

The Florida Bar Board of Governors
December 4, 2015
Ritz Carlton Hotel
Naples, Florida

1. Roll Call

Ramon A. Abadin, President
William J. Schifino, Jr., President-elect
Stephen H. Echsner, 1st Circuit
Lawrence E. Sellers, Jr., 2nd Circuit
William H. Davis, 2nd Circuit
Bruce W. Robinson, 3rd 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
Mary Ann Morgan, 9th Circuit
Paul Louis SanGiovanni, 9th Circuit
Wayne L. Helsby, 9th Circuit
Roland Sanchez-Medina, Jr., 11th Circuit
Dori Foster-Morales, 11th Circuit
Michael J. Higer, 11th Circuit
Dennis G. Kainen, 11th Circuit
Steven W. Davis, 11th Circuit
John H. (Jack) Hickey, 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
David C. Prather, 15th Circuit
Ronald Peter Ponzoli, Jr., 15th Circuit
Michelle R. Suskauer, 15th Circuit
Gary Shepard Lesser, 15th Circuit
Wayne LaRue Smith, 16th Circuit
Walter G. Campbell, Jr., 17th Circuit
Diana Santa Maria, 17th Circuit
Lorna E. Brown-Burton, 17th Circuit
Jay Cohen, 17th Circuit
Adam Glenn Rabinowitz, 17th Circuit
O. John Alpizar, 18th Circuit
John M. Stewart, 19th Circuit
Laird A. Lile, 20th Circuit

Marcy L. Shaw, 20th Circuit
Edward Duffy Myrtetus, Out of State
Ian M. Comisky, 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
Lawrence Worley Tyree, Public Member
Anthony Holloway, Public Member

Members Absent:

C. Richard Nail, 10th Circuit
Leslie J. Lott, 11th Circuit
Margaret Diane Mathews, 13th Circuit

2. Staff in Attendance

John F. Harkness, Jr., Executive Director
John Berry, Director, Legal Division
Adria Quintela, Director, Lawyer Regulation
Paul Hill, General Counsel
Lori Holcomb, Director, Ethics and Advertising, UPL, and Special Projects
Elizabeth Clark Tarbert, Ethics Counsel
Tom Kroeger, Bar Counsel
Terry Hill, Director, Programs Division
Francine Walker, Director, Public Information and Bar Services
Rosalyn A. Scott, Assistant to the President
Gary Blankenship, Senior Editor, The Florida Bar News

3. Guests

Manny Crespo, President, Cuban American Bar Association
Carlos Martinez, Government Lawyer Representative
Leora Freire, Florida Association for Women Lawyers President-elect

4. Invocation and Pledge of Allegiance

Board member Marcy Shaw delivered the invocation and board member Laird Lile led the board in the Pledge of Allegiance.

5. Swearing In of New Member

Wayne LaRue Smith was sworn in, representing the 16th Circuit.

6. Minutes Approval

The board approved the Minutes from its October 16, 2015 meeting. That included ratifying the action taken by the Executive Committee since that meeting: On October 22, the committee voted 7-2 to send an email to all section, committee, and voluntary bar association leaders and to all Bar members soliciting comments on the Code and Rules of Evidence Committee's recommending the Supreme Court not adopt into evidence rules the Florida Legislature's 2013

bill mandating the *Daubert* standard be used when qualifying expert witnesses instead of the *Frye* standard set by the Supreme Court.

7. Consent Calendar Approval

The board approved the consent calendar, including giving final approval to:

- Rule 10-2.1, Generally: Within subdivision (b) amends definition of paralegal to include lawyer authorized to engage in the practice of law in Florida; within subdivision (e) clarifies that bar counsel includes UPL staff counsel.
- Rule 10-3.2, Duties of the Standing Committee: Adds new subsection (b)(7) authorizing the Standing Committee on Unlicensed Practice of Law to close cases with the acceptance of a cease and desist affidavit with restitution to the complainant.
- Rule 10-4.1, Generally: Adds subdivisions (e)(2) and (5) authorizing an unlicensed practice of law circuit committee to close a case based on a letter of advice and to accept a cease and desist affidavit with restitution. The subsequent subdivisions are renumbered.
- Rule 10-5.1, Complaint Processing: Within subdivision (c), removes the words "the appropriate" when referring to the circuit committee to which a case is referred.
- Rule 10-5.2, Disqualification of Attorney for Respondent Due to Conflict: Clarifies rule regarding disqualification of attorney for respondent due to conflict.
- Rule 10-6.3, Recommendations and Disposition of Complaints: Within subdivision (a), adds letter of advice to recommendations and disposition. Within subdivision (b), clarifies the rule regarding bar counsel disagreement with the actions of the circuit committee.
- Rule 20-1.1, Purpose: Changes "member of The Florida Bar" to "employing or supervising lawyer."
- Rule 20-2.1, Generally: Within subdivisions (a),(c), and (e), changes Florida Bar members to employing or supervising lawyers and expands the definition of employing or supervising lawyer to include not only members of The Florida Bar, but also authorized house counsel, foreign legal consultants and military lawyers.

8. Budget Committee Report

Committee Chair Dori Foster-Morales presented three budget amendments for the 2015-16 Bar Budget: \$9,000 for a review of the ACAP/UPL intake system; \$6,210 for a mobile device app for the Annual Convention; and \$33,789 to help return the CLIO technology conference for the June 2016 Annual Convention. The board unanimously approved the three amendments. Foster-Morales said the committee was continuing to study a \$50,000 amendment on tracking annual meeting registration aimed at improving the registration process.

9. Audit Committee Report

Chair Eric Meeks reported that the Bar received a clean audit for its 2014-15 fiscal year from its auditors. He said auditors found no inconsistencies in financial statements and no non-compliances with accounting standards. He also said auditors found no problems with the Bar's building corporation and the FLAME program.

10. Investment Committee Report

Chair Ian Comisky reported that the Bar's short-term portfolio was earning around 1.5 percent, which he characterized as a good return in the low interest environment, while the long-term portfolio made about 3.5 percent so far in the fourth quarter and was roughly even for the year. He presented changes in the mutual funds in Bar's long-term portfolio which were recommended by the Bar's investment advisor and approved by the committee. The board unanimously approved the changes which were to sell all of the position in Herndon Large Cap Value and use that money to increase shares in Powershares FTSE RAFI

(PRF) and Winslow Large Cap Growth; terminate the allocation to SPDR International Gov't Inflation Linked securities with one percent of that going to Lord Abbett Short-Duration Income and the balance to cash; and reduce the Invesco Balanced-risk Allocation by 1.6 percent with the proceeds going to cash.

11. Technology Committee Report

Chair John Stewart said the committee is working with the Board Review Committee on Professional Ethics on lawyer referral service issues. He also touted the upcoming February issue of the Bar *Journal* which will focus on technology and the electronic version will be a "dynamic" issue with enhanced digital capabilities.

12. Appellate Practice Section Report

Section Chair Christopher Carlyle reported the section has just under 1,500 members and a \$130,000 annual budget. It donated \$50,000 to The Florida Bar Foundation and the section Executive Council voted unanimously to take a legislative position opposing joint resolutions in the Legislature that would set term limits for Florida's appellate judiciary. The section has a robust program of CLE courses, including joint courses done with the conference of appellate judges, and does 10 telephone CLE courses a year.

13. Family Law Rules Committee Report

Immediate past committee Chair Elizabeth Blackburn presented a rewrite of the procedural rules for family law. She explained the new version removes all references to the Rules of Civil Procedure and instead incorporates those rules into the family rules and tweaks them as necessary to address the specific needs of family courts. The change means family law practitioners will only have to refer to family law rules and Rules of Judicial Administration, which has procedural rules common to all practice areas. The board voted 45-0 to recommend approval of the rules.

14. Board Review Committee on Professional Ethics

Chair Carl Schwait reported that the committee voted 5-3 via e-mail to recommend that the Board of Governors approve amendments to Rule 4-1.5 regarding lien resolution, alternative 1, in which the court reviewing the fee agreement may adjust the primary lawyer's fee. Other amendments to the proposal, originally filed with the Supreme Court of Florida on October 28, 2015 in the case of *In Re Amendments to Rules Regulating The Florida Bar - 4-1.5 Fees and Costs for Legal Services*, case no. SC14-2112, include: adding a definition of extraordinary versus ordinary lien resolution services; requiring a disclosure at the outset of representation that the personal injury lawyer would not provide extraordinary lien resolution services; defining the type of contingent fee that could be charged for extraordinary lien resolution services; requiring court approval of the extraordinary lien resolution fee if it together with the personal injury fee exceeded the contingent fee schedule set forth in Rule 4-1.5; and adding commentary that the primary lawyer may provide ordinary lien resolution services personally or through another as long as no additional fee is charged to the client. Board member Jay Cohen, who chaired the Special Committee on Lien Resolution, spoke against the Board Review Committee on Professional Ethics motion regarding the issue of the court adjusting the primary lawyer's fee. The Board of Governors voted 26-17 to approve the Board Review Committee on Professional Ethics recommendation and by voice vote with some dissents approved waiving second reading to meet the deadline of January 15, 2016 imposed by the Supreme Court of Florida.

Schwait reported that the BRCPE approved amendments to Rule 4-7.18(a) regarding solicitation on October 15, 2015, that omit the prohibition against direct contact to prospective clients via telegraph and facsimile and add a prohibition against direct contact electronically that is face-to-face (such as Skype). These amendments were reported to the Board of Governors for first reading and will be on the January 29, 2016 agenda for final action.

On September 24, 2015, the Supreme Court of Florida issued an order in case number SC14-2126. The Court rejected the Bar's proposed amendments and instead directed the Bar to propose a rule that

prohibits lawyers from accepting referrals from any lawyer referral service that is not owned and operated by a Florida Bar member and propose any other restrictions necessary to address the Court's concerns in its order. The Court ordered that the Bar file the proposal on or before May 24, 2016. Schwait said the BRCPE began discussion of the Court's order on October 15, 2015, and has continued discussion via both conference call and in person meetings, including working with the Technology Committee.

Schwait reported on efforts to comply with an order by the U.S. District Court for the Northern District of Florida (Judge Robert L. Hinkle) on September 30, 2015 in *Searcy v. Florida Bar* (case number 4:13cv664-RH/CAS), in which the Searcy law firm sued The Florida Bar regarding two lawyer advertising issues: 1) the prohibition against advertising past results unless they are objectively verifiable; and 2) the prohibition against claiming specialization or expertise unless the lawyer is board certified. The court upheld the prohibition against advertising past results unless they are objectively verifiable. However, the court enjoined the Bar from enforcing the prohibition against claiming specialization or expertise unless the lawyer is board certified. The BRCPE voted to direct staff to draft amendments to Rule 4-7.14(a)(4) in light of the federal court order on October 15, 2015, then voted 7-0 to direct staff to draft additional options for its review on December 3, 2015, and will report further to the Board of Governors at a later meeting.

The BRCPE reported to the Board of Governors in Executive Session regarding antitrust issues.

15. Probate Rules Committee Report

Committee chair John Scuderi presented the three-year cycle rule amendment, and the board voted 36-0 to recommend their approval.

16. Leadership Academy Report

Leadership Academy Committee Chair Juliet Roulhac reported that the participants in the third class held their third and fourth sessions and its progressing well and the program is receiving high marks in reviews from the participants. She noted the Bar is accepting applications for the fourth class, which will begin in June.

17. Program Evaluation Committee Report

Chair Michael Higer said the committee recommended approval of nine rule amendments and two policy issues relating to the definition of a member in good standing, and the board unanimously approved those amendments. He said the committee recommended changing the mission statement of the Constitutional Judiciary Committee to include a role it has been fulfilling of educating the public about the judiciary, the constitution, and the rule of law. The board unanimously approved that. Higer said the committee also recommended increasing the size of the Civil Trial Law Certification Committee from nine to 12 members, and the board approved that.

Higer presented five issues on first reading:

- Rule 6-3.7, Inactive Status (to replace Emeritus Specialist Status deletion pending Court approval): Creates an inactive certification status for judges, law professors, active duty military, professional neutrals (mediators, arbitrators and voluntary trial resolution judges), and for substantial or material hardship cases.
- Rule 6-13.2. Definitions (Appellate Practice Certification Rule Amendments): Adds new subdivision (b)(1), which defines what appellate actions will be accepted from either initial or recertification applicants. Including that if the filing date of the principal brief, response or petition, as defined in Rule 6-13.2(b)(f) or (g) is outside the current filing period, the appellate action will not count towards the required total. Adds new subdivision (b)(2), which clarifies that any briefs on merits, following acceptance in the U.S. Supreme Court, and may be considered a separate appellate action. Adds new subdivision (b)(3), which defines what appellate actions will be accepted from either initial or recertification applicants. Within subdivision (e), defines the primary responsibility of an applicant who is not the author on the brief and allows that applicant to obtain credit for the brief if accompanied by

certification from at least one of the designated authors that the applicant had the most substantial and direct participation in the preparation of the brief. Within subdivision (f), defines what principal briefs in appeals mean for initial and recertification applicants, clarifies “cross appeals,” and adds that for good cause, the Committee may treat a combined answer brief and initial brief on cross-appeal as separate principal briefs if the brief reflects a level of effort and preparation comparable to that required to produce separate principal briefs.

- Rule 6-13.3, Minimum Standards (Appellate Practice Certification Rule Amendments): Within subdivision (c), clarifies that any oral argument presented to an appellate court need not be presented in the same cases listed on the appellate actions exhibit.

- Rule 6-13.4, Recertification (Appellate Practice Certification Rule Amendments): Within subdivision (c), clarifies that any oral argument presented to an appellate court need not be presented in the same cases listed on the appellate actions exhibit.

- Bylaws – Real Property, Probate and Trust Law Section: The Real Property, Probate and Trust Law Section (“the Section”) by-laws were amended in the following respects: Within Article II, Section 1, subsection (b), the section proposes to make affiliate section membership available to qualified students enrolled in any accredited law school, wherever located. Within Article IV, Section 3, the section proposes to permit the appointment of co-chairs of the section’s CLE seminar coordination committee and legislation committee and that each co-chair will be a member of the executive committee and entitled to one vote. Within Article VI, Section 2, the section proposes to provide that, with respect to section committees, the use of the term “chair” includes co-chairs, to recognize the need where appropriate for co-chairs of section committees, particularly for the largest of the section committees. Within Article VIII, Section 3, the section proposes to authorize the appointment of co-chairs for the section’s legislation committee, one for real property and one for probate and trust. Within Article IX, Section 1, the section proposes to provide a reasonableness test in determining the existence of a conflict of interest on the part of a member of its Executive Council or a member of one of the section’s committees, requiring the member to bring that conflict to the attention of those present, while permitting the member to continue to participate in the debate, but not to participate in a vote.

Higer said PEC is continuing its review of the Bar’s certification program, its certification plan appeal process, the Lawyers Helping Lawyers program, and the Bar’s Lawyer Referral Service.

18. Communications Committee Report

Chair Renée Thompson said the committee is looking at ways to better educate the public and increase Bar member awareness about the Bar’s grievance process. The committee is also working with the Constitution Revision Commission Special Committee on ways to educate the public about that process. The Bar continues to reach more people, Thompson said, with its social media efforts, which include Facebook, LinkedIn, YouTube, Pinterest, Flipboard, and Twitter.

19. Legislation Committee

Chair Mike Tanner reported that the committee studies joint resolutions filed in the Florida House and Senate that would send a constitutional amendment to voters imposing term limits on district court of appeal judges and Supreme Court justices. He said the committee received a legal opinion that it could take a position on the issue and said the committee recommended that the board adopt a position that The Florida Bar opposed term limits at any level of the state judiciary. The board unanimously found that issue within the purview of Bar legislative activities and then unanimously approved the position. Tanner said the committee recommended approving contracts between the Bar, the Conference of District Court of Appeal Judges, and Paul Hawkes and between the Bar, the Conference of District Court of Appeal Judges, and Tsamoutales Strategies for legislative consulting services. The board unanimously approved both contracts. Legislative consultant Jim Daughton updated the board on issues before the Legislature and he urged board members to remain in contact with their local legislators.

20. Constitution Revision Commission Special Committee Report

Chair Sandy Diamond said the Bar had joined with several other interested groups to educate the public about the CRC process and the Bar also paid for a citizens guide which has been widely distributed. The Cuban American Bar Association financed the printing of 5,000 of the guides in Spanish and the committee is looking for a way to publish a Creole version. Diamond said when the CRC gears up in 2017 it will have little funding but have to move quickly to deal with the issues before it, so the Bar must be ready to help when needed.

21. Young Lawyers Division Report

YLD President Gordon Glover said the division has more than 3,000 law students participating in its mentoring program. The YLD has completed its first 10 Practicing with Professionalism seminars for the year and has also done basic skills courses in family law, personal injury, and evidence. He noted the Senate Judiciary Committee passed a YLD-supported bill to help government lawyers with their student loans. The YLD latest webinar deal with e-discovery and how to avoid the risks and attracted a large audience, Glover said, and the division is setting up a section of its website as a step-by-step guide to starting a law firm. The YLD's pro bono week project was offer training on helping low-income families with children. The YLD Board of Governors, he said, approved a resolution to the Supreme Court to reduce the number of subjects on the bar exam to those prior to the 2013 exam. The YLD board also approved creating an annual award for an outstanding woman lawyer or judge and will make the first award at the June Annual Convention.

22. Executive Session

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

23. Special Appointments

The board appointed Wendi J. Adelson of Miami Beach to a three-year term on the Florida Rural Legal Services, Inc., Board of Directors. The board selected Denise L. Hutson of Gainesville, Julie A. Horstkamp of Venice, James A. Marx of Miami, Guy Rabideau of Palm Beach, Frederick W. Jones of Winter Palm, and Jamie B. Moses of Orlando to two year terms on the Florida Realtor-Attorney Joint Committee. The board chose David P. Rhodes of Tampa for a four-year term on the 11th U.S. Circuit Judicial Conference.

24. Small Claims Rules Committee Report

Chair Andrew Daire presented the committee's three-year cycle rule amendments, and the board recommended their approval 39-0.

25. Rules Committee

Vice Chair Roland Sanchez-Medina presented one issue on first reading – Rule 11-1.2, Activities: Within subdivisions (b), (c) and (d), amendments require that an eligible law student be supervised by a lawyer in appearances in court or administrative proceedings prior to the eligible law student receiving a letter of clearance as to character and fitness from the Florida Board of Bar Examiners.

26. Code and Rules of Evidence Committee Report

Board members voted 37-0 to recommend approval of two of the committee's three-year cycle rule amendments. The first was that the Supreme Court extensively should not adopt to the extent it is procedural a 2013 law from the Legislature requiring that standard of care expert witnesses in medical malpractice cases be from the same specialty as the defendant. The second was to admit the out-of-court statements of disabled or elderly witnesses in some instances. The board extensively discussed the committee's third recommendation that the court should not adopt as an evidence rule to the extent it is

procedural a 2013 law from the Legislature requiring the use of the *Daubert* standard for qualifying expert witnesses instead of the *Frye* standard authorized by the court in previous rulings. The board voted 33-9 to recommend the court approve the committee's recommendation.

27. Disciplinary Procedure Committee Report

Chair Ron Ponzoli reported that the committee is working on two issues. One involves the six-year statute of limitations for filing grievances and how it affects cases filed before the deadline but are stayed for various reasons and then resumed after the deadline. The committee is also looking at Rule 5-1.1(f) which addresses attorneys' duties when holding property in which third parties may have an interest.

28. Rules of Judicial Administration, Criminal Procedure Rules, and Appellate Court Rules Committees Joint Report

RJA Chair Amy Borman, Appellate Court Vice Chair Tom Hall, Criminal Procedure Chair Meredith Charbula, and Vision 2016 Access Subgroup Chair Adele Stone reported on several amendments for the Rules of Judicial Administration. Borman said the changes were to intended to address problems to lawyers getting in and out of cases, including the use of covering attorneys, and guaranteeing that there would be a record when a lawyer appeared in court as either the lead, associate, or covering attorney. During the process of preparing those amendments, Borman said the Vision 2016 Access subgroup approached the RJAC about drafting amendments to allow the expansion of unbundled and provision of limited legal services beyond family and probate law. Because those appearance and unbundled rules did not meet the specific needs of criminal and appellate law, those rules committees drafted separate amendments either exempting them from or modifying the RJA amendments so those needs could be addressed. The board voted 37-0 to recommend approval of the Rules of Judicial Administration amendments and 38-0 to recommend the amendments proposed by the criminal and appellate rules committees.

29. Special Committee to Study the Unethical and Illegal Solicitation of Legal Business Report

Chair Jay Cohen reported that the committee has found evidence of unethical solicitation not only in personal injury cases but also criminal and commercial litigation cases. He reported that both clients and lawyers are reluctant to report solicitation violations to the Bar grievance process, or to prosecutors in cases where it violates the law. The committee is looking at recommending a combination of rule changes, enforcement enhancement, and education for lawyers and the public.

30. President-elect's Report

President-elect Schifino asked board members to recommend qualified lawyers for Bar committee appointments he will be making in early 2016.

31. Time and Place of Next Meeting

There being no further business before the board, President Abadin adjourned the meeting at 1:49 p.m. The next board meeting is January 29 at the Hotel Duval in Tallahassee.

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