

THE FLORIDA BAR BOARD OF GOVERNORS

Regular Minutes

April 2, 2004
The Crowne Plaza
Pensacola, FL

Pursuant to notice, the regular meeting of the Board of Governors of The Florida Bar was called to order at 9 a.m. on Friday, April 2, 2004 at The Crowne Plaza, Pensacola, Florida, with President Miles A. McGrane, III presiding.

1. Roll Call

Board members present:

Miles A. McGrane, III, President
Kelly Overstreet Johnson, President-elect
Alan B. Bookman, First Judicial Circuit
Lawrence E. Sellers, Jr., Second Judicial Circuit
Michael J. Glazer, Second Judicial Circuit
Gregory S. Parker, Third Judicial Circuit
S. Grier Wells, Fourth Judicial Circuit
Henry M. Coxe, III, Fourth Judicial Circuit
William H. Phelan, Jr., Fifth Judicial Circuit
Louis Kwall, Sixth Judicial Circuit
Mayanne Downs, Ninth Judicial Circuit
Warren W. Lindsey, Ninth Judicial Circuit
Robert M. Brush, Tenth Judicial Circuit
Francisco R. Angones, Eleventh Judicial Circuit
David Rothman, Eleventh Judicial Circuit
Ervin A. Gonzalez, Eleventh Judicial Circuit
Jennifer R. Coberly, Eleventh Judicial Circuit
Sharon L. Langer, Eleventh Judicial Circuit
Kimberly A. Bald, Twelfth Judicial Circuit
Timon V. Sullivan, Thirteenth Judicial Circuit
John F. Rudy, II, Thirteenth Judicial Circuit
Gwynne A. Young, Thirteenth Judicial Circuit
Rob Blue, Jr., Fourteenth Judicial Circuit
John G. White, III, Fifteenth Judicial Circuit
Jerald S. Beer, Fifteenth Judicial Circuit
Michael T. Kranz, Fifteenth Judicial Circuit
Nancy W. Gregoire, Seventeenth Judicial Circuit
Henry Latimer, Seventeenth Judicial Circuit
Jesse H. Diner, Seventeenth Judicial Circuit
Frank C. Walker, II, Seventeenth Judicial Circuit
Harold G. Melville, Jr., Nineteenth Judicial Circuit
J. Christopher Lombardo, Twentieth Judicial Circuit
Richard Tanner, Out of State
Ian Comisky, Out of State
Gary J. Leppla, Out of State
Brian D. Burgoon, Out of State
Mark Romance, YLD President
Michael J. Faehner, YLD President-elect
Solomon L. Badger, III, Ed. D., Public Member

Vivian Hobbs, Ph.D., Public Member

Board members absent:

Murray B. Silverstein, Sixth Judicial Circuit
Chobee Ebbets, Seventh Judicial Circuit
Robert A. Rush, Eighth Judicial Circuit
Russell W. Divine, Ninth Judicial Circuit
Don L. Horn, Eleventh Judicial Circuit
David W. Bianchi, Eleventh Judicial Circuit
Steven E. Chaykin, Eleventh Judicial Circuit
Amy L. Smith, Fifteenth Judicial Circuit
James S. Lupino, Sixteenth Judicial Circuit
Alan C. Brandt, Seventeenth Judicial Circuit
Clifton A. McClelland, Eighteenth Judicial Circuit
A. Lawrence Ringers, Twentieth Judicial Circuit

Staff attending the meeting:

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

2. Guests

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

Dan O'Rourke, President-elect Okaloosa Bar Association
Jane Curran, The Florida Bar Foundation
Craig Waters, Office of the State Court Administrator

3. Invocation and Pledge of Allegiance

Board of Governors Past President Pat Emmanuel offered the invocation and pledge of allegiance.

4. Greetings and Other Guest Appearances

John R. Fogg, Mayor of Pensacola welcomed the Board of Governors to Pensacola.
Jane Brehany was presented the President's Award.
Mike Guttman was presented the President's Award.

5. Non-roll Call Grievance Items

Board member Jay White reported that the non-roll call grievance items were: 9a, 23, 24, 28 and 29.

6. Non-Roll call Advertising Appeal Items

Board member Henry Latimer reported that the non-roll call advertising appeal items were: 047-00243 and 04-00244.

7. APPROVAL OF MINUTES and EXECUTIVE COMMITTEE ACTION

- A. Regular Minutes January 30, 2004 meeting
- B. Grievance Minutes January 30, 2004 meeting
- C. Executive Committee action taken:

February 18, 2004

Several matters needing action by the Executive Committee were forwarded to members via facsimile transmission on February 16, 2004 for review and vote. A quorum was reached with the following members participating: President Miles McGrane, President-elect Kelly Overstreet Johnson, Alan Bookman, Michael Glazer, Ervin Gonzalez, Henry Coxe, Jesse Diner, James Lupino, Mark Romance, Robert Rush and Richard Tanner.

Emergency Action Item 1 - Florida Bar Legislative Position:

Formal action by the Executive Committee was requested on a Florida Bar legislative position for the current legislative biennium opposing an amendment to Article V, Section 2 of the Florida Constitution by way of a proposed committee bill ("PCB HPS 1"). The bill proposes creating a federally inspired commission named by the legislature to propose rules of practice and procedure for the courts, for legislative enactment as general law. The current text of Art. V, Sec. 2, which authorizes the Supreme Court to adopt such rules but allows for legislative repeal by two-thirds vote of both chambers, would be totally deleted and replaced with the new concept. The proposal would have the clerk of the Supreme Court serve as the clerk of the new "judicial conference", but no other clear indication of (any) judicial branch involvement is present.

The Executive Committee approved, by a vote of 11-0, The Florida Bar legislative position opposing an amendment to Article V, Section 2 of the Florida Constitution.

Action Item 1 - Code and Rules of Evidence Committee Legislative Position:

The Code and Rules of Evidence Committee sought Executive Committee action on a legislative position request to oppose HB 89 by Rep. Planas and SB 1884 by Senator Lynn. The bills are identical and relate to the admissibility of hearsay evidence. The Code and Rules of Evidence Committee opposes any legislation that would give to state judges excessive discretion to rule on the admissibility of hearsay evidence that does not fall under the specific hearsay exception already delineated in the evidence code. They believe that granting such broad discretion is fraught with the possibility of abusing the confrontation clause of the Florida Constitution and the United State Constitution.

The Executive Committee approved, by a vote of 9-1, the Code and Rules of Evidence committee legislative position to oppose House Bill 89 and Senate Bill 1884.

Action Item 2 - Family Law Rules Committee Out-of-cycle Rules Amendments:

The Family Law Rules Committee had two petitions needing to be filed with the Supreme Court.

The first creates forms and instructions to implement the unbundled legal services rule. They were specifically requested by the Court in its opinion and in a subsequent letter from Clerk Tom Hall. The

Court wants the forms and the brochure being developed by the Family Law Section to be available by May 13, 2004.

The Executive Committee approved, by a vote of 10-0, the creation of forms. They approved, by a vote of 9-1, the instructions, with the one vote in opposition due to the instructions not being provided in the Executive Committee's materials.

The second relates to Florida Rule of Civil Procedure 1.525, Motions for Costs and Attorneys Fees. The rule was added by the Supreme Court effective Jan 1, 2001. Although it is not referenced in the Family Law Rules, judges are applying it to family law cases. Because of the difference (and piecemeal) way that judgements are rendered in family law cases, the rule is causing problems. The committee wanted to file an emergency petition to opt-out of the rule while it works on a replacement rule suitable for family law cases for its next cycles in 2005.

The Executive Committee approved, by a vote of 7-3, the emergency petition.

8. Consent Calendar

The Board approved the consent calendar by a voice vote.

A. UPL Circuit committee nominations

March 2004

- i. Ed Maney, Public member, First Circuit
- ii. Sabrina Bisordi Attorney member, First Circuit
- iii. Ethan Way, Attorney member, Second Circuit
- iv. Christopher Anderson, Attorney member, Fourth Circuit
- v. Jay Taylor, Attorney member, Fourth Circuit
- vi. Matthew Welch, Attorney member, Seventh Circuit
- vii. Keith Miller, Attorney member, Tenth Circuit
- viii. Beach Brooks, Attorney member, Tenth Circuit
- ix. Robert James Bigge, Jr., Attorney member, Seventeenth Circuit
- x. Ingrid Domingues-McConville, Attorney member, Seventeenth Circuit
- xi. D. K. Mink, Public member, Seventeenth Circuit

B. Fee Arbitration committee nominations - **none this meeting**

C. Rules, Bylaws & Policies

1) Rule 3-7.4 Grievance Committee Procedures

Within subdivision (l), alters the requirement that the presiding officer of a grievance committee sign a formal complaint, to only require that the document be "approved" by such officer.

2) Rule 3-7.9 Consent Judgement

Within subdivision (a), conforms the authority of disciplinary staff regarding consent judgments before a formal complaint is filed, to that after a complaint is filed -- as reflected in subdivision (b) - by changing a reference to "staff" counsel, to read "bar" counsel; within subdivision (e), deletes redundant references to staff counsel authority and retitles subdivision to read "Effect of Pleas on Certification" to more clearly reflect its content.

3) Rule 4-1.5 (f)(4)(B) Contingent Fees

Consistent with existing commentary language, adds verbiage within subdivision (f)(4)(B)(ii) to discuss the disfavored status of fees in excess of the rule amounts, place the burden of justifying an increased fee on the lawyer and client, and set forth the criteria for trial judges to consider in approving such fees.

4) Appellate Practice Section Bylaw Changes

In Article IV (Duties & Power of Officers), adds that the section treasurer shall serve as chair of the website committee and shall supervise the development and maintenance of the section site; in Article VI (Meetings of the Section), clarifies that the executive council may direct matters to be submitted in writing to section members for mail vote "unless otherwise specified herein;" in Article IX (Committees) adds the website committee as a standing committee, and confirms that annual committees of the section may be created or dissolved either upon recommendation of the chair or chair-elect and majority approval of the executive council, or by motion of the council and its majority approval; and in Article XII (Amendments), clarifies that these bylaws may only be amended at the section's annual meeting.

D. Board Review Committee on Professional Ethics

- 1) Advertising Appeals 04-00243 and 04-00244-removed from consent
- 2) Advertising Appeal 04-00984
Advertising Appeal 04-00984 concerns application of Rule 4-7.7, requiring filing of non-exempt advertisements to a yellow pages advertisement that contains a photograph of an American flag. Pursuant to the Standing Committee on Advertising yellow pages compliance review program, staff requested on November 4, 2003, that the attorney file the yellow pages advertisement with a late filing fee. In response to the attorney's inquiry, staff indicated on November 20, 2003, that the yellow pages advertisement was not exempt because it contains the image of an American flag. The Standing Committee on Advertising upheld staff's opinion on January 16, 2004. The attorney subsequently requested Board of Governors review.

E. Legislative Committee review

- 1) New section legislative position requests for the 2002-2004 biennium
 - a) Real Property, Probate and Trust Law Section
 - i. Disclosures by sellers of real property SB 2074 / HB 947
Opposes legislation requiring multiple disclosures by sellers of real property, creating contract rescission rights for buyers and seller liability for damages.
 - ii. Preservation of homeowner association governance SB 1438 / HB 589
Supports legislation to preserve homeowner association governance and/or assessment regimes notwithstanding extinguishment of community covenants and restrictions by the Marketable Record Title Act.
 - iii. Condominium units reserve funding issues
Supports legislation that would ensure that those condominium unit owners who are impacted by reserve funding issues have the decision whether to waiver or reduce the reserves.
 - iv. Real Property homestead status F.S. 222.01
Supports an amendment to F. S. 222.01 to provide persons with the same procedure for determination of real property homestead status against foreign judgments as currently is provided against domestic judgments.
 - v. Condominium unit owner's ability to exercise self-government
Supports condominium unit owner's ability to exercise self-government and undertake fair and efficient community administration, including the exercise of basic contract and investment decisions.
 - b) Family Law Section

- i. Recognition of “defacto marriage” SB 1416
Opposes legislation creating the definition for the term “de facto marriage” in SB 1416 in order to terminate a persons alimony obligations.
 - ii. Protective injunctions SB 322
Opposes legislation deleting the term “repeat violence” in F. S. 784.046 for purposes of protective injunctions.
 - iii. Paternity testing SB 2658 / HB 893
Opposes HB 893 and SB 2658 amending F. S. 742.12 which would authorize an unmarried biological father to petition the court to require the mother of the child and the legal father of the child to submit to paternity tests, and allows the court to award visitation to the alleged biological father based on a “best interest” test.
 - iv. Parenting Coordination statute
Supports the creation of a parenting coordination statute that would apply in certain family law cases.
- F. Legislative Objections to 2002-2004 Biennium, Position #10
- G. Prepaid Legal Services Committee - Proposed Chapter 9 Plan Changes
- 1) Professional Firefighters and Paramedics of Delray Beach, Local 1842, IAFF
 - 2) Professional Firefighters and Paramedics of Palm Beach Country, Local 2928, IAFF
 - 3) Firefighters of Boca Raton, Local 1560, IAFF

9. Young Lawyers Division Report

President Mark Romance reported on the following:

- A. Young Lawyers Division Bylaw Changes- **first reading**
Within Article IV (Election of Division Officers) revises voting timelines for office of president-elect, effectively shortening the process by 1 month in most instances; within Article V (Board of Governors) deletes provisions requiring automatic removal of board members for lack of attendance, and substitutes new provision allowing removal for cause by resolution of the board adopted by two-thirds vote of the entire membership; revises subdivision title accordingly, from “Lack of Attendance,” to “Removal”.
- B. Corrective Action - Rule 6-12.4 -**Approved by the Board of Governors.**
Consistent with related amendments proposed for rule 6-12.3, substantial editorial reorganization of the rule, to reflect elimination of the government lawyer deferment from the Practicing with Professionalism course program; adds a requirement for members to provide written notice to the bar of the expiration date of their deferment; restructured rule otherwise maintains the current government lawyer deferment from the basic elective CLE course requirement.

Romance reported that the Board of Governors will begin to receive the monthly newsletter published by the Young Lawyers Division called “Across the Board”. In April’s edition there is an article about a program that the Santa Rosa Bar Association held called “Holidays in January.” On January 31, 2004, in Pensacola, more than 60 attorneys and over 300 under privileged children attended the program which raised between \$6,000 and \$9,000, providing gifts and books for the children.

10. Communications Committee Report

Chair Elect Mike Glazer reported that the Communications Committee received a report on the editorial board visits from Craig Waters, Public Information Director for the Florida Supreme Court. Mr. Waters expressed extreme appreciation to Miles, and to the Bar, from the Supreme Court for assistance in

advocating for adequate funding for Florida's trial courts.

The committee discussed the Bar's annual Reporters Workshop. The program is held every year for 24 reporters who are selected to participate by their newspaper or television stations. The reporters receive two days of intense training on how to report on issues relating to the law, presented by the Media and Communications Law Committee. For many years the workshop moved around the state, however, last year and four years ago it was held in Tallahassee. The program has been embraced by the Florida Supreme Court and the Communications Committee would like to see the program held in Tallahassee for the next few years.

The Committee also received a report on a ceremony to celebrate the 50th anniversary of Brown v. The Board of Education. There will be a reading of excerpts of Thurgood Marshall's arguments in support of the case and Chief Justice Anstead will read the decision in the same hour that it was read 50 years ago. The Bar is sponsoring a reception following the event, and will place video clips of the ceremonial session of the Court on its Web site.

The committee is overseeing an audit of the member communications programs of The Bar. They are sending out 2,500 surveys to randomly selected attorneys and expect a 30% response.

The committee received a report on the Dignity in Law program. The Bar recently hired a full-time public relations professional, Ann Marie Baxter, to coordinate the Dignity in Law program under the direction of Francine Walker. She is working daily with rbb Public Relations to learn about the Dignity in Law program, and rbb will remain available to the Bar on a consulting basis for special projects. Anne Marie is working to distribute public information materials in Spanish to step-up communications efforts with the state's Hispanic media and citizens.

The Committee will be sending a letter to the Board of Legal Specialization and Education (BLSE) concerning their planned promotional campaign, expressing concern that the project only targets lawyers and not the general public.

The Collier County Bar Association requested a grant to help pay for a media law seminar. The request for \$2,190 from the Communications grant program was approved by the Board.

11. Program Evaluation Committee Report

Chair Hank Coxe reported that the committee approved the merger of the Judicial Administration, Selection and Tenure (JAST) Committee and the Judicial Evaluation Committee (JEC). The new combined committee will be called the Judicial Administration and Evaluation Committee (JAEC). The committee requested that term limits not be applicable for the initial appointment. **The Board approved the committee motion to merge the two committees.**

Coxe reported that Francine Walker gave a presentation to the committee on the Citizens Forum. She reported that the forum is both cost efficient and very effective. Board member Glazer reported that the forum has been in existence for about five years and is composed of several board members and between 11 and 14 public citizens. The forum looks at several issues concerning The Bar.

The committee discussed the Equal Opportunity Law Section, concerning their membership requirements and substantive programmatic efforts by the section. The committee hopes to have a final recommendation for the section at the May meeting. The committee will also be discussing an Animal Law Committee when they meet in May.

12. Special Commission on Lawyer Regulation Report

Chair Hank Coxe reported that Board of Governors had funded a survey on lawyer regulation, which commenced in January. The survey included Bar counsel, response counsel, referees, grievance committee members, respondents and complainants from the past three years. Coxe reported that while the process was expected to take about one year, it would probably take close to two years. The deadline for the surveys to be returned was March 31, 2004. The commission received approximately

3,000 surveys, and many faxes, letters and e-mails. The commission now has the task of reviewing each of the completed surveys.

13. Civil Procedure Rules Committee Report

Board member Tim Sullivan reported on a proposed revision to the Uniform Guidelines for Taxation of Costs in Civil Action. The original guidelines were created in 1981, at the Supreme Court's request, by the Conference of Circuit Court Judges. In 1999 the Civil Procedure Rules Committee proposed amendments which were rejected by the Supreme Court in March 2001. The Courts wanted the guidelines to reflect a goal of reducing litigation costs. The Court also felt that all changes should be supported with citations to case law or statute. They directed the Civil Procedure Rule Committee to seek input from trial lawyer groups and to study how other states handle the Taxation of Costs. The study was undertaken and the committee has come up with a plan that includes the concept of making it simple to apply your taxation of cost by making it more predictable and they want to reward the use of technology. Opponents of the previous rule amendments are in support of these changes. **The Board voted 37-0 to approve the rule amendments.**

14. Board of Legal Specialization and Education Policies

- A. Rule 6-3.5 Standards for Certification- first reading
Adds new provision allowing attorneys applying for certification in international law to count the international practice of law as up to 3 of the 5 years required for certification.

15. Unlicensed Practice of Law Report

- A. Rule 10-2.1 Generally-first reading
Clarifies what forms are Supreme Court-Approved forms for purposes of the rule.

16. Special Committee to Review the ABA Model Rules 2002

- A. Elizabeth Tarbert, Director of Ethics and Advertising, reported that the Rules committee voted to approve all of the Special committee's suggestion except for one comment to Rule 4-1.4. The comment concerns the prompt return of a client's telephone call. The Board of Governors will vote on the rule amendments in May.
- B. Amendments to Chapters 4 and 5 of the Rules Regulating The Florida Bar
Chapters 4 and 5 of the Rules Regulating The Florida Bar revised throughout based on the final report of the Special Committee to Review the ABA Model Rules 2002. The proposed changes conform to the recommendations of the ABA Ethics 2000 Commission report.

17. Disciplinary Procedure Committee Report

Chair-elect Greg Parker reported on the following:

- A. Items on first reading
- 1) Rule 3-7.2 (f) Petition to Modify or Terminate Suspension (felony suspension)
Within subdivision (f) restricts the types of challenges that may be brought in the "injunction" action, but does not limit their consideration in the follow up actions.
 - 2) Rule 3-7.10 (g) Petition for Reinstatement (evidence of treatment)
Within subdivision (g), requires petitioner to allow inquiry into petitioner's history of treatment or counseling of chemical or alcohol dependency or a medical condition that adversely affects the petitions's fitness to practice.
 - 3) Rule 3-7.10 (l) Petition for Reinstatement (Comments on Petition)
Within subdivision (l)(4), clarifies the role of local bar associations in reinstatement proceedings.

- 4) Rule 3-7.11 (f)(g)(h) General Rule of Procedure
Within subdivision (f), revises and restates procedure for processing contempt actions to provide 1 procedure in all contempt matters; also provides procedure to institute proceedings, requires responses within court established time frame, allows bar reply; permits assignment of a referee to develop factual record and clarifies that any proceedings before a referee are processed under the RRTFB; deletes subdivision (g) and incorporates the contents therein to subdivision (f); renumbers accordingly; within new subdivision (g), provides that if the bar has court reporters as employees and a respondent objects to their service, the respondent is required to compensate the bar for the cost of hiring an independent court reporter.
- 5) Rule 4-1.5 (e) Fees for legal Services (contingency fee regulation)
Within subdivision (e), adds clarity as to whom may challenge fee contracts based on discipline rules.
- 6) Rule 4-7.7 Evaluation of Advertisements
Within subdivision (b) (5), increases the filing fee for the evaluation of lawyer advertisements, from \$100 to \$150.
- 7) Rule 4-8.1 Bar Admission and Discipline
Adds new subdivision (c) and new language to the Comment disallows an applicant to the bar to commit an act that adversely reflects on the applicant's fitness to practice. This includes acts committed before admission but discovered after admission. Parker also reported that DPC was looking at proposing amendment to the board policy on how rule amendments are processed and would be surveying the board to determine what if any support there might be for such an amendment.

B. Items for final action

The Board approved the following items:

- 1) Rule 4-5.8 Procedures for Lawyers Leaving Law Firms and Dissolution of Law Firms
New rule, which sets forth guidance for allowable client contact by lawyers and law firms when a lawyer is leaving a law firm or when a law firm is being dissolved.

Board member Rob Blue offered an amendment to the rule "at the end of line 24 on 11b(13) add dissolution in this context encompasses change in firm makeup that may fall short of legal dissolution of the entity". The amendment failed on a voice vote. The unamended rule amendment was approved by the Board with no dissent.

18. Legislation Committee Report

Chair Alan Bookman reported on the following action items:

A. Florida Bar legislative position requests for the 2002-2004 biennium

The Board approved the following legislative positions.

- 1) Lawyer Advertising
The Florida Bar favors the most restrictive limitations on lawyer advertising consistent with constitutional requirements.
Chair Bookman reported on House Bill 1357 by Representative Simmons on Lawyer Advertising. The bill has pass the House and is in Senate messages. At this time there is no Senate companion, however, Steve Metz indicated that Senator Campbell vows to run the bill.
- 2) Legal Aid funding
Supports the continuation of status quo funding for legal aid programs, through reactivation of local optional filing fee service charges within F.S. Ch. 28 & 34 which were abolished effective July 1, 2004 through passage of Ch. 2003-402, Laws of Florida.

The committee received a request from Sharon Langer that the Board approve a legislative position concerning legal aid.

3) Law Library funding

Supports the continuation of status quo funding for law libraries, through reactivation of local optional filing fee service charges within F.S. Ch. 28 & 34 which were abolished effective July 1, 2004 through passage of Ch. 2003-402, Laws of Florida.

Board member Rob Blue made a motion that the Board approve a position similar to the legal aid position, only concerning law libraries.

Bookman reported that the House of Representatives passed House Bill 1849 which certifies 51 new judges, but also creates a 6th District Court of Appeals. Bookman reported on some of the amendments that the House attempted to put on the bill that would be very harmful to the courts and judges. The proposed amendments failed. There is no Senate companion to this bill, however, it is an appropriations bill, so it will be considered during the Legislature's budget conference.

Bookman reported on the House and Senate Budgets. The House passed their budget on Thursday, April 1, 2004 and has approximately \$113 million in funding for Article V, Revision 7. The Senate passed their budget Friday, April 2, 2004 and has approximately \$137 million in funding for Article V, Revision 7. The House budget also has a \$500,000 place holder for Civil Legal Aid. The Senate budget does not have any money for Civil Legal Aid. The Florida Bar is trying to get \$5.5 million for Civil Legal Aid. These numbers will be reconciled when the two houses go to conference.

The Kids Deserve Justice specialty tag is moving through the process. House Bill 1259 cleared it's first two committees in the House and Senate Bill 2730 cleared it's first committee in the Senate. The legislators are impressed by the fact that 100% of the proceeds will go to the programs and not to the administration of the programs.

The Article V glitch bills have surfaced in both the House and Senate. Both provide for Legal aid and Law libraries. However their funding source is from fees assessed in F. S. 939.18, which may be inadequate to fund the programs. Some of the board members voice their dissatisfaction of this funding source. Senator Campbell is expected to file amendments to allow for local option add on fees.

Both the House and the Senate glitch bills have provisions that will charge all out of state attorneys a \$100 fee for pro hac vice. The Bar already has rule amendments at the Supreme Court to allow the Bar to charge \$250 for pro hac vice. At this point The Bar is not taking a position on this.

Bookman reported that Senator Villalobos sent a letter to President McGrane, requesting that the Bar invite attorneys in specific areas of the law to attend future Senate Judiciary meetings to testify what the real world effects of certain legislation would be. Bookman reported that he and President-elect Kelly Overstreet Johnson would be facilitating his request.

Bookman reported that Metz had communicated to him that the issue of Court Rulemaking would be coming back up.

President McGrane spoke about Article V, Revision 7 funding. He suggested that the Board go to the local bars and help mobilize them to go to the counties to request more funding for programs like Teen Court.

19. Investment Committee Report

Chair Ian Comisky reported that since last July The Bar's investments have grown from \$13.8 million to close to \$16 million, which is an 11.6% increase. Comisky reported that the committee was advised and did diversify the large cap portion of the portfolio by adding T.C.W. asset management and reducing the amount invested in the Montag & Caldwell mutual fund.

20. President-elect Report

President-elect Johnson reported that the spring ski retreat is scheduled for February 26 through March

5, 2005 at the Charter at Beaver creek. The topic for the retreat has yet to be determined. Johnson reported that she is almost finished making her committee assignments. There are still many openings for people on the following committees: Member benefits, Law Related Education, Prepaid Legal Services. Quality of Life, Traffic Court Rules, Small Claims Rules, Committee on Relations with CPA's and Student Education and Admissions to The Bar.

Johnson reported that the Judicial Nominating Committees (JNC) would be meeting. She has provided the entire Board with a list of nominees, and requests that anyone with any information on any of the nominees contact one of the following JNC Chairs: Greg Parker, David Bianchi, Amy Smith, Warren Lindsey and Larry Ringers.

Board member, Jennifer Coberly made a motion that the board direct the Judicial Administration, Selection and Tenure Committee to coordinate the audio taping or other recording by a certified court reporter of all JNC interviews in the state of Florida henceforth, only the interview, not the deliberation. Board member Coxe made a motion to refer this issue to the Judicial Nominating Procedure Committee and the Judicial Administration, Selection and Tenure Committee, and receive a report and vote on this at the May Board of Governors meeting. In response to this and other board discussion, Coberly withdrew her motion and the board approved Coxe's motion.

21. Certification Plan Appeals Committee Report

Chair David Rothman reported that the committee is working to improve the certification process by amending the rules so that if a person is denied certification due to peer review, the person seeking certification will be informed of how to improve their chances, and where their shortcomings were.

22. Budget Committee Report

A. Chair elect Jerry Beer reported that the 2004-2005 budget has a surplus of about \$460,000. The budget is about \$700,000 larger than the 2003-2004 budget. The board approved the proposed 2004-2005 budget. The approved budget will be published in "The Florida Bar News" and the board will receive member comments at its next meeting.

B. Chair Jessie Diner:

Recommended two budget amendments to the 2003-2004 budget. They are as follows:

1. From the Building Reserve, Security System replacement for Tallahassee Bar facility
\$53,000
2. From the Operating Reserve, Supreme Court Reception for Brown V. Board of
Education \$17,000

The board approved both amendments.

C. Diner reminded the Board that the summary financial statement for February 29, 2004 could be found in the materials

23. Board Review Committee on Professional Ethics

Chair Henry Latimer reported on the following items:

A. Ethics Appeal Proposed Advisory Opinion 02-4

Proposed Advisory Opinion 02-4 involves a lawyer's duty when the lawyer, in a personal injury case, is in possession of settlement funds against which third parties claim an interest. The Professional Ethics Committee requested that The Florida Bar Board of Governors allow the committee to issue a proposed advisory opinion on the topic. The board voted to request that the Professional Ethics Committee adopt a proposed advisory opinion on this issue. Official notice of the committee's intent to consider rendering an opinion on this issue was published in The Florida Bar News. Official notice was published in the October 1, 2003 issue of The Florida Bar

News of the Professional Ethics Committee's adoption of Proposed Advisory Opinion 02-4. PAO 02-4 concludes that there is no bright line rule that can address all situations, but sets forth guidance for a lawyer to consider in determining the lawyer's obligations to third persons with an interest in funds being held by the lawyer. The committee reconsidered PAO 02-4 in light of comments received by Florida Bar members and affirmed the proposed advisory opinion with modification at its January 16, 2004 meeting. Two members of The Florida Bar who timely filed comments requested Board of Governors review.

The BRC voted 7-0 to affirm the proposed advisory opinion with changes beginning at line 137, clarifying that the lawyer is required to hold disputed funds in trust only where the lawyer owes a duty under law to the third person and that whether a lawyer owes a duty under law to a third person is a legal question, outside the scope of the opinion.

The board concurred in the recommendation of the BRC.

B. Ethics Appeal 24989

Ethics Inquiry 24989 concerns the ethical propriety of advancing costs in a patent case. On September 18, 2003, the inquiring attorney requested a written staff opinion concerning the ethical propriety of using a U.S. Patent and Trademark Office deposit account to pay patent and trademark fees. The patent office automatically withdraws additional patent fees from the deposit account if the amount of the patent fees paid on behalf of the client is insufficient; apparently, determining the exact amount of fees is complex and difficult. Florida Bar Staff Opinion 24989 concluded that use of such an account is permissible as long as only law firm money is placed in the deposit account to avoid commingling of law firm and client funds. The law firm may advance those fees on behalf of the client, and bill the client if additional fees are withdrawn by the patent office. The Professional Ethics Committee affirmed the staff opinion at its meeting of January 16, 2004. The attorney subsequently requested Board of Governors review.

The BRC voted 7-0 to affirm the staff opinion as written.

The Board concurred in the recommendation of the BRC.

C. Professional Ethics Committee Request: Proposed Advisory Opinion 02-9, arbitration clauses

The Professional Ethics Committee requested that The Florida Bar Board of Governors clarify the issue of mandatory binding arbitration to settle fee and malpractice disputes, either by amending the rules to address it, or by requesting that the Professional Ethics Committee issue a proposed advisory opinion. In response to a Florida Bar member's inquiry, the Professional Ethics Committee published Proposed Advisory Opinion 02-9, concluding that it is permissible for an attorney to include a clause in an attorney's fee contracts requiring mandatory binding arbitration in all disputes between the attorney and the client. The Florida Bar Board of Governors withdrew the proposed advisory opinion at its December 5, 2003 meeting. The Professional Ethics Committee subsequently voted to request that the board clarify the issue by either amending the rules or by directing the Professional Ethics Committee to issue a proposed advisory opinion. The BRC voted 7-0 to recommend that the board direct the Disciplinary Procedures Committee to draft a rule prohibiting attorneys from including in their fee contracts a mandatory binding arbitration clauses to resolve malpractice disputes with clients. The BRC voted 7-0 to recommend that the board direct the Disciplinary Procedures Committee to draft a rule permitting attorneys to include in their fee contracts mandatory binding arbitration clauses to resolve fee disputes with clients.

The Board voted to direct the Disciplinary Procedures Committee to draft a rule prohibiting attorneys from including in their fee contracts a mandatory binding arbitration clause to resolve malpractice disputes with clients.

The Board voted to table the issue of permitting attorneys to include in their fee contracts mandatory binding arbitration clauses to resolve fee disputes with clients and refer the

issue to the Citizen's Forum for input.

D. Advertising Appeals 04-00243 and 04-00244

Advertising Appeals 04-00243 and 04-00244 concern application of Rule 4-7.5(b), prohibiting visual images in television advertisements other than an attorney in front of a single solid color background, a set of unadorned law books, or the attorney's own office. Staff rendered an opinion on August 13, 2003, that two television advertisements filed by a lawyer referral service contained visual images of a father and child in a wheelchair and children on a playground (file number 04-00243) and a mother and infant in a stroller and children on a playground (file number 04-00244), in violation of Rule 4-7.5(b), among other violations. The Standing Committee on Advertising upheld staff's opinion on October 15, 2003, as to the violation of Rule 4-7.5(b), but declined to determine if the advertisement also violated Rule 4-7.2(b)(4) regarding visual depictions or portrayals. The filer subsequently requested Board of Governors review, limiting the request for review to the issue of whether the visual images in the television advertisements violate any Florida Bar rules and whether enforcement of the rule should be suspended. The item was deferred at the January 2004 board meeting.

The items were discussed in executive session to obtain the advice of outside counsel.

The BRC voted 6-0 to recommend that the Board petition the Supreme Court for an administrative order allowing The Florida Bar to suspend enforcement of the portions of Rule 4-7.5 that are inconsistent with rule amendments requested by The Florida Bar pending the Supreme Court's order on the amendments to Rule 4-7.5 currently before the court in case number SC03-705. The BRC voted 6-0 to recommend that the Board refer back to the Standing Committee on Advertising the issue of whether the visual images in the television advertisements comply with Rule 4-7.2(b)(4).

The Board concurred in the recommendation of the BRC.

24. Elder Law Section Bylaw Changes- first reading

Within Article II (Membership) revises the definition of affiliate members by deleting graduates of any law school, legal assistants, and public members; also adds and defines "at large" membership in the section; within Article III (Officers) adds that the chair-elect shall serve as chair of the legislative committee, and clarifies that the chair-elect automatically becomes chair at the conclusion of duties, without election; within Article IV (Executive Council) revises membership to include past chairs for the 5 preceding years rather than just the immediate past chair; also adds at large members, if any, to the council; within Article V (Committees) deletes from the administrative division group the coordination & liaison committee and the public & member information committee; also deletes from the substantive division group the home & community-based services for the elderly & residency issues committee and the health care committee; retitles estate & financial planning committee, to be the estate planning & advance directives committee, and revises committee scope accordingly; adds medicaid committee to the substantive group; clarifies scope of government benefits committee, to exclude medicaid issues; within Article VI (Meetings) clarifies that advance notice of meetings shall be at least 15 days and may include regular modes of electronic communication used by the section; within Article VIII (Miscellaneous) clarifies that compensated contractual services require the approval of the executive committee, and adds a procedure for approval of bylaw amendments by the executive council. Reorganizes throughout to conform to latest guideline.

25. Government Lawyer Section Bylaw Changes- first reading

Within Article III (Officers) simplifies the nomination of officers not on the ballot, allowing nominations from the floor at the annual meeting rather than by petition at least 30 days prior; deletes redundant reference to authorized appointments of the chair; changes references to "convention," to read "annual meeting"; within Article IV (Executive Council) adds conference call as an authorized mode of meeting; expands

membership of executive council to include any past section chair and any chair of a special committee; and revises nominations process, to eliminate petitions but allow for necessary voting at the annual meeting in the event there are more nominees than positions to be filled; within Article V (Meetings) clarifies what constitutes a quorum for transaction of executive council business and a binding vote – except for specified legislative, court rule, or policy issues – at any council meeting held during the annual meeting or a regular meeting; authorizes conference call participation at regular meetings; within Article VI (Committees) deletes the Pro Bono Services Committee from standing committees group.

26. Public Member Screening Committee Report

Chair Ervin Gonzalez reported that the Public Member Screening committee interviewed six of the nominees in Tampa. They recommended the following people to send to the Supreme Court:

Blair Culpetter, Winter Park

Michael H. Greenhill, West Palm Beach

Frederick A. Hamlin, Sarasota

The board had a lengthy discussion. Board member Sharon Langer made a motion to extend the deadline for receiving nominations in order to recruit more women. The motion was defeated and the Board concurred with the committee’s selection.

27. Supreme Court’s Bar Admissions Committee

The following person was selected for a 2-year term:

Jerry M, Gewirtz, Tampa

28. Time and Place of Next meeting

The next Board of Governors meeting will be held May 26 through May 29, 2004 at the Westin Diplomat in Hollywood, Florida.

There being no further business to discuss, the Board of Governors meeting adjourned at 2:45 p.m.

Respectfully submitted,

Dana M. Wood
Secretary to the Board of Governors

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