

THE FLORIDA BAR—BUSINESS LAW SECTION—EXECUTIVE COUNCIL
Minutes of Meeting
AUGUST 13, 2006—KEY BISCAWAYNE, FLORIDA

The regular meeting of the Executive Council of the Business Law Section of The Florida Bar was held on August 13, 2006, at the Ritz Carlton/Key Biscayne on Key Biscayne, Florida, in conjunction with the annual retreat of the section. Chair Diane Noller Wells called the meeting to order at 8:47 a.m. Diane noted the camaraderie and good cheer observed throughout the three-day retreat. Members of the Executive Council and guests introduced themselves.

Members Present: The following members of the Executive Council were recorded by sign-in sheet as being present at the meeting:

Stuart D. Ames	Samuel A. Lewis
Alan H. Aronson	Maxine Master Long
Daniel H. Aronson	John B. Macdonald
Robert W. Barron	Hon. Catherine Peek McEwen
Douglas A. Bates	Thomas M. Messana
Hans Christian Beyer	Stephen D. Milbrath
Russell M. Blain	Mindy A. Mora
Jason B. Burnett	James B. Murphy, Jr.
Marilyn B. Cane	Karen J. Orlin
Douglas A. Cherry	Mark S. Roher
Michael B. Chesal	Joel B. Rothman
Roberta A. Colton	Stefan A. Rubin
Louis T.M. Conti	Marsha G. Rydberg
Melanie Emmons Damian	Bradley M. Saxton
Prof. Jeffrey Davis	Lisa M. Schiller
Denise D. Dell-Powell	Jeanne L. Seawald
John D. Emmanuel	R. Scott Shuker
Manuel Farach	Paul Steven Singerman
Stephen M. Feidelman	Hon. Thomas B. Smith
G. Steven Fender	Mark E. Stein
Henry H. "Bucky" Fox	Gary I. Teblum
Brian K. Gart	Robert H. Thornburg
Merrick L. "Rick" Gross	Hon. William A. Van Nortwick, Jr.
Jeffrey A. Hirsch	Lori V. Vaughan
G. Alan Howard	Diane Noller Wells
Elena Paras Ketchum	Mark J. Wolfson
Hon. Edward C. LaRose	Donald A. Workman
Thomas A. Lash	

Also present were other section members; guests; the section's program administrator, Austin Newberry; and the section's lobbyist, William B. Wiley.

Approval of Minutes: The minutes of the previous meeting, held on June 22, 2006, at the Boca Raton Resort & Club in conjunction with the annual meeting of The Florida Bar, were read. The spellings of the names of Judge Catherine Peek McEwen and William B. Wiley were corrected. The minutes were approved as corrected.

Treasurer's Report: Secretary/Treasurer Russ Blain presented the treasurer's report. The June 2006 Unaudited Statement of Operations, which had been distributed to council members, was discussed. Russ reported that the section has begun the 2006-2007 year in good financial condition. Russ also reported that the budgeting process for the 2007-2008 fiscal year will begin in October 2006.

Special Committee on Chapter 517: Lou Conti presented the report of the special committee charged with studying Florida Statutes Chapter 517, the Securities and Investment Protection Act, which sets forth rules for broker dealers and investment advisers and deals with investor fraud and deceit. Lou reported that the subcommittee has been charged with examining the statute in the three broad areas of (1) investor protection; (2) regulation of the investment community and specifically unlicensed broker dealers and investment advisers; and (3) the issue of whether capital formation should be made easier in the state of Florida. Lou commended dedicated section members whose involvement has benefited the subcommittee. Lou reported that the top tier at the state level, including Securities Commissioner Don Saxton, have embraced section members as colleagues. Lou also commended the work of the administrative rulemaking subcommittee chaired by Judge William Van Nortwick. Lou reported that the subcommittee is on track toward making positive accomplishments.

State and Federal Court Liaison Committee: Judge William Van Nortwick gave the report of the committee. Judge Van Nortwick reported on the organization of a meeting of general counsel of Florida corporations to be held in Tampa on September 12, 2006, and of the development of a critical mass in connection with that meeting. Judge Van Nortwick reported on the growth of the complex litigation division in circuit court in Orlando, where Chief Judge Geary has met with representatives of the business community and has offered to make Orlando a statewide court of choice for complex business litigation. Judge Van Nortwick noted that Miami also has an interest in developing a complex litigation division. Judge Van Nortwick reported that the business community has an interest in making money available to make business courts a reality. Judge Van Nortwick also reported on initiatives of Supreme Court Chief Justice Fred Lewis, including pattern jury instructions and a second task force. Administrative orders are expected in both those areas. Judge Van Nortwick also informed the council of invitations having been extended to Eleventh Circuit (Dade County) judges to hear Judge Farina at the prior Thursday night's opening dinner of the retreat.

Judge Van Nortwick also reported on the ongoing study by the Supreme Court to determine whether to create a new district court of appeal or to realign the existing district courts of appeal, responding to, among other things, case pressure, recently from southwest Florida and previously from Jacksonville, Fort Lauderdale, Pensacola, and Orlando. The second of a series of task forces is focusing on this issue and is taking

input from lawyers and segments of the bar as to whether a shift in jurisdiction or a new district court of appeal is needed. A public hearing is scheduled for September 11, 2006, in Orlando. The State and Federal Court Liaison Committee intends to have input in that hearing and in the process. Judge Van Nortwick encouraged every lawyer to access the www.flacourts.org and to provide input. It appears that the determination may be made that a new district court of appeal is not needed, but the issue of the creation of branch courts or new jurisdiction is less certain. One possibility is the creation in Fort Myers of a branch of the Second District or moving jurisdiction of the Twentieth Circuit (Fort Myers) from the Second District to the Third District.

Chair Diane Wells asked Judge Van Nortwick to coordinate sending letters of appreciation to the judges who participated in the retreat.

Antitrust and Franchise Committee: Steve Feidelman gave the report of the committee. Steve invited existing members to become active in the work of the committee. Steve also reported that on a “lunch and learn” seminar on noncompetition agreements to be led by Jim Gale in November, a CLE program on dealer termination issues planned for 2007, and a CLE program on franchising a restaurant business.

Bankruptcy/UCC Committee: Brad Saxton gave the report of the committee. Brad reported that the annual “View from the Bankruptcy Bench” will be held in Tampa on October 19, 2007, and in Miami on October 20, 2007. Brad also reported that a subcommittee chaired by Mike Brundage is studying proposed amendments to Article 7 of the Uniform Commercial Code.

Brad also reported on the subcommittee studying amendments to Florida Statutes Chapter 727 governing assignments for the benefit of creditors (“ABC”). Mindy Mora chairs the subcommittee. Brad asked Mindy to provide to the council meeting an overview of the proposed changes, which are intended to be brought before the council for a vote at the November meeting. Mindy reported on the often-confusing nature of the ABC statute, which is essentially the state court insolvency statute. In an assignment, there is no plaintiff or defendant, the assets are assigned to the assignee, there are no preference recoveries, and there is no equivalent to the Office of the United States Trustee. The original statute, enacted in the 1980’s, has not been updated since then. The ABC task force has studied issues that the assignees in ABC cases have been encountering, case law, and developments under case law, and has addressed needed amendments. A proposed revised statute showing redlined additions and deletions to the statutes has been posted on the section’s website, and additional changes will be posted. Mindy asked that the revisions to the statute be considered at the November meeting. Mindy summarized the proposed revisions as follows:

- Judgment lien creditors would retain lien rights but not to seek recovery against real or personal property by judicial process
- Clarify that assignee would receive assignment of tort claims and right to enforce such claims for the benefit of creditors

- Assignee could sell legal action including tort claims to yield funds for benefit of creditors
- Defendant in tort action could not rely upon bad acts by assignor as a defense
- Provide for assignee to operate assignor's business for up to 14 days
- In absence of objection and court order, assignee could continue to operate business up to 45 days
- Landlord would retain rights outside the assignment proceeding, but landlord would be entitled to claim in the assignment proceed in the amount of rent for actual use plus maximum of one year's rent (recognizing that landlord can mitigate damages)
- Cap employment contract damages at one year of wages from date of termination
- Court order would authorize sale of assets in the absence of objection
- Give creditors standing to object to claims
- Require assignee to prepare and maintain claims register
- Require creditors to file claims within 60 days, or 10 days after report of assignee
- Update priority claim amounts
- Damage arising from securities purchase agreement (rescission or fraud) would have same priority as the security that was subject to the purchase agreement

The Bankruptcy/UCC Committee has voted to approve the proposed changes as currently redlined and has proposed that the changes be posted on the website and submitted to the Executive Council for approval at its November meeting.

Brad also reported that the committee had voted to approve a proposed amendment to Chapter 222 dealing with exemptions. The committee proposes to add subsection (4) to §222.25 to provide that, if a resident debtor does not claim the benefit of a homestead exemption, the debtor would be entitled to claim an exemption for personal property not to exceed \$4,000. The proposal is based upon a study done by a subcommittee chaired by Doug Neway. The subcommittee considered Florida's reputation as a debtor's haven, personal property exemptions in effect in other states, and the potential loss in asset distribution, which the subcommittee concluded would be

minimal. Brad made a triple motion on behalf of the Bankruptcy/UCC Committee that the statutory amendment be approved. The motion was made and seconded and was passed unanimously.

Bankruptcy/Judicial Liaison Committee: Brian Gart gave the report of the committee. Brad reported that the committee's meeting had been well attended by lawyers and bankruptcy judges. Brad also reported that the committee had adopted a new approach of developing an advance agenda and scheduling presentations by members and judges, including reports to the committee by Mindy Mora on changes to committee disclosure requirements under §1102 of the Bankruptcy Code (as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005), by Judge Laurel Isicoff on §363 guidelines adopted by the Bankruptcy Court for the Southern District of New York, and by Judge Catherine McEwen on public access to bankruptcy courts. The accompanying have been posted on the website. Brian also reported that the committee, which presently meets in January at the midyear meetings of The Florida Bar and in August at the section retreat, is considering adding a third meeting to its annual schedule. Brian also reported on the activity of the committee's page on the website. Chair Diane Wells asked Brian to send notes of appreciation to the bankruptcy judges who had contributed to the committee's work.

Business Litigation Committee: Steve Fender gave the report of the committee. Steve reported substantial attendance at the committee's meeting. Steve also reported that two lunch-and-learn programs are planned. Steve also reported on the progress of the development of a business court in Miami has made significant progress. Steve also reported on a proposal to make the Florida standard for expert testimony equivalent to the *Daubert* principle in effect in federal court and the correlating rules of evidence. The committee intends to vote electronically before the November meeting of the Executive Council. Bill Wiley informed the council that it can vote as late as January inasmuch as the legislation has already been proposed. Steve also reported that case notes and recent developments are being formulated. Steve also reported that a one-hour CLE program on closing arguments was presented by trial lawyer Irwin Gonzalez.

Continuing Legal Education Committee: Mike Chesal gave the report of the committee. Mike reported having attended the meetings of the substantive committees to coordinate their CLE activities. The goal is for each substantive committee to schedule two lunch-and-learn programs per year. Mike also reported that the CLE calendar for the year will be posted on the website for the benefit of members and prospective members of the section.

Communications Committee: Sam Lewis gave the report of the committee. Sam reported the decision of the committee to eliminate the quarterly publication and to replace it with a case law update and journal similar to the publication of the Committee on Business and Corporate Litigation of the Business Law Section of the American Bar Association. Sam also reported on the startup of a marketing attempt. Each committee chair will be given a deadline within which to provide a written report on the committee's activities in order to attract members from the general bar. The committee also has

proposed recording lunch-and-learn programs, which would then be made available to download. Sam also reported that the website is being used extensively, as evidenced by 2,300 unique visitors to the site during the month of June. The committee considers the design of the website to be good but is considering some redesign elements that would improve the site.

Computer Law Committee: Robert Thornburg presented the report of the committee. Robert reported on the successful four-hour CLE program on Metadata. The committee is continuing to discuss the issue. Three lunch-and-learn programs are planned on the topics of electronic discovery and Metadata, authentication of evidence, and a case law overview. The committee is also planning a seminar to present at the annual meeting in Orlando in June and a seminar by to be presented by Steve Zeplar on authentication of electronic evidence

Robert Thornburg and Doug Cherry presented the committee's report on a uniform electronic filing system and centralized state court database proposed by Supreme Court Justice Barbara Pariente. A pilot program is underway in the 13th Circuit. Manatee County is launching one in the next few months. Concerns have been raised over the selling of private information for profit by the clerks of court and the use of third party vendors. Another issue is the proposed filing in native rather than .pdf format, raising the concern that a native document with attorney comments and other information creates a risk of selling certain information for profit. One other issue is the charging by commercial vendors of a per-filing fee and the resulting issue of access to the courts, especially if electronic filing becomes the only point of access. The specific concern is that this could present the risk of limiting access and the ability of public to view filings. Robert and Doug reported that the committee had conducted a two-hour debate on this topic and was of the consensus that it should provide some policy guidelines for the electronic filing system and serve as a resource, and made the following motion and recommendation of the committee:

It is the unanimous recommendation of the Computer & Cyber Law Committee of the Business Law Section that any electronic filing system to be adopted by the state court system in Florida should (a) incorporate and reflect adequate and effective security policies; (b) not prevent or hinder access to the courts; (c) provide public access commensurate with the nature of the case and in accordance with Florida law; (d) utilize vendor neutral standard formats; and (e) take measures to prevent the commercialization of unique personal identifiers.

The motion was made and seconded, and substantial discussion ensued. The committee is of the view that a uniform access portal is preferable and that clerks can maintain the backend. The real concern regards confidentiality. In that regard, the committee considered limiting access rights. A number of issues need to be considered and will be debated. The view of the committee is not necessarily to adopt PACER system, but to consider various features of PACER and other systems. The committee therefore proposed approval of its motion as a policy guideline that it can present when attending the program in September. Pilot programs in various circuits can be a testing

ground for the privacy concerns are overstated. The issue is electronic access rather than electronic filing. Mark Stein commented that many of these issues have been worked out in the federal electronic filing system. The 67 clerks will use some of this personally identifiable information to sell it. Mark Wolfson suggested that the Business Litigation and the State/Federal Court Liaison committees work with Computer & Cyber Law. Judge Tom Smith suggested the committee communicate with state attorneys. Bucky Fox suggested that the goal be to promote uniformity. Bucky proposed as a friendly amendment a uniform user interface statewide to the extent feasible. Council members will give guidance and support to Robert and Doug in their preparation for the meeting in September with court personnel, clerks, and technologists, appointed by Supreme Court. The amendment was accepted.

At the conclusion of the discussion, a vote was taken, and the motion was unanimously adopted.

Corporations, Securities, and Financial Services Committee: Stef Rubin gave the report of the committee. The committee has discussed changes to the Model Business Corporation Act, Chapter 617, and Chapter 608. Chapter 617 is being discussed at the behest of the Corporations Division of the Office of the Secretary of State to consider aligning it the for-profit provisions of Chapter 607. Proposed areas for consideration are electronic voting, appraisal rights, and other provisions. The Corporations Division has requested that changes be made to certain procedural matters and to filing fees. The committee is also considering various provisions of the Model Not-for-Profit Corporations Act and has concluded there certain changes need to be made. A redlined version of the proposed changes to Chapter 617 was included in the package of documents provided to council members.

Prior to 1994, the Florida not-for-profit statute made provision for derivative actions members could bring on behalf of a corporation, bridging Chapter 617 to Chapter 607. The bridge provision was eliminated in 1994. One proposal is to reenact the bridge provision. Another proposal would require that, in the merger of a not-for-profit corporation, the surviving entity be a not-for-profit. The Model Act categorizes not-for-profit corporations into three categories. The committee proposed instead the two categories of mutual benefit corporations and non-mutual benefit corporations.

The proposed changes have been presented to the Tax Law and Real Property, Probate, and Trust Law (“RPPTL”) sections. Comments made by the Tax Law Section are nonsubstantive. The RPPTL Section has expressed concern about the effect of the proposed statutory changes on condominium associations. The condominium association issue potentially could be resolved by including a provision to the effect that, in the instance of a conflict between the not-for-profit provisions and the condominium chapters, the condominium chapters would apply. That left a further RPPTL Section concern that, although a new not-for-profit provision might not be in actual conflict with the condominium statute, it might nonetheless be inappropriately applied to a condominium association. The latter concern was addressed by adding a sentence to the new §617.703 to state that the provisions of §§617.0606 through 617.0608 not apply to

corporations regulated by the condominium, cooperative, and homeowner association acts.

One additional change adopts the definition of “distribution” contained in the Model Act. Stef moved for approval on a triple-motion basis of the proposed changes, and Stuart Ames seconded the motion.

Bucky proposed a friendly amendment relating to §§617.603, 617.604, 617.605, and 617.01 through 617.06 in the instance in which it becomes necessary for a member to go to court. As presently written, the statutory language provides that in the event of a finding of noncompliance, the court “shall” award attorney’s fees. The proposed friendly amendment would change the §617.1604 language to make the award of attorney’s fees discretionary by changing “shall” to “may.” The motion to amend the triple motion was made by Bucky and seconded by Jim Murphy. Stef reported that this issue had been discussed by the committee and voted down. Stu Ames commented that the statute as drafted further provides instances in which attorney’s fees will not be applicable. Bucky commented that the court must consider whether the failure to file records was based on some viable reason. Discussion on the amendment was concluded, and a vote was called. The amendment failed on a hand vote.

Discussion on the motion to approve the draft legislation was concluded, and a vote was called. The motion was passed, with Bucky Fox casting a negative vote.

Law School and Student Relations Committee: Lori Vaughan gave the report of the committee. The committee has adopted as its primary goal reaching out to new members of the bar. In that initiative, the committee intends to highlight networking and CLE activities and to continue law school programs with Stetson University College of Law, University of Florida Fredric Levin College of Law, and Nova University College of Law. The committee is also seeking to make inroads with other law schools. Lori encouraged council and section members to be present and introduce themselves to law students.

Council of Sections: Marsha Rydberg reported on the activities of the Council of Sections of The Florida Bar. Marsha reported that earlier issues on the allocation of seminar proceeds between sections and the Bar have been primarily resolved. Some of the smaller sections, however, are having trouble making ends meet. Some effort is being made to prevent going from the 90%/10% split to an 80%/20% split this year. Mike Chesal commented that this issue may not have much impact on the Business Law Section because of the reduction in the number of traditional CLE programs. Marsha commented that the 90%/10% split provides incentive to do traditional CLE, among other factors.

Intellectual Property Committee: Jeanne Seewald gave the report of the committee. Jeanne reported that the Florida Supreme Court has approved certification for intellectual property and that the Bar will be appointing a certification committee. Jeanne also reported that the committee is working to schedule several lunch-and-learn

programs within the next several months. Jeanne also reported on the creation of a task force on proposed local patent rules. Its initial effort will be to propose these local rules to the Middle District, where there is perceived to be receptiveness on the part of federal judges.

Legislation Committee: Lou Conti gave the report of the committee. The committee has begun its watch of proposed 2007 legislation, including matters carried over from the 2006 legislative session. One proposed piece of legislation is a change in the limited liability company statute to eliminate duplicate names. Also on the agenda for 2007 will be proposed glitch legislation. Russ Blain reported that the legislation tracking chart from the 2006 session has been posted on the section's website.

Long-Range Planning Committee: Roberta Colton gave the report of the committee. Roberta reported on the long-range planning effect of the replacement of the quarterly periodical with the new case law update and journal that will be published annually.

Opinions Committee: Phil Schwartz gave the report of the committee. The committee has adopted goals and objectives. Its primary goal is to create normative opinion standards that accurately reflect practices in the state and to produce guidelines, not mandates. The committee has set as an objective to be well underway by January. Committee members have begun a dialog with members of its counterpart committee of the Real Property, Probate, and Trust Law Section in an effort to produce a single report on legal opinions that would establish the clout of both business and real property lawyers behind the opinions report, an approach that has worked in other states. The Executive Council of the RPPPTL Section met over the past weekend and is supportive of the joint opinion standards concept. At a national level there is some feeling that the concept of normative opinion standards has not as yet taken hold. Having worked in Florida, it may form a standard for the rest of nation. The committee will report back to the Executive Council in January.

Sponsorship Committee: Tom Messana gave the report of the committee. Tom thanked Tom Lash, Mindy Mora, Brian Gart, and Diane Wells for their particular efforts in soliciting section and retreat sponsors. The process has now been formalized into gold, silver, and bronze sponsorship categories. Tom also thanked members of the council and the section for approaching sponsors, thanking them, and using their products. Last year sponsorships raised \$42,000. This year the figure is at least 25% higher. Tom commented that bringing in sponsorship money allows the section to do more and keep a relatively modest attendance fee for the retreat.

Chair's Report: Diane Wells gave the chair's report. Diane brought to council members' attention the request of the District Court of Appeal Workload Jurisdiction Assessment Committee for judges, lawyers, litigants, and the public to complete an online survey to help evaluate the district courts of appeal, in advance of the public hearing to be held in Orlando on September 7, 2006, as previously discussed. Diane also brought to council members' attention the regional convention and job fair of the

National Black Law Students Association, co-hosted by the University of Miami School of Law, on September 9, 2006. Diane also reported on the request from the Florida Board of Bar Examiners for volunteers to assist in a survey of the appropriateness of testing various subjects on The Florida Bar Examination and the means of testing those subjects. The request has been made to the Business Law Section for involvement in the area of business entities. Anyone who wants to participate should contact Diane.

Diane also thanked Austin Newberry, in his first year of assignment as program administrator to the Business Law Section, for his work on the successful retreat. Many compliments have been expressed about the programs, food, and arrangements. Diane also commended Jeff Otterman, a graphic artist from Tampa, on the graphic design and preparation of the program for the retreat. Jeff compiled all the materials for the program, including the multiple changes made to the biographical sketches on the speakers. Diane asked council members to thank Jeff individually. Diane also commented on the retreat in general, which everyone agreed had been first-rate. Diane thanked the sponsors, the organizers, and the attendees. The council gave a round of applause for the success of the retreat.

Diane commented on the publication of the section's new volume of materials and encouraged contributors to comply with publication deadlines. Diane committed the section to the publication of the volume. Diane also reported compliments having been made on recently sent blast electronic mails. The section will be using different software and will be seeking to create a crisper and cleaner appearance, with the goal of communicating in an effective way to section members.

Diane reported on the upcoming retreat of the Executive Council of the Business Law section, scheduled for November 10–12, 2006, at Atlantis on Paradise Island in the Bahamas. Diane encouraged council members to obtain hotel registration forms and to register as soon as possible.

Chair-Elect's Report: Rick Gross gave the chair-elect's report. Rick commended Diane Wells on the successful section retreat and the phenomenal job done by Diane. A meeting of the Retreat Committee will be held at the conclusion of the Executive Council meeting.

Rick also reported that he and Russ Blain have been approached by the Young Lawyers Division (the "YLD") to consider a joint retreat between the executive councils of the BLS and the YLD. One idea for a proposed venue and date is Las Vegas in March 2008. One other proposed venue is Park City. Mention was made of the fact that Austin Newberry had served as section administrator for the YLD. Rick asked for a straw vote of the council. Members expressed a slightly greater preference for Las Vegas. Members expressed a strong vote in favor of holding a joint retreat with the YLD.

Rick announced that the sectionwide retreats for 2007 and 2008 have been scheduled for Labor Day weekend of each of those years (Friday, August 31, through Monday, September 3, 2007, and Friday, August 29, through Monday, September 1,

2008) at the Ritz Carlton/Naples. This scheduling reflects an effort to arrive at a uniform date. Being on Labor Day weekend, the schedule will shift from a Thursday–Sunday format to a Friday–Monday format. The retreat will begin on start Friday afternoon, meetings will be held on Saturday, CLE programs will be held on Sunday, and the Executive Council meeting will be held on Monday morning.

Adjournment: There being no further business to come before the Executive Council, on motion made and seconded, Chair Diane Wells adjourned the meeting at 10:57 a.m.

Respectfully submitted,

Russell M. Blain
Secretary/Treasurer