

The Florida Bar Board of Governors
March 26, 2010, 8:30 a.m.
The Marquis Marriott
New York City, NY

1. Roll Call

Jesse H. Diner, President
Mayanne Downs, President-elect
Stephen H. Echsner, 1st Circuit
Dominic M. Caparello, 2nd Circuit
Clay A. Schnitker, 3rd Circuit
S. Grier Wells, 4th Circuit
John J. Schickel, 4th Circuit
Andrew B. Sasso, 6th Circuit
Murray B. Silverstein, 6th Circuit
Carl B. Schwait, 8th Circuit
Mary Ann Morgan, 9th Circuit
Daniel L. DeCubellis, 9th Circuit
Scott M. McMillen, 9th Circuit
Robert M. Brush, 10th Circuit
Ramon A. Abadin, 11th Circuit
David Rothman, 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
William J. Schifino, Jr., 13th Circuit
Lansing C. Scriven, 13th Circuit
Gwynne Alice Young, 13th Circuit
Gregory Coleman, 15th Circuit
Scott G. Hawkins, 15th Circuit
Lisa S. Small, 15th Circuit
Edwin A. Scales, 16th Circuit
Walter G. Campbell, Jr., 17th Circuit
Eugene K. Pettis, 17th Circuit
Jay Cohen, 17th 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-elect
Alvin V. Alsobrook, Public Member

Members Absent:

Lawrence E. Sellers, Jr., 2nd Circuit
Denise A. Lyn, 5th Circuit
Charles Chobee Ebbets, 7th Circuit
Ervin A. Gonzalez, 11th Circuit
L. Norman Vaughan-Birch, 12th Circuit
Clifford W. Sanborn, 14th Circuit
David C. Prather, 15th Circuit
Nancy W. Gregoire, 17th Circuit
Timothy A. Bailey, 17th Circuit
Clifton A. McClelland, Jr., 18th Circuit
John M. Stewart, 19th Circuit
Laird Lile, 20th Circuit
Scott W. Weinstein, 20th Circuit
Roger J. Haughey II, Young Lawyers Division President
Arnell Bryant-Willis, Public Member

2. Guests

Tasha Dickinson, Florida Association for Women Lawyers

3. Staff in Attendance

John F. Harkness, Jr., Executive Director
Ken Marvin, Director, Lawyer Regulation
Lori Holcomb, Unlicensed Practice of Law Counsel
Rosalyn A. Scott, Assistant to the President
Gary Blankenship, Senior Editor, Florida Bar *News*

4. Invocation and Pledge of Allegiance

Former board member Michael Stafford led the invocation and Pledge of Allegiance.

5. Non-roll Call Items

Board member David Rothman gave the non-roll call items for the executive session as items 2B and 35 for the Clients' Security Fund and items 17, 21, and 25 for the disciplinary agenda.

6. Minutes – Agenda Item 4

The board approved the minutes from its January 29, 2010, meeting. That action included ratifying the following Executive Committee actions:

- On February 2, 2010, expanding the joint Florida Bar/International Law Section Haiti Relief Efforts to include the option and ability to donate locally to the non-profit major trauma centers that are accepting large numbers of Haitian trauma patients.
- On February 5, 2010, approving the request of the Juvenile Court Rules Committee to file an out-of-cycle rules amendment to create Rule B.010(i) to conform the rule to FlaR.CrimP. 3.130 by requiring the presence of counsel (state attorney or assistant state attorney and public defender or assistant public defender) at juvenile detention hearings.

7. Consent Agenda – Agenda Item 5

The board approved the consent agenda for the meeting. The action included ratifying the following appointments to circuit unlicensed practice of law committees:

- Rebecca Rabone as a public member and Shelley G. Mirpuri as an attorney member to Committee 13B.
- Daniel Ewert as an attorney member and Kelly Stiles as a public member to Committee 1A.
- Teresa Ann Arington as an attorney member to Committee 4.
- Charles T. Myers III as a public member to Committee 7B.

The approval included the board not prohibiting the Business Law Section from taking the following legislative position: Supports SB 1858 providing federal bankruptcy exemption for alimony, support or separate maintenance, that has already been received, to the extent necessary for the support of the debtor or his/her dependents.

The approval included the board not prohibiting the Criminal Law Section from taking the following position: Opposes all efforts to reduce the salaries and currently authorized benefits for trial and appellate criminal justice attorneys and further urge that the Justice Administration Commission (JAC) be adequately funded for all costs and fees associated with criminal justice matters.

The approval included the board not prohibiting the Family Law Section from taking these legislative positions:

- Supports mandatory and discretionary appointment of attorneys for children predicated on the understanding that funding for any attorney ad litem program does not jeopardize funding of the Statewide Guardian ad Litem program, that the administration of the program is not through the Statewide Guardian ad Litem program or any other executive branch agency, and that any funding of the program does not jeopardize other court programs.
- Supports the discretionary appointment of attorneys for children in the following situations: Where the court has a concern that the child has a need for developmental disability, mental health or substance abuse services; and in any Chapter 39 proceedings when the court deems it appropriate.
- Supports the mandatory appointment of attorneys for children in the following situations: In cases where the state is seeking to administer or administers psychotropic medications to a child subject to a Chapter 39 proceeding; where the child is the subject of a proceeding in which the state is seeking the commitment or placement of the child for longer than 72 hours to a secure residential treatment facility, including licensed care under chapters 39, 393, 394, and 397 of the Florida Statutes; to a child involved in a Chapter 39 proceeding at the age of 16 years; in any case where someone is asserting a psychotherapist-patient waiver on behalf of a child, and for a child who is the subject of an application for services pursuant to Chapter 393, Florida Statutes, where the application was denied and the matter proceeds to the administrative appellate level.
- Supports legislation that maintains current uniform laws that have been enacted in Florida that pertain to Marital & Family Law.

- Supports legislation regarding child abduction prevention.
- Supports legislation that will allow a duly licensed attorney acting as a guardian ad litem in Chapter 61 proceedings to also act as the attorney for the guardian ad litem.
- Supports legislation that requires the court to allow an adoption entity to intervene in dependency proceedings where the parent has executed a consent for adoption.
- Opposes legislation that requires only a best interests standard in allowing a third party to be delegated or awarded timesharing or visitation with a minor child.

The consent agenda approval authorized refunds to two Bar members who objected to Bar legislative position #19. The refunds will be \$4.60 each, the pro rata share of their annual membership fees used for legislative activities.

The approval included ratifying the Criminal Law Section's legislative consulting contract with Rod Smith.

8. Report of the Out of State Division – Agenda Item 3b

Division President William Andrew Lee III noted the division represents about 14,000 Bar members who live and practice in other states. The division recently set up an online listserv to promote communication between division members and has an outreach project to Florida's law schools, many of whom will become Bar members but practice in other states.

9. Report of the Health Law Section – Agenda Item 3a

Former Section Chair Allen Grossman reported the section has 1,335 members and has been active in several areas. That includes having three successful CLEs so far this year and planning an upcoming teleconference CLE. The section has a practitioners' handbook for health law attorneys, and is reaching out to students at Florida's law schools. The section is also updating its website.

10. Budget Committee Report – Agenda Item 14

Budget Committee Chair Jake Schickel reported that the ABA compared annual membership fees among state bars. Of the 33 bars that are comparable to The Florida Bar (that are either mandatory bars or that have mandatory and voluntary bars that together perform similar functions to The Florida Bar), the Bar has the lowest annual membership fees. Incoming Budget Committee Chair Dan DeCubellis presented the Bar's 2010-11 budget, which he said will break even or produce a surplus. The board unanimously approved the budget. The budget assumes the cessation of the printed Bar *Journal* directory issue, DeCubellis reported.

11. Legislation Committee Report – Agenda Item 21

Committee Chair-elect Ed Scales reported that the Criminal Law Section had asked the Bar to approve as a Bar position the section's legislative position opposing pay or benefit cuts for trial and appellate criminal justice attorneys and supporting adequate fee and cost funding for criminal justice matters that are administered by the Justice Administration Commission. He noted the committee lost its quorum before making a recommendation

but reservations had been expressed that the Bar already implicitly supported the position because of its support for adequate funding for the courts and related agencies and endorsing the section position might undercut that and other Bar positions. But board members in debate said it was important to show support for public lawyers who work in the criminal justice system. The board, after finding the position within the ambit of Bar legislative activities, voted 26 to 8 to adopt the issue as a Florida Bar level position.

12. Investment Committee Report – Agenda Item 15

Committee Chair Ian Comisky reported that the Bar's long-term investments continue to recover from the 2008 crisis and now are within 3 percent of their all-time high. The committee is continuing to study options presented by its investment advisors for diversifying the Bar's investments. Comisky said the committee expects to make a recommendation at the board's May meeting.

13. Executive Session – Agenda Item 10b

The board went into executive session to discuss disciplinary and Clients' Security Fund matters.

14. Rules Committee Report – Agenda Item 12

Committee Chair Ray Abadin presented 11 items on first reading:

- Rule 1-3.3, Official Bar Name and Address: Adds e-mail address, if the member has one, to the list of information a member must designate and submit to The Florida Bar; changes title from "Name and Address" to "Name and Contact Information"; rewords language and adds titles for subdivision designation for editorial grammar preference.

- Rule 1-7.3 Membership Fees (Hardship): Within subdivision (c), adds financial hardship as an election for members to apply for an installment plan for membership fees; within subdivision (d), removes deadline for requesting inactive status and allows a bar member to request inactive status by written communication as well as the fee statement; adds new subdivision (g) to permit a bar member to request deferred payment or a payment plan for membership fees due to financial hardship; defines financial hardship and establishes procedures to apply for the deferral or payment plan.

- Rule 1-12.1 Amendment to Rules; Authority; Notice; Procedures; Comments: Within subdivisions (d), (g), and (h), adds that publication of proposed amendments, submissions to the Court, and final action by the Court may be on the Bar's website or in the *Bar News*.

- Rule 4-1.6 Confidentiality of Information; Rule 4-1.10 Imputation of Conflicts of Interest; General Rule; Rule 4-1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees; Rule 4-1.17 Sale of Law Practice: Within rule 4-1.6 commentary, changes reference from subdivision (b) to (c) of rule 4-1.9 regarding disclosure of confidential information of former clients. Within rule 4-1.10, subdivisions (b) and (c)(2) as well as commentary, adds a reference to new subdivision (c) of rule 4-1.9 regarding disclosure of confidential information of former clients. Within rule 4-1.11, subdivision (a)(1), adds reference to new subdivision (c) of rule 4-1.9 regarding disclosure of confidential information of former clients. Within 4-1.17

commentary, adds reference to new subdivision (c) of rule 4-1.9 regarding disclosure of confidential information of former clients.

- Rule 7-2.3, Payments: Within subdivision (a), codifies current practice that final action of board is not subject to appeal; adds new Comment to specify what sums are reimbursable.

- Rule 7-2.4, Prerequisites to Payment: Within subdivision (a), simplifies language stating that claims will not be paid while the attorney is a member in good standing.

- Regulations of the Clients' Security Fund: a.1.A. raises amount from \$500 to \$1,000 on claims staff can investigate, gives staff authority to close, as opposed to recommend denial, claims clearly not covered by the rule, when no discipline has been imposed and when the attorney remains in good standing; new a.1.C. added to clarify that claims against members in good standing will be held pending final action in discipline matter and to clarify how claims for fees paid to a suspended or disbarred attorney will be processed; a.2.A. adds comment language to give examples of events that may toll the 2-year limitation period and adds 4-year statute of repose; a.2.B. adds comment language to give examples of factors to consider when determining whether claimant exhausted remedies; new a.2.D. codifies current policy that discipline at the time of death is not a prerequisite to a claim; a.3.E. deletes redundant language – similar language appears in a.1.A.; renumbered a.3.E. clarifies when the difference between recover and the claim amount may be paid; renumbered a.3.F. clarifies what factors may be considered when determining whether the attorney provided useful services; b.1. raises cap on attorney's fee claims from \$2,500 to \$5,000; new b.5 codifies existing policy regarding payment when there is an outstanding claimed lien.

- Rule 20-4.1 Generally: Within subdivision (e), allows an Florida Registered Paralegal to file for an extension of time in which to pay the annual renewal fee – extends time to December 31.

- SBP 1.60 Board Action on Proposed Rule or Policy Amendments: Within subdivision (a), adds section bylaws to the list of items that requires amendments be approved by the board of governors; also within subdivision (a) adds fiscal and planning to the types of review that require notice of proposed amendments; within subdivisions (b) and (e), allows publication and notice of proposed amendments to be on The Florida Bar website or in the *Bar News*; within subdivision (d), redirects the sponsor as responsible for redrafting amendments that the Board of Governors substantively edits.

- SBP 1.64 Petitions to Amend Rules Regulating The Florida Bar: Changes filing of petitions to amend the Rules Regulating The Florida Bar from January on an annual basis to October on a biennial basis in even-numbered years and requires that proposed amendments be submitted to and approved by all appropriate committees and the board of governors no later than the June 30 immediately preceding the October filing date.

- SBP 5.40 Sections of The Florida Bar: Housekeeping - Conforms list of section titles due to a merger between the Practice Management and Development Section and the General Practice, Solo and Small Firm Section, reletters accordingly.

Chair Abadin presented an amendment to SBP 2.30 (Allowance for Expenses of President and President-elect) and recommended the board vote to waive the standing board policies on adoption of amendments to the standing board policies, waiving

substantive, procedural, fiscal, and program review and waiving publication in the bar *News* and to approve the change. The board unanimously waived second reading and unanimously approved the amendment to the policy which allows the President-elect Designate to be reimbursed for expenses incurred while carrying out his or her official duties.

15. Disciplinary Procedure Committee Report – Agenda Item 11

Chair Andy Sasso presented five rule and policy amendments on first reading:

- Rule 3-5.2, Emergency Suspension and Interim Probation (formal complaint): Within subdivisions (a) and (b), clarifies that the petition for emergency suspension or interim probation constitutes a formal complaint and allows the respondent a specific amount of time to file an answer to the bar's petition; adds new subdivision (f), Appointment of Referee, to clarify when a referee is appointed; redesignates and adds titles and language to subsequent subdivisions to clarify the process for handling emergency suspensions and interim probations.

- Rule 3-7.6, Procedures Before a Referee: Amends subdivision (h)(8), to add that if a referee is disqualified from a case, the chief judge of the circuit in which the original referee resided shall appoint a successor referee from that same circuit.

- Rule 5-1.2, Trust Accounting Records and Procedures – Signing Trust Account Checks: Within new subdivision (d), provides that lawyers shall not sign blank trust account checks or use a signature stamp as a signature; further provides that non-lawyers are not permitted to sign trust account checks; redesignates subsequent subdivision entries as necessary; within new subdivision (e) sets forth requirements for documenting wire transfers of trust account funds; within subdivisions (a) and (f), changes the word "attorney" to "lawyer" to maintain consistency.

- SBP 15.55, Deferral of Disciplinary Investigation During Civil or Criminal Proceedings: Amends subdivisions (b) and (c) such that Bar investigations are not closed at staff level during the pendency of a civil or criminal prosecution of a respondent, but rather are deferred until the civil or criminal prosecution of respondent is completed. Eliminates subdivision (b)(3) requiring the complainant to maintain a copy of the file because the Bar investigation file remains open during the pendency of the civil or criminal case(s) against respondent.

- SBP 15.92, Policy on Public Reprimands: Throughout the policy, refines and defines the circumstances under which a respondent shall be required to appear for an in-person public reprimand; also requires that all public reprimands be published in the *Southern Reporter* and requires that the president of The Florida Bar administer all in-person public reprimands before the Board of Governors.

Chair Sasso presented the board with a committee recommendation to add a question to the trust accounting compliance section of the Bar's annual membership fee statement. That section currently has two questions, which asks the recipient Bar member whether he or she is or is not in compliance with trust accounting rules. The new option would allow Bar members, such as judges and government lawyers, to say they do not have a trust account because the member does not receive or hold funds from clients or third parties. The board approved the change.

16. Young Lawyers Division Report – Agenda Item 9

YLD President-elect Renée Thompson reported that the change to Basic Skills Courses rules allowing new Bar members to meet their BSC requirements by taking online courses became effective March 6 and 120 lawyers had already taken advantage of that option. The division helped sponsor the Central Florida diversity picnic in February and along with its Law Student Division had the first annual Community Service Day on February 27. That brought lawyers, law students, and others together for a variety of community and civic projects around the state.

17. Special Appointments – Agenda Item 24

The board appointed John B. Bowman of Fort Lauderdale to a two-year term, beginning July 1, 2010, on the Supreme Court's Bar Admissions Committee.

18. President's Report – Agenda Item 6

President Diner announced that this year's annual membership fee statement would include a voluntary check off to make a contribution to Florida Lawyers Association for the Maintenance of Excellence. He said FLAME has supported several worthy efforts over the years, including voter education projects and studies showing the importance of adequately funding the courts, but is now running low on funds. President Diner recounted that he had visited 14 newspaper editorial boards, resulting in several favorable editorials and related articles on court funding. He also cautioned that while the Bar and the court system are doing well in this year's Florida legislative session, they could face stiff challenges next year. Those could include new fiscal pressures on the courts as the state faces an even larger budget shortfall and a possible attempt to have the Legislature take over from the Supreme Court procedural rule-making authority.

19. Program Evaluation Committee – Agenda Item 13

Chair Gwynne Young reported the committee had approved changes in the mission statement and membership for the Bar's Federal Practice Committee, which will be presented to the board at its May meeting. She also said the committee will present reports on its ongoing evaluation projects at that meeting. Young presented three items on first reading:

- Rule 6-3.8, Board Certified Judicial Fellow, and Rule 6-3.12(h), Board Certified Judicial Fellow Annual Fee: Proposed new Rule 6-3.8 to establish a new status of "board certified judicial fellow" for Florida Bar members who are appointed as judicial officers while board certified. Within subdivision (a), identifies the reason the new board certification status is created, which is to preserve and distinguish the achievement of board certification. Within subdivision (b), provides a definition for the term "judicial officer." Within subdivision (c), indicates that the board certified judicial fellow status is automatic for any Florida Bar board certified member that becomes a judicial officer; the member need not apply and request the status. Within subdivision (d), indicates that the board certified judicial fellow must remain a member in good standing with The Florida Bar, if required to hold the judicial office, to retain the certification status and that board certified judicial fellow status will continue through the term of judicial service. Within subdivision (e), indicates that a member may identify his or her certification status to the public, but must state the area of law practice in conjunction with "board certified judicial

fellow". Within subdivision (f), explains that if a member is no longer a judicial officer and resumes his or her status as a lawyer, the member may reapply for board certification or recertification pursuant to the area standards. Within subdivision (g), indicates that the current procedures for revoking board certification will also be the procedures for revoking board certified judicial fellow status. Within subdivision (h), explains that upon the effective date of the new rule and for two years following, any member who became a judicial officer while board certified and relinquished such certification may request a board certified judicial fellow status. Within subdivision (i), indicates that a board certified judicial fellow is subject to an annual fee no greater than one third of the annual fee for board certification. Rules 6-3.8 through 6-3.11 are renumbered accordingly. Rule 6-3.11 is renumbered to 6-3.12 and new subdivision (h), adds the judicial fellow annual fee in the listing of certification fees (actual amount of the fee is identified in BLSE Policy 2.04); relettered accordingly.

- BLSE Policy 2.04, Certification Fees (Combined Amendments): Within subdivision (a), clarifies that the filing fee is for both initial and recertification applications; Within subdivision (b), removes "BLSE" as the title of the office that receives the exam cancellation notice replaced with "legal specialization and education" consistent with language elsewhere in these policies; Within subdivision (c), revises the reference as to who pays the annual fee to "board certified member" instead of "plan participant;" Within subdivision (d), increases the reapplication fee from \$100 to \$150. Within subdivision (e), removes "application denial challenge" as an item that may accompany a \$125 challenge/petitioning fee because the process no longer exists except as an appeal; New subdivision (j), appeal fee is increased from \$125 to \$500. The appeal referenced is an appeal of a BLSE decision. New subdivision (i), new fee proposed to accompany proposed new rule 6-3.8 Board Certified Judicial Fellow, which indicates that members classified as "board certified judicial fellows" shall pay an annual fee in an amount that shall not exceed one third of the annual fee required for board certified members; and proposed new Rule 6-3.12 (currently 6-3.11) Judicial Fellow Annual Fee, that authorizes a fee to be assessed each member who is classified as a board certified judicial fellow.

- Bylaws - Workers' Compensation Section: Within Article II, Officers, Section 1. Eligibility, rearranges language to refine and clarify definitions of membership; allows affiliate membership status to the section for law students, law college faculty, legal assistants, or paralegals, who are not members of The Florida Bar. Within Article IV, Duties and Powers of Executive Council, Section 2. Meetings, establishes guidelines for a quorum and clarifies regular and special meetings, also within Article IV, authorizes the use of electronic or telephonic communications to conduct committee meetings.

20. Communications Committee Report – Agenda Item 18

Chair Juliet Roulhac reported that the committee is recommending nominees for four upcoming vacancies on the Citizens Forum for appointment by President-Elect Downs. At the May meeting, the committee will be presenting recommendations from a consultant on improving the Bar's website. The committee has been working, Roulhac said, on improving information about public reprimands, including creating a page on the website on when and where public reprimands before the board will be done. A

subcommittee has been appointed, she said, to examine whether Bar members should be able to include ratings on their Bar website profile pages.

21. E-Filing and Electronic Access to Court Records Report – Agenda Item 25

Board member Murray Silverstein reported on ongoing work to set up electronic filing for the court system, as part of the larger effort to provide online access to court records. He said the e-filing work, which is being overseen by the Florida Courts Technology Commission, is proving to be very complex involving clerks, judges, court staff, lawyers, and recently a legislative entity – the Technology Review Workgroup – which reviewed the e-filing efforts. The FCTC has identified 1,526 data elements that will have to be addressed as part of e-filing. With so many players, Silverstein said the process sometimes seems overly bureaucratic but is moving forward. He noted the Supreme Court had approved amendments to Rule of Judicial Administration 2.420 which addresses the critical area of how confidential information will be identified and protected in an electronic system, and that the Rules of Judicial Administration Committee is working on a rule to mandate electronic service of documents. The Bar, Silverstein said, will have a major part to play in educating lawyers about the whole process, including the changes to rule 2.420, electronic filing, and electronic access to court records.

22. Member Benefits Committee Report – Agenda Item 26

Board member Clay Schnitker, liaison to the Member Benefits Committee, presented two recommendations from the committee, both of which were approved by the board. One approved a plan for property and casualty insurance for Bar members, including in coastal areas. The plan will be administered by BPC Financial, which oversees other Member Benefits insurance programs. The second is for Ann Taylor and offers a 20 percent discount on full-price clothing items for Bar members.

23. Clients' Security Fund Procedures Committee Report – Agenda Item 27

Chair Greg Coleman voted to change its name from the Clients' Security Fund Review Committee II to the Clients' Security Fund Procedures Committee. The committee rejected a request from the Clients' Security Fund Committee that it be given subpoena power. Coleman said the committee will be recommending to the board in May a change that would allow the fund to compensate clients when their lawyers' partners or associates steal from them and there is no other recourse for compensation. The committee studied, he said, allowing claims when attorneys steal from third parties when they are holding funds from those parties in trust on behalf of clients, but decided not to make a recommendation on that. Also, the committee has decided not to recommend random trust account audits as a way to reduce claims on the fund and protect clients. Instead, the committee is looking at ways to educate lawyers to help them prevent thefts.

24. Executive Session

The board returned to a brief executive session.

25. Time and Place of Next Meeting

There being no further business before the board, President Diner adjourned the meeting at 12:45 p.m.

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