The Florida Bar Out-of-State Division

State-to-State

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PHOTO:
The Hawaii State Capitol Building [Source: *Google images*]

Banks continue to pursue non-judicial foreclosures of mortgages in Florida Legislature

2011 legislation regarding commercial properties fails

by Robert P. Charbonneau

R. CHARBONNEAU

Within the last several years, the banking lobby in Florida (principally the Florida Bankers Association) has introduced several bills that seek to adopt non-judicial foreclosure procedures. These bills have varied in scope and breadth from year to year. This past legislative session, the banking lobby introduced House Bill 799 (Draft B) and Senate Bill 1288 (together the "bill"), which proposed non-judicial foreclosure of mortgages on commercial properties. Stated reasons for the bill, as well as prior iterations of this type of legislation, include an overly crowded foreclosure docket and recently, in comments made at The Florida Bar Mid-Year meeting by Governor Rick Scott, a suggestion that the judiciary itself may be slowing down the process. During his remarks, Governor Scott stated that a crowded foreclosure docket makes business access to the courts more difficult and discourages businesses that may be contemplating relocation to Florida, thereby slowing economic growth in our state.

Little disagreement exists that, beginning in 2008, the Florida state court system was unprepared to handle the crush of civil filings related to what has now been commonly referred to as the "foreclosure crisis." In August 2009, mortgage foreclosure filings in the state of Florida reached a record level of 403,477 cases (Florida State Courts Annual Report 2009-2010). While that number has declined significantly over the last two years, much of the decline can be attributed to the suspension of mortgage foreclosure filings and prosecution of pending cases due to so-called "robo-signer" scandals that have rocked the banking and mortgage-backed securities industries.

Taking mortgage foreclosures out of a judicially supervised process and placing them into the hands of a for-hire trustee who is essentially accountable to no one would be a dangerous erosion of substantive and procedural due process rights that property owners in Florida have maintained for over 150 years.

Historical perspective

With the passage of the Act of 1853, Florida became a "lien theory" state (as opposed to a title theory state) 158 years ago. In a lien theory state, the lender (or mortgagee) with respect to a loan made to a borrower has a security interest in the form of a lien (or mortgage) in the property; the borrower retains title to the mortgaged property.

In a title theory state, the mortgagee with respect to a loan made to a borrower is vested with the legal title to the property and retains that title until the debt is paid in full. The borrower, or grantor, retains possessory rights and "equitable title," and otherwise has full use of the property for the mortgage term. When the loan is paid off, legal title is restored to the borrower.

Very real differences between lien theory and title theory states reveal themselves when a borrower defaults under a mortgage. "Default, in a Title state, may allow the mortgagee private remedies. Under Florida law, if the mortgagor does not pay the mortgage or otherwise defaults, the mortgagee's remedy is to foreclose in the equity court and seek a judicial sale of the property" (Hon. Thomas E. Baynes, Jr., *Florida Mortgages*, page xii). Hand in hand with the foreclosure in the equity court is the borrower's right to redeem the property. "It is important to know … that the Lien Theory states, such as Florida, recognize the mortgagor's equity of redemption much more strongly than do states accepting the Title Theory" (*Id).*

Current state of the law

Current state law on mortgage foreclosure is codified at Section 697.02, Florida Statutes, which states: "A mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession." In *Georgia Casualty Co. v. O'Donnell*, 109 Fla. 290, 147 So. 267 (Fla. 1933), the Florida Supreme Court stated the following regarding foreclosure in the state of Florida:

> At common law a mortgagee took legal title to the mortgaged property, and foreclosure's primary purpose was to terminate the mortgagor's right to redeem. In Florida a mortgage is a mere lien, and does not vest title in the mortgagee. Under the statute the mortgagee has only a lien, and foreclosure is for the purpose of enforcing it. Strict foreclosure in this state is not permitted, but the equitable remedy of the mortgagee is a sale of the property to pay his debt. As noted by Judge Baynes, in his well respected treatise on Florida mortgage law, "[t]he rights of the mortgagor in his property are paramount in Florida" (*Florida Mortgages*, §1-1, page 2).

The judicial foreclosure process in Florida commences with the filing of a complaint by the lender, naming all parties with an interest in the property being foreclosed. The lender is required to serve the complaint in

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accordance with Chapter 48, Florida Statutes (Process and Service of Process), and the Florida Rules of Civil Procedure, which generally require personal service on the defendants. The defendants have 20 days either to serve an answer and affirmative defenses or to move to dismiss the complaint. If the lender believes there are no disputed facts, the lender can file a summary judgment motion, which requires at least 25 days' notice before the hearing on the motion. Ultimately, the court will adjudicate, either through the summary judgment process or, if there are disputed facts, a trial, the lender's entitlement to the foreclosure remedy, the priority of any other lien interests, any alleged defects in the lender's documentation and any other affirmative defenses raised by the borrower or other parties with an interest in the property.

In addition, lenders have available to them another process to expedite a mortgage foreclosure. Section 702.10, Florida Statutes, commonly referred to as the "Order To Show Cause" Statute (the "OTSC Statute"), is an excellent and often underutilized tool for lenders to recover their real property collateral more quickly and less expensively, and can be invoked by any lender in any foreclosure case (commercial or residential). The OTSC Statute provides lenders with the potential to obtain property quickly and to preserve deficiency rights. In non-residential cases, it also provides the lender the ability to request that the borrower continue making mortgage payments during the pendency of the proceedings. To invoke the OTSC Statute, the lender must file a verified complaint that contains factual allegations sworn to by the lender or lender's representative, properly serve the complaint in accordance with Chapter 48 and the Florida Rules of Civil Procedure and request that the court issue an order directing the borrower to show cause why foreclosure should be denied. This order effectively asks the borrower to come before the court and explain, given the sworn allegations of the complaint, why a final judgment of foreclosure should not be entered. The hearing on the order to show cause must be held within 60 days of the date of service of the order (but at least 20 days after service). This process is *in rem* only, as the lender may only use the OTSC Statute to obtain possession of the real property. However, the OTSC Statute leaves undisturbed the lender's ability to pursue a deficiency judgment in a separate count of the complaint.

Service on the defendant of the order to show cause may be made by mail so long as the original complaint was served in accordance with Chapter 48, *et seq*., and provides the borrower with the requisite procedural due process as enacted by the Legislature. If the borrower cannot adequately show cause to the court why foreclosure of the lender's mortgage interest should not occur, the court will enter a final judgment in favor of the lender. Even if the borrower does show cause, the court is still required to consider whether the lender is likely to prevail in the action and, if so, may require the borrower to make mortgage payments during the pendency of the foreclosure proceeding. The process set forth in the OTSC Statute already adequately addresses the stated concern by lenders that so many borrowers in foreclosure cases have abandoned their real property, subjecting it to vandalism, fire, theft or destruction.

Other states have non-judicial foreclosure statutes, so why not Florida?

A number of states have non-judicial foreclosure processes, and some in Florida's legal and financial communities ask: Why not Florida? To answer the question, one need look no further than the near-daily reports of various scandals plaguing the banking industry, the most notorious being the so-called "robo-signer" scandal.

Earlier this year, the Office of the Florida Attorney General, Economic Crimes Division, released a report on mortgage foreclosures in Florida entitled *Unfair, Deceptive and Unconscionable Acts in Foreclosure Cases*. The report was accompanied by a PowerPoint presentation that walks the reader through the root causes of the robo-signing scandals.

As detailed in the Attorney General's report, when a mortgage customer obtained a loan to purchase a home or other real property, the original note and mortgage used to be maintained by the lending bank in a vault or other secure storage facility. As more Americans pursued the dream of home ownership, the mortgage industry grew, and bankers realized they could cash out the mortgages they had been originating by selling the notes and mortgages to third parties. With increasing frequency, these mortgages and notes were sold to mortgage trusts. Each trust typically held a bundle of 5,000 notes, the payment of which was secured by mortgages on the underlying real properties. The notes in these trusts often had face values totaling in the billions.

These trusts, and the notes and mortgages in them, were bundled into so-called Mortgage-Backed Securities, or MBS, which were then sold to investors. Sometimes the notes and mortgages in these trusts were assigned, sold and resold before they made their way to the trustee of the trust. Rules were therefore needed for how the MBS trusts operated, serviced the notes, disbursed funds and enforced note obligations upon default. These rules were set forth in pooling and servicing agreements. If the process did not work properly, sometimes a note, a mortgage or both documents could—and often did—get lost. Other times, document custodians did not always follow proper procedures under the pooling and servicing agreements. As the mortgages and notes changed hands, MBS trustees and servicers often did not keep up with the requisite assignments necessary to transfer ownership of the mortgage documents legally, and therefore, ownership of the various mortgages, from one bank to another. Keeping track of the ownership of these instruments is important because the holder of a note is the only one that may sue on it, and only the holder of a mortgage may foreclose that mortgage. A valid assignment transfers the ownership of the mortgage and allows the assignee to obtain standing

to commence a foreclosure action if the obligor on the note stops making mortgage payments.

As notes and mortgages were transferred from one lender to another, and with greater frequency as the popularity of MBS grew, assignments were sometimes not properly made, or not made at all. When enforcement of a mortgage became necessary, it sometimes became difficult to determine who had title and ownership of a mortgage and note. As defaults occurred with greater frequency in the latter part of 2008, keeping up with exactly which institution owned what loan became increasingly chaotic.

To keep up with the mortgage and note transfer process, banks appointed individuals to execute the mortgage and note assignments. Unfortunately, many individuals appointed by the banks to execute these assignments knew nothing about the documents they were signing. Because these individuals simply signed the documents as they were told, the popular press pejoratively, albeit accurately, began referring to them as "robo signers." Such individuals included bank employees; law firm employees, including lawyers, paralegals and even secretaries; and document preparation and processing company employees. Thousands and thousands of assignments were signed in this fashion on a weekly basis. What made the robo-signing scandal so egregious is that, in sworn testimony taken from certain robo signers, these individuals attested to falsifying witness signatures on mortgage documents, falsifying notary seals, falsifying affidavits attesting to the accuracy of the documents being signed and sometimes simply falsifying the mortgages and notes themselves.

These practices were discovered over the course of foreclosure proceedings, proceedings supervised by Florida courts. Without the supervision of an independent judiciary, these practices may have gone unnoticed altogether. Banks in Florida and elsewhere are having obvious difficulties meeting the requirements for foreclosure. In response, however, the Bankers Association of Florida has introduced legislation designed to lower those requirements even further.

What the last bill proposed

While the Bankers Association has attempted to have the Florida Legislature pass non-judicial foreclosure bills for both residential and commercial property, this year's efforts focused solely on commercial property. A number of issues existed regarding the bill's violation of due process requirements and failure to protect the due process rights of land owners and others with an interest in the property being foreclosed. The following is a summary of these issues.

Instead of filing a foreclosure complaint with the court and serving that complaint and summons in accordance with Chapter 48 and the Florida Rules of Civil Procedure, the last bill proposed to allow the mortgage lender simply to appoint a private trustee. Rather than personally serving the borrower, that trustee would have provided to the borrower, by certified mail, return receipt requested, notice of the trustee's intent to foreclose upon the lender's mortgage. Once the property was sold by the trustee, the lender would have preserved its rights in all respects to pursue the borrower for any deficiency in the amount between its remaining mortgage indebtedness and the amount for which the property could be sold, regardless of the borrower's conduct during the term of the mortgage or the course of the non-judicial foreclosure process.

After providing the borrower with the combined notice of default and notice of foreclosure, the borrower would have had only 15 business days after receipt of the notice to object in writing to the trustee, using the preapproved objection form provided for in the bill. Then, and only then, would the foreclosing creditor have been required to proceed with a judicial foreclosure action, but only as to the specified default to which the borrower objected. The bill did not provide for assertion of "affirmative defenses" or counterclaims, which the borrower, or any other party with an interest in the real property, would have the right to assert in a judicial foreclosure.

The notice to be provided by the trustee would have been by certified mail, commercial delivery service or delivery service permitted by the agreement between the borrower and the lender, return receipt requested, and by first-class mail or permitted delivery service, postage prepaid. If the trustee did not perfect service within 30 days of the sending of the notice, then the trustee would have been required to perform a diligent search and inquiry to obtain a different address for the borrower or junior interest holders. If that inquiry produced an address different from the original notice address, the trustee would have been required to mail a copy of the second notice by certified mail, registered mail or permitted delivery service, return receipt requested, and by first-class mail or permitted delivery service, postage prepaid, to the new address. Notice would have been considered perfected under the bill upon the trustee's receiving the return receipt bearing the signature of the borrower or junior interest holder within 30 calendar days after the trustee sent the notice. If notice was not perfected after a diligent search and inquiry and the notice was not returned as undeliverable, the trustee could have perfected notice by publication in a newspaper of general circulation in the county or counties in which the commercial real property was located.

The last bill expansively defined commercial real property by defining "commercial property" to include property used by the owner for "other than for personal, family or household purposes." Some property owners operate a home-based business out of their homestead, which under the language of the last bill, would have exposed residential, even homestead property, to non-judicial foreclosure. As well, some property that is likely intended to be subject to non-judicial foreclosure might have been deemed to be excluded by that definition. Consider, for example, a "family business" or a "family counseling center" or a "family physician's practice" operated out of what would otherwise be residential real property.

The last bill did not define "interest holder" to include certain parties such as a short-term possessory interest holders (a tenant for less than one year), an heir of a decedent owner, beneficiary of a trust, etc. Under the

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bill proposed this year, and unlike a judicial foreclosure process, those persons would have received no notice and would have had no rights. This deprivation of notice would violate procedural due process rights. Alternatively, if by their exclusion those interests were left undisturbed, then a purchaser under a non-judicial foreclosure process would not acquire title free and clear of those interests, an infirmity that could lead to title challenges. The last session's bill was, at best, entirely unclear on the method of notice, or even requirement of notice, on a variety of junior and other interest holders in the real property to be foreclosed.

Moreover, junior lienors, who did receive notice of the non-judicial foreclosure under the terms of the last bill, would not have been provided an objection form, arguably preventing such lienors from objecting absent filing an original proceeding with the circuit court. It is not unusual for a "second mortgagee" to contest the priority of the "first," particularly after a refinance. Presently, in a judicial foreclosure, the court determines who really is "first." There was no mechanism under the last bill to make that determination. The "second" mortgagee would have had to sue for an injunction to stop the foreclosure. Similarly, bona fide defenses, such as "marshalling of assets," would not have been available under the last bill. As a further example, a construction lienor who worked on a portion of the property (an outparcel, for example) may now ask the court to "marshal the assets" so the lender can foreclose all of the property except the outparcel (if the value is sufficient), and the outparcel will be left for the construction lienor to foreclose. That could not happen under the last bill—the construction lienor would have had to file for an injunction to stop the non-judicial foreclosure.

Because there was no independence requirement for the trustee in the last bill, anyone could be a trustee, even a bank employee or a bank lawyer. Under the last bill, no independent third party would be required to review the procedure, the amounts requested, the nature and validity of the default, the validity of the bank's paperwork or the fairness and due process issues associated with the foreclosure, all of which would be reviewed in a judicial foreclosure process.

Under the last bill, if within 15 business days the obligor objected to the use of the foreclosure procedure for a "specific default," the creditor would have had to proceed to a judicial foreclosure for the specified default. However, the bill did not provide for assertion of "affirmative defenses" or counterclaims, which the borrower, or any other party with an interest in the real property, would have the right to assert in a judicial foreclosure process.

Under the last bill, if a dispute arose as to whether a particular objection was sufficient to stop the non-judicial foreclosure process, the borrower's only recourse would have been to file for emergency injunctive relief. In other words, if the borrower objected to a basis for the non-judicial foreclosure, and the bank disagreed with the basis, then the borrower's only recourse would be to file a lawsuit to enjoin further foreclosure.

The assumption under the last two non-judicial foreclosure bills was that, in a non-judicial foreclosure procedure, the lender is always correct as to the amount of default, the nature of the default and the calculations of payments, interest, etc. Recent history has confirmed that lenders are often wrong about the amount and nature of defaults in mortgage documents, especially in light of secondary market transactions, servicing agents' sloppiness, etc. No effective means has been provided to challenge these matters in any bill introduced in the Legislature to date.

The notice provisions in the last bill were inadequate. If the borrower did not pick up the "return receipt requested" notice, the bill would have allowed the lender/trustee to publish notice in a newspaper that is not actually widely circulated. In short, the property owner might never have received actual notice of the foreclosure, and property could have been taken without notice … a major due process problem.

The lender would have had the ability to set its own costs, fees, interest, etc., unilaterally without judicial review or third party oversight.

After the foreclosure, the lender would have had the right to seek a deficiency judgment (or arguably judgment on a guaranty) in court. The only defense the borrower would have had is the "adequacy of the price obtained at the foreclosure sale," and the borrower would have had the burden of proof regarding its inadequacy. Most sales are accomplished for a nominal sum "credit bid" by the lender. The last non-judicial foreclosure bill did not provide a means to challenge the lender's unilaterally calculated judgment amount, including attorney's fees and costs, which could be significant, given the lack of checks and balances, as well as the calculation of late charges and post-default interest. A potential for abuse exists any time one party has unilateral, unchecked power; the bill would have provided lenders just that kind of unbridled power.

The only recourse for a lender's wrongful or material violation of the proposed statute would have been damages. Under the last bill, the owner would lose his or her property even if the lender was absolutely wrong. Also, trustees would have been liable only for intentional violations, which are difficult to prove given the intent element, making trustees virtually free of any responsibility for their own negligence.

The bill proposed to eliminate the historic right of redemption after issuance of a certificate of sale. Although the right of redemption has been part of Florida foreclosure law for many generations, with one stroke of the pen, that longstanding right could have been eliminated.

The last bill might have had other, unintended consequences. For example, and as referenced above, the Florida Constitution provides the circuit courts with the exclusive jurisdiction over matters of equity. Section §702.01, Florida Statues, provides that all mortgages shall be foreclosed in equity, imbuing the circuit courts of our state with the exclusive jurisdiction over the foreclosure process. Among other problematic provisions,

the bill proposed that, in the instance of a conflict between the provisions of the bill and Chapter 702, Florida Statutes, or other applicable law, the provisions of the proposed bill, if it had been enacted into law, would prevail, making the legislation patently unconstitutional on its face.

The last bill also sought to address a nonexistent crisis where commercial foreclosures are concerned because such cases make up a very small part of all foreclosure cases filed in Florida. Based upon statistical information set forth in the table below, and maintained by the Office of State Courts Administrator, commercial foreclosures filings, as a percentage of all foreclosure filings, represent a small fraction of foreclosure cases working their way through Florida's courts. This bill, if passed, would have represented a sharp departure from over 150 years of judicially supervised foreclosures, and it was proposed as a remedy to a problem that simply does not exist. The bill did little to address judicial overload, which generally is the result of residential foreclosures, which were not addressed in the bill. The State Courts Administrator compiled the statistics below.

In short, out of almost 100,000 foreclosure filings, less than 4,000 (3.6%) were commercial foreclosures. Moreover, the bill would not have eliminated most of those 4,000 cases because, in most instances, the lender will wish to pursue the guarantor or to seek a deficiency, and that must be done in court. Also, the objection procedures built into the bill would have meant that some foreclosures would have been directed to the courts in any event. Given the inability and lack of standing that junior lienors had under the bill to object, an increase in emergency injunction suits could have been expected.

Even if the last bill had become law, implementation would have been problematic. This is because at present, many if not most of existing mortgage documents in Florida provide for a judicial foreclosure process after default. Therefore, unless the borrower and lender agree to a non-judicial process by way of a novation or other amendment to the mortgage document, the non-judicial foreclosure process envisioned by the last bill would likely have been unavailable to most lenders under already existing mortgages.

Ironically, in the Florida Attorney General's report cited above, proffered solutions for the mortgage foreclosure crisis in Florida included assuring the integrity of the judicial foreclosure process and assuring the due process rights to foreclosed-upon homeowners through proper service of process on the property owner, proper standing to sue by the plaintiff lending institutions and substantive review of the paperwork prior to foreclosure. These recommendations would be impossible to implement in the absence of a judicially supervised foreclosure process.

Passage of the bill was defeated, but similar bills will likely be introduced in future sessions. Before our Legislature should even consider a non-judicial foreclosure process, banks need to show more responsibility, perhaps even honesty, before the people of Florida can trust them with a non-judicial foreclosure process.

Members of the Non-Judicial Foreclosure Study Group of The Florida Bar Business Law Section Bankruptcy/UCC Committee contributed to the paper from which this article is excerpted. The author is the study group's chair and reporter.

FY 2010-2011 YTD	Commercial Filings	Total Filings	% of Filings
$0 - $50K	237	10,247	2.3%
$50K - 250K	909	63,882	1.4%
$250K +	2,418	23,730	10.2%
TOTAL	**3,564**	**97,859**	**3.6%**

Florida Bar Meetings

BOARD OF GOVERNORS

Oct. 18-23, 2011, *Charleston Place, S.C.*

Dec. 7-11, 2011, *The Ritz Carlton, Amelia Island, Fla.*

THE FLORIDA BAR MIDYEAR MEETING

Sept. 21-24, 2011
Hilton Walt Disney World Resort, Orlando, Fla.

President's message:

An exciting new year

by Ward P. Griffin, President

W. GRIFFIN

As we embark on a new Bar year, I am honored to have been elected to serve as president of the Out-of-State Division. We stand as one of only two divisions within The Florida Bar, promoting the interests of the more than 14,000 Bar members who reside or practice beyond Florida's borders.

The Executive Council of the OOSD has been working to craft plans for the coming year and beyond. I would like to take a moment to provide you with some details.

First, the OOSD will continue its popular Free Ethics CLE program. All division members should expect to receive an email in September announcing the availability of the free ethics CLE, with instructions on how to access it. To receive this benefit, be sure you are current on your division dues!

Second, the OOSD is looking forward to hosting another series of networking happy hours this winter. The first of these will coincide with the out-of-state meeting of the Board of Governors of The Florida Bar. All out-of-state members are invited to attend a joint reception with the BOG, scheduled to take place on Thursday, October 20, at Charleston Place in Charleston, S.C.

Beyond the networking happy hours, if you have ideas on networking opportunities in your area, we welcome and appreciate your thoughts and—most important—your willingness to volunteer.

Third, the OOSD has reexamined its overall CLE program and is studying how the program may be improved. Our ultimate goal is to provide relevant, cost-effective CLE opportunities for our members. Further details will be forthcoming, and I look forward to updating you soon.

Fourth, the OOSD has launched a new Student Member Program, with the goal of reaching out to law students who have an interest in becoming involved with the division. We are working with the new Law Student Division of The Florida Bar Young Lawyers Division to spread the word on this initiative.

Moving forward, the Executive Council of the OOSD will work diligently to represent and promote your interests as out-of-state members of the Bar, and likewise will strive to provide useful benefits to all dues-paying members of the division.

We have much work to do, and with that comes many opportunities for further involvement with the OOSD. If you would like to become more actively involved with the division, I hope you will not hesitate to contact me directly. We could use your help!

This will indeed be an exciting year for the OOSD, and I look forward to working through it with you.

The author is an attorney with the U.S. Commodity Futures Trading Commission in Washington, D.C. The statements contained in the article reflect the personal views of the author and do not necessarily reflect the views of the CFTC.

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Let's have an exciting year and grow your Out-of-State Division

D. WORKMAN

Welcome to our new president, Ward Griffin. We look forward to working with Ward to grow your division.

The president's column is about the division's areas of focus this year: improving the free ethics CLE program; networking gatherings; enhancing relevant cost-effective CLE; developing a student member program; promoting the OOSD's interests in The Florida Bar; and increasing involvement by OOS lawyers. Please consider the details Ward has provided in his column. We hope our approach in the *State-to-State* and our other endeavors demonstrate our resolve.

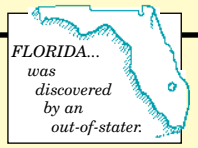
You're reading our latest edition of the all-cyber version of *State-to-State*. You should be receiving a link to each edition of the newsletter that allows you to view the articles online in color at your desk or on your mobile device. Of course, you can also choose to print it and take it with you. We hope you'll agree with this step forward.

We have more articles from new contributing authors this month. 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 in our publication 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're not shy—we want to help you grow your practice.

We continue to work with your OOSD president, Ward Griffin, to reach more members. Our goal is to continue to increase membership in the division. We've enjoyed great success with receptions in various cities. Another effort involves expanding the attraction of the *State-to-State*, especially to advertisers. By doing so, we can expand services provided to OOS lawyers. It should be a win-win for everyone.

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



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State-to-State is devoted to Florida and multi-jurisdictional legal matters. It is editorially reviewed and peer reviewed for matters concerning relevancy, content, accuracy and style. *State-to-State* is sent electronically to more than 14,000 legal practitioners throughout the United States.

Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the division.

The deadline for the **Fall 2011** issue is **November 15, 2011**. Articles should be of interest to legal practitioners with multijurisdictional practices. Please submit articles in a Word format via email to Don Workman, *dworkman@bakerlaw.com*. Please include a brief biography with contact information and a photograph of the author. If a digital photo is not available, please mail a print to The Florida Bar, OOSD, 651 East Jefferson Street, Tallahassee, FL 32399-2300.

Author! Author!

The Out-of-State Division offers its membership a valuable forum for the exchange of information on legal issues affecting our interstate practices. To be truly effective, it is essential for a large cross section of our members to contribute articles, news and announcements to this newsletter.

For those of you who would like to see your work in print, the rules for publication are simple: The article should be related to a subject of general interest to legal practitioners with multijurisdictional practices. Articles focused on your home state are less appealing than issues impacting a number of jurisdictions.

Please send documents in MS Word format via email to Don Workman, *dworkman@bakerlaw.com*.

Please help your colleagues to get to know you by including a brief biography with contact information, and include a head and shoulders photograph. If you do not have a digital photograph, please mail a print to The Florida Bar, OOSD, 651 East Jefferson Street, Tallahassee, FL 32399-2300. Your photo and bio will be kept on file and need only be submitted once.

Out-of-State Division leaders appointed to Florida Bar leadership positions

Two out-of-state Board of Governors members and a past president of the Out-of-State Division have been appointed to serve in Florida Bar leadership positions for the 2011-2012 bar year.

Brian D. Burgoon, Board of Governors member from Atlanta, Ga., has been appointed co-chair 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 an attorney's trust. This is Burgoon's third time chairing the DRC. Burgoon is also beginning a one-year term on The Florida Bar Executive Committee, which 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.

Ian M. Comisky, Board of Governors member from Philadelphia, Pa., has been reappointed 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 Florida 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.

Timothy P. Chinaris, a member of the Out-of-State Division Executive Council from Montgomery, Ala., is the new chair of the 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. Chinaris also serves on The Florida Bar Professional Ethics Committee and is a past president of the Out-of-State Division.

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Board of Governors' update

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:

At its Jan. 28, 2011, meeting in Tallahassee, The Florida Bar Board of Governors:

- Approved as a new Bar legislative position support for a constitutional amendment to raise the mandatory retirement age for judges and justices from 70 to 75. The board tabled a related position on a proposed constitutional amendment requiring that those seeking trial judgeships have been members of the Bar for 10 years, instead of the current five-year standard.
- Approved a modification of an existing Bar legislative position that calls for adequate funding of the court system to include adequate funding of clerks of courts in their court-related duties.
- Heard Investment Committee Chair Ian Comisky report that the total return on the Bar's long-term investment portfolio for the 2010 calendar year was more than 11 percent.
- Heard House Speaker Dean Cannon express support for full funding of the courts and advocate that government functions best when all three branches are fully empowered and respect the rights and duties of the other branches. He called for civil debate on legislative matters, including the proper roles of the various branches. He warned Florida's budget crisis will place heavy burdens on the state, and said the federal health care reform law could double the state's Medicaid rolls, further exacerbating its budget problems in the next few years.
- Heard Chief Justice Charles Canady warn that further budget cuts would cause severe harm to the courts and their ability to resolve cases, and that it's just as important to see that clerks as well as courts are fully funded.
- Heard Disciplinary Procedure Committee Chair Andy Sasso report that the committee continues to look at proposed changes to the trust accounting rules, including preparing trust accounting forms to assist Bar members. Sasso also said that DPC approved a change to Rule 3-7.10, regarding reinstatement, to define community and civic service as required by the rule.
- Saw a demonstration of the scheduled overhaul of the Bar's website, which is expected to go online May 1. The revised site will feature faster ways to find information, improved graphics and enhanced search capabilities.
- Approved unanimously a proposal presented by Program Evaluation Committee Chair Greg Coleman and suggested by a subcommittee that has been working on defining Bar programs and services that can help lawyers hurt by the ongoing poor economy. The Lawyers Helping Lawyers program will have a section on the Bar's revamped website and will offer ways to build a practice, discounted goods and services for lawyers, a job and career center, and other helpful information.
- Heard Coleman report on the special committee examining mandatory regulation of paralegals. He said the committee has tentatively decided that paralegals should be regulated and is now looking at the best way to do that. Coleman said the Bar will survey the 4,500 registered paralegals in the Bar's Florida Registered Paralegal Program to get their views. The matter could be presented to the board at its March meeting.
- Heard Board Review Committee on Professional Ethics Chair Carl Schwait report that the committee will be redrafting its pending rewrite of the Bar's advertising rules after getting input the previous day from the Bar's Citizens Forum and from lawyers during a public session with the committee. He reported that many good suggestions were made and that it might be difficult to meet the committee's original schedule of having the rules ready for second reading at the board's May meeting, but reported it was more important to get the revisions right than to meet the arbitrary deadline.
- Heard from Special Committee on Diversity and Inclusion Co-Chairs Arnell Bryant-Willis and Dori Foster-Morales that the committee has received 29 grant applications requesting more than $56,000 for the Bar's new diversity grant program for local bars, which is funded at $50,000 this year.
- Heard a report from Florida Bar Foundation President John Noland that the foundation's income continues to be extremely low because of low interest rates paid in the IOTA program. The foundation is looking for alternative sources to reduce the cuts for legal aid programs.

At its Mar. 25, 2011, meeting in Orlando, The Florida Bar Board of Governors:

- Approved the Bar budget for the 2011-2012 fiscal year. The budget projects revenues of around $38 million and slightly less expenditures.
- Heard former Bar President Miles McGrane, chair of the Judicial Qualifications Commission, ask the board to oppose a proposed constitutional amendment in the Florida Legislature that would dramatically reduce confidentiality of complaints made to the JQC. The board later in the meeting adopted a legislative position opposing such changes.
- Heard the final recommendations from the Special Committee to Study Mandatory Paralegal Regulation, which have been referred to

continued, next page

the Program Evaluation Committee. The special committee recommended that lawyers could not in any communications refer to support staff as a paralegal unless that person is a Florida registered paralegal. A minority report from the special committee opposes that recommendation. During the Program Evaluation Committee report, Chair Greg Coleman said the Bar had surveyed registered paralegals and out of more than 2,000 responses, only 40 were in favor of mandatory paralegal regulation.

- Approved a legislative position opposing numerous pending legislative bills and proposed constitutional amendments that would dramatically undermine the courts as now written. Opposed bills include splitting the Supreme Court into civil and criminal supreme courts, eliminating the Bar's role in nominating candidates for some judicial nominating commission seats, removing JNCs from the selection process for DCA judges and Supreme Court justices (that bill also creates Senate confirmation for those jurists) and requiring that justices and DCA judges get 60 percent approval in retention elections. (Another measure would have the Legislature take over procedural rulemaking from the Supreme Court; the Bar already has a legislative position opposing that.) The board-approved resolution also set out four principles for legislation affecting the judicial branch: a stable, secure, adequate and permanent source of funding for the courts; the efficient, fair and impartial functioning of the courts and administration of justice that recognizes the courts as a co-equal branch of government; providing access to the courts and legal services for all Floridians; and a continued meaningful role in the judicial selection process.
- Also as part of the legislative discussion, the board heard Barry Richard, the Bar's outside legal counsel, recount his discussions with the House Speaker's Office regarding Richard's personal views on legislative issues. Richard told the Speaker's Office that he did not represent the Bar on legislative matters and that he could not speak for or commit the Bar to any legislative position. Those discussions apparently will help lead to a dramatic change in various House proposals, with a resulting lesser impact on the courts.
- By a separate motion (as noted above), the board also approved a legislative position opposing the proposed constitutional amendment that at some point in the process would make public all complaints filed against judges with the JQC.
- Bar Chief Legislative Counsel Steve Metz said that after a rocky start, the courts appeared to be doing reasonably well in the budget process for the 2011-2012 fiscal year. The House's preliminary plan would have cut judicial salaries by 8 percent, but the speaker interceded and included enough money to keep judicial salaries intact.

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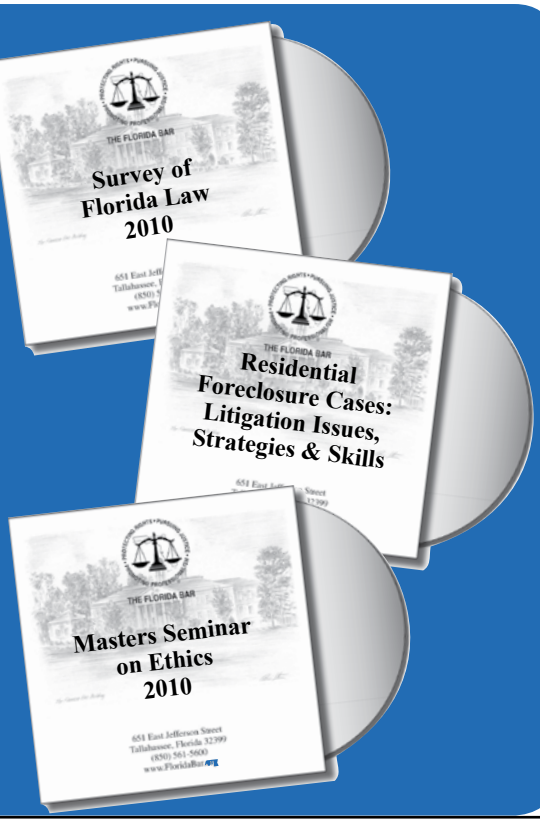

Board updates, *from preceding page*

Attempts to reduce overall judicial pensions appear to have failed, although judges may wind up contributing to their pensions, as will other state employees, including court staff.

- Chief Justice Charles Canady spoke to the board on the court's current year budget crisis, caused by a sharp reduction in foreclosure filings, which provide the bulk of the court system's funding. He said House and Senate leaders were amenable to a plan for the courts to borrow funding to make it to the end of the fiscal year, but that Gov. Rick Scott had asked for more information and so far had only agreed to provide funding to keep the courts going until the end of April. He also praised the House speaker for restoring money to prevent a judicial salary cut, which Canady said would have undermined the ability to attract and keep qualified judges. He warned, though, that the preliminary House budget, perhaps by mistake, eliminated 14 law clerks from the Supreme Court, which he said would substantially undermine the court's ability to handle cases efficiently.
- Heard from Mark Schlakman of the Florida State University Center for Human Rights, who presented a letter from former Supreme Court Justice Raoul Cantero calling for the Bar to endorse a review of Florida's death penalty process. President Downs said the Executive Committee will review and act on that matter.
- Approved, at the recommendation of the Member Benefits Committee, three new benefits for Bar members: Medjet Assistance, an insurance program guaranteeing medical transport when traveling; Sears Commercial Marketplace, which offers a wide range of online shopping for home and office products; and STI Tabs3 Trust Accounting Software, which assists lawyers in setting up and maintaining their trust accounts.
- Heard Board Review Committee of Professional Ethics Chair Carl Schwait report that the committee will be presenting its recommendations for amending Bar advertising rules at the board's May 27 meeting. He said the Supreme Court has ordered that the amendments be submitted to it no later than July 5.
- Recommended to the Supreme Court Winston W. Gardner, Jr., of Orlando, Steven S. Oscher of Tampa and Marni F. Stahlman of Winter Park as candidates to replace Arnell Bryant-Willis as a public member on the board.

At its May 27, 2011, meeting in Key West, The Florida Bar Board of Governors:

- Heard a review of Bar activities in the just-ended legislative session and plans for an earlier start on next year's session, including a new communications plan with board members and Bar members.
- Approved a rewrite of the Bar's advertising rules, as proposed by the Board Review Committee on Professional Ethics. The amended rules will be submitted to the Supreme Court by July 5. Major changes, according to BRCPE Chair Carl Schwait, are that nonmisleading testimonials and past results that can be objectively verified will be allowed and that websites will be subject to all advertising rules, except the requirement that they be

continued, next page

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 (CLER) 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 polices.

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.

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submitted for Bar review. Another amendment specifies that all ads that must be submitted for Bar review must be submitted prior to publication or broadcast, not just electronic ads as in the current rules. Schwait said the committee had four goals in redrafting the rules: simplicity, clarity, consistency and defensibility.

- Heard a report on e-filing for the Florida courts from board members Murray Silverstein and Laird Lile and from Supreme Court Clerk Tom Hall. Hall reported that the e-filing system is gearing up, with more counties joining. He said the largest problem is with lawyers using the system not following the rule on protecting confidential client information in electronic filing. He said a subcommittee of the Rules of Judicial Administration is looking at that problem and is considering a redraft of the confidentiality rule.
- Elected Jay Cohen, David Prather and Ed Scales as the board's representatives on the Executive Committee.
- Approved President-Elect Scott Hawkins' request for a commission to review the Bar's disciplinary operations.
- Rejected, on the recommendation of the Program Evaluation Committee, the proposal from the Special Committee to Study Mandatory Regulation of Paralegals. The special committee had proposed that lawyers be prohibited from calling their non-lawyer employees "paralegals" unless those employees had become Florida registered paralegals with the Bar. Instead, the board approved the minority report from the special committee, which called for maintaining the FRP program. The board also approved recommendations from the PEC, which was completing its three-year review of the FRP program, on ways to enhance the program. The enhancements include improving education opportunities and increasing education about the program.
- Approved recommendations from the Program Evaluation Committee defining the relationship between the Supreme Court Commission on Professionalism, the Bar's Committee on Professionalism and the Bar's Henry Latimer Center for Professionalism.
- Approved the recommendation of the Program Evaluation Committee to extend the Special Committee on Diversity and Inclusion for another year.
- Gave final approval to the Bar's 2011-2012 budget after making minor changes to allow renovation of four bathrooms at the Bar's headquarters.
- Transferred an extra $1 million from the 2010-2011 operating budget into the Bar's building maintenance reserve and added an extra $350,500 for the Clients' Security Fund for claims paid from an unexpected court-ordered payment. Another $500,000, less administrative costs, was added to the CSF claims paid from the CSF reserve.
- Heard from Investment Committee Chair Ian Comisky that the Bar had an outstanding year for its investments, including a positive return in every quarter.

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Board updates, *from preceding page*

- Gave final approval to deleting Standing Board Policy 11.21, which allows introduction of resolutions at the Bar's annual convention.

At its July 29, 2011, meeting in Palm Beach, The Florida Bar Board of Governors:

- Heard from Bar President Scott Hawkins that Gov. Rick Scott had rejected two of the 26 slates of judicial nomination commission candidates submitted by the Bar in May. Scott rejected the slates for the 17th Circuit JNC (although he appointed one nominee on the 2011 slate to a 2010 position) and the Fourth District Court of Appeal JNC. Hawkins said the governor's general counsel did not give a reason for the rejection but did note F.S. §43.291 gives the governor authority to reject a Bar-nominated slate. Hawkins said the Bar would advertise for new applicants and the Executive Committee would select another slate for those two JNCs.
- Heard Supreme Court Justice Charles Canady warn that the courts still face money shortfalls because funding remains heavily reliant on foreclosure filing fees. He said foreclosures have increased slightly from earlier in the year but not enough to meet the revenue projections that legislators used in setting the court's budget. Without a further significant increase in those filings, the courts will have to go back to lawmakers and the governor for additional loans to make it through the 2011-2012 fiscal year, which began with a $54 million loan from the state. "This is an intolerable situation for our branch, and we have got to in this next session of the Legislature get … a funding arrangement that is reliable," the chief justice told the board.
- Approved, upon the recommendation of the Legislation Committee, allowing the Legal Needs of Children Committee to advocate for legislation allowing children sentenced in adult criminal court for more than 10 years to have a meaningful opportunity for early release based on demonstrated maturity and rehabilitation.
- Approved, upon the recommendation of the Board Review Committee on Professional Ethics, expressing concerns to the ABA on changes to two preliminary proposals from the ABA Commission on Ethics 2020 affecting outsourcing of legal services and on technology, largely because the suggested changes were less strict than current Supreme Court rules. Upon recommendation of the Standing Committee on the Unlicensed Practice of Law, the board voted to object to three proposed changes from the ABA Ethics Commission. Those are to allow attorneys from other states to practice for a certain amount of time, to be determined by the Supreme Court, either as attorneys or as authorized house counsel while their petition to join The Florida Bar or to become authorized house counsel is pending; to allow a lawyer licensed in another country to appear *pro hac vice* in Florida; and to allow attorneys licensed in other counties to become authorized house counsel in Florida. The board, on the recommendation of the Standing Committee on UPL, voted to support the ABA Ethics Commission's recommendation that attorneys from other countries can engage in limited and temporary practice in Florida, since that tracks the Supreme Court's rule on multijurisdictional practice.
- Heard former Bar President Herman Russomanno, a member of the ABA Commission on Ethics

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2020, report on the commission's activities. He said the commission welcomed any input and would not be making any recommendation to the House of Delegates before the ABA's August 2012 annual convention.

- Heard Florida Bar Foundation President Michele Cummings report that Florida IOTA income has declined 88 percent because of low interest rates, with little improvement expected until late next year, at the soonest. The foundation has used most of its reserves set aside for difficult economic times, she said, and is now exploring working with banks and capital markets on getting a loan to help continue funding legal aid programs, with the loan to be repaid when interest rates recover.
- Heard Investment Committee Chair Ian Comisky report that the committee is closely monitoring federal debt ceiling extension negotiations because of the potential impacts a deadlock could have on the Bar's investments. He also reported the Bar's investment funds, after another positive quarter ending in June, are at an all-time high.
- Recommended the Supreme Court approve expedited amendments from the Civil Procedure Rules Committee. Committee Chair Kevin Johnson said the rules are the first codification in Florida procedural rules for handling electronic discovery and are based, with some changes, on federal rules. The board also recommended approval of three-year cycle rules amendments for Juvenile Procedure Rules, Traffic Court Rules and Criminal Procedure Rules.
- Heard a lunchtime address from Prof. Thomas Morgan of the George Washington College of Law on changes in the legal profession. He said the rapid growth in the number of lawyers, a difficult economy, technology and the lack of control by bar associations over the legal marketplace are combining to put new pressures on the practice and also leading to rapid changes. Lawyers are likely to have to become more specialized to deal with those changes and will be expected to deliver "Wal-Mart efficiency with a Neiman-Marcus feel."
- Heard Program Evaluation Committee Chair Jay Cohen report the committee would be examining in

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 one of the four out-of-state members of The Florida Bar's Board of Governors since 2000. He practices civil and commercial litigation with The Burgoon Law Firm LLC in Atlanta, Ga. He can be reached at brian.burgoon@burgoonlaw.com.*

Robert P. Charbonneau *is a founding member and partner with Ehrenstein Charbonneau Calderin, a Miami, Fla.-based firm specializing in commercial litigation, corporate restructuring, bankruptcy and creditors' rights. Mr. Charbonneau's clients include lender institutions, creditors committees, Chapter 11 debtors, bankruptcy trustees and other professional fiduciaries operating in distressed/insolvency environments. He can be reached at rpc@ecclegal.com or 305/722-2002.*

Timothy P. Chinaris, *an OOSD past president, is associate dean for information resources and professor of law at Jones School of Law at Faulkner University in Montgomery, Ala., where he teaches courses in legal ethics and other subjects and directs the law library. He previously served in a similar capacity at Florida Coastal School of Law in Jacksonville, Fla. He was ethics director of The Florida Bar from 1989-1997, where his responsibilities included overseeing the Bar's popular "ethics hotline" service, which answers more than 20,000 phone calls per year from Florida Bar members. He has a bachelor's degree in business administration from Florida State University, received his J.D. with honors from the University of Texas School of Law and earned his master's degree in library and information studies from Florida State University. He is admitted to practice law in Florida and Texas. He can be reached at 334/386-7214 or tchinaris@faulkner.edu.*

Ward P. Griffin, *OOSD president, is an attorney with the U.S. Commodity Futures Trading Commission in Washington, D.C. Serving in the Office of the General Counsel, he provides legal counsel to the commission on a broad range of administrative, regulatory and legislative issues. He can be reached at ufward@hotmail.com.*

Eric Meeks, *a past president of the OOSD, is the owner of the Meeks Law Firm Inc. located in Cincinnati, Ohio. His practice is primarily focused on elder law issues, small business needs and personal injury claims. He received his JD from Ohio Northern University, an MBA with an emphasis in finance from Miami University and a BS in accounting from Indiana State University. He is licensed to practice law in Florida, Illinois and Ohio, and before the U.S. Supreme Court. He is also a certified management accountant (CMA) and CPA licensed in Ohio. He is the OOSD listserv administrator, and he can be reached at 513/826-0229.*

Donald A. Workman*, OOSD president-elect 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.*

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the coming year a designated seat for government lawyers on the Board of Governors or an alternative way of bringing government lawyers into the operations of the Bar and board. Other committee projects are a review of the Lawyer Referral Service Committee, a study of what is being done to help the perception of lawyers and judges including relating to next year's merit retention elections, renaming the Judicial Independence Committee and looking at the role of the procedural rule committees.

- Heard Communications Committee Chair Greg Coleman report that the committee is working at improving all levels of Bar communications. He noted President Hawkins has sent a short video to all Bar members, which video is also posted on the Bar's website. He said a similar video is planned quarterly. The committee is looking at how to communicate effectively both with Bar members and board members during legislative sessions, as well as with Bar committees, sections and divisions and with local bars. He said the committee also will be looking at how technology is affecting the practice of law. The committee also recommended and the board approved adding two new areas to the profiles members can post on their member page on the Bar's website; one is to allow lawyers to list their certification in civil and/or family law by the National Board of Trial Advocacy, and the other to list their status as a civil law notary, which allows lawyers to assist in Hague Convention issues worldwide.
- Heard Disciplinary Procedure Committee Chair Clif McClelland report the committee will be recommending a change to trust accounting regulations to require law firms to have written policies spelling out who in the firm is responsible for trust accounts and the duties of other partners and associates. He said the committee is soliciting sample policies from lawyers and law firms so one can be included in the rules. The change recognizes the reality that in many firms, especially large firms, associates and some partners have little effective control or oversight of trust funds.
- Heard Executive Director John F. Harkness, Jr., report that 3,500 people—the largest number ever—were taking the next bar exam. He said typically 75 to 78 percent pass and become Bar members. He added that the Bar used to get around 2,000 new members annually, but that number is now running at 2,500 and is combined with another trend of fewer older lawyers choosing to retire, leading to a rapid growth in Bar membership.

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