



AGENDA

Labor and Employment Law Section Executive Council Zoom Meeting

Thursday, May 20, 2021

5:00 p.m. – 6:00 p.m.

- I. Call to Order and Introductions** – Robyn S. Hankins, Chair

- II. Secretary/Treasurer Report** – Sacha Dyson, Secretary/Treasurer
 - A. Minutes – October 22, 2020 (**Attachment A**)
 - B. Minutes – January 14, 2021 (**Attachment B**)
 - C. April 2021 Section & CLE Financial Statement (**Attachment C**)

- III. Committee and Subcommittee Reports**
 - A. CLE Schedule (**Attachment D**)
 - B. Offering Additional Free Webinars
 - C. Advanced Labor Topics 2021 (virtual)
 - D. Advanced Labor Topics 2022 (Washington, D.C.)
 - E. NLRB Update: Where Do We Stand Now? (Part II)
 - F. Trial Skills Academy Update
 - G. Committees Reports (as necessary) (**Attachment E**)
 - H. Bar Journal Report (**Attachment F**)

- IV. New Business**
 - A. Talking Points
 - B. FYI Legislation (**Attachment G**)

- V. Next Executive Council Meeting**
 - A. June 10, 2021, 5:00 p.m. – 6:30 p.m.
Labor Section Executive Council Meeting

- VI. Adjournment**



Minutes of Labor & Employment Executive Council Meeting October 22, 2020 via Zoom

Robyn Hankins called the meeting to order and welcomed everyone by Zoom at 5:30 p.m. Ms. Hankins and Gregg Morton gave a brief update on the virtual Public Employment Labor Relations Seminar, which was being held today and tomorrow. Mr. Morton reported that we have had a great turnout even though there have been some technical challenges in conducting a virtual seminar. Mr. Morton reported that the chairs of the program, Glenn Thomas & Janeia Ingram, have done a tremendous job in coordinating the program, accommodating the change to a virtual program, and overcoming the technological challenges and glitches.

Sacha Dyson introduced the minutes from the June 19, 2020, meeting. The meeting minutes were unanimously approved without any changes. Ms. Dyson then provided a financial report, which shows that the section continues to be in a good financial condition. There were no questions from the council members.

Ms. Hankins then discussed the next meeting and certification review seminar. A discussion was had with respect to whether the certification review seminar should be a virtual program. The consensus was that the section should plan a virtual program. Mr. Morton explained the challenges when a program is moved to a virtual platform without time to plan. Before a final decision is made, Mr. Morton will check with the speakers. A decision will be made in the next 15 to 30 days.

A discussion was then had with respect to the section's surplus and whether the section should offer free or discounted seminars, especially in light of the pandemic, the section's financial condition, and to provide an additional benefit to the section members. A discussion also was had about whether Zoom could be used as the platform for virtual programs. Robert Turk suggested that we should seriously look at this issue and the council members discussed whether it would be financially viable and the options available if the section wanted to offer free or discounted seminars. Ultimately, the consensus was that the executive council should study this issue further after obtaining information from the bar staff and the CLE committee on what options might be available to the section.

Ms. Hankins addressed the invitation from the Annual Convention Committee to apply for a presidential showcase seminar at the annual convention. A discussion was had regarding the type of seminar that the section could propose, which will be reviewed further by Mr. Morton.

Mr. Morton gave an update on CLE. In addition to the PERL seminar, the section will be continuing its webcast series and it provided a free CLE with the YLD on COVID-related issues. Currently, there are five planned webcasts. Mr. Morton also discussed the Advanced Labor Topics seminar in Washington, D.C. He and the bar staff are currently reviewing options to move the seminar to 2022 due to the pandemic. The bar staff are working with the hotel on these options.

Ms. Hankins asked if there were any committees who wanted to give a report in addition to the written reports from the Wage & Hour Committee and Robert Eschenfelder for the bar journal. David Block provided a report on the outreach committee, which had a virtual meeting where they discussed a telephone campaign to reach members and working with the ADR section to discuss collaborating on CLEs. Robert Turk provided a report of a virtual meeting of the long-range planning committee where they discussed the trial academy and the section needs when the section is able to return to in-person events. Cynthia Sass provided a report of the ABA Liaison Committee and announced that there is a virtual ABA conference from November 11 to 13, 2020, where she encouraged everyone to attend.

Ms. Hankins then called on Debbie Brown to present a Hall of Fame Nomination for Donald T. Ryce, Jr. A discussion was had regarding the nomination. A motion was made and second to approve the nomination, which passed unanimously.

Ms. Hankins introduced a request from the Business Law Section to comment on a legislative position regarding pending legislation on the restrictive covenant statute. A discussion was had regarding this request from the Business Law Section and whether the request was moot. Ultimately, consistent with the Section's bylaws, no position will be taken on this proposal by the Business Law Section. The section is providing notice of this request in the event that any individual member wants to take a position.

A discussion also was had regarding the website and using some of the section funds to obtain professional assistance with the website. This was a topic at a previous section retreat. The website committee will look at this issue further as well as what was previously approved at the last retreat.

The next meeting will take place by Zoom on January 14, 2021.

The meeting was adjourned at 6:32 p.m.



Minutes of Labor & Employment Executive Council Meeting January 14, 2021 via Zoom

Robyn Hankins called the meeting to order and welcomed everyone by Zoom at 5:00 p.m. Ms. Hankins introduced Gary Lesser – a candidate for Florida Bar President – who gave an overview of his priorities.

Scott Atwood, in the absence of Sacha Dyson, provided a financial report, which shows that the section continues to be in a good financial condition. Mr. Atwood then introduced the proposed budget for 2021-2022. The proposed budget provides for approximately \$140,000 in revenue and \$137,000 in expenses. A discussion was had regarding the budget, including whether there was a need to increase the budget to provide for the approved website assistant. The consensus was that there was room in the current budget to absorb this cost. A motion was made to approve the budget, which was second, and the motion to approve the budget passed unanimously.

Ms. Hankins introduced Steve Davis – another candidate for Florida Bar President – who gave an overview of his priorities.

Mr. Morton gave an update on CLE. A discussion was had with respect to the location of Advanced Labor Topics and moving the seminar in Washington, D.C. to 2022 and whether the section should have an Advanced Labor Topics this year and in what form. Mr. Morton gave an update on the trial academy. The consensus is that this seminar must be in-person and therefore will need to wait until after the pandemic. A discussion also about offering free webinars to the members and whether to make all of the webcasts free of charge paid for by an increase in dues. The consensus was that the section should not increase dues with its surplus. A discussion was had about mentoring the less experienced lawyers.

Ms. Hankins asked if there were any committees who wanted to give a report in addition to the written reports from the Law School Liaison Committee, Judicial Outreach Committee, and Robert Eschenfelder for the bar journal. A discussion was had about the idea to create a CLE for state court judges to understand labor and employment issues, which was addressed by the Judicial Outreach Committee. A discussion also was had about securing an administrative assistant for the website, which was discussed at the last meeting.

Mr. Morton and Leslie Langbein brought up a proposal to donate to the one promise campaign of the Florida Bar Foundation. A discussion was had about this donation. A motion

was made, and seconded, and it passed unanimously to make a \$1,000 donation to the Florida Bar Foundation.

The next meeting is tentatively scheduled to take place on April 8, 2021, by Zoom. However, this meeting will be set once a decision is made regarding the location and date for Advanced Labor Topics.

The meeting was adjourned at 6:00 p.m.



**2020 – 2021
Labor & Employment Law Section
FINANCIAL STATEMENT**

APRIL 2021

Beginning Fiscal Year Fund Balance	\$168,512
Total Revenue	\$216,166
Total Expenses	(\$49,194)
Net Operations	\$166,512
Ending Fiscal Year Fund Balance	\$335484*

**see attached statement of operations*

MEMBERSHIP

Current Membership	2,099
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**THE FLORIDA BAR
LABOR AND EMPLOYMENT LAW SECTION
APRIL 2021**

	FINAL 2019-2020	APRIL YTD 2020-21	FY 20-21 Budget
3001-Annual Fees	\$90,090	\$90,315	\$91,395
3002-Affiliate Fees	1065	\$1,120	\$1,050
Total Fee Revenue	\$91,155	\$91,435	\$92,445
3351-Sponsorships			\$2,500
3391 Section Profit Split	\$13,254	\$75,159	\$37,500
3392-Section Differential	\$4,833	\$1,328	\$4,200
Other Event Revenue	\$18,087	\$76,487	\$44,200
3401-Sales-CDs/DVDs		\$2,159	
3411-Sales-Published Materials		\$120	
Sales, Rents & Royalties Revenue		\$2,279	
3561-Advertising			\$1,200
Advertising Revenue	\$	\$	\$1,200
3899-Investment Allocation	(\$2,085)	\$45,965	\$6,601
Non-Operating Income	(\$2,085)	\$45,965	\$6,601
Total Revenue	\$107,157	\$216,166	\$144,446
4131-Telephone Expense			
4133-Internet Service			
4134-Web Services	3591	\$1,812	\$8,000
4311-Office Supplies	187	\$15	\$500
Total Staff & Office Expense	\$3,778	\$1,827	\$8,500
5051-Credit Card Fees	\$1,378	\$598	\$1,300
5121-Printing-Outside	3720	\$2,750	\$3,000
5131-Production Outside			
Total Contract Services	\$5,098	\$3,348	\$4,300
5501-Employee Travel	\$851		\$6,156
5531-Board/Off/Memb Travel		\$287	\$1,000
5599-Other Travel	\$11,309	\$1,438	\$25,500
Total Travel	\$12,160	\$1,725	\$32,656
6001-Post 1st Class/Bulk	\$28	\$107	\$150
6301-Mtgs TFB Annual Meeting			\$5,000
6311-Mtgs General Meeting	\$1,568	\$2	\$3,500
6319-Mtgs Other Functions			\$5,000

6321-Mtgs Meals			\$12,000
6325-Mtgs Hospitality	\$2,913		\$8,000
6399-Mtgs Other		234	\$3,000
6599-Brd/Off Other			\$500
7001-Grant/Award/Donation	\$3,145	\$567	\$7,000
7011-Scholarship/Fellowship	\$1,000	\$3,000	\$12,000
7999-Other Operating Exp	\$378	\$403	\$500
Total Other Expense	\$9,032	\$4,313	\$56,650
8021-Section Admin Fee	\$36,468	\$36,631	\$37,098
8101-Printing In-House	\$216		\$400
8121-Graphics & Art	\$625		
8141-Journal/News Service	\$425	\$850	
8171-Course Approval Fee	\$150		
Total Admin & Internal Expense	\$37,884	\$37,481	\$37,498
9692-Transfer Out-Council of Sections	300	\$500	\$500
Total InterFund Transfers Out	\$300	\$500	\$500
Total Expense	\$68,252	\$49,194	\$140,104
Net Income	\$38,905	\$166,972	\$4,342
2001-Fund Balance, Beginning	\$129,607	\$168,512	
Fund Balance, Ending	\$168,512	\$335,484	\$



LABOR CLE SCHEDULE

2021

- May 21, 2021 Advanced Labor Topics 2021 (Virtual)
- October 14-15, 2021 47th Public Employment Labor Relations Forum
Rosen Plaza Hotel, Orlando
- Fall 2021* *CLE / EC Meeting at Breakers, Palm Beach*
- October 6, 2021 (tentative)* *NLRB Update: Where Do We Stand Now? Part II*
Bob Turk & Lisa Berg

2022

- January 27-28, 2022 22nd Labor and Employment Law Annual Update and
Certification Review
The Florida Bar Winter meeting
Rosen Shingle Creek, Orlando
- April 8-9, 2022 Advanced Labor Topics 2022
The Madison Washington, D.C.
- August 2022* *Trial Skills Seminar*

2023

- January 19-20, 2023 23rd Labor and Employment Law Annual Update and
Certification Review
The Florida Bar Winter meeting
Rosen Shingle Creek, Orlando

CLE PROGRAM TYPES

Joint Sponsored CLE

CLE programs are those jointly sponsored with the Bar CLE Committee.

- Anyone can attend
- Full range of aftermarket sales available

Administrative charge: The administrative fee is based off one of 8 per hour management fees that have been established based on the estimated Bar staff time that will be utilized including the PA identifying such factors as whether the event is live or recorded (or both), the venue, the number of speakers, and any meals, refreshment breaks or receptions (banquet or catered). Program time includes not only seminar time but also preparation time. (The time Bar staff is involved in some capacity is referred to as program hours and is not to be confused with CLE credits or CLE scheduled time).

Income/loss sharing:

- 80/20 between Section/ Bar
- Sponsorship revenue, exhibit fees and aftermarket sales - included in revenue and subject to the 80/20 split, if they have been used in the determination of the registration fee for the purposes of keeping the fee low.
- Section differential - Section receives 100% of the section differential off the top (meaning it does not go into the revenue/loss split).

Section Sponsored CLE

If an event is not a section service program as now defined or does not qualify for joint sponsorship with the CLE committee (ex. out-of-state) it will be accounted for like a CLE event.

- Anyone can attend
- Aftermarket sales are limited to CDs, DVDs and Books. Cannot be placed in 24-7 on demand catalog.

Administrative charge: The administrative fee is based off one of 8 per hour management fees that have been established based on the estimated Bar staff time that will be utilized including the PA identifying such factors as whether the event is live or recorded (or both), the venue, the number of speakers, and any meals, refreshment breaks or receptions (banquet or catered). Program time includes not only seminar time but also preparation time. (The time Bar staff is involved in some capacity is referred to as program hours and is not to be confused with CLE credits or CLE scheduled time).

Income/loss sharing:

- All revenues belong to the Section and all expenses are the responsibility of the Section.

Section Service Program

Educational program independent of the CLE committee (Existing and New)

- Limited to section members only (or have an option for non-members to join as part of entrance) and must be held in one continuous session
- Cannot have aftermarket sales of any kind. However, event can be recorded and offered for free.

Administrative Charge: No administrative charges other than those charged to the section for general management. In other words, there is no separate charge to the service program.

Income/loss sharing:

- All revenues belong to the Section and all expenses are the responsibility of the Section.

Section Special Project

For unique special projects (not routine) The Bar will work with the Section to identify the additional cost for them to include in their budget. This would be something like a 10-year anniversary edition of a historical document or video. The Bar will need to know how much of its staff time would be required to complete the project or if the Section was planning on outsourcing the project. It may be decided that the project may not put any undue strain on resources and it could be absorbed.

Judicial Outreach Committee:

At the last Executive Council Meeting, I discussed a proposed labor and employment law seminar for state court judges. The idea was raised to convert that seminar into one focusing on the federal summary judgment standard in light of the Florida Supreme Court adopting that standard for state court. Since then, Chief Judge Ray and I have worked on the seminar, and we've made great progress. We have two confirmed speakers, Judge Raag Singhal of the Southern District of Florida and Judge Thomas Logue of the 3rd DCA. We may include a third speaker. This will be a one-hour lunchtime virtual seminar. Chief Judge Ray has involved OSCA and we expect OSCA's involvement to be very helpful in promoting and organizing the seminar. We expect the seminar to occur within the next couple of months. Since summary judgment motions are frequently filed in federal labor and employment law cases, we anticipate using labor and employment cases as examples when discussing the federal judgment standard.

Adam S. Chotiner

Bar Journal Report

Chair Hankins and Executive Council Members,

In advance of the **May 20th 2021** Executive Council meeting, below please find my report of the last 12 months of the Section's Florida Bar Journal activities:

Authors Currently Working

- Author Leslie Langbein is writing an article on the “war on arbitration” which she expects to submit for editing in time for inclusion in the **November/December 2021** Journal issue.

Articles Set to Publish

- The article *Accommodating Mental Disabilities During and After the Pandemic* by author Alicia H. Koepke has been accepted for publication in the **May/June 2021** Journal issue.
- The article *Preventing Re-Victimization of Sexual Harassment Victims: the Limits of Discovery of Plaintiff's Intimate Past in Sexual Harassment Suits* by author Travis R. Hollifield has been accepted for publication in the **July/August 2021** Journal issue.
- The article *Diversity Initiatives and the Backlash of Reverse Discrimination Claims* by author Jacqueline M. Prats has been accepted for publication in the **September/October 2021** Journal issue.

Published in Last 12 Months

- The article *Calculating Economic Losses in Eleventh Circuit Employment Termination Cases* by Author Charles L. Baum II, Ph.D., Professor of Economics, Middle Tennessee State University, was published in the **January/February 2021** Journal issue.
- The article *Social Media and the Progressive Limitations on Public Sector Employees' First Amendment Right to Free Speech*, by authors Gregory A. Hearing, Don Slesnick, Daiquiri Steele, and Matthew A. Bowles was published in the **November/December 2020** Journal issue.
- The article *Loss in the Time of Corona: Evaluating WARN Obligations during a Pandemic*, by author Alicia Koepke was published in the **July/August 2020** Journal issue.

As always, I appreciate the helpfulness of the members of the Executive Council and Section overall in submitting article ideas and referring aspiring authors to me. Please let me know if you have any questions associated with my report.

Regards,
Robert Eschenfelder
Bar Journal Articles Editor

WHITE PAPER ON BILLS RELATING TO OFFERS OF JUDGMENT

April 5, 2021

I. Position in Brief

The Florida Bar Business Law Section’s Business Litigation Committee (the “Committee”) opposes Senate Bill 686 (SB 686) and House Bill 1533 (HB 1533). While there may be room for improvement in Florida’s statute concerning offers of judgment,¹ the proposed legislation, if enacted, would unnecessarily prolong litigation and increase costs, improperly allow for the unilateral election of mandatory binding arbitration, and unfairly shift the burden of compliance to the offeree resulting in the risk of waiver of rights. Further, the proposed revisions are vague and confusing in terms of whether the reference to allowing attorneys’ fees to be excluded from an offer is intended to be part of the damages in the settlement amount or is intended to be the fees that must be paid if the offer is rejected and later determined to be reasonable.

Accordingly, SB 686 and HB 1533 would undermine the purpose of offers of judgment and demands for judgment – to encourage early settlement and an early end to litigation by having an offer the other party may accept and be done with the litigation, on the one hand, and by imposing attorneys’ fees on the party ultimately determined to have rejected a reasonable offer on the other hand - without alleviating the issues in section 768.79, Florida Statutes.

Lastly, to the extent the proposed procedures are intended to address a narrow type of case within a specific industry, then those amendments should be explicitly limited to those areas and not general amendments to section 768.79 which broadly applies to all civil cases.

II. Offers of Judgment

Section 768.79, Florida Statutes concerns offers of judgment and demand for judgment. The statute encourages settlements by providing a mechanism to shift what could be significant attorneys’ fees and costs to a party who does not accept an offer that will ultimately be assessed as a reasonable settlement offer. Section 786.79 was passed to “reduce litigation costs and conserve judicial

¹ § 768.79, Fla. Stat.

resources”² by encouraging settlements between civil litigants.³ Settlements have been encouraged through this statute by “deter[ring] individuals from rejecting purportedly reasonable settlement offers through the imposition of the sanctions of costs and attorneys’ fees.”⁴ Furthermore, all proposals for settlement authorized by Florida law, including those authorized by section 768.79 are governed by Florida Rule of Civil Procedure 1.442, which “supersedes all other provisions of the rules and statutes that may be inconsistent with this rule,”⁵ and contains the requisite procedure for the making and accepting of such offers.⁶

SB 686 and HB 1533 both seek to amend and expand section 768.79, Florida Statutes.

A. Senate Bill 686.

SB 686 amends section 768.79 to permit a party to make an offer of judgment that would settle a plaintiff’s claim for indemnity or damages and stipulates that entitlement to attorneys’ fees and costs will be established at a later time by the parties or the court. It does not include a mechanism for making an offer to settle the potentially more complicated and contentious matter of awarding attorneys’ fees and costs.

The bill permits an offer of judgment that is served on joint owners of real property who are insureds to require that both insureds either accept or reject the offer.

² *Kubajda v. Borden Dairy Co.*, 202 So. 3d 391, 395 (Fla. 2016) (quoting *Attorneys’ Title Ins. Fund, Inc. v. Gorke*, 36 So. 3d 646, 650 (Fla. 2010)); *see also Diecidue v. Lewis*, 223 So. 3d 1015, 1019 (Fla. 2d DCA 2017) (explaining that “the purpose of section 768.79 and rule 1.442 is to reduce litigation costs, not create more”).

³ *Gorke*, 36 So. 3d at 652 (“[S]ection 768.79 . . . was enacted by the Legislature for the purpose of encouraging settlements.”); *see also Wilcox v. Neville*, 283 So. 3d 878, 881 (Fla. 1st DCA 2019) (“[T]he purpose of section 768.79 is to encourage the settlement of lawsuits.”).

⁴ *Diamond Aircraft Indus., Inc. v. Horowitz*, 107 So. 3d 362, 372 (Fla. 2013) (“[T]he Florida Legislature enacted section 768.79 to deter individuals from rejecting purportedly reasonable settlement offers through the imposition of the sanctions of costs and attorneys’ fees.”); *Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 79 (Fla. 2012); *see also* § 768.79(1), Fla. Stat. (providing that the offeror may recover reasonable attorneys’ fees and costs from an offeree when the offeree did not accept the offeror’s offer of judgment and the ultimate “judgment is one of no liability or . . . is at least 25 percent less than” the offeror’s offer of judgment).

⁵ Fla. R. Civ. P. 1.442(a).

⁶ *See generally* Fla. R. Civ. P. 1.442.

Finally, the bill requires a party served with a statutory offer to, within 30 days, notify the party making the offer of any grounds for challenging the validity of the offer. The notice must be in writing and state with specificity the grounds for challenging the validity of the offer. The right to challenge the validity of the offer is waived if not objected to within the specified timeframe.

The bill would take effect July 1, 2021 and apply to all offers of judgment made after July 1, 2021.

B. House Bill 1533.

HB 1533 amends section 768.79 to permit a party to make an offer of judgment that would settle a plaintiff's claim for indemnity or damages. It requires that such an offer stipulate that entitlement to attorneys' fees and costs be established at a later time by the parties, the court, or an arbitrator. The bill further states that following such an offer, either party may elect mandatory binding arbitration which must occur no later than 45 days after the date of acceptance or later date agreed to by the parties.

The bill permits an offer of judgment that is served on joint owners of real property who are insureds to require that both insureds either accept or reject the offer.

Finally, the bill requires a party served with a statutory offer to, within 30 days, notify the party making the offer of any grounds for challenging the validity of the offer. The notice must be in writing and state with specificity the grounds for challenging the validity of the offer. The right to challenge the validity of the offer is waived if not objected to within the specified timeframe.

The bill would take effect July 1, 2021 and apply to all offers of judgment made after July 1, 2021.

III. Section Policy Positions

A. Increased Litigation Costs and Prolonged Litigation

The Section opposes SB 686 and HB 1533 as they would increase attorneys' fees and costs and prolong litigation rather than achieving finality.

The Florida Supreme Court has repeatedly explained that "the purpose of section 768.79 is to 'reduce litigation costs and conserve judicial resources by encouraging the settlement of legal

actions.”⁷ To accomplish its purpose, section 768.79 imposes sanctions of attorneys’ fees and costs on parties who reject reasonable settlement offers.⁸ The procedure concerning the making of an offer, its acceptance or rejection and any attendant consequences are outlined in Rule 1.442,⁹ which governs all proposals for settlement authorized by Florida law.

By permitting a party to make an offer for only indemnity or damages, leaving the issue of entitlement to attorneys’ fees and costs to be determined or established at a later date prolongs litigation rather than ends it. Under the proposed procedure, a settlement would no longer be formed upon the acceptance of an offer, but instead would delay finality until the parties or the court, or in the case of HB1533, an arbitrator, determines entitlement to and the amount of attorneys’ fees and costs to be awarded. Essentially, any settlement offer that excludes attorneys’ fees and costs would be bifurcated. Under either bill, litigation would be prolonged and attorneys’ fees and costs would increase.

B. Unilateral Mandatory Arbitration

The Section opposes HB 1533 as it improperly enables one party to unilaterally impose mandatory binding arbitration, thus infringing on the rights of the other party to have the issue be determined by the court.

Under Florida law “no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate.”¹⁰ The amendments proposed to section 768.79 by SB 686 and HB 1533 would result in a derogation of Florida law and abridgement of legal rights.

⁷ *Kuhajda*, 202 So. 3d at 395 (quoting *Gorka*, 36 So. 3d at 650)); see also *Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 79 (Fla. 2012); *Sarkis v. Allstate Ins. Co.*, 863 So.2d 210, 218 (Fla.2003).

⁸ *Horowitch*, 107 So. 3d at 372.

⁹ *Gorka*, 36 So. 3d 646, 649 (Fla. 2010).

¹⁰ *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) (citing *Seaboard Coast Line R. Co. v. Trailer Train Co.*, 690 F.2d 1343, 1352 (11th Cir. 1982) (holding that the federal policy favoring arbitration “cannot serve to stretch a contract beyond the scope originally intended by the parties”)).

C. Offeree's Waiver of Rights

The Section opposes SB 686 and HB 1533 as it would unfairly shift the burden of making a valid offer to the offeree.

When entering into a settlement, the party who makes the offer (or the offeror) is generally responsible for the validity of the offer in which it presents to the other party (the offeree) for acceptance. Both SB 686 and HB 1533 seek to unduly burden offerees by requiring them to identify any potential issues within the offeror's work within 30 days, or alternatively, waive any future objections to the validity of the offer. This would unfairly shift the burden of compliance.

D. Vagueness and Ambiguity

The Section opposes SB 686 and HB 1533 because both contain vague and ambiguous provisions that would lead to greater uncertainty in a complicated procedure that has already been addressed by Florida Rule of Civil Procedure 1.442 and the courts.

Both bills permit a party to make an offer for only indemnity or damages, leaving the issue of entitlement to attorneys' fees and costs to be determined or established at a later date. Neither bill, however, clarifies whether the entitlement referred to is as to attorneys' fees and costs claimed as damages or entitlement to fees under section 768.79 should the offer be rejected and later determined to be reasonable.

Further, among other ambiguities, the proposed revision defining "judgment obtained" as "the total amount of damages, if any, but does not include any amount awarded for attorneys' fees and costs," is ambiguous when applied to instances in which attorneys' fees and costs are part of the damages claimed.

The drafters appear to be attempting to address the issue of making an offer to an opposing party where the opposing party may have a right to fees and/or costs by statute or contract but the offeror does not know how much the offeree has incurred in fees and costs as of the date of the offer or how much the offeree ultimately will incur as of the conclusion of trial. That is a frustrating problem, but the proposed provisions will do more harm than good in their efforts to address it.

In complex business litigation, this area gets very complicated where there are both claims and counterclaims and where there are claims that have statutory or contractual prevailing party fee provisions mixed with those that do not. The bills do not address:

- How the "prevailing party" would be determined if an offer in a complex case were to be accepted;

- To which claims the settlement/judgment amount would be attributed; or
- Whether the fact that there was a “settlement” be grounds to claim that there was no prevailing party.

The proposed revisions would further complicate the scenario in which an offer made by a defendant to a plaintiff is rejected and the plaintiff prevails and is the “prevailing party” and has a statutory or contractual fee theory but does not “beat” the offer of judgment by 25%. The proposed revisions do not address whether in such a scenario, both parties or neither party would get a fee award.

In sum, the proposed revisions would further complicate the analysis by excluding the fees component and not explaining which fees – fees that are a part of the damages or fees to be awarded under section 768.79 - are permitted to be excluded or addressing the impact of the proposed changes.

E. Area-Specific Amendments to Statutes of General Application

The Section opposes SB 686 and HB 1533 to the extent they aim to address area-specific concerns by revising a statute of general application to civil cases. To do so would unnecessarily complicate the procedure for a large volume of cases to which the revisions need not apply. Any specific revisions should be explicitly limited to the specific areas they are intended to address and in a separate section of the statute.



The Florida Bar

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Joshua E. Doyle
Executive Director

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VOLUNTARY BAR GROUP LEGISLATIVE OR POLITICAL ACTIVITY WORKSHEET

- This worksheet is for voluntary bar groups (VBGs) to gather and share information before submitting an [official request](#) for approval of legislative or political activity, whether new or rollover.
- Political activity is defined in SBP 9.11 as “activity by The Florida Bar or a bar group including, but not limited to, filing a comment in a federal administrative law case, taking a position on an action by an elected or appointed governmental official, appearing before a government entity, submitting comments to a regulatory entity on a regulatory matter, or any type of public commentary on an issue of significant public interest or debate.”
- VBGs must advise TFB of proposed legislative or political activity and identify all groups the proposal has been submitted to. If comments have been received, they should be attached; if they have not been received, the proposal may still be submitted to the Legislation Committee. *See* SBP 9.50(d).
 - The Legislation Committee and Board will review the proposal unless an expedited decision is required.
 - If expedited review is requested, the Executive Committee may review the proposal.
 - The Bar President, President-Elect, and chair of the Legislation Committee may review the proposal if the legislature is in session or the Executive Committee cannot act because of an emergency.

General Information

Submitted by: *(name of VBG or individual)* The Business Law Section of The Florida Bar

Address: *(address and phone #)* 651 E. Jefferson Street, Tallahassee, FL 32399

Position Level: *(name of VBG)* TFB Section

Proposed Advocacy

Complete #1 below if the issue is legislative, #2 if the issue is political; #3 must be completed.

1. Proposed Wording of Legislative Position for Official Publication

Triple Motion Concerning Proposed Amendments to Section 768.79, Florida Statutes - Offers of Judgment
That the Business Law Section oppose any amendment to section 768.79 concerning offers of judgment that:
(1) would prolong litigation and increase costs; (2) would allow for the unilateral election of mandatory
binding arbitration; (3) would shift the burden of compliance to the offeree resulting in the risk of waiver
of rights; (4) is vague and ambiguous; and/or (5) is intended to apply to a narrow type of case within a
specific industry unless explicitly so stated and set forth in a separate paragraph.

2. Political Proposal

N/A

3. Reasons For Proposed Advocacy

a. Is the proposal consistent with *Keller v. State Bar of California*, 496 US 1 (1990), and *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1989)? Yes

b. Which goal or objective of the Bar's strategic plan is advanced by the proposal?
Enhance and improve the value of Florida Bar membership and the Bar's relationship
with its members.

c. The proposal: (*see SBP 9.50(a) - check all that apply*)

is within the group's subject matter jurisdiction as described in the group's bylaws;

is beyond the scope of the bar's permissible legislative or political activity, or
within the bar's permissible scope of legislative or political activity and
consistent with an official bar position on that issue; and

does not have the potential for deep philosophical or emotional division among a
substantial segment of the bar's membership.

d. Additional Information: See attached white paper.

Referrals to Other Voluntary Bar Groups

The VBG must provide copies of the proposed legislative or political action to all bar divisions, sections, and committees that may be interested in the issue. *See* SBP 9.50(d). List all divisions, sections, and committees to which the proposal has been provided pursuant to this requirement. Include all comments received as part of your submission. The submission may be made before receiving comments but only after the proposal has been provided to other bar divisions, sections, or committees.

Real Property Probate and Trust Law Section of The Florida Bar

Trial Lawyers Section of The Florida Bar

Labor and Employment Law Section of The Florida Bar

Contacts

Board & Legislation Committee Appearance *(list name, address and phone #)*

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Manny Farach, 505 S Flagler Dr, West Palm Beach, FL 33401, 561-602-6507

Appearances before Legislators *(list name and phone # of those having direct contact before House/Senate committees)*

Aimee Diaz Lyon, 119 S. Monroe Street, Ste. 200, Tallahassee, FL 32301, 850-205-9000

Manny Farach, 505 S Flagler Dr, West Palm Beach, FL 33401, 561-602-6507

Meetings with Legislators/staff *(list name and phone # of those having direct contact with legislators)*

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