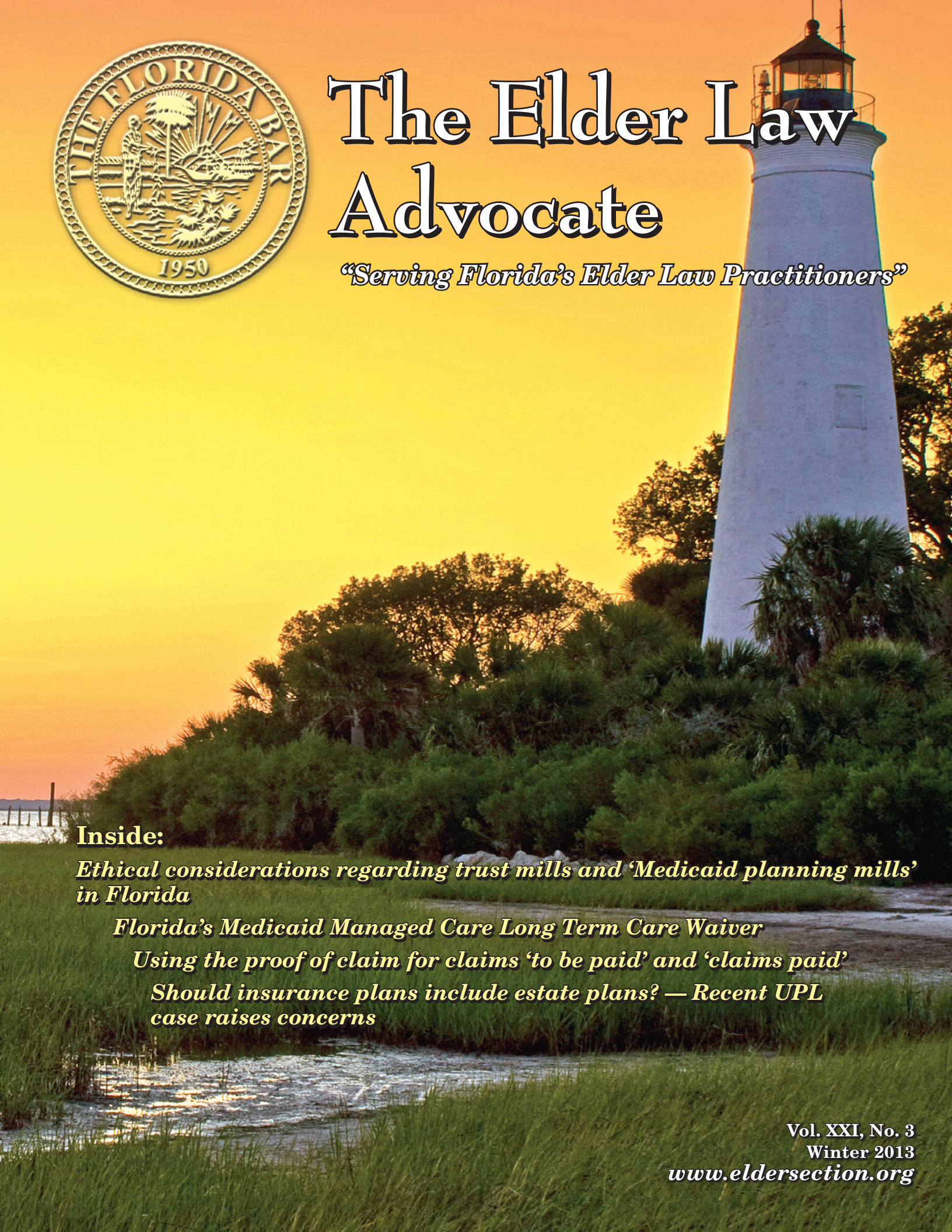

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

Vol. XXI, No. 3
Winter 2013
www.eldersection.org

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

COVER ART

"St. Marks Lighthouse"

by Randy Traynor, Florida Bar Staff
(www.randytraynorphotography.com)

12/2013

Contents:

The deadline for the SPRING ISSUE is March 1, 2014. 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.

Medicaid mills and pension poachers

One of the major areas of practice for many elder law attorneys is public benefits planning. Two important programs for seniors needing long-term care assistance are the Medicaid Institutional Care Program and the Veterans Administration's Aid and Attendance Improved Pension benefit.

With both of these programs, proper counseling and advice on how to qualify and apply for these benefits can provide seniors and their families with the information necessary to decide if the burdens of qualifying for these programs are worth the benefits. Because the senior clients we represent oftentimes suffer from physical and mental infirmities that diminish their abilities to make fully informed decisions, elder law attorneys regularly counsel the client's spouse or children about how these programs may benefit the client.

Both Medicaid and Aid and Attendance require the applicant to meet certain asset and income requirements to become eligible for these programs. If a client's assets and income are within program limits, an application is filed and the approval process begins.

When a client has income or assets above program limits, an elder law attorney must use his or her specialized legal training, skill and expertise to assess resources, determine dates of eligibility, prepare qualified income trusts and advise the client how the complex state and federal regulations apply to the client's particular situation. It is this specialized knowledge, skill and professional judgment that set us apart from non-attorney planners.

Lately, the Elder Law Section has become aware of the proliferation of non-attorney Medicaid planners—"Medicaid mills"—that go beyond the organization of a senior's assets and the preparation and filing of a Medicaid application, which have traditionally not been considered the practice of law. These Medicaid mills are creating complex legal transactions that can have significant tax consequences, and often incorporate the sale of commission-driven products that have nothing to do with eligibility and no disclosure to the client of the commissions and the downsides involved.

A Florida elder law attorney is bound by The Florida Bar Rules of Professional Conduct. Florida lawyers are bound by the duty to represent the client and to detail the scope of representation, even when the client is incapacitated or suffers from diminished capacity. The lawyer has a duty to protect confidential information and to avoid conflicts of interest. Also, a Florida attorney must exercise independent professional judgment and render candid advice. In order for an attorney to be considered a "specialist," he or she must be board certified by The Florida Bar.

Message from the chair

John S. Clardy III

When seniors with complex mental and physical issues face medical and long-term care expenses that can quickly reach the tens of thousands of dollars, the desire "to do something" often overrides the usual decision-making process of weighing the costs and benefits of a particular action. When a non-attorney planner who advertises as a "Medicaid specialist" and offers a money-back guarantee comes into the picture, it is easy to see how seniors and their families can be confused.

The Elder Law Section's Unauthorized Practice of Law Committee has been active in making The Florida Bar aware of this problem. The Florida Bar Standing Committee on the Unauthorized Practice of Law is considering an advisory opinion on Medicaid planning by non-attorneys similar to one issued by the Supreme Court of Ohio. The section is hopeful that this opinion will give us clearer guidance on this issue.

Another issue is the involvement of Florida attorneys with these non-attorney planners. Some Medicaid mills "work with" or "collaborate with" a Florida attorney for the preparation of powers of attorney, qualified income trusts and personal service contracts. As with the "trust mill" cases in Florida in the 1980s and 1990s, serious ethical issues abound, such as how is the attorney-client relationship established, confidentiality, who is determining the appropriate planning strategy, how is the attorney compensated and who is advising the client. Attorneys failing to follow the Rules of Professional Conduct in these instances can suffer severe consequences.

In addition to Medicaid mills on the state level, the U.S. Department of Veterans Affairs has been dealing with "pension poachers" nationwide. This practice includes selling insurance policies, annuities and other commission-driven products by insurance agents under the guise of assisting veterans free of charge for qualifying for Aid and Attendance benefits.

According to the *Pensacola News Journal*, two major insurance companies, American Equity Life Insurance Company and Aviva Life and Annuity Company, have recently taken a stand against pension poaching by refusing to accept new business that is associated with VA benefits planning. At the section's VA Seminar this past September, it was made clear that

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from preceding page

pension poaching is still an issue and that changes to the VA regulations will be forthcoming.

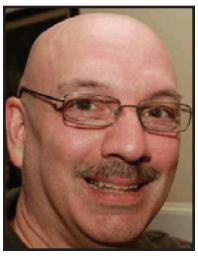
As elder law attorneys, we are in a unique position to protect one of the most vulnerable populations of Floridians. The safeguards and protections that the Rules of Professional Conduct provide our clients when we represent them are unique among the professionals with whom they deal. It is up to us to be responsible in our planning and to represent our clients ethically and professionally.

The Elder Law Section will continue to support the good works of our members and to promote the protection of seniors. There is much work to be done—and many ways you can help. Get involved in a section committee, attend section events and let us know when you come across these issues in your community.

For Your Practice

To Facebook or not to Facebook?

by Al Rothstein


AL ROTHSTEIN

Social media is still new to many law firms. Some have no presence while others have put up a Facebook page but haven't posted messages or connected with anyone. While the time it takes to create and maintain an effective social media presence is certainly a concern, it is well worth the investment. Consider your social media as a way to deliver your unedited messages to the audiences of your choice. It's much harder to do that with traditional media!

Posts of value

Think of social media as an ongoing conversation that 1) engages people, and 2) offers information that shows your expertise. It is important that your Facebook messages, called "posts," address issues your readers care about. While that may seem obvious, too many people just talk about their own accomplishments and don't explain how those accomplishments might benefit their audiences. The following is an example of a good post that shares valuable consumer tips:

How to prevent identity theft

1. Shred important papers
2. Don't put outgoing mail in an unsecured mailbox
3. Don't carry too many credit cards
4. Share personal information on phone or internet *only if you initiate contact*
5. Review your credit report annually

For help: Academy of Florida Elder Law Attorneys (*www.afela.org*)

Method

Now about the issue of time. Facebook allows you to schedule your posts, so you can actually plan daily activity on your page ahead of time. You can also show the location of your post, which helps to personalize it. And speaking of personalization, your photos and logos are important! I encourage you to add those, as well as your website address, to the posts and to your page's photo section. That's why they call it ***Face***book!

A technical point: When including the website address in your post, an image, a description and the web address will appear in a box at the bottom of the post. You can then delete the website address included in your description for a cleaner, more uncluttered post.

Personal posts

Many times you will see that your personal experiences get excellent responses from followers and help to humanize your image. For example, posting a promotion about charity events you are involved with, even if the events have nothing to do with elder law, can get good responses from followers and help raise money for a good cause. Everybody wins!

Results

The bottom line, of course, is turning social media into greater knowledge of your firm, what you do as an elder law attorney and ultimately, more people visiting your office for your assistance. As in any public relations opportunity, positioning yourself as the qualified elder law attorney that you are, as well as a friendly face who engages people on the issues our senior citizens and their families face, should be a key component in your marketing plan. When you also consider that there is virtually no cost, other than your time, social media, combined with and used as a reinforcement tool for other PR/marketing efforts, is a worthwhile endeavor for your elder law practice.

Al Rothstein *is president of Al Rothstein Media Services (www.rothsteinmedia.com), the public relations and marketing strategist for the Academy of Florida Elder Law Attorneys and a number of elder law firms.*

Guardianship in Florida: Heading in the right direction

by Phoebe Ball

PHOEBE BALL

Florida's guardianship statute is something to be proud of. Compared to other states, our statute provides strong due process protections, both for individuals faced with guardianship proceedings and for those already under guardianship. Among these due process protections are a presumption of capacity until adjudicated otherwise, the right to an attorney and the right to have the incapacity determination made by an examining committee made up of professionals who have received special training in rendering capacity determinations. Once a person is declared incapacitated, he or she is entitled to the least restrictive alternative to guardianship. If there are no alternatives and guardianship is necessary, the incapacitated person has rights to have an attorney, access to the courts and periodic review of the need for guardianship. In addition, guardians are supposed to consider the preferences of the person under guardianship when making decisions. The Legislature's stated goal is to

> ... promote the public welfare by establishing a system that permits incapacitated persons **to participate as fully as possible in all decisions affecting them**; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through **providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf**." § 744.1012 Florida Statutes (emphasis added)

Even before the statute was revised in 1989, Florida's appellate courts recognized that, "[i]n our present day paternalistic society we must take care that in our zeal for protecting those who cannot protect themselves we do not unnecessarily deprive them of some rather precious individual rights." *In re McDonnell,* 266 So.2d 87, 88 (Fla. 4th DCA 1972)

Self-determination, a not so distant shore

The Florida Legislature and the appellate courts in Florida have taken an enlightened approach to guardianship that predated—and in many ways anticipated—the Americans with Disabilities Act and the seminal *Olmstead* ruling requiring states to provide services to individuals with disabilities in the least restrictive manner that will meet their needs. Unfortunately, as is so often said, if your only tool is a hammer, every problem looks like a nail. Despite the well-meaning nod to less-restrictive alternatives in the statute, guardianship is often the only tool a judge has at his or her disposal to address the needs of a person with disabilities who may need assistance with a variety of tasks in order to safeguard his or her health and welfare. However, other tools—such as supported decision-making—are being increasingly recognized as viable and less-restrictive alternatives to the removal of legal rights under guardianship. Greater reliance on these alternatives in the future is a crucial piece of the human rights puzzle for people with disabilities, and one that is necessary to ensure the full inclusion of people from across the spectrum of disabilities in our communities.

That's why for the last several years, the Big Bend Office of Public Guardian has collaborated with self-advocates, parent advocates, Disability Rights Florida and the Agency for Persons with Disabilities in a project funded by the Florida Developmental Disabilities Council and Guardian Trust called Lighting the Way to Guardianship and Alternatives. As a part of this project, we've had the opportunity to connect with lawyers, judges, people with disabilities and their families and talk to them about how to use supported decision-making and a variety of other tools to help people who may need decision-making assistance. These alternatives help families avoid the expensive, cumbersome and intrusive process of guardianship—and most importantly, preserve the individuals' civil rights while providing the assistance they may need to ensure their welfare and protection against abuse, neglect and exploitation.

These ideas may have seemed radical to some when we began this initiative several years ago, but the nation and the world are starting to come around. Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD)—an international treaty that has been signed by the president of the United states but has not yet been ratified by Congress—requires signatories (currently 76 countries, including virtually every member of the European Union) to reconsider guardianship and provide for alternatives whenever possible. In addition, the *Jenny Hatch* case out of Virginia and several other high-profile cases across the country have given individuals who had been adjudicated incapacitated the right to make significant decisions regarding where, how and with whom they lived. The result of this newly focused attention on guardianship has led to a groundswell of support across the country for re-examining guardian-

ship from a human rights perspective.

The way forward

In keeping with this national trend, the project team that coordinated the Lighting the Way training series is undertaking a similar project to examine how we might help individuals already under guardianship—particularly those with developmental disabilities—to develop tools and strategies to increase their functional capacity, foster circles of support that can assist them with decision-making and implementation and ultimately lead to a restoration of some or all of the rights that were removed under guardianship. Additionally, we will be looking at ways to increase the awareness of alternatives to guardianship for people with disabilities within the legal community and to make policy changes where the law has become an impediment to self-determination for people in need of decision-making assistance.

Florida, with its history of being on the forefront of guardianship reforms, is in a unique position to reduce the reliance on guardianship and to insist that real alternatives be made available to people who need decision-making assistance that increases, rather than supplants, their self-determination. The best way to make this happen is to make sure the appropriate tools find their way to all the people currently involved in the process. We look forward to input from the Elder Law Section and other sections of the Bar that have pushed to make Florida's guardianship statute one of the best in the nation. With the combined efforts of the disability, elder and legal communities, Florida can continue to light the way to better decision-making options for all of us who may, now or in the future, need help managing property or meeting some of our essential health and safety requirements, but who nonetheless possess an inherent and inalienable right to self-determination.

Phoebe Ball *is an attorney who has spent her professional career working on issues related to disability law. She is a published policy researcher in the areas of employment, asset development, work incentives, self-determination and benefits programs for individuals with disabilities. She has been a staff attorney with Disability Rights Florida for six years, providing legal services to individuals with disabilities related to Medicaid, guardianship, self-determination and civil rights. She is also an adjunct professor at Florida State University School of Law, teaching a disability law course.*

For Your Practice

News from The Florida Bar

Your CLE course books

by Arlee J. Colman, Program Administrator

If you have attended a CLE course sponsored by The Florida Bar in the past three years, you're familiar with the relatively new policy of **electronic course books.** If you haven't attended a bar CLE lately, you should continue reading.

A link prior to the course

On July 1, 2010, The Florida Bar moved from providing a printed copy of the seminar course book to providing an online version of the materials. **Two or three days before a seminar, the Bar sends an email that contains a link to the course book** to each attendee. This online version is searchable in pdf format once it is downloaded and saved.

Here is something you need to know the next time you plan to attend a Florida Bar CLE. Once you arrive on site, the only thing the Bar can do is forward you the email with a link to the materials, or loan you a flash drive to download them. As you can see, it is important that you check to make sure you have received the materials link before you leave for the seminar. If you have not received the link, call the Bar's registration department at 850/561-5831, and staff will resend the email.

For those members who still want a printed book, you may purchase a copy from The Florida Bar for $60 plus tax. When you register for a seminar, you will see the option of buying a printed copy of the course book on the registration form. If you order a printed course book, staff will have it on site for you.

Ethical considerations regarding trust mills and 'Medicaid planning mills' in Florida

by John R. Frazier


JOHN FRAZIER

As the practice of elder law has evolved over the years, new issues evolve as well. Estate planning and Medicaid planning legal counsel is geared to help and to protect Florida's senior citizens and their families. But because there is money to be made, problems can arise.

The trend began with the advent of so-called "trust mills," of which Florida has seen its share. Trust mills are run by experienced marketers—usually non-lawyers—using at least arguably deceptive sales tactics to entice, frighten and strongly convince senior citizens that purchasing boilerplate living trusts is in their best interest. Trust mill agents have been found to engage in the unlicensed practice of law (UPL) when they cross the line from simply providing blank legal forms to a client to giving legal advice. When attorneys get involved in assisting trust mills by preparing or reviewing living trusts for non-attorneys, they are inviting potential problems for themselves that they may not know about.

It has become increasingly clear that there may be a trend of "Medicaid planning mills" emerging in Florida. There are a growing number of attorneys who are now working with non-attorney Medicaid planners in our state. Of course, this issue may be having an increasingly negative impact on the overall practice of Medicaid planning, on the unsuspecting attorneys who work with the trust mills and, last but not least, on the senior citizens and their families.

How 'living trust mills' operate

People operating trust mills sometimes have been known to hold themselves out to be lawyers or to present themselves as an "estate planning" or "legal services" firm closely associated with lawyers. Other mills simply position themselves by convincing the senior that they are sharing vital information that "lawyers don't want you to know." In short, they claim "we are saving you from the expensive lawyers."

The trust documents—prepared by non-lawyers—are promoted as wealth transfer vehicles that will protect the senior's money, avoid taxes and avoid lengthy and costly probate. Mass sales of the "one-size-fits-all" trusts generate fees, but the end game is to encourage the elderly "client" into purchasing insurance or annuity products. Once a customer purchases the living trust, the trust mill has the person's personal and financial information and will often attempt to upsell its financial product to the client—which may or may not be in the client's best interest, yet is clearly in the financial best interest of the person doing the selling.

How The Florida Bar has addressed the trust mills issue

The Florida Bar has been ever vigilant in investigating and prosecuting allegations of UPL brought against trust mills operating in Florida. As a starting point, The Florida Bar Standing Committee on the Unlicensed Practice of Law petitioned the Florida Supreme Court for an advisory opinion on non-lawyer preparation of living trusts.

In a 1992 opinion, the Supreme Court of Florida held:

> [T]he assembly drafting, execution, and funding of a living trust document constitute[s] the practice of law. We also agree that a lawyer must make the determination as to the client's need for a living trust and identify the type of living trust most appropriate for the client. ... Giving legal advice ... concerning the application, preparation, advisability or quality of any legal instrument or document or forms thereof in connection with the disposition of property inter vivos or upon death constitutes the practice of law and may not be carried on by nonlawyers.[1]

The Florida Bar and the Attorney General of the State of Florida have taken strong steps to investigate, prosecute and halt living trust mills. Many trust mills have been aggressively petitioned by The Florida Bar against the unlicensed practice of law. Decisions by the Florida Supreme Court have repeatedly held that the activities of these trust mills constitute UPL to the extent that they:

- prepare legal documents to a greater extent than typing or writing information provided by the customer on a form;
- engage in oral communications to gather information to prepare the living trusts;
- perform legal research for the purpose of preparing the documents;
- use business names and advertisements suggesting to the public that they are authorized to provide legal services; and
- prepare legal documents that are not forms approved by the Florida Supreme Court.

Attorneys assisting trust mills in Florida

Many trust mills use no attorneys at all. In other instances, attorneys have entered into business arrangements with trust mills. Often the attorneys' capacity is to "review" or prepare living trust documents for a fee. Yet these attorneys may never engage in the important attorney-client process necessary to establish

Ethical considerations
from preceding page

an effective trust. They may never discuss with the senior his or her estate planning needs or review the senior's assets. By so doing, these attorneys may be supporting UPL activities that present a risk of harm to the public.

A case in point: In 1996, The Florida Bar and the Attorney General filed coordinated but separate actions against two companies, Senior Estate Services Inc. and Remington Estate Services of Florida Inc. Both companies operated out of Texas, selling living trusts and related documents through elaborate marketing schemes to elderly residents of Florida.

In this case, two Florida lawyers participated in the process to sell living trusts, and the documents were sent to these lawyers for review prior to delivery to customers. The customers did not meet with the lawyers nor did they pay them a fee. The lawyers executed a form letter to the customers saying that the documents conform to current law and "meet your needs as they have been communicated to my office." The lawyers also instructed the elderly purchasers to contact them in the event that "Congress or the state legislature enact revisions to the current estate or trust tax provisions."[2]

By orders dated Oct. 15, 1998, and Dec. 16, 1999, the Supreme Court of Florida granted the petition of The Florida Bar and prohibited the companies' officials from engaging in the unlicensed practice of law. On July 6, 2000, the Florida circuit court hearing the Attorney General's action against these companies entered a permanent injunction and final judgment in the amount of $3,450,360 against Remington Estate Services, which covered restitution to consumers, civil penalties and attorneys' fees and costs.[3]

The rise of 'Medicaid mills' in Florida

The Elder Law Section is concerned about a growing possible trend of "Medicaid mills"—similar to the more well-known concept of a trust mill.

Since the adoption of the Deficit Reduction Act in 2007, there has been a significant proliferation of non-attorney "Medicaid planning" companies in Florida. Some of these non-attorneys have held themselves out as "Medicaid planning experts" and "Medicaid planning specialists," despite the fact they are not attorneys (and some hold no professional license at all).

Many of these individuals know that the unlicensed practice of law is a crime (UPL is a third degree felony in Florida). Many of these non-attorney Medicaid planning companies now "work with," "affiliate with" or "collaborate with" Florida attorneys in order to prepare the legal documents needed to process their Medicaid cases. Frequently the required legal documents needed to complete a Medicaid case include durable powers of attorney, qualified income trusts, personal service contracts, as well as other legal and estate planning documents. A growing concern has arisen regarding the preparation of legal documents by attorneys for the clients of the non-attorney Medicaid planning company. The concerns are as follows:

- Are the attorneys meeting with, communicating with and establishing an independent attorney-client relationship with the clients of the Medicaid planning company?
- Are the non-attorney Medicaid planning companies recommending legal documents or legal strategies to their clients?
- Who is paying the attorney who is providing legal documents for the clients of the Medicaid planning company?
- If the attorneys are not interacting with the clients of the Medicaid planning company, are the non-attorney Medicaid companies directing the attorney as to which legal documents are to be prepared for the clients of the non-attorney Medicaid planning company?

- Are the non-attorney Medicaid planning companies directing attorneys as to the dollar amount to be stated in personal service contracts?
- Are the non-attorney Medicaid planners substituting their judgment for the judgment of the attorneys with respect to the drafting of the legal documents?
- Are the non-attorney Medicaid planners advertising the legal services of attorneys they work with in writing and verbally to nursing home referral sources?
- Are nursing home employees now referring legal work to non-attorneys because the non-attorney Medicaid planners are advertising that they "work with an attorney"?

Crossing the ethical line

Medicaid planning and the practice of elder law involve some of the most vulnerable groups of people in the United States: the elderly and people with mental and/or physical disabilities. Non-attorneys engaged in trust mills and Medicaid mills should be a concern to all attorneys for clear reasons: 1) they disparage the practice of law; 2) they put the public at risk of dire financial consequences; and 3) they potentially compromise the legal careers of attorneys with whom they collaborate.

When attorneys engage in questionable business activities with non-attorney Medicaid planners, they not only run the risk of engaging in the unlicensed practice of law, they risk crossing the line of the rules of professional ethics.

Taking the helm going forward

As chair of the Elder Law Section Unlicensed Practice of Law Committee, I hope to encourage elder law attorneys to rally with new awareness to the ethical issues that arise when attorneys affiliate or collaborate with non-attorneys, particularly in the realm of Medicaid planning in Florida. It is our duty to support The Florida Bar's investigation of both attorney and non-attorney engagement in UPL. Just as important, we must galvanize our efforts to address attorney liability, clarify the ethical parameters involved and promote a staunch campaign of continuing legal education regarding these issues. The Florida Bar Standing Committee for UPL is in the process of drafting a proposed Medicaid planning UPL advisory opinion. We expect the proposed advisory opinion to clarify and address many issues and concerns related to non-attorney Medicaid planning companies as well as to the attorneys who affiliate with those Medicaid planning companies.

***John R. Frazier, J.D., LL.M.**, is licensed to practice law in Florida and Georgia, and he practices primarily in the fields of elder law, Medicaid planning, veterans benefits law, estate planning, asset protection, taxation, probate and business organizations. He is admitted to practice before the United States Court of Appeals for Veterans Claims, and he is a member of the National Organization of Veterans' Advocates. He is chair of the Elder Law Section UPL Committee and is co-author of the book The Medicaid Handbook: A User's Guide to Florida Medicaid with Joseph F. Pippen, Jr.*

Endnotes:

1 The Florida Bar Re Advisory Opinion – Nonlawyer Preparation of Living Trusts, 613 So.2d 426, 427-428 (Fla. 1993).

2 http://www.aging.senate.gov/minority/public/index.cfm/files/serve?File_id=41a9c78f-0a99-3904-ead8-412dea6574a5

3 http://www.aging.senate.gov/minority/public/index.cfm/files/serve?File_id=41a9c78f-0a99-3904-ead8-412dea6574a5

Call for papers – *Florida Bar Journal*

John S. Clardy III is the contact person for publications for the Executive Council of the Elder Law Section. Please email John at *clardy@tampabay.rr.com* for information on submitting elder law articles to The Florida Bar Journal for 2013-2014.

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.

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Florida's Medicaid Managed Care Long Term Care Waiver

by Twyla Sketchley


TWYLA SKETCHLEY

Beginning Aug. 1, 2013, Florida began implementing its Medicaid Managed Care Long Term Care Waiver (the waiver). Between Aug. 1, 2013, and Mar. 1, 2014, Florida will transition approximately 90,000[1] current Medicaid recipients from a fee-for-service system into managed care. The waiver is being rolled out by region, beginning with Region 7 and ending with Regions 1, 3 and 4 on Mar. 1, 2014. All future recipients of Medicaid long-term care services will also be required to enroll in a managed care plan through which they will receive long-term care services.

The State awarded seven managed care organizations contracts to provide services to those Floridians who need Medicaid long-term care benefits.[2] American Eldercare Inc. is the only managed care company with a contract in every region. However, American Eldercare was recently acquired by Humana, which was awarded contracts in Regions 4, 10 and 11.[3] All managed care companies are required to provide a minimum set of covered services. These services include, but are not limited to, nursing home care, assisted living care, respite, home-delivered meals, medication management, therapy, hospice and homemaker services. A complete list of services required to be provided by all managed care companies is available on the Agency for Health Care Administration's (AHCA) Statewide Medicaid Managed Care website.[4]

Throughout the roll-out process, providers and Medicaid recipients have discovered a number of glitches affecting enrollment, payment and consumer choice. Enrollment alone has presented providers, clients and attorneys with difficulty. In response to the confusing morass of "information" released by state agencies and managed care companies, the Foundation for LTC Solutions LLC[5] created an easy-to-use enrollment decision guide to help attorneys and clients find their way through the enrollment maze.[6] The following are just three of the many glitches that have been discovered so far:

1) Medicaid recipients in regions not yet rolled out have been prematurely enrolled in managed care organizations providing services in regions currently rolled out. This glitch interferes with the ability of the nursing home or other provider to get paid. When a nursing home or provider submits a request for payment for a prematurely enrolled recipient, the provider is denied payment because AHCA has the Medicaid recipient as a managed care recipient. Even though the Medicaid recipient is not supposed to be enrolled and is receiving no services from the managed care company, the provider is to seek payment from the managed care company. Even when AHCA has been notified of the mistake prior to actual automatic enrollment, in some cases AHCA has ignored the notification and has prematurely enrolled the recipient anyway. To resolve this issue, the provider and/or the recipient must contact the managed care company to have the managed care company assist in correcting the problem. Because AHCA has already paid the managed care company, the managed care company must return the payment. Then the current provider can resubmit the request for payment. This causes delays in payment. For providers who may be unaware of the problem or how to resolve it, this glitch may lead to improper notices of discharge for non-payment or termination of services.
2) Managed care case managers are developing care plans for the Medicaid recipient, a/k/a an enrollee, without having the Medicaid recipient's advocate or representative present, even when this person's presence is requested or needed. One of the underlying goals of the waiver is to allow the Medicaid recipient to participate in his or her care and in the development of the care plan. The current system makes this possible in cases where the enrollee has capacity and is not subject to other impairments. However, under the current system, it may not be possible for an incapacitated or impaired enrollee to participate fully. Managed care plans have a limited time after receiving an enrollee to meet with and develop an enrollee's care plan. An enrollee can request the presence of an advocate, friend or family member during the care plan meeting, assuming he or she has the capacity to do so. However, managed care case managers continue with the meeting and planning process if the enrollee does not request the presence of a representative or family member or if the case manager cannot reach the representative or family member. If an enrollee lacks capacity or has difficulty understanding the process, his or her participation in the plan's development is limited and the plan developed may end up reflecting the best interests of a managed care plan or the preferences of a case manager and not that of the enrollee. This can significantly impact the services received and the enrollee's placement in the coming year.
3) Medicaid recipients who no longer have capacity to contact the enrollment broker to choose a managed care plan are unable to choose a plan and are being

automatically enrolled in the State's chosen plan. This occurs for two reasons: 1) there is no system in place to allow an incapacitated person without an agent or guardian acting under legal documents to have a plan chosen for the enrollee by anyone other than the State's automatic enrollment system; and 2) the enrollment broker fails to accept or acknowledge a durable power of attorney, health care surrogate designation or letters of guardianship. If a consumer is competent, he or she can sign the AHCA Designation of Authorized Representative for Selection of Managed Care Plan found on the AHCA website.[7] This form must be signed, witnessed and faxed (850/402-4678), emailed (*flenrollmentrequest@automated-health.com*) or mailed (AHCA, P.O. Box 5197, Tallahassee, FL 32314) to AHCA's enrollment broker. Once the enrollment broker acknowledges receipt and enters the information into the computer system, the *designated representative* (which is not the same as the designated representative for all other Medicaid purposes) can choose a managed care plan on behalf of the Medicaid recipient. If the Medicaid recipient is no longer competent to sign the form, then the agent or guardian must fax, email or mail a copy of the durable power of attorney, health care surrogate designation or letters of guardianship to the enrollment broker. The enrollment broker will then review the documents to determine if it will allow the agent or guardian to select a managed care plan on behalf of the Medicaid recipient. If the enrollment broker determines the agent or guardian lacks the legal authority to make the selection or if the Medicaid recipient is incapacitated and has no guardian, health care surrogate or agent under a durable power of attorney, there is currently no alternative process by which the Medicaid recipient can have a plan selected for him or her. The recipient will be automatically enrolled in the State-selected plan.

As managed care rolls out statewide, other glitches will arise. Each week, the Foundation for LTC Solutions discusses a new glitch and possible solutions in its Tuesday "Glitch" Session Facebook post.[8] These posts provide information to help consumers, advocates, attorneys and providers.

Since Medicaid reform was touted as a cost-saving measure and long-term care is the largest segment of Medicaid spending, it is easy to see how this population may be subject to service reductions to control costs. To further complicate matters, managed care plans are being paid capitated rates to provide services in all areas, except nursing home care, which is still based on a daily rate. However, the formulas used to pay managed care plans for Medicaid recipients in nursing homes provide incentives to transition nursing home patients into the community and keep them there. While everyone agrees we would like all long-term care recipients to remain in the community, the reality is that there are times when that is not a safe or appropriate alternative.

Elder law attorneys must become familiar with this new system to help clients find their way and obtain appropriate and necessary care. Cost-saving concerns combined with a structure that has little or no history upon which to base its success or failure is a minefield for the unprepared. Right now, information about this new system is limited. Most information is provided through the State, usually through AHCA trainings posted on the AHCA website.[9] However, this information is provided from the State's perspective, and like elder law attorneys and providers, state regulators, too, are learning as they go. State regulators, unlike elder law attorneys, have the added burden of presenting this waiver as a success regardless of the actual results. In this environment, there is conflicting information about grievance procedures, confusion about whether residents' rights and licensing regulations still apply, talk of reclassifying residents' complaints submitted to the long term care ombudsman as something other than complaints so the data reflects no complaints involving managed care plans and erroneous data being provided to managed care plans and providers about enrolled Medicaid recipients. In this confusion and absence of clear information, seven managed care plans are attempting to provide all the care for 90,000 frail, vulnerable Floridians—and cut costs while they do it. Is your elder law practice ready for the results?

Twyla Sketchley *is a Florida Bar board certified elder law attorney and a managing member of the Foundation for LTC Solutions LLC. She is the immediate past chair of The Florida Bar's Elder Law Section. She is an attorney with The Sketchley Law Firm PA in Tallahassee, Fla.*

Endnotes:

1 http://ahca.myflorida.com/Medicaid/statewide_mc/index.shtml

2 http://ltcfoundation.org/mananged-care-plans/(Note: the URL is correct as printed.)

3 http://www.bizjournals.com/louisville/news/2013/07/24/humana-plans-to-purchase-american.html

4 http://ahca.myflorida.com/Medicaid/statewide_mc/index

5 The Foundation for LTC Solutions LLC is a conflict-free advocacy and consulting company that provides training about Florida's Medicaid Managed Care Long Term Care Waiver (the waiver), consultations on cases involving the waiver and assistance with grievances under the waiver. It was created by Rebecca Bell, Emma Hemness and Twyla Sketchley, all board certified elder law attorneys, who have been volunteering to monitor Medicaid reform for the section since it was proposed legislation in 2011. More information about The Foundation for LTC Solutions LLC and its resources are available at http://ltcfoundation.org.

6 http://ltcfoundation.org/medicaid-managed-care/

7 http://flmedicaidreform.com/SharedFiles/english/Designation%20of%20Authorized%20Representative%20For%20Selection%20of%20Managed%20Care%20Plan_EN.pdf

8 https://www.facebook.com/FoundationforLTCSolutions

9 http://ahca.myflorida.com/Medicaid/statewide_mc/index.shtml#NEWS

Using the proof of claim for claims 'to be paid' and 'claims paid'

by Alex Cuello


ALEX CUELLO

Florida Statute § 733.705(2) provides that the personal representative may file a proof of claim for all claims he or she has paid or intends to pay. If an interested person objects, F.S. 733.705(4) distinguishes the procedure for resolving objections to a proof of claim for items listed as "to be paid" as compared to items listed as "paid." Routinely, if the decedent died within two years of the commencement of the estate proceedings, the personal representative publishes a notice to creditors once a week for two consecutive weeks in a newspaper in the county where the estate is administered.[1] Service of the notice to creditors is required on reasonably ascertainable creditors, unless the creditor is listed in the personal representative's timely filed proof of claim.[2]

Following the publication of the notice to creditors, the estate is liable only to creditors who have filed a claim "in the probate proceedings on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of the service on the creditor ... ."[3] Alternatively, within three months after the time of the first publication of the notice to creditors, the personal representative "may file a proof of claim of all claims he or she has paid or intends to pay."[4] Any claim listed on the personal representative's proof of claim is deemed to have been filed as if the creditor had filed a statement of claim.[5] The personal representative must serve the proof of claim on all interested persons at the time of filing or promptly thereafter.[6]

Objections by interested persons to the personal representative's proof of claim are administered by procedural rules similar in application to rules for objections to a statement of claim. An interested person must file his or her objection to the personal representative's proof of claim "[o]n or before the expiration of 4 months from the first publication of notice to creditors or within 30 days from the timely filing or amendment of a claim, *whichever occurs later* … ."[7] However, whether the personal representative lists the claim on the proof of claim as "paid" versus "to be paid" is significant in how the objection is resolved.

Objections to the personal representative's items on a proof of claim listed as "to be paid" are administered similarly to procedures for objections to a statement of claim. The objection must "identify the particular item or items to which the objection is made."[8] Service of the objection to an item listed as "to be paid" must be made on the personal representative, within 10 days of filing on the claimant.[9] The objection must state that "the claimant is limited to a period of 30 days from the date of service of an objection within which to bring an independent action.[10] Depending on the amount of the claim, the independent action is filed in county or circuit court. The independent action may be filed concurrently with a petition to transfer venue back before the probate division. Pursuant to the Probate Code, "[t]he court may determine all issues concerning claims or matters not requiring trial by jury."[11] Notwithstanding the jurisdictional monetary limits, "[c]ourt means the circuit court."[12]

Objections to the personal representative's items listed on a proof of claim designated as "paid" do not require notice that the claimant is limited to a period of 30 days from the date of service of an objection within which to bring an independent action. Instead, if the personal representative pays an expense of administration or an obligation of the decedent, the "[i]ssues of liability as between the estate and the personal representative individually … shall be determined in the estate administration in proceedings for an accounting or surcharge, or in another appropriate proceeding, whether or not an objection has been filed."[13] No independent action is required to be filed in circuit court when there is an objection to an item on the personal representative's proof of claim listed as "paid."[14] If the personal representative lists an item on the proof of claim as "to be paid" and then pays the claim without approval of the interested person, issues of liability between the estate and the personal representative are determined as if the item had been listed "paid," without the requirement of filing an independent action. This means jurisdiction remains in the administrative proceedings.

If not barred by F.S. 733.710, which bars claims two years after the date of death, "[t]he personal representative may settle in full any claim without the necessity of the claim being filed when the settlement has been approved by the interested persons."[15] Absent approval by the interested persons, the personal representative may file a proof of claim itemizing claims "to be paid" and those "paid," without the creditor having to file a statement of claim. Objections to the former are procedurally similar to a statement of claim. After service of the proof of claim, if an interested person objects, notice must be served on the personal representative and the claimant that an independent action must be filed within 30 days of

Proof of claim
from preceding page

service.[16] Failure to bring an independent action bars the claimant from filing any action or proceeding on the claim against the personal representative.[17] Objections to items listed on the proof of claim by the personal representative as "paid" are determined in the estate administration in proceedings for an accounting or a surcharge, or in another appropriate proceeding, without the necessity of filing an independent action.

Alex Cuello, Esq., *is the principal shareholder of the Law Office of Alex Cuello PA in Miami. He has been admitted to practice law in Florida since 1996. He received his B.A. from Florida International University, law degree from St. Thomas University and Master of Laws degree in elder law from Stetson University. He is board certified by The Florida Bar as a specialist in elder law. His practice focuses on elder law, with an emphasis in the areas of probate administration and litigation, guardianship administration and litigation, estate planning, Medicaid planning and Social Security Disability claims. He serves on the Executive Council of the Elder Law Section, is a member of the Elder Law Certification Committee, teaches the court-approved Professional Guardian and Family Guardianship courses and is AV rated by Martindale-Hubbel. You may contact him by telephone at 305/669-1078 or email at ac440@bellsouth.net and visit his website, www.alexcuello.com.*

Endnotes:

1 Fla. Stat. §733.2121.
2 *Id.* (3).
3 Fla. Stat. §733.702(1).
4 Fla. Stat. §733.703.
5 *Id.*
6 5.498(b), Fla.Prob.R.
7 Fla. Stat. §§733.705(2) and (4). [emphasis added] and 5.498, Fla.Prob.R.
8 5.499(b), Fla.Prob.R.
9 *Id.*, (e).
10 *Id.* (b).
11 Fla. Stat. §733.705(10).
12 Fla. Stat. §731.201(7).
13 Fla. Stat. §733.705(4).
14 5.499(c), Fla.Prob.R.
15 Fla. Stat. §733.702(1).
16 5.499(b), Fla.Prob.R.
17 Fla. Stat. §733.705(5).

Should insurance plans include estate plans?
Recent UPL case raises concerns

by John T. Cardillo
submitted on behalf of the Financial Products Committee


JOHN CARDILLO

Consider the following scenario. Mr. and Mrs. Smith, an elderly couple, receive a card in the mail that offers them a free information guide on how to avoid probate and estate taxes and "other important elder law changes." The Smiths fill out and return the card, and an agent comes to their home to speak to them about their estate plan. When Mrs. Smith asks about the probate process, the agent responds:

> Basically, Mr. and Mrs. Smith, probate is having to go through the hassels (sic) of the court system. That's easy for you to understand, isn't it? How do you feel about that?

The agent tells the Smiths about the "numerous tasks" associated with the probate process and then asks the Smiths:

> Would you agree that this looks like a colossal amount of tasks for anybody to undertake, especially on top of managing their immediate families' own affairs? Do these tasks sound like something a family would want their loved ones to go through?

The agent also tells the Smiths that the IRS predicts probate expenses to average 4 to 5 percent of the typical estate. "As you can see," says the agent, "these expenses may be very costly and can range anywhere from a couple hundred dollars to tens of thousands of dollars. Are you and your family prepared to take on these potential costs, and even if you are, why would you want to?"

The agent continues:

> Mr. and Mrs. Smith, if you think information about probate and estate administration is bad, wait until I tell you about the next one. It takes place while you are alive ... Mr. and Mrs. Smith, when someone becomes unable to handle their own affairs, the court usually steps in and takes control ... Mrs. Smith, is this something that you would want to have to go through, and Mr. Smith, is this something that you would want to put her through!?

The above quoted excerpts were taken from a document titled The Presentation Outline, which is Exhibit C to The Florida Bar's Petition Against the Unlicensed Practice of Law filed in *The Florida Bar vs. The Legal Maintenance Organization of America, Inc., et al*,[1] a case where The Florida Bar alleged that the respondents were engaged in the business of marketing, selling, delivering and executing unsuitable financial products (usually living trusts) to Florida senior citizens.

General allegations

The petition makes the following allegations about the business operations of LMO America and Quest Financial. LMO America advertised prepaid legal insurance plans with titles such as "NuLawyer Estate Plan" and "LMO America Revocable Living Trust Insurance Policy." LMO America contracted with Quest Financial, a company that recruited, trained and supervised agents to assist in the marketing and execution of the estate plans. Senior citizens, solicited through direct mail cards, would meet with agents at the seniors' homes to hear estate planning sales presentations.

The outline referenced above included a section on how an agent could close a sale at the conclusion of the plan presentation: "just start writing up the application and let them [customer] stop you if they want to. As a 'rule of thumb' it is recommended that you always try to overcome objections, but never exceed 3 attempts as that could be viewed as a high pressure sales tactic."

If the prospective customer agreed to purchase a plan, the agent completed an LMO America application form and collected payment, usually $1,895 for a trust. The agent received a $600 commission. After a customer signed up, the application was sent to an attorney for drafting.

LMO America contracted with two drafting attorneys in Florida. The customers (who had little to no contact with the attorneys) did not choose the attorney. Any communication with the attorney occurred only after the plan was purchased. LMO America paid the attorneys $125 to $150 per trust. A customer could purchase a deed by giving the agent a check for $125, made payable to "designated attorney." The attorneys periodically appeared at Quest Financial company meetings and assisted in training the agents.

Upon completion, the agents delivered the plans to the customers at their homes and supervised the plans' execution and notarized the customers' signatures. During this last stage, some agents would attempt to sell annuities to the customers.

Specific allegations

The petition presents five counts of specific allegations involving prospective customers. In one count an agent showed the prospective customer

several trusts that had been prepared by different attorneys. The agent then held up one trust and said "you can see how thin it is." The agent claimed that attorneys "don't make enough money" on trusts to take the time to create trusts of the same quality as the ones proposed by Quest Financial. The agent further claimed that a lot of attorneys do not like to prepare trusts and many do not know how to create them. The agent promised that if the customers bought an insurance policy from Quest Financial, they were guaranteed not to have to pay any money if they wanted to make amendments.

In another count, an agent responded to the question about why a trust was necessary by telling the prospective customers that they "could not trust the government and that they were not protected and would have to spend lots of money if they did not have a trust in place." The agent advised the customers to "act quickly" and that the prospective customers needed to purchase the trust "immediately." Lastly, the agent allegedly advised the customers that there was an estate tax on all assets over $600,000.

A third allegation involved a foreign couple who purchased a trust and a deed. Prior to executing the documents, the agent advised the couple that the plan was useless, as title to the property could not be transferred. The couple, however, did not receive a return of their money.

Answers and defenses

Each respondent filed a response to the petition. LMO America and Hayes moved to dismiss, arguing that they only offered legal expense insurance products, which is not the unlicensed practice of law. Quest Financial and Norman answered the petition denying all incriminating allegations.

Coleman, Norman and Falato each filed answers and defenses to the specific allegations against them. All of the agents denied engaging in the practice of law. Coleman filed an extensive answer to the petition and categorically denied any of the specific incriminating allegations against him. He offered a defense to each and every allegation. As an overriding defense, he argued that he was acting in his capacity as a licensed insurance agent, selling an insurance plan, and that any legal decisions were handled by a plan attorney. Norman made a similar argument, and Falato denied working as a legal expense agent, giving sales presentations on or selling insurance policies or estate plans, or giving any legal advice.

Resolution

On Oct. 7, 2013, a referee entered an order approving stipulations between The Florida Bar and the respondents.[2] Each stipulation acknowledged that the compromise was of disputed claims and that the respondents denied the allegations of unlicensed practice of law. The parties agreed that the stipulations were entered into to avoid further litigation.

LMO America, Quest Financial, Hayes and Norman agreed to discontinue underwriting, promoting or selling any legal expense insurance policy where the main components are the design, preparation and delivery of living trusts. The Bar agreed to suspend $3,000 in penalties and $189 in costs against LMO America and Hayes if they complied with the stipulation. Quest Financial and Norman agreed to pay $6,771.03 in costs and a $3,000 penalty.

Finally, the Bar acknowledged that as a licensed legal expense insurance agent, Coleman was required to describe the provisions of any insurance policy, including the mechanical functions of the policy, to his prospects. The Bar further acknowledged that Coleman had no control over, or responsibility for, creating any insurance applications or recording answers on the insurance application given by the applicant. The Bar also acknowledged that Falato was licensed to sell insurance policies in Florida and was not prevented from doing so by entering into the stipulation.

Conclusion

As a result of this case, the Financial Products Committee of the Elder Law Section will form an ad hoc committee to explore potential legislative changes that address whether insurance plans should include estate plans. Upon the conclusion of its review, the ad hoc committee will make recommendations to the section.

John T. Cardillo *is a member of the firm Cardillo Keith Bonaquist in Naples, Fla. He graduated from Boston College with a B.A. in 2000 and from Florida State University with a J.D. in 2003, the year he also was admitted to The Florida Bar. His practice areas include civil litigation, trial practice, wills and estate planning, guardianship, criminal and juvenile, wills and estate planning, and adoptions.*

Endnotes:

1 The respondents in this action are the corporations, the Legal Maintenance Organization of America Inc. (LMO America) and Quest Financial & Insurance Services Inc. (Quest Financial), their respective presidents, Peter O. Hayes and Michelle L. Norman, and three agents of Quest Financial, William Darrell Coleman, Angeline P. Robertson and Vincent E. Falato.

2 The petition alleges that in 2009, Quest Financial and Coleman were investigated by The Florida Bar for the unlicensed practice of law. As a result of that investigation, Norman and Coleman executed cease and desist affidavits. Both parties acknowledged executing a cease and desist affidavit, but denied violating its terms. Coleman claimed that the allegations leading up to the affidavit were unfounded and vague and that he had executed the affidavit because it was in the best interest of both parties to move on.

COMMITTEE REPORTS

Financial Products Committee

Jill J. Burzynski, chair

The Financial Products Committee is analyzing what actions the section can take to stop living trust mills from avoiding unlicensed practice of law by claiming to be selling insurance. A UPL case recently brought by The Florida Bar was settled in part due to the defense that the individuals were not practicing law but instead were selling insurance that had been approved for sale by the Florida Office of Insurance Regulation. (See related article on page 15.) The committee will be analyzing whether it should recommend to the section that legislation be proposed or whether the problem can be addressed by existing law.

Guardianship Committee

Sponsored by Wells Fargo
Carolyn Landon and Melissa Barnhardt, co-chairs

At our next meeting, to be announced soon, we will be discussing two bills, HB 941 and CS/HB 943, sponsored by Rep. Elaine Schwartz (D-Hollywood), an Elder Law Section member

House Bill 941 amends 744.108, F.S.; providing that fees and costs incurred by an attorney who has rendered services to a ward in compensation proceedings are payable from guardianship assets; providing that expert testimony is unnecessary in proceedings to determine compensation for an attorney or guardian; amending 744.3025, F.S.; providing that a court may appoint a guardian ad litem to a minor if necessary to protect the minor's interests in a settlement; providing that a settlement of a minor's claim is subject to certain confidentiality provisions; amending 744.331, F.S.; directing that the examining committee be paid from state funds as court-appointed expert witnesses if a petition for incapacity is dismissed; requiring that a petitioner reimburse the state for expert witness fees if the court finds the petition to have been filed in bad faith.

House Bill 943 amends 744.3701, F.S.; creating an exemption from public records requirements for records relating to the settlement of a claim on behalf of a minor or ward; authorizing a guardian ad litem, a ward, a minor, and a minor's attorney to inspect guardianship reports and court records relating to the settlement of a claim on behalf of a minor or ward, upon a showing of good cause; authorizing the court to direct disclosure and recording of an amendment to a report or court records relating to the settlement of a claim on behalf of a ward or minor, in connection with real property or for other purposes; providing a statement of public necessity.

In addition we will discuss the possible reintroduction of "Removal of the Right to Bear Arms" legislation.

Legislative Committee

Scott A. Selis, chair

2013 was a great year for the Elder Law Section's Legislative Committee. Through the hard work and dedication of many, the section successfully shut down efforts to enact draconian restrictions on personal service agreements and spousal refusal.

But we can't stop now. There are many issues that we want to ensure work to the benefit of our clients, which in turn will help our section members. The areas on which the Legislative Committee intends to focus are:

- Rep. Kathleen Passidomo's efforts to shore up the financial exploitation statutes so that prosecutors can get more convictions of those who prey on our clients
- Senator Eleanor Sobel's efforts to strengthen regulations of assisted living facilities to increase safety
- Increased regulation of Medicaid planning companies

There will surely be issues that arise that we don't presently anticipate. If you'd like to participate in the Legislative Committee or just want to ask questions, please contact the committee chair, Scott A. Selis. He can be reached at 386/445-8900 or *sselis@palmcoastlaw.com*.

Medicaid & Government Benefits Committee

2012-2013 Annual Report
Sponsored by EPIC
John S. Clardy III and Amanda Wolf, 2012-2013 co-chairs
Leonard E. Mondschein and Amanda Wolf, 2013-2014 co-chairs

The Medicaid and Government Benefits Committee of the Elder Law Section of The Florida Bar is composed of more than 65 members. The average number of members present during committee meetings ranges from 10 to 20 per meeting. Committee meetings are held on the third Friday of each month from 9 to 10 a.m. Eastern. The committee held 18 meetings during the 2012-2013 year.

Various topics and issues were discussed during the 18 committee meetings. One such topic was a proposal for the section to take on a qualified income trust (QIT) pro bono project. The proposal was in response to various nursing homes expressing their concern that they have to refer to non-attorneys to prepare QITs for their residents, because attorneys will not assist clients who cannot afford to pay them. The potential plan was for the committee to develop a procedure wherein nursing facilities are directed to contact legal aid societies in their

Committee reports
from preceding page

area if their residents cannot afford to hire an attorney, but their income exceeds the Medicaid income limits. The legal aid societies would have a list of attorneys who are willing, knowledgeable and available to assist the residents for free as long as the nursing facility resident qualifies for free legal services under the umbrella of the particular legal aid society.

Although the committee agreed that the project would be beneficial to the Elder Law Section's effort to increase its pro bono services and helpful to the section's effort to overcome unlicensed practice of law (UPL) issues, there were also concerns. The main concerns of the committee were 1) the potential liability that may exist if the QIT is improperly funded; 2) the vast amount of time involved in overseeing that the QIT is funded properly; and 3) the problem with limiting representation to the QIT only. A subcommittee was created to address these issues. The committee is still considering the project but is moving toward the idea of providing education directly to the legal aid societies so they are able to provide the legal assistance required.

Each month, Rebecca Bell and/or Emma Hemness informed the committee on the transition to managed care. Each meeting, Susan King provided updates on ESS Policy Manual changes, including the change identifying the increase in the penalty divisor. The changes to the Florida Administrative Code Section 65A-1.712 regarding Medicaid gifting and partial return cures was also a topic of conversation.

Another concern addressed by the committee was the increase in the number of hospital patients who are being admitted to the hospital for observation rather than inpatient level of care and how that impacts their qualification for Medicare rehabilitation coverage. Under the Recovery Audit Contractors program, private companies referred to as recovery audit contractors (RAC) are hired by the Centers for Medicare and Medicaid (CMS) to review Medicare claims retrospectively for potential overpayments or underpayments. RACs are auditing hospitals for improperly admitting patients with the intent of returning money to the Medicare trust fund. As a result of the RAC industry, the practice of admitting patients who should have been on observation status is being closely scrutinized. Consequently, hospitals are now admitting more patients for "observation," because they are concerned about failing an RAC audit and the fines associated with failing the audit. However, the resulting impact to patients is that without the inpatient level of care, they will not qualify for Medicare rehabilitation coverage should they require rehabilitation in a nursing facility.

The committee discussed due process issues within Department of Children and Families (DCF) notice of case actions. The notice of case actions have recently been revised to identify that if information requested within the notice is not returned by the required date, the notice serves as a denial and a separate denial notice will not be received. These notices are being automatically generated by the DCF's computer systems and are not accurately reflecting verification that has already been provided to DCF. The committee intends to propose a standardized method for the section to respond to the notices.

Greg Glenn has been very active in working with DCF's technology department to try to repair issues regarding the My ACCESS system. On a weekly basis, he provided the committee with updates.

The majority of our committee's time was spent on proposed legislation concerning Medicaid qualification. Specifically, much time was spent on HB 1323 and SB 1748 dealing with personal service contracts and spousal refusal. Two workgroups were created (a personal services workgroup headed by Amanda Wolf and a spousal refusal workgroup headed by John Clardy) within the committee to enable the committee to divide and conquer the proposed legislation. Each workgroup reviewed the proposed legislation line-by-line to provide the section with legal arguments to support the section's position on the proposed legislation. Many of our committee members were helpful in the section's fight against the proposed legislation, especially Elaine Schwartz, who was instrumental to the section's success

in this effort. Although the legislation was not voted on in the Senate before the legislative session ended, we fully anticipate seeing the issues again in the next legislative session.

Finally, once the 2013 legislative session was over, the committee discussed the Real Property, Probate, and Trust Law (RPPTL) Section's Ad Hoc Creditors' Rights Committee's proposal regarding the expansion of creditors' rights and how it will impact Medicaid planning and the ability for our clients to pass on an inheritance. A committee member from each of the 11 regions of Florida was chosen to act as a leader over his or her region. Attorneys within each region were then encouraged by the region leader to contact the executive members of RPPTL in their area to educate them on our section's concerns regarding the expansion of creditors' rights. It is our understanding, however, that the creditors' rights issue was not voted on during the RPPTL's annual meeting.

The Medicaid Committee will be engaged in supporting the Public Policy Task Force in its advocacy efforts regarding Medicaid issues. In addition, the committee will be reporting on the managed care rollout in different counties as it relates to our clients and practices.

We anticipate a very active 2014 legislative session and welcome all who are interested in our committee. For further information, please contact one of the co-chairs, Amanda Wolf at 813/350-7991 or Leonard Mondschein at 305/274-0955.

Mentoring Committee

Jason A. Waddell, chair

The Mentoring Committee is preparing for an exciting 2014. We will continue our Tricks of the Trade bimonthly CLEs. We are accepting recommendations for speakers and/or topics for the upcoming year. If there is a topic you would like to learn more about or a topic you wish to present, please email Jason Waddell at *jason@ourfamilyattorney.com*. Our next presentation will be on Dec. 5, 2013, at 12 noon. Watch for an email regarding the specifics of this call.

Our committee is also matching attorneys new to our section with mentors.

Finally, we are working in conjunction with the section's chair and chair-elect on the Annual Update scheduled for Jan. 16-18, 2014. We encourage you to save the dates to attend this CLE. With a new facility, sponsors and many new speakers, this looks to be the Florida Elder Law Event of 2014.

Probate & Estate Planning Committee

A. Stephen Kotler and Mike E. Jorgensen, co-chairs

The Probate & Estate Planning Committee held an organizational meeting at the Crystal River Plantation Golf and Country Club in early

November 2013 during the Elder Law Retreat. We set a meeting schedule for the 2013-2014 year. We will be meeting telephonically on Dec. 10, 2013, Feb. 11, 2014, April 8, 2014, and June 10, 2014. All meetings are at 8:30 a.m. Eastern. Each meeting will last approximately 45 minutes, have a guest speaker and allow time for a roundtable discussion of topics that are top of mind of the attendees.

Our guest speaker at the December meeting will be Michael A. Lampert, immediate past chair of the Tax Section of The Florida Bar. Potential topics to be covered at future meetings are Adversary Proceedings in Probate, Decanting Irrevocable Trusts, Accounting Issues for Trust/Probate, Title Issues for Estate Planners and much more.

The committee may be assigned responsibility for reviewing and analyzing proposed legislation that affects section members.

We welcome your participation and suggestions and look forward to a great year. Those who wish to serve on this committee should email Mike Jorgensen at *mjorgensen@seniorcounsellaw.com* or Steve Kotler at *skotler@kotlerpl.com*.

Veterans' Benefits Committee

Patti Fuller, chair

On Sept. 27, 2013, the Veterans Benefits Committee presented a live one-day CLE entitled Veterans Benefits Claims - Leveling the Playing Field. The seminar was chaired by Greg Glen and Susan King. They did an outstanding job bringing together representatives from the Department of Veterans Affairs and the Veterans Benefits Administration who shared insights into the claims and fiduciary appointment process. The seminar also included a session presented by a Veterans Health Administration (VHA) medical center social worker on the VHA Geriatric and Extended Care Program for long-term care benefits and services available to all veterans, regardless of net worth, and a session presented by a VHA medical services physician on presumptive service connected conditions.

The Veterans Benefits Committee continues to monitor possible changes in VA pension benefits in the proposed Senate and House bills. These changes include the establishment of a 36-month look back, including transfers to an annuity, trust or other investment if such transfer reduces the net worth of the claimant.

The Veterans Benefits Committee holds a semi-monthly teleconference the fourth Wednesday of the month at 9 a.m. Eastern. Our next teleconference will be on Nov. 27, 2013.

Special Needs Trust Committee

Sponsored by Family Network on Disabilities

Travis D. Finchum and David J. Lillesand, co-chairs

The Special Needs Trust Committee is getting ramped up. We will be holding organizational meetings very soon to address several lingering and new issues. We need to finalize our brochure copy for the Bar's flyers and handouts regarding special needs trusts. We also want to review our suggestions to the judiciary regarding how to proceed with special needs trust cases before the courts. We will explore the possibility of putting together a practical handbook for attorneys on drafting and administering special needs trusts as well as continue our discussion and planning of a specific CLE on Florida law and drafting and administration of special needs trusts. We want the CLE to be very practical for our drafting attorneys.

We are getting a little late start on the year, but we will make it up and have a very productive and informative year for those interested in special needs trusts. If you are interested in being involved, please email Travis Finchum at *travis@specialneedslawyers.com* or David Lillesand at *david@lillesandlaw.com*.

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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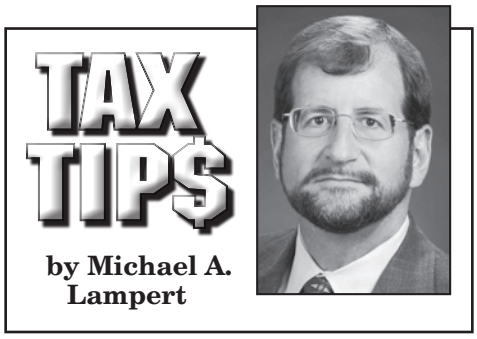
Tax tips for elder lawyers



by Michael A. Lampert

Be careful the client does not just pay the tax due

A client comes in owing $50,000 in back taxes. A decision is made to do an offer in compromise. The client is to borrow the offer amount and legal fees from his parents. The client doesn't come back in. After a follow-up call, the client says his parents just gave him the funds to pay off all the taxes. The client likely just wasted some of his parents' money.

I had a similar issue with an offshore disclosure case. The case was almost over, and the IRS was mostly paid. But there was a calculation issue resulting in a potential amount owed of several thousand dollars. The client called and said, "My CPA solved the problem." I found out how the CPA solved the problem. He found out the balance the IRS said was due and had the client pay it. Yet the client might not have owed the amount paid.

Sometimes the elder parents' desire to help their child, while perhaps well placed, costs the parents more than it needs to. Also, in many of these cases, will dealing with just the tax issue be enough to help the client get on the road to recovery? Is the client also facing non tax debt and other financial issues?

Documentary stamps on transfers for real property between spouses—potential trap

Be careful when transferring encumbered real property between husband and wife not incident to divorce. Documentary stamps for the value of the encumbered real property transferred between spouses may be subject to documentary stamps. The value is based on the transferor's outstanding mortgage note amount. The fact of joint liability under the mortgage/note may be irrelevant. This issue is ripe for a legislative fix; more tax is paid if the clients are still married than if they get divorced.

Surprising income tax result when cashing life insurance

Typically, when surrendering a life insurance policy, income is determined by subtracting the premium paid from the cash received. However, as can be seen in *Brown v. Comm,* 110 AFTR 2d 2012 (CA7 09/11/2012), this is not always the case. If some of the life insurance coverage was previously surrendered, this reduces the policy investment in the policy. In addition, if some of the dividends earned on the policy purchased additional coverage, this also reduces the investment. Likewise, if the cash value reduced a policy loan, the policy loan amount is added to the amount of cash received. Be very careful in considering the possible tax result when a life insurance policy is surrendered. There may be unexpected gains subject to income tax.

Some common IRS misconceptions and a tax scam

Recently I read an internet blog regarding the IRS that very simply addressed items that, while obvious to tax attorneys, are often not obvious to other attorneys, accountants and their clients. I have modified it and hope it is helpful.

1. A revenue officer (RO) collects unpaid taxes. A revenue agent (RA) audits. There are other IRS employees that do similar tasks, but these are the two main ones. When your client says he or she has received an IRS communication, find out the sender's title.
2. An RO's badge is a card. An RO does not carry a gun and cannot arrest you. An RO can refer you to criminal investigation.
3. If an IRS representative does show up with a badge, this person is an IRS special agent. Special agents are federal cops with guns and arrest powers. Far too often the client (or the attorney/accountant) unknowingly talks himself/herself (or the client) into jail by saying too much or the wrong thing.
4. ROs have significant power, but it is not unlimited. They are not evaluated on how much they collect, but on how they close cases. They generally try to contact the taxpayer initially in person, which can be a real shock to the client.
5. ROs (and RAs) can be reasonable and even friendly. Unfortunately, this may cause the taxpayer client to cooperate so much that the client makes it worse for him or herself.
6. The IRS does not email taxpayers. There are occasional exceptions during, for example, an ongoing tax matter for which other contact has been well established. If your client receives an email from the "IRS," it is virtually certain to be fraudulent.
7. The filing of a federal tax lien by the IRS is a public record. Your client will be inundated with mail solicitations and phone calls from people offering to resolve tax problems.

Unfortunately, it can be very easy to impersonate an IRS official. In addition, if your clients have a federal tax lien filed against them, the mail and phone solicitations that offer to

Tax tips
from preceding page

"solve their tax problems" can be relentless. Some of the written solicitations look strikingly like official IRS communications.

In some cases, fraudsters obtain the federal tax lien information, and perhaps information from other internet searches, on their potential victim (your client). The fraudster then contacts your client and demands that a wire be immediately sent (or personal financial account information provided) to pay the tax. The fraudster threatens the arrest of your client within a short period of time if payment or account information is not made or provided. While it is hoped that the client will call his or her attorney, or at least the IRS for verification, because the fraudster appears to have so much "personal" information, the client is more likely to believe the fraud. During the recent government shutdown, this fraud increased—because when your client called the IRS, the call was answered with a recording about the shutdown.

***Michael A. Lampert, Esq.**, is a board certified tax lawyer and immediate past chair of The Florida Bar Tax Section. He regularly handles federal and state tax controversy matters, as well as exempt organizations and estate planning and administration.*

It takes a network!

The tale

A long-time client calls to let you know she can no longer take care of herself and is afraid to stay alone. She has gotten very frail over the past few years, and her children live out of state. All of her friends are her age, and they are also quite frail so she has no one to call in an emergency. She is lonely and asks you what she should do. She would like to stay in her home but is not sure she can. Should she move; should she stay? And who can she turn to for assistance with these decisions?

The tip

As an elder law attorney, you are already aware that your clients look to you for more than just legal advice. Elder law attorneys are often confidants, therapists and friends. We really are "counselors" at law. But you cannot make this decision for her. Nor can you physically pack up your client and move her to a new home. In a situation like this, the need for an extended community network of professionals becomes glaringly apparent.

It is very important for elder law attorneys to have connections in the community where they practice. Connections like financial planners, geriatric care managers, care companions and even estate sale or moving professionals.

First, you need to determine if your client can stay at home. Is she healthy enough? A geriatric care manager can come to the home and evaluate your client to ascertain if she needs assistance to stay at home.

Tips & Tales

by Kara Evans

The care manager can help identify and locate available services, provide information about care solutions and advocate for your client.

Then the question of finances arises. Can the client afford to stay in her home? Can she afford an independent or assisted living facility? If you have a good working relationship with a compassionate financial advisor, he or she can assist your client with these questions. A good financial planner will be able to spot issues such as underperforming assets or inappropriate investments that possibly could be structured to provide more income. Alternatively, a thorough financial review may show that your client is eligible for some type of public benefits.

Perhaps your client would benefit from a companion. There are many companies that provide companion care. The care can be provided in the home or in an institutional setting. The companion can be there for just a few hours or around the clock. Many of the companions will assist with shopping, cleaning, laundry and even accompany your client on outings.

Maybe your client does need to leave her home. Can you recommend a moving company that will assist with her transition plans? Not just packing and delivering. She will need someone to coordinate the relocation and help her choose what items to take if the move requires downsizing. The mover may also have to pack and ship family heirlooms to family members who live out of town. Clearing out a lifetime of possessions can be emotionally daunting even for a young, healthy person. Your client will need compassionate assistance.

This is common scenario. As an elder law attorney, you should make it part of your practice to personally meet and connect with these types of providers in your community. After all, it may take a village to raise a child, but it takes a network to help your client.

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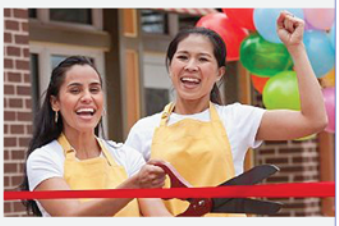

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The Florida Bar Continuing Legal Education Committee and
the Elder Law Section present

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~ LIVE PRESENTATIONS ~

The Elder Law Annual Update and Hot Topics (#1712)

COURSE CLASSIFICATION: ADVANCED LEVEL

JANUARY 17 – 18, 2014

COURSE NO. 1712R

With a third day added for new Elder Law attorneys:

The Essentials of Elder Law for New Attorneys & Paralegals (#1713)

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

JANUARY 16, 2014

COURSE NO. 1713R

Due to popular request, this annual event has been extended to three days. An extra day has been added for "Elder Law Essentials for New Attorneys and Paralegals." The second and third days are for the "Annual Update" which will encompass more advanced topics and issues. A complete list of presentations can be found in this brochure

LOEWS PORTOFINO BAY HOTEL

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RESERVATIONS: A block of suites has been reserved at the **Loews Portofino Resort** at the rate of **$169 single/double occupancy.** To make reservations, call the resort directly at **(407) 503-1000. Reservations must be made by 12/27/13 to assure the group rate and availability.** After that date, the group rate will be granted on a "space available" basis.

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SCHEDULE – DAY 1

Essentials of Elder Law for New Attorneys and Paralegals

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation:
Thursday, January 16, 2013

Course No. 1713R

7:30 a.m. – 8:00 a.m.	**Late Registration Continental Breakfast**
8:00 a.m. – 8:20 a.m.	**Welcome and Introductions**
8:20 a.m. – 9:00 a.m.	**Ethics** *Rebecca Morgan and Roberta Flowers, Stetson Univ., St. Petersburg*
9:00 a.m. – 9:40 a.m	**Elder Abuse** *Victoria Heuler, Tallahassee*
9:40 a.m. – 10:30 a.m.	**Guardianships** *Enrique Zamora, Miami*
10:30 a.m. – 10:40 a.m.	**Break**
10:40 a.m. – 11:30 p.m.	**Pre-Mortem Legal Planning (Property)** *Evett Simmons, Port Saint Lucie*
11:30 a.m. – 12:20 p.m.	**Health Care Decision Making** *Vicki Bowers, Jacksonville*
12:20 p.m. – 1:20 p.m.	**Lunch**
1:20 p.m. – 2:00 p.m.	**Social Security Benefits** *David Lillesand, Clearwater*
2:00 p.m. – 2:40 p.m.	**Special Needs Trust** *Lauchlin Waldoch, Tallahassee*
2:40 p.m. – 2:50 p.m.	**Break**
2:50 p.m. – 3:40 p.m.	**Veteran's Benefits** *Valerie Peterson, Sisters, OR*
3:40 p.m. – 4:40 p.m.	**Medicare/Medicaid** *Heather Kirson, Orlando*
4:40 p.m. – 5:20 p.m.	**Financial Products (Long Term Care Insurance)** *Rob Cochran, Tampa* *Scott Vedder, Tallahassee*
5:20 a.m. – 5:45 p.m.	**Post Mortem Issues** *Phil Weinstein, Miami*

CLE CREDITS

CLER PROGRAM

(Max. Credit: 9.5 hours)

General: 9.5 hours Ethics: 1.0 hour

CERTIFICATION PROGRAM

(Max. Credit: 7.0 hours)

Elder Law: 7.0 hours
Wills, Trusts & Estates: 3.0 hours

SCHEDULE – DAYS 2 & 3

Elder Law Annual Update and Hot Topics

COURSE CLASSIFICATION: ADVANCED LEVEL

Live Presentation: Friday and Saturday, January 17 – 18, 2014

Course No. 1712R

The Elder Law Annual Update and Review Course will cover hot topics within each topic of interest to an advanced Elder Law practitioner. Recent case law and statutory changes will be discussed, as will strategies for dealing with these changes successfully. Attendees will leave with a higher level of expertise and an enhanced ability to meet clients' needs. For attorneys preparing to take the Elder Law Board Certification exam, the course includes special components designed to provide invaluable tips and assistance in preparing for the exam.

FRIDAY, JANUARY 17TH

8:20 a.m. – 9:00 a.m.
Medicaid Part I: Planning and Strategies
Emma Hemness, Brandon

9:00 a.m. – 9:50 a.m.
Medicaid Part II: Case Law Administration and Managed Care
Heather Kirson, Orlando

9:50 a.m. – 10:20 a.m.
Affordable Care Act
Scott Solkoff, Delray Beach

10:20 a.m. – 10:30 a.m.
Break

10:30 a.m. – 11: 20 a.m.
Veteran's Administration
Valerie Peterson, Sisters, OR

11:20 a.m. – 12:00 p.m.
Pre-Mortem Legal Planning—Tax Issues
Steve Kotler, Miami

12:00 p.m. – 12:20 p.m.
Task Force Update
Ellen Morris, Boca Raton

12:20 p.m. – 1:20 p.m.
Lunch

1:20 p.m. – 2:00 p.m.
Social Security
David Lillesand, Clearwater

2:00 p.m. – 2:30 p.m.
Special Needs Trusts
Lauchlin Waldoch, Tallahassee

2:30 p.m. – 3:00 p.m.
Administrative Advocacy (Including Managed Care Appeals)
Nancy Wright, Gainesville

3:00 p.m. – 3:10 p.m.
Break

3:10 p.m. – 3:40 p.m.
Residents' Rights (Nursing Home & ALF)
John Griffin, Sarasota

3:40 p.m. – 4:10 p.m.
Age/Disability Discrimination
Michael Spellman, Tallahassee

4:10 p.m. – 5:00 p.m.
Guardianship
Enrique Zamora, Miami

5:00 p.m. – 6:30 p.m.
Certification Review Boot Camp
Jason Waddell, Pensacola

SATURDAY, JANUARY 18TH

8:20 a.m. – 9:10 a.m.
Pre-Mortem Legal Planning – Wills, DOPA's, Health Care Advocacy Directives
Jacqueline Schneider, Coral Gables

9:10 a.m. – 10:00 a.m.
Elder-Related Torts
Scott Gwartney, Tallahassee

10:00 a.m. – 10:10 a.m.
Break

10:10 a.m. – 11:00 a.m.
Litigation for Elder Law Attorneys
Hung Nguyen, Coral Gables

11:00 a.m. – 11:50 a.m.
Trust Drafting and Administration
David Carlisle, Miami

11:50 a.m. – 12:30 p.m.
Representing Fiduciaries
Steve Hitchcock, Clearwater

12:30 p.m. – 1:30 p.m.
Lunch

1:30 p.m. – 2:20 p.m.
Probate, Homestead, Elective Share
John Moran, Tallahassee

CLE CREDITS

CLER PROGRAM	CERTIFICATION PROGRAM
(Max. Credit: 14.5 hours)	(Max. Credit: 14.5 hours)
General: 14.5 hours Ethics: 0 hours	Elder Law: 14.5 hours Tax Law: 1.0 hour Wills, Trusts & Estates: 3.5 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

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REGISTRATION

Essentials of Elder Law for New Attorneys & Paralegals ~ and ~ Elder Law Annual Update and Hot Topics

ONE LOCATION: (369) LOEWS PORTOFINO BAY HOTEL, ORLANDO (JANUARY 16-18, 2014)

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Summary of selected case law

by Diane Zuckerman

Probate assets and estate planning

The Estate of Barbara Kester v. Rocco, et al, Case No. 1D12-2006 (1st DCA, 2013)

The facts of this case remind us of the importance of helping our clients coordinate their wills, trusts and financial account titles to accomplish the intended estate plan. The appellant in the case, Glenda Kester, appealed a trial court order finding the she had breached her fiduciary duty as both an agent under a power of attorney and as personal representative of her mother's estate by exerting undue influence over her. The First District reversed the trial court.

The mother, decedent Barbara Kester, had five children, Glenda, David, Monte, Pamela and Cynthia. Barbara had executed a will in 2004 and two codicils in 2010 in which she devised her estate equally to all five. Glenda and David were nominated as personal representative. At the time of Barbara's death, she held two financial accounts in which Glenda was either a joint owner or payable on death beneficiary. Glenda took possession of the money in these two accounts shortly after her mother died. The decedent also had an annuity contract, which named Glenda, Monte and David as beneficiaries. Glenda distributed Monte's and David's shares to them. Given that these three assets had beneficiary designations, Glenda had not listed them as estate assets in the inventory, and neither Pamela nor Cynthia received any distribution.

Barbara's will and codicils were admitted to probate without objection. However, Pamela and Cynthia challenged the inventory and filed a motion to compel Glenda to return to the estate for distribution the value of the sums in the two financial accounts. Pamela and Cynthia argued at the hearing that because it was the decedent's intent to distribute to her five children equally, that Glenda had unduly influenced her mother and had breached her duty as a fiduciary. They alleged she misappropriated the funds in the beneficiary designation accounts for her own benefit, against their mother's wishes.

After the hearing, the trial court granted the motion requiring Glenda to return the value of the assets to the probate. Further, the court revoked the letters of guardianship for Glenda and David and appointed Pamela.

In its opinion, the First District reviewed the evidence provided at the hearing. The key evidence relied upon by the trial court was an undated and unsigned "spreadsheet," purported to have been prepared by Glenda at Barbara's request, a year prior to Barbara's death in 2011. The codicils did not reference the spreadsheet. This spreadsheet listed Barbara's assets, including the accounts at issue, their estimated values and a "to do list" for actions to be taken concerning the assets. Only the first action on the list, removing Pamela and Cynthia from the annuity, was accomplished. The testimony at trial was consistent that Barbara's intent was to distribute such property equally and that until her death, Barbara had good mental acuity and actively participated in her own finances.

The court cited law referencing the presumption and burden of proof in showing undue influence. Undue influence is presumed when there was a confidential relationship with the testator, such person was active in procuring the execution of the estate plan documents and as a result, that person became a substantial beneficiary. The active procurement element involves whether the beneficiary selected or instructed the drafting attorney, was present during meetings concerning the estate plan, actively secured the witnesses or was involved in the safekeeping of the documents.

The court noted that the evidence showed Glenda had a close relationship with her mother, as did her siblings, all of whom participated in her care before she died. The evidence revealed that Glenda was not present when the beneficiary designations were made and that she did not give her mother instructions on how they should be titled.

Additionally, the First District noted that the trial court was wrong to the extent it relied on the spreadsheet, because it was not referenced as a separate writing in the codicils and did not meet the requirements of Section 732.515, F.S.

The First District noted that it would not overturn a trial court's decision in a probate matter unless the court either misapprehended the evidence or misconceived the law. Here the First District found that Pamela and Cynthia had not met their burden of proof for showing either undue influence or a breach of fiduciary, and reversed the trial court's order.

Conflict in statute of limitations for creditor claims

Golden v. Jones, No. 4D12-2094 (4th DCA 2013)

This case is important because it establishes and certifies conflict with the first and second districts, with respect to the applicable statute of limitations for reasonably ascertainable creditors in a probate action. In other words, the districts are in conflict with respect to the interpretation of F.S. 733.702 and 733.710 as to reasonably ascertainable creditors.

In this case, Jones passed away in February 2007. In June 2007, the estate published a notice to creditors, and the three-month creditor period

ended in September 2007. At the time of his death, Jones was divorced but allegedly owed money to his former wife pursuant to a marital settlement agreement dating back to 2002. The estate did not serve the 30-day notice to the former wife, apparently because it was believed she was not a reasonably ascertainable creditor. The former wife, through her guardian, filed a statement of claim in January 2009, within the two-year limitation under Section 733.710, but outside the three-month creditor period under Section 733.702. The two issues presented were whether the former wife was a known or reasonably ascertainable creditor, and if so, whether the statute of limitations for filing a timely claim was two years after death, or in the alternative, three months after the date of first publication of notice to creditors.

The First District remanded the case to the trial court to determine whether the former wife was a known or reasonably ascertainable creditor. The First District held that if the trial court found that she was, then the limitation period would either be 30 days after notice (which she never received) or within two years of the death. Since the former wife had not received a 30-day notice, then the statement of claim would be timely, given that it was filed within two years of the date of death.

The First District certified conflict with *Lubee v. Adams*, 77 So. 3d. 882 (2nd DCA, 2012), and *Morgenthau v. Estate of Andzel*, 26 So. 3rd 628 (1st DCA, 2009). The take-home message here is that until the conflict is resolved, the question of whether a statement of claim is timely made depends on the district in which the case is filed. In an abundance of caution, the personal representative in cases filed outside the First and Second District Courts of Appeal should serve questionable creditors with notice to start the clock running. Otherwise, creditors of decedents who have not been directly served with a notice to creditors will have up to two years from the date of death to file a claim in the estate.

Trustee duties, breach of fiduciary duty and cautionary tale

McCormick v. Cox, Case No. 3D12-1289 (3rd DCA, 2013)

This case arises from an appeal of a final judgment finding breach of fiduciary duty and an order removing the trustee and assessing damages against the appellants (trustee, lawyers and law firm) for excessive fees and under-evaluation of the assets, in the amount of $5.3 million. The trial lasted eight days. On appeal, the Third District used the abuse of discretion standard.

The facts reflect that appellant/lawyer Arthur F. McCormick drafted a will and living trust for Robert Cox, who died in January 2001. Under the terms of the trust agreement, the assets were split into two trusts: 1) Robert W. Cox Family Trust, in which Cox's surviving wife was the lifetime beneficiary; and 2) Robert W. Cox Bypass Trust, in which his four children were equal beneficiaries. Significantly, both of the trusts owned a single asset consisting of 100 acres of property in Massachusetts, which was operating as a nine-hole golf course at the time Cox died. McCormick was nominated and acted as trustee of both trusts. He, his son and their law firm provided legal services to the trust as well. Following Cox's death, McCormick acted in capacity as both trustee and attorney with respect to the administration of the two trusts.

In 2006, the appellant beneficiaries filed a lawsuit against McCormick, his son and their law firm: a) seeking a temporary injunction prohibiting them from making payments or encumbering assets; b) requesting a statutory review of trustee's fees; c) requesting a review of attorney's fees; d) objecting to a distribution to Cox's wife; e) alleging breach of fiduciary duty and seeking a surcharge against the trustee and the law firm; f) objecting to the 2005 accounting; and (g) seeking the removal of the trustee.

Evidence at trial reflected that sometime in 2002, an expert appraisal was done reflecting that the value of the real property operating as a golf course was $2.5 million at the date of death. This was the amount used on the federal estate tax return filed on behalf of the decedent. The report also concluded that the "highest and best use of the subject property would be for residential development to the maximum intensity that the physical characteristics of the property would allow."

Evidence presented at trial showed that the property would have had much higher value on the date of death if the property was used for residential development as opposed to a golf course. The appellees' expert testified that it was a breach of duty to undervalue property for federal estate tax purposes. Further, the evidence at trial reflected that the appellants did not pursue an evaluation of the property for residential development in order to maximize its value.

At some point during the relevant years of 2001 to 2005, the town of Lynnfield, Massachussetts, where the property was located, made an offer to purchase the property for $12 million. Subsequent to this offer, but before the ultimate sale to the town in this amount, the evidence showed that a real estate broker and trustee McCormick were reviewing offers to buy the property, ranging from $10,868,400 to $15 million. The appellees' expert testified at trial that the property value at the time of death was $8 million versus the $2.5 million value determined by the trustee.

In 2005, the attorney/trustee McCormick sold the property to the town buyer for $12 million. Thereafter, purportedly to save on capital gains taxes, McCormick structured an in-kind exchange, under Section 1031 of the IRS, by buying a qualifying shopping center with some of the proceeds received from the sale of the property to the town. The beneficiaries agreed to the plan. However, and herein lies the crux of the alleged breach, in structuring the exchange to defer capital gains taxes, the trust, exclusive of trustee's fees, incurred $2,146,812 in expenses. The amount claimed for trustee's fees amounted to $1.2 million, which McCormick

Case law
from preceding page

had apparently paid himself without notice to the beneficiaries. The appellees/beneficiaries also sought a refund (disgorgement) of attorney's fees in the amount of $74,327.62 paid by trustee McCormick to his law firm. The trial court sided with the appellees.

In affirming the trial court in all of the rulings, the Third District noted that the appellees had introduced competent evidence to show the appellants had breached their duty by undervaluing the property for federal estate tax purposes. Of significance to the court was the fact that McCormick had not amended the federal estate tax returns to reflect the true value, given the ultimate sale for $12 million. The court reasoned that the claimed expenses of $2,146,812 for the capital gains restructure would not have been needed had the valuation been correct in the first place.

The Third District affirmed that failing to provide annual accountings and failure to post bond constituted a breach of fiduciary duties. The court also affirmed the finding that unilateral payment by a trustee to himself of seven figures from the trust's assets without disclosing entitlement of the amount to the beneficiaries constituted a flagrant violation of duty. The court found that the combination of $1.2 million to the trustee's fees and the costs associated with the buying of the shopping center severely depleted the assets of the trust.

The court also found that the trial court had not abused its discretion in removing the trustee.

This case reminds us of the risks of serving as trustee and attorney for the same trust. It also reminds us to be sure our trustee clients comply with the accounting requirements set forth in the trust or law, or to obtain written waivers from the beneficiaries. Risk can also be reduced by providing accurate assessment of costs and fees associated with a specific legal plan. The beneficiaries were caught by surprise at the significantly high cost and expenses associated with the capital gains reduction strategy (which in retrospect is understandable). Also, a lawyer must be cognizant of the toll that prejudgment interest can take on a judgment. Here the awarded judgment included unnecessary expenses, unnecessary fees and prejudgment interest adding up to $5.3 million.

Guardianship law

Krumholz v. Guardianship of H.K., 114 So. 3d. 341 (3rd District, 2013)

This case provides interpretation of Section 744.311(6)(c). Hannah Krumholz, the purported incapacitated person, appealed the trial court's ruling that found incapacity, ordered the appointment of temporary guardians and ordered the examining committee to make recommendations regarding the alleged incapacity. Thereafter, an eight-hour hearing was held, and the trial court found that Krumholz was totally incapacitated and appointed a professional plenary guardian. The trial court's order stated that Krumholz's incapacities were "imminent danger that the physical or mental health or safety will be seriously impaired, and that she suffered from memory loss and amnestic cognitive impairment and delusions." The Third District held that this order did not contain sufficient findings of fact, required by Section 744.311(6)(c), which states:

> In determining that a person is totally incapacitated, the order must contain findings of fact demonstrating that the individual is totally without capacity to care for herself or himself or her or his property.

The court held that the requirement was not met by the judge and remanded the case back to the trial court for further proceedings, in accordance with the order.

Fair Hearings Reported

by Diana Coen Zolner

***Petitioner v. Respondent (DCF Sumter)*, Appeal No. 11F-00619 (May 6, 2011)**

The petitioner was admitted to the nursing facility on Aug. 21, 2009, and remained a resident of the facility as of the hearing date. On Jan. 27, 2010, the petitioner admittedly gave a gift of $52,000 in liquid assets to her son. The petitioner then applied for Medicaid Institutional Care Program (ICP) benefits with the knowledge that the gift could result in an ineligibility period based on an improper transfer of assets.

As a result of the gift, the respondent denied the petitioner's request for ICP benefits based on excess counted assets and imposed a 10.4-month asset transfer penalty period beginning Feb. 1, 2010, through Dec. 12, 2010. On Dec. 1, 2010, the respondent received documentation from the petitioner that $32,000 of the total $52,000 transferred was returned in increments over the period of February 2010 to July 2010. Each of the returned amounts was used by the petitioner in that same month to pay her outstanding debt to the nursing facility.

However, the remaining $20,000 of the initial gift was never returned to the petitioner. Consequently, the respondent divided this amount by a $5,000 monthly nursing home rate to determine a four-month period of ICP ineligibility due to the improper transfer of assets. Since the petitioner received the last portion of repayment of the gift in July 2010, the respondent began the penalty period in July 2010 and determined that it would

continue through October 2010.

The petitioner appealed the decision and continued to seek ICP benefits for July 2010 through October 2010. In dispute was the month in which the transfer penalty should begin. The petitioner argued that the provision in the SSA's Program Operations Manual (POMS) that addresses increases in the value of resources should apply in determining when the returned assets counted as being an available resource. In essence, she argued that the return of assets was an increase in the value of her resources and that because she spent down those increased assets in the same month they were received, the increased assets should not have a countable value.

The hearing officer found that the return of transferred assets does not meet the definition of an increase in resources, because all of the examples of increased resources in the POMS were situations where an individual gains something he or she never had before, such as an inheritance, and not a return of his or her own resources. The hearing officer further found that to shorten the penalty period in this instance is inconsistent with federal law, which provides a penalty for an individual who transfers resources that could be used to pay nursing facility costs, thereby transferring the expense of the nursing facility care to the taxpayers through Medicaid. Using the petitioner's argument, an individual could transfer $40,000 in resources. This would result in an eight-month penalty period. If $20,000 were returned immediately, the individual could use those funds to pay for four months of nursing home care. The penalty would then be reduced to four months—the same four months the individual was able to pay for with partial return of the assets, resulting in no penalty for the remaining uncompensated transfer of $20,000. The hearing officer concluded that such a result is inconsistent with the law and direction provided by CMS and the State Medicaid Manual, which states, "When a penalty has been assessed and payment for services denied, a return of the assets requires a retroactive adjustment, including erasure of the penalty, back to the beginning of the penalty period." Once the penalty period has been erased, if appropriate, a new penalty may be imposed for the proper time period. The petitioner's appeal was denied.

***Petitioner v. Respondent (AHCA Polk),* Appeal No. 11F-08312 (March 5, 2012)**

The petitioner previously received Medicaid Managed Care health benefits. During that time and continuing, she suffered from severe pain attributed to her sacroiliac joint, which required use of a cane or a motorized chair for mobility. She had been prescribed various treatments to relieve her severe pain, including joint injections, prescription medications, physical therapy and chiropractic services, all of which proved unsuccessful. Her treating physician submitted a prior-authorization request on her behalf for a surgical procedure to help alleviate her pain.

The respondent determined that, although acknowledging the petitioner was in severe pain, the surgery prescribed by her treating physician: 1) was not supported by the medical community; 2) resulted in little empirical evidence that it would alleviate her pain; and 3) had no repeated proven benefit. As a result, the respondent could not authorize the procedure as medically necessary. In support of this determination, the respondent's medical expert explained that the denial was the result of a review of the generally accepted medical standards, which designate the petitioner's requested surgery as experimental and investigational. The expert further explained that alternate treatments with demonstrated effectiveness, such as chiropractic services, physical therapy and optimal medication management, were available and should be utilized over an extended period rather than an experimental and investigational form of treatment.

The petitioner argued that she tried all of these alternate forms of treatment and that none were successful. She further argued that her pain was worsening and that she would do anything to stop it. In response, the respondent argued that treatment unsupported by the medical community that has no repeated benefit and is experimental and investigational cannot be authorized as medically necessary.

The burden of proof was assigned to the petitioner, and the burden of proof was determined to be by a preponderance of the evidence. The administrative law judge based his decision on the following authority:

1) Florida Statute § 409.912, which provides that the respondent "... shall purchase goods and services for Medicaid recipients in the most cost-effective manner consistent with the delivery of quality medical care";
2) Title 42 Part 438 of the Code of Federal Regulations (C.F.R.), which sets forth the federal requirements for Managed Care Medicaid, allows the respondent to place appropriate limitations on services based on the criteria of medical necessity and/or utilization of control procedures (under § 438.210(a)(2)(iii)); and
3) Florida Administrative Code Rule 59G-1.010(166), which defines medical necessity and sets forth the criteria for such services, one of which is that the treatment must "[b]e consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational." Furthermore, this rule states "[t]he fact that a provider has prescribed, recommended, or approved medical ... care goods or services does not, in itself, make such care, goods or services medically necessary ..."

Based on the hearing evidence and the above authorities, the administrative law judge concluded that the requested surgical procedure was not consistent with generally accepted professional medical standards, it

was experimental and investigational, and although the petitioner is in severe pain, the requirements of the medically necessary rule cannot be circumvented, and each component must be satisfied. Therefore, the petitioner's appeal was denied.

***Petitioner v. Respondent (DCF Escambia),* Appeal No. 11F-01016 (May 11, 2011)**

The petitioner jointly owned non-income-producing property with her daughter, the equity value of which was at least $14,000. The findings of fact showed the property was listed for sale with a real estate broker for fair market value for the period of April 17, through June 9, 2010, and again on Oct. 29 through Dec. 17, 2010. During the period of June 10, 2010, through Oct. 28, 2010, the contract listing the property had expired. However, the petitioner's representative argued that the existence of a "for sale" sign on the property for the periods of time when the property was not listed with a real estate broker was proof that the property was for sale. The burden of proof was on the petitioner.

The respondent determined that the listing agreements for April through June and October through December showed the petitioner had an intent to sell the property and that because there was an intent to sell, the property met a resource exclusion and the value of the property was not counted toward the ICP Medicaid resource limit of $2,000. The respondent also determined, however, that during the period of June 10, 2010, through Oct. 28, 2010, when the listing agreement had expired and was not yet renewed, the petitioner no longer intended to sell the property. Consequently, the respondent determined that the petitioner was ineligible for ICP Medicaid benefits during this period due to excess assets since the property no longer met the resource exclusion.

The administrative law judge concluded that Federal Regulations 20 C.F.R. §§ 416.1201 (Resources; general) and 416.1245 (Reasonable efforts to sell) set forth that reasonable efforts to sell property consists of taking all necessary steps to sell it in the geographic area covered by the media serving the area in which the property is located, unless the owner has good cause for not taking these steps. More specifically, reasonable effort to sell means an attempt to sell the property by listing it with a real estate agent; or by undertaking to sell it on his or her own by advertising the property for sale in at least one of the appropriate media, placing a "for sale" sign on the property, conducting "open houses" or otherwise showing the property to interested parties on a regular basis and an attempt of any other appropriate methods of sale. Verification of a petitioner's effort to sell the property at fair market value is obtained through documentation such as a listing agreement with a real estate broker or a listing in a local newspaper.

The administrative law judge rejected the petitioner's argument that the existence of a "for sale" sign on the property for the periods of time that it was not listed with a real estate broker was proof that the property was for sale. There was no evidence that the property was listed for sale in any local news media or that there were any other proactive efforts to sell the property once the listing agreement expired. The petitioner's presentation of a "Sign/Service Request" requesting a "for sale" sign be installed in April 2010 and taken down in December 2010 was insufficient and unreliable to conclude that a "for sale" sign was actually placed on the property. Furthermore, there was no evidence that the petitioner conducted "open houses," that the property was shown to interested parties on a continuous basis or that any other appropriate methods of sale (as required by the above federal regulations) occurred during the periods of time that the property was not listed with a real estate broker. As a result, the hearing officer concluded that there was no "good faith" effort to sell the property from at least June 10, 2010, through Oct. 28, 2010, and that the department acted correctly to deny ICP benefits during the months of June through December 2010 for excess resources.

Diana Coen Zolner *graduated from Touro College, Jacob D. Fuchsburg Law Center in May 2001. After graduating law school, she worked as a prosecutor for the District Attorney, Suffolk County, New York, from 2001 to 2002. She then transitioned to private practice as an associate attorney, practicing in the areas of elder law, wills, trusts and estates from 2002 to 2008. In September 2008, she moved to Florida to enjoy the sunshine and began working as an associate attorney and continued to practice in the areas of wills, trusts and estates. She is currently employed as an associate attorney with Brandon Family Law Center LLC in Brandon, Fla.*

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