

Florida Bar Board of Governors
October 12, 2018
Ritz Carlton Hotel
Amelia Island

1.Roll Call

Michelle Renee Suskauer, President
John M. Stewart, President-Elect
Lawrence E. Sellers, Jr., 2nd Circuit
Melissa VanSickle, 2nd Circuit
Bruce W. Robinson, 3rd Circuit
Michael Fox Orr, 4th Circuit
Michael G. Tanner, 4th Circuit
Renée E. Thompson, 5th Circuit
Joshua T. Chilson, 6th Circuit
Sam Nicholas Masters, 7th Circuit
Stephanie M. Marchman, 8th Circuit
Thomas P. Wert, 9th Circuit
Julia L. Frey, 9th Circuit
Wayne L. Helsby, 9th Circuit
C. Richard Nail, 10th Circuit
Roland Sanchez-Medina, Jr., 11th Circuit
Dori Foster-Morales, 11th Circuit
Jordan A. Dresnick, 11th Circuit
Jeffrey Rynor, 11th Circuit
Steven W. Davis, 11th Circuit
F. Scott Westheimer, 12th Circuit
Thomas Roe Bopp, 13th Circuit
Amy S. Fariior, 13th Circuit
Margaret Diane Mathews, 13th Circuit
Paige A. Greenlee, 13th Circuit
Michael P. Dickey, 14th Circuit
Sia Baker-Barnes, 15th Circuit
Ronald P. Ponzoli, Jr., 15th Circuit
Robin I. Bresky, 15th Circuit

Gary S. Lesser, 15th Circuit
Wayne LaRue Smith, 16th Circuit
Jay Kim, 17th Circuit
Lorna E. Brown-Burton, 17th Circuit
Hilary Creary, 17th Circuit
Adam G. Rabinowitz, 17th Circuit
James G. Vickaryous, 18th Circuit
Gregory S. Weiss, 19th Circuit
Laird A. Lile, 20th Circuit
Ian M. Comisky, Out of State
Christian P. George, Young Lawyers Division President
Santo DiGangi, Young Lawyers Division President-Elect
Lawrence W. Tyree, Public Member
Sharon B. Middleton, Public Member

Members Absent:

Jeremy C. Branning, 1st Circuit
Sandra Fascell Diamond, 6th Circuit
Wayne L. Helsby, 9th Circuit
Deborah B. Baker-Egozi, 11th Circuit
John H. (Jack) Hickey, 11th Circuit
Diana Santa Maria, 17th Circuit
Marcy Lynn Shaw, 20th Circuit
E. Duffy Myrtetus, Out of State
Eric L. Meeks, Out of State
Brian D. Burgoon, Out of State

2. Staff in Attendance

Joshua Doyle, Executive Director
Lori Holcomb, Division Director, Ethics and Consumer Protection
Francine Walker, Director, Public Information and Bar Services
Adria Quintela, Staff Counsel, Lawyer Regulation
Elizabeth Clark Tarbert, Ethics Counsel
Rosalyn A. Scott, Assistant to the President
Jim Ash, Senior Editor, Florida Bar News

3. Invocation and Pledge of Allegiance

Board member Michael G. Tanner delivered the invocation and board member Michael Fox Orr led the Pledge of Allegiance.

4. Welcome by 4th Judicial Circuit Chief Judge Mark Mahon

Judge Mahon described recently finding a 1918 letter from the clerk of the Supreme Court welcoming his grandfather to the practice of law. Describing himself as “a third-generation Jacksonville lawyer,” Judge Mahon welcomed the board.

5. Guests:

Judge Joey Williams, Florida Conference of County Court Judges
Judge Scott Bernstein, Florida Conference of Circuit Court Judges
Kyleen Hinkle, President-elect, Florida Association for Women Lawyers
Kevin Allen Nash, Vice President, Virgil Hawkins Florida Chapter, National Bar Association
David Aronberg, Government Lawyer Representative
Andrew Sasso, Board Parliamentarian

6. Non-Roll Call Grievance Agenda Items

Board member Ponzoli reported that there were no non-roll call grievance agenda items and no non-roll call advertising appeal agenda items.

7. Minutes Approval

The board approved the regular and grievance minutes from its July 27, 2018, meeting. That approval included ratifying the actions taken by the Executive Committee:

- At a June 11, 2018, meeting, the Executive Committee voted 9-0 to approve the request of the Animal Law Section to intervene in and file an amicus brief in a lawsuit challenging an amendment placed on the November 6, 2018, General Election ballot by the Constitution Revision Commission which prohibits wagering on greyhound racing.
- At an August 13, 2018, meeting, the Executive Committee endorsed the request of the Criminal Procedure Rules Committee to correct the committee’s proposed amendment to Fla. R. Crim. Proc. 3.691, which was discovered with

the release of SC18-118. The committee also approved the request of the Disciplinary Procedure Committee to approve a safe harbor provision in Standing Board Policies for the Bar's trust accounting piloting program. The policy provides that lawyers participating in the program will not be prosecuted under Bar Rule 4-1.2 (b), (d), and (e) as long as the lawyer uses reasonable care and acts in good faith. The committee voted 13-0 to approve both requests.

- At an August 29, 2018, meeting, the Executive Committee approved the Criminal Law Section's request to file an amicus brief in a challenge to Amendment 6 on the November 6 General Election ballot placed there by the Constitution Revision Commission. The section supports the argument that the issues were improperly "bundled" in that amendment and opposes the victims' rights section of the amendment. The Executive Committee also endorses the request of the Family Law Rules Committee for additional changes, made in response to received comments, to proposed changes to Fla. Fam. Law R. Proc. 12.407 pending before the Supreme Court in SC18-853. The initial changes were submitted by the Rules Committee along with the Steering Committee on Family and Children in Court and the Juvenile Court Rules Committee and in response to a request by the court. The Executive Committee approved both requests 12-0.

8. Consent Agenda

The board approved the consent agenda as submitted, including:

- Appointing Barbara S. Boone as public member and G.C. Murray, Jr. as an attorney member to the UPL Committee 2; Richard A Price as an attorney member to UPL Committee 7B; Michael J. Furbush as an attorney member to UPL Committee 9B; Karen George and Howard Schneider as attorney members to UPL Committee 11C; and Rachel W. McCreary as an attorney member to UPL Committee 18A.
- Not objecting to the International Law Section taking the following legislative position: Supporting reform of the Florida Statutes regulating service of process abroad.
- Not objecting to the Real Property, Probate and Trust Law Section taking the following legislative positions:
 - Supporting legislation authorizing remote online notarization of certain documents, using audio-video technology meeting specified standards, including limitations on the effectiveness of certain powers of attorney executed online.

- Supporting proposed legislation relating to electronic wills and to the testamentary aspects of electronic revocable trusts, that retains the requirements that two subscribing witnesses sign in the physical presence of the testator and provides for protections to ensure the integrity, security, and authenticity of an electronically signed will or trust.
- Supporting amendment to Florida Statutes, including Florida Statutes § 744.331, amending the current statutory procedure for dismissal of a petition to determine incapacity to require a unanimous finding by the examining committee that a person is not incapacitated and creating a new statutory procedure which would allow for the presentation of additional evidence before a petition to determine incapacity is dismissed in the event that there is a unanimous finding of the examining committee that a person is not incapacitated.
- Supporting amendment to Florida Statutes, including F.S. § 744.1097, to specifically address venue for the appointment of a guardian in minor guardianship proceedings.
- Supporting proposed legislation to amend Section 712.03, which would clarify the operation of a statute in light of a common real estate practice that may inadvertently re-inscribe restrictions and Sections 712.04 and 712.12, which would address the judicial exception created by *Save Calusa Trust V. St. Andrews Holdings, Ltd.*, 193 So. 3d 910 (Fla. 3d DCA 2016) for restrictions imposed in connection with governmental zoning, development, or building approvals.
- Supporting amendment to Florida Statutes, including F.S. 744.1097 to specifically address venue for the appointment of a guardian in minor guardianship proceedings.
- Supporting proposed legislation to amend Section 712,03, which would clarify the operation of the statute in light of a common real estate practice that may inadvertently re-inscribe restrictions and Sections 712.04 and 712.12, which would address the judicial exception created by *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So. 3d 910 (Fla. 3d DCA 2016) for restrictions imposed in connection governmental zoning, development, or building approvals.
- Not objecting to the Business Law Section taking the following legislative positions:
 - Supporting ensuring the identification of goods and services in the Revised Model Trademark Act, Chap. 495, F.S., conforms to federal law.

- Support proposed legislation updating and modernizing the Florida Business Corporation Act (Chap. 607, F.S.), harmonizing certain of those provisions with provisions in other Florida entity statutes, including within Chaps. 605 and 620, and cleaning up certain glitches within such other Florida entity Statutes.
- Approving the legislative consulting contract between the Elder Law Section and Brian B. Jogerst.
- Approving the legislative consulting contract between the Workers Compensation Section and Fausto Gomez.
- Approving the legislative consulting contract between The Florida Bar, the Florida Conference of Circuit Court Judges, and Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A.
- Approving the legislative consulting contract between The Florida Bar, the Florida Conference of Circuit Court Judges, and The Advocacy Group at Cardenas Partners, LLC.
- Approving the legislative consulting contract between The Florida Bar, the Conference of County Court Judges of Florida, and Paul M. Hawkes.
- Approving the legislative consulting contract between The Florida Bar, the Florida Conference of District Court of Appeal Judges, and Paul M. Hawkes.
- Appointing Richard M. Benham of Tallahassee to the Board of Directors of Legal Services of North Florida for a term ending May 31, 2020.
- Approving an amendment to The Florida Bar Retiree Health Plan Trust.
- Approving the formal comment by the Board of Governors in *In re: Amendments to the Florida Rules of Judicial Administration – Parental Leave*, Case No. SC18-1554.

9. Budget Committee Report

Committee Chair Thompson reported that the budget is sound and benefited from cost savings and better than anticipated investment earnings. Member fee collections have already reached 88 percent. Thompson moved approval of a \$3,784 roll over amendment for the Justice Teaching Grant. The board approved unanimously.

10. Investment Committee Report

Chair Comisky said despite recent volatility in the stock market, the Bar's investment fund is sound. Fund managers will soon recommend rebalancing the portfolio to reflect rising interest rates, Comisky said. He said the committee was satisfied with an annual fee analysis.

11. Audit Committee Report

Vice-chair Rabinowitz reported that audits are ongoing.

12. Florida Bar Foundation Report

Foundation Executive Director MacKenzie thanked the Florida Attorneys Charitable Trust for donating \$741,202 for low-cost legal services associated with disaster relief, which, when combined with reserves, allowed the foundation to donate \$881,000 for hurricane victims in Florida. MacKenzie reported that Wells Fargo is the foundation's first "Community Champion" for raising the interest it pays on large attorney trust accounts from 15 basis points to 100 basis points, representing an annualized increase in IOTA funds from that institution of \$4.4 million. If the other top 10 banks did the same, the foundation would receive \$26 million in additional IOTA revenues.

13. Special Committee on Trust Accounting Solutions Report

Chair Sasso reported that the program is now built and representatives from TMI and FIS recently presented a webcast demonstration. Hurricane Michael forced the cancellation of an initial test, Sasso said. Virtual law offices representing small, medium and large firms have been created and bar staff have volunteered to be test subjects for the initial stage.

14. Legislative Committee Report

Co-Chair Lesser urged board members to study reports by the Special Committee on Mental Health and the Special Committee on Child and Parent Representation, ahead of contemplated board action at the December meeting. Lesser invited Bar outside counsel Barry Richard to describe the multi-step process for adopting legislative positions. Lesser moved that the board not prohibit the advocacy of the Animal Law Section in the form of letters to political leaders regarding animal cruelty prosecution in the 5th Circuit. The board approved the motion unanimously. Co-Chair Lesser urged board members to review proposed changes to Standing Board Policy Series 900 ahead of contemplated board action at the December meeting. Legislative consultant Jim Daughton urged board members to attend the Bar's annual legislative reception on Wednesday, February 6th.

15. Appellate Court Rules Committee Report

Chair Brewer moved the board approve an out-of-cycle proposed amendment to Rule 9.130, which would create new subdivision (a)(3)(C) (xiii) to establish a new type of appealable non-final order for permanent guardianships established for dependent children pursuant to section 39.6221, Florida Statutes. President Suskauer asked for a motion to accept the committee report and it was moved and seconded. The board voted 39-0 to recommend approval. Chair Brewer asked for approval of out-of-cycle proposed changes to Rule 9.20, which would amend subdivisions (d)(1)(C), creating new subdivision (d)(3)-(d)(4) as (d)(4)-(d)(5) respectively. Brewer said the amendments would create an easier way for counsel or a pro se party to request an unredacted version, to the extent permitted by the security matrix, of the record on appeal and trial transcript. President Suskauer asked for motion to approve the report by the Appellate Court Rules Committee and it was moved and seconded. The board voted 39-0 to recommend approval.

16. Annual Convention Committee Report

Chair Hurst-Miller reported that the convention will take place June 26th-29th in Boca Raton and that the theme will be "Unconventional." Hurst-Miller urged board members to encourage law-firm sponsorship of the judicial luncheon and to attend General Assembly.

17. Board Review Committee on Professional Ethics Report

Chair Lawrence E. Sellers reported the committee's actions:

- a. The Board Review Committee on Professional Ethics voted 9-0 on June 12, 2018 to approve amendments to Rule 4-7.14 which address how lawyers who are not board certified and how law firms, which cannot be board certified, may refer to themselves as specialists, experts, or other variations of those terms. The proposed amendments to Rule 4-7.14 amend subdivision (a)(4) to omit parts of the rule that the Bar is enjoined from enforcing and add new subdivisions (a)(5), (a)(6) and commentary. The proposed amendments would allow a lawyer who is not board certified to use the terms "specialist" and "expert" if the lawyer can objectively verify the claims based on the lawyer's education, training, experience, and substantial involvement in the area of practice. The amendments would allow law firms to claim specialization or expertise if they can objectively verify the claim as to at least one lawyer in the firm based on the lawyer's education, training, experience, and substantial involvement in the area of practice, but would

require a disclaimer that not all lawyers in the firm are specialists or experts if that is the case. New commentary is added explaining that lawyers are not required to be board certified to make claims of specialization and expertise, but do have to show education, training, experience, and substantial involvement in an area of practice to make such claims. The Board of Governors approved the recommendation on voice vote without objection.

b. The Board Review Committee on Professional Ethics voted 7-0 to recommend that the Board of Governors approve Draft Proposed Advisory Opinion 17-2 (to be renumbered 18-1 to reflect the current year) regarding how qualifying providers/lawyer referral services may be paid in compliance with Rules 4-7.22 and 4-5.4, which prohibit a qualifying provider/lawyer referral service from being paid in any manner that constitutes an improper division of legal fees with a nonlawyer. The opinion summarizes ethics opinions from other states and sets forth factors to consider in determining whether a particular charge is permissible. Examples of charges that would generally be permissible include:

- a reasonable, pre-arranged fixed charge per time period such as weekly, monthly, or yearly;
- a reasonable, pre-arranged fixed charge for each time a consumer views information about a specific lawyer, commonly referred to as “pay-per-click”;
- a reasonable, pre-arranged fixed charge per matter referred to the lawyer that is not contingent on the outcome of the matter and does not vary based on the amount at issue in the matter; and
- a reasonable, pre-arranged fixed charge per matter referred to the lawyer that varies based on the type of matter only if the varying charge is based on demonstrably different marketing and administrative costs rather than the perceived value of the case.

Examples of charges that would generally be impermissible include:

- a charge calculated as a percentage of the fee received by a lawyer;
- a charge calculated as a percentage of the client’s recovery in the matter;

- a charge based on the perceived value of the case referred to or accepted by a participating lawyer.
- a flat charge that differs based on the perceived value of the case referred to or accepted by a participating lawyer;
- a flat charge per case accepted by a participating lawyer; and
- a flat charge per case accepted by a participating lawyer that differs based on the type of matter (e.g., personal injury versus family law).

The Board of Governors approved the recommendation on voice vote without objection.

c. The Board Review Committee on Professional Ethics deferred action on a Florida Bar member request to amend Rule 4-7.13 to address lawyers using the name of another lawyer or law firm to trigger a search result that includes an Internet advertisement of the first lawyer, so that the committee can continue to work with the Bar's outside counsel and the proponents of the proposed amendment.

d. The Board Review Committee on Professional Ethics voted 6-1 to recommend that the Board of Governors determine in response to Advertising Inquiries 38381 and 38387 that 411-Pain is a qualifying provider under Rule 4-7.22(b), in which the inquiries indicate that 411-Pain is a medical and legal referral service that offers services matching consumers with medical professionals and lawyers. The matching of consumers and lawyers is free of charge to both consumers and participating lawyers, but medical professionals pay a fee to receive referrals. 411-Pain requires participating lawyers to sign an agreement that there are no fees or costs for accepting matches with consumers, that participating lawyers must comply with all applicable Florida Bar rules, including Rule 4-7.22, and acknowledge that there is no quid pro quo or requirement of cross referrals. The Board of Governors approved the recommendation on voice vote with one objection. Board members Davis and VanSickle abstained from the vote of both the Board Review Committee on Professional Ethics and Board of Governors.

e. The Board Review Committee on Professional Ethics voted 10-0 to recommend that the Board of Governors affirm the Standing Committee on Advertising decision in Advertising Inquiry 37997 that LegalRFQ.com is a qualifying provider under Rule 4-7.22, in which the inquiry indicated that LegalRFQ.com is a website matches consumers and participating lawyers under the following parameters. Consumers and participating lawyers pay a fixed annual membership fee to participate. Consumers pay a separate fixed fee to post a general description of legal matters in which they seek legal representation and on which participating lawyers may bid; the set fee varies depending on type of matter being posted. Participating lawyers pay a separate fixed fee to bid and may provide marketing materials with their bids; the set fee varies depending on type of matter being posted. Consumers may select from among the participating lawyers who have submitted a bid. The Board of Governors approved the recommendation on voice vote without objection.

f. The Board Review Committee on Professional Ethics voted 6-1 to recommend that the Board of Governors determine in response to Advertising Inquiry 38435 that 1-800-Ask-Gary is a qualifying provider under Rule 4-7.22(b), in which the inquiry indicates that 1-800-Ask-Gary proposes to change its business operation: it will advertise as “1-800-ASK-GARY, an Auto Accident and Injury Helpline” to obtain patients for the owner of 1-800-Ask-Gary’s medical clinics, collectively named Physicians Group; the advertisements will specifically indicate that they are advertisements for Physicians Group; callers who ask legal questions will be referred to a personal injury lawyer in their geographic area; participating lawyers will pay nothing to 1-800-Ask-Gary, will not be required or pressured to refer clients to Physicians Group, and will not be required to provide any benefit to 1-800-Ask-Gary or Physicians Group. The Board of Governors approved the recommendation on voice vote with 1 objection. Board members Davis and VanSickle abstained from the vote of both the Board Review Committee on Professional Ethics and Board of Governors.

18. Rules Committee Report

Chair Mathews urged board members to familiarize themselves with proposed changes to Standing Board Policy 16.21, “Waiver of Conflicts as Lawyer for Respondents,” which was on first reading. Final action is likely in December, Mathews said.

19. Executive Director's Report

Executive Director Doyle praised staff members who worked despite Bar closures due to Hurricane Michael. He said the Bar's communications office was internally reorganized and will hopefully better serve the public and its members.

20. Criminal Justice Summit Report

Summit Chair and former President Hank Coxe reported that the Criminal Justice Summit, called by President Suskauer for October 16th -17th in Tampa, will include experts with differing perspectives, such as the Florida Prosecuting Attorneys Association and the American Civil Liberties Union, on issues ranging from juvenile sentencing to conviction integrity.

21. Executive Session

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

22. Florida Lawyers Assistance, Inc., Report

FLA board liaison Smith praised FLA for saving the lives and/or careers of countless Bar members. FLA Executive Director Judy Rushlow reported that FLA's staff includes a new, full-time outreach coordinator and that its expanded role includes helping the legal community deal with mental health challenges as well as substance use disorders.

23. Past Florida Bar President Report

Former president James C. Rinaman, Jr., of Jacksonville, who served in 1982, noted that FLA, Inc., was created during his tenure as president.

24. Judicial Liaison Report

Former Florida Conference of Circuit Court Judges Chair, and 11th Circuit Judge Scott Weinstein, announced the creation of the "Florida Judicial Wellness Program," which is separate from but works with Florida Lawyers Assistance to help judges with mental health and substance use disorder problems.

25. Alternative Dispute Resolution Section Report

Section Chair Christina Magee said the Section is establishing a Mediator Ethics Advisory Committee, or MEACs, searchable database. The Supreme Court is contemplating mandating use of certified mediators in family, dependency, county and circuit civil court systems, and ADR is creating a working group to coordinate the rule-making process with other Bar sections.

26. Young Lawyers Division Report

President George reported the creation of a volunteer legal hotline to help Hurricane Michael victims. YLD Health and Wellness Committee is sponsoring a Bar survey, and a “#StigmaFreeYLD” campaign begins next week, George said.

27. Program Evaluation Committee Report

Chair-elect Westheimer said PEC created a new subcommittee to review proposal for a Cannabis Law Committee. Westheimer moved approval of proposed changes to Standing Board Policy 3.12 Finances (FRP Enhancement Committee Expenses). The board voted unanimously to approve. Westheimer moved approval of proposed changes to Rule 6-16.3 Minimum Standards (Business Litigation). The change would clarify that 50 hours of required continuing legal education hours for recertification must be completed since the last certification application. Westheimer moved to waive first reading and the motion passed unanimously. Westheimer announced proposed changes to Rule 6-16.4 allowing an advanced trial seminar to substitute for the jury trial requirement as first reading. Chair-elect Westheimer moved approval to distribute the YLD Mental Health and Wellness survey. The Board voted unanimously to approve.

28. Communications Committee Report

Chair Westheimer reported that media consultants are working with Bar staff on the digital transition of Bar publications. Citizens Advisory Committee Chair Tyree reported that the committee has been challenged to increase awareness of the public in non-lawyer opportunities to serve on Bar committees, a project that is headed by Vice-chair Sylvia Fernandez Carra-Hahn.

29. President-elect Report

President-elect Stewart urged board members to study the meeting calendar and note the meeting scheduled for Williamsburg, Va. In March, 2020. The board has revamped its long-range planning, a process that includes a new facilitator and the first of two meetings in September. The Technology Affecting the Practice of Law Committee will have a report by the end of the year, Stewart reported.

30. President's Report

President Suskauer reported that she and President-elect Stewart attended the ABA meeting in Chicago and many other functions on the Bar's behalf. She urged board members to attend the Fall Meeting and the Criminal Justice Summit, in Tampa October 16th -18th. President Suskauer praised the Sarasota Bar for its sponsorship of the Booker Law Academy.

31. Family Law Rules Committee Report

Board member Rynor proposed deletion of Family Law Rules of Procedure Form 12.996(d), and after voting unanimously to accept the committee report, the board voted 38-0 to recommend approval.

32. Time and Place of Next Meeting

There being no further business before the board, President Suskauer adjourned the meeting at 1:57 p.m. The next meeting is December 14th at the Ritz Carlton in Naples.

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