

THE FLORIDA BAR – BUSINESS LAW SECTION – EXECUTIVE COUNCIL
 Minutes of Meeting
 January 21, 2010 – 3:30 p.m.
 Orlando, Florida

The following members of the section and the council were recorded as being present:

Alan Aronson	Mark Nichols
Alan Howard	Marsha Rydberg
Ava Doppelt	Mark Roher
Barbara Leach	Mark Stein
Bill Wiley	Maxine Long
Brian Gart	Michael Higer
David Ackerman	Mindy Mora
Diane Wells	Peter Valori
Gary Teblum	Philip Schwartz
Gwynne Young	Rick Gross
J.C. Ferrer	Roland Sanchez-Medina
Jodi Cooke	Stefan A. Rubin
Jason B. Burnett	Stephan Nagin
Jason M. Murray	Steven Fender
Jeffrey Hirsch	The Honorable Paul Glenn
Jeffrey Davis	The Honorable Lewis Killian
John Emmanuel	The Honorable Catherine Peek McEwen
Jon Polenberg	The Honorable John K. Olson
Jude Cooper	The Honorable Michael G. Williamson
Kim Hines	The Honorable Paul Hyman
Leyza Blanco	The Honorable William Van Nortwick
Leanna Loucks	Tom Messana
Louis Conti	
Manuel Farach	

I. Call to Order; Introductions

The Chair, Louis Conti, called the council to order and welcomed the attendees to the meeting of the Executive Council. Each of the attendees introduced themselves and identified the city in which he or she practices or maintains an office.

II. Approval of the Minutes

The Chair presented the minutes from the November 5, 2009 meeting of the council prepared by the secretary/treasurer, and Stephan Nagin moved for the minutes to be approved. The motion was seconded by Rick Gross, and the minutes were unanimously approved by the council.

III. Treasurer's Report

Mindy Mora, secretary/treasurer of the council, presented the Treasurer's Report and reported on the financial statements prepared by The Florida Bar as of September 30, 2009 for the Section, which reflected that the Section had income exceed expenses by \$200,000 for the program year through November 2009.

Ms. Mora also presented the proposed 2010/2011 proposed budget which shows a \$39,000 deficiency, and sought approval of the proposed budget, subject to any refinements proposed by the council officers in order to reduce expenses to achieve a balanced budget. Philip Schwartz suggested that the budget would need to be revised to address the cost of printing the *Report on Standards for Third-Party Legal Opinions of Florida Counsel* (the "*Report*"), which will principally consist of the cost of the paper on which the *Report* will be printed. Mr. Schwartz was unsure as to the exact cost of reproducing the *Report*, but agreed to research the cost (for both paper and postage) and provide the amount to Ms. Mora. The members of the Council had a discussion about the cost of producing the *Report* being at the expense of the Section, not of the individual members. In addition, the Section will make the *Report* available to download off the Section's website. The final *Report* is expected to consist of 270 pages, and the Section will likely need to print 5,000 copies for Section members only. If the Section seeks to sell the *Report*, the Big Bar may seek a share of the proceeds generated from such sales.

Ms. Mora made a motion to approve the proposed 2010/2011 budget, subject to (a) the officers of the Section adjusting certain expenses to achieve a balanced budget, (b) providing for estimated revenue from CLE programs on the *Report* and (c) providing for the cost to print and distribute the *Report*. The motion was seconded by Mr. Gart. The motion was unanimously approved by the council.

IV. Reports of Committees and Task Forces

A. **Computer/Cyberlaw.** Steve Milbrath provided the report, and advised that the committee is trying to increase participation, particularly among younger lawyers. A number of the committee members are making written contributions to various periodicals. In addition, the committee has a seminar on computer and cyber law issues planned.

B. **Intellectual Property.** Robert Thornberg provided the report, and advised that the First Annual IP Symposium is planned for March 25 and 26, 2010 in Tampa. Mr. Thornberg

requested that each of the lawyers on the council suggest to the lawyers their respective firms that they attend the Symposium. The committee is going to seek a sponsor for the Symposium. Mr. Thornberg also provided an update on certification and advised that the committee agreed to increase from 30% to 50% the percentage of a lawyer's practice needed to obtain certification in the intellectual property area. Mr. Thornberg also provided an update on uniform patent rules in the Middle District. Mr. Thornberg requested that the Section bifurcate the computer law committee and the IP committee meetings in the future.

C. Antitrust, Franchise & Trade Regulation: Jason Murray provided the report, and advised that the committee meeting was well-attended with committee members, as well as members of the Diversity Committee. The committee is working on the statute addressing covenants not to compete in Florida. The issue recently arose in a Winn Dixie case dealing with a restrictive covenant in a lease. The committee is trying to modify the statute to make clear what the statute covers, and may be need to expand the overall modification of Fla. Stat. sec. 542.335. The statutory modification will also address esignatures on covenants not to compete. The committee will work with the business litigation committee on these revisions and will produce a white paper on the issues addressed by the proposed statutory modifications.

The committee also has other publications and articles being produced, including on the issue of how recent cases are affecting affirmative defenses in Florida.

Mr. Murray advised that the committee is working on programming for the committee meeting at the Bar's annual meeting, which may be a 90-minute CLE program. As part of that effort, the committee is seeking a representative from the Obama administration to speak on antitrust issues.

D. Bankruptcy/UCC committee: Jason Burnett provided the report, and advised that over 40 committee members were in attendance at the committee's meeting. The attendance list included 6 bankruptcy judges from around the state of Florida.

The committee considered two matters which required triple motions. The first issue relates to the adoption in Florida of UCC Article 7, which is being promulgated by NCCUSL. The primary thrust of this article deals with electronic documents of title, and is not viewed as controversial. Article 7 has been adopted by 36 states, but not Florida nor New York. The committee is reviewing article 7 to see if the article requires any minor modifications to be consistent with Florida law. The focus of the article is that by becoming a holder and potentially a holder in due course of documents of title entitles the holder to delivery of goods if the holder has control. To establish control, a jurisdiction needs systems in place to evidence that the documents reliably prove a holder has control. The committee voted unanimously in favor of a triple motion which was presented to the council by Professor Davis. Mr. Schwartz seconded the triple motion. The council voted unanimously to approve the triple motion.

Mr. Burnett presented the second issue which required a triple motion: This triple motion seeks a modification of Fla. Stat. sec. 222.201 to make exempt accumulated child support and alimony, so long as such funds are reasonably necessary for support of child and spouse. The triple motion was made by Mr. Burnett and was seconded by Ms. Rydberg. The council passed the triple motion unanimously.

E. **Judicial Liaison Committee:** Judge Paul Hyman provided the report, and advised that the committee meeting was well attended, including attendance by six bankruptcy judges representing each of the judicial districts within the State of Florida. The chief judge from each district provided a report as the matters pending within his district, and reports were also provided by a representative from each of the local bankruptcy bar associations. Reports were also provided from the clerk's office in two of the three districts. The committee meeting then turned to a discussion of issues of concern by various practitioners. One of the issues discussed was uniform procedures to be employed in connection with motions for relief from the automatic stay \in the Middle District of Florida. .

F. **Business Litigation:** Jon Polenberg provided the report, and advised that the committee had a vigorous meeting. The primary focus was on various legislative matters. Two triple motions were presented. The first matter requiring a triple motion is prefiled bill SB 1108, with a companion bill in House. The bill addresses the issue raised if a trial court loses jurisdiction, and the ability of the court to issue a sanctions motion. The committee recommended that the Section provide technical support to correct bill; as it doesn't quite work as drafted. Mr. Polenberg made a triple motion is to provide technical input to SB 1108 and the companion bill in the House. Mr. Nagin seconded the motion. The motion was passed by the council unanimously.

The second triple motion is to provide technical input to sponsors of a bill that essentially provides for a private judge statute which enables the chief judge of a circuit to appoint retired judges to hear motions and trials with per diem payment by the parties to a litigation. The draft bill needs to be refined to achieve the goal of expediting matters through the court system. Mr. Polenberg made the triple motion, which was seconded by Mr. Gart. During discussion, the observation was made that the criteria for requesting a private judge is ambiguous, and needs to be better defined. As drafted, the committee opposes the proposed bill, but wants to work with the bill sponsors to create a protocol that works. Following discussion, the council passed the triple motion unanimously.

G. **Communications:** Peter Valori provided the report, and advised that the committee had a short meeting, during which the committee members discussed the Section website. The website is being updated with a pictures of all members of the council, and a picture of the leadership of the Section on the website opening page. Mr. Valori requested that each committee chair provide an updated description of the work of his/her committee. In addition, each committee needs to provide a submission for the Journal, which should be delivered to Leora Hermann. The Section is seeking sponsorships in order to support the cost of producing the Journal, and is trying to work with Donnelly to print the Journal. If the Section is unable to obtain sponsors and the support of Donnelly, the Journal will cost the Section \$15,000 to \$20,000 to print.

H. **CLE.** Alan Aronson provided the report, and advised that lunchtime CLE's are continuing. Mr. Aronson advised that the process for producing these seminars is well-organized and easy to set up. On February 4, 2010, the Section is presenting a lunchtime CLE entitle "Fundamentals of Accounting." Mr. Aronson noted that this is an easy way to encourage sponsorship by allowing the sponsor to make a presentation to Section members.

I. **Corporations, Securities and Financial Services:** J.C. Ferrer provided the report and advised that the committee engaged in a discussion on Fla. Stat. chapters 607 and 608, as well as a discussion of the state's efforts to sunset the Division of Corporations and to roll the Division into the Department of Revenue. The Section continues to oppose this effort. Mr. Ferrer encouraged all of the council members to send letters opposing the state's efforts to sunset the Division of Corporations.

J. **Diversity Committee:** Jason Murray provided the report and advised that the committee had organized the Section's attendance at the Minority Mentoring Picnic in Miami-Dade county, which was organized by John Kozyak which drew in state-wide attendance from practitioners, judges, and students. A number of Section members volunteered to represent the Section at its booth to speak with students and other attendees at the Picnic, including Mindy Mora, Rick Gross, Melanie Damien, and Peter Valori. Mr. Murray noted a few of things that the Section should have prepared in order to be prepared for these types of events, such as signs, banners, and printed brochures about the Section which highlight its focus, work and substantive law committees.

Mr. Murray reported that there is a second picnic scheduled in Tampa at Stetson on February 27, 2010 from 11 a.m. to 4 p.m., which will mirror the South Florida event. Given that this will be at target rich environment to attract new members, Mr. Murray suggested that the Section offer a give-away to obtain attendees' business cards, and requested authorize the Section authorize the purchase of a prize such as a Wii system or Sony Playstation, to entice prospective members to find out about the Section. Mr. Murray estimated the cost of the banner at about \$100, a giveaway at \$200, plus other give-aways such as pens, for a total of \$750. Mr. Murray made a motion for the Section to authorize the committee be permitted to expend \$750 to be used for printing and giveaways. The motion was seconded by Mr. Polenberg, and was carried unanimously by the council.

Mr. Murray also began a discussion about the 2010 Retreat. The Diversity Committee wants to put on program addressing diversity within the profession. The committee's suggestion to invite in-house counsel to talk about why diversity is important to get and keep business, as well as the chairs of various firms about their firm-wide initiatives about challenges of achieving diversity in firms. Mr. Murray advised that this program will need to be able to offer speakers reimbursement for their travel and lodging, and that the committee anticipated having a 3 person panel for this program. After discussion, Mr. Murray agreed that the committee would try to get sponsors for this program, and to work with the Retreat Committee to finalize the arrangements for this program.

K. **FICPA Liaison Committee:** Diane Wells provided the report, and advised that the committee was trying to redefine its mission, and therefore its report to the council will be on hold until then.

L. **Legislation:** Bill Wiley provided the report of the committee, and advised that the Section will be opposing the sunset of the Division of Corporations. Mr. Wiley requested that all Section members need to oppose this effort. In addition, Lou Conti needs to draft a letter on behalf of the Section, which Mr. Wiley can edit, as appropriate, to provide a template for Section members to use to communicate with their legislative representatives. Valerie

Yarbrough will assist in getting the template distributed and posted on the Section's website so that all members can make communicate with their legislators. Mr. Wiley further advised that there are many pre-filed bills this legislative session, so the committee will be very busy reviewing proposed legislation of interest to the Section and will need the assistance of all of the substantive law committees to assist in that review.

M. **Long Range Planning:** Judge Williamson advised that the committee did not have any report for the council.

N. **Membership & Law School Relations:** No report.

O. **Retreat & Sponsorship:** Alan Howard provided the report, and advised that the committee is hard at work in planning the Section 2010 Retreat in Naples. In 2009, the Section reversed the recent historical trend of losing money, and was able to realize a profit of \$10,000. This was achieved through modifying expenses in the food and beverage area, increased registration fees and increased vigilance in ensuring attendees paid for all Section fees charged. This effort will continue through the 2010 Retreat. This year, we will be celebrating the 40th anniversary of the Section and will include special events at Retreat to commemorate the occasion. In 2009, the Section had tremendous sponsor support amounting to \$87,000, which was the highest sponsorship level ever achieved. Mr. Howard requested that the Section offer kudos to Lisa Schiller and her entire retreat committee.

The committee needs to know about each Section committee's needs for meeting times and potential conflicts. The committee inquired whether the business courts presentation should be done again on an annual basis, or whether the Section should skip this presentation this year. Mr. Howard further questioned whether the business court judges possibly limit their formal involvement to State/Federal Judicial Liaison Committee meeting.

P. **State/Federal Judicial Liaison Committee:** David Ackerman provided the report and advised that the committee has prepared a manual on practice issues. The committee sponsored a very successful luncheon presentation by judges from the Middle District of Florida, which was moderated by Judge Scriviner. Case summaries of various decisions from the business courts around the state are being prepared by Manny Farach and are being distributed to committee members.

Q. **Council of Sections:** Marsha Rydberg provided the report, and advised that upcoming legislation is being drafted by the RPPTL which will provide for non-judicial foreclosures.

R. **Board of Governors:** Gwynne Young provided the report, and advised that the BOG is considering advertising rules changes. The BOG has a meeting next week in Tallahassee. The BOG needs to review each of the section's budgets as part of deciding upon the Big Bar budget.

Ms. Young also reminded the Council about the Section's involvement in the Florida Attorneys Saving Homes (FASH) program. Ms. Young is the coordinator of the pro bono committee for the RPPTL section. FASH is still an active pro bono program, and there are still many Florida residents that need help. If any of the Section members are interested in

volunteering, there is a real need for more volunteers. Many of the courts are requiring mandatory mediation in foreclosure cases. FASH volunteers are being used to represent parties in these mediations. Ms Young also made a request for speakers to talk about the FASH program, particularly in Jacksonville, Orlando, Gainesville and the Panhandle.

Judge Van Nortwick reminded the Council that he is the chair of the Florida Bar Foundation and oversees the Florida Association of Legal Services, which oversees pro bono programs for the Bar. For a number of years, there have been increases in the number of practitioners and amount of hours provided for pro bono services in the State of Florida. But recently, the trend of greater participation has stopped and the numbers of lawyers participating in pro bono activities has been decreasing. This contradicts the reports from lawyers who participate in pro bono activities who report greater professional satisfaction. With a grant from the Florida Bar Foundation, the Bar has started a campaign to get younger lawyers involved in doing pro bono work. Unfortunately, the program started at the same time as the recession began. There is a new program matching lawyers with kids aging out of foster care. The program provides web-based training and legal checklist for lawyers doing this work. The Foundation wants this Section to provide support to lawyers of Section doing pro bono work, and has a brochure to solicit lawyers interested in doing pro bono work.

S. Third party opinion standards: Philip Schwartz provided the report of the special committee's three year effort to prepare this joint report on third party opinion standards with the RPPTL Section, which has already approved the report.

The Opinions Committee set out to accomplish two things. First, the Committee wanted to produce a useful practice guide for lawyers, who need guidance to render opinions. The joint report includes four annotated forms of opinion letters, which will be put on the Section's website.

Second, the Committee believes it is important to reflect what is the customary practice within the state for third party legal opinions. The applicable standard of care for Florida lawyers is based upon the practice with respect to opinions within the jurisdiction. Customary practice is both a sword and a shield. If an attorney performs the due diligence required to support his/her opinion, the attorney ought to be protected from claims of third parties or clients. If the attorney fails to perform the requisite due diligence, the attorney may have a problem. If customary practice is the standard of care, then opinions should be interpreted under this report.

There will be a comment period. The report will be widely disseminated. For example, Maryland issued a report in 2007 and took comments thereafter, and subsequently issued a supplement. The Florida committee took a different tack.

The Opinions Committee sought approval by the Executive Council of the joint report. The report will be subject to comments, so the Committee may be back in September if revisions are needed due to comments.

A motion was made by Mr. Schwartz to approve the joint report subject to any comments received by June 30, 2010. The motion was seconded by Judge Williamson as restated. The

report will be disseminated subject to comments. If any comments are received through the comment period ending June 30, 2010, then the Committee may seek to revise report.

The Business Litigation Committee expressed concerns about certain assumptions. One is that it is assumed that the opinions report is incorporated in all opinion letters even if not so stated in an opinion letter. The report recognizes that judges may inappropriately not evaluate an opinion based upon the standards set forth in the report. However, no business litigator was involved in the discussion on this issue. The Business Litigation Committee requested more time to review the report to resolve their concerns about this issue. However, the Opinions Committee was unwilling to wait to issue the Report, and wanted to issue the report subject to the comments period.

The Chair of the Council called the question, and a vote was taken. Fifteen Council members voted in favor of the motion, while thirteen Council members opposed the motion. Judge McEwen abstained. Based upon the vote, the motion carries.

T. **LLC Drafting Committee.** Lou Conti provided the report, and advised that the LLC Drafting Committee is presently a small working group, which is encouraging others to become involved. If any member of the Section has any interest in the LLC Act, including judges, litigation attorneys, or anyone else, the Committee is encouraging them to get involved. A two-day drafting session is planned on February 25 and 26, 2010 in Miami. The Committee is continuing to have monthly call in sessions.

U. **Chair Elect Report:** Michael Higer provided the report, and advised that the Spring 2011 Executive Council meeting will be held in Amsterdam. Mr. Higer indicated he is seeking volunteer to assist him in planning the trip.

Next year, Mr. Higer reminded the Council that the Big Bar is not holding Mid-Year meeting, and inquired whether the Section have a January meeting. Otherwise, there will only be an Executive Council meeting in November and Spring. Mr. Gross made a suggestion that the Council skip the November Council meeting and instead meet as a whole section in January at a fly-in location, given the Section's need for a January meeting for legislative planning purposes. Mr. Wiley and Mr. Conti concurred.

V. **Chair's Report:** Lou Conti provided the report. On behalf of Greg Yadley, he requested that Section members please attend the Federal Securities Institute in Miami. For Peter Valori, Mr. Conti reminded the Council that articles are needed for the Florida Bar Journal.

Mr. Conti reviewed the events scheduled for the Toronto Spring Retreat. Council members are invited to fly in on Wed., April 28, 2010. There is a full itinerary planned with a reception planned at Blake Cassels & Grayton LLP with a presentation on the Canadian legal system. A dinner is scheduled for that night.

On the 29th, there will be a guided tour of Toronto for 3 hours, including the CN Tower, a lunch at Stikeman Elliott, if the weather is good, and a ferry ride across the lake. That night, there will be a reception by our Section for members of the bench and bar of Ontario.

On Friday, there is an all day trip planned to Niagara Falls with a ride on the Maid of the Mist. There will be an Executive Council meeting on the bus on the way to Niagara. Lunch is planned at Niagara on the Lake. There will be a tour of three wineries with tastings. There will be a group dinner that night for those who elect to go out.

Saturday, a group breakfast is available. A series of tours will be offered on Saturday based upon your preference. That evening, a special event farewell dinner will be held at the Four Seasons.

On Sunday, a brunch will be offered at the Four Seasons, before parties depart. For those who stay, there will be golf or a visit to the Lake Country.

This is expected to be an active trip, and will provide an opportunity for Council members to meet with members of the Toronto bar.

V. Adjournment

The meeting was adjourned upon the motion by Mr. Conti which was seconded by Ms. Mora.