The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Vol. XVII, No. 1
Spring 2009

www.eldersection.org

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

The deadline for the SPRING ISSUE is May 15, 2009. 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 Patricia I. "Tish" Taylor, Esquire, *pit@mcsumm.com*, or call Arlee Colman at 1-800-342-8060, ext. 5625, for additional information.

CONTENTS:

COVER ART: The cover art was taken from a painting by the section's program administrator, Arlee Colman. See more of Arlee's work at www.artbyarlee.com.

Members move the section forward

Linda R. Chamberlain

Message from the chair

Happy New Year! What a difference a few months can make in a vibrant, active organization. We are fortunate to have many committed, active members moving our section forward throughout the year. This message is dedicated to thanking each and every member for your membership, contribution and participation. I want to personally acknowledge and thank those that have taken time away from their practices to further the mission of our organization. This is not an exhaustive list of accomplishments; however, it will provide insight into how your organization and its members are working for you.

Congratulations and thank you to **Tish Taylor**, **Arlee Colman**, **Susan Trainor, Lynn Brady** and **Len Mondschein** for a new and improved *The Elder Law Advocate*. Collectively they have done an outstanding job of putting together helpful and educational information to assist each of us in our daily endeavors as elder law attorneys. We appreciate the beautiful cover artwork, created by our own section administrator, **Arlee Colman**.

This fall in Fort Lauderdale, we sponsored the Elder Law Update organized by Chair **Susan King**. This informative meeting focused on representing the developmentally disabled and tier assignment appeals. The Department of Elder Affairs presented information regarding levels of care and access to services. An audiotape of the presentation is available to order on *www.legalspan.com*.

During our October Executive Council meeting, the Special Needs Trust Committee, led by **David Lillesand** and **Alice Reiter Feld**, added a new subcommittee focused on developmental disabilities, with **Gregory Glen** as chair. The committee is working with APD to provide training to attorneys willing to provide pro bono services to those who have suffered a reduction in services.

The Executive Council voted to allocate funds for the Elder Law Section to secure a lobbyist. **Chris Likens**, **Ellen Morris** and **Jana McConnaughhay** are researching and developing a position description for our section's lobbyist.

Ellen Morris, legislative chair, and **Twyla Sketchley** have developed a protocol for the section to follow for all proposed legislation and have created a list of the section's legislative positions. The legislative positions were presented and unanimously approved by the Executive Council. The legislative positions of the section may not be advanced or supported before any public body until they have been reviewed and approved by the Board of Governors. You may review the Elder Law Section's legislative positions approved by the Board of Governors at *www.flabar.org*.

Jana McConnaughhay was appointed by Florida's chief financial officer to participate on the "Safeguard Our Seniors" task force as a representative of the Elder Law Section. The SOS task force was created to review and recommend solutions to better protect Florida seniors against financial fraud, with an immediate focus on annuity fraud. The task force includes senior advocacy, legal, investigative, consumer, regulatory and industry representatives.

In November, **Carolyn Sawyer** and **Erika Dine**, co-chairs of the Abuse and Exploitation Committee, together with our public relations representative with the Public Policy Task Force, **Al Rothstein**, created a dynamic PowerPoint presentation for our members to use when speaking to the community and seniors regarding safeguards to avoid exploitation. This presentation is being used all over the state of Florida by elder law attorneys volunteering to provide this public service.

January 2009 brought us a magnificent Certification Review course, with more than 80 attendees. **Babette Bach**, chair-elect, met with the speakers to coordinate materials and topics to ensure a solid review as well as excellent written materials for each of the areas the certification exam covers.

February brought our first Elder Law Section "webcast" and seminar focused on litigation. Led by **Twyla Sketchley** and **Steven Quinnell**, this seminar was well received. We look forward to it becoming an annual addition to our CLE courses.

A Litigation Committee is being established, chaired by **Gerald "Jay" Hemness**. Look for more information to follow as the committee is developed and goals are established.

The first Thursday of every month now brings you the opportunity to participate in a free telephonic conference during which experienced elder law attorneys speak on a specific elder law topic, allowing time for questions and answers. The Mentor Committee, co-chaired by **Angela Warren** and **Carolyn Sawyer**, has put together topics necessary for anyone considering adding elder law to his or her areas of practice.

Charlie Robinson and **Marjorie Wolasky**, our RPPTL liaisons, have kept us involved and up to date on all practice areas we share with the RPPTL Section. We currently have committee members actively involved with the RPPTL's Guardianship Committee – **Twyla Sketchley**, Power of Attorney Committee – **Robert Morgan** and Creditor's Rights

continued, next page

Committee – **Marjorie Wolasky**.

The Public Policy Task Force, with co-chairs **Victoria Heuler** and **Chris Likens**, has worked diligently throughout the year. Please take the time to read the task force updates, available at *www.afela.org*.

This year brought the addition of an annual Sponsorship program. Please join me in thanking our Gold Sponsor, **The Guardian Pooled Trust**, and our Silver Sponsor, **EPIC Elder Planning Income Concepts LLC**, for their support throughout the year.

Congratulations to Elder Law Section member **Russell E. Carlisle**, recipient of the 2009 Tobias Simon Pro Bono Service Award. This award is intended to encourage and recognize extraordinary contributions by Florida lawyers in making legal services available to persons who otherwise could not afford them, and to focus public awareness on the substantial voluntary services rendered by Florida lawyers in this area. Carlisle is a former chair of The Florida Bar Commission on Elder Law and its Elder Law Certification Committee. He has been board certified in elder law since 1998. In more than 50 years as an attorney, Carlisle has been dedicated to pro bono legal service to the poor, both in its funding and in leading others to render such service.

Congratulations to four additional members of the Elder Law Section for receiving the Florida Bar Pro Bono Service Awards: **Twyla Sketchley**, **John K. Kendron**, **Shannon M. Miller** and **Jean M. Finks.** This award is intended to encourage lawyers to volunteer free legal services to the poor by recognizing those who make public service commitments and to raise public awareness of the substantial volunteer services provided by Florida lawyers to those who cannot afford legal fees.

As you review this edition of *The Advocate*, you may be inspired to become more involved and to participate in a standing committee or a special project. There are many more participants than I can mention in this article that help to further the Elder Law Section's mission. We need more active participation and look forward to your volunteering and commitment to our Elder Law Section. Please attend the next Executive Council meeting on Friday, June 26, 2009, at 2:00 p.m.

The Florida Bar and LegalSpan: Bringing online CLE to attorneys

Since August 2000, The Florida Bar has been offering quality CLE programs as online, on-demand seminars through a partnership with LegalSpan. The popularity of this type of delivery method has been growing exponentially ever since.

With increasingly hectic schedules and the rising cost of travel, attorneys are turning to the Internet to meet their educational needs. Online CLE programs offer the flexibility of viewing programs at your own pace, anytime, anywhere.

Whether a first-time or net-savvy user, Florida attorneys are finding that online CLE programs are time saving and easy to use:

> "I am very pleased to be able to have these seminars made available to members of The Florida Bar. With the format you have provided, I feel that I am at the seminar, and I have the materials which I can download and save for future reference. Thanks for a great product well presented and technically friendly!" — *Andrew, Live Oak*

"I found this online seminar to be convenient, understandable and user-friendly. I will use this method more in the future. Thank you for this informational and convenient seminar."
— *Gerald, West Palm Beach*

"Excellent resource. A very convenient way to engage in continuing education that has high-quality speakers and content." — *Bruce, Miami Beach*

"This is the greatest thing ever invented. I can now complete my CLE requirements at home. Everything was so easy. Thank you." — *Sheila, Largo*

"Terrific site and material. It makes it much easier to get CLE credit, and makes the materials much more useful since they can be viewed multiple times." — *Thomas, Brandon*

With the explosion of MP3 players and iPods in the market, LegalSpan developed the technology to enable The Florida Bar to introduce downloadable audio versions of its CLE programs. Since its inception in March 2006, the downloadable versions of The Florida Bar's CLE programs have become as popular a method of obtaining education as online CLE. "We want to foster greater collaboration among members and a more vibrant educational dialogue. Attorneys learn best at their own pace, in their own way, in a comfortable environment. Our online options give members educational content when and where they want it," says Programs Division Director Terry Hill.

The Florida Bar's catalog of online and downloadable programs is robust, offering more than 200 programs, covering all practice areas. Attorneys are able to enjoy the time and money savings, without sacrificing content, by participating in these types of programs. The complete catalog of Florida Bar CLE courses can be viewed at *www.floridabar.org/cle* by accessing the LegalSpan link under Online Courses.

the Guardian POOLED TRUST

Shielding the Financial Future of the Disabled

Looking for Medicaid options?
WE CAN HELP.

The Guardian Pooled Trust can protect the assets of a disabled person, helping them financially qualify for **SSI** and **Medicaid**.

- Immediate response to distribution requests via mail, e-mail or fax.
- Timely accountings.
- Direct payment to caregivers or to third parties.
- Conservative investment strategy.
- Board Certified Elder Law Attorney as Co-Trustee.

Guardian Pooled Trust
901 Chestnut Street, Suite B
Clearwater, FL 33756

(727) 443-7898
Toll Free (800) 669-2499
www.guardianpooledtrust.org

National Non-profit for Americans with Disabilities, Inc.
A 501(c)(3) Non-Profit Corporation

Twenty-two Florida Lawyers receive pro bono awards

The Florida Bar recognized 22 lawyers for their work on behalf of poor and indigent clients at a Jan. 29 ceremony at the Florida Supreme Court.

In 2007-2008, Florida lawyers provided 1,489,099 hours of pro bono services to those in need and $5,288,466 to legal aid organizations.

The Florida Bar President's Pro Bono Service Award was established in 1981. It is intended to encourage lawyers to volunteer free legal services to the poor by recognizing those who make public service commitments and to raise public awareness of the substantial volunteer services provided by Florida lawyers to those who cannot afford legal fees. President John G. "Jay" White III of West Palm Beach presented the 2009 awards.

The award recognizes pro bono service in each of Florida's 20 judicial circuits and one Florida Bar member practicing outside the state of Florida. It is presented annually in conjunction with the Tobias Simon Pro Bono Service Award, which is given by the chief justice of the Florida Supreme Court. Awards recognizing pro bono contributions were also presented for Distinguished Judicial Service, Law Firm Commendation, Voluntary Bar Association and Young Lawyer during the Jan. 29 ceremony.

From left to right:
John Justin Kendron, Jean M. Finks, Russell E. Carlisle, Twyla Lawrene Sketchley and Shannon McKenzie Miller at the Florida Supreme Court

Four Elder Law Section Members receive Pro Bono Service Awards

Twyla Lawrene Sketchley
Second Judicial Circuit (Franklin, Gadsden, Jefferson, Leon, Liberty and Wakulla) Tallahassee

Twyla Lawrene Sketchley is the founding and managing attorney of the Sketchley Law Firm PA in Tallahassee. She focuses on the areas of elder law, probate and trust, special needs planning, public benefit eligibility and guardianship. Sketchley provides pro bono legal work through Legal Services of North Florida and the Office of Public Guardian Inc. and through her office privately. She pays monthly visits to a local elderly center to offer free legal services and advice. She also assists in creating powers of attorney, wills and advance directives, and in handling custody issues, probate, homestead, veteran's benefits, Medicaid and Medicare through the Legal Services of North Florida. Sketchley has taken on numerous pro bono guardianship cases, which are distinct from other cases because they are often ongoing, sometimes for many years.

John Justin Kendron
Third Judicial Circuit (Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee and Taylor) Lake City

John Justin Kendron is a partner in the law firm of Robinson Kennon & Kendron PA in Lake City. His principal areas of focus are trusts and estates, probate, wills and estate planning and guardianship. Kendron has primarily done his pro bono work by participating with Three Rivers Legal Services. Beginning in 2008, he started giving probate training seminars there. He has also conducted several information sessions on estate planning to seniors at Lake City's Lifestyle Enrichment Center.

Shannon McKenzie Miller
Eighth Judicial Circuit (Alachua, Baker, Bradford, Gilchrist, Levy and Union) Gainesville

Shannon McKenzie Miller is a partner in Miller & Brasington law firm in Gainesville and a resident mediator/arbitrator at The Resolution Center of North Central Florida. Miller has worked to help many people through her pro bono assistance. Many of the cases she has handled are serious in nature, including Medicaid qualification, guardianship and representing severely disabled people who have been physically abused by parents. She has taken on estate manners and has a special interest in the elderly and defending their rights. She has lectured on Medicaid, advance directives, guardianship, homestead and estate planning to organizations such as the Alzheimer's Association, hospice and the National Association of Mental Illness.

Jean M. Finks
Twentieth Judicial Circuit (Charlotte, Collier, Glades, Hendry and Lee) Punta Gorda

Jean M. Finks is a sole practitioner in Punta Gorda. Her principal areas of practice are guardianship, estate planning, probate and residential real estate transactions. Early in her career she accepted a few legal aid cases, but most of her pro bono clients have called upon her directly, and she has rarely turned them down. Presently, nearly 40 percent of her guardianship cases are pro bono. Many of these cases involve impoverished relatives (grandparents, siblings, aunts, etc.) who are guardians over their loved ones ranging in ages from infants to teenagers to mentally challenged adults. Many of the wards' parents are imprisoned, drug-addicted or deceased. Her assistance has been essential in getting benefits for clients including military pensions and health benefits. She also contributes her legal expertise to local Law Day activities, at mall answer desks and radio call-in shows and to other programs for public schools and adult caregivers.

Russell E. Carlisle receives highest statewide pro bono award

Russell E. Carlisle of Fort Lauderdale has been selected as the recipient of the 2009 Tobias Simon Pro Bono Service Award. The award was presented by Chief Justice Peggy A. Quince at a Jan. 29 ceremony at the Florida Supreme Court in Tallahassee.

Florida Chief Justice Peggy A. Quince congratulates Russell E. Carlisle, recipient of the 2009 Tobias Simon Pro Bono Service Award.

The Tobias Simon Pro Bono Service Award commemorates Miami civil rights lawyer Tobias Simon. Simon was well known throughout Florida and beyond as a tireless civil rights attorney, a crusader for prison reform and an appellate authority. He practiced law for 30 years and counted Martin Luther King, Jr., among his clients. Simon died of cancer in 1982 at the age of 52. The award is intended to encourage and recognize extraordinary contributions by Florida lawyers in making legal services available to persons who otherwise could not afford them, and to focus public awareness on the substantial voluntary services rendered by Florida lawyers in this area.

Carlisle is a former chair of The Florida Bar Commission on Elder Law and its Elder Law Certification Committee. He has been board certified in elder law since 1998. In his more than 50 years as an attorney, Carlisle has been dedicated to pro bono legal service to the poor, both in its funding and in leading others to render such service.

Carlisle was founding president of the Legal Aid Service of Broward County in 1975. The following year he joined the board of directors of Florida Legal Services. As vice president of Florida Legal Services, he briefed and argued the first petition for Interest on Trust Accounts (IOTA) before the Florida Supreme Court. Carlisle became president of The Florida Bar Foundation in 1979 and devoted the next two years to obtaining the tax and regulatory approvals for IOTA. Carlisle and others took the program to other U.S. jurisdictions, and it is now available in all 50 states, the District of Columbia and the U.S. Virgin Islands. It is the second largest provider of funds for legal services to the poor in the United States.

In 1981, Carlisle was elected president of the Broward County Bar Association, where he established its pro bono services program, Broward Lawyers Care, which now has 1,250 members. Through Broward Lawyers Care, Carlisle and others provided services ranging from legal asylum representation for Haitian refugees from the Duvalier regime to assistance with guardianship and elder law matters. Carlisle received The Florida Bar President's Pro Bono Award in 1982 and again in 2008.

In 1989, Carlisle chaired The Florida Bar Commission on the Elderly. This led to the establishment of a Department of Elder Affairs by the Florida Legislature. Carlisle was the founding president of the Academy of Florida Elder Law Attorneys and has been active with the National Academy of Elder Law Attorneys in both Florida and New Hampshire since 1993. In 2004, he co-authored an *amicus curiae* brief in the Florida Supreme Court, *Bush v. Schiavo*, on behalf of The Florida Bar Elder Law Section, the Academy of Florida Elder Law Attorneys and the National Academy of Elder Law Attorneys, successfully advocating the position that the actions of the governor and the Florida Legislature attempting to overrule the court decisions allowing removal of Terry Schiavo's life support violated the separation of powers provisions of the Florida Constitution.

The Tobias Simon award was created in 1982 and is believed to be the first of its kind in the country conferring recognition by a state's highest court on a private lawyer for voluntary, free legal services to the poor. A permanent plaque listing the names of all award recipients hangs in the lawyers' lounge of the Florida Supreme Court Building in Tallahassee.

Russell E. Carlisle makes comments regarding the Tobias Simon Pro Bono Service Award at the Florida Supreme Court.

Committees keep you current on practice issues

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.

All section members are invited to join one or more committees. 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.

SUBSTANTIVE COMMITTEES

Exploitation & Abuse
Carolyn H. Sawyer, Orlando
407/354-0888
chsawyer1@aol.com

Erika Dine, Sarasota
941/365-2304
edine@boyerjackson.com

Estate Planning & Advance Directives
Stephen Kotler, Naples
239/435-1533
skotler@wga-law.com

Marjorie Wolasky, Miami
305/670-7005
mwolasky@wolasky.com

Creditors' Rights, Subcommittee of Estate Planning
Kara Evans, Tampa
813/926-6517
evanskeene@aol.com

Guardianship
Beth Prather, Ft. Myers
239/939-4888
bethp@osterhoutmckinney.com

Carolyn Landon, West Palm Beach
561/805-9800
c-landon@att.net

Ethics
Steven Lee Rachin, Tallahassee
850/386-8833
stevenrachinpa@earthlink.net

Legislative
Ellen S. Morris, Boca Raton
561/750-4069
emorris@elderlawassociates.com

Litigation
Gerald L. Hemness, Jr., Brandon
813/661-5297
geraldhemness@tampabay.rr.com

Death Care Industry
Philip M. Weinstein, Tamarac
954/899-1551
pmweinstein@msn.com

Medicaid & Government Benefits
Robert Morgan, Jacksonville
904/268-7227
rmorgan@flfirm.com

John S. Clardy III, Crystal River
352/795-2946
clardy@tampabay.rr.com

Power of Attorney, Subcommittee of Medicaid
Robert Morgan

Special Needs Trust
David J. Lillesand, Miami
305/670-6999
lillesand@bellsouth.net

Membership
Travis Finchum, Clearwater
727/443-7898
travis@khsfllp.com

Unlicensed Practice of Law
April Hill, St. Petersburg
727/343-8959
adh@hilllawgroup.com

ADMINISTRATIVE COMMITTEES

CLE
Jacqueline Schneider, N. Miami Beach
305/919-7730
floridaelderlaw@bellsouth.net

Newsletter
Patricia Taylor, Stuart
772/286-1700
pit@mcsumm.com

Susan Trainor, Editor
850/878-7760
editor@ctf.nu

Mentor
Angela Warren, Pensacola
850/434-7122
awarren@mcelderlaw.com

Carolyn H. Sawyer, Orlando
407/354-0888
chsawyer1@aol.com

Council of Sections Representative
Babette Bach, Sarasota
941/906-1231
babette@sarasotaelderlaw.com

ELS Certification Representative
Beth Prather, Ft. Myers
239/939-4888
bethp@osterhoutmckinney.com

Law School Liaison
Jason White, Tallahassee
850/784-2599
jwhite@mcconnaughhay.com

Website
"Rep" Deloach, Seminole
727/443-7898
rdeloach@dhstc.com

David J. Lillesand, Miami
305/670-6999
lillesand@bellsouth.net

LIAISONS

AFELA
Randy C. Bryan, Oviedo
407/977-8080
randy@hoytbryan.com

FSGA
Joan Nelson Hook, New Port Richey
727/842-1001
jnh@elderlawcenter.com

RPPTL
Charles F. Robinson, Clearwater
727/441-4516
charlier@charlie-robinson.com

Marjorie Wolasky, Miami
305/670-7005
mwolasky@wolasky.com

NAELA
Howard Krooks, Boca Raton
561/750-3850
hkrooks@elderlawassociates.com

BOG
Laird A. Lile, Naples
239/649-7778
llile@lairdalile.com

Litigation Committee

Gerald L. Hemness, Jr., chair

Another perspective on Chapter 415 and commercial transactions

This article is submitted on behalf of the Elder Law Section's Abuse, Neglect and Exploitation Committee and Litigation Committee in response to "The appropriate use of F.S. Chapter 415," which appeared in the fall 2008 edition of The Elder Law Advocate.

In the last edition of *The Advocate*, judicial staff attorney Lawrence Scott Kibler expressed concerns about a civil claim he frequently encounters: claims by seniors under Chapter 415 for "ordinary commercial transactions such as the sale of financial products." Given the difficulties inherent to litigating a vulnerable adult's claims and the scarce remedies available, Kibler's position must be rebutted in defense of one of the few statutory tools the Legislature has given us.

Kibler first questioned a plaintiff's ability to invoke Chapter 415 without a "confirmed report" of abuse, neglect or exploitation. Despite acknowledging the Legislature's removal of the report prerequisite from Chapter 415 almost a decade ago, Kibler suggests that the language *"as specified in this chapter"* might preserve an ongoing requirement for "mandatory reporting and use of social services and criminal investigations to protect the elderly." However, most advocates for vulnerable adults know all too well that long before a claim is filed under Chapter 415, our clients have attempted to find remedy via social services and the criminal justice system. Unfortunately, the providers in those venues carry heavy caseloads and a heavier burden of proof, and all too often decline to assist under the mantras "This appears to be a civil matter" or "The evidence won't surpass a reasonable doubt." Chapter 415 provides potential relief free of bureaucratic systems and with a civil claim's far more achievable burden of proof.

Kibler's primary argument against broad use of Chapter 415 stems from his interpretation of *Bohannon v. Shands Teaching Hospital and Clinics, Inc.*, 983 So.2d 717 (Fla. 1st DCA 2008), wherein a plaintiff unsuccessfully argued that inadequate or poorly performed medical services should fall within the protections of Chapter 415. Though the First District did conclude that the facts in *Bohannon* did not support a claim under Chapter 415, Kibler incorrectly describes the decision as limiting Chapter 415. The language of the ruling actually makes it apparent the court intended quite the opposite …

> With respect to the chapter 415 claim, the parties and *amici curiae* have framed two main issues. The plaintiffs/appellants essentially assert that a claim arising from the medical negligence may be prosecuted under chapter 415. The defendant/appellee hospital essentially asserts that an acute care hospital cannot be held liable under chapter 415. We conclude that **neither position is correct** [emphasis added] … we can conceive of scenarios in which acute care hospitals might become "caregivers" of "vulnerable adults" under chapter 415 definitions, and might then "abuse" or "neglect" those vulnerable adults (*Id.* at 720).

Common medical malpractice (well intentioned care that is bungled or ends badly) will not fall within Chapter 415's definition of abuse or neglect. Within the realm of Adult Protective Services, abuse must be "willful," and neglect must involve an unreasonable "omission" or "carelessness." The First District's decision makes it quite clear that when those standards are met, a plaintiff will have a civil claim under Chapter 415, with or without a companion claim under a medical malpractice theory. Perhaps based on misinterpretation, Kibler suggests that just as "Chapter 415 was not intended … to provide an alternate cause of action for medical negligence … . Likewise … Chapter 415 was not intended to provide an alternate cause of action for fraudulent securities transactions." This proposition cannot stand once the *Bohannon* decision is recognized not as limiting, but rather as clarifying, what facts are required to support a claim under Chapter 415. Though the First District, in a medical context, could not find adequate *mens rea* in *Bohannon's* facts to support a claim under Chapter 415's definition of abuse, in a financial context, Kibler's fraudulent transaction is exactly the sort of scenario of which the First District could conceive.

Kibler also takes issue with whether an insurance agent selling a financial product is a "fiduciary," but Chapter 415 only requires that the alleged exploiter stand in a position of trust and confidence or have the ability to discern that the vulnerable adult lacks the capacity to consent. The Legislature's intent to expand this category is clear and should serve as warning to any who contemplate taking advantage of those less able to protect themselves.

Finally, Kibler argues, "… certainly the Legislature did not intend to allow senior citizens to sue every time they unwisely purchase a consumer product." Again, the argument seems to suggest that because some facts won't support a claim under Chapter 415, the protections of the chapter perhaps should not be applicable to any consumer transaction. However, Chapter 415 contains several terms that clearly limit a vulnerable adult's potential claims, terms like "willful," "knowingly" and "by deception or intimidation." The chapter's language, as reinforced by the *Bohannon* decision, clearly provides a cause of action to a senior who, by virtue of age and vulnerability, has been duped to buy something clearly inappropriate to his or her circumstances and tailored to profit the salesperson.

Not every poor purchasing decision by a senior fits within the protections

of Chapter 415, but those decisions that result from predatory and deceptive persons taking advantage of vulnerable persons certainly should.

Unlicensed Practice of Law Committee

April Hill, chair

It should not come as a surprise that the committee has experienced several obstacles. One of note recently is the resistance of people to report UPL. We have heard from a number of attorneys who have seen clear-cut cases of UPL resulting in harm to the clients, but when asked to report, the clients draw back. It appears people do not want to "squeal."

Even so, we continue to seek pathways for the UPL message. This is, in actuality, a consumer protection issue. So we are in the process of preparing statements that, once approved by the section's leadership, can be provided to Medicaid offices, nursing homes, hospitals and others that deal directly with consumers. We meet telephonically the third Tuesday of each month and welcome new members. Please contact April Hill at *adh@hilllawgroup.com* if you would like to join our call.

Legislative Committee

Ellen S. Morris, chair

BATCHELOR

The elder attorney's role during legislative session

by Tom Batchelor, Ph.D., ELS Governmental Consultant

As with recent legislative sessions, the Elder Law Section (ELS) and the Academy of Florida Elder Law Attorneys (AFELA) will be alert to legislation that may affect the lives of Florida's elders and disabled persons and/or influence the practice of elder law. Linda Chamberlain, ELS chair, Ellen Morris, chair of the ELS Legislative Committee, and I and have been monitoring the filing and referral of 2009 legislation for several months. As legislative committees meet to take up and dispose of these bills, I will try to keep the Joint Public Policy Task Force informed of schedules, hearings and actions taken on bills of interest to the ELS and AFELA. The task force will be assessing these bills according to their alignment with the revised policy positions proposed by the ELS Legislative Committee last summer and approved in January by the Board of Governors. (See the Legislative Committee report by Ellen Morris in the fall 2008 issue of *The Advocate*.) I encourage all elder law attorneys to become familiar with these positions. You can view them on The Florida Bar's website (*www.flabar.org*) under Legislative Activity/Legislative Positions.

Having served during three different decades as staff director of a number of committees in the House of Representatives, including the Elder and Long Term Care Committee and the Aging and Human Services Committee, I am aware of both the good and the bad that can make their way through the legislative process. Sometimes laws that are detrimental to the health and welfare of Florida's elderly citizens may be enacted because individuals who could provide crucial information and perspectives have not come forward to help shape public policy. Granted, it is difficult to keep up with the fast-moving 60-day process every spring, even if you live or work in Tallahassee. And maybe the environment seems much too formidable for a concerned person to negotiate to make a difference. But as advocates for the elderly working together with other organizations, we should claim our place at the table. I encourage all ELS and AFELA members to get familiar with the House and Senate websites and to remain alert to legislative actions affecting your clients and your practice (*www.flsenate.gov* and *www.myfloridahouse.gov*).

There are a number of other approaches to keeping up and making a difference. Perhaps the *sine qua non* (for the Latin buffs) is to get to know your district House member and your senator. One thing I have learned over the years is that legislators typically are very solicitous of their constituents and generally eager to hear from those who voted them into public office. Contact your representative and senator by phone or in person to introduce yourself. Visit their legislative office staff members and make them your friends. Sometimes it is easier to get to know your legislators through their staff. Stop by their local offices when they are not in Tallahassee so they can connect a name and a face. Treat the legislators and all staff members with respect and appreciation. Inform them of your areas of expertise and whose interests concern you. Offer your time and expertise to the legislators to help them understand how proposed legislation affects your clients. Provide your legislators a summary of who you are and what you care about, neatly and succinctly summarized on one sheet of paper, if possible. Stay in touch with your legislators, being mindful of their busy schedules, and above all do not become a demanding pest. If your legislator is not receptive, then you have to join with other influential individuals and groups and take other approaches to getting and providing information.

Another way to stay informed and to have your voice heard is to get to know the administrative and professional staff of the legislative committees that handle your issues. As a staff director in the House, I was always cognizant that the office and the desk where I worked belonged to the public. My door was

almost always open. I recognized that crucial information bearing on an issue was often just a person away. I learned early on that, just when I thought I had an issue totally vetted and decided, someone would show up with a new and often important piece of information or a new perspective. I greatly valued information from people I came to trust. Individuals who deliberately lied to me continued to be welcome in my office; I treated them with courtesy, but never trusted their "facts" again. Of course, each committee staff person has his or her unique personality, perception of responsibility, understanding of the House's or Senate's rules of conduct and sometimes the chairperson's "marching orders." From my experience, legislative staff members mostly are dedicated to conducting a thorough, accurate and professional analysis of each bill to be heard. If you have substantive information to illuminate a proposal, they are generally disposed to receiving it. Do not be afraid to offer it. It could be the critical missing piece.

There are a number of good websites to consult to explore some of the most important do's and don'ts when talking with legislators. Simply search on "how to talk with your legislator" to find a wealth of good ideas. A couple of sites I have viewed are Common Cause (*www.democracymatters.org/site/c.lgLUIXOwGnF/b.3842827/*) and League of Women Voters (*www.lwvwi.org/cms/content/view/64/21*).

The focus of the 2009 Legislative Session, as often is the case, will be on the enormous budgetary shortfalls. Without a substantial infusion of federal dollars under the federal stimulus plan, many valuable Florida programs may have to be eliminated or drastically reduced. It will take a bold, coordinated and sustained effort on the part of everyone concerned about the needs of Florida's elderly citizens to prevent damaging cutbacks in crucial programs. I encourage all elder law attorneys to contact their legislators to voice their concerns. In addition, and in some cases as a corollary to the budget issues, a number of substantive bills have been filed. Some bills worth following this session are SB 540/HB 153 establishing in law the concept of a "health care representative," SB 724/HB 141 providing added protections for seniors in annuity sales contracts and SB 260/HB 589 directing the Department of Elder Affairs to establish an Alzheimer's disease education and screening program.

Tom Batchelor, Ph.D., *retired in March 2003 after more than 18 years with the Florida House of Representatives and almost 31 years of service with the State of Florida. He was staff director of a number of standing and select House committees and managed the development of major legislation on nursing homes and assisted living, adult protective services, end-of-life care, the Baker Act and many others. Since retiring he has worked as a governmental consultant to the Florida State Guardianship Association, the Elder Law Section of The Florida Bar and the Academy of Florida Elder Law Attorneys.*

Ten Considerations for the Special Needs Practitioner

by Jason A. Waddell

I recently had the pleasure of speaking with Mary Alice Jackson of Boyer & Jackson in Sarasota, Fla., one of the country's leading experts in the field of elder law. On this call, we discussed special needs trusts and the various issues new attorneys need to be aware of when drafting these trusts.

We discussed her lecture at Stetson University's annual Special Needs Trusts Conference this past October (a great conference if you have the chance to go). Her topic that afternoon was "Ten Considerations for the Special Needs Practitioner." She agreed these are a good starting point:

1. **Good intake system**. Make sure you get the history of your client. Reference other attorneys' intake sheets to make sure you are asking the right questions.
2. **Drafting: one size does not fit all.** While there are basic formats out there, each client is different, and you must read every line every time.
3. **Case law.** It will make you a better drafter.
4. **Amendments: flexibility for an uncertain future**. Do not lock the trustee into today's facts and law. Leave a means of change, keeping in mind basic requirements of SNT drafting.
5. **Identify your client and scope of representation**. Often you have five parties involved; know who you represent.
6. **Professional responsibility: confidentiality**. Be careful what you share and remind your staff they are bound by your rules as well.
7. **Develop interdisciplinary partners**. By utilizing other professionals' knowledge, you will familiarize yourself with the disabled person's environment and become a better drafter in the process.
8. **Professionalism: loyalty and conflicts of interest**. If you represent a party other than the beneficiary, you are under a duty to remain loyal to that party's interests, but in the end, there is an overriding duty of loyalty to the person with the disability.
9. **Know the system and read the POMS**. You must read the POMS if you are going to practice in this area, and you need to understand the various systems the client will go through.
10. **Competence**. Gain an understanding and comprehension of certain basic terms, acronyms and cites.

It was this last area that reminds me why these trusts can keep a lawyer up at night. Mary Alice created an A-Z list of terms and cites one should be familiar with and stated at the conference there were more that could be on the list. When we spoke, she provided some guidance on how to enter into this without losing too much sleep!

Mary Alice suggested that new attorneys consider working on testamentary trusts (i.e., third-party trusts) prior to taking on self-settled trusts. Her explanation for this was twofold: 1) problems are easily made with self-settled trusts; and 2) self-settled trusts are often rushed.

She recommended that a lawyer interested in drafting self-settled trusts begin with small cases. She explained that when she started, she drafted trusts for individuals who were receiving a small amount for a very small fee or for nothing at all. She explained that this is an excellent way to learn the system with less exposure.

I inquired about who should act as trustee since family members often want to, but do not seem capable of acting in this capacity. She stressed that most experts in this area try to avoid using family members as trustees. Instead, they use trust companies they have formed relationships with to serve as trustees. If the corpus of the trust is too little for the trust company, other professionals, such as professional guardians, are used prior to looking to family members.

Finally, we talked about networking. Mary Alice emphasized that working with good PI attorneys, who understand that you need time to do your job just as they had time to do their jobs, is essential. If an attorney seems unwilling to learn what you are doing or is indifferent to your needs, turn down the case because you will be the one exposed at the end of the day. Further, she recommended working with other professionals and experts to conduct public speeches and seminars. Aside from the exposure, she said this is an excellent way to learn.

Obviously, Mary Alice would know since she is a frequent speaker at most conventions held for elder law attorneys. We are grateful to her taking the time from her schedule to speak with us. She has offered a copy of materials from the top 10 list. If you are interested, you may contact my office at 850/434-7122, and I will email you a copy.

For more information on this topic, plan to attend the SNT teleconference on May 7, 2009, at 12 noon, E.D.T. Mary Alice Jackson and Lauchlin Waldoch will be our mentors on the call. Check the Mentoring Committee webpage for more information and updates at *www.eldersection.org*.

SECTION NEWS

Litigating for the Elderly & Special Needs Client CLE

by Twyla Sketchley

On Feb. 6, 2009, the Elder Law Section held its first annual Litigating for the Elderly & Special Needs Client CLE. Co-chaired by Steven Quinnell and Twyla Sketchley, the program used a 30-minute presentation format and included an impressive lineup of elder law and litigation attorneys experienced in all stages of litigation associated with the unique needs of elderly and special needs clients.

Gerald "Jay" Hemness, chair of the Elder Law Section's Litigation Committee, discussed procedures and difficulties associated with advocating for the abused, neglected and exploited client, including how to engage law enforcement and the state attorneys' offices in the criminal prosecution of perpetrators.

Twyla Sketchley, a board certified elder law attorney and secretary of the Elder Law Section, outlined the various points at which litigation can occur in guardianship cases and provided practice points for recovery of attorneys' fees.

Martha Barrera, an attorney with the Advocacy Center for Persons with Disabilities, provided a comprehensive review of proceedings before the Division of Administrative Hearings, including tips for representing families challenging tier assignments with the Agency for Persons with Disabilities.

Sheri Hazeltine, an elder law attorney and board member of Florida's Voice on Developmental Disabilities, summarized a variety of issues regarding the abuse of a durable power of attorney and the dangers related to courts recognizing a durable power of attorney as a less restrictive alternative to guardianship.

Bruce Robinson, a board certified trial lawyer and a certified civil mediator, provided participants with practical tips for proper, effective preparation and how litigants can get the most out of mediation.

Steven Quinnell, a board certified elder law attorney and co-chair of the program, summarized various contested probate issues, including creditor search and wrongful death issues.

continued, next page

Elder Law Section 2009 calendar

Bay Area Elder Consumer Protection Expo
April 22, 2009, 8 a.m. – 12 noon
Great Hall, Stetson University College of Law
This expo will educate seniors about consumer protection, exploitation, abuse and neglect.
Contact: Slade Dukes, 727/562-7800, ext. 7078, or *elderconsumers@law.stetson.edu*

The Florida Bar Annual Meeting
June 26, 2009
Orlando World Center Marriott, Orlando
407/239-4200

Elder Law Section Schedule
9 - 10:30 a.m.
Committee Chair's Training Session
12 noon - 2 p.m.
Awards Luncheon – Purchase of Ticket Required
2 - 5 p.m.
Executive Council Meeting

Elder Law Section Annual Retreat
October 8-10, 2009
The Breakers, Palm Beach

Elder Law Certification Application Deadline
If you wish to apply for certification, the filing period **opens July 1, 2009,** and applications must be filed by **August 31, 2009**.

Elder Law Certification Review Course
January 21-22, 2010
Hilton Walt Disney World, Orlando

Spring Issue *ELS Advocate* Article Deadline: May 15, 2009

George Felos, the lead attorney for Michael Schiavo during the Terri Schiavo end-of-life litigation, provided participants with a brief glimpse into the *Schiavo* cases and a number of tips to help attorneys prevent and avoid litigating health care decisions.

The program's judicial panel included First District Court of Appeals Judge Joseph Lewis, Circuit Court Judge Mel Grossman and Administrative Law Judge Erroll Powell. The panel discussed the current state of professionalism in the courtroom and how practitioners can improve their professionalism in litigation.

Lois Lepp, an elder law attorney and former Florida Bar discipline counsel, advised program participants on the numerous pitfalls in litigation that can lead to Bar grievances.

Tracy Moye, a trial attorney with a practice focused on elder law and personal injury, discussed techniques for preparing, supporting and cross-examining special needs witnesses, including those with cognitive impairments.

Andrew B. Sasso, a member of The Florida Bar Board of Governors whose practice focuses on litigation in trusts, probate and guardianship, summarized the five trust litigation keys, including protecting attorney-client privilege during trust litigation.

The day ended with a panel discussion of remedies in litigation, providing practical tips on presenting effective attorneys' fees arguments and preparing expert witnesses for attorneys' fees hearings by Gerald "Jay" Hemness, Steven Quinnell and Andrew B. Sasso.

Thanks to the efforts of all of the attorneys and judges on the program, Litigating for the Elderly & Special Needs Client CLE was a huge success. With the lessons of this year's program, next year's program will be even better. Litigating for the Elderly & Special Needs Client is now available on CD from The Florida Bar at *www.floridabar.org*.

May's Elder Law Month educates public

by Al Rothstein

Elder Law Month 2009 is already off to a good start. The Academy of Florida Elder Law Attorneys has its members scheduled to speak to citizens groups throughout the state of Florida. AFELA is also in its second year of partnering with AARP to present its members with speeches and literature that provide an understanding of the difficult financial and health care decisions they may have to make.

Once again, our Elder Law Month efforts are being chaired by AFELA member Kara Evans of Tampa.

AFELA will provide speakers to AARP, Rotary clubs, Kiwanis clubs and other civic organizations on other critical topics such as asset planning and elder exploitation, a new topic coinciding with a campaign driven by The Florida Bar's Committee on Elder Abuse, Neglect and Exploitation, chaired by Carolyn Sawyer.

Questions about our Elder Law Month activities can be answered by contacting Al Rothstein, AFELA's public relations specialist, at *elderissues@rothsteinmedia.com*.

2009 ELS Slate of Officers

The Executive Council has approved the following slate of officers submitted by the Nominating Committee on March 20:

By Nomination

Substantive Chair	**Twyla Sketchley, Tallahassee**
Secretary	**Jana McConnaughhay, Tallahassee**
Treasurer	**Robert Morgan, Jacksonville**

By Ascension

Chair	**Babette Bach, Sarasota**
Chair-Elect	**Leonard Mondschein, Miami**
Administrative Chair	**Enrique Zamora, Miami**

Elder Law Section Statement of Operations

Revenue	2007-2008 Approved Budget	Year End June 2008 Actuals	2008-2009 Approved Budget
Dues	87,500	79,050	87,500
Affiliate Dues	0	0	0
Less Retained by TFB	(30,625)	(27,670)	(30,625)
Total Dues	**56,875**	**51,380**	**56,875**
CLE Courses	6,000	17,344	21,000
Sponsorships	4,900	7,800	2,500
Member Service Program	1,500	1,000	1,500
Fair Hearings Forms	10,500	8,175	13,500
Newsletter Advertising	3,500	1,500	2,250
Investment Allocation	6,780	3,412	11,936
Total Revenues	**111,655**	**102,566**	**109,561**
Expenses			
Employees' Travel	4,786	1,445	2,908
Postage	1,600	1,853	1,500
Printing	700	713	500
Officers' Office Expenses	150	15	150
Newsletter	5,500	6,564	5,500
Supplies	300	196	250
Photocopying	200	79	150
Chair's Special Projects	1,500	2,035	1,500
Officers' Travel Expenses	1,500	1,077	1,500
Meeting Travel Expenses	3,500	3,213	3,500
Committee Expenses	3,500	4,682	3,500
Public Info & Website	2,000	6,398	3,500
Certification Committee Expenses	3,000	4,638	3,000
Board or Council Meetings	4,500	1,705	4,500
Bar Annual Meeting	2,500	0	0
Section Service Program	2,000	2,312	2,000
Speaker Gifts	200	200	200
Section Membership Directory	5,600	5,135	5,600
Awards	1,500	581	1,500
Fair Hearing Forms	3,000	5,262	3,000
Legislative Consultant	35,000	35,000	35,000
Legislative Travel	500	310	500
Council of Sections	300	300	300
Operating Reserve	8,137	0	8,227
Miscellaneous	100	50	100
Course Credit Fees	300	150	150
Total Expenses	**116,623**	**119,505**	**92,631**
Beginning Fund Balance	**96,862**	**150,669**	**170,518**
Net Operations (Revenue less Expenses)	**(8,196)**	**(21,186)**	**16,930**
Ending Fund Balance	**88,666**	**129,483**	**187,448**

Article VIII – Section 3. – Compensation and Expenses. No salary or other compensation may be paid to any member of the section for performance of contractual services to the section without the approval of the executive committee, but members of the executive council may be reimbursed for such reasonable and necessary telephone expenses, reproduction expenses that such member incurs in the performance of services for the section and that are specifically authorized by the chair, the treasurer, or by the executive board.

Wards and support for their dependents

by Enrique Zamora

Guardians and their attorneys face a difficult situation when trying to determine who can qualify as a ward's dependent and the amount of support that these dependents might be entitled to receive from the ward. Pursuant to F.S. §744.421, any person who depends on a ward for support may petition for a support order. The definition of dependent is not clear under F.S. §744.421. However, F.S. §744.397 defines as a dependent any person who is a legal dependent as well as a person who the ward is morally or equitably obligated to aid, assist, maintain or provide care (§ 744.421 Fla. Stat. (2008); Fla. Stat. § 744.397 (2008)). In addition, such dependents must have an existing need that can be satisfied by the ward's estate. Although F.S. §744.397 is intended to be applied only to the income generated from the property of a ward, this definition could be applied to a petition for support of the ward's dependents under §744.421.

Case law regarding the definition of a dependent, in the context of §744.421, is very limited. Courts have attempted to expand the meaning of dependent through the interpretation of other related statutes. Earlier decisions such as *In Re: Guardianship of Helen F. Bohac,* 380 So. 2d 550 (Fla. 2d DCA 1980), interpreted the meaning of a ward's dependents, pursuant to § 744.441 (regarding the powers of a guardian to make gifts), as being family members. However, the determination of who is a family member was found by the court to be distinctive to the particular facts of each case and construed to include those to whom the ward would be under a legal duty to support under normal conditions (i.e., spouse, children). The court also stated that other than familial connection, it could consider the close relationship of the recipients to the ward and whether the ward and the dependent cohabitated (*Id* at 553). In fact, the court found that the lexicographer's meaning of the word "family" may include persons whom the ward, under normal conditions, would be under no legal duty to support.

Florida, as indicated by the decision of *Rainey v. The Guardianship of Mackey,* 773 So. 2d 118 (Fla. 4th DCA 2000), employs the "substituted judgment" standard for decision making by guardians on behalf of their wards, where the guardians must act as they believe the wards themselves would have acted. The court in *Mackey* stated that, in determining whether to substitute the guardian's judgment for that of the ward, the court should consider donative intent, the permanency of the ward's condition, the size and nature of the ward's estate, the needs of the ward and recipients, the affinity between the ward and the recipients and whether they are dependent upon the ward (*Mackey* at 119 (citing to *Bohac* at 553)). Therefore, using prior history as a basis, the substituted judgment standard may also assist the court in determining whom the ward intended to be a dependent.

It may be possible that an individual who is considered to be a dependent of a ward because of a familial relation may not be entitled to receive support from the ward. In *Guardianship of Tanner v. Jannis*, 564 So. 2d 180 (Fla. 3rd DCA 1990), the court found that the ward's husband did not qualify as an indigent husband under F.S. §744.397 since he was financially secure and was also not considered a dependent as contemplated in F.S. §744.421 because of his ability to continue to provide for himself. The court held that in circumstances such as these, family members may not be entitled to support from a guardianship estate (*Tanner* at 183).

In applying substituted judgment, the courts have found that there are limitations on the amount of support to dependents who are able to financially provide for themselves. However, the ability of a ward to pay for dependents may also be limited. In a recent case advocated by the author, guardianship assets held for the primary benefit of the ward were found by the court to be available to pay for the school tuition of the ward's grandchildren. The court found, based on evidence presented regarding tuition payments made prior to incapacity, that the ward had expressed a desire to support her grandchildren in attending private school. The court held that this express intention, made prior to incapacity, was sufficient to support its findings under both the "substituted judgment" standard and the "best interest" standard.

Consequently, both guardians and their attorneys must be aware of the specific circumstances in which dependents may receive support from the ward. Evidence must be presented to qualify a person as a dependent of the ward, coupled with the size of the ward's estate and the ability of the ward's dependents to provide for their own support without the benefit of the ward's financial help.

Enrique Zamora *is a partner with the firm of Zamora & Hillman with offices in Miami, Fla. His practice includes the areas of probate administration, probate litigation, guardianship, estate planning and elder law.*

Treatment of losses from worthless securities

by Michael A. Lampert

With the economy as it is, clients are often faced with worthless securities. The IRS has recently amended the regulations concerning losses sustained from abandoned stock or other securities. A security is a share of stock or other ownership in a corporation or other business entity; a right to subscribe to receive a share or other ownership interest of stock in a corporation or other business entity; or a bond, debenture, note, certificate or other evidence of indebtedness issued by an entity, a government or a political subdivision of government entity.

To successfully abandon a security:

- the taxpayer must permanently surrender and relinquish all rights in the security; and
- the taxpayer must not receive consideration for the security.

Generally, a loss established by the abandonment of a security is treated as a loss from the sale or exchange of a capital asset on the last day of the tax year. However, the amount allowed as a loss deduction is subject to the capital loss limitations. These regulation amendments apply to any abandonment of stock or other securities after Mar. 12, 2008.

This development could impact your client's tax situation if the client believes he or she owns worthless securities. It is very important to clearly abandon the security. Remember that with public companies filing Chapter 11, stock often is worth pennies per share, yet there is a value. The same has happened with some well publicized private investment failures in which the client can expect a recovery of pennies on the dollar. To be safe, the client is often better served by selling the asset or otherwise transferring title. These new regulations increase the ability to take the deduction. Note that in some fraud cases, a theft loss may apply in addition to or instead of the capital loss for the worthless security.

Michael A. Lampert *is a board certified tax lawyer. He regularly handles state and federal controversy matters as well as exempt organizations and estate planning.*

Tax tips

The rates, they keep on changing.

- Tax exempt gift is $13,000 in 2009.
- The estate tax exemption is $3.5 million in 2009 with a 45 percent maximum rate. Remember, it is still $2 million through 2008.
- Remember that the gift tax exemption remains $1 million, even in 2009.

Stetson Law to offer new online degree in law and aging for non-lawyers

Starting in June 2009, non-lawyers around the world who work with the elderly will have an opportunity to obtain a Master of Jurisprudence in law and aging from Stetson University College of Law in Tampa Bay, Fla. After an on-campus orientation, courses will be offered online for professionals who work with the growing senior population.

"This new graduate program will allow professionals who work in the field of aging to learn more about laws, policies and programs," says Professor Rebecca C. Morgan, Boston Asset Management chair in elder law and director of Stetson's Center for Excellence in Elder Law.

Applicants must have a bachelor's degree, substantial experience in the field of aging and an acceptable score on the GRE or an equivalent examination to be considered for admission. Students in the new two-year program will learn more about elder law, guardianships, government benefits, housing options for the elderly, disability programs, retirement, long-term care, health care and the ethical issues faced by professionals.

Stetson's Center for Excellence in Elder Law was established in 1995 to meet the increasing need for legal education and research in the field of law and aging.

For additional information about the program, visit *www.law.stetson.edu/elderlaw/MJ* or contact the Center for Excellence in Elder Law at Stetson Law at 727/562-7393 or *elderlaw@law.stetson.edu*.

Discussing Income Properties With Your Medicaid Clients?

"Proud Sponsor of the Elder Law Section"

If real estate is suitable for your Medicaid client, EPIC offers a complete Real Estate Medicaid Solution!

- Selection of appropriate properties for your client
- Asset protection through purchase of ownership in 30 days or less
- All real estate transactional services (deed preparation, title work and closing)
- Steady and Unfluctuating rental income throughout the lease term
- Payment of real estate taxes, repairs and Maintenance, and insurance
- Supporting documentation for the Medicaid application
- Buy-back of the real property interest when no longer needed

EPIC

Elder Planning Income Concepts, LLC

Emma Hemness, Managing Member

(813) 661-5297

309 N. Parson Ave. Brandon, Fl. 33510

E-mail: epicinfo@aol.com

Providing asset protection through a "No-Hassle Real Estate Medicaid Solution" for over 3 years.

"For Elder Law Attorneys by Elder Law Attorneys" • Visit us at www.epicelderlaw.com

Rainmaking 101

Client types

by Mark Powers and Shawn McNalis

We hope you read "Word of mouth marketing" in the last edition and have started to identify the "ideal" client types for each of your practice areas. Though it may sound simple, recognizing whom you best serve is an important first step in building a successful practice. Here's why: The quality of your practice—and how much you enjoy working in your practice—is directly correlated to the quality of your clients.

If you, like many of your colleagues, have stocked your practice with clients that aren't a good fit, you'll spend much of your career feeling frustrated and unappreciated. In addition, you'll never realize your income potential. Our research has shown that if you were to apply Pareto's Principle, also known as the "80/20 rule" to your client base, you would probably find that 80 percent of your income comes from 20 to 40 percent of your clients! In this lesson, you will learn the power of this principle and how to apply it to your practice.

Most of you know from your own experience that all clients are not created equal—but you haven't yet learned to trust your instincts during the intake process. You may recognize that the client that darkens your door with a page ripped out of the phone book is not quite the same as those sent by your best referral source, but you give everyone the benefit of the doubt. Don't. Become more rigorous in your screening procedures. Carefully selecting the clients you work with not only improves your morale, but also minimizes collection problems and has the added benefit of protecting you against malpractice problems in the future.

The four client types

There are four levels of client types. We call them "A," "B," "C" and "D" clients. Each level is judged according to certain general criteria: clients' ability to pay; having needs consistent with your expertise; their ability to cooperate; their opinion of attorneys in general; whether they are high or low maintenance; their ability to be satisfied with services rendered; and the likelihood of these clients sending more work or quality referrals. In addition, practice-specific criteria should also be developed that relate to the viability of each prospective client's case.

In this ranking system, which you can custom fit to your particular practice areas, "A" and "B" matters are the good, "C" matters are the bad and "D" matters are downright ugly.

Who are your "A" and "B" clients?

Our studies show that the "A" and "B" clients for most practice areas typically comprise 20 percent of your client base. Hidden among the other clients you serve, they are usually a small, quiet, but vitally important group. How important are they? As mentioned before, they will generate a hefty 60 to 80 percent of your revenues and only take up 20 to 40 percent of your time. In addition, they pay their bills, appreciate the value of the work you do for them, cooperate with you, show up on time and send quality referrals. In short, these are the clients you actually enjoy working with! They are the low-maintenance clients that bring you the kind of matters that fit your expertise. They are not crisis driven, and they trust your opinion. These are the clients that tend to get lost in the shuffle as you scramble to handle the constant demands of your "C" and "D" clients.

The next step

If you find you have stocked your practice with "C" and "D" clients, conduct a "housecleaning." Most attorneys are appalled to discover how many problematic clients they work with. But there is a solution—follow the steps listed below to conduct your own "housecleaning." If you have any doubt during this process and begin to vacillate on whether or not a client is appropriate for you, ask your staff. "C" and "D" clients often treat your staff members poorly or take up an unreasonable amount of their time.

1. Rank your current clients and consider referring out, closing or letting go of all the "D's" and most of the "C" clients.
2. You can do this in person, over the telephone or by letter. Your Bar will typically have sample disengagement letters that you can use. If the issue is nonpayment, you are not ethically bound to continue work for a client that is not paying you. *(Litigators must be careful here—confer with your trial judge.)*
3. Avoid working with more "C" and "D" clients! Refine your intake selection so you don't admit them into your practice in the first place!

Fortunately, "C" and "D" clients don't sneak into your practice unannounced. They usually arrive waving several red flags. And you welcome them in. Often because you *need* the money—hoping that uneasy feeling you felt upon meeting them was just heartburn. Ironically, the client that you take because you need the money ends up taking your time and not paying you for it. Begin to trust that uneasy feeling. It might be trying to tell you that you are getting involved with the wrong kind of client.

Mark Powers *is president of Atticus Inc. and co-authored with* ***Shawn McNalis*** The Making of a Rainmaker: An Ethical Approach to Marketing for Solo and Small Firm Practitioners. *Both are featured marketing writers for* Lawyers, USA. *Powers founded Rainmakers™, a simple process for attorneys at all levels to stay focused on marketing, creating fresh ideas and on-going accountability to marketing. To learn more about Atticus or Rainmakers™, visit the Atticus website at* www.atticusonline.com *or call the Atticus office at 352/383-0490.*

Fair Hearings Reported

by Nicholas J. Weilhammer

Petitioner v. Florida Department of Children & Families, Appeal No. 08F-00106 (District 4, Unit 88250, Mar. 26, 2008).

Petitioner received an insurance settlement of $20,000 in July 2007. Petitioner's agent gave petitioner's grandsons the proceeds under a power of attorney in September 2007. Petitioner was admitted into a skilled nursing facility and filed an application for ICP benefits in October 2007. Petitioner's agent stated he distributed the funds because petitioner expressed a desire to do something for her grandchildren, and at the time of transfers she had no plans of being placed in a nursing facility.

DCF denied ICP benefits for October-December 2007 due to improper transfer of assets, presuming the transfers were made to become Medicaid eligible. At the time of transfer, petitioner could not live alone and had received the insurance proceeds as a result of a motor vehicle accident; thus, petitioner should have anticipated that she would need medical care. The transfers in this case are not specifically excluded, and petitioner did not rebut the presumption the transfers were made to become eligible for ICP. Undue hardship was not proven since petitioner did not show she would be deprived of food, clothing or medical care or that her life or health would be endangered. Appeal denied.

Petitioner v. Florida Department of Children & Families, Appeal No. 08N-00006 (District and Unit information redacted, April 1, 2008).

Neither petitioner nor his son attended the hearing. Individuals from the Broward County Long Term Care Ombudsman Council were present at the hearing, but did not have written authorization from petitioner giving permission for them to represent him at the hearing. The hearing officer granted a motion determining that petitioner abandoned the hearing due to nonappearance. Appeal denied.

Petitioner v. Florida Department of Children & Families, Appeal No. 08N-00019 (District and Unit information redacted, April 1, 2008).

Respondent provided notice to petitioner in January 2008 that he was to be discharged in February 2008 for nonpayment of a $60,000 bill at the facility. The discharge location provided was "facility of choice." The facility representative had a couple of facilities in mind to which to discharge petitioner, but had not started the process to transfer petitioner. The facility must provide a location to which the resident is to be transferred or discharged. Appeal granted.

Petitioner v. Florida Department of Children & Families, Appeal No. 08F-00374 (District 08, Unit 88806, Apr. 4, 2008).

Petitioner filed for ICP benefits in December 2007, retroactive to November 2007. Petitioner receives monthly income below the income limit; however, in the month of November she receives an annual IRA distribution that results in income in excess of the income limit. DCF denied ICP benefits for November 2007.

Petitioner argued that if the yearly distribution were divided by 12 and prorated, petitioner would be eligible for benefits year-round. However, the distribution cannot be prorated when the income in the month of receipt causes ineligibility. Petitioner must pass an income eligibility test each month before income may be prorated. Appeal denied.

Petitioner v. Florida Department of Children & Families, Appeal No. 08F-00922 (District 14, Unit 88119, Apr. 23, 2008).

Petitioner applied for ICP benefits in June 2007, retroactive to May 2007. DCF received information concerning assets of petitioner and her spouse, and determined that assets exceeded the ICP limits. DCF argued the full value of IRA's had to be counted as a resource because there was no distribution of income for the months at issue. DCF approved petitioner for August 2007 and ongoing, but denied benefits for May-July 2007.

The record was left open to give the representative time to provide written documentation from petitioner's spouse that he was acting in her behalf. DCF did not appear at the reconvened hearing.

At the time of application, only those countable resources that exceed the community spouse's resource allowance are considered available to the institutionalized spouse. The community spouse's resource allowance for the time period at issue was $101,640, and the institutionalized spouse's resource limit was $2,000. DCF determined the assets to consider available to the institutionalized spouse were in excess of $101,640, but offered no testimony in support.

The value should be excluded as a resource since there was distribution, although it was only the minimum required by the IRS on an annual basis and was distributed in December 2006. Both petitioner's and her husband's IRA's had an annual distribution in December 2006, with the exception of the one IRA of the husband's valued at over $60,000, which is a counted asset.

If an individual is eligible to receive regular periodic payments from a retirement fund, the payments are considered unearned income and the fund is not considered an asset to the individual. If the community spouse receives periodic payments from the retirement funds he owns, the funds are not considered an asset when computing the couple's total countable assets. DCF's manual does not define "periodic" as related to this subject. Social Security authority defines periodic retirement benefit as being made at some regular interval and does not exclude an annual payment as meeting the definition. Thus, an annual payment meets this definition. DCF erred in counting the value of the IRA's, which

continued, next page

had periodic annual payments, toward the couple's total asset value. However, because DCF failed to attend the reconvened hearing to show the total assets counted to determine ineligibility for the months at issue and because the only argument for ineligibility that was made had to do with the value of the IRA's, the officer concluded that petitioner met the burden by a preponderance of evidence to prove eligibility. Therefore, petitioner was eligible for May, June and July 2007, even counting the community spouse's one IRA that did not have periodic payments. Appeal granted.

Petitioner v. Florida Department of Children & Families, Appeal No. 08F-00467 (District 07, Unit 88999, May 23, 2008).

Petitioner created a land trust for which she is the initial beneficiary. Petitioner's funds bought a partial interest in a piece of non-homestead, rental property titled to the land trust. Co-trustees of the land trust were buyers of 23 percent undivided interest in the property. The total paid was fair market value ($128,000). The remainder beneficiaries had no rights to the availability or proceeds of the land trust until the death of the initial beneficiary. Title to the property was conveyed to the trustee. The agreement stated the beneficiary had the power to direct the trustee, and that such rights are personal property. Petitioner applied for ICP benefits in July 2007. DCF denied ICP for August-November 2007 based on excess assets based on the value of her land trust.

Since DCF's manual does not address land trusts, staff sought guidance from the program office. DCF determined the land trust was personal property even though it was income producing according to CMS, the agreement and the Florida Land Trust Act. Counting the land trust's value, applicant was over the asset limit, and DCF denied the application. In December 2007, a corrective deed showed petitioner personally owned the interest in the rental property, and it became a real property interest. DCF denied eligibility prior to December 2007.

The hearing officer concluded the land trust was personal property according to the trust document. The manual's relevant exclusion regarding income-producing assets only applies to real property, though the manual does not limit the income-producing exclusion to real property, and DCF would prefer such language. The change in ownership occurred in December, the date of the new deed, so there was no relation back to the original deed even though the deed was titled a "corrective deed." DCF is not the appropriate forum to establish legal restrictions other than reflected on the face of the deed. DCF, in its interpretation, was not rule-making since it is not possible to write policy on every type of trust that could be created. The DCF memo is a permissible agency interpretation of established authorities. Appeal denied.

Summary of selected caselaw

by Nicholas J. Weilhammer

Cutler v. Cutler, 2008 Fla. App. LEXIS 13457 (Fla. 3d D.C.A. Sept. 3, 2008).

Trustor created a land trust. Trustor named herself and her two children co-trustees of the trust and conveyed her residence and an adjacent vacant lot to the trust, subject to a life estate in herself. Trustor was the sole beneficiary of the trust and retained the right to withdraw and appoint the principal of the trust to or for her benefit at any time. The trust provided that the remainder interests in these properties, which were titled to the trust, would be distributed to trustor's estate upon her death. On the same day the trust was created, trustor deeded her residence and the adjacent vacant lot to it. She also executed a will in which she specifically devised the residence titled to the trust to her daughter. She specifically devised the adjacent vacant lot titled to the trust to her son. She also directed that her debts be satisfied equally from both properties should the funds in her estate be insufficient to satisfy those debts.

Trustor died. Because estate funds were insufficient to satisfy her creditors, the son sought to have the two parcels devised to trustor's estate abate "equally" in accordance with his mother's express wishes. The daughter objected. The trial court held the residence retained its homestead status while titled in the trust, where it was exempt from the creditors after death.

The court affirmed the order confirming the property retained its homestead status, but reversed the order finding it exempt from the decedent's debts since the trust agreement expressly stated the corpus of the trust were to pass to the estate upon her death. The owner of homestead property may devise that property in a manner that terminates homestead protections. Although trustor did not direct that her home be sold, she did direct, in a specific manner, that it be used to satisfy her debts, which was the equivalent of ordering it sold and the proceeds distributed to pay debts, which results in loss of homestead protections.

Johnson v. State of Florida, 2008 Fla. App. LEXIS 14218 (4th D.C.A. Sept. 17, 2008).

In 2002, defendant became the full-time caretaker for the alleged victim, who suffered from dementia/Alzheimer's. In March 2003, defendant accompanied the alleged victim to an attorney's office, where the alleged victim consulted with the attorney concerning her will. Defendant was in the waiting room during the consultation. The attorney prepared the will, which left the alleged victim's condominium and one-half of her estate to defendant. No one testified that defendant had any involvement in the drafting of the will or that she knew she was a beneficiary under the will.

In April 2003, the alleged victim and her friend, accompanied by defendant, went to the bank, closed a $61,052.18 matured certificate of deposit (CD) and at the suggestion of the friend, had the proceeds issued in the form of a cashier's check made payable to defendant. Defendant stood in the bank lobby during the transaction.

In July 2003, the alleged victim's physician placed a call to the Department of Children and Families (DCF) when he became concerned about the alleged victim's competency. The state charged defendant with exploitation of the elderly, arising from the CD transaction. The state argued the will tends to prove that defendant occupied a position of confidence and trust with the victim. The trial court allowed evidence regarding the will, finding it was relevant and inextricably intertwined with the charged offense.

The court held being named a beneficiary proves nothing more than that the testator chose to leave assets to that person, regardless of the nature of any relationship. It was unnecessary for the state to admit the will to prove that defendant occupied a position of trust and confidence because defendant readily admitted that fact.

The will, viewed in isolation, was not a bad act. However, the spin placed on it by the state suggested that defendant possessed bad character or propensity to exploit, that she was a greedy person who, unsatisfied with being a beneficiary in the will, considered herself entitled to additional cash. This turned the otherwise irrelevant and generic fact of being the beneficiary in a will into "bad act" evidence deemed inadmissible under Section 90.404, Florida Statutes (2007). Reversed and remanded for a new trial, excluding the evidence of the will.

Tenet South Florida Health Systems v. Jackson, 2008 Fla. App. LEXIS 14228 (Fla. 3d D.C.A. Sept. 17, 2008).

Personal representative of the estate of her mother brought an action against petitioner for breach of the statutory duty of care by a healthcare provider to a vulnerable person. The complaint alleged, *inter alia*, that petitioner failed to administer proper nursing care and other medical services.

Petitioner moved to dismiss the complaint on grounds that the complaint was not an action pursuant to Chapter 415, but was a complaint for medical malpractice pursuant to Chapter 766. The trial court denied its motion to dismiss for failure to

continued, next page

comply with Chapter 766 medical negligence pre-suit requirements.

The court held the allegations did not state a claim for neglect. Petitioner does not meet the required definition of a "caregiver," nor does the complaint allege neglect as defined by the statute. The decedent was admitted to the hospital for the purpose of a surgical procedure. Nowhere in the complaint is there any allegation that there existed a commitment, agreement or understanding that a caregiver role existed between petitioner and the decedent, though a hospital can be a caregiver pursuant to the statute.

Even it were to allege that the hospital was a caregiver, the claim is still one for medical malpractice and not for elder abuse since it arises out of the rendering or failure to render medical care or services. Thus pre-suit notice under Chapter 766 was required. Petition for *writ of certiorari* granted.

Jaylene, Inc. v. Moots, 2008 Fla. App. LEXIS 13982 (Fla. 2d D.C.A. Sept. 12, 2008).

Decedent executed a durable power of attorney (POA), naming the personal representative as agent. The grant of authority therein was broad and unambiguous, but did not specifically grant the agent the power to consent to arbitration.

Later the agent executed a care agreement with the nursing home in her capacity as attorney-in-fact for decedent, which agreement contained an arbitration clause. The agent later brought an action against a nursing home alleging violations of decedent's rights under Fla. Stat. § 400.022. The nursing home sought to compel arbitration pursuant to the agreement. The trial court denied their motion to compel arbitration since it did not authorize the agent to agree to arbitration, although it found that the arbitration clause was valid.

The court held the grant of authority to the agent was virtually all-inclusive, including the authority to enter into binding contracts and to settle claims. Further, Fla. Stat. § 709.08(6) and (7)(a) supported the holding that the POA encompassed the authority to agree to arbitration.

Balboni v. Larocque, 2008 Fla. App. LEXIS 15130 (Fla. 4th D.C.A. Oct. 1, 2008).

Decedent and his wife executed estate planning documents in 2002. Decedent's will altered distribution by intestacy, and it was kept in his home. Decedent died, and his will was never found, though other estate planning documents were. The trial court granted the petition filed by decedent's living children for the establishment and probate of a copy of the lost will, arguing the will was accidentally lost or destroyed and that decedent did not intend to revoke it. Decedent's grandchildren from decedent's deceased son opposed the petition.

The court held that evidence that a testator's will was in his possession prior to death and cannot be located subsequent to death gives rise to a rebuttable presumption that the testator destroyed the will with the intention of revoking it. Evidence that can serve to rebut the presumption of intentional revocation of a lost will consists of evidence that the will was either accidentally lost or destroyed, or willfully and fraudulently destroyed by an adverse party. The effect of the presumption is to require a finding of revocation, unless the proponents of the lost will offer evidence tending to show that the will had not been revoked. The evidence relied upon by the trial court—the mirror-image wills of decedent and his wife, decedent's longstanding testamentary scheme, the discord between decedent and granddaughter and the presence of nurses and visitors in the home—was insufficient to overcome the presumption that decedent intentionally revoked his will at some point in time prior to his death. Reversed.

Welcome, new members!*

Mr. Bradley Kent Alley
Marlowe and Weatherford PA
1150 Louisiana Ave.
Winter Park, FL 32789-2354
407/629-5008
Fax: 407/740-0310
Email: bka@winterparklaw.net

Ms. Laura A. Callison
576 Thornwood Lane
Orange Park, FL 32073-5718
904/521-3194
Email: laurar11121@aol.com

Ms. Damaris Ghislaine Claude
Julie Eason Smith PA
2060 Winter Springs Blvd.
Oviedo, FL 32765-9347
407/365-9910
Fax: 407/365-1239
Email: damarisclaude@cfl.rr.com

Mr. Hugh Cotney
Hugh Cotney PA
233 E. Bay St., Ste. 905
Jacksonville, FL 32202-3456
904/356-0162
Fax: 904/355-5170
Email: cotneypa@bellsouth.net

Ms. Eve M. Greenberg
825 E. Main St.
Lakeland, FL 33801-5151
863/816-5803
Email: egreenberg@tampabay.rr.com

Mr. Louis Manuel Hillman-Waller
Zamora & Hillman
3006 Aviation Ave., Ste. 4C
Coconut Grove, FL 33133-3866
305/860-6565
Fax: 305/285-3285
Email: lmhillman@zhlaw.net

Ms. Juli Jessica Kempner
1000 N. Ashley Dr., Ste. 640
Tampa, FL 33602-3701
Email: julimsw@hotmail.com

Mr. Michael Lee Marlowe
Morlowe & Weatherford PA
P.O. Box 2366
Winter Park, FL 32790-2366
407/629-5008
Fax: 407/740-0310
Email: mlm@winterparklaw.net

Mr. James Hamilton Monroe, Jr.
P.O. Box 540163
Orlando, FL 32854-0163
407/872-7447
Fax: 407/872-7491
Email: jamesmonroe@
jamesmonroepa.com

Student Member

Ms. Regina Drennan
2531 Key Largo Ln.
Fort Lauderdale, FL 33312-4605
954/253-2314
Email: rdrennan@stu

Ms. Colleen Cleary Ortiz
Bozeman Jenkins & Matthews PA
114 E. Gregory St.
Pensacola, FL 32502-4970
850/434-6223
Fax: 850/434-5242
Email: cortiz@bjm-law.com

Mr. Lawrence Wayne Smith
Gary Dytrych & Ryan
701 U.S. Highway 1, Ste 402
North Palm Beach, FL 33408-4514
561/844-3700
Fax: 561/844-2388
Email: lws@gdr-law.com

Mr. Benjamin Richard Wallace
434 N. Grandview Ave.
Daytona Beach, FL 32118-3929
386/252-1133
Fax: 386/239-0320
Email: brwall13@hotmail.com

Mr. William Parks Weatherford, Jr.
1150 Louisiana Ave., Ste. 4
Winter Park, FL 32789-2354
407/629-5008

Ms. Tracy Ann Heider Winrow
Tracy A. Heider Winrow
17 Royal Palm Way Unit 406
Boca Raton, FL 33432-7826
561/361-1785

(*as of March 9, 2009)

Call for papers — *Florida Bar Journal*

Babette Bach is the contact person for publications for the Executive Council of the Elder Law Section. Please email Babette at *bsbette@sarasotaelder.com* for information on submitting elder law articles to *The Florida Bar Journal* for 2009. A summary of the requirements follows:

- Articles submitted for possible publication should be typed on 8 & 1/2 by 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.

The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

FAIR HEARINGS REPORTED

The Elder Law Section is making available by subscription copies of the reported fair hearings regarding ICP Medicaid. Also included in the packet are policy clarification correspondence copied to the Elder Law Section from the Department of Children and Families.

The reports are emailed on a monthly basis and posted on the section's website at *eldersection.org.* It takes approximately 30 to 60 days after the month's end to receive the opinions, so mailings will typically be several months behind.

ANNUAL SUBSCRIPTION: $150

****

Fair Hearings Reported
ORDER FORM

NAME: _____ Bar #: _____

ED007

ADDRESS: _____

CITY/STATE/ZIP: _____

EMAIL ADDRESS: _____

PHONE: (_____) _____

METHOD OF PAYMENT:

❑ Check (in the amount of $150) payable to: "The Florida Bar Elder Law Section"

❑ Master Card ❑ VISA

Card No.: _____ Expires:____/_____

Name of Cardholder: _____

Signature: _____

Fax to: 850/561-5825.
Mail to: The Florida Bar Elder Law Section, 651 East Jefferson Street, Tallahassee, FL 32399-2300