



MINUTES

*Labor and Employment Law Section Executive Council Meeting
EL SAN JUAN RESORT & CASINO, SAN JUAN, PUERTO RICO
Friday, April 13, 2012 • 5:00 p.m. - 6:00 p.m. – Orquidea 1 & 2*

I. Call to Order - Gregory A. Hearing, Chair

II. Secretary/Treasurer Report – Robert S. Turk

- a. Consideration of Minutes
The Reading of the Minutes of the February 16, 2012 Executive Council Meeting were approved unanimously.
- b. Financial Statement
Robert S. Turk provided the report.

Through February 29, 2012, the current fund balance for the Section is \$229,908.
Current Section membership is 2,006.

III. Committee and Subcommittee Reports

- a. Membership Outreach
Eric J. Holshouser – No report.
 - i. ABA Liaison Subcommittee
William Cassidy, Jr. / James M. Craig – No report.
 - ii. Law School Liaison Subcommittee
Jonathan W. Oliff / Deborah C. Brown provided the report.
Ms. Brown reported that the Subcommittee is currently handling two projects. First, the Subcommittee is reaching out to law schools for scholarships and to professors. Second, Ms. Brown discussed briefly that the Subcommittee has a list of nominees for the Section's Hall of Fame and those nominees will be posted on the Section's website with their biographies. Ms. Brown also reported that the scholarships would be named for Hall of Fame inductees starting with the 2012-2013 law school classes. This year the only scholarship is currently named for Gary Vause. In the future, as the number of Hall of Fame inductees grows, inductees' names will be rotated on a regular basis among the scholarships.

Mr. Oliff reported that the outreach to professors is ongoing but there is an issue regarding locating adjunct professors. He anticipates that the Subcommittee will be making contact with each law school shortly.

iii. Judicial Outreach Subcommittee

Zascha Blanco Abbott reported that the Subcommittee has scheduled lunches with judges in Miami-Dade County, the Keys and Jacksonville. The Subcommittee is presently setting those dates and will make an announcement soon to the membership.

iv. Local/Voluntary Bar Association Liaison Subcommittee

Lindsay Hanson / Leslie Langbein – No report.

v. EEOC and FEPA Liaison Subcommittee

Patrick Martin / Scott Atwood – No report.

vi. NLRB Liaison Subcommittee

Stephen A. Meck recently reported on new cases from PERC that may be of interest to members and they will be reported on PERC's website. Because of telephone interference, part of his report was inaudible.

vii. Wage and Hour Administration Liaison Subcommittee

Chairs of this Subcommittee provided a report which is attached to these Minutes as Attachment "1."

Marguerite Longoria and Alan Gerlach reported that approximately 31 members of the Subcommittee participated in a telephone meeting with Jacksonville's Wage and Hour Administrators.

viii. Membership Outreach Subcommittee

Robyn Rusignuolo reported but, because of telephone interference, her report was inaudible. However, the Subcommittee's report is attached to these Minutes as Attachment "2."

b. Long Range Planning Committee

The Committee's Chairs provided a written report which is attached to these Minutes as Attachment "3."

Robert L. Kilbride reported that, with regard to concerns regarding the Labor & Employment Law Certification, the Committee did not want to see the certification exam "dumbed-down." Instead, examinees should be provided with more questions on the exam and more short-answer questions. There was also a recommendation for an expansion of topics from which examinees could choose in order to make the exam more relevant to their respective practices.

Marlene Quintana reported that, as a BLSE member, if the LRP Committee wanted to submit changes to the exam, they should be submitted to the BLSE Committee for consideration. Normally, the BLSE Committee discusses what is presented at a meeting and then vote. Ms. Quintana reported that she is working with the Labor & Employment Certification Committee members. A concern was raised that not many individuals in this State are being certified. Ms. Quintana noted that relative to other certifications, the Labor & Employment Certification had a good number of individuals successfully certified.

Ms. Quintana also reported that the BLSE Committee has hired consultants for recommendations. There was a discussion that these consultants may recommend that the BLSE no longer allow certification committees to grade on a curve but use a pass rate with a score of 65% for examinees. There was discussion that the Labor & Employment Certification Committee would likely oppose this recommendation. Ms. Quintana also stated that the consultants were looking to standardize the exams for all examinees and, instead of offering more topics, were indicating that there should be one test for all examinees. Again, this is contrary to what most Labor & Employment lawyers have complained about.

There was a discussion regarding whether in-house counsels should be certified. Frank Brown noted that this change would need to be passed by the Florida Supreme Court. Marguerite Longoria noted that she had no dispute with in-house counsels being allowed to become Board Certified without having litigation experience but also pointed out that there are a number of plaintiff and defense attorneys, as well, who do not do litigation and should also be considered Board Certified.

Damon F. Kitchen stated that in his opinion the present rules regarding eligibility for Board Certification should be left "as is." There does not appear to be a need to push to change the eligibility requirements for Board Certification because if an individual does not do arbitrations, mediations or litigation, they should not be Board Certified.

To conclude the discussion because of time, Chair Hearing said that he would ask the Special Projects Committee to review this issue. Chair Hearing stated that he would share his ideas with the Committee but Sherril Colombo (incoming Section President) would appoint the members to the Committee.

Eric J. Holshouser then asked whether there was a market for in-house counsel to want to be certified. He asked what purpose is it for an in-house counsel to be Board Certified since they only have one client who is a sophisticated user of lawyers. He noted that the purpose of Board Certification is for the public to know who is experienced in the Labor & Employment area in order to make an informed choice about hiring counsel. Since the public is not hiring an in-house counsel, this rationale for Board Certification may not apply to in-house counsel.

- c. Communications Committee
Cathleen Scott – No report.

i. Publications Subcommittee

Frank E. Brown asked for volunteers to write an article for the Bar Journal on the Ministerial Exemption addressed recently by the U.S. Supreme Court.

Chair Hearing reported that the Checkoff is being finalized and will be distributed on April 24, 2012. There was a general call for new articles for the next edition of the Checkoff which is tentatively set for early July 2012.

ii. Website Subcommittee

Judge Stephanie W. Ray noted that the Subcommittee's report was submitted in advance of the meeting. The report is attached to these Minutes as Attachment "4."

In addition, the Subcommittee proposed a website advertisement policy statement and fees be adopted. This policy statement is attached to these Minutes as Attachment "5."

A Motion was made to approve the policy statement and proposed fees. The Motion was unanimously approved.

d. Special Projects Committee

The Committee provided a report in advance of the meeting and the report is attached to these Minutes as Attachment "6."

David W. Adams reported that he had found a used Polycom Telephone System and asked the Executive Council to approve the purchase of a new Polycom Telephone System for use at Executive Council meetings. Mr. Adams made a Motion for \$750 to purchase and upgrade the present phone system. Eric J. Holshouser seconded the Motion and it passed unanimously.

IV. New Business

a. Sponsorships/Advertisements

No report.

b. Hall of Fame Inductees

Deborah C. Brown provided the Executive Council with nominations for the inaugural Hall of Fame. The proposed nominees were:

Granville Alley
Steve Bloom
Harold Boire
John Breckenridge
Charles "Charlie" Kossuth

Irving Miller
John Robinson
Leo Rock
William “Bill” Sizemore
Harrison C. “Tommy” Thompson
Gary Vause

Stephen A. Meck moved that each of these nominees be inducted into the inaugural Hall of Fame Class. Damon F. Kitchen seconded the Motion. Shane T. Muñoz asked that each member be voted on individually. As a result, each nominee was briefly discussed individually and each was individually voted into the Hall of Fame unanimously.

V. Chair’s Report

Shane T. Muñoz announced that he was recommending that restarting the Stetson Trials Skills Seminar be deferred due to a drop in attendance at other CLE presentations. Mr. Muñoz also announced that the fall PERLA Forum is being scheduled as well as the Section’s fall Litigation Seminar. That Seminar will have the same Co-Chairs as last year (Robyn Hankins and Robert L. Kilbride).

Chair Hearing announced that he would be speaking on Social Media at the Florida Bar’s annual convention in June on behalf of the Section.

VI. Chair Hearing announced that the next Executive Council Meeting and Reception is scheduled for:

Thursday, June 21, 2012 – Gaylord Palms, Orlando

Executive Council Meeting: 5:00 p.m. – 6:00 p.m.

Reception to Honor Inaugural Section Hall of Fame Inductees – 6:00 p.m. – 8:00 p.m.

A Motion was made to adjourn the meeting, which was unanimously passed.

PRESENT:

Zascha Blanco Abbott
David W. Adams
Frank E. Brown
Gregory A. Hearing
Eric J. Holshouser
Robert L. Kilbride
Jonathan Oliff
Marguerite Longoria
Shane T. Muñoz
Marlene Quintana
Cary R. Singletary
Robert S. Turk

TELEPHONE:

David E. Block
Deborah C. Brown
Sherril M. Colombo
Robert M. Eschenfelder
Honorable Alan O. Forst (*tried to call
in but could not get through*)
Alan M. Gerlach, Jr.
Richard E. Johnson
Damon F. Kitchen
Brian Lerner
Stephen A. Meck
Ray J. Poole, Jr.
Honorable Stephanie W. Ray
Robyn Rusignuolo
Cynthia N. Sass
Jill S. Schwartz
Leslie K. Reicin Stein
John S. Trimper

GUESTS:

Ron Rosengarten
Don Ryce
Angela Froelich/Section Administrator

EXCUSED:

Scott A. Fisher
Daniel R. Levine

ABSENT:

Scott E. Atwood
Walter E. Aye
William P. Cassidy, Jr.
James M. Craig
Thomas A. Delegal, III
Lindsay B. Hanson
John D. Hoffman
Nick Karatinos
Leslie W. Langbein
Patrick Martin
Robert A. Miles
Cathleen Scott
Scott T. Silverman
Grier S. Wells

Attachment “1”

The Wage And Hour Administration Liaison Sub-Committee

The Wage and Hour Administration Liaison Sub-committee sponsored their second annual one-hour teleconference with the Department of Labor's Wage and Hour Division Jacksonville District Director Michael Young and Community Outreach and Planning Specialist William "Roy" Richardson on March 27, 2012. Subcommittee members dialed in for the call, hosted by Alan Gerlach and Marguerite Longoria, Sub-committee Co-Chairs. Alan Gerlach served as moderator during the presentation.

DD Young began his presentation by describing the transformation his agency has made between engaging in complaint-driven enforcement to strategic enforcement involving initiatives focusing on industries and geographic areas. The Wage & Hour Division has concluded that emphasis on these initiatives is increasing compliance more effectively than was complaint-driven enforcement.

DD Young's presentation made it abundantly clear that his Division has been and continues to be extremely active in its oversight of wage and hour compliance. In reviewing 2011's accomplishments, DD Young reported that Jacksonville Wage & Hour conducted 25 investigations of limited service eating and drinking establishments, recovering \$327,000 in back wages (showing a decrease in noncompliance from 7.3% in 2007 to 4% in 2011.) The Division's annual migrant and seasonal agricultural workers initiative recovered \$347,000 in unpaid wages, and decreased noncompliance from 70% in 2009 to 25% in 2011. He reported that the ABA referral initiative is on-going with mixed results. While marginal cases are not being picked up by lawyers, the referrals provide the Wage & Hour Division a way to provide service to their clients. In addition, it appears that the threat of giving a client a referral to private counsel seems to prompt resolution of claims. Finally, the Liquidated Damages pilot program initiated in 2011 is ongoing. The Wage & Hour Division initiated the program to make it less profitable for employers to violate the law as a result of the imposition of liquidated damages in addition to back wages. The general policy is to impose liquidated damages where the company lacks any objective or subjective defense for the violation, or has a history of non-compliance. DD Young stated that he is less likely to impose liquidated damages in very high-dollar investigations but did in fact do so in a restaurant case which went to litigation in 2011.

Going into 2012, the staff of the Jacksonville Division includes 28 investigators, six technicians to screen claims, four assistants, and an administrative assistant. The National office has mandated several initiatives for 2012 which will apply to all field offices, including devoting 35% of the staff efforts to non-complaint targeted investigations and exploratory investigations for planning purposes. A residential construction initiative has been mandated, which is half-way complete and targets contractors of large developments and sub-contractors in each trade. An agricultural initiative has again been mandated targeting the pine-straw, citrus, and watermelon industries in various counties, H2A issues and responding to complaints, but lack of cooperation in documenting violations and language barriers remain problematic. Another on-going project involves the investigation of temporary help and leasing companies in the Veterans Administration in Lake Nona and Jacksonville. The Division is also developing an initiative around the Service Contract Act at the Naval Air Station. There will also be an H2B initiative which will likely focus on unskilled non-agricultural workers in the hotel industry. The Division

will conduct an initiative focusing on misclassification of independent contractors in all industries, but especially within the cable television, install and construction industries. The Sheltered Workshop initiative will be concluding as a result of finding few violations, but the liquidated damages pilot is ongoing. The Limited food service initiative will continue its scope of 50 establishments, but as a result of the high compliance shown to date, may be discontinued in 2013.

The Division has added a new position known as Community Outreach and Planning Specialist, which is currently held by Roy Richardson. Mr. Richardson will work on education and public outreach efforts. He will be responsible for identifying initiatives which will yield the greatest compliance results, and in doing so, gather input from employee advocates, legal aid groups, business groups and members of The Florida Bar. This planning project will be completed early in 2012. Mr. Richardson invited Sub-committee members to contact him with enforcement suggestions, questions and comments at 904.359.9289, and Mr. Young echoed the suggestion.

Specific issues of note included:

Transportation: The Division is still enforcing 29 U.S.C. section 213(b)(1) - DD Young pointed out that employers should be aware that they will lose entitlement to claim the exemption for an entire week as to any driver, mechanic or helper otherwise exempt who works on a non-commercial vehicle or a vehicle not displaying the hazard placard.

Tip Credit: DD Young pointed out that employers no longer have the right to retain a portion of the employee's tips, for instance those included in charge payments. While formerly permissible, employers can no longer recover a portion of these tips – they are entirely the property of the employee and cannot be co-opted except with respect to a legal tip pool in which only eligible employees historically eligible for tips participate. The Division will invalidate the tip credit for the entire time during which the employee has participated in the tip pool if the employer improperly retains some of these funds, and the employer will owe the entire minimum wage PLUS the illegally co-opted tips.

At the conclusion of the presentation, several Sub-committee members submitted specific questions to which the speakers responded. Among the topics included were liquidated damages, imposition of civil money penalties, fluctuating workweeks, and scope of the executive exemption.

Submitted on April 4, 2012

Alan Gerlach and Marguerite Longoria
Co-Chairs, Wage & Hour Subcommittee
Labor & Employment Section

Attachment “2”

Membership Outreach Subcommittee

After obtaining approval to proceed with the Labor & Employment tool kits to be posted on the Section's website for membership use, Leslie and I obtained commitments from firms (Ogletree Deakins and Ford & Harrison) to draft a particular tool kit. I will be drafting one as well. We are in the process of confirming commitments and topics with several other firms. We anticipate having the tool kits completed within the next couple of months.

Thank you,
Robyn Rusignuolo & Leslie Stein

Attachment “3”

REPORT OF LONG RANGE PLANNING COMMITTEE

For April 13, 2012 Executive Council Meeting

Tad, Robert & I have conferred regarding the requirements for Board Certification in Labor and Employment Law and we want to provide our thoughts.

1. The test should not be 'dumbed down.' Yet, we should consider offering more question options from which applicants may chose to answer. This would help to solve the problem of many applicants not having experience in labor law, unemployment compensation, OSHA, etc.

2. Current re-certification requirements are adequate, but not excessive. There is no need for modification.

3. For in-house counsel, the Section should consider recommending modification of the practice requirements for taking the examination and certification. As presently constituted, it is not likely that in-house counsel will qualify for taking the exam because their role does not offer sufficient opportunity to achieve the practice requirements. Yet, such attorneys may be capable of passing the examination based upon subject matter knowledge. Perhaps we should relax the practice requirements for in-house attorneys to take the exam and to be certified, provided they have a certain amount of Labor and employment experience.

It is recommended that a study group should be established on the in-house counsel and optional questions issues. Also, any changes should be ultimately proposed by the Section to the Board of Specialization.

We do not expect that such an important issue could be effectively addressed at the April meeting. If a study panel is established, it could bring back recommended changes for consideration by the entire council. Perhaps we could establish the study group at the April meeting.

Best wishes,

Cary R. Singletary

Co-chair

Attachment “4”

**Labor and Employment Law Section
Website Subcommittee Report
April 9, 2012
Submitted by Co-Chairs: Brian Lerner and Judge Stephanie Ray**

New Developments on Website:

- Researched pricing for website advertising and worked with Communications Committee to develop advertising guidelines. Proposed guidelines and pricing options attached.

Outstanding Issues/Projects:

- Website Advertising: Obtain approval from the EC of the guidelines and pricing for website advertising, and rollout advertising if approved.
- Homepage Blog: The subcommittee is exploring ways to more fully utilize the blog capability of the website such as posting pictures, video clips, and initiating discussions on hot topics in the law.
- Social Media: The subcommittee will be beta-testing a Linked In Discussion Group and will continue exploring the benefits of using other social media, including Facebook and Google+.

Attachment “5”

WEBSITE ADVERTISING

The committee has met and proposes the following policy and fees to be adopted:

Policy Statement:

Advertising Policy: The Labor & Employment Law website will accept all legal advertisements and professional announcements that are in keeping with the publication's standards of ethics, legality, and propriety, so long as such advertising is not derogatory or demeaning. Advertising in which the advertiser violates or enables another to violate the Rules of Professional Conduct of The Florida Bar or the Florida Code of Judicial Conduct will not be accepted. While advertising copy is reviewed, publication herein does not imply endorsement of any advertiser's goods, services or opinions. The Labor & Employment Law website is distributed electronically to the 2,200 members of the Labor & Employment Law Section, including attorneys, judges, students, other legal professionals, and subscribers.

Proposed Fees:

- Features text and logo of a sponsor conveniently located at the top of the home page on our website, linking the logo to the sponsor's website.
- Shared with no more than ten rotating, each load of page shows text and logo.
- Text max of 120 characters with spaces.
- 3 months \$250.00
- 6 months \$450.00
- 1 year \$600.00

Attachment “6”

SPECIAL PROJECTS COMMITTEE REPORT

Special projects had two things:

1. Purchasing a better Polycom phone system we could bring with us to avoid use of microphones at meetings; and
2. Recertification trends and marketing for the certification exam to ensure viability.

David Adams, Esquire
Sponsler, Bennett, Jacobs & Adams, P.A.