

The Florida Bar  
September 29, 2006  
Ponte Vedra Inn and Club  
Ponte Vedra Beach, Florida

Pursuant to notice, the regular meeting of the Board of Governors of The Florida Bar was called to order at 9:00 A.M. on Friday, September 29, 2006, in Ponte Vedra, Florida, with President Henry M. Coxe presiding.

**1. Roll Call**

Henry M. Coxe, III, President  
Francisco R. Angones , President-elect  
Ross M. Goodman, First Judicial Circuit  
Lawrence E. Sellers, Jr., Second Judicial Circuit  
Gregory S. Parker, Third Judicial Circuit  
S. Grier Wells, Fourth Judicial Circuit  
John J. Schickel, Fourth Judicial Circuit  
Andrew B. Sasso, Sixth Judicial Circuit  
Murray B. Silverstein, Sixth Judicial Circuit  
Charles Chobee Ebbets, Seventh Judicial Circuit  
Carl B. Schwait, Eighth Judicial Circuit  
Mayanne Downs, Ninth Judicial Circuit  
Daniel L. DeCubellis, Ninth Judicial Circuit  
Warren W. Lindsey, Ninth Judicial Circuit  
Robert M. Brush, Tenth Judicial Circuit  
Ramon Abadin, Eleventh Judicial Circuit  
David Rothman, Eleventh Judicial Circuit  
Ervin A. Gonzalez, Eleventh Judicial Circuit  
Jennifer Coberly, Eleventh Judicial Circuit  
Dennis Kainen, Eleventh Judicial Circuit  
Sharon L. Langer, Eleventh Judicial Circuit  
Benedict P. Kuehne, Eleventh Judicial Circuit  
Steven Chaykin, Eleventh Judicial Circuit  
Kimberly A. Bald, Twelfth Judicial Circuit  
Timon V. Sullivan, Thirteenth Judicial Circuit  
William Kalish, Thirteenth Judicial Circuit  
Gwynne Alice Young, Thirteenth Judicial Circuit  
Clifford W. Sanborn, Fourteenth Judicial Circuit  
John G. White, III, Fifteenth Judicial Circuit  
Gregory Coleman, Fifteenth Judicial Circuit  
Scott G. Hawkins, Fifteenth Judicial Circuit  
Lisa S. Small, Fifteenth Judicial Circuit  
Edwin Scales, Sixteenth Judicial Circuit  
Allison Bethel, Seventeenth Judicial Circuit  
Eugene K. Pettis, Seventeenth Judicial Circuit  
Jesse H. Diner, Seventeenth Judicial Circuit  
Clifton A. McClelland, Jr., Eighteenth Judicial Circuit  
Harold G. Melville, Nineteenth Judicial Circuit  
Laird A. Lile, Twentieth Judicial Circuit  
A. Lawrence (Larry) Ringers, Twentieth Judicial Circuit  
Richard Arthur Tanner, Out-of-State  
Ian M. Comisky, Out-of-State  
Gary J. Leppla, Out-of-State

Brian D. Burgoon, Out-of-State  
John M. Stewart , YLD President  
Scott Atwood, YLD President-elect  
Solomon L. Badger, III, Public Member  
J. Blair Culpepper, Public Member

Board members absent:

Dominic M. Caparello, Second Judicial Circuit  
Denise A. Lyn, Fifth Judicial Circuit  
Nancy W. Gregoire, Seventeenth Judicial Circuit  
Frank C. Walker, II, Seventeenth Judicial Circuit

Others in attendance:

Wendy Loquasto, President of Florida Association for Women Lawyers  
Jimmy Cunningham, President, Virgil Hawkins Florida Chapter of the National Bar Association  
Marlene Quintana, Vice-President of Cuban American Bar Association

Staff attending the meeting:

John F. Harkness, Jr., Executive Director  
Tina Ruffin, Assistant to the President  
Dana Watson, Secretary to the Board of Governors  
Elizabeth Tarbert, Director of Ethics and Advertising  
Mark Killian, Managing Editor, Florida Bar News  
Allen Martin, Director Finance and Accounting  
Mary Ellen Bateman, Director, Ethics, Advertising and Professionalism Division  
Lori Holcomb, Director of Unlicensed Practice of Law  
Francine Walker, Director of Public Information  
Ken Marvin, Director of Lawyer Regulation

**2. Guests**

John Peyton, Mayor of Jacksonville  
Jane Curran, Executive Director of the Florida Bar Foundation  
E. Duffy Myrtetus, Out of State Lawyers Division  
Bill Lee, Out of State Lawyers Division  
Josh Doyle, Metz, Husband & Daughton  
Senator James King, Eighth Senate District  
Representative Dick Kravitz, Nineteenth House District  
Representative Mark Mahon, Sixteenth House District  
Bill Voss, Chair Criminal Procedure Rules Committee  
Patrick M. J. Hutton MD, President of the Florida Medical Association

**3. Invocation and Pledge of Allegiance**

The Invocation and Pledge of Allegiance were led by Grier Wells.

**4. Non-roll call Grievance Agenda Items**

Co-chair David Rothman reported that the only non-roll call grievance agenda items were numbers 7, 9, and 19.

Co-chair Grier Wells reported that the Client Security Fund items were numbers 1, 2, 3, 8 and 11.

**5. Non-roll call Advertising Appeal Agenda Items**

Chair Larry Ringers reported that the only advertising appeal agenda non-roll call items were numbers 5b(1), 5b(5) and 5b(6).

**6. Approval of Minutes- Approved**

- a. Regular Minutes, July 28, 2006 meeting - Approved
- b. Grievance Minutes, July 28, 2006 meeting – Approved
- c. Summary of Executive Committee action taken
  - 1) August 25, 2006, 14<sup>th</sup> judicial circuit JNC nominee
  - 2) September 8, 2006, 3<sup>rd</sup> & 14<sup>th</sup> judicial circuit JNC nominees

**8. Consent Calendar – Approved**

The following items were approved by a voice vote:

- a. UPL Circuit Committees
  - 1) UPL Circuit Committee regrouping: 17<sup>th</sup> circuit
    - UPL Circuit Committee 17A**
    - James Solomon Haliczzer, Attorney member
    - Robert James Bigge, Jr, Attorney member
    - Debra L. Block, Public member
    - D. Paul Bonevac, Public member, transferred from 17B
    - Carolyn Beth Brombacker, Attorney member
    - Scott Michael Dressler, Attorney member
    - Thomas F. Jordan, Public member
    - Vernon Pierce, Public member
    - UPL Circuit Committee 17C**
    - Haas A. Hatic, Attorney member
    - Mark R. Dissett, Public member
    - Ingrid Domingues-McConville, Attorney member
    - Mark Fravel, Public member
    - Julie Fara Klahr, Attorney member, transferred from 17B,
    - Carlos M. Llorente, Attorney member, transferred from 17B
    - Gino Martone, Public member, transferred from 17B
    - D. K. Mink, Public member
    - Stephanie Jean Toothaker, Attorney member
  - 2) Nomination of Circuit Committee Members:  
UPL Circuit Committee, October 2006
    - Debra E. Lane, Sixth Judicial Circuit, Public member
    - William H. Barlett, Sixth Judicial Circuit, Attorney member
    - Shirley D. Coleman, Ninth Judicial Circuit, Public Member
- b. Board Review Committee on Professional Ethics
  - 1) Advertising Appeal 06-02178 (**removed from consent**)
  - 2) Advertising Appeal 06-01735
    - Advertising Appeal 06-01735 concerns application of Rule 4-7.2(b)(1)(B), prohibiting statements that are likely to create an unjustified expectation about results the lawyer can achieve. Staff rendered an opinion on March 13, 2006, that the language “Avoid Time in Court” in a direct mail advertisement to handle traffic ticket cases was likely to create an unjustified expectation about results the lawyer can achieve, in violation of Rule 4-7.2(b)(1)(B), among other rule violations. The Standing Committee on Advertising upheld staff’s opinion on April 24, 2006. The attorney filed a revision to the direct mail advertisement that addressed the other advertising rule violations, but continued to include the language “Avoid Time in Court.” Staff rendered an opinion on June 1, 2006, that the language “Avoid Time in Court” in a direct mail advertisement to handle traffic ticket cases was likely to create an unjustified expectation about results the lawyer can achieve, in violation of Rule 4-7.2(b)(1)(B). The attorney requested review of the staff opinion. The Standing Committee on Advertising met on July 18, 2006 and determined that the attorney’s request for review was not time-barred, but should be addressed directly by the Board of Governors as the committee had already addressed the issue in this file. The Board Review Committee on Professional Ethics voted 4-1 to affirm the Standing Committee on Advertising decision. The board voted to approve the board review committee recommendation on the consent calendar.

3) Advertising Appeal 06-02249

Advertising Appeal 06-02249 concerns application of Rule 4-7.2(b)(1)(B), prohibiting statements that are likely to create an unjustified expectation about results the lawyer can achieve. Staff rendered an opinion on May 10, 2006, that the language "SAVE VALUABLE TIME! We'll spend the hours attending your mandatory court appearances" in a direct mail advertisement to handle traffic ticket cases was likely to create an unjustified expectation about results the lawyer can achieve, in violation of Rule 4-7.2(b)(1)(B), among other rule violations. The Standing Committee on Advertising upheld staff's opinion on June 22, 2006. The attorney subsequently requested Board of Governors review.

The Board Review Committee on Professional Ethics voted 4-2 to affirm the Standing Committee on Advertising decision.

The board voted to approve the board review committee recommendation on the consent calendar.

4) Advertising Appeal 06-02108 **(withdrawn)**

5) Advertising Appeal 06-02587 **(removed from consent)**

6) Advertising Appeals 06-00578, 06-00579, 06-00582, 06-00782, 06-01994, 06-01995 **(removed from consent)**

c. Appellate Practice Section Bylaws

Within Article III (Officers and Executive Council) and Article VII (Elections), revises various provisions to allow for past chairs to serve on the executive council upon request, or to address that change; within Article IV (Duties and Power of Officers), Article V (Duties and Power of Executive Council), Article VI (Meetings of the Section), Article VIII (Succession of Officers and Vacancies), Article X (Legislative Policies), and Article XI (Miscellaneous Provisions), revises various provisions to combine the positions of secretary and treasurer, or to address that change; within Article VI (Meetings of the Section), authorizes the use of e-mail for communications and voting; and within Article I (Name and Purpose), Article II (Membership and Dues), and Article IX (Committees), makes various stylistic or non-substantive refinements.

d. City, County, and Local Government Law Section Bylaws

Within Article IV, Section 1 (Executive Council – Governing Body) clarifies that the council members from each Florida appellate district must be residents of the district as determined by the individual's official bar address or actual residency.

e. Legislation Committee review

1) New section legislative position requests for the 2006-2008 biennium

a) Business Law Section

i. § 222.25 F.S./ Personal Property Exemption

Supports amendment to §222.25 F. S. to provide an exemption from legal process of not to exceed \$4,000 in personal property, provided a resident debtor does not claim or receive the benefits of a homestead exemption under Article X, Section 4 of the Florida Constitution.

ii. Chapter 617 F. S. / Not For Profit Corporations

Supports proposed technical, clarifying and modernizing revisions to Chapter 617 F. S., re: not for profit corporations. The scope of such amendments includes changes to Ch. 617 that will conform that chapter to changes made in Ch. 607 re for profit corporations since 1990.

b) Family Law Section

i. Automatic adjustment of child support

Supports an amendment to § 61.13 (1)(a)(1),(2) and (3) to require that the trial court set forth in an order establishing or modifying child support a schedule containing specific findings designating the child support award for multiple children based upon current net income so that as each child attains the age of majority, the aggregate number of remaining minor children for whom child support is being paid is accordingly reduced, to the appropriate child support amount as set forth on the schedule, until such time as the total child support obligation is extinguished.

ii. Imputation of income for child support calculation purposes  
Supports an amendment to §61.30(2)(b) to include subparagraphs 1., 2., 3. and 4. which defines the criteria for imputation of income for child support calculation purposes under the statutory child support guidelines, assigns the evidentiary burden to the party seeking to impute the income; makes mandatory the obligation to make findings of fact when imputation of income occurs; creates a rebuttable presumption pertaining to imputation of the minimum wage to parties residing in the State of Florida and outside of the State of Florida; and finally limits those circumstances when a court may not impute income beyond minimum wage requirements.

iii. Parental responsibility  
Supports the adoption of legislation that will enhance parental responsibility for and time-sharing of children involved in dissolution of marriage, domestic violence and paternity matters, when in a non-intact family unit, including: (1) the elimination of labels and presumptions previously associated with custody and visitation issues; (2) the promotion of co-parenting between parents so long as domestic violence does not prevent such co-parenting concepts; and (3) minimizing the detriment (emotional, financial or otherwise) that might arise from prolonged litigation that is often inherent when parents are adversaries in proceedings involving their child(ren)

iv. Virtual visitation  
Supports the adoption of legislation that will authorize the courts to enhance current "traditional" in-person and telephonic time-sharing and communication via "virtual visitation" by parents with their child(ren) utilizing technology currently available [including but not limited to electronic mail (e-mail), web-cam, video conferencing, other wired or wireless technologies via the Internet], or such other prospective technology. When considering whether or not to order "virtual visitation" the court should consider certain factors, including but not limited to (a) the child(ren)'s best interests in connection therewith; (b) the parents' finances; (c) whether the equipment and/or technology is reasonable available, financially and otherwise, to the parents and child(ren); and (d) any other relevant factors.

v. Chapter 39 – Putative Father Registry  
Supports an amendment to Chapter 39 F. S. applying Florida's Putative Father Registry to all termination of parental rights actions. An unmarried biological father's consent is on required when he acts to protect his parental rights by legally establishing his rights or registering with Florida's Putative Father Registry prior to the date the petition to terminate parental rights is filed with the court.

vi. Notice to Putative father  
Supports amendment to Chapter 39 F. S. which would clearly set forth the intent that application of the Florida Putative Father Registry would differ in Dependency/Shelter proceedings and Termination of Parental Rights Proceedings as the interests of the child were different in each proceeding

vii. Extension of authority to juvenile judges  
Supports an amendment to Chapter 39 F. S. which would provide juvenile judges with the authority to enter legally recordable paternity judgments, child support orders and income deduction orders.

viii. Difference in dependency / shelter and termination proceedings  
Supports amendment to Chapter 339 F. S. that applying Florida's Putative Father Registry to Dependency/Shelter proceeding by personally providing a father identified as a result of §39.503 F. S.

inquiry with a disclosure on his paternal responsibility to register with Florida Putative Father Registry, support his child and legally establish his rights to the child. Such a father would have 30 days from personal receipt of the disclosure to assert his rights by registering with Florida's Putative Father Registry.

- c) Real Property, Probate and Trust Law Section
  - i. §198.13 F. S. / Florida estate tax return  
Supports an amendment to §198.13 F. S. to eliminate the requirement of a personal representative of an estate to file a Florida estate tax return with the Department of Revenue, also elimination of the requirement of an individual who would otherwise be responsible for filing a return reporting a generation-skipping transfer with the Florida Department of Revenue if a state generation-skipping transfer with the Florida Dept. of Revenue if a state generation-skipping transfer tax credit is not allowable pursuant to the Code as of a decedent's date of death.
  - ii. Chapter 713 F. S. / Construction Lien Law  
Supports the amendment of Chapter 713 F. S. to change seventeen (17) construction lien law statutes to clarify the statutes and to conform to existing case law.

- 2) Section legislative consultant contracts
  - a) Family Law Section – Fred Dudley

### **9. Program Evaluation Committee Report**

Chair Gwynne Young told the board that the committee had met and discussed the following BLSE rule amendments on first reading.

- 1) **BLSE Rule Amendments for 6-13.1 thru 6-13.5**
  - 6-13.1** - Adds new language to incorporate criteria of "character, ethics and reputation for professionalism."
  - 6-13.2** - Adds new subdivision (b), to define "appellate action"; reformats remainder of rule to accommodate proposed change; within former subdivision (c) – new (d) – includes other edits consistent with controlling editorial protocols without substantive effect.
  - 6-13.3** - Within subdivision (a), refines verbiage and adds waiver language for up to 2 of the 3 years' substantial involvement for appellate judges, clerks, career attorneys, or staff attorneys in an appellate court; within former subdivision (a)(2) – new (b) – adds language to specify the 5-year time frame, to clarify primary responsibility in appellate actions, and to describe applicant obligations re demonstrating case participation as substantial and direct; within former subdivision (a)(3) – new (c) – adds language to clarify primary responsibility in oral arguments and to describe applicant obligations to demonstrate case participation as substantial and direct; deletes current subdivision (a)(4); within new subdivision (d), adds language to provide that authorization for education accreditation be within the purview of the certification committee or BLSE; within former subdivision (b) – new (e) – adds language to exclude relatives or current associates from providing reference statements on an applicant's behalf; revises other subdivision entries to accommodate proposed changes.
  - 6-13.4** - Amplifies preamble to include 5-year reference; within subdivision (a), streamlines verbiage; within subdivision (b), eliminates "Requirement" from subdivision title consistent with titles as styled in other area standards; adds language to clarify primary responsibility in appellate actions and describe applicant obligations to demonstrate their case participation as substantial and direct; within subdivision (c), adds language to clarify primary responsibility in oral arguments and describe applicant obligations to demonstrate participation as substantial and direct; further allows committee to waive requirement; within subdivision (d), amends subdivision title consistent with styling in other area standards; revises verbiage to allow 30 hours of judicial education to satisfy the standard 50 CLE hours required for recertification; within subdivision (e), adds new language to prohibit relatives or current associates or partners from acting as references; and, within new subdivision (f), specifies expanded requirements for judges re recertification in accordance with their responsibilities either in an

appellate capacity or otherwise, previously within rule 6-13.5.

**6-13.5** - Deleted in view of expanded new provisions, now within rule 6-13 as new subdivision (f).

2) BLSE Rule Amendments for 6-22.1, 6-22.3 & 6-22.4

**6-22.1** - Adds new language to incorporate criteria of "character, ethics and reputation for professionalism".

**6-22.3** - Within subsection (c) re education, revises and streamlines language consistent with committee and BLSE policies.

**6-22.4** - Amplifies preamble to include 5-year reference; within subdivision (a), eliminates redundant language; within subdivision (b), eliminates redundant language, along with requirement for samples of memoranda or briefs; within subdivision (d), streamlines and simplifies language; within subdivision (e), adds reference to note specific provisions waived for an applicant certified 14 years or more.

Young told the board that the committee recommended that it approve the proposed Florida Registered Paralegal Program committee. She said that it will be implemented by the Unlicensed Practice of Law division of the Bar. The board concurred with the committee recommendation and approved the new committee by a voice vote.

The committee also recommended the approval of a proposal for an Attorney-Client Privilege Task Force. The Bar Task Force on the Attorney-Client Privilege is charged with making recommendations concerning the compelled or coerced waiver of the attorney-client privilege. It also will examine the purpose behind the attorney-client privilege and its exceptions; the circumstances in which competing objectives are currently being asserted by government agencies and others to override the privilege; and the extent to which the correct balance is being struck between the competing objectives. Coxe said the task force also will consider the practice of prosecutors, regulators, and agencies requesting that corporations waive their attorney-client privilege and the protection of the work product rule and make recommendations to the Bar. The members will be from private practice, the government, business organizations, and law school faculty. The board approved the new task force by a voice vote.

Young told the board that one of the PEC responsibilities is to periodically review the standing committees of the Bar. She said that the committee was in the process of looking at the following sections or committees: the Practice Management and Development Section; the Quality of Life and Career Committee and the Legal Needs of Children Committee.

Finally, the PEC recommended the following four board members to meet with members of the Florida Medical Association: Grier Wells, Jennifer Coberly, Greg Coleman and Gary Leppla.

## **10. Legislation Committee Report**

Chair Warren Lindsey reported that the legislation committee had met and discussed all of the legislation position requests which were on the consent calendar, as well as the following section position requested by the Public Interest Law Section. The committee recommended that the board not prohibit PILS from lobbying on the following position:

Opposes the indiscriminate use of chains and shackles in juvenile court proceedings, and encourages the adoption of a ban on the indiscriminate use of chains and shackles in juvenile court proceedings through court rule, legislation and executive branch policy.

The board concurred with the committee recommendation and approved the motion by a voice vote.

Lindsey told the board that the committee had approved the legislative consultant contracts for: Steve Metz, G. Herb Sheheane, Pamela Burch Fort, Matt Bryan and Michelle Lorenzo- Palicio. The board approved the contracts by a voice vote.

Lindsey reminded the board that it had tabled a roll-over legislation position request of the Real Property, Probate and Trust Law section concerning a non-resident personal representative due to a request from the Out – of – State Practitioner's Division. He reported that in the interim between the July 28, 2006 meeting and this meeting, the sections had discussed the item and would continue to work together to try to reach a compromise. Due to the fact that the requested position is within the RPPTL scope and not contrary to any Big Bar position and isn't too divisive, Lindsey said that the committee recommendation is that the board not prohibit the RPPTLs from lobbying on the following position. A motion was made to take the position off of the table which passed.

Opposes amendment to §733.302, F. S., to expand the class of non-residents which may serve as personal representative because of a concern that any addition to the class may

subject the entire statute to a renewed constitutional challenge.

The board concurred with the committee motion and approved the request by a voice vote.

Lindsey reported that the committee recommended the adoption of one Big Bar position concerning increasing the threshold for constitutional amendments to 60%.

The Florida Bar supports the adoption of Amendment 3, "Requiring Broader Public Support for Constitutional Amendments or Revisions", as a measure toward protecting the integrity of Florida's Constitution.

A hand count was taken as to whether the position fell within Keller: 44 were in favor and 1 was opposed. A hand count was taken as to whether the board agreed with the position; 42 were in favor and 1 was opposed.

Finally, Lindsey told the board that the following three legislators had been invited to speak. Lindsey introduced: Senator Jim King, Representative Dick Kravitz and Representative Mark Mahon, each of whom spoke to the board.

### **11. Audit Committee Report**

Chair Bill Kalish reported to the Board that the audit report on The Florida Bar's June 30, 2006 financial statements has been received and reviewed by the Audit Committee. This report was a "clean opinion" and was not accompanied by the usual Management Advisory Letter. The lack of a management advisory letter is a sign that management and staff are doing a good job. A copy of the audited financial statements will be included in the December 2006 board materials mailings.

Next, Kalish reported the committee had received an updated report from Dan Bennett on the status of the disaster response planning. The full board will be updated at a future meeting.

### **12. Investment Committee Report**

Chair Comisky reported that the Bar's long term portfolio had increased by \$4.1 million since June 1, 2006, \$3.1 million was transferred from another Bar account, which means that the actual increase was \$460,000. The Bar's short term portfolio increased by \$3.3 million since June 1, 2006, which Comisky said was misleading because it represents the annual fees members pay.

Comisky reminded the board that it had approved a diversification of up to 20% of the portfolio. The committee is still studying the options and invested the money transferred into the long term fund using the existing investment allocation.

### **13. Judicial Independence Committee Report**

Chair Eugene Pettis reported that the committee had met earlier in September at the Bar's General meeting on sections and committees. He reported that the committee had worked on developing a strategic plan and would be meeting in late November or early December to discuss the plan further. He told the board that the committee had spent the last year and a half gathering information and that it wants to start disseminating the information to educate the public. Pettis told the board that the committee wants to be sure that the public understands where the Bar stands on topics concerning the independence of the judiciary.

### **14. Communication Committee Report**

Chair Tim Sullivan reported that the committee had met and continued its discussions on placing member disciplinary histories on the Bar Web site. Currently, when an attorney is suspended or disbarred, the attorney's profile page is taken off of the site. The committee discussed leaving the profile up, but putting on the page that the attorney is ineligible to practice law with an explanation as to why. The committee also suggested putting a 10-year disciplinary history on each member's biography page listing disbarments, suspensions and public reprimands only. Staff is working on a feasibility report and page layout/modification example.

The committee also discussed the Web site passwords. It takes 5-7 days to receive a password in the mail under the current system. The chair appointed a subcommittee to look into the password procurement process and alternatives to the current system. One of the suggestions that the subcommittee considered was to put a personal identification number (PIN) on each attorney's Bar card. The cost for this would be around \$70,000.

Sullivan told the board that the committee was also looking at ways to educate members about the Bar's

grievance procedures. One recommendation from the committee was to produce a CD for CLE credit. The Young Lawyers Division is adding a component to the Practicing with Professionalism that may be able to be placed on such a CD. Finally, the committee suggested that all future board of governors or Bar meetings should be held at facilities that have wireless capabilities.

#### **15. Family Law Rules Committee Report**

Board liaison Bob Brush reported that the Family Law Rules Committee had updated procedure forms 12.950(a), 12.950(b), 12.950(c) and 12.951(a) and 12.951(b) to concur with §742.18 F. S. regarding disestablishing paternity. The board approved the forms 38-0.

#### **16. Unlicensed Practice of Law Report**

Board liaison Mayanne Downs reported on the following items on first reading:

- 1) Chapter 10 Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law Practice of Law
  - a) Subchapter 10-7 Proceeding Before a Referee
    - i) Rule 10-7.1 Proceeding for Injunctive Relief  
Adds new subdivision (e) to define the record in such proceedings; clarifies the roles of referee and bar counsel in preparation and filing of the record; and provides a mechanism for review of a referee's denial of a motion to supplement or remove items from the record; revises other subdivision entries as necessary.
    - ii) Rule 10-7.2 Proceedings for Indirect Criminal Contempt  
Adds new subdivision (e) to define the record in such proceedings; clarifies the roles of referee and bar counsel in preparation and filing of the record; and provides a mechanism for review of a referee's denial of a motion to supplement or remove items from the record; revises other subdivision entries as necessary.
- 2) Chapter 17 Authorized House Counsel Rule
  - a) Subchapter 17-1 Generally
    - i) Rule 17-1.2 Definitions  
Within subdivision (a), moves non-definitional terms to other appropriate rules; adds definition of "authorized house counsel" as someone who has been certified as such by the Supreme Court of Florida.
    - ii) Rule 17-1.4 Registration  
Within subdivision (a), allows inactive members to provide certification of inactive status in lieu of a certificate of good standing; clarifies that an authorized house counsel must be familiar with chapters 4 and 17 of the Rules Regulating The Florida Bar; also includes language removed from rule 17-1.2, requiring registrants to provide certified statement that they have not been permanently denied admission to practice due to character and fitness; within subdivision (b), deletes unnecessary language regarding examples of grounds for returning applications; adds new subdivision (e) – Duty to Update – re a certified authorized house counsel's continuing need to advise the bar re inactive status in any other jurisdiction.
    - iii) Rule 17-1.5 Termination or Withdrawal of Registration  
Within subdivision (a), adds involuntary placement on inactive status as another ground for termination of authorized house counsel status; within subdivision (b), clarifies procedure for notifying individuals and business employers of any termination of status.
    - iv) Rule 17-1.9 Continuing Legal Education Requirement  
New rule, to accommodate non-definitional provision re CLE removed from rule 17-1.2.  
Downs also asked the board to review two letters to the Florida Supreme Court of Florida re: Completion of Immigration Forms and re: Correction of Errors and Omissions.

No votes were taken.

#### **17. Special Committee on Website Advertising Rules 2005- 06**

Chair Chobee Ebbetts reported that the committee on lawyer advertising had submitted to the Supreme Court, its rule changes which said that attorney websites would not be treated as advertisements, but rather as requests for information. The Supreme Court rejected that section of the submission and sent the committee a message that they expect the Bar to be as restrictive on attorney websites as it is on all other

attorney advertisements. The Supreme Court wants the Bar to implement this rule change even if it means it has to increase manpower. Ebbetts said that the committee is working on a rule to say that an attorney's website is treated the same way as a Yellow Page advertisement, minus the prior review. Ebbetts told the board that he hoped that it would be able to review and vote on the new rules at the December meeting. The following rule amendment was on **first reading**:

1) Rule 4-7.6 Computer-Accessed Communications

Within subdivision (b) and comment re internet presence, amends provisions to conform guidance re lawyer websites to the general requirements of lawyer advertisements set forth in rule 4-7.2.

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

Chair Larry Ringers reported that the board review committee on professional ethics had met and recommended the approval of the following:

ADVERTISING APPEAL 06-02178

Advertising Appeal 06-02178 concerns application of Rule 4-7.2(b)(1)(B), prohibiting statements that are likely to create an unjustified expectation about results the lawyer can achieve. Staff rendered an opinion on May 8, 2006, that the following language was likely to create an unjustified expectation about results the lawyer could achieve, in violation of Rule 4-7.2(b)(1)(B): "Normally, this immediately suspends pending lawsuits, including foreclosure suits, garnishments, and other attempts by creditors to collect." The Standing Committee on Advertising upheld staff's opinion on June 22, 2006. The attorney subsequently requested Board of Governors review. The Board Review Committee on Professional Ethics voted 6-0 to reverse the decision of the Standing Committee on Advertising, finding the language permissible. The board approved the board review committee's recommendation by voice vote.

ADVERTISING APPEAL 06-02587

Advertising Appeal 06-02587 concerns application of Rule 4-7.7, requiring filing of lawyer advertisements. The *Orlando Magazine* ran "Lawyers of Distinction" series, listing lawyers who were listed in *Best Lawyers in America*. As part of the series, *Orlando Magazine* published a "special advertising section" in which law firms could pay a fee to include a "profile" that was written in the style of an article, but including contact information for the lawyer or law firm. One of the lawyers who paid for a profile filed the firm profile for review with The Florida Bar and enclosed a copy of the entire magazine. Bar staff then requested filings from all the lawyers and law firms that had profiles published in the *Orlando Magazine* "Lawyers of Distinction" series. In file number 06-02587, staff requested on March 16, 2006 that the lawyer file a copy of the lawyer's profile published in the "special advertising section" of the *Orlando Magazine's* "Lawyers of Distinction" series. The lawyer requested Standing Committee on Advertising review of staff's opinion that the profile was an advertisement, requiring filing. The Standing Committee on Advertising upheld staff's opinion on June 22, 2006. The attorney subsequently requested Board of Governors review. The filer argued that the firm profile is not an advertisement, that the *Orlando Magazine* initiated the contact with the filer that prompted the publication of the profile, and that the filer limits his practice to mediation and offers the mediation services only to other lawyers. This agenda item was removed from the consent calendar at the request of Board of Governors member Mayanne Downs. The Board Review Committee on Professional Ethics voted 4-2 to affirm the Standing Committee on Advertising decision. The board approved the board review committee's recommendation by voice vote.

ETHICS REQUEST 26068

On March 11, 2005, the State of Florida Commission on Ethics requested an advisory opinion from The Florida Bar providing clarification and/or expansion of ethical guidance to Florida Bar members regarding conflicts of interest in representing public officials as expressed in Florida Ethics Opinion 77-30. The Florida Bar Executive Director requested the Professional Ethics Committee's guidance on how The Florida Bar Board of Governors should respond to the request. At its June 23, 2005 meeting, the Professional Ethics Committee voted to recommend that the board respond to the inquiry by informing the commission that the opinion is good, the commission should continue to refer lawyers who appear before it to the opinion, and that enforcement of the ethics rules is not within the purview of the committee. At its August 2005 meeting, the board deferred this issue to obtain input from the City, County and Local Government Law Section. At its December 16, 2005 meeting, the board reviewed the response by the City, County and Local Government Law Section, which indicated that the opinion was overbroad and should be modified. The board voted to refer Florida Ethics Opinion 77-30 to the Professional Ethics Committee to review and modify the opinion in light of current rules and practices. After study by a

subcommittee and discussion by the full committee, the Professional Ethics Committee voted at its April 10, 2006 meeting not to modify the opinion, which is based on a limited set of facts. At its June 2006 meeting, the board voted to defer action on Florida Ethics Opinion 77-30 and direct staff to draft a revised opinion that addresses consent and waiver for the board's consideration. At its July 28, 2006 meeting, the board voted to approve Proposed Advisory Opinion 77-30, which was published for Florida Bar member comments in the August 15, 2006 Florida Bar News. The Miami-Dade Commission on Ethics and Public Trust filed comments on September 18, 2006. The Board Review Committee on Professional Ethics voted 5-0 to affirm Proposed Advisory Opinion 77-30 (Reconsideration) with the following modification at lines 66-67:

The Board is of the opinion that there are some conflicts involving the representation of individual county commissioners that may be waived by both the individual commissioner and the county.

The board voted to approve the board review committee recommendation by voice vote.

Advertising Appeals 06-00578, 06-00579, 06-00582, 06-00782, 06-01994, 06-01995

Advertising Appeals 06-00578, 06-00579, 06-00582, 06-00782, 06-01994 and 06-01995 concern application of Rule 4-7.2(b)(1)(B), prohibiting statements that are likely to create an unjustified expectation about results the lawyer can achieve, Rule 4-7.2(b)(4), prohibiting visual depictions that are false, misleading or manipulative, and Rule 4-7.5(b)(1)(C), prohibiting background sounds other than instrumental music. Staff rendered a preliminary opinion on September 20, 2005, that the transcripts of advertisements in file numbers 06-00578, 06-00579, and 06-00582 did not comply for various reasons, including violations of the rules listed above. Staff rendered a preliminary opinion on October 12, 2005, that a revised transcript of advertising file number 06-00578 and new advertising file number 06-00782 complied with the lawyer advertising rules, but that the revised transcript in file number 06-00579 did not comply with the lawyer advertising rules because of an impermissible manipulative depiction. Staff rendered a preliminary opinion on November 17, 2005, that a revised transcript in file number 06-00579 complied with the lawyer advertising rules. Staff rendered an opinion on April 11, 2006, that the advertisements in file numbers 06-00578, 06-00579, 06-00582, 06-00782, 06-01994 and 06-01995 did not comply.

The Standing Committee on Advertising upheld staff's opinion on June 22, 2006. The attorney subsequently requested Board of Governors review.

*Key Issues:*

1. Is the following language likely to create an unjustified expectation about the results the lawyer can achieve in violation of Rule 4-7.2(b)(1)(B):

When justice is done for a mother, a child a family you can't beat that. [File No. 06-00578]

The Board Review Committee on Professional Ethics voted 4-0 to reverse the Standing Committee on Advertising decision, finding the above language permissible.

The board approved the board review committee's recommendation by voice vote.

2. Is the visual depiction of a crashed car with people inspecting the crashed car, including a deployed airbag, manipulative and therefore impermissible under Rule 4-7.2(b)(4)? [File numbers 06-00579, 06-00582, 06-00782, 06-01994 and 06-01995]

The Board Review Committee on Professional Ethics voted 4-2 to reverse the Standing Committee on Advertising, finding the above visual depiction permissible.

The motion of the board review committee failed on voice vote.

A motion to affirm the Standing Committee on Advertising decision that the above visual depiction is impermissible under Rule 4-7.2(b)(4) was made, seconded, and passed on voice vote.

3. Are the following background sounds impermissible under Rule 4-7.5(b)(1)(C) because they are sounds other than instrumental music?

a. File No. 06-00578: Sounds of horns honking and sounds of traffic.

b. File No. 06-00579: Sounds of horns honking; sounds of traffic; sounds of a car crash scene including squealing brakes; sounds of kids playing with bouncing ball; sound of a computer turning off; sound of a light switch turning off.

c. File No. 06-00582: Sounds of wind through a car window; sounds of passing traffic sounds; sounds of a car crash scene including squealing brakes; sound of a heart monitor beeping; sound of someone exhaling loudly (along with an image of a cigarette); sound of pouring liquid; sounds of footsteps.

d. File No. 06-00782: Sounds of horns honking; sounds of traffic; sound of wind through a

car window; sounds of a car crash scene including squealing brakes, sounds of kids playing with a bouncing ball, sound of a heart monitor beeping; sound of light switch turning off.

e. File No. 06-01994: Sounds of horns honking; sounds of traffic, sounds of a car crash scene including squealing brakes; sounds of kids playing with bouncing ball; sound of a light switch turning off.

f. File No. 06-01995: Sounds of horns honking; sounds of traffic; sound of wind through a car window; sounds of a car crash scene including squealing brakes; sounds of kids playing with a ball; sounds of a heart monitor beeping, sounds of a light switch turning off.

The Board Review Committee on Professional Ethics voted 6-0 to affirm the Standing Committee on Advertising decision.

The board approved the board review committee's recommendation.

### **19. Criminal Procedure Rules Committee Report**

Chair Bill Vose reported that the committee recommended a positive vote on the amendments to Florida Rules of Criminal Procedure 3.131 and 3.132. The board concurred with the committee motion 27-4.

The committee also recommended a positive vote on proposed amendment to 3.250 and proposed new 3.851 to Florida Rules of Criminal Procedure dealing with closing arguments. Vose explained to the board that the rule amendments were to replace a rule the legislature repealed during its last session. Vose said that the panel's proposal conforms the rules of procedure to the new statute. After a lengthy discussion, the board voted 5-30 to withhold its support of the rule amendments. Committee member David Rothman moved to approve the committee's minority position. The minority report states, in part, that while the state may bear the burden of proof, not all defenses are equal. The board adopted the minority position by a voice vote.

### **20. Disciplinary Procedures Committee Report**

Chair Andrew Sasso reported that the committee recommendation is to approve the following two rule amendments on second reading:

- 1) Rule 3-7.2 (j) Professional Misconduct in Foreign Jurisdiction  
Within subdivision (l)(2), allows the Supreme Court of Florida to issue an interim order suspending a member who is the subject of certain final disciplinary adjudication in another court or disciplinary authority.
- 2) Standing Board Policy 15.65 Policy for Audits after Disbursement  
Consistent with proposed amendments to rules 3-7.11(i) and 5-1.2(e), new policy to implement post-suspension or disbarment trust audit authority to allow the bar to identify the full extent of a respondent's trust obligations, to confirm sources of available funds to satisfy respondent's trust obligations, and to obtain information necessary to satisfy the public policy of reporting criminal conduct to appropriate agencies.

The board concurred with the committee recommendation and approved the rule amendments by a voice vote.

Sasso also informed the board that the following rule amendments were on first reading and would be voted on in December.

- 3) Chapter 4 Rules of Professional Conduct
  - a) Subchapter 4-1 Client-Lawyer Relationship
    - i) Rule 4-1.8 Conflict of Interest; Prohibited and Other Transactions  
Within comment re gifts to lawyers, clarifies that "relatives" specified in subdivision (c) of the rule includes relatives by both blood and marriage; within comment re financial assistance, clarifies that an attorney may advance costs for a client's medical examinations if for diagnostic purposes used for litigation purposes.
    - ii) Rule 4-1.9 Conflict of Interest; Former Client  
Within subdivisions (b) and (c), adds provisions to clarify that a lawyer is prohibited from disclosing information relating to a former client's representation unless either permitted or required under the rules of professional conduct.
    - iii) Rule 4-1.18 Duties of Prospective Client  
Within comment, corrects reference to "paragraph" (d)(2)(i) of the rule to read "subdivision" (d)(2)(i).

- b) Rule 4-2.4 Lawyer Serving as Third Party Neutral and 4-3.3 Candor Toward the Tribunal  
In connection with companion amendment of rule 4-2.4, adds to commentary the language deleted from comment to rule 4-2.4 regarding lawyer conduct in representing clients before a third-party neutral and whether third-party neutrals are considered a tribunal for purposes of this rule.
- c) Rule 4-3.3 Candor Toward the Tribunal (reorganization)  
Conforms rule more closely to ABA Model Rule by reorganizing rule, adding the requirement that a lawyer correct any false statement of material fact or law previously made to the tribunal by the lawyer in subdivision (a)(1); clarifies the lawyer's obligation regarding offering false testimony in subdivision (a)(4); and adding commentary on application of the rule to ancillary proceedings, strengthening commentary on the rationale for the rule, and clarifying commentary on presenting false evidence.

## **21. Supreme Court Commission on Professionalism**

Board liaison Ross Goodman reported to the board that the Disciplinary Procedure Committee had voted 0-6 against Rule 3-5.4 re: Judicially Imposed Fines and Referrals to Practice and Professionalism Enhancement Programs for unprofessional conduct. Goodman suggested to the board that if it were not to approve the rule that it needs to give direction to the professionalism committee, because it is trying to give judges a tool to use when an attorney is unprofessional, but not in contempt. In this proposal the fines collected would go directly to the Center on Professionalism. Goodman told the committee that the DPC felt that the issue needed to be further studied.

## **22. Board of Legal Specialization and Education Report**

Chair Ben Kuehne reported that the BLSE recommended the approval of the following rule on second reading.

### 1) BLSE Policy 1.01 Administration

Within subdivision (a)(3), adds "character, ethics, and reputation for professionalism" to update qualifications for certification in language pertaining to BLSE responsibility in the promulgation of rules and policies; within subdivision (b), adds provision for waiver of policy by two-thirds vote of BLSE members present during a regularly scheduled meeting. The board concurred with the BLSE recommendation and approved the policy amendment.

Kuehne told the board that the BLSE had reviewed the following items on first reading:

### 2) Subchapter 6-10 Continuing Legal Education Requirements Rule

#### a) Rule 6-10.3 Minimum CLE Standards

Within subdivision (b), adds "unlawful bias elimination" to the list of approved CLE topics; within subdivision (e), clarifies that approved courses of other bars must still meet criteria for accreditation per policies pursuant to this rule; also within subdivisions (a), (b), and (d) re applicability, required CLE, and course approval, changes verbiage to read "must" rather than "shall"; includes other edits consistent with controlling editorial protocols without substantive effect.

#### b) Rule 6-10.4 Reporting Requirements

Within subdivision (b), changes verbiage re assignment of CLE reporting cycles, from "as set forth in the rules" to "as assigned by The Florida Bar"; also within subdivisions (a) and (b) re required reports and time for filing, changes verbiage to read "must" rather than "shall".

#### c) Rule 6-10.5 Delinquency and Appeal

Within subdivision (a) re delinquency, adds reference to rule 1-3.4(a) re CLER delinquency; within subdivision (c), clarifies that appeal of a denial of certification must be by petition for review to the Supreme Court in accordance with Fla.R.App.P. 9.100.

#### d) Rule 6-10.6 Reinstatement

Streamlines verbiage and adds reference to rule 1-3.7 which governs reinstatement to membership.

### 2) Subchapter 6-13 Standards for Certification of a Board Certified Appellate Lawyer

#### a) Rule 6-13.1 Appellate; Generally

Adds new language to incorporate criteria of "character, ethics and reputation for professionalism."

- b) Rule 6-13.2 Appellate; Definitions  
Adds new subdivision (b), to define "appellate action"; reformats remainder of rule to accommodate proposed change; within former subdivision (c) – new (d) – includes other edits consistent with controlling editorial protocols without substantive effect.
- c) Rule 6-13.3 Appellate; Minimum Standards  
Within subdivision (a), refines verbiage and adds waiver language for up to 2 of the 3 years' substantial involvement for appellate judges, clerks, career attorneys, or staff attorneys in an appellate court; within former subdivision (a)(2) – new (b) – adds language to specify the 5-year time frame, to clarify primary responsibility in appellate actions, and to describe applicant obligations re demonstrating case participation as substantial and direct; within former subdivision (a)(3) – new (c) – adds language to clarify primary responsibility in oral arguments and to describe applicant obligations to demonstrate case participation as substantial and direct; deletes current subdivision (a)(4); within new subdivision (d), adds language to provide that authorization for education accreditation be within the purview of the certification committee or BLSE; within former subdivision (b) – new (e) – adds language to exclude relatives or current associates from providing reference statements on an applicant's behalf; revises other subdivision entries to accommodate proposed changes.
- d) Rule 6-13.4 re: Appellate; Certification  
Withdrawn from consideration by the BLSE and sent to the BLSE appellate practice section to work on the language.
- e) Rule 6-13.5 Appellate Court Judges  
Deleted in view of expanded new provisions, now within rule 6-13 as new subdivision (f).
- 3) Subchapter 6-22 Standards for Certification of a Board Certified Antitrust and Trade Regulation Lawyer
  - a) Rule 6-22.1 Antitrust and Trade Regulation; Generally  
Adds new language to incorporate criteria of "character, ethics and reputation for professionalism".
  - b) Rule 6-22.3 Antitrust and Trade Regulation; Minimum Standards  
Within subsection (c) re education, revises and streamlines language consistent with committee and BLSE policies.
  - c) Rule 6-22.4 Antitrust and Trade Regulation; Recertification  
Amplifies preamble to include 5-year reference; within subdivision (a), eliminates redundant language; within subdivision (b), eliminates redundant language, along with requirement for samples of memoranda or briefs; within subdivision (d), streamlines and simplifies language; within subdivision (e), adds reference to note specific provisions waived for an applicant certified 14 years or more.

### **23. Budget Committee Report**

Chair Jesse Diner reported to the board that the committee met and discussed the following standing board policy amendment on first reading:

SBP 6.31 - Changes two paragraphs, first the reference to audiotapes and videotapes is changed to audio, video and other electronic media. Second, changes the Young Lawyer Division revenue split on electronic media to the same as they receive on their cosponsored courses.

Diner told the board that the budget committee recommended that the board approve the following budget amendments:

- |   |                                 |
|---|---------------------------------|
| 1) Law Related Education – November journal program reserve.  | \$5,856 - from the operating    |
| 2) Public Information -Translation of consumer pamphlets operating reserve.                           | \$7,842 - from the              |
| 3) Florida Registered Paralegal Program committee program reserve and \$5,800 of Time Redistribution. | \$11,153 - \$5,353 from the new |

- |  |                                  |
|--|----------------------------------|
| 4) Generators  | \$25,505 - from Building reserve |
| 5) Attorney Client Privilege Taskforce program reserve.                                      | \$77,642 - from the new          |
| 6) Committee on Judicial Evaluation new program reserve and \$20,000 of Time Redistribution. | \$31,930 - \$11,930 - from the   |

The board unanimously approved the budget amendments.

**24. Young Lawyers Division Report**

President John Stewart reported that the Young Lawyers Division (YLD) had recently made a financial and time commitment to help with the high school moot court competition. Stewart said that the YLD is also promoting the inaugural dinner of the Santa Rosa county Bar association, which President-elect Angones will be attending. Stewart reminded the board of the October 21, 2006 Third Annual Minority Mentoring Picnic to be held at Amelia Earhart Park in Hialiah, FL. Stewart told the board that the YLD is co-sponsoring a welcome resection with the South Florida Minority Bar Association Affiliates for the Virgil Hawkins Florida Chapter of the National Bar Association's first quarterly meeting which is held the day before the mentoring picnic.

**25. General Practice, Solo and Small Firm Section Bylaws – on first reading**

Within Article III, Section 4(d) (Officers – Term of Office - Chair Emeritus) adds provision authorizing immediate past chair to remain on executive committee for 1 year following service, and thereafter in chair emeritus status further serving as chair emeritus liaison to the council for 1 additional year; specifies duties of chair emeritus liaison and other rights of continued council membership by past chairs following service as chair emeritus liaison.

**26. Time and place of next meeting**

The board of governors' next meeting will be December 6 – 10, 2006 at the Ritz Carlton, Key Biscayne Florida.

There being no further business to discuss the board adjourned at 4:01 PM.

Respectfully submitted,

Dana M. Watson

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