

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

Understanding the 60-Day Transition Rule

How to prepare an appealable fair hearing/How to prepare an appealing appeal

What the new FINRA suitability rules mean for elderly investors

Avoiding client dissatisfaction and malpractice related to the QDRO process in elder planning

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The Elder Law Advocate

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The Elder Law Advocate will be glad to run corrections the issue following the error.



COVER ART

"Pink on Blue"

by Timothy B. Darby
Darby Law Group PA
Lakeland, Fla.

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The deadline for the FALL ISSUE is July 1, 2013. Articles on any topic of interest to the practice of elder law should be submitted via email as an attachment in MS Word format to Stephanie M. Villavicencio at svillavicencio@zhlaw.net, or call Arlee Colman at 800/342-8060, ext. 5625, for additional information.

Advertise in *The Advocate*

The Elder Law Section publishes three issues of The Elder Law Advocate per year. The deadlines are March 1, July 1 and November 1. Artwork may be mailed in a print-ready format or sent via email attachment in a .jpg or .tif format for an 8-½ x 11 page.

Advertising rates per issue are:	Full Page	\$750
	Half Page	\$500
	Quarter Page	\$250

The newsletter is mailed to section members, Florida law libraries and various state agencies. Circulation is approximately 1,900 in the state of Florida.

Interested parties, please contact Arlee Colman at acolman@flabar.org or 850/561-5625.

What we can do together

As chair of the Elder Law Section, one of my privileges is to report to The Florida Bar the successes of the section's talented members that lead and populate the section's committees that move the section's projects forward with incredible success. The section's successes show what we can do when we work together toward a common goal. So far this year (and the fiscal year is only a little more than half over), we have already accomplished so much. I want to share just three of our successes. I share these because they exemplify what our section does to protect Florida's elders when we work together.

Advisory Opinion: Medicaid and the unlicensed practice of law

Since 2007, the section has worked to eliminate the harm done by non-attorney Medicaid planners who engage in the unlicensed practice of law, advising elders on assets transfers, financial products and gifts to obtain Medicaid eligibility. In 2009, after great effort, **April Hill**, as chair of the section's UPL Committee, solicited and received a letter from The Florida Bar's Standing Committee on UPL regarding what the Bar considers the unlicensed practice of law in Medicaid planning. However, that letter did nothing to slow the onslaught of non-attorney Medicaid planners and the harm done to Florida's seniors.

Since that letter was issued, the section has worked to educate consumers and to get an Advisory Opinion issued by the Standing Committee on UPL on what constitutes the unlicensed practice of law in Medicaid planning. After four years of hard work, the section's UPL Committee, chaired by **John Frazier**, has persuaded the Bar's Standing Committee on UPL that an Advisory Opinion is necessary to protect Florida's elders. This was a Herculean task and would not have been accomplished but for

the collective efforts of all those who participated under John's leadership of the UPL Committee.

To present the case to the Bar's standing committee, the section's UPL Committee researched UPL in Medicaid planning in Florida and other states. This research was presented to the standing committee with a memo about the Medicaid planning process. When the standing committee asked for a public hearing,



Twyla L. Sketchley

Message from the chair

the UPL Committee organized the section's attorneys and their clients to submit written testimony, to appear and testify at the public hearing and to submit follow-up testimony after the hearing.

At least 13 attorneys submitted written testimony to the standing committee prior to the public hearing. Nearly 20 elder law attorneys attended the public hearing in support of the issuance of an Advisory Opinion. All written testimony and a transcript of the public hearing will be posted on The Florida Bar's website under the Standing Committee on UPL. The Advisory Opinion draft should be issued by the Standing Committee on UPL in June 2013. This opinion will outline what the Bar considers to be the unlicensed practice of law in the Medicaid planning context. Once issued by the Standing Committee on UPL, it will be presented to the Florida Supreme Court, where elder law attorneys will have another opportunity to submit comments as needed.

Training to increase the prosecution of exploitation

For at least the past five years, the Exploitation & Abuse Committee (EA committee) has been working to increase the prosecution of those who exploit elders. It has always been a tested topic on the elder law board certification exam, and it is covered in the annual certification review. Building on this, the EA committee, chaired by **Carolyn Sawyer** (2010 Charlotte Brayer Public Service Award recipient), produced specific, expanded education materials for section members. Carolyn brought in experts from other fields to talk to committee members and convinced these experts to present at section programs. This education was designed to bring the issue to the desk of every attorney who works with the elderly. More members were made aware of the problem and how to report the issue. However, few state attorneys or law enforcement officers are members of the section, so the groundswell of interest and education fell short of those that actually prosecute exploitation as a crime.

Four years ago, the EA committee formed a partnership with the Florida Attorney General's Office to begin educating state attorneys and law officers about exploitation of the elderly. That partnership produced an amazing three-day conference and training for attorneys, prosecutors, law enforcement officers and adult protective service investigators. This program presented all perspectives of the investigation and brought all stakeholders to one forum to exchange ideas, information and tips. This training was so successful that it has been held every year since.

This year, under the leadership of co-chairs **Carolyn Sawyer** and **Angela Warren**, the EA committee is working with officers and investigators across the state to

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Message from the chair

from preceding page

present *Teaming Up Against Elder Financial Exploitation*, April 17-19, in Altamonte Springs. The program will be recorded so it can be shared with law enforcement agencies, adult protective service investigators and prosecutors who cannot attend.

Legislation to increase the protections of vulnerable adults against exploitation

This year, the Exploitation & Abuse Committee and the Legislative Committee, chaired by **Scott Selis** (2012 Charlotte Brayer Public Service Award recipient), joined forces to protect Florida's vulnerable adults against exploitation. In summer 2012,

Rep. Kathleen Passidomo (R-Naples) approached the section and asked what she could do from a legislative standpoint to make it more likely that exploitation would and could be prosecuted.

The members of the EA and Legislative committees formed a subcommittee to meet with Passidomo to develop solutions. Because of the state's budget issues, there was no money available to assist in developing or creating a solution, making the committee's task even more difficult. The committee and Passidomo worked together and created legislation that updates the language identifying vulnerable adults and creates consistent language to describe vulnerable adults in both the criminal and civil statutes.

Passidomo sponsored House Bill 253, the result of the EA and Legisla-

tive committees' work with her. Passidomo's bill has a companion in the Senate, Senate Bill 1222, sponsored by Sen. Garrett Richter (R-Naples). We are hopeful that next year's *Teaming Up Against Elder Exploitation* will be training stakeholders on this updated, common language.

These three successes demonstrate the strength of the Elder Law Section when we work together for the benefit of Florida's elders and vulnerable adults. As chair, I encourage every member to join the section's efforts to protect Floridians. All it takes to make the kinds of difference seen in these three examples is a few hours a year and an interest in any one or more than a dozen ongoing section projects. Visit the section's website to see what our committees are working on and how to join those efforts.



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Message from the chair-elect: Engaging those in authority

John S. Clardy III



When meeting with clients and families that face disabling conditions and discussing ways of navigating our nation's long-term health-care maze, I have caught myself re-

marking on more occasions recently, "We live in interesting times."

I had always heard "May you live in interesting times" was a Chinese curse (which may or may not be true). After a quick internet search, I learned this phrase is one of three related "curses." The second, "May you come to the attention of those in authority," while somewhat alarming, is not quite as ominous (when you really think about it) as the third, "May you find what you are looking for."

In the coming years, your Elder Law Section will continue to be engaged with "those in authority."

While the state's transition of the administration of Medicaid to managed care organizations will be a front-of-the-mind issue for many of us, it will not be the only one. Revisions to the guardianship statute, protecting consumers from the unauthorized practice of law, and advocacy against abuse and exploitation of our state's most vulnerable residents are three others that come quickly to mind.

As the substantive committees of the section continue to grow, there are always ways we can use your time and talents to help us promote the field of elder law while we advocate for Florida's senior and disabled population. If you have not logged on to the section's website as a member lately, there is a host of relevant information on the committee pages.

When you find a subject that interests you, contact the committee chair; he or she will be happy to have you join! And don't forget, committee involvement benefits you. For example,

you will increase your knowledge base, you will create relationships with other elder law attorneys around the state and you will become a part of the engine that drives the section.

My mom always said, "Challenges are opportunities to learn." As governments and the judicial system on all levels continue to operate under tight financial pressures, our practices and our clients will face many such "learning opportunities" in the months and years ahead.

As always, the Elder Law Section will be there to help Florida elder law attorneys meet these opportunities. Your support and involvement in the section are needed and appreciated. I look forward to accepting the job as your section's chair in July. We have been blessed to have the strong and effective leadership of Twyla Sketchley this past year, and I will give my best to promote the mission of the section and its membership. I look forward to the year ahead.

MARK YOUR CALENDAR!

"Tricks of the Trade" Mentor Committee Teleconference

June 6, 2013 • 12 noon-1 p.m.

(An email with the call-in information will be sent to all section members prior to the teleconference.)

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ELDER LAW SECTION ACTIVITIES AT THE FLORIDA BAR ANNUAL CONVENTION

Boca Raton Resort & Club

June 27, 2013 • 1-6 p.m.

**"Charting the Course — Navigating Public
Benefits in Today's Environment"**

June 27, 2013 • 12 noon-2 p.m.

Elder Law Section Awards Luncheon

June 28, 2013 • 9-11:30 a.m.

Elder Law Section Executive Council Meeting

.....

Elder Law VA Seminar September 27, 2013

West Palm Beach Marriott

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AFELA - 2013 UnProgram

December 6-7, 2013

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Elder Law Annual Update and Review

January 17-19, 2014

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Understanding the 60-Day Transition Rule

by Leonard E. Mondschein

The 60-Day Transition Rule allows a nursing home resident to move from a skilled nursing facility (SNF) back to the community and qualify for Medicaid without being on a waiting list. Returning to the community can mean the person's own residence, independent living or an assisted living facility (ALF). While this rule sounds simple, the failure of the Department of Elder Affairs (DOEA) and the Agency for Health Care Administration (AHCA) to publish and disseminate accurate information regarding this program has prevented individuals in SNFs to transition back into the community in violation of a United States Supreme Court ruling as well as Florida statutory and case law. The purpose of this article is to discuss the background of the 60-Day Transition Rule, how it works and what changes are needed to implement the rule so the state of Florida is in compliance with federal and state law.

In 1999, the United States Supreme Court ruled in *Olmstead v. Zimring* (527 U.S. 481) that institutionalization based on disability when a person qualifies for in-home care that is readily available amounts to discrimination by segregation in violation of Title II of the Americans with Disabilities Act (ADA). To comply with *Olmstead*, the Florida Legislature enacted F.S. 430.7031, entitled "Nursing Home Transition Program," which states:

The Department (Elder Affairs) and the Agency for Health Care Administration (AHCA):

(1) Shall implement a system of care designed to assist individuals residing in nursing homes to regain independence and to move to a less costly setting.

Paragraph (4) goes on to state:

(4) Shall offer such individuals priority placement and services in all home based and community based care program and shall

ensure that funds are available to provide services to individuals to whom services are offered.

Unfortunately, neither DOEA nor AHCA promulgated rules to implement the statute. In 2008, a class action, *Long v. Benson*, was filed against the state of Florida for failure to comply with *Olmstead* and claiming that the majority of the state's Medicaid funds were being used for nursing home care. In 2009, a settlement was reached, placing the lawsuit in abeyance for one year to give the state some additional time to make some progress on implementing a transition program. In 2010, the plaintiffs went back to court, arguing that the state had not made sufficient progress.

On Aug. 19, 2010, AHCA issued a draft entitled, "Nursing Home Transition Plan," with the expressed intent of "building upon the legislative nursing home transition language in Section 430.7031, Florida Statutes." This 11-page document established a 60 consecutive day stay in a skilled nursing facility as a requirement for qualifying for the Nursing Home Transition Program. Its three stated goals are:

1. The state will develop and implement a plan to achieve the successful transition of eligible Medicaid beneficiaries 18 years of age or older from nursing homes into the least restrictive setting appropriate to their needs.
2. Increase awareness of, and provide information regarding alternatives to, nursing home care to nursing home residents, their families and/or authorized representatives, health care professionals and organizations that promote residence in the community for individuals with long-term care needs.
3. Identify individuals who desire to transition from nursing homes to community settings by developing,

enhancing or adopting assessment tools to successfully identify candidates.

To satisfy numbers 2 and 3 of the stated goals, the program was to develop specialized materials to educate and inform residents, stakeholders and respective parties about community alternatives to nursing homes, and to develop information to be used for answering phone calls by DOEA, ARC, the long-term care ombudsman, etc. In particular, the state was to develop outreach materials and make them available on the agencies' websites to provide information on Florida's Nursing Home Transition Program.

Individuals interested in the program should contact CARES or the Aging Resource Centers (ARC). A slide presentation used to educate CARES employees was implemented describing a procedure that would employ a person to be known as a transition case manager or TCM. These individuals would be a new type of social worker hired as independent contractors by DOEA to coordinate the transition process.

Notwithstanding the above, the reality of DOEA's and AHCA's efforts to comply with *Olmstead*, *Long v. Benson* and F.S. 430.731 are as follows:

1. Only the caseworkers from CARES are acting as TCMs for the Nursing Home Transition Program. There are no outside TCMs as contemplated in the DOEA's training materials.
2. Most skilled nursing home and ALF administrators either do not know about the program, or if they do, have no idea how it works.
3. There is no literature to be found in skilled nursing homes or ALFs regarding the 60-Day Transition Program.
4. If a person transfers from a skilled nursing home to an ALF or to home care without following the exact

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60-Day Transition Rule

from preceding page

unpublished protocol established by CARES, he or she will not be entitled to Medicaid services immediately and will be added to the normal wait list for long-term care diversion.

5. The literature that is available online regarding the 60-Day Transition Program does not accurately reflect how the program has been implemented by DOEA and AHCA.

So, how does the Nursing Home Transition Program actually work? First, the applicant must be in a skilled nursing home for 60 consecutive days. Next, the applicant or his or her representative must contact the CARES unit of DOEA to open a transition case. The caseworker at CARES acts as the TCM and determines whether or not the plan will constitute a safe discharge. CARES will interview the family, the ALF if applicable, medical personnel and the SNF prior to writing its plan and giving its approval. Once approved, the transition will take place and the applicant will not have to go on a waiting list to receive Medicaid services. This is very important, since being

on a waiting list to receive Medicaid services can last more than a year.

Some elder law attorneys whose clients cannot afford the difference between the private pay rate of the ALF and the applicant's income place their clients in a SNF for 60 days before applying to CARES for a safe transition to an ALF. While this approach may not have been intended by AHCA or DOEA, it is a useful planning tool in the right situation.

The joint Public Policy Task Force of the Elder Law Section and the Academy of Florida Elder Law Attorneys has reached out to legal counsel for DOEA to advise the department of the lack of transparency regarding the 60-Day Transition Rule and to make suggestions on how the program can work in accordance with the letter and spirit of *Olmstead*, *Long v. Benson*, F.S. 430.7031 and any rules promulgated or unpromulgated in furtherance thereof. Here are the task force's suggestions:

1. Rewrite accurate literature on exactly how the 60-Day Transition Rule works so that all applicants, stakeholders and interested parties will understand how the program is being implemented.
2. Post this information with a link on the front page of the DOEA and

AHCA websites so that it can be easily accessed.

3. Disseminate all materials to all skilled nursing homes and ALFs in Florida as well as to all hospital discharge planners.

In conclusion, the state of Florida will not be in compliance with *Olmstead*, F.S. 430.7031 or *Long v. Benson* until the 60-Day Transition Rule is properly implemented, which means the creation and dissemination of accurate and useful material for applicants, stakeholders and those affected by the rule.



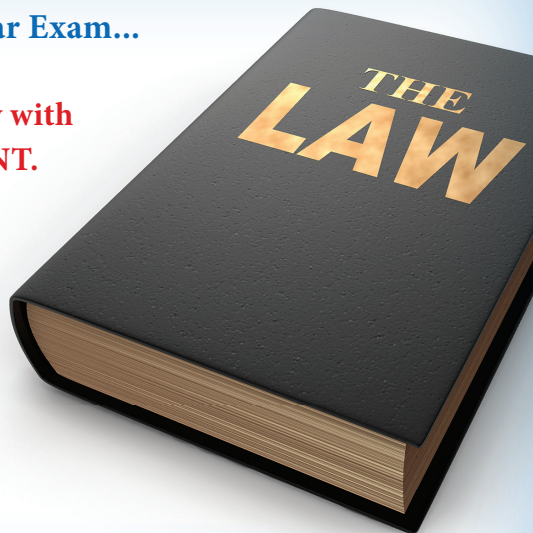
Leonard E. Mondschein, J.D., LL.M., is a shareholder in the law firm of Mondschein and Mondschein PA with offices in Miami and Aventura. He received the J.D. degree from the New

England School of Law and the LL.M. degree from New York University. He is board certified by The Florida Bar in wills, trusts and estates and is an adjunct professor of law at the University of Miami School of Law for the LL.M. program in estate planning.

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Use care when referring clients to professionals

by David A. Weintraub

Hypothetical 1

You have just referred one of your elderly clients to a local accountant. The accountant is in his 40s. You have seen him around town for years. He regularly eats breakfast at an expensive local restaurant. He appears to be popular at the restaurant. His office is located in a good part of town. He is a nice guy. You have heard that in addition to being an accountant, he also advises his clients about investments. So, what can possibly go wrong with referring one of your elderly clients, for accounting purposes, to this gentleman? Well, lots can go wrong.

As it turns out, for years this accountant, while being registered as a stockbroker/financial advisor, was alleged to have been soliciting his clients to co-invest in various internet businesses operated by the accountant's son. The accountant was further alleged to have signed promissory notes in favor of his customers, for an aggregate amount in excess of \$1 million. When his former broker-dealer employer learned of his conduct, he was fired. His former employer, the broker-dealer, has paid settlements in excess of \$500,000 to several investors. As the result of an investigation initiated by FINRA, the Financial Industry Regulatory Authority, the accountant was suspended for two years from acting in any capacity with a FINRA member firm. That suspension ends in December 2013. The accountant's Florida accounting license remains in good standing.

Hypothetical 2

Sadie and Thelma, 78 and 80 years old, respectively, have been domestic partners for 50 years. They recently returned from a California vacation and are now married. Their combined assets are \$750,000. Because of their very conservative nature, 100 percent

of their assets are in a savings account with a local bank. They need income. They also need new estate planning documents, which is why they have come to you. Because they barely receive any interest from the local bank, they also want you to recommend a new financial advisor.

For the past three or four years you have been receiving invitations to attend a dinner at a local restaurant. The dinner's sponsor is a local financial advisor who regularly pitches annuities. The advisor appears to be about 50 years old. While you have been attending the dinners, it has been mostly for networking purposes. The food is O.K., but you love the bottomless red wine. The advisor's talk about annuities has been too complex for you to follow (especially after the wine), and it has gone in one ear and out the other (the talk, not the wine). However, you have assumed 1) the advisor must be both *well educated* and *experienced* in order to understand annuities, and 2) the advisor must be *very successful* to be able to pay for dinner for his 20 to 30 guests. These assumptions, it turns out, are wrong. First, the advisor never graduated from high school, having left school in the 11th grade. Second, until five years ago, the advisor was working as a salesman at the local used car dealership. He had been there for 15 years. Third, the advisor initiated Chapter 7 bankruptcy proceedings three years ago, unable to juggle his own finances.

Lessons learned(?)

If after reading the preceding paragraphs you would remain comfortable referring your elderly clients to either the accountant or the advisor, please stop reading and move on to the next article. If you would not be comfortable, please continue reading.

The key fact in the preceding hypo-

theticals is that both the accountant and the advisor either have in the past, or may still, advise clients about investments. This fact alone should alert you to the availability of voluminous public information about the individual's background. The single most important document to review is the advisor's Central Registration Depository report or CRD. The CRD details the financial advisor's employment history, including all reportable events. A financial advisor's reportable events include customers' complaints, arbitrations, settlements, arbitration awards, regulatory investigations, bankruptcies, uncollected judgments and certain criminal matters. For the accountant in Hypothetical 1, his CRD reflects settlements exceeding \$500,000, a summary of each complaint, the amount of each individual settlement and the two-year suspension of the accountant's securities license. As for the free dinner financial advisor, his CRD reflects that he has been licensed for only five years, that he failed the Series 7 examination two times before passing, that he worked for 15 years as a used car salesman and that he recently filed for bankruptcy court protection. Notably, the fact that he never completed high school would not appear anywhere on his CRD.

Obtaining a CRD

Obtaining a CRD is easy and free. After obtaining the broker's CRD number from FINRA's website, www.finra.org/Investors/ToolsCalculators/BrokerCheck/index.htm, one can download a redacted version of the CRD. The redacted version of the CRD differs in several respects from an unredacted version. First, the redacted version does not provide the name of the investors who have

continued, next page

Referring to professionals

from preceding page

complained about the broker. Second, the redacted version will not include bankruptcies that occurred more than 10 years ago. Third, the redacted version will not report whether the broker ever failed a licensing exam. The easiest way to obtain an unredacted CRD is through the Florida Office of Financial Regulation. Send an email to electronic_licensing@fldfs.com or samantha.chambers@flofr.com. In the email, request the broker's entire CRD, including a full legacy report.

Stockbrokers' education

My corporations professor in law school once said, "Financial advisors are nothing more than used car salesmen with more expensive suits." Although her words may have been somewhat harsh, her comment was prescient in one particular regard—the subject of education. Whether one sells used cars or investments, the educational prerequisites for those who sell them are identical—there are none. Perhaps there is good rea-

son in the case of the car salesperson, but is the same true with respect to one's financial advisor? Unfortunately, neither the SEC nor FINRA mandate educational prerequisites for taking the primary stockbroker licensing examination. Both the securities industry and regulators allow individuals without any formal higher education not only to advise our elderly clients how to invest, but also to recommend and sell products that have "rocket science" complexity. In the past 10 years, the types and varieties of complex variable and equity indexed annuities, as well as structured products, have exploded. Many of these products' strategies are so intricate that the salespeople selling them readily acknowledge they do not understand them and are forced to rely upon the marketing literature presented by their firms.

Conclusion

Rather than focusing on whether Florida courts would recognize the tort of "negligent referral" in the accountant, attorney or stockbroker context, the safer path is to spend a

few minutes investigating the background of the person to whom you are referring your vulnerable clients. The Florida Bar posts information regarding a lawyer's disciplinary history. The Florida Office of Financial Regulation provides information regarding a stockbroker's regulatory history. The Florida Department of Business and Professional Regulation provides information about complaints against accountants. Given the degree to which our clients, especially our vulnerable elderly ones, trust our professional referrals, it is not asking too much to engage in a few minutes of due diligence before making a referral.



David A. Weintraub, Esq., is a securities attorney with offices in Plantation, Fla., and New York, N.Y., who represents retail and institutional investors throughout the United

States. He can be reached at daw@stockbrokerlitigation.com.

DPOA still a less restrictive alternative to guardianship

by Sam W. Boone, Jr.
on behalf of the Estate Planning and Advance Directives Committee

A recent case out of the 3rd District Court of Appeal, *Albelo v. Southern Oak Ins. Co.*, --- So.3d ---, 2013 WL 440199 (Fla. 3d DCA February 06, 2013), is one of the first to apply Florida's new Power of Attorney Act. The case demonstrates the importance of a well drafted durable power of attorney (DPOA) and reaffirms that a DPOA will be considered by the court to be a less restrictive alternative than a guardianship. It also reminds us that the rewrite of Chapter 709, enacted in 2011, applies to DPOAs executed before the new law came into effect, even

though the court notes that it believed "the result would be the same even if the former version of Chapter 709 were applied fully to the facts of this case."

In this case, a woman in her eighties executed a DPOA appointing her son as her agent. That DPOA was duly executed in April 2007. The mother suffered damages to her home caused by a burglary just a month after she executed the DPOA. After the insurance company paid a de minimis amount on the claim, the woman's son, as agent for his mother, filed an additional claim in a sworn proof of

loss on behalf of his mother, supported by a public adjuster's estimate.

The trial court's order dismissed the mother's premises liability complaint, with prejudice, for failure to file a petition in probate to determine her own incapacity. The appellate court reversed the trial court and held both the insurance company and its attorneys liable for appellate attorney's fees under Section 57.105(1).

The insurance company contended that the claim was fraudulent and instigated not by the mother but rather by her son. The insurance

company also alleged that it was concerned that a settlement with the agent without the binding effect of a judgment against it might expose it to subsequent claims in the future.

According to the appellate court, Section 709.2119, Florida Statutes (2012), provided explicit protection to the insurance company. That section protects a third party who in good faith accepts a power of attorney that appears to be executed in the manner required by law at the time of its execution and allows that third party to rely upon the power of attorney and the actions of the agent that are reasonably within the scope of the agent's authority. Further, the third party, in this case Southern Oaks, may enforce any obligation created by

the actions of the agent. In reliance on this section, the court found "[the insurance company] and its counsel's persistence in arguing [the mother] was required to seek a guardian for herself as a condition of continuing this action was frivolous."

When a new statute as comprehensive as the revised Durable Power of Attorney Act is first effective, there is always some concern over how documents written under the old statute will fare. This case brings us confidence that DPOAs executed under the old law will continue to be recognized and enforced. The additional good news for our clients is that a well drafted DPOA will continue to be recognized by the courts as a less restrictive alternative to guardianship.



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chapter of the National Academy of Elder Law Attorneys. He is an active member of, and serves in leadership roles for, The Florida Bar's Elder Law and Real Property, Probate and Trust Law sections, including membership on both executive councils. He serves as co-chair of the Elder Law Section's Estate Planning and Advance Directives Committee and is the co-author of the chapter on "Asset Protection in Florida on General Exemptions From Creditors" in *The Florida Bar Practice Manual*.

Avoiding client dissatisfaction and malpractice related to the QDRO process in elder planning

by Matthew L. Lundy

When planning for the elderly, sometimes it can be advantageous to transfer all or part of a retirement account from one spouse to another for purposes of distributing income and maintaining support for one of the spouses. Effectuating such a transfer generally requires: 1) filing an action for support unconnected with a dissolution of marriage pursuant to Florida Statute § 61.10; 2) an agreement between the parties; and 3) the preparation and processing of a qualified domestic relations order (QDRO) or similar order (as in the case of certain government and military retirement plans).

When proceeding in this process, it is always best to have the client engage someone who understands it inside and out. When it comes to retirement plan division, mistakes are extremely common. These mistakes often lead otherwise satisfied clients to become dissatisfied. With a proper explanation to a client, combined with the effective execution and completion of the QDRO process, client dissatisfaction is

substantially less likely. This article addresses some of the common mistakes made by attorneys when setting clients' expectations related to the QDRO process, and it offers recommendations on how to avoid those mistakes.

Timing of completing a QDRO or similar order

By far the most common mistake attorneys make when setting clients' expectations related to the QDRO process is in assuming the QDRO process comes with some kind of guarantee as to timing. This is to say, when your client asks you how long it will take to roll money out of the account in question, you should know that 29 U.S.C. § 1056(d)(3)(G)(i)(II) provides:

within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

As a practical matter, this means the plan's administrator has no precise time limit as to how long it can take to review and administer an order. While certain timetables may be safely assumed from experience, promising a client that the QDRO process will be quick can lead to unrealistic expectations. If an attorney is not familiar with a particular plan and its qualification process (keep in mind there are more than 100,000 plans nationwide and that number is growing), it is best to avoid estimating anything shorter than several months from the time the QDRO is prepared.

Which plans require QDROs?

By law, not all retirement plans require QDROs. For example, Individual Retirement Accounts (IRAs) do not, by law, necessitate the use of a QDRO to effectuate division of such accounts. I.R.C. § 414(p)(1)(B) (along with ERISA 29 U.S.C. § 1056(d)(3)) defines what a QDRO is, and

continued, next page

QDROs only apply to plans subject to the anti-alienation rules of IRC § 401(a)(13). Only plans subject to the anti-alienation rules of I.R.C. § 401(a)(13) are governed by I.R.C. § 414(p). I.R.C. 401(a)(13) lays out a series of anti-alienation rules that do not apply to IRAs because IRAs are set up by individuals, and not by employers, which is the common thread of the anti-alienation provisions.

But is there a law that *prevents* IRAs from requiring that a QDRO or a QDRO-like order be prepared to divide an account? The answer is no. In fact, many IRA and annuity custodians demand that they be directed by a QDRO (although that term is something of a misnomer in this context) to effectuate any transfers to a former spouse as a part of a domestic relations case. Thus, unless you know with absolute certainty that a particular IRA does not require a QDRO, it is best to make sure you reserve jurisdiction for the entry of such orders and to look into the matter as early as possible.

Note that government retirement plans are exempt from ERISA, but many around the country have QDRO-like orders that go by different names (such as RBCO or DRO or PADRO). Each of these plans, like IRAs and most ERISA-based accounts, have unique rules that one must follow to divide them properly. Thus, if an attorney is not acquainted with the processes established by a particular plan, it is best to avoid making assumptions that one plan is similar to another and to consult with someone who knows about this unique area of the law.

Tax consequences

Generally, the distributee of a payment from a retirement plan will be taxed on said distribution. See I.R.C. § 72(a)(1). Thus, when a QDRO or a similar order is administered, and direct payment is made from a retirement plan to an alternate payee, the participant will not experience any tax consequences, but an alternate

payee will.¹ Worth noting is that if the goal is a mere transfer without any distribution, no one should be taxed if the money is rolled into another pre-tax qualified account.

That said, when dealing with a defined contribution plan, there are generally two tax consequences and one exception to each of those consequences. First, any distribution made to a party from a defined contribution plan will be subject to regular income tax, unless said payment is made from a Roth IRA and/or the Roth portion of a 401(k). See I.R.C. § 408A(d). Second, any distribution made from a defined contribution plan prior to age 59½ will be subject to a 10 percent penalty. A limited exception to the 10 percent penalty exists when a distribution is made pursuant to a QDRO. To be clear, when an ERISA-based qualified defined contribution plan² is divided pursuant to a QDRO, the payee spouse has the option of taking a distribution (versus a rollover) that will be subject to regular income tax, but not subject to the 10 percent penalty, even if the payee is younger than 59½. See I.R.C. § 72(t). This becomes a useful rule if you are trying to use a QDRO during a case to pay fees or temporary support, since both parties can potentially benefit from this 10 percent penalty exemption.

Valuation dates; passive gains and losses

Neither a valuation date, nor passive gains and/or losses should be presumed, especially if you are trying to set appropriate expectations for your client. When parties execute a settlement agreement, they often fail to specify a valuation date. However, parties may agree to use virtually any date of their choosing, as long as it is allowable under a particular retirement plan. When parties use ambiguous settlement agreement language, such as stating a dollar amount or a percentage without specifying a valuation date, the potential for unnecessary litigation is created. This is particularly true when the market is volatile or if you are dealing with a potentially hotly contested estate. Thus, it is critical that the parties agree to a date of valuation.

Practical considerations: Getting it without liability

Whether you decide to refer these matters to another attorney completely, or only partially refer out the portion related to handling the QDRO itself, it is imperative that you keep in mind your own potential liability. Common practice in Florida is to have non-attorneys prepare QDROs and to advise on issues related to same. Keep in mind that The Florida Bar requires non-attorneys to be supervised and to take actions in family law matters on behalf of parties only when directed by attorneys. This means that if you have a non-attorney prepare a QDRO, you are responsible for supervising that non-attorney. Further, the preparation of orders is the practice of law, and if you refer parties to a non-attorney and do not supervise the non-attorney, then I am of the opinion that you may be aiding in the unlicensed practice of law.

Conclusion

The division and transfer of retirement accounts is a complex matter. To best protect yourself and your client, it will serve everyone well to familiarize yourself with the law and the practical considerations related to the process, and to refer out the portion that may best be handled by a third-party attorney.



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Endnotes:

¹ Under existing law, this tax liability cannot be shifted as far as I am aware, although parties can gross up the amount to an alternate payee to account for taxes and penalties.

² This does not include government plans or IRAs.

Two similar rules of civil procedure with two specific and distinctly different applications

by Alex Cuello

Whenever a lawyer tries a case, he or she must keep an overwhelming amount of information at the forefront of his or her mind: facts of the case, relevant case law, rules of evidence, testimony of parties (experts and lay witnesses), documentary evidence, burdens of proof and the rules of civil procedure. Sometimes, unknowingly, confusion sets in. If there is an error in the final ruling, there are two rules of civil procedure in the trial lawyer's tool kit to rectify an incorrect judgment, namely: Florida Rule of Civil Procedure 1.530, Motion for New Trial and Rehearing Amendments of Judgments; and Rule 1.540, Relief from Judgment, Decrees or Order. On the surface, both of these rules appear very similar and overlapping. However, their respective applications are specific and diverse from each other. Due to their similarity, it is not uncommon for lawyers and judges inadvertently to apply one in the place of the other. But when examined closely, their applications are specific to the relief sought and do not overlap.

Most recently, in *The Balmoral Condo. Assoc. v. Grimaldi*, 38 FLW D174b (Fla. 3d DCA 2013), the appellate court reversed the trial court's decision to vacate a summary judgment and untangled the web of confusion sometimes created by these two rules. The trial court had initially granted Balmoral's motion for summary judgment. Thereafter, pursuant to Rule 1.530, Grimaldi filed a timely motion for rehearing. The hearing occurred four months later, wherein the motion was denied. However, at the hearing, Grimaldi's counsel filed a new motion titled "Motion to Vacate and/or for Rehearing," wherein it was asserted that granting summary judgment was wrong as a matter of law. The trial court denied Grimaldi's initial motion for rehearing and set for hearing at a later date Grimaldi's

successive motion to vacate and/or for rehearing. At the subsequent hearing, the trial court acknowledged it was without jurisdiction to hear the portion of the motion to vacate because it had already denied such relief, but claimed to have retained jurisdiction under Rule 1.540 to hear the motion-for-rehearing portion of the pleadings. The trial court sided with Grimaldi, vacated the order and ruled that it never should have granted summary judgment. The appellate court found that the trial court lacked jurisdiction to vacate the summary judgment based on the inappropriate application of the two rules.

"[R]ules 1.530 and 1.540 provide two very different approaches for judges to revisit final judgment."¹ The main differences include the relief sought for reconsidering the court's ruling and the time limits to file the respective motions. Rule 1.530 states in part that

[o]n a motion for rehearing of matters heard without a jury, including summary judgments, the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment.²

A motion for a new trial or for rehearing shall be served not later than 10 days after the return of the verdict in a jury action or the date of the filing of the judgment in a non-jury action. A timely motion may be amended to state new grounds in the discretion of the court at any time before the motion is determined.³

"The purpose of a motion for rehearing is to give the trial court an opportunity to consider matters which it failed to consider or overlook."⁴ Rule 1.530 provides wide-ranging grounds upon which to argue "that the final order conflicts with the governing law and is otherwise simply wrong on the merits."⁵ "A rehearing is a second consideration of a cause for the sole pur-

pose of calling to the attention of the court any error, omission, or oversight that may have been committed in the first consideration."⁶ Rules 1.530 affords a party the opportunity to argue error as a matter of law in the court's ruling. However, under 1.530, a motion for new trial or rehearing must be served within 10 days of a verdict or filing of the judgment.⁷ The trial court has no authority to extend the time for filing a motion for rehearing or new trial.⁸ And, following denial of a motion for rehearing, or if no such motion is timely filed, "the trial court loses jurisdiction to rehear the judgment on the merits."⁹

Distinctly, Rule 1.540 provides very narrow and limited grounds for which relief may be granted. "[T]he contention that a final order is wrong as a matter of law on the merits is not one of the enumerated grounds for relief under Rule 1.540."¹⁰ The rule states in part that

On motion and upon such terms as are just, the court may relieve a party ... from a final judgment, decree, order, or proceeding for the following reasons: 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; 3) fraud ...; 4) that the judgment or decree is void; or 5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application.¹¹

"[T]he trial court is restricted in providing relief from judgments, decrees, or orders to the limited number of grounds set forth in *Florida Rules of Civil Procedure 1.540*."¹² "Rule

continued, next page

Rules of civil procedure from preceding page

1.540 was intended to provide relief from judgments, decrees, or orders under a limited set of circumstances; it was neither intended to serve as a substitute for a new trial mechanism prescribed by Rule 1.530 nor as a substitute for appellate review of judicial error.”¹³ Instead, Rule 1.540 is intended for use to correct “honest mistakes made during the regular course of litigation, including those that result from oversight, neglect, or accident.”¹⁴

Another distinguishing feature, apart from the limitation on the application of Rule 1.540, is the time limitation for filing a motion for relief from judgments, decrees or orders. Rule 1.540 has two time tables, both of which afford a significantly larger period of time to request relief from judgments, decrees or orders, albeit for a limited list of reasons. A party has no more than one year after the judgment, decree or order to move for relief under Rule 1.540 on the basis of mistake, inadvertence, surprise, excusable neglect, newly discovered evidence (which by due diligence could not have been discovered in time to move for a new trial or rehearing) or fraud. If the basis of the motion for relief from judgment is that the judgment or decree is void; or that the judgment or decree has been satisfied, released or discharged; or that a prior judgment or decree upon which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment or decree should have prospective application, then the moving party must file its motion within a reasonable time.¹⁵ “Within

a reasonable time” includes setting aside judgments entered two years earlier without notice to a party.¹⁶

Both 1.530 and 1.540, Fla.R.Civ.P., provide attorneys an opportunity to cure defective judgments, decrees or orders. However, their applications to revisit final judgments are distinctly diverse. Motions for a new trial, a rehearing or amendments to judgments premised on judicial error in the application of the law are governed by Rule 1.530, and they must be filed within 10 days after return of the verdict in a jury action or the date of the filing of the judgment in a non-jury action. Failure to file a motion timely divests the trial court of jurisdiction to hear any motion asserting a mistake in application of the law. A timely appeal would be required to challenge the merits order. Rule 1.540 affords an attorney more time to file for relief from a judgment, decree or order, but it expressly limits the basis for review. Rule 1.540 “envisions an inadvertent and honest mistake in the ordinary course of litigation, ... including the inadvertent and erroneous signing of an order submitted by counsel.”¹⁷ Although both rules are available to trial lawyers, failure to apply their methodology appropriately in seeking relief may result in waiving a party’s rights and may require further judicial labor by way of an appeal.



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Endnotes:

- 1 *The Balmoral Condo. Assoc. v. Grimaldi*, 38 FLW D174b (Fla. 3d DCA 2013).
- 2 1.530(a), Fla.R.Civ.P.
- 3 1.530(b), Fla.R.Civ.P.
- 4 *Pingree v. Quaitance*, 394 So.2d 161 (Fla. 1st DCA 1981).
- 5 *Id.*, *Balmoral*.
- 6 *Langer v. Aerovisa, S.A.*, 584 So.2d 175 (Fla. 3d DCA 1991) (quoting: *Cole v. Cole*, 130 So.2d 126 (Fla. 1st DCA 1961)).
- 7 1.530(b), Fla.R.Civ.P.
- 8 *Capital Bank v. The Hon. Francis X. Knuck*, 537 So.2d 697 (Fla. 3d DCA 1989).
- 9 *Herskowitz v. Herskowitz*, 513 So.2d 1318 (Fla. 3d DCA 1987).
- 10 *Id.*, *The Balmoral Condo. Assoc.*
- 11 1.540(b), Fla.R.Civ.P.
- 12 *Bank of America, N.A. v. Lane*, 76 So.3d 1077 (Fla. 1st DCA 2011).
- 13 *Pompano Atlantis Condo Assoc., Inc. v. Merlino*, 415 So.2d 153 (Fla. 4th DCA 1982) (citing: *Kuykendall v. Kuykendall*, 301 So.2d 466).
- 14 *Paladin Prop. v. Family Invest. Ent.*, 952 So.2d 560 (Fla. 2d DCA 2007).
- 15 1.540(b), Fla.R.Civ.P.
- 16 *Polani v. Payne*, 654 So.2d 202 (Fla. 4th DCA 1995).
- 17 *Schrank v. State Farm Mut. Auto. Ins. Co.*, 438 So.2d 410 (Fla. 4th DCA 1983).

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How to prepare an appealable fair hearing

by Nancy E. Wright

Like chess players, the best advocates are always thinking ahead. Just as settlements are more successful when opposing counsel knows you are prepared to go to hearing, fair hearings are more successful when you anticipate an appeal. Ironically, the better you are at preparing ahead, the less likely you will need to take that next step.

On the most basic level, your task at a fair hearing is to tell your client's story in a clear and convincing way. The complicating factor is that you have multiple audience members with differing agendas: your client, opposing counsel, the hearing officer or the administrative law judge and, potentially, the appellate court. The following are some tips for a fair hearing presentation that will address that unseen audience, the appellate court.

Write the script. An appeals court is stuck with a paper record. This small and obvious fact should stay in the back of your mind during the hearing. In some ways this can work to your favor. For example, taking your time to find an exhibit or to collect your thoughts will not be reflected in the record. When your witness nods or refers to an exhibit by pointing, however, the appellate court will be lost. You will need to clarify missing visual cues, refer to exhibits by number and make sure that pronouns are attached to names.

Another common "script" error is to rely heavily on exhibits without any narrative that emphasizes the key points and chronology. This should be done either by testimony of witnesses or through a well-crafted opening or closing statement.

After the hearing, you will be asked to prepare a proposed order, which many advocates use as their "closing statement." This becomes part of the record, but don't leave too much of the "story telling" to this post-hearing

submission. The appellate review will be based primarily on what the judges see in the transcript of the hearing, not on your interpretation via proposed order.

Facts are better than law. The main job of the hearing officer or the ALJ is to act as a fact finder. This is clear in the standard of review for overturning findings of fact. If the administrative tribunal issues a final order, an appellate court can reverse a finding of fact only if it is not supported by any competent substantial evidence.¹ If the order of the hearing officer or the ALJ is only a recommended order, the agency issuing the final order has the same standard of review.² If the agency improperly rejects or modifies a finding of fact, a prevailing appellant can be awarded reasonable attorney's fees and costs for both the administrative proceeding and the appeal.³

You may have a good legal argument, but make your case on the facts as best you can, and argue the law as an alternative. When you submit your proposed order, make sure you separate factual issues from legal issues so that there can be little argument about which is which.

Don't forget the law. Raise all of your legal issues, even if the hearing officer or the ALJ doesn't think there is authority to hear them.⁴ The case law on whether an issue is waived if not raised at the hearing is confusing at best. Why risk it? Examples of legal arguments to consider: inadequate notice,⁵ *res judicata* or "administrative finality,"⁶ an agency's use of an unadopted rule as the basis for its decision,⁷ conflict with authorizing state or federal law⁸ and unconstitutionality.⁹

Where do you make these legal arguments? You can amend the hearing request as a matter of right before the hearing officer is assigned or

with good cause (liberally construed) later.¹⁰ Other options include a motion for summary final order or relinquishment of jurisdiction (depending on whether the order will be final or recommended)¹¹ and the pre-hearing stipulation. Legal arguments can be raised at hearing and in your proposed order, but they run the risk of being rejected as too late to give opposing counsel adequate notice.

A hearing is informal; an appeal is not. The rules of evidence are somewhat less stringent for administrative hearings. Differences relate primarily to less tolerance for redundancy¹² and a greater leniency for hearsay. The closer you stick to the formal rules, however, the better your record on appeal.

Hearsay evidence is admissible, but only to supplement or explain other evidence.¹³ If you do not have direct evidence on a critical component of your case, hearsay evidence will not help you, no matter how much of it is in the record. Best practice is to justify all hearsay exceptions for your evidence and to object to any agency attempts to introduce hearsay.



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services attorney, she facilitated a statewide advocacy effort to defend children and adults with developmental disabilities from significant reductions in services. She also initiated a program to assist homeless clients with applications and hearings to obtain Social Security and Veterans' benefits. She has been a member of

See "Appealable," page 18

How to prepare an appealing appeal

by Mary Wakeman

In the article “How to prepare an appealable fair hearing” by Nancy Wright, you learned how to prepare a fair hearing case for possible appeal. Despite your best efforts at the fair hearing, a decision was rendered against your client, and the client now wants to hire you to handle an appeal of the matter. Fortunately, the client has enough money to finance the appeal, and the case concerns an issue that will impact others in similar circumstances.

The starting point for appeals of an administrative action is Rule 9.190, Florida Rules of Appellate Procedure. This rule provides that administrative action appeals are governed by the Rules of Appellate Procedure, except as modified in Rule 9.190. The rule further provides that commencement of an administrative appeal may be done in conformance with other rules of appellate procedure, depending on the nature of the administrative order to be appealed.¹

Most orders rendered after a fair hearing will be “[a]n appeal from final agency action as defined in the Administrative Procedure Act, Chapter 120, Florida Statutes, including immediate final orders entered pursuant to Section 120.569(2)(n), Florida Statutes” Commencement of appeals of those orders is invoked by filing the original notice of appeal with the clerk of the lower administrative tribunal (typically the clerk of the agency that rendered the order) within 30 days of rendition of the order to be reviewed and by also filing a copy of the notice, along with any applicable filing fees, with the clerk of the appellate court.² The rule requires actual *filing* of the notice, not merely mailing of the notice. Failure to adhere to this requirement will result in an untimely appeal, which will be dismissed.

If you are not sure if the order you received is a “final, appealable” order, file the notice of appeal anyway. If the

order is not final and appealable, the appellate court usually will ask you to show cause why the appeal should not be dismissed. In the interim, you can obtain a final order, and the appellate court usually will let you substitute the new final order for the old and let the appeal proceed.

Rule 9.190(c) governs the preparation of the record on appeal. As mentioned in the previous article, the record will consist only of the items and evidence submitted to the lower tribunal. It is the appellant’s obligation to see that a complete record is prepared to permit the court to perform its review. If a complete record is not available or submitted, motions to supplement may be granted, but only if the item was actually submitted to the lower tribunal or agency. Courts have determined that they cannot perform their review function because of an incomplete record, and the appealing party has lost because of it.

Stays pending review may be available, but typically have to be brought before the lower tribunal/agency for determination first.³ There are automatic stays available in certain circumstances, as provided by Rule 9.130 (bonds that are posted for money judgments or civil orders against public officers or public bodies) or by Section 120.68(3), Florida Statutes (suspension or revocation of a license), or for timely review of an award by an administrative law judge on a claim for birth-related neurological injuries.⁴

Briefs are governed by Rule 9.210, which dictates the size of the font to be used, paper size, margin size, binding of the brief (thankfully no longer necessary with the advent of e-filing in the district courts of appeal), the size of headings, information to go on the cover sheet and the required contents of the brief, including the applicable standard of review for each issue. The rule also requires each party to include a certificate that his or her

brief complies with this rule. Courts will reject briefs that do not comply with the rule’s requirements, so it is important to review the rule carefully before you file your brief. Initial briefs in administrative appeals under Rule 9.190 are due within 70 days of filing the notice of appeal.⁵ Answer briefs are due within 20 days of service of the initial brief, and reply briefs are due within 20 days of service of the answer brief.⁶

Remember that appellate courts have to review briefs all day long. Making your brief an “easy” read for the court is a welcome change. I see many briefs where the author is simply reciting, almost by rote, all of the factual evidence submitted to the lower tribunal. Since the court will review your summary of argument and statement of facts first (because those sections come earlier in the brief), you can use that opportunity to convince the court to start thinking your way. Although argument in the statement of facts is not permitted, you may still write a persuasive statement that will get the court on your side before ever reading your actual argument. I usually write the statement of facts after I am finished with the argument sections, because I find I can distill the facts down to their essential essence once I put all of my arguments into place.

If attorneys’ fees are available by statute or by contract in your case, remember to file a motion for appellate attorney’s fees. That motion must be served no later than the date the reply brief is due to be served.⁷ If you wish to request oral argument, you must file a separate motion no later than the date on which your last brief is due⁸ (for appellees, that will be the answer brief and for appellants, the reply brief, unless cross-briefs are filed).

Rehearings or requests for clarification of adverse appellate decisions

See “Appealing,” page 18

The Florida Bar since 1980, after graduating with high honors from Florida State University College of Law. She is a member of the Elder and Health Law sections of The Florida Bar and the Eighth Judicial Circuit Bar, and is licensed to practice before the Florida Supreme Court and the Federal District Court for the Northern District of Florida. She is on the board of Helping Hands, a volunteer medical service for homeless individuals, and the Alachua County Health Care Advisory Board.

Endnotes:

- 1 *M.S. v. DCF*, 6 So. 3d 102 (Fla. 4th DCA 2009).
- 2 §120.57(1)(l), Fla. Stat.; *Gruman v. De-*

partment of Revenue, 379 So. 2d 1313 (Fla. 1st DCA 1980).

- 3 §120.595(5), Fla. Stat.
- 4 E.g. *DER v. Falls Chase Special Taxing District*, 424 So. 2d 787 (Fla. 1st DCA 1982).
- 5 *Goldberg v. Kelly*, 397 US 254 (1970).
- 6 *Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335 (Fla. 1966); *Felder v. Dept. of Mgmt Servs.*, 993 So. 2d 1031 (Fla. 1st DCA 2008).
- 7 §120.57(1)(e)1., Fla. Stat.
- 8 E.g., *French v. DCF*, 920 So. 2d 671 (Fla. 5th DCA 2006).
- 9 E.g., *Communications Workers of America v. City of Gainesville*, 697 So. 2d 167 (Fla. 1st DCA 1997).
- 10 F.A.C. Rule 28-106.202.
- 11 F.A.C. Rule 28-106.204(4) & (5).
- 12 §120.569(2)(g), Fla. Stat.
- 13 §120.57(1)(c), Fla. Stat.; *Kaye v. State, H.R.S.*, 654 So. 2d 298 (Fla. 1st DCA 1995).

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from preceding page

or certifications of questions of great public importance may be filed under certain circumstances.⁹ Those motions must be *filed* (not merely served) within 15 days from the date of the adverse decision.

When in doubt about your obligations in an appeal, do not hesitate to consult with an appellate specialist. If you do not deal regularly with the Rules of Appellate Procedure, they can be a trap for the unwary and may result in your client being foreclosed from his or her right to appeal.



Mary Wakeman concentrates her practice on all aspects of civil appellate practice, including employment law, general liability and workers' compensation defense. In addi-

tion, she is part of the firm's elder law section, where her practice consists of wills, trusts, probate and incapacity planning, including powers of attorney, living wills and health care surrogate designations. She is board certified in appellate practice and frequently lectures at accredited seminars each year on a variety of topics related to civil and appellate practice, workers' compensation and elder law. She has also attained the rating of AV preeminent, the highest rating possible by her peers through Martindale-Hubbell.

Endnotes:

- 1 R. 9.190(b), Fla. R. App. P. (2013).
- 2 R. 9.110(c), Fla. R. App. P. (2013).
- 3 R. 9.310(b) and (c), Fla. R. App. P. (2013).
- 4 R. 9.190(e), Fla. R. App. P. (2013).
- 5 R. 9.110(f), Fla. R. App. P. (2013).
- 6 R. 9.210(f), Fla. R. App. P. (2013).
- 7 R. 9.190(d)(1), Fla. R. App. P. (2013).
- 8 R. 9.320, Fla. R. App. P. (2013).
- 9 R. 9.330(a), Fla. R. App. P. (2013).



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THE FLORIDA BAR

Screening for benefits: Are you a veteran?

by Carla-Michelle Adams

Elder law practitioners must have a comprehensive understanding of available benefits and eligibility requirements in order to fully advise their clients. Inquiring about veteran status is critical because it may provide a client who is ineligible for Medicaid or Social Security Income with health care or a pension plan.¹ The U.S. Department of Veterans Affairs (the VA) has a wide range of benefits available for veterans. The benefits include outpatient treatment, home health services, health insurance and burial benefits. It is the responsibility of the practitioner to determine whether the client qualifies for the wide range of benefits and services that the VA offers to those who have served. If practitioners have a general understanding of eligibility requirements and the process for applying for benefits with the VA, they can properly screen clients for benefits to which they may be entitled.

Identifying the client as a veteran

The initial inquiry in assessing the client's eligibility for benefits is whether your client is a veteran. A veteran is "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."² Active military service includes full-time service in the U.S. Army, Navy, Air Force or Coast Guard and specific other groups.³ After determining that the client is a veteran, a request should be made for military department service records. The service record will function as proof of veteran status to the VA when a claim for benefits is filed.

Establishing the length of service

Preceding Sept. 8, 1980, there was no minimum length of service requirement for general eligibility of

benefits.⁴ However, post Sept. 8, 1980, there are specific lengths of service requirements for various benefits. Veterans who enlisted after Sept. 7, 1980, or who entered active duty after Oct. 16, 1981, must have served 24 continuous months or the full period for which they were called to active duty to be eligible for benefits.⁵ The minimum duty requirement may not apply to veterans who were discharged for hardship or for a disability incurred or aggravated in the line of duty.⁶

Determining the time frame of service

The distinction between wartime and peacetime service is critical for eligibility for specific benefits. Service-connected compensation and health care benefits do not require wartime service. However, service during wartime is an eligibility requirement for a veteran, surviving spouse or dependent child of a veteran to be entitled to a pension.⁷ Over 90 percent of elderly veterans have wartime service.⁸ The client should identify the time period of service, as many elder law clients will assume that wartime service refers to actual combat rather than the time frame of service. Federal regulation identifies the time frame of each war period. All other times outside of the designated periods listed below qualifies as peacetime service:

- **World War I:** Apr. 16, 1917, through Nov. 11, 1918. The ending date is Apr. 1, 1920, if the veteran served with U.S. Military Forces in Russia. Service after Nov. 11, 1918, and before July 2, 1921, is considered World War I service if the veteran served in the active military, naval or air service after Apr. 5, 1917, and before Nov. 12, 1918.
- **World War II:** Dec. 7, 1941, through Dec. 31, 1946, extended to July 25, 1947, where continuous with active

duty on or before Dec. 31, 1946.

- **Korean Conflict:** June 27, 1950, through Jan. 31, 1955.
- **Vietnam Conflict:** Feb. 28, 1961, through May 7, 1975, for veterans who served "in the Republic of Vietnam during that period" and Aug. 5, 1964, through May 7, 1975, "in all other cases."
- **Persian Gulf War:** Aug. 2, 1990, through a date to be prescribed by presidential proclamation or law.⁹

Inquiring about the nature of discharge

The VA views a military discharge as dishonorable if it fits within one of several categories of conduct specified in federal regulations including but not limited to general court martial, mutiny, felony conviction involving moral turpitude, willful and persistent misconduct and spying.¹⁰ If the client has been dishonorably discharged, it is a potential bar to receiving benefits. Furthermore, benefits will not be provided to any veteran wanted for an outstanding felony warrant.¹¹

Initiating a claim

To file a formal claim for benefits, the veteran must fill out the appropriate form for the benefits sought. The application can be accessed and submitted online on the VA's website (www.va.gov). An informal claim for benefits must be in writing and include a general identification of the benefit sought. In advising a client who may be eligible for veterans' benefits, they should be made aware that a substantially complete application contains:

1. The claimant's name and relationship to the veteran if applicable;
2. Sufficient service information for the VA to verify the claimed service, if applicable;

continued, next page

In Memoriam Ray Parri



The legal community, and the elder law community in particular, lost one of its visionary members with the passing of Raymond L. Parri on Jan. 12, 2013. A graduate of the Brooklyn College of the City University of New York, with a B.A., and the Brooklyn Law School, with a J.D., Ray began his practice in New York in 1962 and became a member of The Florida Bar in 1977.

Settling in Clearwater, Fla., Ray practiced in the area of elder law until 2009. Ray was nationally certified as an elder law attorney (CELA) by the National Elder Law Foundation and was board certified in elder law by The Florida Bar. Always active in the Bar and the local community, Ray served as treasurer, secretary and as a member of the Executive Council of The Florida Bar Elder Law Section. He was a past president of the Academy of Florida Bar Elder Law Attorneys and served on The Florida Bar Elder Law Section and AFELA Medicaid Task Force. Ray served as the first president of the Better Living Consortium, which is affiliated with the District Area Agency on Aging (the organization serves Pinellas and Pasco counties of Florida). He had been an adjunct professor at Stetson University of Law, teaching elder law. Ray also served as chair of the National Academy of Elder Law Attorneys (NAELA) Long-Term Care Task Force and the Practice Management Special Interest Group and on the NAELA Government Benefits Task Force. In 2011, Ray was awarded a Lifetime Achievement Award from the Elder Law Section of The Florida Bar, which Ray's son accepted on Ray's behalf.

Over the years, Ray wrote numerous published articles in both professional and lay publications on elder law and estate planning subjects. He spoke for professional organizations on local, state and national levels, including continuing education for attorneys, accountants, insurance groups, health care providers and medical personnel, as well as lay groups such as support groups for disabled persons and senior citizens and other civic organizations.

Even while maintaining a busy law practice, Ray always found time to impart his wisdom and experience to his fellow elder law attorneys, in particular to his son Dan, who now runs the law practice. Several members of the Elder Law Section, including Chair Twyla Sketchley, spoke fondly of Ray at the recent Elder Law Section Executive Council meeting. They recalled Ray's willingness to give his time, advice and experience to other members of the section, noting that Ray was always ready to answer questions and to assist in solving a problem. One of the most poignant comments came from Charlie Robinson, who knew Ray for many years:

He had an active, creative mind and really took to the practice. Ray was part of our original study group that included Ira Wiesner, Julie Osterhout, Margrit and Roger Bernstein, Ken Rubin and Jerry Solkoff. Our study group met three to four times a year at Julie Osterhout's office, as her location was equally out of the way for each of us. I always drove with Ray as my passenger, and we developed a friendship I will always remember and cherish. Ray started to have some serious trouble with his back, and so he rode with me to a lot of Elder Law Council meetings, always in the back seat. He was giving me driving directions constantly until I started to refer to him as my "Jewish mother-in-law" back seat driver. We always had fun and never stopped giving each other a hard time. I treasure Ray's friendship and his analytical skills, not to mention his deep love for his wife, Sandy, and his children.

Although Ray will be missed, the mark he left on the Elder Law Bar will not be forgotten. At the request of Ray's family, donations in Ray's honor can be made to the Clearwater Bar Foundation. The Elder Law Section of The Florida Bar recently honored that wish with a \$1,000 donation to the foundation in Ray's name.

Submitted by Steven Hitchcock, Esq., chair, Elder Law Section Ethics Committee

Are you a veteran? from preceding page

3. The benefit claimed and any medical condition on which it is based;
4. The claimants signature; and
5. In claims for non-service connected disability or death pension and parents' dependency and indemnity compensation, a statement of income.¹²

Initial screening process

Using the information presented above, practitioners can conduct the initial screening process to determine if the client is potentially eligible for benefits from the U.S. Department of Veterans Affairs. In taking the initiative to determine if the client is a veteran, the practitioner is presenting the client with the opportunity to apply for benefits that can ease financial burdens and improve his or her life.



Carla-Michelle Adams, Esq., associate attorney at Newman Law Firm PA, was admitted to practice law in Florida in 2011. She received her B.A. from the College of New Rochelle, law degree from Florida Coastal School of Law and will complete her Master of Laws degree in elder law in May 2014 at Western New England University School of Law. She may be contacted at 904/355-8835 or carla.adams@newmanlawfirm.com.

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Endnotes:

- 1 Mary Ellen McCarthy, *What Difference Does It Make If Your Client Is a Veteran? None if You Don't Ask about Veteran Status*, J. on Poverty L. & Pol'y (2009).
- 2 Formerly the Veterans Administration; see website at <www.va.gov>
- 3 Julie Braun, *Veterans Benefits for the Elderly*, in Elder Law Portfolio (2009).
- 4 *Id.* at 14-11.
- 5 *Id.* at 14-11.
- 6 Federal Benefits for Veterans Dependents and Survivors 2012 Edition.
- 7 Julie Braun, *Veterans Benefits for the Elderly*, in Elder Law Portfolio (2009).
- 8 *Id.* at 14-11.
- 9 Federal Benefits for Veterans Dependents and Survivors 2012 Edition.
- 10 Julie Braun, *Veterans Benefits for the Elderly*, in Elder Law Portfolio (2009).
- 11 Federal Benefits for Veterans Dependents and Survivors 2012 Edition.
- 12 38 C.F.R. § 3.159(a) (3) 2008.

Majority of veterans don't understand burial benefits

by Philip M. Weinstein
on behalf of the Death Care Committee



A recent study shows that approximately 60 percent of veterans do not fully understand the burial benefits provided by the federal government. While the reasons for this are largely unknown, the seemingly difficult processes involved in obtaining veterans' benefits are partly to blame. Another likely cause is the possibility that many veterans and their families are not aware of what the government provides when a veteran passes away. The benefits can be significant, but they vary depending on several conditions set forth by the U.S. Department of Veterans Affairs. Certain restrictions apply based on whether burial takes place in a private or a national cemetery.

Burial benefits available include a gravesite in any of the 131 national cemeteries with available space, opening and closing of the grave, a concrete receptacle, perpetual care,

a government headstone or marker, a burial flag and a Presidential Memorial Certificate, at no cost to the family. Cremated remains are buried or inurned in national cemeteries in the same manner and with the same honors as casketed remains. These burial benefits are available for the veteran, spouse and dependent child.

Regardless of the cemetery chosen, benefits include a government issued flag, a government headstone or marker and a Presidential Memorial Certificate. Even though these benefits are "guaranteed," certain procedures must be followed to receive them. Some veterans may be eligible for monetary burial allowances as well, but this is yet another issue that complicates matters; in order to be considered, the veteran must meet a list of additional requirements.

With so many issues related to receiving VA burial benefits, it is no wonder there is a gap in understanding—the guidelines are difficult to comprehend. Thankfully, though, at least one funeral services company has stepped in to assist veterans

and their families during their time of need.

The Dignity Memorial® Network, the nation's leading network of locally operated funeral homes and cemeteries, offers a free *Veterans Planning Guide* to eligible veterans. The 56-page guide clearly outlines VA burial benefits, spells out the required procedures and offers helpful information to veterans and their families. The guide also contains worksheets that allow veterans to plan their own arrangements, making clear their final wishes. The veteran's military discharge document (DD 214 or equivalent) is needed to file for any benefit.

For more information about the Dignity Memorial Network's veterans' services, or to request a free planner, call Philip M. Weinstein, funeral director, toll free at 877/554-7878 or go to www.dignitymemorial.com.

Philip M. Weinstein is an honorary life member of the Elder Law Section, and he chairs the Death Care Committee.

Advice for young lawyers

by Brandon Arkin
on behalf of the Mentoring Committee

It's not easy being a young lawyer these days. *The New York Times* published an article in 2010 declaring that law school was no longer the "golden ticket." Things are starting to look better, but good jobs are hard to come by, and employers who want to train new lawyers are even more difficult to find. The cost of learning on your own can be astronomical; CLEs, treatises and attending bar meetings are impracticable for many young at-

torneys with massive student debt. So, what's a young lawyer to do? Distinguish yourself.

Whenever there is an overcrowded marketplace, the key is to make yourself stand out.

First, make yourself useful in your area of practice. One way to accomplish this is by getting involved with section work, committees or charitable work related to your field. If you're passionate about protecting

the elderly, reach out to your local community-based services, offer your time to legal aid and participate on a committee to help refine the law to better protect the elderly.

Second, find a niche area or a newly developing legal trend and become a definitive resource in that area. Read the statutes, case law and proposed legislation. Then write articles and look for speaking opportunities to educate

continued, next page

Advice for young lawyers

from preceding page

interested parties on the new rules or changes and how they will affect lawyers' practices and their clients.

Third, seek out opportunities to learn your trade. When lawyers come out of school, many of them have never argued a case, filed documents with the court, conducted an initial client intake or litigated a real court case. There is a great way to improve your legal skills while providing a service to the public: Volunteer with your local legal aid organization. This is an amazing opportunity to get real-world training and courtroom experience. You are provided with an attorney as a mentor in the applicable area of practice as well as access to legal resources, and you are covered under

legal aid's malpractice insurance. Legal aid not only provides you with work experience, a mentor and familiarity with the judges, it can also turn into a possible referral source. The client you represented in the pro bono case may have friends or family who need legal representation and have the ability to hire a private attorney. Of special note to elder law attorneys, there is always a need for pro bono attorneys in guardianship cases.

While this article is directed toward young attorneys, I believe it is applicable to any attorney in the job market. If you work at a firm and you believe you are doing enough by going to work, putting in your hours and then going home, you are not growing, not learning, you have no effect on the laws governing your practice and you will always be playing catch-up as the law changes. By taking this

advice to heart, you have the ability to help your community, become an invaluable resource at your firm, help shape the future of your practice area and always be aware of the new developments affecting your practice, allowing you to stay a step ahead of your competition.



Brandon Arkin
practices elder law and family law in Palm Beach, Broward and Miami-Dade counties. He is co-chair of the Mentoring Committee and chair of the Law School Liaison

Committee. If you have any questions, need a mentor or want to become a mentor, email him at brandon.arkin@gmail.com.

COMMITTEE REPORTS

Estate Planning and Advance Directives Committee

Sam W. Boone, Jr., and Kara Lyn Evans, co-chairs

The Estate Planning and Advance Directives Committee has had a great year so far. We have had educational and instructive presentations on homestead, the do's and don'ts of probate practice, partition actions, adversarial actions in probate proceedings, email service and e-filing, and manipulating the conduct of beneficiaries through conditional gifts.

Ethics Committee

Steven E. Hitchcock, chair

The Ethics Committee continues to advocate for a revision to Rule 4-1.14, Florida Rules of Professional Conduct, and has considered strategies to advocate effectively for a change to the rule. The proposed change would align Florida's rules with Rule 1.14,

ABA Model Rules of Professional Conduct, providing more guidance to attorneys who work with clients who have diminished capacity. The committee has also considered the ethical issues involved when attorneys work with non-attorney Medicaid and VA planners. The committee voted to provide ethics training on this issue at an upcoming CLE event. Stay involved with the Elder Law Section to find out when the training will be offered.

Law School Liaison Committee

Brandon Arkin, chair

The Law School Liaison Committee is diligently working to reach out and create a relationship with each of the Florida law schools. The committee is working with the University of Miami student chapter on planning a speaking and awareness event on campus. The event will include a panel discussion with local judges and University of Miami alumni, with a networking

reception afterward.

The committee is also in the process of establishing an elder law student-run committee at Nova Southeastern, with the goal of expanding into a full and independent elder law society. In addition, the committee is working with Florida Coastal to help create an elder law awareness event and to gain student members for the section.

If anyone has an associate, paralegal or family member at any of the Florida law schools who is interested in helping us establish an elder law society on campus or is interested in an elder law awareness event, please have that person contact our committee's chair at brandon.arkin@gmail.com.

Residents' Rights Committee

Laurie Ohall and Aubrey Posey, co-chairs

In preparation for the 2013 Legislative Session that began on Mar. 5,

the Residents' Rights Committee reviewed proposed legislation and made recommendations to the Legislative Committee of the Elder Law Section. Many of the bills reviewed relate to the continued need to strengthen assisted living facility (ALF) regulations.

The Residents' Rights Committee recommended supporting HB 187 by Rep. Mike Fasano (R-36), which includes many provisions to improve residents' lives. Specifically, the bill would require facilities with even

just one resident classified as limited mental health (LMH) to obtain an LMH license, ensuring that ALF staff has the specialized training needed to care for these residents. ALF administrator qualifications would be more stringent, and a Board of Assisted Living Facility Administrators would be established to regulate the profession. HB 187 includes provisions to establish a consumer website to assist consumers in making informed choices when choosing an ALF.

SB 646 also proposes requiring an

LMH license for those facilities with one LMH resident and establishing a consumer website. The committee recommended supporting all of SB 646 except Section 4, which proposes to reduce monitoring visits of facilities with extended congregate care and limited nursing services licenses. Because residents served in these facilities have higher care needs, the committee does not believe it would benefit residents or the protection of their rights to reduce these monitoring visits.

Homestead in trust? Just say no!

The tale:

A client comes to you with a request. Years ago, she and her now deceased husband did some estate tax planning. As part of the planning, one-half of the homestead property was placed in her trust and one-half in her husband's trust. Each trust had the standard language that the assets in the deceased spouse's trust shall be held for the benefit of the surviving spouse with the spouse receiving all income and principal for health, education, maintenance and support. She would like to have the house placed in her trust because her trust puts some restrictions on how and when her children can receive money and property. So, she wants you to write a deed transferring the half of the home from her deceased husband's trust to her trust. Can you help?

The tip:

You have some very bad news for your client. Remember the Florida Constitution, Article X, Section 4(c)? Well, it states that "The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child." The cases hold that "This exception is exclusive and prohibits the testator from devising less than a fee simple interest to his surviving spouse ..." (*In re Estate of*

Finch, 401 So.2d 1308 (Fla.1981). Since the deceased husband's trust did not leave the interest in the homestead in fee simple, the devise failed and that portion of the home owned by that trust will pass as directed in F.S. 732.401. She has a life estate, and the kids own the remainder interest. She is frowning as you tell her this, and it is about to get worse. She does not even have the option to make the election to take an undivided one-half

Tips & Tales

by
Kara Evans



interest in the homestead as a tenant in common with the kids because her husband died two years ago and the election had to have been made within six months.

As for the portion of the homestead that is still in her trust, you need to caution her that too many restrictions on her children's rights to the property may cause a loss of the exemption from forced sale granted under Article X, Section 4(a), which inures to the heirs of the owner under

Section 4(b). Indeed, there is at least one case where the exemption was lost because the trust did not devise the property specifically to the heir. In *Elmowitz v. Estate of Zimmerman*, 647 So.2d 1064 (Fla. 3rd DCA 1992), Mrs. Zimmerman's will devised her homestead to the Zimmerman Trust, and the trustee subsequently deeded the home to Mrs. Zimmerman's sister. The court noted that the property was not specifically devised to the sister, that she was only entitled to an equivalent in value from the assets of the trust and thus she could not claim protection under Article X, Section 4(b) of Florida's Constitution. It is not impossible that Florida courts will start to look through the trust to be sure the beneficiaries have the requisite possessory interest in the property before allowing the exemption from forced sale to be claimed.

In addition, how do you get an order determining homestead status of real property if the property is owned by a trust? Some attorneys have massaged the language in the petition and order to deal with the fact that the trust may own the property but the trust beneficiaries are the "real" heirs. I have even had an order with this language signed. However, some judges have refused to entertain such a petition.

So, when it comes to placing a homestead in trust, just say NO!

Committees keep you current on practice issues

Contact the committee chairs to join one (or more) today!

Monitoring new developments in the practice of elder law is one of the section's primary functions. The section communicates these developments through the newsletter and roundtable discussions, which generally are held prior to board meetings. Each committee makes a presentation at these roundtable discussions, and members then join in an informal discussion of practice tips and concerns.

Committee membership varies from experienced practitioners to novices. There is no limitation on membership, and members can join simply by contacting the committee chair or the section chair. Be sure to check the section's website at www.eldersection.org for continued updates and developments.

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For Your Practice

Practice expanders: Let disability programs help you increase your service to clients

by Richard La Belle

The disability world can be overwhelming. How can an attorney practicing in this area be expected to keep up with a constantly changing legal landscape as well as new developments in medicine, technology and the evolution of how various disabilities are defined, recognized and treated? For those of us who have practiced in this area, we know it can be a daunting challenge to stay current on all the legal developments while trying to figure out the best way to approach a particular situation our clients may be facing. Many times, such situations have a by-the-book, “legal” solution and then a practical, this-is-how-it’s-done, “real world” solution. Trying to figure out which approach will best serve our clients and meet their needs most effectively can be extremely complicated at best.

Fortunately, there’s help available for you and your clients, for free, from a series of programs and organizations funded by the federal and state governments. Becoming familiar with these programs and enlisting them to help your clients can often save you a lot of time and stress, probably save your clients heartache and help you to increase your level of service to your clients.

Let me give some examples. Let’s say you’re representing a client who has recently been seriously injured or has had a serious stroke. The bottom line is he now finds it very difficult to walk unassisted. He needs a wheelchair, he can’t get it paid for by a public benefits program and he can’t afford to purchase outright the kind he needs. He needs to be able to get in and out of his house. He needs an accessible vehicle that he can get

into and out of in the wheelchair. He needs to be able to go back to work at some level. This client has come to you for some traditional estate planning documents, but he has all of these other pressing needs. Where do you turn?

You can start with your local Center for Independent Living (CIL). There are a number of CILs across Florida, covering all major urban and many rural areas. Many of the CILs have programs where they loan durable medical equipment (like wheelchairs) for free and/or give away or sell the equipment at a greatly reduced price. They can also help build a ramp for your client’s home, again often for no or a low charge. They can connect your client with resources to find an affordable, dependable, accessible vehicle. Finally, they can provide your client with a whole range of resources and assistance to help him return to work, including finding assistance for training programs and/or accommodations that may be provided by employers—all for free.

Next example: A long-time client tells you her grandson has been diagnosed with a developmental disability. The child has been having problems in school and was flagged for further evaluation. The client doesn’t understand what the diagnosis means, for either the child’s current or future prospects. She doesn’t think her grandson is getting what he needs at school to be successful. Your client tells you the teachers are throwing around all sorts of terminology, but it seems to her that her grandson is not progressing like he should be. Your client tells you her daughter and son-in-law are emotional wrecks, they’re

devastated by the diagnosis and they have no idea of where or to whom to turn for more information. Your client also thinks it would be helpful to find a support group for her daughter and son-in-law. You don’t practice special education law, and you have no idea where to find a support group. What do you tell your client?

You can tell her to call a Parent Training and Information (PTI) Center, funded by the U.S. Department of Education. These programs are run by parents of students with disabilities and are required to reach out to all students with disabilities and their families in the public education system. There are several such programs in Florida, covering the entire state. My organization, Family Network on Disabilities, is fortunate to have two PTI grants. Staff members at the PTIs are very knowledgeable about the laws and regulations governing special education. They are also very familiar with supports and resources available to parents and families of students with disabilities. They can help families gather information about a child’s disability and help formulate strategies for learning that have been proven to be effective for other children with similar disabilities. On top of all this, as parents of children with disabilities themselves, they have been through the process and can provide invaluable insight and support to families, including helping them to connect with support groups. PTI staff can provide workshops and other types of training to families on a wide range of topics related to education and living independently. PTIs have a great

continued, next page



For Your Practice

deal of information available online, for free, so that families with internet access can review the information and resources at the time that works best for them. Finally, PTI staff can attend meetings at a child's school with the parents, such as meetings to develop an individual education plan, or IEP, for a child in special education, and to serve as a resource for the IEP team and as a support for the family. There is no charge for any of these services.

Final example: You serve on the board of directors of a local community organization. One day, one of your fellow board members calls you up and wants your help with a situation she has encountered. She tells you that she and several other parents of children with disabilities are in the process of purchasing a large house they want to turn into a group home for their adult children, all of whom have developmental disabilities. She tells you they have been working on this for a long time, the house is within their budget range and it would be a great opportunity for their children. However, they have run into a problem with the homeowner's association for the neighborhood in which they want to buy. The association is trying to block them from establishing a group home. She wants to know what their options are and what rights the parents and their adult children with disabilities have in this situation. You believe an injustice is occurring, but the last time you dealt with a land use issue was in law school and you have no idea what state or federal statutes may be applicable to defend the rights of the people with disabilities. Where do you turn?

You can turn to Disability Rights Florida, formerly known as the Advocacy Center for Persons with Disabilities. Disability Rights Florida is the Protection & Advocacy (P&A) entity for Florida, designated by the

governor and funded through the federal government to protect and advocate for persons with disabilities. In essence, it is a public interest law firm specifically for persons with disabilities. Disability Rights takes on a wide range of issues, both on its own (particularly in the education and employment areas) and as co-counsel with attorneys in private practice. In this situation, you could consult with Disability Rights, which could provide a wide range of legal and other resources, as well as potentially serve as co-counsel in the matter—all at no cost to you or your client.

The bottom line is that using these organizations can save you many hassles and at the same provide your clients with more services.

Richard La Belle is executive director of Family Network on Disabilities of Florida. Prior to becoming



executive director in 2005, he practiced law for nearly 20 years, concentrating in the areas of disability law, including special needs trusts. He and his wife are the parents

of four children, two of whom have disabilities. He has long been active in promoting the rights and welfare of persons with disabilities. He received his law degree from Florida State University and served on the editorial board of the Law Review. He was awarded a Master of Science degree from the London School of Economics in London, England. He received a B.A., with a major in political science, from Florida State University. He is a member of Phi Beta Kappa and the Order of the Coif.

Helpful phone numbers and websites

Florida Independent Living Council (CILs)
www.flailc.org
850/222-9422

Florida Association for Centers for Independent Living
www.floridacils.org
850/575-6004

Family Network on Disabilities (PTI Centers)
www.fndusa.org
800/825-5736

Disability Rights Florida
www.disabilityrightsflorida.org
800/342-0823



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2:00 p.m. – 2:50 p.m.	Medicaid Reform... What's on the Horizon
2:50 p.m. – 3:40 p.m.	Practice Management Tips When Public Benefits are Part of Your Practice
3:40 p.m. – 3:50 p.m.	Break
3:50 p.m. – 4:40 p.m.	SSI, SSDI, ACA, SNT: Understanding the Impact of Benefits
4:40 p.m. – 5:30 p.m.	VA Benefits—Aid and Attendance
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What the new FINRA suitability rules mean for elderly investors

by Scott Ilgenfritz

The purpose of this article is to provide some practical information about the new suitability rules of the Financial Industry Regulatory Authority (FINRA) and their application to elderly investors. FINRA's new "know your customer" rule, FINRA Rule 2090, and its new "suitability" rule, FINRA Rule 2111, became effective on July 9, 2012.¹ The know your customer rule is patterned after NYSE Rule 405(1), and the suitability rule was based upon NASD Conduct Rule 2310.² In adopting these rules, FINRA intended to "retain the core features of the previous NASD and NYSE rules covering the same subject areas and codify well-settled interpretations of those rules."³ However, these rules also "created new or modified obligations."⁴

FINRA Rule 2090 states:

Every member shall use reasonable diligence, in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer.

This rule has important implications for all investors, including senior investors. It requires that brokerage firms exercise reasonable diligence to know their customer upon the opening of a brokerage account. These obligations are spelled out in more detail in FINRA Rule 2111. The "know your customer" obligation on the part of a brokerage firm extends to "each person acting on behalf of such customer." Thus, a brokerage firm must make reasonable efforts to know the relationship between an elderly investor who has an account with the brokerage firm and a person holding a power of attorney for the elderly investor. The same is true for the salient facts concerning the

attorney-in-fact.

In addition, the "know your customer" obligation extends to the "maintenance of every account." Brokerage firms must retain information concerning the essential facts regarding the maintenance of each account. In other words, a brokerage firm must exercise reasonable diligence to know of a change in circumstances pertaining to a senior investor, including declining health, declining mental capacity and changes in financial needs, such as investment objectives, investment time horizon, liquidity needs and risk tolerance.

According to the supplementary material appended to and incorporated into FINRA Rule 2090, the "facts 'essential' to 'knowing the customers' are those required to a) effectively service the customer's account, b) act in accordance with any special handling instructions for the account, c) understand the authority of each person acting on behalf of the customer, and d) comply with applicable laws, regulations, and rules."⁵ Rule 2090 and Rule 2111 require brokerage firms to obtain and maintain a broad range of information from their customers to open and maintain accounts and to make suitable recommendations.

The core requirements of FINRA Rule 2111, entitled "Suitability," are stated in the rule as follows:

A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member [brokerage firm] or associated person [financial advisor] to ascertain the customer's investment profile.⁶

In other words, for every securities

transaction recommended to an investor and every investment strategy involving a security recommended to an investor, it is the obligation of the brokerage firm and the financial advisor to have a reasonable basis to believe such transaction or investment strategy is suitable or appropriate for the investor based upon the information gathered from the investor.

Under the predecessor rule, NASD Conduct Rule 2310, the categories of information required to be gathered were the investor's financial status, tax status and investment objectives and other information used or considered to be reasonable in making recommendations to the investor.⁷ FINRA Rule 2111 expands the categories of information that are included in a "customer's investment profile" to include, in addition to the previous categories of information, the following: a customer's age, other investments, investment experience, investment time horizon, liquidity needs and risk tolerance.⁸ Although FINRA Rule 2111 expressly adds types of information to be gathered from the customer, it can be argued that the additions "codify well-settled interpretations"⁹ of the predecessor rule, NASD Conduct Rule 2310.

The applicability of the new suitability rule to an "investment strategy involving a security or securities" is an addition to the rule. Significantly, the supplementary material appended to and incorporated into the rule states: "The phrase 'investment strategy involving a security or securities' used in this Rule is to be interpreted broadly and would include, among other things, an explicit recommendation to hold a security or securities."¹⁰ This supplementary material adds significant protections for investors for two reasons. First, it

provides for the broad interpretation of the term “investment strategy.” Second, an investment strategy under the rule includes an explicit “hold” recommendation.

In guidance provided concerning the interpretation of FINRA Rule 2111, FINRA has made clear that an “investment strategy” includes a recommendation to purchase securities on margin or to use home equity to purchase securities.¹¹ Thus, for example, if a financial advisor for an elderly widow recommended that she open a margin account to purchase securities, the recommended use of margin would be subject to the suitability rule. Likewise, if a financial advisor recommended to an elderly couple to obtain a reverse mortgage and to use the proceeds from the reverse mortgage to purchase securities, the recommendation of the reverse mortgage would be subject to the suitability rule.

In the well-documented meltdown of the technology sector of the stock market between March 2000 and December 2002, thousands of investors (including the elderly) who were heavily concentrated in technology stocks, received recommendations from their financial advisors to “hold” those securities. Those hold recommendations frequently resulted in substantial losses for investors. However, under the old suitability rule, which applied to the “purchase, sale or exchange of any security,” the hold recommendations were not subject to the old rule. Under FINRA’s new suitability rule, if such “hold” recommendations are explicit and unsuitable for an elderly investor, those recommendations violate the new rule.

The supplementary material contains a strong declarative statement that represents a codification of well-settled interpretations. With respect to disclaimers, the supplementary

material states: “A member or associated person cannot disclaim any responsibilities under the suitability rule.”¹²

In the current, extended low interest rate environment, elderly investors who are living on a fixed income are, naturally, interested in increasing the rate of return on their investments. Financial advisors often take advantage of that desire or need for a greater rate of return by recommending alternative investments to elderly investors, including non-traded REITs, private placements, limited partnerships and promissory notes. These alternative investments are generally sold to investors with the delivery of a private placement memorandum or a prospectus, which contains risk disclosures and disclaimers in favor of the issuer of the investment. Brokerage firms and their registered representatives defending claims by investors concerning these alternative investments seek to rely upon the risk disclosures and disclaimers in the prospectus or private placement memorandum to defeat an investor’s claim that the alternative investment was too risky and, therefore, unsuitable for the investor.

The express prohibition of brokerage firms or their registered representatives disclaiming their responsibilities under the suitability rule precludes this defense. The prohibition in the new rule is consistent with prior SEC and NASD pronouncements.¹³

FINRA’s new suitability rules reinforce, codify and supplement interpretations of preexisting rules and add protections for all investors. Violations of the new suitability rules, like violations of other FINRA rules, are evidence of negligence on the part of a brokerage firm and its associated persons, creating liability on their part for losses suffered by investors.



Scott Ilgenfritz is a partner with Johnson, Pope, Bokor, Ruppel & Burns LLP in Tampa. For more than 20 years, a principal focus of his practice has been

the representation of investors and other victims of negligence, fraud or other wrongdoing by brokerage firms, stockbrokers and other financial professionals. He is the president of the Public Investors Arbitration Bar Association, a national association of lawyers who represent investors and advocate for investors’ rights.

Endnotes:

1 See Securities Exchange Act Release No. 64260 (April 8, 2011), 76 F.R. 20759 (April 13, 2011); File No. SRFINRA-2011-016.

2 See FINRA Regulatory Notice 11-02, p. 2. The complete text of the rules discussed in this article is available on the FINRA website at www.finra.org, on the site map for the FINRA website, under the heading “Regulation,” subheading “FINRA Rules.” The regulatory notices cited in this article are available on the FINRA website, on the site map for the website, under the heading “Regulation,” subheading “Notices.”

3 See FINRA Regulatory Notice 11-25, p. 2.

4 Id.

5 See FINRA Rule 2090.01, “Essential Facts.”

6 See FINRA Rule 2111(1).

7 See NASD Conduct Rule 2310(1).

8 See FINRA Rule 2111(1).

9 See FINRA Regulatory Notice 11-25, p. 2.

10 See FINRA Rule 2111.03, “Recommended Strategies.”

11 See FINRA Regulatory Notice 11-25, p. 6.

12 See FINRA Rule 2111.02.

13 See *In the Matter of Ross Securities, Inc.*, 41 SEC 509, 510 (1963); *In re Larry Ira Klein*, 52 SEC 1030, 1036 (1996); *In re Miguel Angel Cruz*, Complaint No. C8930048, 1997 NASD Discip. LEXUS 62 (Oct. 31, 1997); NASD Notice to Members 05-59; and NASD Notice to Members 03-71.

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Summary of selected case law

by Diane Zuckerman

Attorney's fees

Linda Bishop, Appellant, v. The Estate of Edward D. Rossi, Case No. 5D12-565 (5th DCA 2013)

This case addresses the findings of facts necessary for a judge to make in any order regarding an award of attorney's fees. In this case, the trial court awarded attorney's fees to the personal representative of the estate. Apparently the personal representative was also a lawyer. The Fifth District noted that Florida Probate Rule 5.080 gives the court broad discretion when assessing attorney's fees and costs. The trial court had held an evidentiary hearing on the petition for fees and costs, which included both argument of counsel and testimony of the parties.

In its opinion, the Fifth District made note that the appellant had not filed a transcript of the hearing, and thus there was no evidence available to the district court to review. Although the trial court's order awarding fees granted the amount of the invoice submitted by the lawyer, it did not contain any findings of fact with regard to the reasonableness of the fees. Citing *Quality Holdings of Fla. Inc. v. Selective Invs IV LLC*, 25 So. 2d. 34 (4th DCA 2009), for the proposition that an award of attorney's fees must contain express findings regarding the number of hours reasonably expended and a reasonable hourly rate for the type of litigation involved, the Fifth District concluded that the trial court's order awarding fees was insufficient because it did not determine the reasonable number of hours expended and the reasonableness of the hourly rate. The district court reluctantly remanded the issue back to the trial court for factual findings of the reasonableness of the attorney's fees.

The take-home message for petitioners is to make sure the trial

court's order makes factual findings for the award of fees to prevent or lessen the likelihood of appeal. It would be wise to bring this case to the court's attention at the fee hearing and to ask that the order make a determination of the reasonableness of the hourly rate and number of hours expended on the case so that it meets the requirements of the law.

The Fifth District also cited *Simhoni v. Chambliss*, 843 So. 2d. 1036 (Fla. 4th DCA 2003), which provides:

It is well settled that an award of attorney's fees must be supported by substantial competent evidence and contain express findings regarding the number of hours reasonably expended and a reasonable hourly rate for the type of litigation involved.

Jurisdiction pending appeal

Jeannie Garrison, Appellant, v. Connie Greenman Vance, In Re Guardianship of Dorphia Sue Garrison, Alleged Incapacitated Person, Case Nos. 1D12-2999 and 1D12-3000, (1st DCA, 2013)

This case involves rulings of the trial court with respect to appointment of a guardian and determination of incapacity when an appeal was pending in the same case. A petition to appoint a guardian and a petition to determine incapacity were initiated by two of the daughters of the alleged incapacitated person, Dorphia Sue Garrison. In response, a third daughter, Jeannie Garrison, moved to dismiss the petitions on the grounds of lack of personal jurisdiction and forum non conveniens. The trial court denied the motion to dismiss in February 2012, and Jeannie Garrison timely sought appellate review on the two issues. The First District affirmed the trial court's order, denying the motion to dismiss in September 2012.

However, while the appellate review referenced above on the issues of personal jurisdiction and the forum were pending, the trial court issued an order determining incapacity and an order appointing Connie Greenman Vance as guardian for Dorphia Sue Garrison. These trial court orders were rendered in May 2012.

The appellant appealed these two orders, arguing that the appellate action had divested the trial court of jurisdiction, thereby rendering the orders appointing a guardian and determining incapacity invalid.

The First District rejected the appellant's argument, on the grounds that Florida Rule of Appellate Procedure 9.130(f), provides:

In an absence of a stay entered by the appellate court, the lower tribunal may proceed with all matters in the case while an interlocutory appeal is pending, except that the lower tribunal "may not render a final order disposing of the cause pending such review."

In other words, the rule did not divest the trial court of jurisdiction for any issues that were not on appeal.

Noting the general rule that the divestment of jurisdiction applies only to matters under appellate review, the First District found the issues of incapacity and appointment of a guardian were not under appeal and therefore, absent a stay order, the trial court had jurisdiction to rule on these matters.

As a practice tip, if the petitioner wants any action of the trial court stayed during appeal, it is wise to file a motion to stay in the trial court, pending a resolution of the issue on appeal.

Durable power of attorney, award of sanctions

Maximillana Albelo, Appellant, v. Southern Oak Insurance Company,

Appellee, Case No. 3D11-3012 (3rd DCA 2013)

This is an appeal from the trial court's dismissal of Maximillana Albelo's premises liability suit with prejudice for her failure to file a petition to determine her own incapacity. She appealed and at the same time served a 57.105(1) motion asserting a frivolous claim. The Third District reversed the trial court, finding that Southern Oak Insurance Company and its counsel's persistence in arguing that Albelo was required to seek a guardian for herself was frivolous.

In addition to reversing the trial court's order, the Third District granted Albelo's motion for appellate attorney's fees under Section 57.105, F.S. Further, it found that both the insurer and its counsel should bear equally the assessed attorney's fees for the appeal. Section 57.105 reads in pertinent part:

Attorney's fee; sanctions for raising unsupported claims or defenses; exceptions; service of motions; damages for delay of litigation.—

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

The history of the case reflects that Albelo brought a premises liability claim against her homeowner insurance company, Southern Oak Insurance Company, for losses caused by a burglary of the home. The facts of the burglary and the

loss were not disputed. Also, it was undisputed that the insured suffered cognitive disability, although there was no legal determination of incapacity.

The insurance company initially paid \$1,690.00 for the loss on the claim. A few months later, the insured filed a sworn proof of loss in the amount of \$57,760.66.

In denying the claim, Southern Oak Insurance Company took the position that the claim was fraudulent and was instigated by the insured's son, and filed a motion to dismiss on those grounds. Further, the insurance company was concerned about whether any settlement would be binding on Albelo, given her cognitive status, and took the absurd position that she had a duty to file a petition to determine her own incapacity. The trial court granted the motion to dismiss, and the appeal followed.

The record reflected that one month prior to the burglary, Albelo had executed a durable power of attorney in favor of her son. The Third District cited to Section 709.2119, F.S., regulating powers of attorney, specifically the provision:

(1)(a) A third person who in good faith accepts a power of attorney that appears to be executed in the manner required by law at the time of its execution may rely upon the power of attorney and the actions

of the agent which are reasonably within the scope of the agents authority and may enforce any obligation created by the actions of the agent as if

1. The power of attorney were genuine, valid, and still in effect;
2. The agent's authority were genuine, valid and still in effect, and
3. The authority of the officer executing for or on behalf of a financial institution that has trust powers and acting as agent is genuine, valid and still in effect.

Of significance, the Third District noted that Southern Oak Insurance Company did not dispute the validity of the durable power of attorney.

This case is an example of the use of Section 57.105 to minimize or discourage frivolous claims. The district court apparently believed the validity of the durable power of attorney was obvious and the insurance company would not have suffered any harm in relying on it, given the protection to third persons. The ruling infers that the DPOA precluded a need for a legal determination of incapacity and that failure of the insurance company and its lawyer to know this resulted in an unnecessary and frivolous court action. Obviously the trial court erred as well in granting the dismissal with prejudice.

continued, next page

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Factual findings required for temporary injunction

Jeanne Saunders and George Saunders, Appellants, v. M. Ashley Butler Ph.D., as Guardian of Claudine B. O'Connor; Richard S. Scolaro, Michael Mullarney, Scolaro, Shulman, Cohen, Fetter & Burstein, P.C.; Lutheran Services Florida Inc., as Emergency Temporary Guardian of Thomas F. O'Connor; and Ernie C. Lisch, as Guardian of the Property of Thomas F. O'Connor, Appellees, Case No. 2D11-4786 (2nd DCA 2013)

Here the appellants challenge a trial court's order on two fronts, the issuance of a declaratory injunction and the court's appointment of M. Ashley Butler as guardian for Claudine B. O'Connor.

The facts of the case reflect that Thomas and Claudine O'Connor married in 1998. It was a second marriage for both, and a prenuptial agreement reflected an intent to keep their assets separate from each other. Mrs. O'Connor had executed a prior revocable living trust, and Mr. O'Connor executed a revocable living trust in 1998.

After 12 years of marriage, the Department of Children and Families

filed a petition to determine incapacity of Mrs. O'Connor. The trial court found her to be incapacitated and at a final hearing appointed Butler as plenary guardian.

Additionally, DCF had also filed a petition to determine incapacity as to Mr. O'Connor. The court appointed Ernie Lisch as Mr. O'Connor's plenary guardian. DCF alleged it was suspected that Mr. O'Connor's daughter, Jeannie Saunders, and her husband, George Saunders, had misappropriated his funds.

When Butler began marshalling the ward's assets, she became concerned and noted she was unable to account for about \$6 million in funds that were originally owned by Mrs. O'Connor. She suspected the assets had been transferred by and to Mr. O'Connor's family members and Mr. O'Connor's trust. Butler filed a declaratory action, in which she asked the court to determine who was the true owner of the assets in Mr. O'Connor's trust. In the declaratory action, Butler sought an injunction asked for an ex-parte order enjoining the Saunders, their attorneys, the Scolaro law firm and Lisch from "withdrawing, disbursing, investing or otherwise transferring any assets of Thomas O'Connor," pending the determination of ownership.

The Saunders appealed and ar-

gued, among other things, that the trial court's order failed to make factual findings regarding the four elements required to obtain a temporary injunction. The district court agreed with this argument, citing *Randolph v. Antioch Farms Feed and Grain Corp.*, 903 So. 2d. 384 (2nd DCA, 2005), which sets forth the obligation of the trial court to make factual findings that 1) the plaintiff will suffer irreparable harm absent the entry of the temporary injunction; 2) that no adequate legal remedy exists; 3) that the plaintiff has a legal right to the relief sought; and 4) that the injunction serves the public interest. The district court held that since the trial court's order omitted these findings, it was necessary to remand back to the trial court either to make these findings or to dissolve the injunction.

The court made special note that its decision to remand should not be construed as determining the validity of any allegation. This case is another example of how appellate action can be avoided or minimized by making sure the trial court's order conforms with the law. This can be done by the lawyer drafting the proposed order for the court, requesting the court to make specific findings in the order or moving for an amended order.

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A summary of the requirements follows:

- Articles submitted for possible publication should be MS Word documents formatted for 8½ x 11 inch paper, double-spaced with one-inch margins. Only completed articles will be considered (no outlines or abstracts).
- Citations should be consistent with the Uniform System of Citation. Endnotes must be concise and placed at the end of the article. Excessive endnotes are discouraged.
- Lead articles may not be longer than 12 pages, including endnotes.

Review is usually completed in six weeks.

Fair Hearings Reported

by Diana Coen Zolner

Petitioner v. Respondent, Appeal No. 12F-07798 (December 31, 2012).

A qualified income trust (QIT) was established and approved by the Department of Children and Families for the purpose of qualifying the petitioner for the Institutional Care Program (ICP) Medicaid. The petitioner's income was deposited into a joint account owned with his spouse for the month of April 2012. On April 6, 2012, his spouse moved funds from the joint account to her separate account. She then funded the QIT on May 10, 2012, by moving money from her separate savings account into the QIT. The petitioner's spouse believed that by moving funds into the QIT account in May 2012, she was properly funding the trust and her husband would be eligible for ICP Medicaid for that month. The petitioner's income began being direct deposited into the QIT in June 2012. The department denied eligibility for May 2012.

The department's Policy Manual (165-22), Section 1840.0110 states "The individual (or their legally authorized representative) must deposit sufficient income into the trust account in the month in which the income is received to reduce their countable income ... to within the program income standard. The individual must make the deposit each month that eligibility is requested."

The disputed issue was whether or not the trust was properly funded for the month of May 2012 with the petitioner's May 2012 income. The department argued that the petitioner's April income was used to fund the trust in May and this was not proper because the income trust must be funded each month with that month's income.

The hearing officer concluded that the petitioner's spouse made a good faith effort to fund the trust timely so that her husband's Medicaid eligibil-

ity could begin in the month of May 2012. Therefore, in accordance with *Forman v. Department of Children and Families*, 956 So.2d 477, (Fla.4d DCA 2007), a de facto income trust was created that fulfilled the requirements for ICP eligibility and the department should have considered the trust properly funded in May 2012. Therefore, the department erred in its denial of ICP Medicaid for May 2012.

Petitioner v. Respondent, Appeal No. 10F-00519 (April 12, 2010).

The petitioner applied for and was approved for ICP Medicaid for the months of May and June 2009. During the application process, the petitioner's representative reported that the petitioner received annual distributions from an individual retirement account (IRA) and the last payment was received on November 2008.

The petitioner reapplied in October 2009, requesting ICP benefits beginning again in November 2009. In processing the case, the respondent discovered a letter reporting that the petitioner receives an annual distribution from her IRA every November. Based on this information, the respondent denied the petitioner's application for November 2009. The basis for the denial was that the petitioner would potentially be over the income cap as a result of the anticipated annual IRA income distribution for November 2009.

In response to the denial, the petitioner's representative provided documentation that on Nov. 16, 2009, the annual IRA distribution was discontinued and the petitioner took full distribution (less federal tax withholding), bringing the IRA account value to \$0.00. The distribution check was initially deposited into the petitioner's bank account and subsequently transferred into the community spouse's account before

the end of the month of November.

The petitioner argued that once the request to close the IRA account was made, regular payments would be discontinued and the proceeds of the IRA then became a countable asset. That countable asset was transferred to the community spouse under an allowable transfer in the month of November 2009, and therefore, the petitioner was eligible for benefits in November 2009. The respondent argued that since distribution was already being received, the gross distribution of the proceeds of the IRA should be counted as income for Medicaid eligibility and November 2009 should remain a denied month.

The hearing officer determined that both the Code of Federal Regulations at 20 C.F.R. § 416.1121 and the ACCESS Policy Manual at 1640.0505.04 essentially define retirement funds as unearned income when employment ends. The Policy Manual goes on to state that if an individual is receiving regular payments from a retirement fund, those payments are unearned income and the fund is not considered a countable asset.

Based upon the above authorities, the hearing officer considered payment of the balance of the IRA account in November 2009 as countable unearned income. Therefore, as a result of the distribution, the petitioner's income was over the limits for ICP Medicaid and the respondent's action to deny ICP benefits for November 2009 was within the rules of the program.

Petitioner v. Respondent, Appeal No. 09F-03514 (August 21, 2009).

The petitioner was discharged from the hospital into a skilled nursing facility on Feb. 8, 2008. Applications requesting ICP Medicaid on the petitioner's behalf were submitted to the Department of Children and Families

continued, next page

by a designated representative of the facility in March 2008, May 2008 and July 2008. All of these applications were denied for failure to provide the department with the proof of assets needed to determine eligibility.

The petitioner had a joint SunTrust bank account with an individual referred to as T.L. T.L. did not use any of the funds or access any of the funds on the petitioner's behalf. The balance in the account ranged from \$2,578.26 in May 2008 to \$3,040.15 in August 2008 through February 2009.

On Oct. 31, 2008, a petition for appointment of plenary guardian (incapacitated—person and property) and a petition to determine incapacity were filed in the county probate court on behalf of the petitioner. A plenary guardian was appointed for the petitioner on Feb. 6, 2009. On Mar. 19, 2009, the guardian submitted an application requesting ICP Medicaid on the petitioner's behalf and requested retroactive benefits beginning in May 2008 (the date of the initial ICP Medicaid application).

In March 2009, the SunTrust account was closed and the balance of \$3,356.17 was transferred to a guardianship account. On Apr. 9, 2009, a check was written from the guardianship account to the facility for the petitioner's care, bringing the balance of the account below the ICP Medicaid asset limit of \$2,000.00. ICP Medicaid eligibility was granted effective April 2009.

The petitioner's representative argued that the petitioner had been diagnosed with senile dementia, was both mentally and physically incapacitated and could not have accessed her bank account until a guardian was appointed. Therefore, because accessing her assets to bring them below the asset limit was out of the petitioner's control, she should have been eligible for retroactive benefits as of March 2008.

Based on Florida Administrative Code, the department's Public Policy

Manual and Florida guardianship law, the hearing office determined the following: 1) getting to the bank to withdraw the funds was a physical barrier and not a legal restriction on access to the funds; 2) the fact that a guardian must be appointed to dispose of an applicant's assets does not make such assets unavailable; and 3) the only situation where assets are to be excluded, when there is no legal guardian or other individual who can access such asset, is when an applicant is comatose. Therefore, the department's action to deny ICP benefits from May 2008 through March 2009 was proper.

Petitioner v. Respondent, Appeal No. 09F-03311 (August 12, 2009).

At issue is the action taken by the department to deny ICP Medicaid benefits to the petitioner when the petitioner's family was never notified that the petitioner's income was over the ICP program limit and a qualified income trust (QIT) would have to be established for the petitioner to become Medicaid eligible.

The family asserted they had received no communication of any kind from the department notifying them that a QIT was required. The department admitted the family was never notified of the necessity of a QIT. The family reported that after months of unreturned phone calls to the

department, they decided to consult an elder law attorney regarding ICP Medicaid eligibility. It was the attorney who informed the family that the petitioner's income was over the limit and a QIT was necessary.

A QIT was established and funded on the petitioner's behalf in January 2009. Subsequently, the department determined the petitioner was eligible for ICP Medicaid in January 2009, but was not eligible for September 2008 through December 2008 because the QIT was not funded.

The application for ICP Medicaid was submitted in August 2008. According to the department's Policy Manual in effect August 2008 through March 2009, the department had an affirmative duty to advise the petitioner of the ICP program income limit and that the petitioner would not qualify for benefits until a QIT was established and properly funded. The hearing officer determined that since the petitioner was not informed by the department of this requirement to set up and fund an income trust, the denial of ICP benefits for September 2008 through December 2008 must be reversed.

Important: The hearing officer noted that the department's Policy Manual was updated in April 2009 to remove the language requiring the department to notify ICP applicants of the requirement to establish a QIT.

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