

MEETING MINUTES

Business Litigation Committee

Business Law Section of the Florida Bar

June 26, 2014

After the meeting was called to order, the first item was the approval of the minutes of the meeting dated January 22, 2014. The minutes were approved by unanimous vote, without corrections or amendments.

The next items on the agenda were the subcommittee updates.

Business Litigation Jury Instructions: Manuel Farach discussed the fact that on July 6, 2013, the Supreme Court of Florida had approved the first set of business litigation jury instructions. A business court judge from every district is now on the subcommittee. A meeting of the subcommittee took place on March 13 and 14 at the Fourth District Court of Appeal, where the subcommittee bestowed an award on Judge Gerber. The subcommittee is still in the process of accepting proposed legal issues / topic areas to investigate, the result of which would be a jury instruction on that topic. The subcommittee is not going to propose jury instructions on legal concepts where the matter is unsettled or unresolved; the proposed jury instruction should be on a well-settled area of the law.

Antitrust: Judge Larose reported the subcommittee had made a decision not to sunset antitrust/trade regulation as a certification. The subcommittee decided to adopt broader standards for the certification, similar to the ABA standards. There will also be additional focus given to the trade regulation component, both on the certification and in attempting to attract additional members to the subcommittee. Trade regulation will include noncompete agreements, and unfair competition. The subcommittee will be drafting certification standards, with the goal of obtaining Committee approval of the standards at the August retreat meeting.

Franchise: No report.

Legislative: The vice-chair spoke on these issues. The vice-chair discussed the recently-passed legislation regarding changes to the proceedings supplementary statute. The vice-chair also indicated the benefit corporation bill had passed, and indicated the subcommittee on the proposed revisions to Chapter 607 were continuing their work on the process, and were looking toward possibly the 2016 session.

Michel Weisz, also of the Proceedings Supplementary Task Force, indicated the Task Force had discussed the new legislation and its effects on the Task Force's work. The vice-chair indicated Senator Simmons, who was the primary drafter of the proceedings supplementary measure, indicated he wanted to soon pass additional legislation further revising the proceedings

supplementary statute. The question for the Committee, and for the Section, is whether to: 1) wait for the draft legislation proposed by Senator Simmons' team and work on technical support and revisions at that time; 2) meet with Senator Simmons and ask him to wait for a period of time (12-18 months) until the Task Force has completed its draft of proposed legislation; or 3) have the Task Force have legislation drafted in time for the 2015 legislative session.

Mr. Weisz spoke about the Task Force's progress to date. Currently, the Task Force was working on incorporating provisions of the fraudulent transfer statute into the proposed legislation on proceedings supplementary: such as requiring the service of a complaint, allowing for motion practice, and the granting of the right to a jury trial. Mr. Weisz also spoke about a recent court decision holding that proceedings supplementary are removable to federal court. The vice-chair and Mr. Weisz reported the Section's lobbying team would be meeting with Senator Simmons' staff regarding the Senator's goals for the upcoming session, and anticipated we would have more information regarding the projected track of the further revisions to the proceedings supplementary statute.

In addition, the vice-chair discussed Senator Simmons' conversation with Jon Polenberg regarding on the "anti-Sharia" family law legislation. The Business Law Section worked with the International Law Section on technical support for the bill, and ultimately, the Sections appeared satisfied that the new legislation was limited to family law situations. But Senator Simmons advised Mr. Polenberg that in his opinion, new legislation would be proposed in the 2015 session to apply the concept to all business situations, including business-to-business contractual relationships. The Senator suggested to Mr. Polenberg because the new legislation would be proposed, perhaps the Section would propose legislation on the concept, thereby having the first opportunity to craft the legislation to make it the least "offensive" as possible. The committee then discussed this issue, after which a motion was made to create a subcommittee charged with drafting proposed legislation on the anti-Sharia concept. The motion passed unanimously.

Lastly, the vice-chair discussed the Committee's "positions." As discussed during the Legislative Committee meeting, the Business Litigation Committee had, in years past, adopted certain legislative positions. Specifically, the Committee had adopted 7 positions, such as supporting the update and modernization of the Florida Arbitration Code. Those legislative positions are scheduled to "sunset" by the end of July, 2014. If the Committee does not pass the positions, it would be compelled to adopt them if and when those issues are raised again. The Legislative Committee recommended that the Business Litigation Committee readopt the positions, for even if some of the stated positions seemed stale or obsolete, the positions allowed the Section to approach any future proposed legislation that might touch on the legislative positions in the light of what had been already approved, without again having to do a triple motion before the Section. Because the positions were distributed to the Vice-Chair on the day of the meeting, the Committee decided it would send an e-mail to its members with the stated positions, and ask the Committee to vote to uphold the positions via e-mail vote.

Inclusion, Mentoring & Fellowship: Sarah Paris reported on the successful events that had taken place since the last meeting. She stated the committee was working on implementing and expanding the mentorship program, and to that end, the committee is still looking for volunteer mentors. The Section had also given the committee an additional grant to increase to 10 the number of fellows to the diversity fellowship program. Ms. Paris reported the Annual Minority Mentoring Picnic in Miami is scheduled for Saturday, November 1, 2014, at Amelia Earhart Park in Hialeah.

Pro Bono: Maxine Long discussed the committee sponsored pro bono clinics for issues concerning nonprofit companies. The committee is working on putting together a set of law firm policies and standards for pro bono work. The Pro Bono Committee sent the standards out, and received feedback from several of the firms. The Committee is still in the process of taking the feedback and incorporating those into the standards and policies.

Social Media: Mark Nichols reported the Committee has a very large LinkedIn group. The committee will encourage the members to provide content to the website, thereby using the website as a member benefit tool. The committee plans on meeting with a marketing professional to enhance the use of social media by the Section.

Communications: Kaci Donlon reported the committee is working on updating the website, and is looking to our Committee for content. If the members have a scholarly article they want to have published, they may send the article to the communications committee. In keeping with past policy, there will be no comments section accompanying the articles.

E-Discovery: James Murphy reported the committee is now a full committee of the Florida Bar, and is working to broaden its role. To that end, it is putting on a CLE on Friday, June 27, 2014, on eDiscovery and forensic presentations in federal court. The committee is also working on putting together a set of PSI protocols, and invites our Committee to send comments and proposed protocols to Steve Tepler. The Bar's Professional Ethics Committee is also addressing how the Rules of Professional Conduct – in particular, the rule on competent representation – will deal with eDiscovery. There is not, at this time, a movement to establish a Florida Bar Certification on eDiscovery.

Peter Valori discussed the continued project of the development and evolution of the case law post-*Tiara Condominium*. The information is still being gathered, and will perhaps result in articles to be written in the Bar publications. So far, it appears the decisions turn primarily on the facts attendant to each case. The group will continue updating as the courts develop the body of case law on the issue.

The Committee next discussed the Business Litigation Certification Review courses, and ways in which the Section (and the Committee) can boost usage by practitioners of the courses. Judge Freeman raised the possibility of doing a comprehensive seminar regarding business litigation, with the idea of using the seminar as offering training for the Certification Test; the

idea was based on a yearly seminar put on for the Family Law Certification. Rick Gross suggested repackaging the course as a seminar with the Business Court Judges; this would not expressly be for the Business Law Certification; rather, the Certification would be more of a byproduct of the seminar. The seminar would be used to attract new members to the Section and to our Committee. Following further discussion, a motion was made to create a subcommittee to put together a seminar on business law. The motion was approved by unanimous vote.

Rick Gross reported the retreat would again host the Business Court Judges Roundtable at the retreat. He further reported there was movement on the subject of creating a Business Court in the 20th Judicial Circuit.

There was no report of the State/Federal Court Judicial Liaison Committee.

Next, the Committee discussed CADRA. The Committee, through Robert Kain, distributed drafts of the then-current version of the Computer Abuse Nondisclosure and Data Recovery Act (CADRA). Mr. Kain discussed how the task force, which was formed at the August 31, 2013 committee meeting, took the comments and concerns raised at that meeting and made changes to the draft of the proposed legislation with those concerns in mind. The new proposed draft is significantly shorter and addresses far less than the initial draft distributed in August. The draft now only addresses those who obtain information from a protected computer without authorization; transmit a program, code, or command without authorization to a computer, and that transmission causes harm; and traffic in passwords, security codes, and the like. Mr. Kain did not ask the Committee to vote on the draft of CADRA at that time; he indicated he would ask for the Committee to approve the draft at the meeting to take place during the Labor Day Retreat.

Ryon McCabe reported there would be a lunchtime CLE scheduled on mediation, the date of which was still to be planned.

Lastly, Rick Gross discussed a proposal raised by Leyza Blanco regarding a request made to her for the Committee to keep on its website a repository of applications for those wanting to become a receiver in cases pending before the 11th Judicial Circuit in Miami-Dade County. Considerable discussion was had on this issue. The request originated because of a lack of diversity in the appointment of receivers. The repository was not intended to create a “wheel,” by which receivers would be chosen in-turn; parties could still suggest receivers. The repository could also give more transparency to the process. Mr. Gross, on behalf of Ms. Blanco, moved that the Committee approve the request. Jeffrey Hirsch made an amendment to the request that the Committee approve the request so long as the Business Litigation Committee website include a disclaimer as part of the repository that by putting the information on the website, the Committee is not recommending any of the applicants to be receivers in any case pending in Miami-Dade County, and that the Committee has not vetted any of the applicants on the website. Mr. Gross stated the court would promulgate an Administrative Order stating the applications

would be available for viewing on the website. Kaci Donlon reported the Committee would have to create space on our website for the repository. The question was then posed whether an applicant would be allowed to include his/her *curriculum vitae* as part of the application. Based on the information available at the time, it appeared the answer was the applicant would be allowed to include the *c.v.*, and possibly information regarding the firm for whom the applicant worked. This raised additional concerns as to what the exposure was to the Committee for including this information on the website. There were also questions raised to whether the Committee or the Section derived any benefit for hosting the repository, or whether the repository would in fact help the judges to choose a receiver. After further discussion, James Murphy made a motion made to table the proposal until further information could be obtained regarding the Committee's concerns. The motion to table the proposal passed unanimously.

Upon motion, and unanimous approval, the Chair then adjourned the meeting.