

THE FLORIDA BAR—BUSINESS LAW SECTION—EXECUTIVE COUNCIL
Minutes of Meeting
JANUARY 18, 2007—HYATT REGENCY, MIAMI

The regular meeting of the Executive Council of the Business Law Section of The Florida Bar was held on January 18, 2007, at the Hyatt Regency in Miami, Florida, in conjunction with the midyear meetings of The Florida Bar. Chair Diane Noller Wells called the meeting to order at 3:57 p.m. The following members of the council were recorded as being present:

Diane Noller Wells, Chair	Jeffrey A. Hirsch
Merrick L. Gross, Chair-Elect	G. Alan Howard
Russell M. Blain, Secretary-Treasurer	Hon. Paul G. Hyman, Jr.
Murray B. Silverstein, Board Liaison	Katherine C. Lake
David P. Ackerman	Hon. Edward C. LaRose
Stuart D. Ames	Thomas A. Lash
Alan H. Aronson	Stephen E. Mahle
Daniel H. Aronson	Hon. Catherine Peek McEwen
Douglas A. Bates	Thomas M. Messana
Howard J. Berlin	Mindy A. Mora
Hans Christian Beyer	James B. Murphy, Jr.
Jason B. Burnett	Jason M. Murray
Prof. Marilyn B. Cane	Hon. John K. Olson
Prof. Stuart R. Cohn	Karen J. Orlin
Louis T.M. Conti	Mark S. Roher
Melanie Emmons Damian	Stefan A. Rubin
Kenneth F. Darrow	Marsha G. Rydberg
Prof. Jeffrey Davis	Bradley M. Saxton
Ava K. Doppelt	Lisa M. Schiller
John D. Emmanuel	Philip B. Schwartz
Manuel Farach	Jeanne L. Seewald
Stephen M. Feidelman	Paul Steven Singerman
G. Steven Fender	Mark E. Stein
Juan Carlos Ferrer	Gary I. Teblum
Henry H. "Bucky" Fox	Robert H. Thornburg
James A. Gale	Peter F. Valori
Joseph R. Gomez	Hon. William A. Van Nortwick, Jr.
Michael J. Higer	

Also recorded as being present were the following:

Caryl E. Delano
Marty Hollander
Heather Howdeshell
Jennifer Morando
Mark Nichols
Austin Newberry, Program Administrator

Recognitions and Announcements: Diane recognized Judge Paul Hyman, who recently became chief bankruptcy judge for the Southern District of Florida. The council gave a round of applause to Judge Hyman. Diane also recognized council member Jeanne Seewald, who recently was named Collier County Lawyer of the Year. The council gave a round of applause to Jeanne. Diane commented on the successful council retreat held in November at Atlantis on Paradise Island in the Bahamas. Diane announced publication by the Law Practice Management Committee of the “Staff Management for the Law Office” manual and compact disc, which are available on request.

Approval of Minutes: The minutes of the previous meeting held on November 11, 2006, at Atlantis on Paradise Island in the Bahamas, in conjunction with the annual retreat of the council, were read and approved as read.

Treasurer’s Report: Secretary/Treasurer Russ Blain presented the treasurer’s report. Russ presented the current financial statement reflecting the financial condition of the section. Russ then presented the budget for 2007-2008, which had been provided to council members as part of their meeting packets. Russ presented the following changes to the published proposed budget:

Business Law Expense—Budget Line Item No. 84501—Legislative Consultant:
Increase from \$60,000 to \$66,000

Business Law Expense—Budget Line Item No. 84991—Special Projects:
Increase from \$2,000 to \$3,000, in part to provide sponsorship funds for the upcoming National Conference of Bankruptcy Judges to be held in Orlando in October

Business Law Retreat Expense—Budget Line Item No. 84063—Family Dinner:
Increase from \$35,000 to \$45,000

The motion was made and seconded to approve the budget. After discussion, a vote was called, and the budget was approved as presented, with the above-mentioned changes.

Special Committee on Chapter 517: Stuart Cohn reported that the special committee is continuing its work and will present a report at the annual meeting in June.

Special Committee on Alternative Dispute Resolution: Diane Wells announced that a report on the progress of the special committee will be placed on the agenda for the June annual meeting.

Antitrust, Franchise & Trade Regulation Committee: Steve Feidelman gave the report of the committee. Steve announced a lunch-and-learn CLE program scheduled for mid-March. Steve also announced that the committee will sponsor a full-day CLE program in September on the topic “How to Franchise Your Business.” Steve reported on Prof. Marilyn Cane’s CLE presentation on electronic storage to the committee and the impact of new discovery rules on electronic data and storage.

Bankruptcy/UCC Committee: Brad Saxton gave the report of the committee. Brad reported that Prof. Jeff Davis had presented a program to the committee on the *in pari dilecto* doctrine. Elyse Homer gave the committee a report on the upcoming filing of the section’s brief in the *DeMayo v. Chames* case pending before the Supreme Court of Florida, in which the section is appearing as *amicus curiae*. Brad reported that the committee is tracking the pending Business Law Section-initiated legislation to amend the provisions of Chapter 727 of the Florida Statutes dealing with assignments for the benefit of creditors and section-initiated legislation to increase the personal property exemption. Brad also reported on pending amendments to Articles 1 and 9 of the Uniform Commercial Code. The committee will sponsor a CLE program in March on condominium bankruptcies, which will be conducted as a call-in telephonic conference seminar. The committee will coordinate with the National Conference of Bankruptcy Judges to promote The Florida Bar and the Business Law Section at the upcoming conference scheduled to be held in Orlando in October. At the June meeting, the committee will seek funding for that effort, allowance for which has been made in the 2007-2008 budget.

Bankruptcy Judicial Liaison Committee: Judge Hyman gave the report of the committee and reported on near-record-high attendance of almost 50 people at the committee’s meeting. Kathy Gould, Clerk of the Bankruptcy Court for the Southern District, addressed the committee on the progress of electronic filing and on the anticipated difficult time ahead with budget issues. The courts are requesting that section members with connections to members of Congress assist in obtaining budget and appropriations relief. The committee also discussed local rules amendments in the Southern and Middle districts and court facilities issues in Broward and Palm Beach counties. Judge Hyman also reported on the committee chaired by Judge McEwen regarding Florida as a venue choice for bankruptcy filings. Judge Hyman also reported that future meetings of the committee, customarily scheduled on the first day of bar events (the day before other standing committee meetings), in the future will begin at 4:00 p.m. Judge Hyman also reported that the committee, which over its history has met at the midyear meetings and the section retreat, has added to its schedule a third meeting, to be held annually in June in conjunction with the annual convention of The Florida Bar.

Business Litigation Committee: Steve Fender gave the report of the committee. Steve recognized law students from the Fredric G. Levin College of Law at the University of Florida who had attended the committee’s meeting. Steve reported that the updated business litigation manual will be finished by the end of the year. The committee will sponsor a CLE program at the June meeting based on the new publication. Steve also reported on the recent administrative order entered by Thirteenth Judicial Circuit (Hillsborough) Chief Judge Manuel Menendez, creating the third

business court in the state after the Ninth (Orange) and Eleventh (Dade) circuits. The next business court initiative will be the establishment of a business court in the Fifteenth Judicial Circuit (Palm Beach). Steve also reported that the committee has been working with the Communications Committee to replace the brief bank on the website with a page on which to post information and decisions by the business courts. In line with the focus on business courts, the committee at its meeting conducted a CLE presentation with Circuit Judge Gill Freeman, Mike Higer, and Rick Gross serving as panelists in a discussion of the new Eleventh Judicial Circuit business court.

Continuing Legal Education Committee: Diane Wells gave the report of the committee on behalf of committee chair Mike Chesal. Diane pointed out the need for more lunch-and-learn programs. Diane also encouraged committees to organize CLE presentations for their June meetings.

Communications Committee: Melanie Damian gave the report of the committee. Melanie reported on the schedule for the new developments journal to be published by the section in mid-March. Lexis/Nexis has agreed to print, bind, and distribute the journal free of charge to the section, in exchange for advertising. Melanie requested a volunteer to edit the franchise section, to which Steve Feidelman responded. Melanie also reported on plans to update the section's website and requested that members furnish ideas for the website updating to Melanie or to Tracey Eller.

In conjunction with publication of the new developments journal, Diane Wells discussed the proposed contract with Lexis/Nexis, which calls for the printing of 250-300 pages, production of artwork, and distribution to members at no charge to the section. The contract has a one-year duration but is automatically renewable for two additional years unless either the section or Lexis/Nexis by July 31, 2007, notifies the other of its decision not to renew. Lexis/Nexis will be entitled to staff a table at the section retreat in September at which to display other publications and to send two representatives to the retreat free of charge. The motion to approve the contract with Lexis/Nexis and to authorize the chair to execute it on behalf of the section was made and seconded. Upon further discussion, clarification was made that the journal will include a section for every substantive committee of the section, will have the appearance of a law review-type publication, and, among other things, will cover statutory changes made during the year being covered. John Emmanuel suggested listing the committee chairs and vice chairs in the journal. The motion unanimously passed.

Computer Law Committee: Bob Thornberg gave the report of committee. Bob reported on the success of the November CLE program on cyber law and that the committee is planning a seminar for the June meeting in conjunction with the annual convention of The Florida Bar. Bob also reported that the committee has discussed certification in computer law and growing issues surrounding Metadata, spoliation of data, and changes in rules in evidentiary rules regarding electronic data.

Bob reviewed the action taken by the council at the August 2006 meeting to state the section's position on electronic filing in state court proceedings. Following that vote, Bob and Doug Cherry in September attended a meeting of the state court filing

committee. Bob reported that some of the section's concerns had been met but that others had not. In particular, the clerks of court favor the filing of papers in Word or WordPerfect format so that vendors can mine the information, producing revenue for the clerks. The clerks have proposed imposing a charge on the electronic filing of a court paper. Bob reported that the committee is continuing to work with the statewide committee on the electronic filing issues and that progress is being made.

The motion was made and seconded to amend the original section vote to add a Clause G that would require that all electronic submissions be done exclusively in portable document format (".pdf"). Rick Gross expressed the view that a per-paper filing charge is egregious and poses the risk of blocking access to the courts. Rick proposed a friendly amendment to provide for the section to oppose the imposition of a filing fee on each electronically filed court paper. Judge Olson clarified the friendly amendment to state that no action be taken to prevent access to the court, "including fees or otherwise." Rick accepted Judge Olson's clarification, and Bob accepted the friendly amendment as clarified. A vote was taken on the proposed friendly amendment, which was passed unanimously. A vote was then taken on the motion, which was passed unanimously.

Intellectual Property Committee: Jeanne Seewald gave the report of the committee. Jeanne reported that the deadline to file for intellectual property certification is February 28, 2007. The first certification examination is expected to be administered on October 1, 2007. Application can be made through the section website. One requirement of certification is 45 intellectual property CLE hours within a three-year period. The committee is planning a CLE course to provide hours and a preparation course for the examination. Jeanne also reported on a CLE presentation made to the committee on the digital millennium copyright act. Jeanne reported that Hank Coxe, president of The Florida Bar, had appointed a nine-member certification committee chaired by council member Jim Gale. Jim reported to the council that with the implementation of intellectual property certification has come a mandate to make certification more inclusive and less exclusive. Among other things, intellectual property certification is intended to include not only registered patent and copyright attorneys but also attorneys who practice intellectual property litigation including trade secret litigation. Certification initially was proposed with subcategories. In the form approved by the Bar, the categories were eliminated, but they have been maintained in the accompanying descriptive material. Jim recommended that anyone with questions about the certification program call him or Ava Doppelt. Jim reported that the requirements for obtaining intellectual property certification are less onerous than in most board certification areas. For instance, most other certification areas require that the applicant devote 50% of his or her practice to the certificated field. In contrast, the intellectual property certification imposes only a 30% requirement. In addition, lawyers who have 20 years or more experience in intellectual property practice are exempt from the examination, registered patent attorneys are exempt from two hours of the examination, and board-certified business litigators are exempt from a portion of the examination.

Corporations, Securities, and Financial Services Committee: Stefan Rubin gave the report of the committee and reported on a CLE presentation to the committee on the use of employee stock option plans in examiner actions. Stefan also gave an update on

the pending work on amendments to Chapter 617 of the Florida Statutes and the efforts to coordinate legislative initiatives with the Real Property, Probate and Trust Law Section. Stefan also reported that other bills of interest to the committee and the section likely will appear this year.

Council of Sections: Marsha Rydberg gave the report on the Council of Sections. Russ Blain reported on the September meeting. Marsha will present the council's position on state court electronic filing to the Council of Sections.

Board of Governors Liaison: Murray Silverstein, the section's liaison to the Board of Governors of The Florida Bar, reported that he will present an update on the progress of creation of business courts to the state court committee of the board. Russ Blain and Lou Conti encouraged council members to keep Murray apprised of section initiatives and actions.

Legislation Committee: Lou Conti gave the report of the committee. Lou first reported on the standing section position to support additional funding for judges. Rick Gross then reported on the business court pilot program and on proposed legislation that would expand the Ninth Circuit (Orange County) business court to a regional business court centered around the Fifth District Court of Appeal. The legislation appears to have been withdrawn. Rick reported that Representative David Simmons has announced his intention to proceed with funding of the three pilot complex litigation court programs in the Ninth (Orange), Eleventh (Dade), and Thirteenth (Hillsborough) circuits. The motion was made and seconded that the section support the funding and allocation of appropriate and necessary resources to fund complex business litigation pilot projects in those three circuits. Manny Farach reported that progress toward the development of a business court in the Fifteenth Judicial Circuit (Palm Beach) and proposed a friendly amendment to the motion to add that circuit. Rick accepted the friendly amendment. Judge Van Nortwick expressed concern that funds for the pilot projects not be derived by shifting them away from other areas of the judicial system and proposed as a friendly amendment that the motion state that the pilot project funding is to be in addition to existing court funding. Rick accepted that friendly amendment as well. A vote was taken, and the motion was passed unanimously.

Lou then presented proposed amendments to the limited liability company statute to be considered and voted on triple-motion criteria. The motion was made and seconded to support legislation that would eliminate duplicate names among limited liability companies. Lou reported that nothing under current law prevents an LLC from recording a name that has already been recorded by another entity. The proposal to eliminate duplicate names emanated from the Real Property, Probate, and Trust Law Section at the suggestion of various title companies. That section's proposed legislation requires that the name for a limited liability company be distinguished from the names of other LLC's. The Business Law Section proposal, on a parallel with existing Delaware corporate law—(1) would go the further step of requiring that an LLC name be distinguishable from the name of another LLC and be distinguishable from an existing corporation or partnership name, *unless* the permission of the prior name holder is granted in writing, and the written consent would need to be filed with the Secretary of State; (2) would

contain a “grandfather” provision that would permit existing cross-entity duplicate names on record to remain; (3) would apply to both domestic and foreign entities; (4) would conform the amendments to partnership and corporate statutes. The motion was passed unanimously.

Lou presented another RPPTL legislative proposal to amend the partnership and LLC statutes to limit creditor remedies available with respect to claims against general partnership interests (in general or limited partnerships) or LLC member interests solely and exclusively to charging liens against such partnership interest or membership interest. The proposed legislation would also prohibit foreclosure against such partnership or membership interests. The changes would provide that a pledge of all or part of a partnership interest or LLC membership interest entitle the recipient of the pledge to obtain the economic benefits of the partnership or membership interest but not have the right to become a substitute member or to vote or to force a distribution or sale of assets. The motion to adopt the legislative position was made and seconded. In essence, the legislation would limit credit remedies solely to charging liens and prohibit foreclosure. Lou stated the view that the legislation seeks to codify the development of the law through judicial decisions and to parallel very similar provisions in the Florida limited partnership statute based on uniform limited partnership provisions. Case law as it has developed in Florida suggests that the same result should accrue in a general partnership or limited liability company. The underlying goal is to prevent a third party from assuming operational control as a substitute partner or LLC member, conform to the limited partnership statute and to the position taken in *Givens v. National Loan Investors L.P.* (5th DCA 1998).

Judge Catherine McEwen requested clarification of the intent of the proposal in the instance of a single-member limited liability company. Substantial discussion ensued on the distinction between the effects of a charging order on a single-member LLC versus its effect on a multi-member LLC. Phil Schwartz emphasized the intent of the legislation as bringing the LLC statute into conformity with the limited partnership statute and uniform LLC law. Marsha Rydberg pointed out the concern that a creditor of a managing member might assert rights over management of the business. Judges Hyman and Olson recommended referral of the proposed legislation to the Bankruptcy/UCC Committee to consider the effect on bankruptcy trustees. Paul Singerman stated that limited partnerships and LLC’s have been an effective asset protection device and that the proposed legislation in fact would affect bankruptcy estates. Lou pointed out that the general partnership statute as written provides for a charging lien but does not make it the creditor’s exclusive remedy and does not prohibit foreclosure of the partnership interest, in contrast to the limited partnership statute. Stu Cohn mentioned that the legislative change may be necessary to prevent a court from substituting a creditor as a managing member of an LLC or as a partner of a general partnership. Tom Messina stated the view that there is a problem with a charging lien being an exclusive remedy and that the proposed legislation is an asset protection amendment that needs to be considered by the Bankruptcy/UCC Committee. In response, Lou pointed out that the legislation would not change existing law, that it was never intended that a creditor could replace a member of an LLC or a partner of a general partnership, that the legislation is consistent with the position taken by the section when it was considering the Revised Uniform Partnership

Act (“RUPA”), and that the legislation is intended to prevent a creditor from assuming a partner’s or member’s position and disrupting the operation of the partnership or LLC business. Bucky Fox responded to the suggestion that the legislation be referred to Bankruptcy/UCC by reminding the council that the committee will not meet again until June, by which time the legislation will have been lobbied for passage without regard for the section’s position. Stu Cohn withdrew his second of the motion, and Phil Schwartz re-seconded it. The chair called for a vote on the motion by show of hands, and upon a count, ruled that the motion had passed by a vote of 20 to 18, with Professors Davis, Cohn, and Cane abstaining.

The motion was made and seconded to reconsider the earlier vote supporting the legislation that would make a charging lien the sole remedy against a general partnership interest or an LLC membership interest. A question was raised as to whether all those who voted are voting members of the council. Howard Berlin observed that, on a vote as close as this one had been, consensus might be lacking. The chair ruled that a roll-call vote was appropriate and called for a re-vote by roll call. The motion again passed, by a vote of 20 to 19.

A further motion was made and seconded to again reconsider the vote. Judge Olson commented that the council traditionally has not take a position on a matter on which the vote was as close and the issue as controversial as this one had been. Jim Murphy proposed that the matter be tabled and referred to the Bankruptcy/UCC Committee to be considered at a telephonic meeting and then be reconsidered by the Executive Council at a telephonic meeting.

Stu Cohn expressed the view that the law on charging liens against partnership interests and LLC membership interests is very well settled and that the legislative proposal under reconsideration is consistent with the legislation that had been earlier passed and with the uniform law. Rick Gross commented that the point of the legislation is to promote consistency and that, if the section has taken a position on prior statutory changes, it should act similarly on this one to ensure that the language in the general partnership statute and the LLC statute matches that of the existing limited partnership statute. Karen Orlin commented that the proposed legislation is no different from existing law and is intended to create consistency.

The chair called for a show of hands among those who had opposed the motion on the prior vote as to who would change their votes if single-member LLC’s were to be excluded from coverage of the legislation. A majority of those who had voted against the motion indicated that their vote would change if single-member LLC’s were excluded. The motion was then made and seconded to amend the prior vote on the charging lien motion to exclude single-member LLC’s from the scope of the legislation. The motion passed unanimously.

Lou Conti on behalf of the Legislation Committee presented a further legislative proposal to support a bill to correct glitches in Chapter 608. The motion was seconded. The legislation (1) would add a footnote; (2) would correct the definition of “entity” to add the word “corporation,” which by a scrivener’s error had been omitted; (3) in the

provision to convert a general partnership to an LLC, would change the reference from “statement of registration” (which does not exist) to “registration statement”; and (4) would add a cross-reference to the LLP statute. The motion to approve the legislation was made and seconded and passed unanimously.

Membership & Law School Relations Committee: Doug Bates gave the report of the committee and reported on the “Taking Care of Business” program that had been presented at the Black Law Students Association meeting earlier that day.

Opinions Committee. Phil Schwartz gave the report of the committee. The opinion standards drafting committee comprises members of the opinions committees of both the Business Law Section and the Real Property, Probate, and Trust Law Section. The committee is continuing to work through the process of rewriting the opinions standards and is making progress.

Sponsorship Committee: Rick Gross gave the report of the committee. The committee is developing a sponsorship form. The committee has discussed entering into long-term contracts with sponsors. Rick encouraged council members to use section sponsors to present CLE presentations. Rick will be following up with council members to assist in procuring sponsors.

State/Federal Court Liaison Committee: Judge Van Nortwick gave the report of the committee. Substantial time has been devoted to the discussion of business courts. The committee has proposed publication of an article in *The Florida Bar Journal* about business courts, the nature of business courts, and the effect of the business court on case operations in the Ninth and Eleventh circuits where they have been in effect. Judge Van Nortwick also reported on the progress of the business case jury instruction committee that Judge Tom Smith is chairing. Judge Van Nortwick also reported on the perceived need to have members of the federal judiciary present at judicial liaison meetings. Judge Van Nortwick also reported that the committee has directed efforts to the need to increase the pro bono involvement of business lawyers. Numerous nonprofit entities in the state that provide services to indigents are in need of legal counsel. These are organizations to which lawyers could provide a necessary service and obtain credit for pro bono hours provide. Marsha Rydberg mentioned that Bay Area Legal Services in Tampa has such a program up and running. Judge Van Nortwick acknowledged the Tampa program but commented that the efforts have been less than effective in other parts of state and that numerous nonprofit corporations do not have lawyers assisting them.

Judge Ed LaRose discussed the activities of the complex litigation task force. Chief Justice Fred Lewis created the special task force to study management of complex litigation cases, which have a tendency to become mired and not resolved quickly. Judge LaRose reported that the task force had conducted its first working meeting. The initial goal of the task force is to identify types of cases that should be subject to special management, including cases that are outside the scope of business courts such as mass-tort cases. One issue is the development complex litigation rules. The rules developed by the Ninth Judicial Circuit rules may serve as a model. Another matter facing the task

force is developing a standard on the types of cases that are to be assigned to complex litigation courts.

Attorney-Client Privilege Task Force: Kacy Lake has been appointed to this task force and gave a report on behalf of the task force. The task force was appointed in response to the ongoing issue of whether corporations can and should waive the attorney-client privilege in order to escape criminal punishment. Some of the areas that have been suggested for consideration by the task force are selective waiver and the attorney-client privilege with respect to experts. Kacy asked council members with ideas for the task force to present those ideas to Kacy or to respond to the task force questionnaire.

Chair's Report: Diane Wells presented the chair's report. Diane commended council members and others on strong attendance and on the time and effort expended in doing the work of the committees. Diane presented a letter from The Florida Bar Foundation soliciting nominations for the 2007 Medal of Honor awards. The deadline for submitting nominations is February 14, 2007. Diane also announced the development by the Practice Management Section of CLE material on the subject "Staff Management for the Law Office."

Chair-Elect's Report: Rick Gross gave the chair-elect's report. Rick announced the dates of the section retreat, scheduled for August 3–September 3, 2007, at the Ritz Carlton/Naples. Further to his earlier comments on the part of the Sponsorship Committee, Rick informed the council that letters will soon be sent to prior and potential sponsors and solicited the help of the council in identifying potential sponsors. Rick also announced preliminary plans for the spring 2008 retreat of the Executive Council, tentatively planned for March 27–30, 2008, in Park City, Utah. Rick commented on efforts underway to price hotel room rates and on the existence of direct flights from Florida cities into Salt Lake City.

Next Meeting: Diane announced that the next meeting of the council will be held on Thursday, June 28, 2007, in conjunction with the annual convention of The Florida Bar at the Marriott World Resort in Orlando. Committee meetings will be held on Thursday of the convention, and a CLE presentation will be scheduled on Friday.

Adjournment: There being no further business to come before the council, the chair adjourned the meeting at 6:08 p.m.

Respectfully submitted,

/s/ Russell M. Blain

Russell M. Blain
Secretary/Treasurer