

**Minutes of the Business Litigation Committee Meeting  
Business Law Section of the Florida Bar Annual Retreat  
September 1, 2012**

The meeting of the Business Litigation Committee of the Business Law Section of the Florida Bar (the “Committee”) was held at the Ritz Carlton, Naples on September 1, 2012.

Present were the following:

Honorable Gill Freeman, Honorable Alice L. Blackwell, Honorable William Van Nortwick, Ron Ravikoff, Irwin Gilbert, John Chapman, Joanne O’Connor, Scott Konopka, Mark Nicolas, Dan O’Malley, Robert Powell, Kacy Donlon, Ryon McCabe, Kevin Kwan, Nick Krohn, Honorable Edward LaRose, Jim Murphy, Jim Foster, David Ackerman, Rick Gross, Jason Kellogg, John Clough, Honorable Thomas B. Smith, Jon Polenberg, Honorable Gerald Cope, Honorable Jennifer Bailey, Adam Rabin, Detra Shaw-Wilder, Honorable Jose Rodriguez, Honorable Meenu Sasser, Maxine Long, Frank Scruggs, Russell Landy, Barbara Riesberg, Gilbert Squires, Jon Swergold, John McManus, Peter Valori, Melanie Damian, Michael Higer, Greg Weiss, Hal Litchford, Lawrence Silverman, Honorable Juan Ramirez, Jr., Carol Cope, Honorable Peggy Quince.

I. Committee Chair Barbara Riesberg called the meeting to order at 10:10 a.m.

II. Bill Wiley, lobbyist for the Business Law Section, visited the Committee to speak about the Committee’s legislation efforts, including:

- a. The Revised Uniform Arbitration Act;
- b. Courts funding; and
- c. Proposed ABC legislation from the Bankruptcy UCC Committee

III. Introductions

IV. Committee Chair Riesberg asked the members to review the June 21, 2012 minutes for the Business Litigation Committee meeting at the Annual Meeting. Judge LaRose moved to approve the minutes and the minutes were approved unanimously.

V. Subcommittee Updates

A. E-Discovery State Rules

Barbara Riesberg discussed that the work of the subcommittee and reported that it was working on protocols and forms for practitioners to use as a bridge between federal

and state law. A chapter was proposed to be in the Business Litigation Manual on this topic.

The subcommittee plans to set up a seminar at the annual Florida Bar meeting, and lunch CLEs regarding the Florida rule changes.

#### B. Business Litigation Jury Instructions

A petition was submitted to the Supreme Court for approval of the proposed jury instructions.

### VI. Committee Liaison Reports

#### A. Diversity Committee

Judge La Rose attended the Diversity Committee meeting as a liaison of the Committee.

Judge Freeman discussed the Miami Minority Picnic scheduled for November 10, 2012. It was discussed that the committee offer free membership to law students. The committee is in need of lawyers who are available to follow up with law students, and planning joint events with minority bar associations (including lunchtime CLEs).

Peter Valori volunteered to man the Committee's booth at the picnic and to follow up with law students. Mr. Valori will head a subcommittee to work with the minority mentoring picnic planners.

#### B. Pro Bono Committee

Mark Nichols reported that the Pro Bono Committee conducted a pro bono clinic for non-profit agencies. It was reported that there were more lawyer volunteers than non-profit attendees. Melanie Damian also spoke about possible recruiting sources so more non-profit agencies may attend a future clinic.

### VII. Legislative Updates

#### A. Legislative Subcommittee

Russell Landy gave a brief summary of the upcoming legislative year and members volunteered to serve on the Legislative Sub-Committee.

#### B. LLC Drafting Task Force

Mark Nichols reported to the Committee about the progress of the LLC Drafting Task Force, and the August 31, 2012 CLE conducted by the task force to educate about the proposed changes in the LLC Act.

Jon Polenberg led a discussion of an issue which came up during the CLE regarding the duty of good faith and fair dealing. The LLC Act drafters intend to place a provision in the LLC Act to protect minority shareholders by adding a cause of action for breach of duty of good faith and fair dealing. The Committee discussed the issues arising from such an amendment, including the applicable standard for such a cause of action, and whether Florida currently has such a cause of action.

Mr. Nichols reported that the LLC Drafting Task Force has requested that the Committee take a position regarding the amendment.

Judge Freeman recommended drafting proposed forms of operating agreement.

Ryan McCabe moved that the Committee authorize Mr. Nichols to report to the LLC Task Force that the Committee is opposed to any alteration of the common law in the new LLC statute on this issue. Rick Gross seconded the motion. There was no opposition and the motion passed.

Mr. Nichols also reported that there were proposed changes to chapters 47 and 48, Florida Statutes regarding service of process on LLCs.

Mr. Nichols and the other members of the LLC Subcommittee were thanked by the Committee for their hard work.

## VII. Business Law Journal

Peter Valori reported that the Committee planned to use Manny Farach's weekly case summaries, categorize them, and highlight the most significant changes with case notes. The Committee planned to do approximately four or five case notes.

Because of tight deadlines, utilizing law students would not work this year, but the Committee wants to reintroduce using law students next year. Judge Freeman pointed out that approximately 50% of law school graduates do not have jobs, so they may be good candidates to help write case summaries.

There was a call for volunteers to edit case summaries by Kacy Donlon by the September 15, 2012 deadline.

VIII. The Chair recognized Justice Peggy Quince, who joined the meeting.

IX. Business Litigation Certification Review Course

Mark Nichols advised that the Committee is looking for speakers on construction law and intellectual property.

Peter Valori reported that there are now five CLE's available online for free.

## X. State and Federal Court Judicial Liaison Committee

Mark Nichols reported that the Committee's Judicial questionnaire has been added to the website [www.Flabizcourts.org](http://www.Flabizcourts.org).

The Committee informed the new Business Court Judges in attendance about the Business Court website and the desire to have orders available on the website.

It was proposed to ask the Executive Council if it was interested in receiving Mr. Farach's weekly case summary email blast.

John Polenberg discussed the Federal Court Roundtable scheduled for the June 2013 Annual Meeting, and asked if the Executive Council wished to sponsor the event for \$1,000. Mr. Polenberg made a motion, which passed with no opposition.

Ryan McCabe asked about how the Committee goes about inviting Judges to Committee events, and it was explained that requests should go through the State and Federal Court Judicial Liaison Committee.

Judge Van Nortwick recommended that we invite judges within driving distance of the annual meeting to attend the June meeting.

## XI. Non-Compete Subcommittee

Hal Litchford discussed section 542.335, Florida Statutes, and its unintended consequences on employment relationships. His sub-committee wished to pass a "glitch bill."

Mr. Litchford indicated that shopping center leases were being struck down because parties were unable to show a legitimate business interest in restrictive covenants. The sub-committee wished to add that real estate covenants are enforceable, notwithstanding anything else in the statute.

Mr. Litchford also discussed that non-disclosure agreements may not be enforceable, as well as confidentiality in return of proprietary documents in employment agreements.

Mr. Litchford also discussed referral sources, and the subcommittee's wish to address the split in the circuits regarding whether they are legitimate business interests. The subcommittee believes that a referral source is as protectable as patients, customers or clients, especially for physicians. Melanie Damian indicated that the proposal may be a change in the law.

A meeting was to be held after the meeting to further explore these issues.

Judge LaRose also spoke on the issue.

Committee Chair Riesberg asked the non-compete subcommittee to formulate recommendations for the Committee regarding these issues.

## X. Old Business

Committee Chair Riesberg discussed the proposed ABC amendments.

Committee Chair Riesberg also discussed that the Bankruptcy/UCC committee is requesting comments on their Receivership Practice Guide. All comments should go to Jay Brown.

Michael Higer spoke regarding judicial merit retention. Mr. Higer detailed the strong effort from the Florida Bar to educate the public regarding merit retention, and referred members to the Florida Bar website for materials for educating the public.

Jim Murphy volunteered to head a sub-committee regarding lunch time CLEs. Proposed ideas for topics included:

- LLC interest charging orders
- Covenants not to compete
- Irwin Gilbert talked about “Lawyers Helping Lawyers” and trying to have true nuts-and-bolts seminars for new lawyers
- Motion calendar
- Gilbert Squires expressed a desire to combine this with the minority mentoring efforts
- E-service and E-filing
- People who want to help can contact Mr. Gilbert: [igilbert@bizlit.net](mailto:igilbert@bizlit.net)
- Professionalism breakfast
- It was commented that live events were better for connecting than phone events.

## XII. New Business

It was discussed that there are new changes to the Florida Rules of Evidence regarding privilege and hearsay exceptions.

## XIII. Adjourn

Mark Nichols moved to adjourn the meeting, which passed with no opposition.