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Report on Third-Party Legal Opinion Customary Practice in Florida – A report worth its ‘wait’ in gold

Service by email mandatory as of Sept. 1, 2012

Hawkins Commission on Review of Discipline System issues report
Out-of-State Division Executive Council

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LOUISIANA STATE CAPITOL PHOTOS:

**Cover:** The new Capitol Building, Baton Rouge [Source: Google Images]

**Above:** The old Capitol Building, Baton Rouge [Source: Wikimedia Commons]
Friends:

With a grateful heart, it is my privilege to write my first article as president of the Out-of-State Division. Over the past several years, I have had the pleasure to serve on the Executive Council and as State-to-State editor, treasurer and president-elect. These positions have afforded me the opportunity to work with a great and talented group of attorneys. We have accomplished much, and there's opportunity for more progress.

Before I go further, I have also had the pleasure to work with the division's program administrator, Arlee Colman, from The Florida Bar. We could not have functioned without her. Arlee will be moving to an even greater position as program administrator for the Tax and Elder Law sections. We will miss Arlee and thank her greatly. We welcome our new program administrator, Diana Polston-Burnett, who will work with Arlee to transition.

One of my first assignments was to establish The Florida Bar Out-of-State President's Goal and Objectives for 2012-2013. You can find them following this column. The Executive Council has reviewed and approved what I describe as this “checklist” for what we need to accomplish. They also will serve as a grading system on my performance during my presidency, if you will, what we accomplish this year. We can use the checklist at the end of the year to see how I measure up.

One of our first accomplishments has been improved opportunities for participation of the president-elect, Mindi Wells. You’ll see elsewhere in this edition the president-elect’s column. Mindi and I have been working since day one of this Bar year to increase the involvement of the president-elect. Mindi also serves as chair of the OOS CLE and Information committees. Thank you, Mindi! Here’s an update on where we are so far in other areas:

Continuing legal education: We are eagerly planning events in conjunction with the out-of-state meeting of the Bar’s Board of Governors, which is scheduled to take place in Atlanta on Oct. 3-6, 2012. We will offer a CLE course at the Atlanta meeting on Oct. 4. We are working with the Real Property Probate and Trust Law Section to provide you a great three hours of CLE, including an hour of ethics. You can find details elsewhere in this edition. The division is working with Florida Bar President Gwynne Young to co-host a reception with the Board of Governors immediately following the CLE, to which all out-of-state Florida lawyers are invited. Another webinar is being planned for the fall. Plus, you can access online “Privilege & Work Product Protection From Discovery in Federal Controversies and Litigation” that was conducted in May 2012.

Diversity: We must actively encourage women, minorities and diverse groups to participate and join. Such an effort is a top priority with President Young, as it is for me. The Long-Range Planning Committee will also address this topic, and we would value your input and participation.

Long-range planning and bylaws review: We organized a special committee to ensure our bylaws reflect the current needs of our members. We will also evaluate the division’s long-range plan so that we enhance value to out-of-state lawyers and encourage their participation as members.

Receptions: In addition to the Atlanta reception, we have receptions planned for Washington, D.C., and New York City. Plus, we will co-host a reception with the Young Lawyers Division at its March 2013 meeting in Austin, Texas. Stay tuned for more details.

OOS publication: The State-to-State continues to provide great outreach and substantive articles. We send each edition electronically to all out-of-state lawyers, a circulation of well over 14,000 attorneys. We strongly encourage you to submit articles, and we will strive to publish them all. We also include a description of you and your practice. There’s no secret—we want to help you get the word about you. So, send us your articles!

Webpage: The OOS Information Committee has been working to update and improve the division’s webpage. You can access the State-to-State, CLE, ethics programs and a variety of information. We continue to look for improvements. Please let Mindi know any ideas or suggestions. We’d love to have your help, so please contact us.

Speaking of contacts, you’ll see after Mindi’s column the contact information of the officers and Executive Council members. We are here to serve you. We want your thoughts on how we can seize opportunities to better serve out-of-state lawyers. We want to help your practice and help you do your job.

We will be guided in all we do by our promise to you in accordance with the OOS bylaw “to assist out-of-state lawyers: in administrative, educational and practice development issues; with pro bono activities; in relocating to Florida; and in establishing a network of out-of-state members.” That’s a big promise; we could use your help. Please join us in this very worthwhile pursuit, and make this a great year of opportunities!

— Donald A. Workman
Division President, 2012-2013
Florida Bar Out-of-State President’s Goal and Objectives for 2012-2013

GOAL
To further enhance OOS Division services to members through continued improvement of CLE, publications, student/young lawyer growth, diversity and revenue in order to stimulate growth in membership.

OBJECTIVES
• Ensure OOS meets or exceeds desire of members regarding OOS direction and services
• Increase CLE offerings
• Improve webpage for members
• Stimulate perception of OOS within Bar and BOG through outreach with current and future members
• Participate in CLE at October Board of Governors meeting
• Conduct at least three receptions nationally
• Analyze bylaws and revise as needed
• Increase advertising in and revenue from State to State
• Increase participation of president-elect
• Conduct at least monthly meetings of Executive Board and quarterly meetings of Executive Council in addition to annual meeting

Need to meet your CLE requirements— for free?

Many of you may not know it, but The Florida Bar offers a large number of CLE programs at no cost to its members. This is especially useful to out-of-state members in states where there is not a mandatory CLE requirement. To access these programs, go to The Florida Bar’s website (www.flabar.org) and click on the “CLE” tab in the upper right-hand corner. Scroll down to “Online Courses” and click on “Catalog of Courses.” That brings you to a list of offered programs. If you click on either “Discounted or Reduced Price Programs” or “Law Practice Management,” you will see more than 30 hours of free online course offerings. That, combined with the free ethics tape the OOSD provides, should pretty much let you fulfill your CLE requirements.
A “third-party legal opinion” is a specialized form of written legal opinion letter that a lawyer issues and delivers, generally in connection with the closing of a commercial transaction. Unlike the written advice that lawyers commonly give to their clients by letter, email and phone, a third-party legal opinion is given by counsel representing one party to another party on the other side of the transaction. Third-party legal opinions are given in a wide variety of transactions, from debt or equity financings and acquisitions of stock or assets to construction and permanent loans secured by real estate. The third-party legal opinion is usually part of the documentation exchanged between counsel for the parties as a condition of the closing of the transaction.

Third-party legal opinions are invaluable legal tools in commercial transactions because they provide certain qualified assurances concerning, among other matters, the reliability and enforceability of the transaction documents. Prior to 1991, attorneys issuing third-party legal opinions in Florida did so somewhat at their peril, largely guided by traditional forms and a body of unwritten “customary practice.” Customary practice is a term of art that, following language in the Restatement (Third) of the Law Governing Lawyers, establishes the standard of care against which attorneys rendering third-party legal opinions should be measured in most cases.

Although a body of customary practice in the issuance of third-party legal opinions has long existed nationally and in Florida, prior to 1991 the standards in Florida were mostly a set of standards that were informally understood between practitioners who regularly issued opinions of this kind. The Business Law Section of The Florida Bar made an initial effort to identify and document opinion practices in the giving of third-party opinion letters with the publication of its Report on Standards for Opinions of Florida Counsel (the 1991 Report).3 Initially, the 1991 Report was applicable only to business transactions not involving real property; however, in 1996 the Real Property, Probate, and Trust Law Section of The Florida Bar (RPPTL Section) published a supplement to the 1991 Report that addressed third-party opinions rendered in connection with real estate secured financing transactions. Then, in 1998, the 1991 Report was further supplemented to deal with the particular issues involved in an opinion regarding personal property secured transactions, of the type typically provided by a borrower’s counsel in a lending transaction.

Although these reports were helpful initial attempts to define the parameters of customary practice applicable to third-party legal opinions in Florida, they suffered from several flaws. First, they did not address the relationship between the “standards” discussed in the reports and “customary practice.” Second, they did not cover every aspect of opinion-giving comprehensively. The 1991 Report called for certain supplements covering various important topics to be prepared at a later date, but the supplements were never created. Finally, the Legal Opinion Standards Committee of the Business Law Section and the Legal Opinions Committee of the RPPTL Section (collectively, the committees) were not always acting jointly in addressing their subject matter; as such, there had been little formal discussion between the two regarding the internal cohesion and consistency of their respective work products. Thus, the 1991 Report and supplement thereto were in need of a substantial update and rewrite.

In 2006, the committees began the first truly unified and comprehensive effort to reduce to writing their common understanding of Florida customary practice in the giving of third-party legal opinions. These efforts, requiring more than five years to complete, resulted in the publication of the final draft of the Report on Third-Party Legal Opinion Customary Practice in Florida (the “Report”), dated as of Dec. 3, 2011. Thanks to the colossal efforts of the committees, Florida’s third-party legal opinion customary practice has now been painstakingly researched, debated, defined, documented and published for the benefit of the legal community.

Third-party legal opinions are largely a specialized practice, yet the committees elected to send or make available the 284-page report, without charge, to all of the nearly 15,000 members of the Business Law and RPPTL sections. Philip B. Schwartz, chair of the Business Law Section Legal Opinion Standards Committee and the reporter of the Report, explains:

The Report, which is intended to be a practice guide, contains checklists and information that will be useful to Florida lawyers in their everyday practices, whether or not they are rendering a third-party legal opinion. The various sections of the Report cover topics such as determining whether an entity has been properly formed, whether such entity has the power to enter into a particular transaction, whether such entity has properly authorized the transaction and whether such entity has properly executed and delivered the agreements relating...
to the transaction. The Report also covers such topics as how to properly create, attach to collateral and perfect security interests under Article 9 and Article 8 of the Florida UCC (and as to the priority of those security interests), issues particular to the proper creation of liens on Florida real estate, issues particular to Florida documentary stamp and intangible tax issues and Florida law regarding usury and choice of law. It also has useful advice on the ethical issues faced by lawyers in commercial transactions, recognizing (and questioning) underlying factual assumptions; identifying one’s representation of a particular client and resulting legal duties to that client; and the necessity of properly qualifying legal advice to clients to warn them of extenuating circumstances that might cause a different outcome than that predicted by counsel … Whether the reader is a transactional lawyer or a litigator, the Report will be helpful to the lawyer who needs to understand the application of the law on these types of issues, since questions on these issues not only come up in the transactional context, but also when a lawyer is litigating these types of issues.  

The committees believe the Report is “a major step forward in the practice of third-party legal opinions in Florida …”  

**What is a third-party legal opinion?**  
An attorney who renders a third-party legal opinion (the opining counsel) is not giving the opinion to his or her client, but is instead giving it to a third party (the opinion recipient). The opinion recipient is generally the person on the other side of the client’s commercial transaction. If the opinion recipient has legal representation for purposes of the transaction, the opinion recipient’s attorney will review the opinion letter to ensure it reflects a reasoned, fair and adequate treatment of the subject matter of the opinion within the bounds of customary practice.

**Purpose of a third-party legal opinion**  
Third-party legal opinions “make agreements clearer, more predictable and more enforceable by [requiring a party to] state its view as to the agreement’s legal effect … . By pinning down the parties’ legal positions at the outset of the transaction, third-party opinion letters reduce misunderstandings and, perhaps more importantly, hinder a dishonest party’s ability to limit or avoid its contractual obligations.” Additionally, third-party legal opinions may serve as a tool for apportioning some of the risk of a business transaction. For example, assume that a person seeks to borrow money from a bank on behalf of a business entity. The bank will need to verify that the person has the legal authority to execute the loan documents (such as a note, security agreement or mortgage) on behalf of the borrowing business so that the agreement is enforceable against the borrower according to its terms. Ordinarily, to protect itself from a claim that its loan documents are unenforceable, the bank would be responsible for investigating the organizational status of the borrower (e.g., in the case of a corporation, whether the borrower filed articles of incorporation with the Florida secretary of state and adopted bylaws) and the borrower’s authority to enter into agreements with the bank. Although the bank would normally obtain representations from the borrower confirming the borrower’s status and authority, among other things, the bank, without more, would assume the full risk of defectively performing any verifying investigations beyond the borrower’s representations. On the other hand, if the borrower’s attorney provides a third-party legal opinion to the bank, such as stating that the borrower is authorized to borrow the funds (and that the officer of the borrower executing the loan documents has been authorized to do so), the effect is often threefold. First, the opinion letter serves as further support for the representations made to the bank by the borrower, such as further support for the borrower’s power and authority to be bound by the identified loan documents. Second, the opinion letter can often serve as an
estoppel for later assertions in litigation by the borrower that are contrary to the opinions included in the opinion letter. Third, the responsibility and risk associated with confirming the opinion items set forth in the opinion letter, such as the borrower’s authority to execute the identified loan documents, transfers in part to the opining counsel. If the third-party legal opinion is incorrect and the opining counsel has not followed customary practice applicable to rendering the opinions given, the bank may well have a claim for negligent misrepresentation against the opining counsel, even though the bank is not the opining counsel’s client.

Not surprisingly, third-party legal opinions can cover a variety of issues and risks that accompany commercial transactions, such as verification of entity status, authority to transact business in Florida, creation and attachment to and perfection of a security interest in collateral and the enforceability of legal documents delivered in a transaction under the laws of a particular state.8

In addition to its risk-shifting feature, third-party legal opinions may also provide a means to accomplish the following:

- obtain more favorable terms in the loan documents during the opinion negotiation process;
- encourage out-of-state entities to transact business in Florida by providing the benefit of an opinion concerning the operation of Florida laws on the transaction documents, without the added expense of hiring local counsel;
- document and substantiate statements made by the parties while also reducing opportunities for deception or exaggeration;
- establish and/or explicitly disclose the diligence and investigation, and limitations, followed in rendering the opinion; and
- clearly express assumptions made by the parties.

A third-party legal opinion can only provide these benefits, however, if the parties have a mutual understanding of its language and scope. An opining counsel must be able to write an opinion letter that is unambiguous and that avoids unnecessary risks while the opinion recipient’s attorney must be able to verify that the third-party legal opinion includes the content for which the opinion recipient negotiated and provides the proper protection against future disputes or claims.9

It would be inefficient and confus- ing to enumerate every step taken to verify the supporting facts, every assumption made in rendering the opinion and every issue not taken into consideration within an opinion letter. Therefore, an opinion letter only includes the substantive opinion and the most important disclaimers to and limitations of the opinion. The rest of the meaning is “understood” in accordance with the customary practice of lawyers who regularly give and receive opinions.10 Thus, knowledge of the customary practices contained in the Report is essential in rendering and interpreting third-party legal opinions.

The Report

The Report provides concise guidance for preparing third-party legal opinions and for the diligence process to be followed in rendering third-party legal opinions. In this regard, the Report includes sample language and illustrative forms, provides straightforward due-diligence checklists and notes common pitfalls and their solutions. The Report helps Florida attorneys to render opinion letters without speculation as to the best phrasing for an opinion or the diligence required to support it. In addition to the foregoing benefits, out-of-state practitioners can use the Report to understand the established forms and conventions for opinions under Florida customary practice. This in turn will assist an opinion recipient’s attorney in evaluating whether the benefits of a third-party legal opinion in a transaction outweigh the costs of diligence and investigation to the opining counsel’s client.

Because the Report presents a step-by-step approach to many fundamental legal analyses and provides clear instructions for dealing with the most common business issues, it can also serve as a general resource for members of the legal profession who do not regularly render or receive third-party legal opinions or deal with the substantive legal issues that are the subject of the respective legal opinions. David Brittain, chair of the RPPTL Section Legal Opinions Committee, explains that even threshold issues are thoroughly dealt with, starting with “the generally recognized requirements under Florida law by which a lawyer may conclude … that various important Florida business entities have been legally organized, … that such entities have the power and authority to own property and transact business, and that the principal executing a legal document has been properly authorized to do so, such that a binding contract between such an entity and third parties has been formed.”11 By way of example, one may glean information from the section of the Report about opinions of “Entity Status and Organization of a Florida Entity.”12 (See chart on the next page.)

Types of opinions

Below are several categories of opinions addressed in the Report.13 These are commonly required in connection with business transactions and relied upon by opinion recipients:

1) “Opinions that are the ‘building blocks’ for or are necessary to render a ‘remedies opinion,’ including opinions on entity status and organization, authorization to transact business in Florida, entity power, authorization of the transaction, execution and delivery, no violation and no breach or default and no required governmental consents or approvals”14

2) The “remedies opinion,” which focuses on the enforceability of an agreement against a party15

3) The “no litigation” confirmation, in which the opining counsel declares that, to its knowledge, there is no pending or overtly threatened litigation against the client16

4) “Opinions on particular substantive areas of commercial practice, including opinions with respect to the issuance of securities, opinions with respect to collateral in secured transactions under the Uniform Commercial Code and opinions in connection with real estate transactions”17
5) Special transaction-specific opinions, including “opinions on the enforceability of choice of law provisions in agreements and opinions with respect to usury.”

It is worth noting, however, that certain types of opinions are outside the normal course of opinions rendered by Florida counsel; the laws associated with such opinions are outside the scope of a third-party opinion unless specifically incorporated by express reference.

**Common elements of opinions**

Despite the varied spectrum of categories of third-party legal opinions, elements that are common to all Florida opinions and elements that are often included in Florida opinions are detailed in the Report. These common elements include the following:

- The date of the third-party legal opinion, along with a disclaimer that the opinions contained in the

<table>
<thead>
<tr>
<th>ENTITY TYPE</th>
<th>Organizational Documents</th>
<th>Properly Organized?</th>
<th>Formed or Existing?</th>
<th>Status Is Active?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporation</td>
<td>Articles of incorporation from Florida Dept. of State (FDOS)</td>
<td>See § 607.0205 of the FBCA; must have bylaws and elected directors and officers</td>
<td>See § 607.0203 of the FBCA and obtain certification of filing from FDOS</td>
<td>Obtain FDOS “certificate of status;” fees and penalties owed to FDOS are paid; most recent year’s annual report filed with FDOS; articles of dissolution not filed</td>
</tr>
<tr>
<td>Limited Partnership</td>
<td>Certificate of limited partnership from FDOS</td>
<td>Confirm filing of certificate of limited partnership as required by § 620.1201 of FRULPA</td>
<td>At least 1 general partner and at least 1 limited partner have agreed to carry on business as co-owners for profit; filed with FDOS; no circumstance exists that would require dissolution; avoid pitfall: see § 620.1201 of FRULPA</td>
<td>Department’s standard form of certificate of status issued under § 620.1209(1) of FRULPA</td>
</tr>
<tr>
<td>General Partnership</td>
<td>Written partnership agreement and, if filed, a partnership registration statement</td>
<td>See § 620.8101(7) of FRUPA; Florida law does not require written agreement, but it is risky to opine if no written agreement exists</td>
<td>At least 2 general partners have agreed to carry on business as co-owners for profit; no circumstance exists that would require dissolution; also see F.S. § 865.09 and § 620.8105 FRUPA</td>
<td>Opinion on “status” is not applicable because there are no governmental filings required for the creation or existence of a Florida general partnership</td>
</tr>
<tr>
<td>LLC</td>
<td>Articles of organization from FDOS and written operating agreement</td>
<td>See §§ 608.407 and 408 of FLLCA for requirements</td>
<td>Obtain a certified copy of LLC’s operating agreement including all amendments; manager appointed, if required by operating agreement</td>
<td>Obtain FDOS “certificate of status;” fees and penalties owed to FDOS are paid; most recent year’s annual report filed with FDOS; articles of dissolution not filed</td>
</tr>
<tr>
<td>Trust</td>
<td>Written trust agreement</td>
<td>• Look at current written trust agreement to confirm that a trustee has been designated</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>• If trustee is an entity, also analyze entity status of the trustee; see F.S. § 660.41</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>• If land trust, must satisfy F.S. § 689.071; look at powers of the trustee</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not-for-Profit</td>
<td>Florida’s not-for-profit statute (Chapter 617, Florida Statutes) sets forth requirements for organization and existence of a Florida not-for-profit corporation; requirements similar to “corporation;” follow instructions for Florida not-for-profit corporation with respect to organization and entity status</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
letter speak as of the date of the opinion\textsuperscript{20}

- Name(s) of the opinion recipient(s), with a statement that limits who may rely on the third-party legal opinion (typically limited to the named opinion recipient(s)) and who may receive copies of the letter\textsuperscript{21}
- A statement identifying the opining counsel as the client’s counsel and not as counsel to the opinion recipient\textsuperscript{22}
- A brief description of the transaction to establish the context in which the third-party legal opinion is being delivered, and a statement that the opinion was provided at the request, and with the consent, of the client\textsuperscript{23}
- A list of the transaction documents as to which the opinion is being given
- A statement pointing to the specific transaction document that contains definitions for any terms used but not defined within the opinion letter\textsuperscript{24}
- An explanation that the third-party legal opinion was made in reliance on facts certified to by the client, generally including a list of the assumed facts, and a disclaimer that the certified facts may not be relied upon by any party, nor are they part of the opinion
- A disclaimer that limits the scope of reliance on the third-party legal opinion to the laws of specific jurisdictions (generally the laws of Florida and the United States of America)\textsuperscript{25}
- A description of limitations to laws of specific jurisdictions or to substantive areas of law as well as areas of law that may be related, but were excluded in rendering the opinion\textsuperscript{26}
- If local or special counsel renders any part of the third-party legal opinion, the letter should define the duties of the opining counsel in selecting local/special counsel, and responsibility for the legal opinions of local/special counsel
- A list of any certificates of public officials relied upon in rendering the third-party legal opinion, along with the dates as of which each is assumed to be accurate
- A statement as to whether the opining counsel “has actual knowledge that a proposed law or regulation would affect an opinion being given” and either confirming that the opinion recipient is aware of the proposal or expressly noting the status of the proposed law or regulation in the opinion\textsuperscript{27}
- A listing of all assumptions that were relied upon without further investigation in rendering the opinion\textsuperscript{28}
- A section explicitly defining the standard used for phrases such as “to our knowledge,” along with the level of inquiry undertaken, if any, prior to asserting “no knowledge” of a circumstance
- A note that the third-party legal opinion is to be interpreted under Florida customary practice
- If desired, a statement expressly incorporating the Report into the third-party legal opinion letter by reference\textsuperscript{29}
- The signature(s) of opining counsel(s) with a description of their representative capacity
- Each of the operative opinions presented as separately enumerated paragraphs, with each accompanied by an overriding leading phrase indicating that it is the opinion of the opining counsel and is limited as set forth in the letter\textsuperscript{30}

The Florida Supreme Court issued an opinion addressing mandatory email service on June 21, 2012. The original opinion contained an effective date of July 1, 2012. A corrected opinion and a correction notice have been issued providing a revised effective date of Sept. 1, 2012.

Email service becomes mandatory on Sept. 1, 2012, in civil, probate, small claims and family law divisions of the trial courts, as well as in all appellate cases. (Email service in criminal, traffic and juvenile matters is not mandatory until Oct. 1, 2013.)

Links to the corrected opinion and the correction notice are provided below.

Corrected opinion link:
www.floridasupremecourt.org/decisions/2012/sc10-2101.pdf  
(Email service opinion with effective date of Sept. 1, 2012)

Correction notice link:
www.floridasupremecourt.org/decisions/2012/sc10-2101_Notice.pdf  
(Correction notice reflecting the effective date of Sept. 1, 2012)

The Florida Bar will provide complimentary education on the mandatory email service requirements prior to the effective date.

Illustrative forms for rendering opinions

The Report also includes four illustrative opinion letter forms: 1) a letter to be used in a commercial lending transaction; 2) a letter to be used in a lending transaction secured by real estate; 3) a letter to be used in connection with a share issuance by a Florida corporation; and 4) a letter to be used in a loan
transaction when Florida counsel is acting as local counsel.34 The Report also includes an illustrative form of certificate to counsel that can be used to document the factual matters underlying a particular opinion letter.

Because the Report is meant to be a practice guide rather than a treatise, “the key to using the Report is the use of the illustrative forms of opinion letters that accompany this Report in conjunction with the commentary regarding the committees’ views on the meaning of the words in the opinion and the diligence that is recommended to be completed to give the opinions set forth in this Report.”35 Forms are available online as a word processing file attachment to the Report, and they are annotated with guidance and with references to sections of the Report where further information can be found.36

Brittain states, “Whether a lawyer is engaged in the practice of real estate law, litigation, bankruptcy, estate planning or corporate transactions, he or she will certainly not regret having a copy of the Report either at desk side or on the hard drive.”37 Moreover, “Florida customary practice is consistent with the customary practice in many other states, and therefore the guidance in the Report (and particularly the illustrative forms) will be useful tools for lawyers no matter where they practice.”38 But don’t take our word for it. An electronic version of the Report is available at www.flabizlaw.org.

Endnotes:


2 Restatement (Third) of the Law Governing Lawyers §§ 51, 52, 95.


10 Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, supra n. 5 at 1277.


13 Suggested resources for guidance on third-party opinion customary practice in these categories can be found on pages 185-187 of the Report.

14 Report, supra n. 7 at 7.

15 Id. at 95.

16 Id. at 118.

17 Id. at 7.

18 Id. at 163.

19 Id. at 185-187. These opinions include: 1) federal securities law opinions, which may be required for public and private securities offerings and may be rendered to underwriters, placement agents, purchasers, transfer agents, securities exchanges and rating agencies, among others; 2) opinions to parties outside the United States, or cross-border opinions, which raise issues that are more complex than normal, because of differences in legal principles in foreign jurisdictions, and differences in education, practice and language; 3) opinions on loan transaction compliance with federal margin regulations and whether the borrower may be an “investment company” under the Investment Company Act of 1940; 4) opinions involving any aspect of intellectual property laws; 5) tax opinions in connection with commercial transactions, often related to the tax implications of the transaction for one of the parties; 6) true sale, substantive consolidation and other insolvency-related opinions; and 7) opinions on municipal bond issues.

20 Id. at 18.

21 Id.

22 Id. at 20.

23 Id. at 21.

24 Id. at 22.

25 Id. at 24.

26 Id. at 33.

27 Id. at 27.

28 Id.

29 Id. at 35.

30 Id. at 36.

31 Id. at 7.

32 Id.


34 Brittain, supra n. 3.

35 Email from Philip Schwartz to Stephanie Lieb (July 24, 2012).
President-elect’s message

What have you done for me lately?

by Mindi Wells

Hello, fellow members of the Out-of-State Division of The Florida Bar. I am honored to be serving as president-elect of the division this year and look forward to meeting and working with many of you throughout the upcoming years. By way of introduction, I have been a member of The Florida Bar since 2003 and have been involved with the OOSD since 2004, initially as the Young Lawyers Division representative and then as an Executive Council member. I was elected to three two-year terms as an out-of-state member. I was elected to three terms as an Executive Council member and then as an Executive Council member. I was elected to three terms as an Executive Council member and then as an Executive Council member. I was elected to three two-year terms as an out-of-state representative to the Young Lawyers Division Board of Governors, serving from 2004 to 2010, and then was elected treasurer of the OOSD in 2011. Over the years, I have had the opportunity to serve with a number of outstanding leaders of the OOSD and know the division will continue to thrive and grow under Don Workman’s leadership and into next year.

Speaking of growing and thriving leads me to the heart of this message: “What have you done for me lately?” We appreciate your support and membership in the division and understand the value of your time. With so many activities, organizations and causes—as well as work and family—demanding of your time, treasures and talent, we thank you for being a part of the OOSD. It is important to us that we provide benefits and value to our members.

So, it is a fair question to ask of us: What have you done for me lately? Let me tell you!

CLE: Every year, the division provides to its members a FREE audio download for up to two ethics hours of CLE credit. In addition, Ian Comisky and Bruce Zimet held an audio webcast on “Privilege & Work Product Protection for Attorneys and Accountants in Federal Controversies & Litigation” on May 23, 2012, which qualified for one hour of ethics credit. Did you miss it? Don’t worry—we’ll be conducting a similar live CLE in Atlanta on Oct. 4, 2012. At that same CLE, you can also learn more about Florida e-filing, trust law and powers of attorney. Watch for more details!

Networking: The OOSD is co-hosting a reception with The Florida Bar Board of Governors during its out-of-state meeting in Atlanta, Ga., on Oct. 4 at 6 p.m. at the Four Seasons Hotel. We encourage all members of The Florida Bar in and around the Atlanta area to join us and meet your OOSD Executive Council and BOG members. Future networking opportunities are currently being planned.

Now, let me ask you: What can YOU do for the OOSD?

Attend events: We look forward to seeing you at upcoming CLEs and networking events.

Host a reception: The division hopes to plan additional receptions throughout the country. If you are interested in hosting a reception in your area, please let me know!

Recruit a new member: Nearly 13,000 members of The Florida Bar reside outside the state, and approximately 10 percent of them are members of the OOSD. Help us build the division by recruiting a new member, bringing that colleague to a reception or encouraging him or her to attend a CLE. For your convenience, a membership application is included on page 27.

Present a CLE: Volunteer to speak at a CLE. We have the ability to record them off site, to conduct them as a webcast or to do them live around the country.

Write an article: Authors are welcome to submit articles of general interest to legal practitioners with multijurisdictional practices for inclusion in State-to-State. We welcome our members to contribute articles, news and announcements to our newsletter. Send your submissions to Don Workman, dworkman@bakerlaw.com.

Suggest a topic: Have a topic of interest to out-of-state practitioners? Let us know! Your suggestion could result in a CLE program, an article or an addition to our website.

Those of us on the OOSD Executive Council are committed to serving the needs of our members while continuing to grow and develop the division. Please feel free to contact any one of us with questions, comments or concerns. Our contact information is on the next page.

See you in Atlanta!
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New officers sworn in at Bar Convention

Scott Hawkins (right), president of The Florida Bar, swears in the 2012-2013 officers for the Out-of-State Division. Left to right are Ward Griffin, Washington, D.C., immediate past president; Mindi Wells, Columbus, Ohio, president-elect; Donald Workman, Washington, D.C., president; and John Voorn, Palos Heights, Ill., secretary.
Let’s have a great year and grow your Out-of-State Division

The Out-of-State Division is here to serve you.

The president’s column talks about the areas of focus this year. They are: improving the free Ethics CLE program; hosting networking gatherings; enhancing relevant, cost-effective CLE; developing a student member program; promoting OOS interests in The Florida Bar; and increasing involvement by OOS lawyers. Please consider the details we’ve provided in this issue. We hope our approach in State-to-State and other endeavors demonstrate our resolve.

You’ll see in this edition the many programs available to out-of-state members. Joining provides many benefits. One of my favorites involves the work of this publication to introduce you to other out-of-state members who share a desire to develop their respective practices. We’re not shy—we want to help you develop business. So please get involved!

You’re reading our latest edition of the all-cyber version of State-to-State. You should be receiving a link to each edition of the newsletter that allows you to view the article online in color at your desk or on your mobile device. Of course, you can also choose to print it and take it with you. Our intention also involves expanding the attraction of State-to-State, especially to advertisers. By doing so, we can better serve out-of-state lawyers. Remember, too, that you can feature yourself or your law firm as well. It should be a win-win for everyone.

Your publication continues to grow. And we’d like even more! You’ll see throughout the State-to-State our requests for contributing authors. Our content continues to increase because of you. We feature our contributing authors prominently and include the information you’d like others to read about your practice. We have two goals here: to present your ideas to a broad audience and to introduce the readers to you. We want to help you grow your practice.

So, send us your articles and we’ll get you published as quickly and as often as we can. And by all means, please let us know how we can serve you better. Please feel free to contact me at dworkman@bakerlaw.com or by telephone at 202/861-1602. We also look forward to seeing you at one of the local receptions.

—Don Workman, editor
Baker Hostetler congratulates

**Don Workman**

on his election as

*President of The Florida Bar’s*

*Out of State Division.*

Donald A. Workman
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In summer 2011, then-Florida Bar President Scott Hawkins created a special commission to analyze, review and make recommendations regarding certain issues impacting the lawyer discipline system. The commission comprised a broad spectrum of attorneys and laypersons, including large firm, solo practitioners, government lawyers, judges and a retired Florida Supreme Court justice. Two out-of-state attorneys served on the commission: out-of-state Board of Governors member Brian D. Burgoon and Atlanta attorney Chris Marquardt.

The Hawkins Commission was divided into three subcommittees, each assigned specific review issues. The first subcommittee focused on the Standards for Imposing Lawyer Sanctions, alternatives to discipline and problems related to aging attorneys. The second reviewed the Bar’s Attorney Consumer Assistance Program, which handles intake and mediation for the grievance program, disciplinary complaints against lawyers made by judges and frivolous or retaliatory complaints. The last group addressed complex discipline cases and cases involving widespread impacts (such as with mortgage foreclosure irregularities or when one lawyer’s bad actions affect numerous clients) and communication with the public and Bar members about the grievance program. The commission’s three groups met throughout the year by conference call, and the entire commission met together at an all-day session in Orlando in January, which was also attended by three Florida Supreme Court justices.

The commission’s final report and recommendations were presented to President Hawkins and The Florida Bar Board of Governors at its May 2012 meeting in Naples, Fla. Among the commission’s recommendations were the following:

- Allowing expanded use of the Bar’s grievance diversion measures, which allow lawyers facing minor misconduct to have those charges dismissed in exchange for attending rehabilitative programs such as courses on trust accounting, ethics and professionalism, anger/stress management, advertising and practice management.
- Addressing the problems facing older attorneys, including recommendations for the creation of programs and services designed for older lawyers and reciprocal mentoring programs between young lawyers and senior attorneys, assisting in the recognition of elderly attorneys who may have become incapacitated, and consideration of allowing older attorneys to permanently retire when facing minor disciplinary issues.
- Establishing a communications program for addressing high-profile, complex or widespread disciplinary cases to assist the Bar in being able to quickly provide information to the media and the public.
- Examining the rules relating to conditionally admitted members (for example, those attorneys who may be admitted on a probationary status because of a substance abuse problem).
- Keeping judges up-to-date on the status of grievances that they file.
- Creating an education program to better inform the public and attorneys about the disciplinary process.
- Revising the grievance complaint form to better track potentially frivolous complaints against lawyers.
- Allowing attorneys suspended for more than 90 days to begin the reinstatement process before their suspension has ended. By rule, attorneys suspended for more than 90 days must establish “rehabilitation” before the suspension can be lifted, regardless of the number of days stated in the suspension. In other words, an attorney suspended for six months is not eligible to begin practicing law again at the end of the six-month suspension; he or she must prove rehabilitation for the suspension to be terminated. Currently, the rehabilitation proceedings often take from 6 to 12 months. The new proposal would allow for the investigation and rehabilitation process to begin earlier.

The Bar has begun the process of implementing the Hawkins Commission’s recommendations and has made a few changes already. Other issues are going to the board’s committees for further review/implementation/rule drafting, etc. The Hawkins Commission’s final report can be obtained from the Florida Bar’s website (click here).

Information for this article was obtained from articles written by Gary Blankenship, senior editor, Florida Bar News.
Case analysis: Not just for beginners

by Richard Tanner

Organizing your case will help you create a winning case. This organization includes several elements: conducting thoughtful evidence and applicable caselaw analysis, determining themes, planning a good story and setting up to begin telling the story during your opening statement.

Start with finding the case’s themes, both factual and legal.
Create your case’s theme(s) with a view toward your local community’s values. You will need to determine how your moral theme comports with the local community’s values for it to be the most persuasive. Themes are best kept simple, fact consistent and human interest oriented. Your theme may become your attention-drawing first sentence in your opening statement.

Review the pleadings for contested legal issues and dispositive facts.
Use case analysis to create a plan for identifying and managing your sources of fact. Read, organize and understand your case file. Make notes about questions you have regarding missing data, fact judgments and witnesses’ credibility. Remember, the outset of your case analysis, when you are learning the facts of the case, is as close to the jury’s perspective as you are going to get. Jury members hear the evidence for the first (and only) time in the courtroom. So, your first encounter with witness and evidence reviews is your insight into the jury’s “blank slate” perspective. Your first questions and reactions to witnesses and evidence are likely to be the jury’s first questions and reactions, so addressing those issues early will give you the edge. I’ll say more about that below.

Identify the applicable law.
You learned this in three years of formal education, so I don’t need to dwell on it. Go to the jury instructions and read what the court is going to say about the law in your case. The law will give continuity and coherence to the specific facts that justify why a verdict is required. My only post script here is to think through your motions in limine and your admissibility issues in the case analysis as well, since they may affect your theme’s development.

Identify a moral theme.
Yes, everything from motor vehicle accidents to patent cases has a moral theme. Do not get fixated by my use of the word “moral” … this is not a spiritual moral. It is a right vs. wrong theme. Empower the jury to bring back the result you want by creating a moral theme that compels that result for your client. The moral theme is the emotional compulsion to bring the desired result.

Identify the factual theories.
These are the case’s dispositive facts that support the moral theme. Incorporate case analysis of admissibility issues at this stage so you do not have to struggle with them later. In the instance of a debatable evidence admissibility issue, set up your admissibility argument right then. Make a border note about which rule governs, and then you will be prepared to defend the issue.

Organize and understand the factual issues, their conflicts and their corroborations.
When you read your case file, read it like a human being. Make notes of your initial reactions to the witnesses and the exhibits, both logical and emotional. These reactions are the persuasive pressures arising from those facts. Recall my thoughts above about the jury’s first reactions to your evidence. Since you are experiencing reactions to the evidence, just as the jury members will, your human reactions will aid your persuasive use or omission of evidence.

The term “organize” has special meaning in case analysis. It means to choose a system for your on-going case analysis. Anything that is identifiably orderly, that facilitates cross referencing and that provides easy retrieval is fine. These systems come in many forms, from very formal commercial (costly) trial notebook formats to simpler witness folders or loose-leaf notebooks. Pick one. Then use it to create witness notes, e.g., what needs to be said, who will say what, who will confirm earlier dispositive facts and who will enhance/diminish other witnesses’ credibility. The pleasure of this part of the work is that there is no right or wrong way, as long as it is a system that can be revised, enhanced or supplemented easily.

In the factual case analysis, a hand-drawn chronological timeline is very helpful. It gives a case analyzer an overview and a trial attorney a sense of sequencing for witnesses’ testimony. It gives you a visual chronological timeline of case facts, and since chronological order promotes learning and retention, it also provides the timing order for presenting your evidence during the trial.

Evaluate each witness separately.
Decide which of your witnesses will be called (could be called or must be called). What witness sequencing is
needed for evidentiary foundations? What witness sequencing will give you maximum jury retention and impact (i.e., primacy and recency)? What witness sequencing will give you maximum corroboration or repudiation of other witnesses? Decide which of the opposing side’s witnesses are most suitable for credibility attack via case facts, personal facts or legal attack.

Make a list of your evidentiary and demonstrative documents, by witness and by need.

You are going to do this for the court before the pre-trial conference anyway, so why not make this list early, at a point when it has utility to you in your preparation?

Building a winning case begins with case analysis. Using case analysis from the outset to address the evidence and the law helps you to develop effective themes and plan a good story, and prepares you to deliver that story to the fact finder. Cases are won when juries can easily follow and understand the theme and the evidence. When organized by case analysis, the evidence will tell a persuasive story, and a favorable verdict is likely to follow.

Application deadline nears for 12 Florida Bar board certification areas

Applications due Aug. 31, 2012

Florida Bar members interested in board certification must have applications postmarked by Aug. 31, 2012, for 12 of Florida’s 24 legal specialization areas: admiralty and maritime law, adoption law, appellate practice, aviation law, civil trial, education law, elder law, immigration and nationality, international law, labor and employment law, marital and family law and tax law. Applications are available on The Florida Bar’s website at www.floridabar.org/certification.

Board certified attorneys are the only Florida lawyers allowed to identify themselves as “specialists” or “experts” or to use the letters “B.C.S.” to indicate Board Certified Specialist when referring to their legal credentials.

“The Florida Bar’s board certification program is one of the best in the country,” says Florida Bar President Gwynne A. Young of Carlton Fields in Tampa. “It assists the public in locating lawyers who have demonstrated their level of skill, excellence and commitment to professionalism.”

Board certification is the Florida Bar’s highest evaluation of attorneys’ competency, experience and professionalism in areas of law approved for specialization by the Supreme Court of Florida. Board certified lawyers are legal experts dedicated to professional excellence, and attorneys who become board certified are evaluated as to their character, ethics and reputation for professionalism in the practice of law. Florida offers 24 specialty areas for board certification, more than any other state. The Florida Bar maintains a free, online directory of board certified lawyers by specialty area and city at www.floridabar.org/certification. About 4,500 of Florida’s 91,000 lawyers have earned board certification.

A lawyer who is a Florida Bar member in good standing and who meets the standards prescribed by the Florida Supreme Court may become board certified in one or more of the 24 certification fields. Minimum requirements for board certification are listed below; each area of certification may contain higher or additional standards.

• A minimum of five years in law practice

• Substantial involvement in the field of law for which board certification is sought

• Satisfactory peer review from other lawyers and judges to assess competence in the specialty field as well as character, ethics and professionalism in the practice of law

• Completion of the board certification area’s continuing legal education requirements

• A passing grade on the examination required of all applicants or satisfaction of strict criteria to exempt the exam

Board certification is valid for five years, during which time the attorney must continue to practice law and attend Florida Bar-approved continuing legal education courses. Recertification requirements are similar to those for initial certification. Not all qualified lawyers are certified, but those who are board certified have taken the extra step to have their competence and experience evaluated.

Applications for Florida’s additional board certification areas are due Oct. 31. Board certification applications, requirements and staff contact information are available at www.floridabar.org/certification.
Out-of-state leaders appointed to Florida Bar leadership positions

Three out-of-state members of the Florida Bar Board of Governors and a past president of the Out-of-State Division have been appointed to serve in Florida Bar leadership positions for the 2012-2013 bar year.

Brian D. Burgoon – Executive Committee & Disciplinary Review Committee chair-elect

Brian D. Burgoon, Board of Governors member from Atlanta, was selected by Florida Bar President Gwenye Young as one of her two presidential appointees to the Florida Bar Executive Committee. The Executive Committee acts on behalf of the Florida Bar in between the bimonthly meetings of the Board of Governors, including matters relating to policy issues, legislative positions, the selection of nominees for the Judicial Nominating Commissions and disciplinary matters. The Executive Committee members also assist the Bar’s leadership with the preparation of the Bar’s long-term Strategic Plan.

Burgoon has also been named chair-elect of The Florida Bar Disciplinary Review Committee (DRC). The DRC oversees the prosecution of disciplinary violations committed by Florida lawyers and serves as a review board for disciplinary trials conducted by judges in the respondent’s local area. The DRC reviews cases for issues of guilt or innocence, as well as the appropriate sanction being recommended by the judge, and decides whether to appeal those issues to the Florida Supreme Court. In certain circumstances, the DRC also reviews certain pre-trial matters, such as the local grievance committees’ probable cause findings. In addition, the DRC reviews claims that are recommended for payment or denial from the Client Security Fund, which was established to reimburse losses to clients as a result of the misappropriation or embezzlement of money or property placed in the attorney’s trust. Burgoon just completed his third term as DRC chair and will resume the role of DRC chair for the 2013-2014 bar year.

Ian M. Comisky – Investment Committee chair and Audit Committee vice chair

Ian M. Comisky, Board of Governors member from Philadelphia, has been re-appointed chair of The Florida Bar Investment Committee. The Investment Committee is responsible for establishing The Florida Bar’s policy to guide staff and the professional managers in investing the Bar’s reserve funds. The committee also reviews investment performance to ascertain compliance with the investment policy and to make changes, when warranted, to that policy. Comisky has served as Investment Committee chair since 2005.

Comisky has also been selected vice chair of the Audit Committee, which represents the board in matters concerning the Bar’s auditors and which recommends to the board fiscal and accounting policy changes.

Richard A. Tanner – Rules Committee vice chair

Richard A. Tanner, Board of Governors member from Upper Montclair, N.J., was appointed vice chair of The Florida Bar Rules Committee. The Rules Committee is charged with drafting and reviewing changes to the Rules Regulating The Florida Bar, Standing Board Policies and other bar policies and regulations prior to Board of Governors’ review and approval. Changes to the Rules Regulating The Florida Bar, after board approval, are then submitted to the Supreme Court of Florida for final approval and adoption.

Timothy P. Chinarris – LOMAS Advisory Board chair

Timothy P. Chinarris, a member of the Out-of-State Division Executive Council from Montgomery, Ala., has been re-appointed to a second term as chair of The Florida Bar’s Advisory Board for the Law Office Management Assistance Service (LOMAS). The LOMAS Advisory Board oversees and reviews the activities of LOMAS, whose purpose is to offer practical technical advice on law office management to sole practitioners and small-to-medium-sized law firms. Chinarris also serves on The Florida Bar Professional Ethics Committee and is a past president of the Out-of-State Division.

Burgoon, Comisky re-elected to Board of Governors

Out-of-state attorneys Brian D. Burgoon and Ian M. Comisky were both re-elected to The Florida Bar Board of Governors in December 2011. Their new two-year terms representing the out-of-state lawyers began at the annual convention in June.

Burgoon manages his own firm, The Burgoon Law Firm LLC in Atlanta, and focuses his practice on civil and commercial litigation. He also serves as an arbitrator for commercial cases pending before the American Arbitration Association. Burgoon has chaired both the Disciplinary Review Committee (DRC) and the Rules Committee of The Florida Bar.
In addition to his service on the Board of Governors, he also serves on the board of directors of the University of Florida Alumni Association and the board of directors of the University of Florida College of Law Alumni Council.

Comisky is a partner at Blank Rome LLP in Philadelphia who practices in the area of white collar criminal defense, tax litigation and complex corporate and commercial litigation. He chairs The Florida Bar’s Investment Committee. Comisky also serves as special projects chair for the ABA Tax Section and serves on the boards of directors of the Citizens Crime Commission of the Delaware Valley, Historic Philadelphia Inc. and the Madlyn and Leonard Abramson Center for Jewish Life.

Out-of-state members of YLD board elected

Ward P. Griffin of Washington, D.C., and Seth Goettelman of Sturgeon Bay, Wis., were reelected, without opposition, to the Young Lawyers Division (YLD) Board of Governors in December. Griffin is an attorney with the U.S. Commodity Futures Trading Commission and has served on the YLD Board of Governors since 2006. Griffin has served as president of both the Out-of-State Division and the Government Lawyers Section of The Florida Bar. Goettelman is associate general counsel at The Marcus Corporation in Milwaukee, Wis. He first joined the YLD board in 2010.

In addition, Leslie Utiger was elected to her first term on the YLD board in December. Utiger is an associate with Akerman Senterfitt’s Consumer Finance Litigation & Compliance Practice Group in Dallas.
We want you to stay informed on actions taken by The Florida Bar Board of Governors. So, here are the latest Board of Governors’ updates.

The Florida Bar Board of Governors met on May 18, 2012. Major actions of the board and reports received include:

- The Commission on Review of the Discipline System presented its report. Appointed in June 2011, the commission was charged with studying the Bar’s regulation of lawyer conduct as it relates to the rapidly growing number of Bar members and in view of high-profile matters involving broad-scale misconduct. Rather than serving as an omnibus examination of the disciplinary system, as was conducted by another Bar commission from 2003-2005, the focus was on specific tasks undertaken by three subcommittees of the commission (detailed in a Feb. 1 Florida Bar News article). In addition to lawyer members, each of the subcommittees had a non-lawyer member from The Florida Bar Citizens Forum. Recommendations, which now go to various Bar committees to draft implementation plans for board approval, include making greater use of the grievance diversion process, allowing lawyers with longer suspensions to apply for reinstatement before the suspension is over and dealing with problems faced by aging attorneys.

- The board approved a social media policy for the Bar and Bar sections and divisions, presented by the board’s Communications Committee, that will initially enable use of Facebook and Twitter as supplemental communications tools. To meet public records obligations—The Florida Bar is part of the judicial branch of government, and access to records of the judicial branch is governed by Florida Rules of Judicial Administration rule 2.420—the Bar and the sections and divisions will employ a software program that will retain all postings as per the Bar’s public records retention schedule.

- After an extensive review, the board’s Program Evaluation Committee recommended changing the primary focus of the Lawyer Referral Service Committee to the review and oversight of bar member involvement in nonprofit lawyer referral services. The board agreed to that change and to assigning public education and marketing of local bar association lawyer referral services to the Voluntary Bar Liaison Committee.

- As specified in Section 42-291, F.S., the board approved the Bar’s nomination of three lawyers for one seat on each of the state’s judicial nominating commissions for appointment by the governor.

- An amendment to Rule 4-1.5 of The Rules Regulating The Florida Bar is being considered to change language regarding non-refundable fees to refer to them as advance fees that are subject to refund. The review was prompted by a concern that calling advance fees “nonrefundable” causes consumers to believe they are never entitled to a refund. A prior ethics opinion held that refundable fees are allowed but that they are subject to rules prohibiting excessive fees; the draft amendment is consistent with that opinion. Comments on the proposed rule were received after publication of a notice in the May 1 Florida Bar News. A new rule intended to assist the Supreme Court with disbursing money from frozen trust accounts of emergency suspended lawyers is also being drafted.

- Video messages to the membership from Bar President Scott Hawkins are sent by email and are posted in several formats and with the text on the President’s Page on the website. You also can access Board of Governors’ member and committee lists, minutes, agendas and the special appointments calendar on the website.

The Florida Bar Board of Governors met on July 27, 2012. Major actions of the board and reports received include:

- The Special Committee on Lawyer Referral Services presented its final report. Recommendations include that lawyers may not accept referrals from services that also make referrals for other professional services stemming from the same incident, that lawyers joining referral services must report to the Bar which services they use and that referred clients must make the initial contact with the lawyer or law firm. The report was referred to the Board Review Committee on Professional Ethics for further consideration and recommended action.

- Florida Bar Foundation President Maria Henderson reported that the foundation expects income from its chief funding source IOTA (interest on trust accounts) to be $5.6 million for 2012-2013, the same as for 2011-2012. Interest rates are expected to remain low through 2014, she said, which means that cuts to legal aid programs will exceed the 71 percent previously forecast. Direct donations from Florida lawyers to the “NOW” fundraising campaign and contributions from six Bar sections are helping to offset the losses. The foundation will also be receiving $2.025 million in cy pres residual...
Board updates, from preceding page

- Funds from a class action settlement in a Washington State consumer class action case. Florida Bar President Gwynne Young has pledged to seek additional ways to support funding for legal aid in Florida in her President’s Page: “Thou Shalt Not Ration Justice” in the July/August 2012 edition of The Florida Bar Journal.

- Discussion was held on proposed constitutional Amendment 5, which will appear on the November 6 general election ballot. The amendment broadens the access of the House of Representatives to Judicial Qualification Commission records, provides for Senate confirmation of Supreme Court justices within a specific time frame of gubernatorial appointment and allows the Legislature to revoke a Supreme Court-approved procedural rule by simple majority vote of both chambers instead of the current two-thirds vote. The board referred the matter to the Legislation Committee for consideration.

- The Professional Ethics Committee was directed to prepare two advisory opinions. One will address lawyers allowing non-lawyer staff to use lawyers’ IDs and passwords when electronically filing documents with the state court system. The second will address protecting confidential

*Mark your calendar!*

- September 19-22, 2012
  Florida Bar Midyear Meeting
  Buena Vista Palace
  Walt Disney World
  Lake Buena Vista, Fla.
  (Details: www.floridabar.org)

- October 3-6, 2012
  Board of Governors Meeting
  OOSD Events in Conjunction With BOG Meeting
  Oct. 4 – OOSD CLE Program
  Oct. 4 – OOSD Reception
  Four Seasons Hotel
  Atlanta, Ga.

- December 5-8, 2012
  Board of Governors Meeting
  Ritz-Carlton
  Amelia Island, Fla.

- January 30-31, 2013
  OOSD Board & Committee Meetings
  Florida Bar Headquarters
  Tallahassee, Fla.

- January 30-31, 2013
  Board of Governors Meeting
  (Including Citizens Forum)
  Hotel Duval
  Tallahassee, Fla.

- April 17-20, 2013
  Board of Governors Meeting
  Tampa Marriott Waterside
  Tampa, Fla.

- May 29 - June 1, 2012
  Board of Governors Meeting
  Ritz-Carlton
  Sarasota, Fla.

- June 26-29, 2013
  Florida Bar Annual Convention
  Boca Raton Resort & Club
  Boca Raton, Fla.

Participate in the OOSD listserv. All participants of the listserv can supply to others the results of their work, ask relevant questions or request help on subjects simply by sending an email to the listserv email address.

To join, go to www.google.com and click on “Sign in” in the top right corner. (You first need to have set up a Google account.) Your sign-in email address is your email address on record with The Florida Bar, and you can then make your own secure password. Once you have created your account, you should be able to click on “More,” which is located at the top of the screen near the center of the page. Then click on “Groups.” The Florida Bar Out-of-State Division Group should appear on the right side of the screen under “My Groups.” If it does not appear or if you have any questions, you can contact the group administrator, Eric Meeks, at emeeks@meekslawfirm.com.
client information when storing records via cloud computing. The Standing Committee on Advertising will prepare an advisory opinion on the use of metatags—words or phrases that are invisible to the typical website viewer but that are designed to make the site score highly with Internet search engines—on lawyers’ websites. The standing committee requested that it be directed to write the opinion in the wake of complaints and reports that some law firms have used the names of non-firm lawyers, other firm names and even the domain names of other lawyers and firms as metatags to enhance the likelihood they will be listed high by search engines.

- A proposed rule change was referred back to the Code and Rules of Evidence Committee. The proposed rule is based on recent legislation that requires out-of-state and Canadian expert witnesses for medical and dental malpractice cases to register with the Department of Health. The board motion asked the committee to take more input on the issue and to reconsider the matter at its Sept. 21 meeting, during the Bar’s Midyear Meeting.

- On the recommendation of the Communications Committee, the board approved the proposals from the Commission on Review of the Discipline System for dealing with complex and high-profile grievance cases (recommendations A1, A2 and A3 by Subcommittee Three, pages 36-42).

- The Vote’s in YOUR COURT, a public education program of The Florida Bar, is now being promoted through social media and discussed at editorial board meetings and through presentations to community organizations. Research indicates that a majority of Florida voters do not know what judicial merit retention means and also that voters often skip that section of the ballot. Educational resources provided by the Bar include speakers for community groups, a voter guide in English, Spanish and Creole and biographies of the justices and judges who will be on the Nov. 6 ballot. Visit and recommend the webpage to family, friends, colleagues and clients at www.floridabar.org/thevotesinyourcourt.

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**Out-of-state practitioners reporting CLE to The Florida Bar**

In the past, The Florida Bar has accepted a transcript from another jurisdiction to satisfy the continuing legal education requirement (CLE) in Florida. Since other jurisdictions have different requirements for compliance for continuing legal education (CLE), The Florida Bar needs to ensure the programs meet the criteria set forth by the governing rules and policies.

There are two ways for members to report their completion of a CLE program from another jurisdiction. If The Florida Bar has previously approved a program for CLE credit, a member can go online and post the course to his or her CLE record with the five-digit course number provided by the sponsor of the program.

If The Florida Bar has not previously approved a program, the member will need to complete an application for course attendance credit and submit it with the course outline, brochure and timed agenda for evaluation after completing the program. The processing time is four to six weeks and is based on a member’s reporting deadline.

Please visit our website at www.floridabar.org/CLER to find all applicable forms, rules, policies and contact information.

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**We can be BIGGER & better!**

Share your expertise with other out-of-state practitioners. Market your practice to 14,000 Florida lawyers out of state—all for free! Submit articles of interest to legal practitioners with multijurisdictional practices to Don Workman at dworkman@bakerlaw.com. Please include a brief biography with contact information and a photograph of the author. We will publish you!
Contributing authors

The Out-of-State Division appreciates the articles submitted for this edition by our contributing authors. They can serve as a resource to fellow division members who might have a question regarding these authors’ areas of expertise or if a referral is needed.

Brian D. Burgoon has served as an out-of-state member of The Florida Bar Board of Governors since 2000, is past chair and current chair-elect of The Florida Bar Disciplinary Review Committee and served as a member of the Hawkins Commission on Review of the Discipline System. He practices civil and commercial litigation with Burgoon Law Firm LLC in Atlanta, Ga. He can be reached at 404/260-5147 or burgoon@burgoonlaw.com.

B. Claudette Goyanes is a candidate for juris doctor, 2013, at Stetson University College of Law in St. Petersburg, Fla., and summer associate at Trenam Kemker in Tampa.

Stephanie C. Lieb is an associate with Trenam Kemker in Tampa, Fla., practicing in that firm’s business reorganization and bankruptcy areas. Prior to joining Trenam Kemker, she served in the U.S. Bankruptcy Court, Tampa Division, as judicial law clerk to Judge Catherine Peek McEwen from 2006 to 2008, and as acting judicial law clerk to Judge Michael G. Williamson in 2008. She can be reached at 813/223-7474 or slieb@trenam.com.

Catherine Peek McEwen is a U.S. bankruptcy judge for the Middle District of Florida, Tampa Division, and is the vice-chair of the 13th Judicial Circuit (Florida) Pro Bono Committee. One of Judge McEwen’s mantras is that “judges admire pro bono volunteers.”

Richard A. Tanner is a member of The Florida Bar Board of Governors, representing the Out-of-State Division; a past president of the OOSD; an adjunct professor of trial advocacy at Florida State University; a NITA certified trial practice teacher; and a CLE lecturer and certified Florida mediator, practicing in Cedar Grove, N.J., and Tallahassee, Fla. He can be reached at 850/201-3655.

Mindi Wells, OOSD president-elect, is the assistant administrative director of the Supreme Court of Ohio in Columbus, where she oversees the daily operations of the court, directs special projects, drafts administrative court management policies and prepares budgets for the appellate courts. She is licensed in Ohio, Florida and before the Supreme Court of the United States. She can be reached at 614/387-9510 or mindi.wells@sc.ohio.gov.

Donald A. Workman, OOSD president and State-to-State editor, is a partner in the Business Group and head of Baker Hostetler’s bankruptcy and creditors’ rights practice in the Washington, D.C., office. His practice areas include business bankruptcy, creditors’ rights, debtor reorganizations, general insolvency, stockbroker liquidations and commercial litigation. He can be reached at 202/861-1602 or dworkman@bakerlaw.com.

Become a contributor! See submission information on page 12.
Power, Trust, (e)Service and Privilege: What an Out-of-State (and In-State, too!) Florida Practitioner Needs to Know

Continuing Legal Education Program
October 4, 2012 • Four Seasons Hotel • Atlanta, Georgia

2:15 – 2:30 p.m. Late Registration

2:30 – 2:45 p.m. Opening Remarks and Introductions

2:45 – 3:20 p.m. Florida’s New Power of Attorney Act – A Practical Perspective
Sandra Fascell Diamond, Seminole, Fla.

3:20 – 3:50 p.m. The Florida Trust Code: Then, Now and Down the Road
Barry F. Spivey, Sarasota, Fla.

3:50 – 4:05 p.m. Break

4:05 – 4:40 p.m. E-Things for the Florida Attorney: An Update on the Status of e-Filing and e-Service
Laird A. Lile, Naples, Fla.

4:40 – 5:30 p.m. Privilege & Work Product Protection for Attorneys and Accountants in Federal Controversies & Litigation
Ian Comisky, Philadelphia, Pa.
Bruce A. Zimet, Fort Lauderdale, Fla.

Sponsored by the Out-of-State Division and the Real Property, Probate and Trust Law Section of The Florida Bar.

Reception to follow.

For registration information, go to www.flabaroutofstaters.org.

Commit 10 hours this year to the OOSD!

A 10-hour yearly commitment to the OOSD (less than one hour per month) translates to doing just one of the following activities:

1) Support the division by attending Executive Council meetings;
2) Join and participate in a committee for the next year;
3) Write one substantive article for State-to-State;
4) Volunteer to write materials and present one hour of a CLE a year;
5) Volunteer to be a mentor for law students; or
6) Help update, improve and maintain the division’s website.
Privilege & Work Product Protection for Attorneys and Accountants in Federal Controversies & Litigation

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Recorded Wednesday, May 23, 2012

Course No.1533R

The out-of-state division present

The Florida Bar Continuing Legal Education Committee and
The Out-of-State Division present

Privilege & Work Product Protection for Attorneys and Accountants in Federal Controversies & Litigation

Ian Comisky, Philadelphia, PA
Bruce A. Zimet, Fort Lauderdale, FL

IAN COMISKY. Mr. Comisky concentrates his practice in the areas of civil and criminal tax litigation, anti-money laundering compliance and complex corporate and commercial litigation. He is the co-author of Tax Fraud and Evasion. He represents both corporations and individuals in criminal tax investigations (both administrative and grand jury), tax litigation in the Tax Court, Claims Court and District Courts, jeopardy and termination assessment litigation, summons enforcement litigation, as well as responsible officer penalty and collection matters. Mr. Comisky graduated from the U. of Pa. Law School where he serves as an adjunct professor and was an Assistant United States Attorney for the Southern District of Florida.

BRUCE A. ZIMET, a member of The Florida Bar since 1976, is a 1976 graduate of the Washington College of Law at the American University where he was a member of the Law Review. He began practicing in 1976 at the Broward County Public Defenders Office, where he tried numerous felony cases. In 1978, Mr. Zimet became an Assistant United States Attorney in the Southern District of Florida. He remained in the U.S. Attorney’s Office for nearly six years, the final two years as Chief Assistant United States Attorney for the Northern Division (Fort Lauderdale, West Palm Beach and Ft. Pierce). During Mr. Zimet’s tenure he conducted major complex grand jury investigations and tried numerous high profile cases involving public corruption, sophisticated white collar fraud and financial crimes. He also represented the United States before the Fifth Circuit and Eleventh Circuit Court of Appeals. Mr. Zimet has been in the private practice of law in Ft. Lauderdale since 1983.

AUDIO CD ORDER FORM

The audio webcast program will cover attorney client privilege and work product protection issues in federal tax controversy and related litigation, including an emerging issue with respect to the Sixth Amendment right to counsel and the payment of legal fees. The webcast program provides ethics CLE credit, and will proceed as a series of hypotheticals which prompt discussion on the retention of accountants to assist attorneys in civil and criminal litigation and the various issues facing the accountant and attorney.

TO ORDER AUDIO CD BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department. 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

Name ___________________________ Florida Bar # ________
Address ___________________________
City/State/Zip _______________________
Phone # ___________________________
Email Address _______________________

E-mail address is required to receive electronic course material and will only be used for this order.

A JC: Course No. 1533C

METHOD OF PAYMENT (CHECK ONE):
☐ Check enclosed made payable to The Florida Bar
☐ Credit Card – Fax to 850/561-9413.
  □ MASTERCARD □ VISA □ DISCOVER □ AMEX

Signature: ___________________________  Exp. Date: _____/____ (MO/ yr)

Name on Card: ___________________________
Billing Zip Code: ___________________________
Card No. ___________________________

☐ AUDIO CD (1533C)
$50 plus tax (section member)
$70 plus tax (non-section member)
(includes electronic course material)  TOTAL $ ________
Apply for CLE credit for out-of-state seminars!

The application is available on the Bar’s website. Go to www.flabar.org and click on the headings in this order to find the form you see below: CLE/CLER-BSCR Information and Forms/CLE Forms and Applications/Course Attendance Credit.

For more information on applying for out-of-state CLE credit, contact the CLER department at 850/561-5842.

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**Continuing Legal Education Application for Course Attendance Credit**

The Florida Bar  
Legal Specialization & Education  
651 E. Jefferson Street  
Tallahassee, FL 32399-2300  
(850)561-5842 (Phone)  (850)561-5660 (Fax)

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**PLEASE ATTACH A COURSE BROCHURE AND/OR OUTLINE WHICH:**

(A) FULLY DESCRIBES THE COURSE CONTENT AND LEVEL OF PRESENTATION  
(B) INDICATES THE TIME DEVOTED TO EACH TOPIC COVERED WITHIN THE PROGRAM  
(C) IDENTIFIES THE INSTRUCTORS

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**CERTIFICATION CREDIT**

Indicate if credit is to be assessed for Board Certification.

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**TOTAL MINUTES ON INSTRUCTION:** (EXCLUDING BREAKS, MEALS AND INTRODUCTIONS AND BASED ON A 50 MINUTE HOUR)

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If requesting Ethics, Professionalism, Substance Abuse, and Mental Illness Awareness Credit, please check appropriate box below.

- Ethics
- Professionalism
- Substance Abuse
- Mental Illness Awareness

**NOTE:** If you have completed the minimum number of required CLER hours, and are not seeking Certification credit, please do not submit further courses for evaluation. There is no carry over of hours in Florida from one reporting period to the next.

You may submit this application to clemail@flabar.org with the proper documentation. Materials submitted for CLE credit review will be discarded once the credit has been determined. Should you wish to have your materials returned, please enclose a self-addressed stamped envelope.
The Florida Bar and LegalSpan:
Bringing online CLE to attorneys

Since August 2000, The Florida Bar has been offering quality CLE programs as online, on-demand seminars through a partnership with LegalSpan. The popularity of this type of delivery method has been growing exponentially ever since.

With increasingly hectic schedules and the rising cost of travel, attorneys are turning to the Internet to meet their educational needs. Online CLE programs offer the flexibility of viewing programs at your own pace, anytime, anywhere.

Whether a first-time or net-savvy user, Florida attorneys are finding that online CLE programs are time saving and easy to use:

“I am very pleased to be able to have these seminars made available to members of The Florida Bar. With the format you have provided, I feel that I am at the seminar, and I have the materials which I can download and save for future reference. Thanks for a great product well presented and technically friendly!”

—Andrew, Live Oak

“Excellent resource. A very convenient way to engage in continuing education that has high-quality speakers and content.”

—Bruce, Miami Beach

“This is the greatest thing ever invented. I can now complete my CLE requirements at home. Everything was so easy. Thank you.”

—Sheila, Largo

“Terrific site and material. It makes it much easier to get CLE credit, and makes the materials much more useful since they can be viewed multiple times.”

—Thomas, Brandon

With the explosion of MP3 players and iPods in the market, LegalSpan developed the technology to enable The Florida Bar to introduce downloadable audio versions of its CLE programs. Since its inception in March 2006, the downloadable versions of The Florida Bar’s CLE programs have become as popular a method of obtaining education as online CLE. “We want to foster greater collaboration among members and a more vibrant educational dialogue. Attorneys learn best at their own pace, in their own way, in a comfortable environment. Our online options give members educational content when and where they want it,” says Programs Division Director Terry Hill.

The Florida Bar’s catalog of online and downloadable programs is robust, offering more than 200 programs, covering all practice areas. Attorneys are able to enjoy time and money savings, without sacrificing content, by participating in these types of programs. The complete catalog of Florida Bar CLE courses can be viewed at www.floridabar.org/cle by accessing the LegalSpan link under Online Courses.

Stay current on ethics:
Free publication now available

In the past, out-of-state Florida Bar members have found that it can be difficult to stay abreast of ethics developments in Florida. Now, two free resources are available to help you stay current in this important area.

The “2011 Florida Legal Ethics Review” by Tim Chinaris is available free of charge. This comprehensive compendium concisely summarizes developments in Florida legal ethics during 2009, including rule changes, cases and ethics opinions of interest. Arranged topically, the subjects covered are: Rule Changes (including Proposed Rule Changes); Advertising; Attorney-Client Relationship; Candor Toward the Tribunal; Confidentiality and Privileges; Conflicts of Interest (Including Disqualification); Disciplinary Proceedings; Fees (Including Attorney’s Liens); Ineffective Assistance and Right to Counsel; Law Firms; Legal Malpractice; Professionalism; Public Official Ethics and Public Records; Rules and Ethics Opinions; Trial Conduct; Trust Funds; Unauthorized Practice of Law; and Withdrawal From Representation.

To get your free copy, just send an email request to tchinaris@gmail.com. A copy will be emailed to you in PDF format.

And stay up-to-date with legal and judicial ethics on a daily or weekly basis by visiting the comprehensive ethics website “sunEthics” (www.sunethics.com). This site offers summaries of cases and ethics opinions as they are released; links to everything related to Florida legal ethics, judicial ethics, bar admissions and professionalism; and links to ethics resources throughout the nation.
Join The Florida Bar’s Out-of-State Division today and receive...

2 Hours of Free Ethics Credit!

Just $30

Join The Florida Bar Out-of-State Division and receive access to the

Annual Free Ethics Audio

Just another way the Out-of-State Division assists attorneys who are out-of-state members of The Florida Bar.

Join today!

The Florida Bar Out-of-State Division Membership Request (Item # 8161001)

Name _______________________________________________ Florida Bar Number ________________

Address ____________________________________________________________________________________

Phone: (_____ ) _____________________________________________________________________________

City/State/ZIP ______________________________________________________________________________

Signature _________________________________________________________ Date ______________________

Mail with check to: The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32399
Contact: Arlee J. Colman, program administrator, acolman@flabar.org, for information.