting copies requirement): Within subdivision (a)(3)(B), deletes the requirement of a requestor providing enough copies for each board member.

## **20. Disciplinary Procedure Committee Report**

Chair Ron Ponzoli reported the committee had one item on the consent agenda (Rule 3-2.1(i)) for final reading. He presented two items on first reading:

- Rule 5-1.1 Trust Accounts (commentary on third party interests): Adds commentary to Rule 5-1.1 to include examples of situations where a lawyer must protect and acknowledge a third party's interest in trust account funds. These examples come from opinions of the Supreme Court of Florida, cited in the comment.

- Rule 5-1.2 Trust Accounting Records and Procedures: Within subdivision (c), changes references from lawyers who sign trust account checks to "signatories." Within subdivision (g)(1), changes a reference to rule 5-1.2(c)(5) to "this rule." Adds new subdivision (g)(2), "report of trust account violations or errors to staff counsel under this rule" as a ground for auditing a lawyer's trust account and renumbers other subdivisions accordingly.

## **23. Criminal Procedure Rules Committee and Appellate Court Rules Committee Report**

Board member Dennis Kainen said amendments pertain to rules 3.781, 3.802, and 9.141 dealing with reviews of sentences. The board recommended approval of the amendments 28-0.

## **24. Report of Criminal Procedure Rules Committee Out-of-Cycle Report**

Board member Dennis Kainen presented an amendment to Rule 3.010 to clarify that if a defendant is represented by a public defender, conflict counsel, or appointed private counsel, the R. Jud. Admin. 2.505(g) on limited appearance counsel does not apply. The board recommended approval of the amendment 28-0.

## **25. Rules of Judicial Administration Out-of-Cycle Report**

Board member Andy Sasso presented an amendment to remove the size limits on electronically filed and served documents from the Rules of Judicial Administration and place those standards in the Florida Court Technology Standards. The board recommended approval of the amendment 28-0.

## **26. Special Appointments**

The board appointed Mark Herron of Tallahassee to a four-year term on the Supreme Court's Judicial Ethics Advisory Committee.

## **27. Gender Bias PowerPoint Presentation**

President Abadin showed the program, which was prepared with help from the Florida Association for Women Lawyers, the Young Lawyers Division, the Communications Committee, and the Bar's Public Information and Bar Services office. The program addresses the findings of a recent YLD survey showing that young women lawyers still face gender bias issues in their career, including belittling treatment, lack of advancement opportunities, lack of alternative work schedules, lower pay, and inability to be assigned to important cases. Abadin said he will be presenting the program at various FAWL chapters but added it needs to be shown to other legal groups, including those with a large male membership. Board members discussed ways to address issues raised in the presentation.

**29. Time and Place of Next Meeting**

There being no further business before the board, President Abadin adjourned the meeting at 3:22 p.m. The next board meeting is May 20, 2016, at the Eau Hotel in Palm Beach.

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