

The Elder Law Advocate

www.eldersection.org

Vol. XVI, No. 1

"Serving Florida's Elder Law Practitioners"

Fall 2007

INSIDE:

Committee reports.....	3
Public Policy Task Force update.....	6
Florida DCF appoints Stetson law professor to chair advisory panel on adult protection system.....	6
News & Notes.....	6
Calendar.....	7
"UnProgram" Nov. 30 - Dec. 1.....	7
Elder mediation: Keeping care decisions out of court.....	8
Tips & Tales:	
Always speak to the person in charge.....	10
Elder Law Retreat.....	13
A few brave souls help with 'FUN-draising'.....	16
The National College of Probate Judges and Stetson University College of Law project for law students.....	18
Fair hearings reported.....	20
Summary of selected caselaw.....	22

CLE: Certification Review Course

Jan. 24 - 25, 2008

Watch your mailbox
for details to come.

I'm a 'good' lawyer ...

I'm a "good" lawyer. What do I mean by this? Well, it is certainly not a self-critique, but rather the realization that I really, really like being an elder law attorney.

A relative once summarized the current popular opinion about lawyers in a joke. You know, the one with 1,000 lawyers at the bottom of the ocean being a good start. Perhaps a few in our law profession might provide justification for the joke. However, I take great pride in pointing to our Elder

Law Section as proof to the contrary, or at least a reason to pick the 1,000 lawyers carefully, since I believe our section members are the "good" lawyers.

A quote from Hubert Humphrey, paraphrasing Mahatma Gandhi, might better explain why I believe we, as elder law attorneys, merit distinction from the group ...

The moral test of a [society] is how it treats those

who are at the dawn of life, the children; those who are in the twilight of life, the aged;

See "A 'good' lawyer," page 2



Emma S. Hemness

Message from the chair

Legislative news

by Ellen S. Morris

The county delegation meetings will begin in the fall, and the Elder Law Section believes it is crucial to have at least one member represent the section at each delegation. I will be contacting members who have expressed an interest or who have told me of a personal connection to legislators in their county, but I will also publish the dates of the delegation meetings on the AFELA listserv and on the ELS website so others may attend. There is strength in numbers!

Thursday, October 25, 2007

10 a.m. - 5 p.m.

Alachua County Legislative Delegation
George Kirkpatrick Criminal Justice
Center
Santa Fe Community College Campus
Gainesville

Friday, November 16, 2007 • 2 p.m.

Duval County Legislative Delegation
Organizational Meeting and General
Legislative Hearing
St. James Building, 1st Floor
117 W. Duval Street, Jacksonville

If you have an idea or an issue that you think may be best served by passing legislation, please contact me.

Ellen S. Morris, Esq.
ELDER LAW ASSOCIATES PA
7000 W. Palmetto Park Road, Ste. 205
Boca Raton, FL 33433
561/750-3850
800-ELDERLAW (353-3752)
561/750-4069 fax
www.elderlawassociates.com
emorris@elderlawassociates.com

A 'good' lawyer

from page 1

and those who are in the shadow of life, the sick and the needy, and the handicapped.

By these wise words we, as elder law attorneys (the "good" lawyers), are helping raise the marks history will give our society by holding us all accountable for how these vulnerable individuals are treated. The results we acquire for our clients are the very measuring stick by which we, as a people, will be judged.

Being a "good" lawyer is no easy thing. We are talking about protecting our society's most vulnerable: the elderly and persons with special needs. And we have all shared stories about the unique obstacles we face while representing these clients, or we have experienced moments where we ask ourselves, "What other attorney would do this?" In fact, it was just such a sharing of these stories with a few fellow elder law attorneys that provided me with the subject matter for this message. Here are some thoughts that came to my mind:

I recall the elderly woman who came in for planning needs and brought along her husband, who suf-

fered from diminished capacity. As we spoke, he sat quietly in the room with us, but eventually interrupted to ask me in a non-threatening tone, "Can I pinch y ur cheek?" My brain sputtered like an old Ford Pinto for a moment, trying to determine which "cheek" he had in mind, before I let him reach over to pinch my cheek (the one on my face). The consultation continued for perhaps five minutes before he again asked, having not remembered the first pinch. My cheek was quite rosy before the hour ended, but I knew I was a "good" lawyer.

Or the aging gentleman facing allegations of incapacity in a guardianship proceeding who also suffered from occasional incontinence. As elder law attorneys, we know that *incontinence* doesn't equal *incompetence*. But having a client who suffered one such accident on the steps of the courthouse, a "good" lawyer ends up taking a considerable amount of time "educating" the other professionals on this simplest of concepts.

Or the 50-something mentally ill man who considers his care needs not nearly so interesting as the "naughty" pictures he's drawn (fortunately "naughty" only on a level of PG-13) and who proudly wants to show you the many similar works of art he has

been laboring over since the "good" lawyer's last visit.

I'm sure you have many stories like these. No doubt, though, these are our most vulnerable, the people by whom we will be measured; and representing them requires the most caring spirit. Showing them compassion and empathy when others offer no hope or comfort, caring about their emotions as well as their finances, the things we consider usual parts of our everyday job, are the things that make it apparent—we are the "good" lawyers.

And being a "good" lawyer is no easy thing, requiring more effort these days. The laws we must understand govern both the living and the dead, and are in a constant state of change. The Deficit Reduction Act of 2005 has made the most sweeping changes to Medicaid eligibility rules in 17 years. In the post-Schiavo era, upholding one's healthcare advance directives can quickly devolve into a political quagmire. More non-attorneys are crossing the line into the unlicensed practice of law than ever before; financial exploitation of vulnerable persons seems more and more common; and this is only the beginning as our aging population is expected to swell for years to come.

Fortunately, I believe the Elder Law Section is ready for the tasks that lie ahead. The section is growing and maturing. It works hard to support your efforts to be a "good" lawyer. This is evident in our new Mission Statement:

The Elder Law Section exists to cultivate and promote professionalism, expertise and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs, and advocates on behalf of its members.

But while we boast nearly 1,800 members, we have only a handful of elder law attorneys that are involved consistently in the section's substantive committees. So I am inviting each and every member of our section to become active in one of the substantive areas in which you have an interest. If everyone were to contribute just a little of their time, perhaps more people would recognize that there really are "good" lawyers ... and we are they.

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

Emma S. Hemness, Brandon	Chair
Linda R. Chamberlain, Clearwater	Chair-elect
Babette Bach, Sarasota	Administrative Law Division Chair
Leonard C. Mondschein, Miami	Substantive Law Division Chair
Enrique Zamora, Coconut Grove	Secretary
Twylla L. Sketchley, Tallahassee	Treasurer
Patricia I. "Tish" Taylor, Stuart	Editor
Susan Trainor, Tallahassee	Copy Editor
Arlee J. Colman, Tallahassee	Section Administrator
Lynn M. Brady, Tallahassee	Layout

Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the section.

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

The deadline for the WINTER ISSUE is January 15, 2008. Articles on any topic of interest to the practice of elder law should be submitted via email as an attachment in rich text format (RTF) to Patricia I. "Tish" Taylor, Esquire, pitt@mcsumm.com, or call Arlee Colman at 1-800-342-8060, ext. 5625, for additional information.

COMMITTEE REPORTS

Guardianship Committee

Carolyn Landon and Beth Prather, co-chairs

A changing of the guards

Senate Bill 1088 was signed into law by Governor Charlie Christ on May 24, 2007. Among its changes, the new law amended Chapter 744 to provide that representation for alleged incapacitated persons who are indigent be provided by the Office of Criminal Conflict and Civil Regional Counsel or by a private attorney effective October 1, 2007. The Elder Law Section Guardianship Committee is seeking new committee members for input about this new legislation and its effects on guardianship. Contact committee chairs Carolyn Landon or Beth Prather as soon as possible if you are interested in joining the committee or if you have other issues concerning guardianship that you would like the committee to consider. The bill can be viewed at the following link, http://election.dos.state.fl.us/laws/07laws/ch_2007-062.pdf.

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

Beth Prather
239/939-4888, bethp@omplaw.com

* * *

Elder Abuse, Neglect & Exploitation Committee

Carolyn Sawyer, chair

The ELS Committee on Elder Abuse, Neglect & Exploitation got off to a great start with its first meeting on August 22, 2007. The meeting was attended by Carolyn Sawyer, chair, Chris Vogel, vice chair, and by eight active members: Marjorie Wolasky, Laurel Davidson, Anne Sheffler

Douglass, Kara Lyn Evans, Gerald (Jay) Hemness, Patricia Kent, Twyla Sketchley and Carolyn Landon.

The committee made a good beginning at establishing its goals for the year as well as a path for achieving those goals.

There is no dearth in Florida of people, agencies and entities dedicated to preventing the abuse, neglect and exploitation of the elderly, or to providing assistance when such instances occur. However, although we live in the "age of communication," the very volume of elder service providers, and the diverse missions and resources at their disposal, makes delivery of assistance to prevent and/or to address abuse, neglect and exploitation of the elderly an often difficult and frustrating proposition.

Communication and multidisciplinary teamwork on the state and local levels are the keys to helping to protect the elderly, to address their needs when they do become victims and to prosecute anyone who violates Florida's criminal laws by victimizing an elderly person.

Therefore, the committee is dedicated this year to identifying the relevant state and local entities as well as the members of the private sector that also come into contact with or otherwise encounter such situations and to organizing systemic and continuing opportunities for intercommunication between all the parties. In plain English, we want to get the State Attorney's Offices, the Adult Protective Services investigators, AHCA, the Ombudsman Councils, the TRIAD organizations, the Attorney General's Office (including, but not limited to Seniors vs. Crime), the various law enforcement agencies and the private sector elder law practitioners and elder service providers to get to know each other and to establish an ongoing and workable plan or system for them to *communicate* on a regular basis, so that each can assist and complement the work and role of the others. We hope to engage the state's academic resources to assist in this effort. Finally, in this time

of troubled finances on state and local levels, we seek to do this in a manner that does *not* require the commitment of any additional funding.

Our goals are ambitious, but achievable. We invite assistance, ideas and information from all members of the Elder Law Section. Please email chsawyer1@aol.com.

* * *

Medicaid Committee

Jana McConnaughay and John Clardy, co-chairs

Due to Florida's pending implementation of provisions of the Deficit Reduction Act of 2005 (DRA), the standing Medicaid Committee will have many important issues to address in the coming year.

One of its first tasks this year will be a review and analysis of Florida's new Long Term Care Partnership Plan in conjunction with the ad hoc Long Term Care Partnership Committee. Any members interested in helping with this effort are encouraged to join.

In the early 1990s, Congress established the Long Term Care Partnership Program. Four states (California, Connecticut, Indiana and New York) established programs. In response to concerns about promoting private long term care insurance through the Medicaid program and the limited value of some of the policies, Congress established a moratorium on the establishment of new programs in 1993. The DRA lifts the moratorium and permits all states to establish partnership programs.

The Long Term Care (LTC) Partnership Program combines private long-term care insurance with access to Medicaid for those exhausting their insurance benefits. The purpose is to encourage people to purchase LTC insurance coverage privately, with the assurance that they could receive additional LTC services through Medicaid as needed

continued, next page

COMMITTEE REPORTS

Medicaid committee *from preceding page*

after their coverage is exhausted.

Florida's partnership plan is a "dollar for dollar" model. Floridians can purchase an approved LTC policy that will protect a specific amount of their assets. For example, a person who purchases a partnership policy with maximum benefit coverage equaling \$100,000 would have an "asset disregard" for \$100,000 worth of assets if ever in need of Medicaid coverage. The rationale is that the dollar amount the LTC insurance pays out is equal to the beneficiary spending down assets before qualifying for Medicaid.

The Florida Department of Insurance released its rules regarding LTC Partnership plans effective August 1, 2007. According to these rules, approved partnership policies will have several common features, including a requirement that they be federally tax-qualified.

Additionally, partnership policies must have compound annual inflation coverage if issued to an insured under the age of 61 and annual inflation coverage if issued to an in-

dividual between the ages of 61 and 76. Insurers are also required to offer current policyholders with coverage issued on or after March 1, 2003, an option to exchange their policy for a partnership policy.

In the consumer protection arena, insurers must provide a disclosure at issuance of coverage that: (1) the policy is an approved partnership policy; (2) explains the benefits associated with the policy; and (3) discloses that partnership status may be lost if the insured moves to a different state, modifies coverage after issue or changes in federal or state law occur. If an insurer becomes aware that a policyholder takes action that will cause the loss of partnership status, the insurer must explain how that action will impact the insured and how to retain partnership status, if possible.

Some of the important issues the committee will address over the coming year include:

Consumer Protection - Under Florida's rules, there is no protection for consumers who purchase partnership policies should Florida in the future decide to no longer offer these plans. A consumer protection agree-

ment would protect partnership policyholders from future changes in the law and require the state to honor the dollar for dollar asset disregard.

Reciprocity - Under the DRA, reciprocity is not mandatory, and a state may opt out of offering reciprocity at any time. How does this affect Floridians purchasing these policies if they move to another state?

The committee will also analyze whether a similar opportunity may exist for an individual to use assets, rather than long-term care insurance, to fulfill the requirement of the asset disregard. This would require new legislation in the state of Florida. We are looking for members to work on this very important issue as well as others dealing with the LTC Partnership Plan on behalf of future elderly populations who may be too sick to qualify for long-term care insurance, but still want to be fiscally responsible without having to suffer from the indignation of self-improvement.

Contact Emma Hemness (hemnesselderlaw@aol.com), Jana McConaughay (jana@mclawgroup.com) or John Clardy (clardy@tampabay.rr.com) to become a member of our working group.



BERKSHIRE
TRUST ADVISORY

888-618-8478

Substantive 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 substantive 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 substantive committee chair or the section chair. Be sure to check the section's website at www.eldersection.org for continued updates and developments.

Medicaid

Jana E. McConnaughay, Tallahassee
850/425-8182
jana@mclawgroup.com

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

Newsletter

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

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

Law School Liaison

Jason White, Tallahassee
850/784-2599
jwhite@mconnaughay.com

CLE

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

Special Needs Trust

Alice Reiter Feld, Tamarac
954/726-6602
reiterfeld@aol.com

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

Death Care Industry

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

Estate Planning

Stephen Kotler, Naples
239/435-1533
skotler@wga-law.com

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

Ethics

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

Abuse, Neglect and Exploitation

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

Christopher Vogel, Viera
321/617-7510
cvogel@sa18.state.fl.us

Mentor

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

Legislative

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

Website

Jana E. McConnaughay, Tallahassee
850/425-8182
jana@mclawgroup.com

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

Council of Sections

Representative
Emma Hemness, Brandon
813/689-8725
hemnesselderlaw@aol.com

AFELA Representative

Michael Pyle, Daytona Beach
386/615-9007
mikep@pylelaw.com

NAELA Representative

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

Real Property/Probate Representative

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

FSGA Liaison

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

Public Policy Task Force update

by Chris Likens and Victoria Heuler, co-chairs

The Public Policy Task Force is an ad hoc committee appointed by the chair of the Elder Law Section and the president of AFELA, and it reports to both organizations. The task force was initially appointed to address several policy changes concerning Medicaid; however, over the past several years the task force's mission has grown to monitoring and coordinating the Elder Law Bar's legislative and public policy agenda.

Funding through the AFELA Advocacy Fund has enabled the task force to employ an administrative law attorney, John Gilroy; a lobbyist, former Senator Ken Plante; a legislative consultant, former legislative staff director Tom Bachelor as well as media relations expert Al Rothstein. Each of these individuals has helped our efforts tremendously.

Over the past year John Gilroy

has helped monitor the progress of Florida's implementation of the Deficit Reduction Act of 2005 (DRA) and has attended numerous workshops and informal meetings to improve the proposed rule. Ken Plante and Tom Bachelor have intervened on our behalf regarding proposed legislation concerning Medicaid, guardianships and end-of-life issues. In addition they have helped coordinate members speaking to local legislative delegation meetings and have assisted the section's leadership connecting with administrative and legislative officials on a number of topics of concern to our membership.

Al Rothstein has established a statewide speakers bureau, coordinated the placement of many media stories and editorials and has most recently established a media room at the AFELA website that contains

topics for interested media, recently published stories and materials concerning elder law to assist the media. He has also assisted in fund-raising by creating media relations materials available to contributors to the Advocacy Fund.

The members of the task force spend an incredible number of hours in our weekly (and sometimes more frequent) meetings, monitoring changes in administrative policy or legislation and coordinating the appropriate response with the ELS and AFELA. However, none of the efforts of the task force would be possible without the financial support of the members contributing to the Advocacy Fund.

For further information, or if you have an issue to bring to the attention of the task force, please feel free to email us at cal@calikens.com or vheuler@mcconnaughhay.com.

Florida DCF appoints Stetson law professor to chair advisory panel on adult protection system

Department of Children and Families Secretary Bob Butterworth has appointed Stetson professor Rebecca C. Morgan to chair the Select Advisory Panel on Adult Protective Ser-

vices. The goal is to review all aspects of the department's adult protection system and identify areas that need improvement.

"It's critical that we address the

needs and issues of caring for the state's most vulnerable adults," says Secretary Butterworth. "The Task Force on Child Protection is currently working to improve Florida's child welfare system, but we need to make a similar effort to properly protect and provide for our adult population, especially the elderly and disabled."

Butterworth has asked the panel to provide the department's leadership with advice and counsel on services to Florida's adults, including guardianship, as well as to identify statutory, policy or procedural problems with state programs and make recommendations for improvement.

Secretary Butterworth has asked the panel to hold its first meeting before October 10 of this year.

News & Notes

• The Florida Bar has named **Laird Lile** of the Board of Governors to be its liaison to the Elder Law Section. "We are privileged to have Laird as our liaison to the Board of Governors on behalf of our section," says **Emma Hemness**, ELS chair

• **Emma Hemness**, ELS chair, gave the section's annual address to The Florida Bar Board of Governors in person during its regularly scheduled meeting held October 5 in Coconut Grove.

**Mark your
calendar:**

"UnProgram"

**November 30 -
December 1**

The Academy of Florida Elder Law Attorneys (AFELA) will present the annual UnProgram November 30 - December 1, 2007, at the Embassy Suites Orlando Airport in Orlando, Florida.

The UnProgram is a unique program designed to allow elder law attorneys with all types of experience to network, discuss changes in the law and policy and learn innovative new practice procedures.

Friday's program is a facilitated open forum in which elder law attorneys discuss developments in elder law, review changes in public benefits and aging policy and exchange practice tips. Friday's program is open only to the first 50 AFELA or National Academy of Elder Law Attorneys (NAELA) members who register.

During Saturday's program, facilitators lead small group discussions on a variety of elder law topics, including Medicaid issues, special needs trust planning, estate and life care planning and marketing. Written reference materials are provided for topics. Saturday's program is limited to the first 100 attorneys who register. AFELA or NAELA membership is not required.

For registration or sponsorship information call AFELA at 850/656-8848 or visit the AFELA website at www.afela.org.



Mark your calendars!

ELDER LAW CERTIFICATION REVIEW COURSE

January 24-25, 2008

Orlando - The Florida Hotel at the Florida Mall

* * *

ELDER LAW SECTION EXECUTIVE COUNCIL MEETING

January 25, 2008

Orlando - The Florida Hotel at the Florida Mall (Following the Certification Review Course)

* * *

FUNDAMENTALS OF ELDER LAW II

April 10, 2008

Tampa - Tampa Airport Marriott

* * *

12TH ANNUAL PUBLIC BENEFITS SEMINAR

April 11, 2008

Tampa - TBA

Building a Better Practice: Florida Bar CLE!



THE FLORIDA BAR

www.FloridaBar.org

**Quality Speakers!
Online Registration!
Convenient Locations!
Audiotapes/Videotapes/CDs!
Courses Online at Legalspan.com!**

Visit www.FloridaBar.org and click on "CLE,"
then "Search Calendar" to view scheduled courses.

Elder mediation: Keeping care decisions out of court

by Twyla Sketchley

Mediation is used throughout the Florida court system to help parties find solutions in dissolution proceedings, workers' compensation issues, appellate cases, dependency and civil actions, including guardianship and probate. In Florida, "mediation" is a statutorily defined process whereby a neutral mediator facilitates the resolution of a dispute between two or more parties.¹ It is an informal and non-adversarial process protected by confidentiality.² The objective of mediation is to help the parties reach a mutually acceptable and voluntary agreement.³ The mediator's role is merely to assist parties in identifying issues, to foster joint problem solving and to explore settlement alternatives.⁴

Elder mediation encompasses "mediation" as defined by Florida law. However, like elder law, which focuses on the client, elder mediation helps parties focus on providing for the care and support of an elderly or disabled loved one.

Issues appropriate for elder mediation

As elder law attorneys know, when individuals age, they and their families address issues ranging from driving to pet care to paying for long-term care. Elder mediation can help resolve these issues. Elder mediation is not limited to families in litigation;

it is also available to families that are facing disagreements on the many issues of care for elderly or disabled loved ones.

Elder mediation can help families resolve issues such as healthcare decisions, care-giving burdens, financial decisions, public benefits and support issues, residential placement issues, caregiver payment, pet care, care for adult dependents of an elder, communications, visitation arrangements, decision-making authority, property maintenance and the delegation of duties and responsibilities. In cases where the elder is involved in a guardianship proceeding, many of the above listed issues can be resolved through mediation, as can those involving the guardianship, such as the extent of guardianship, care plans, who will be guardian, methods of accounting and reporting, dissemination/disclosure of information, use of professionals and use of less restrictive alternatives.

Benefits of elder mediation

Elder mediation allows families the opportunity to resolve issues privately, without government interference and for less than costly court proceedings. Through mediation, the parties set their own agenda and are not limited by how issues may be framed by a court, assuming they will be addressed at all. Resolving

disputes can help keep families together and allow the parties to save money and time. Families can then focus attention and resources on the individual needing care.

Elder mediation enjoys a high success rate in Florida. Moreover, even if not all issues are resolved, most participants in mediation report they are usually satisfied with the process, which can be especially helpful when elder mediation occurs early.

How to participate in elder mediation

When parties are in litigation, they may be referred to mediation by a judge or a special hearing master, as is currently done in many circuits. Parties may also voluntarily engage in mediation at any time, even before litigation arises.

In selecting a mediator, parties should look for mediators with elder law experience and knowledge and good problem-solving skills.

Twyla Sketchley is a Florida Bar board certified elder law attorney and the managing attorney for The Sketchley Law Firm PA in Tallahassee, Florida.

Endnotes:

- 1 Fla. Stat. § 44.1011(2) (2007).
- 2 Fla. Stat. § 44.405 (2007).
- 3 Fla. Stat. § 44.1011(2) (2007).
- 4 Ibid.

Call for papers — *Florida Bar Journal*

Emma Hemness is the contact person for publications for the Executive Council of the Elder Law Section. Please e-mail Emma at hemnesselderlaw@aol.com for information on submitting elder law articles to *The Florida Bar Journal* for 2007. 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.

InterActive Legal

Practice With Confidence!



 Expert Drafting Software

 Legal Education

 Practice Management

WEALTH TRANSFER PLANNING

ESTATE PLANNING

ELDER LAW PLANNING

MEDICAID PLANNING

Our legal products and educational programs are developed by experts in trust & estates, business succession planning, elder law and Medicaid planning. Wealth Transfer Planning, our lifetime estate planning and drafting system, is authored by Jonathan G. Blattmachr and Michael L. Graham and contains a sophisticated set of automated forms on HotDocs.

SPECIAL OFFER: Schedule a web demonstration of Wealth Transfer Planning by November 30 and receive a free video DVD – your choice of "Estate Planning Express Lecture Series" OR "Coping with Strangi," both recorded by Jonathan G. Blattmachr. This is a \$199 value.

To find out how our products can help you "Practice with Confidence," contact Nicole Splitter (908) 931-0944 (nsm@ilsdocs.com) to schedule a personal web demonstration.

InterActive Legal
100 Highland Park Village, Suite 200
Dallas, Texas 75205
(888) 315-0872
www.ilsdocs.com

Always speak to the person in charge

The tale:

Our family was in a service business, the pest control business to be exact. As a kid visiting my father's office, I always noticed the poster on the wall of the service technicians' meeting room. The poster would be changed every so often, and though seemingly obvious, each poster shouted a very important message, such as "In Our Business the Customer Is King" or "Always Speak to the Person in Charge."

Several months ago, we took in a case where a qualified income trust (QIT) was part of the solution. The granddaughter of the institutionalized person sought our help because she realized that her grandfather, who had been in the nursing home for about five months, had only enough funds to self-pay for another six months.

A review of the facts and the client's current estate planning documents, which were prepared by a major law firm, revealed that the client had what we would deem to be an extremely well drafted durable power of attorney, EXCEPT it contained no provisions regarding Medicaid, applying for benefits, creating a QIT or any kind of trust. Were we out of luck? My knee jerk reaction was "yes" as I asked the granddaughter if she wanted to be her grandfather's guardian.

The first tip:

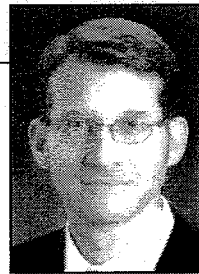
You are better off to have something you do not need than to need something you do not have. Throwing everything in your document except the kitchen sink will make for a longer document and higher cost; however, you will be less likely to need something you do not have at a time when it is unlikely you will be able to get it (capacity issues).

Next, we pondered how we were going to create the QIT. A QIT may be created only by one of the following:

1. The individual;
2. The individual's spouse;
3. A person, including a court or an administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or
4. A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

We all know too well there have been many administrative headaches

Tips & Tales



A. Stephen Kotler

in determining who can create the QIT. The Department of Children and Families (DCF) has been inconsistent from one district to another with respect to who can create a QIT, among several other planning solutions commonly employed by elder lawyers. Here the magnitude of the inconsistency is that some districts allow a spouse to create the QIT and other districts require a spouse to have a power of attorney.

It seems the policy in most districts has resulted in a narrow interpretation of who can validly create the trust. For example, DCF has not permitted healthcare surrogates or representative payees to create the QIT, even though they are arguably "a person with authority to act on behalf of the individual." Further, if a trust is to be created by an attorney-in-fact, the power of attorney, if signed on or after October 1, 1995, must contain language specifically granting the power

to "create any document or other disposition effective at the principal's death." Language such as "the power to create a trust for my benefit" has been found insufficient by DCF district legal counsel.

While we were thinking guardianship was the answer, we decided to seek out a colleague's opinion. This colleague indicated we should petition the court outside of guardianship. When there is no spouse, guardian or attorney-in-fact with specific authority to create a QIT, the court may do so. There is precedent in that DCF district legal counsel throughout the state have concluded that a trust created by the court outside of guardianship would satisfy the requirements of the Federal Omnibus Budget Reconciliation Act of 1993 and would be approved for Medicaid eligibility purposes.

The second tip:

First, do your homework and then seek the advice of someone who is smarter than you. In other words, it is crucial that you know what you do not know.

In seeking help from a court that may not have seen this issue before, a likely question put to you will be "Why not a guardianship?" because this is one of the most important considerations to be made by the court that has been petitioned to establish the QIT. Simply, it is a matter of cost. The costs of guardianship outweigh the benefits of such a proceeding for the sole purpose of creating a QIT. Funding of the trust can be accomplished outside of guardianship when the petitioner already has legal access to the Medicaid recipient's funds; therefore, the guardianship is not needed for any purpose at all. Thankfully, it is the stated policy of Florida that if there is a less restrictive means to accomplish what a guardianship can accomplish, it should be done by those less restrictive means and

not by guardianship.

At this point, we are ready to petition the court outside of guardianship to create the QIT. The client, though previously a resident of Collier County, had been moved to another part of the state by the granddaughter, and therefore, we called another elder lawyer colleague in the client's district seeking help should we need it and to ask a question regarding the policy in that district about an issue not related to the QIT. This colleague suggested we contact the district legal counsel directly.

While speaking with the district legal counsel, who was not sure about the issue on which we sought help, we mentioned we would be submitting a QIT and first had to get the court's authorization. The

district legal counsel then informed us that so long as there was nothing in the durable power of attorney to preclude application for benefits and there is general authority to "do anything I can do" (the district legal counsel's words), the district legal counsel would accept it. The district legal counsel would not require specific authority to establish a trust or to create any document or other disposition effective at the principal's death in order for the power of attorney to be effective. The district legal counsel's rationale was that there is nothing left over at the end, so the QIT was a lifetime situation and not a testamentary scheme. Next, the district legal counsel added, "We aren't in the business of keeping people from getting benefits." Right about then, all at the same time I was feel-

ing relieved, thankful and not so bright as I remembered the posters in my father's office.

The third tip:

Always speak to the person in charge.

A. Stephen Kotler is an AV rated, Florida Bar board certified wills, trusts and estates lawyer with Wollman Gehrke & Solomon PA in Naples. He maintains a practice in the areas of comprehensive wealth transfer planning, related income tax issues, asset preservation, probate, trust administration, federal transfer tax and long-term care planning. Mr. Kotler received his JD from Emory Law School and has an LLM in estate planning from the University of Miami.



**Mae Volen
Senior Center, Inc.**
The Lifeline for Seniors

The Mae Volen Senior Center, Inc., is a 501(c)(3) nonprofit organization. Founded in 1968, we have been continuously, proudly and ethically serving the senior population of Palm Beach County ever since.

In our 33,000 square foot facility in Boca Raton, we offer:



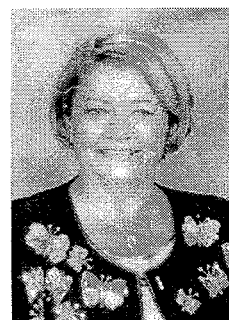
Linda Rosa, Director of Care Management can answer your questions about Living Well Care Network.

For further information on the Living Well Care Network, contact her at
561-395-8920 x246
rosal@maevolen.com

- Living Well Care Network - A Care Management Department
- The finest, most compassionate Adult Day Health Care program (Mae Volen operates a dementia-specific facility in Delray Beach as well)
- A Transportation department that operates 23 vehicles and provided 70,000 rides to seniors in 2006
- Life Enrichment program for active seniors with activities such as oil painting, computer classes, reiki, yoga and weekly field trips.

In the state of Florida or out of state,
call us toll-free at: 866-711-6872

www.maevolen.com



Denise Parsons, Director of Adult Day Health Care, can answer your questions about the Center's Adult Day Care services.

For further information on Adult Day Care, contact her at 561-395-8920 x253
parsonsd@maevolen.com

litigation

financial crimes

exploitation

DPA mis – use

(561)

655 - 1556

www.pankauskilaw.com

pankausk i

LAW FIRM
P. L. L. C

west palm beach • referral fees

Elder Law Retreat:

Networking, practice tips ... and lots of fun, too!

The setting for the 2007 Elder Law Retreat was the luxurious Breakers Hotel in Palm Beach, Florida. Following years of tradition, the primary focus of the retreat was to focus on practice management issues, network with one another and have fun with other section members and their families.

ELS Chair Emma Hemness set the tone for the event by welcoming section members and their guests to a tequila tasting seminar in the chair's suite on Thursday afternoon.

Friday morning featured a presentation by Steven Silverberg on "Building PowerPoint Presentations, Law Office Software and Technology." Steve counseled us on some of the latest programs available to enhance our PowerPoint presentations and gave us practical information regarding law office technology. Following Steve's presentation, Al Rothstein gave us some very helpful tips on using the media to market our law practices.

Friday's luncheon featured the return of "recovering lawyer" and comedian Shawn Carter, whose humor brought many chuckles.

The setting for Friday evening's entertainment, the gorgeous Ponce de Leon Ballroom at The Breakers, was splendid. It was hard to determine just which station was more popular, the fabulous vodka slide, compliments of Elder Law Associates, or the tasty prime rib. With plentiful libations and great music, the dancing started and a few brave elder law attorneys displayed their best dance moves.

Following breakfast complete with mimosas (compliments of E.P.I.C. LLC) on Saturday morning, we were honored to have two members of the Kelley law firm address our group. Rohan Kelly talked to us about the escalating trend of pre-death probate and trust litigation. Shane Kelly then shared his experiences with guardianship litigation. Shane's presentation included sharing his war stories about his experience with the Anna Nicole Smith case.

The final program consisted of a panel featuring section members Jana McConaughay, Victoria Bowers and David Midgett, who talked about the pros and cons of adding another attorney to your practice.

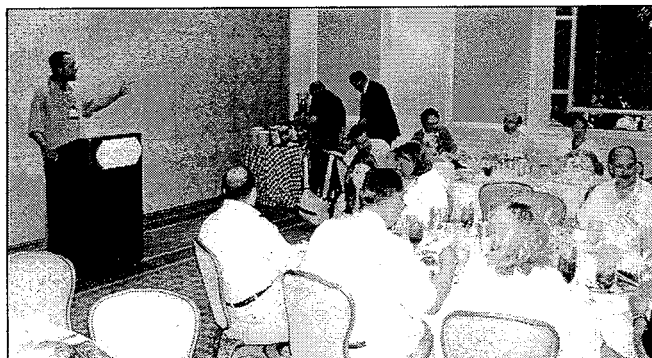
Special thanks go to Babette Bach and Marjorie Wolasky for co-chairing this event, to Arlee Colman for another job well done and especially to our sponsors, FirstLantic of Del-

ray Beach, Colling Gilbert Wright & Carter of Orlando, Comfort Choice of Miramar, Interactive Legal Systems of Dallas, Texas, The Center for Special Needs Trust Administration Inc. of Clearwater, Berkshire Trust Advisory of Jacksonville, Academy of Florida Elder Law Attorneys, Mae Volen Senior Center Inc. of Boca Raton, Elder Law Associates of Boca Raton and E.P.I.C. LLC.



Rohan Kelly discusses escalating trend of pre-death probate and trust litigation.

Computer guru Steve Silverberg shares time-saving tips for office software applications.



Shawn Carter, humorist and "recovering lawyer," entertains during luncheon.

What happens in West Palm ... Stays in West Palm (... or maybe not)

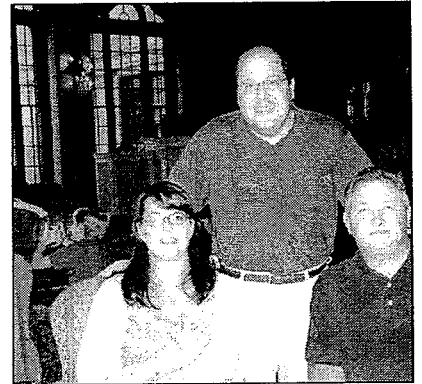
Casino Night at the Elder Law Retreat



Jay wonders, "How did I get this lucky?"



A toast to Ellen and Howie, sponsors of the vodka slide



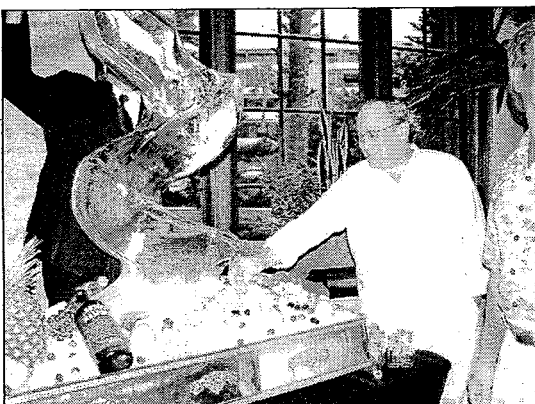
Having a good time at Casino Night



"Stu, I'm going to call, and raise you ..."



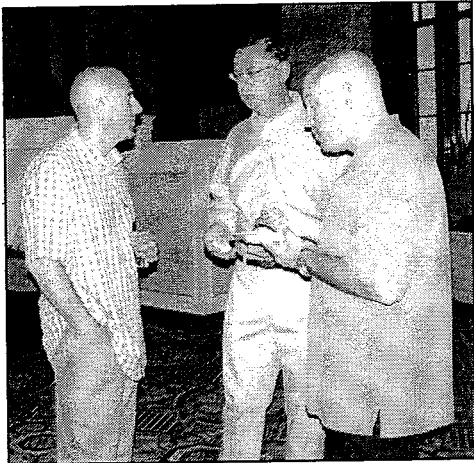
"So, Jack ... should I hit or stand?"



"I've really got to come to Florida events more often!"



Somebody's gotta' try it this way ...

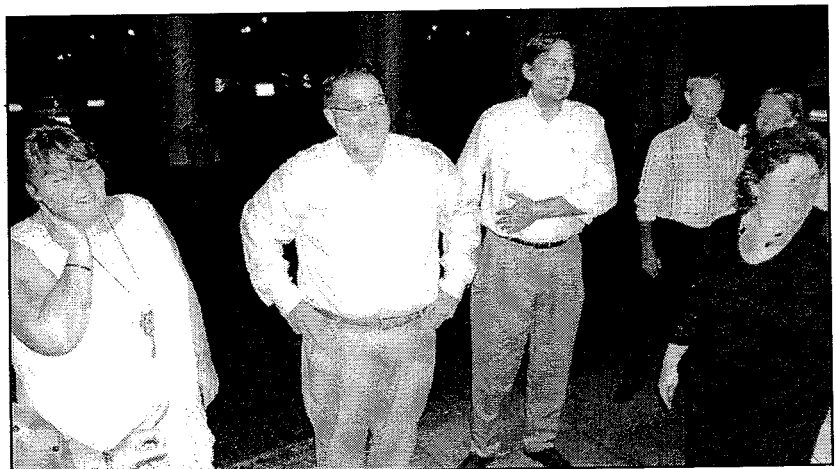
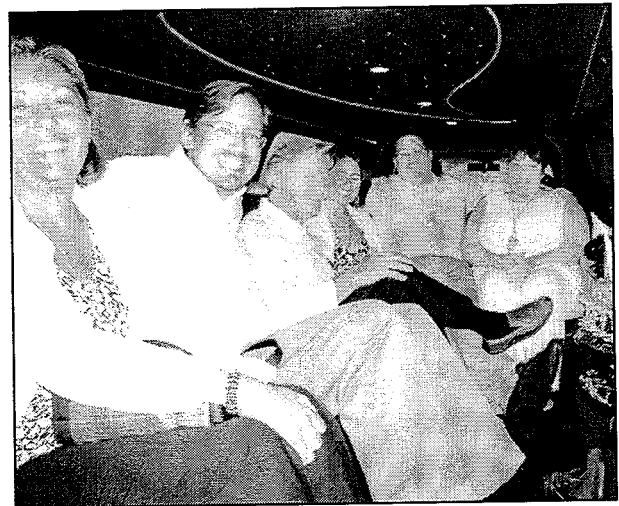


Do these guys ever stop talking about work?



If that's Tom Sawyer, who's Huckleberry Finn?

More fun during the Retreat ...



A few brave souls help with 'FUN-draising'

In concert with the Elder Law Retreat, an impromptu fund-raising event was pulled together to benefit the AFELA Advocacy Fund. Part of the event involved an Elder Law Section "Celebrity Car Wash." Step one was to find a few ELS celebrities willing to put on a bathing suit and wash a car. Step two was to have retreat attendees determine who among our celebrities would have to complete that task. Each celebrity required to complete the task would produce a short home video of themselves doing the deed, which would be shown at the December AFELA UnProgram. Step three had retreat attendees vote with monetary contributions in either a "happy face" or an "unhappy face" jar, with each celebrity's own action-figure sized cardboard cutout affixed thereto (see photos). Step four: More money in the "happy face" jar at the end of the event meant the celebrity would be required to complete the task; more money in the "unhappy face" jar let them off the hook.

We strongly suspect a few of the celebrities had "moles" at the retreat who made sure their "unhappy face" jar prevailed. Yet, by the event's end, several celebrities found themselves having more money in their "happy face" jar. So, in all fairness, each celebrity was given the opportunity to "buy" himself or herself out of the task. The result? Currently, we do not have ANY celebrities having to don a bathing suit and wash their car. However, you never know when the "Celebrity Car Wash" event will come back by popular demand ...

Can you guess our celebrities' identities by their "glam" names?

Chippendale Charlie
Ira the Incredible
Joan-alicious
John the Jock
Juicy Couture Julie
Lauchlin the Lucious

Len the Looker
Mah-velous Mary Alice
Ravishing Rebecca
Sheri the Sumptuous

Can you guess which celebrity said ...?

"Heck, I'll do it in a thong if it'll raise money!"

"You can't get me to wash a car, but I am willing to kiss a pig!"

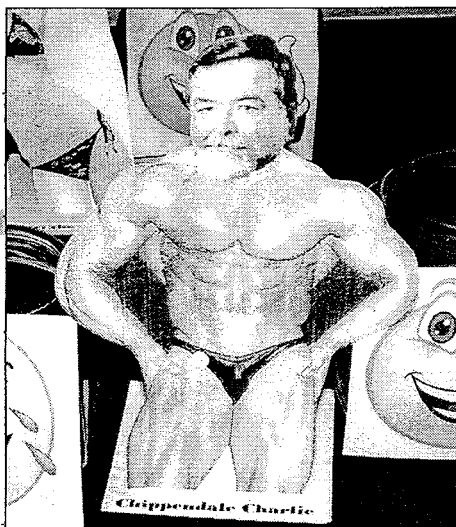
"I'm only going to do it if you can convince x, y and z to do it!" (But, later on ... "Darn, I didn't think they'd actually say 'yes!'")

"How about if I drive through a car wash while wearing my bathingsuit? Will that work?"

"I won't wash my car, but I'll wash my boat."

"Yes, I'll do it. Sounds like fun."

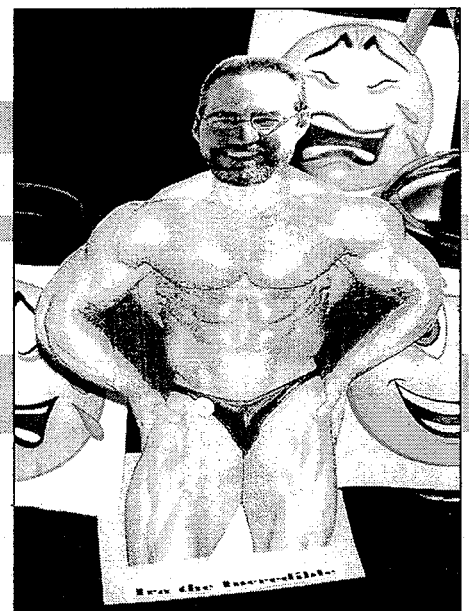
"You want me to do what?!"



"Chippendale Charlie"



"Joan-alicious"



"Ira the Incredible"



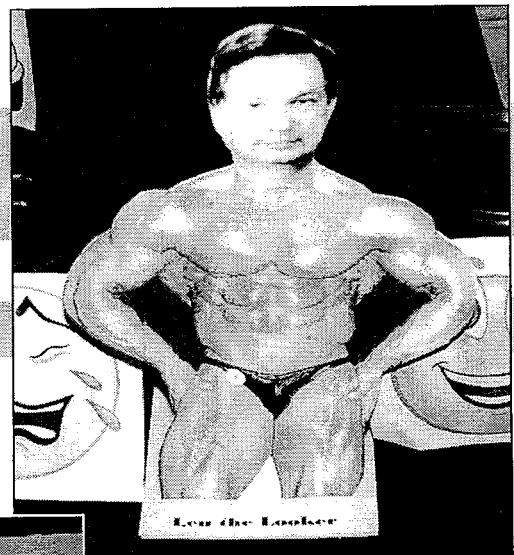
"John the Jock"



"Juicy Couture Julie"



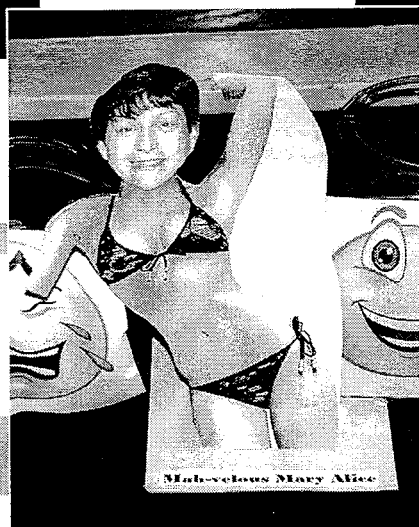
"Lauchlin the Lucious"



"Len the Looker"



"Ravishing Rebecca"



"Mah-velous Mary Alice"



"Sheri the Sumptuous"

The National College of Probate Judges and Stetson University College of Law project for law students

by Hon. John N. Kirkendall and Rebecca C. Morgan



KIRKENDALL

Recently, the National College of Probate Judges (NCPJ) and Stetson University College of Law started a project to bring together law students and NCPJ judges. Stetson is Florida's oldest law school¹ and is nationally known for its advocacy programs. It has been ranked by *U.S. News & World Report* as **the** top law school in advocacy and a top school in legal writing.² For a long time, Stetson has emphasized lawyering skills as part of its educational mission.



MORGAN

In addition, Stetson is home to a vibrant elder law program.³ Because older persons make up a significant percentage of the population, it is critical that attorneys who represent them are properly trained to do so. By combining elder law and advocacy skills, Stetson provides its students a number of practical educational opportunities, including this one with the NCPJ.

For those unfamiliar with the NCPJ, it was formed some 30 years ago by a group of probate judges. They observed that there was no national educational organization dedicated solely to judges exercising probate jurisdiction. The College was created "in response to public concern with the time and costs involved in estate administration," and to "improve the administration of justice in courts with probate jurisdiction."⁴

The NCPJ is truly one of a kind.⁵ The mission of the NCPJ is "[t]o promote efficient, fair and just judicial administration in the probate courts and [t]o provide opportunities for continuing judicial education for probate judges and related personnel."⁶ The College accomplishes its purpose

through publications, programs (national and regional) and projects.⁷

While the National Judicial College is widely recognized for its excellence in educating judges, its devotion to probate courts was, of necessity, of an abbreviated nature. Further, although there are some excellent state training programs for probate judges, many states have concluded that it is important to have their probate judges attend national programs as well, at least every three years or so, so their states' practices and procedures can reflect the best of what is available nationally. The idea was readily accepted, and now membership at any given time ranges from 400 to 600 judges nationally. The influence of the NCPJ is far wider than its membership when one considers the training the judges engage in at home, once they return from the national meetings.

In addition, membership in the NCPJ is open to probate practitioners, professors and others interested in advancing probate law. In fact, faculty members from Stetson are members and have been some of the National College's most popular presenters at national conferences.

The NCPJ-Stetson projects

At the NCPJ board meeting in Williamsburg in April 2007, the NCPJ board approved two projects with Stetson Law School: a "virtual internship" program and a pro bono project. In this section of the article, we explain the scope of the two projects.

The pro bono project

Stetson has had a longstanding commitment to public service, being one of the first law schools to adopt a public service requirement that all students must fulfill before graduation.⁸ Initially, the NCPJ student opportunities will focus on several projects, including the NCPJ web page, as well as the NCPJ-NGA (National Guardianship Association) guardianship statistical study.

Stetson is one of the law schools

in the country that makes extensive use of technology. Training in the elder-friendly William R. Eleazer Courtroom,⁹ distance learning opportunities in tandem with other law schools and the online LL.M. program in elder law¹⁰ are examples of what is occurring at Stetson. The NCPJ and many of its member judges have websites. Students working on the web page project will locate, collect and summarize probate and guardianship statutes by state for inclusion on the NCPJ members-only portion of the NCPJ web page. Students who volunteer for the pro bono web projects may design templates for evaluating national and state probate court websites and will also use those templates to prepare evaluations. The students will gather and summarize the various states' probate and guardianship statutes, with links for the online versions of the statutes. Those students with technical savvy will review, evaluate and suggest improvements to the NCPJ web page. They will also help the webmaster in analyzing and developing additional content for the NCPJ website, beyond the articles and statutory compilations.

The NCPJ and the NGA are also undertaking a guardianship statistical study in select states. Policymakers around the country have often speculated about the number of elder persons who have guardians appointed for them at any given time. It is interesting that these numbers are not presently available. They are important numbers, not only in gross terms but also in terms of how many limited guardianships there are—that is guardianships where the guardian has been awarded some but not all of the powers of the individual to make decisions for him or herself. Courts now routinely prefer limited as opposed to full (or plenary) guardianships, but it is not known how this is playing out in practice. Gerontologists believe an understanding of these numbers will help determine the extent to which quality of life can be improved for older persons. Five

states have been selected to initiate the study. Stetson students will have the opportunity to participate in the project in several ways. We envision students assisting with various components of the study, including the collating and summarizing of the data collected. Students may also research issues that will be turned into articles for the NCPJ magazine and website.

We contemplate many other volunteer opportunities for Stetson students with the NCPJ. Michael Farley, assistant dean of student life, coordinates the pro bono project at Stetson's end and works directly with Judge Kirkendall, who serves as the point of contact for the NCPJ.

The "virtual intern" program

The NCPJ has many judges in small communities without access to law students or the funding to hire legal interns. Many students desire an opportunity to develop a relationship with a court, perhaps in a state or a community where the student hopes to practice. Stetson and the NCPJ created the "virtual intern" program to meet these two needs. Stetson provides the students, and the NCPJ provides the judges. Judges may participate for an entire semester and have an intern assigned to him or her for the duration of the semester, or judges may participate on a project basis rather than a semester basis.

Interns are given a variety of research assignments,¹² including research for a specific case, for an issue of interest to the judge or for an article or a speech for the judge. Since the judges are not from the Tampa Bay area,¹³ the students communicate with the judges by email or telephone, thus the "virtual" nature of the internship.

We believe this project will provide a huge benefit to the judges and the students. The participating judges will benefit by having the interns working for them on various assignments. We recognize that this is not completely "free," although it really has no monetary cost to the judges and the courts. Although there is no financial cost to the participating judges or the courts, there is a cost—that is, one of time.

At the conclusion of the program,

judges have a work product they could not have obtained otherwise, and the interns gain experience from working for a judge. For those students who are interested in elder law, the opportunity to work with a judge and to research some amazing issues is incredibly valuable. The virtual internship also benefits the NCPJ by providing interns to participating judges. The project fits within, and in some instances helps further, the goals of the NCPJ.¹⁴

There are additional benefits to the students. For example, a judge may choose to serve as a reference for the intern or to recommend the intern for employment opportunities. When the interns graduate, the NCPJ will provide a certificate from the College to be awarded to the interns at Stetson's Honors and Awards ceremony.

Conclusion

We believe these programs will be hugely beneficial to the NCPJ, its judicial members and Stetson law students. Probate courts play a huge role in an elder law practice, yet oftentimes, students as well as the public know very little about a probate court's jurisdiction and responsibilities.¹⁵ The opportunity for students to work with judges is significant. From the NCPJ's perspective, the resources provided through Stetson's students are invaluable.

For more information about this program, please contact Becky Morgan at Stetson, morgan@law.stetson.edu. For information about the NCPJ, please contact Judge Kirkendall, judgejnk@yahoo.com.

Portions of this article appeared in the summer issue of the NCPJ magazine and are reprinted with the permission of NCPJ.

Judge John N. Kirkendall is president of the National College of Probate Judges. He has written and lectured widely and is nationally known and recognized for his work on guardianship matters. His principal interest at this time is to assist in developing a nexus between students interested in a career in law and judges specializing in probate matters. Judge Kirkendall can be reached by email at judgejnk@yahoo.com.

Professor Rebecca C. Morgan holds the Boston Asset Management faculty

chair in elder law at Stetson University College of Law. She is director of the Elder Law Center as well as the online LL.M. in elder law. She can be reached by email at morgan@law.stetson.edu.

Endnotes:

- 1 See <http://www.law.stetson.edu/general/first.htm>.
- 2 See <http://www.law.stetson.edu/communications/news.asp?id=239>.
- 3 See www.law.stetson.edu/excellence/elderlaw. Starting with the fall 2007 semester, Stetson offers an LL.M. in elder law that is done via distance learning.
- 4 http://www.ncpj.org/about_us.htm.
- 5 The NCPJ website describes the College's uniqueness this way: "[i]t is the only national organization exclusively dedicated to improving probate law and probate courts." http://www.ncpj.org/about_us.htm.
- 6 http://www.ncpj.org/about_us.htm.
- 7 http://www.ncpj.org/about_us.htm.
- 8 See <http://www.law.stetson.edu/studentlife/probono.asp>.
- 9 The Eleazer courtroom was dedicated on the Stetson campus in 2005. The courtroom was designed to be elder-friendly and barrier free and is the first (and perhaps only) courtroom of its kind in the United States. See <http://www.law.stetson.edu/eleazercourtroom/>.
- 10 <http://www.law.stetson.edu/Excellence/elderlaw/LLM/>. Applications are now being taken for the fall 2008 entering class.
- 11 "Virtual internship" is the label we have assigned to this project, primarily for two reasons: First, the label is a nod to the communication methods being used—students do not meet with their judges in person but instead communicate by email or telephone. Second, it's catchy! The real name of the project is referred to as directed research.
- 12 Some requests, such as those unconnected with being a judge, may be inappropriate for student involvement. Judge Kirkendall and Professor Morgan will make decisions about the appropriateness of the requests if the request is not clearly related to judicial activities.
- 13 The law school's main campus is in Gulfport, Florida, with another campus in Tampa, Florida. The two cities fall within a geographic location referred to as the Tampa Bay area. Stetson offers a state judicial internship program for those judges in the Tampa Bay area. The virtual interns are for those judges outside the geographic location of the school.
- 14 Those goals are:
 - To foster a court system that offers equitable and expeditious administration of estate and all other proceedings under probate jurisdiction.
 - To encourage the preparation and distribution of materials that will aid in the administration of probate courts (for example,

continued, next page

Project for law students

from preceding page

court practice manuals).

- To help probate courts take advantage of technological progress in court administration; for example, using computers for document management, court book-keeping and fiduciary accounting.
- To sponsor regular seminars and courses for the continuing education of probate judges and court personnel.
- To publish and distribute educational brochures and periodicals.

- To provide a continuing educational program as well as other measures that will improve probate judicial administration.
- To cooperate with other legal judicial organizations in efforts to improve judicial administration.
- To be a research and learning resource for judges and scholars studying probate administration.
- To assist in drafting modern probate legislation and provide expert opinions regarding proposed legislation.
- To encourage, where applicable, the preparation and adoption of standardized uniform practice procedures, both within

and between states. http://www.ncpj.org/about_us.htm.

¹⁵ The NCPJ website describes it this way:

Probate courts are responsible for equitably handling many kinds of problems in our society. Though they deal primarily with the estates of deceased persons, probate courts also play an important role in protecting the rights of people with special needs— the mentally ill, alcoholics, orphaned children, the aged, and developmentally disabled persons. http://www.ncpj.org/about_us.htm.

Fair hearings reported

by Nicholas J. Weilhammer

Petitioner v. Florida Department of Children & Families, Appeal No. 06F-07483 (Dist. 03 Lafayette, Unit 88674 Apr. 20, 2007).

Petitioner had multiple diagnoses, was incoherent upon admission to skilled nursing facility and was unable to perform any activities of daily living. Petitioner also had history of being a juvenile sexual offender. Petitioner applied for ICP benefits in June 2006. Petitioner's condition improved, and he was discharged in July 2006. In June, CARES staff went to the facility to determine the level of care needed, but became aware that petitioner would be discharged when his health improved. CARES withheld petitioner's level of care because he was a juvenile sexual offender and could pose a danger to others. DCF denied application for ICP benefits in September 2006.

To qualify for ICP, the individual must meet criteria, including appropriate placement. An individual must be placed in a facility certified to provide the type and level of care DCF has determined is required. To be placed, CARES must determine if the individual needs ICP level of care. Petitioner met the level of care criteria from the date of admission through date of discharge, as CARES acknowledged at the hearing. The level of care was inappropriately withheld. Appeal granted, and ICP benefits from March-July 2006 were approved.

Petitioner v. Florida Department of

Children & Families, Appeal No. 06F-06761 (Dist. 11 Dade, Unit 88601 Apr. 3, 2007).

Petitioner was receiving ICP benefits. In September 2006, DCF became aware that petitioner had a monthly income, not initially reported, of over \$1,400 from a long-term care policy. Petitioner also had SSA income of \$814. In September 2006, DCF terminated petitioner's benefits due to excess income, effective October 2006. Petitioner argued that the money paid under the long-term care policy should be excluded from ICP eligibility because the type of income is not listed in any regulation.

The listing of income in 20 C.F.R. § 416.1221 ("Some types of unearned income are—") is not an all inclusive list of income. For instance, 20 C.F.R. § 416.1221 states that "income is anything you receive in cash or in kind that you can use to meet your needs for food and shelter." Petitioner can use the payment to meet her needs. 20 C.F.R. § 416.1221 ("What is not income") excludes certain items from being considered as income. There is no evidence that the payment from the long-term policy was a reimbursement for expense. In fact, petitioner is seeking to have Medicaid pay that expense. Appeal denied.

Petitioner v. Florida Department of Children & Families, Appeal No. 07F-00262 (Dist. 9 Palm Beach, Unit 88322 Mar. 8, 2007).

Petitioner was admitted to nursing facility and established a durable

power of attorney (DPOA). Petitioner's bank account had over \$50,000. Money was withdrawn to purchase a personal service contract (PSC), which was mostly medical in nature. Petitioner died the following month. Petitioner appealed denial of ICP application for Medicaid benefits due to petitioner's assets exceeding eligibility limits. DCF argued that based upon Fla. Stat. § 708.08 [sic], a PSC cannot be purchased through the powers granted in the DPOA because there was no authority in the DPOA to make that specific purchase. Because the funds used to make the purchase could have been used for medical treatment at the nursing facility, the purchase of the PSC was made without the consideration for ICP eligibility. Petitioner argued the DPOA was broad enough to allow the attorney-in-fact to conduct all business as if it were the petitioner.

Neither the purchase of the PSC nor the exercise of making healthcare decisions was specifically enumerated in the DPOA, which concerned itself with financial instruments and insurance policies. Appeal denied.

Petitioner v. Florida Department of Children & Families, Appeal No. 06F-07268 (Dist. 13 Lake, Unit 88083 Feb. 6, 2007).

Petitioner applied for ICP benefits in August 2006. Income exceeded the income limit, so an irrevocable medical income assistance trust was established, signed by the daughter as DPOA. DCF eligibility review staff

believed the trust was comprised of the income only, was irrevocable and Florida would receive all funds remaining in the trust at death up to the amount paid on behalf of petitioner. District legal counsel in September 2006 found the trust insufficient with regard to designation that Florida would receive funds at death. No other sufficiency was indicated, and counsel did not participate in the hearing. ESS office received counsel's review seven weeks later, and petitioner was not advised of any deficiency prior to the application's denial. DCF denied ICP benefits based on excess income. Petitioner believed denial was based on the trust's completion by a paralegal rather than an attorney, and took remedial measures.

There is no requirement for an attorney to complete the trust document; it was completed appropriately, and the requirement to have Medicaid-expended funds to be received by Florida upon death was met. Appeal granted for further administrative processing.

Petitioner v. Florida Department of Children & Families, Appeal No. 06F-05138 (Dist. 11 Dade, Unit 88601 Jan. 29, 2007).

Petitioner filed application in May 2006. Petitioner died in July 2006. Petitioner and husband (the community spouse) had over \$126,000 in countable resources. DCF denied the application for ICP due to excess assets for May-July 2006 because it exceeded the asset limit (\$2,000) and community spouse asset allocation standard limit (\$99,540). The MMMIA was \$1,604. The spouse had \$749.58/month income; the couple had interest income of over \$240/month.

DCF's community spouse asset allocation standard can be revised through a fair hearing process. Petitioner's community spouse's income, even with the addition of all the interest amount added, does not add up to DCF's MMMIA amount, thus the spouse's asset allocation needs to be revised to prevent spousal impoverishment. Petitioner should be eligible for ICP benefits for May-July 2006 based on the revision. Appeal granted.

Petitioner v. Florida Department of Children & Families, Appeal No. 06F-07025 (Dist. 12 Flagler, Unit 88216

Jan. 3, 2007).

Petitioner was admitted to nursing home as a private patient and applied for ICP benefits in May 2005. DCF initially determined the personal service contract (PSC) was not binding, then later relented. Petitioner's funds were placed in escrow account at time of ICP application to pay for repairs to petitioner's home. DCF determined the funds were accessible to petitioner, and counted the asset. Petitioner's representative then closed the escrow and paid outstanding balance to the facility in January 2006. DCF approved ICP Medicaid for February 2006, but denied ICP for May 2005-January 2006 due to excess assets.

Petitioner argued the escrow should be an excluded asset. DCF argued there was no asset exclusion related to such an escrow account.

There is no authority to exclude the account and no evidence the asset was unavailable. A trust can include an escrow account and is revocable if the account can be dissolved. Petitioner's representative dissolved the account as soon as she found it would preclude ICP eligibility. Remanded to allow petitioner the opportunity to show exactly when the escrow was liquidated in January 2006.

Petitioner v. Florida Department of Children & Families, Appeal No. 06F-05943 (Dist. 14 Polk, Unit 88588 Dec. 19, 2006).

Petitioner entered nursing facility in September 2005. Petitioner's son alleged he filed an application for benefits in September 2005. DCF could not find a record of the application in its computer system. Petitioner applied again in March 2006. In April 2006, DCF approved petitioner for ICP benefits effective December 2005.

The son testified he had filed an application for benefits in September 2005, handing the application to a DCF employee. A witness corroborated his statements and could describe the DCF employee. DCF held a phone interview with the son regarding insurance information. DCF's computer system shows entries in November and December 2005, reflecting a return of information requested. Subsequent to that time, running record comments show the son's repeated attempts to find September's application status.

Petitioner has met his burden of proof that he submitted the application in September 2006. Appeal granted.

Update your CLE record in record time!

CLE CREDIT POSTING

Discover the convenience of online posting at

www.floridabar.org

Click "Member Profile" at top right

Click "CLE Activity Posting" link

Login and Post Credits

REMINDER: FLORIDA BAR CLE ATTENDANCE
CREDITS ARE POSTED AUTOMATICALLY

Summary of selected caselaw

by Nicholas J. Weilhammer

Estate of Orlanis v. Oakwood Terrace Skilled Nursing and Rehabilitation Center, 2007 Fla. App. LEXIS 13391 (Fla. 3d D.C.A. Aug. 29, 2007).

Deceased resided at facility until her death. Personal representative of deceased sued the facility for wrongful death, negligence and statutory damages. The admissions agreement contained an optional arbitration clause and automatic assignment upon sale or transfer of license. Estate appealed order compelling arbitration.

The appellees waived their right to arbitrate by affirmatively seeking the benefits of the rules of discovery before filing their motion to arbitrate. The offending discovery included interrogatories, requests for production of documents and notices to produce to non-parties. Any defendant who seeks the benefits of the discovery rules prior to filing his motion to arbitrate forfeits his right to arbitration. Reversed.

In re Guardianship of Graham v. Graham, 2007 Fla. App. LEXIS 11735 (Fla. 4th D.C.A. Aug. 1, 2007).

While residing in Florida, the court appointed an emergency temporary guardian with plenary authority over ward's person and property, and appointed counsel for her. Son then took ward from the residence where she had been placed by the guardian and moved her to California without giving notice to the court or any of the parties. The trial court held son in indirect criminal contempt for removing ward from Florida and defying the guardianship orders. Son refused to reveal whereabouts of himself and ward. Attorney appeared but was not permitted to represent ward. Trial court found counsel had no standing to bring motions on behalf of ward. Attorney filed a petition seeking review of the denial of an *ore tenus* request to substitute counsel and argued the guardianship proceedings violated ward's right to due process of law and that the guardianship proceedings be dismissed because ward was not in Florida.

The court acquired jurisdiction over ward when the guardianship

proceedings were initiated by DCF while ward was hospitalized in Florida and when the guardianship was established. Son's improper act of subsequently removing ward from Florida cannot divest the Florida court of jurisdiction. Court approval is required before removing a ward from the state. Son did not obtain prior court approval and did not notify anyone that he had taken ward to California. If a guardian cannot remove a ward from the state without prior court approval, surely son cannot do so here. Termination of the guardianship on the ground that ward was no longer located in Florida would permit son to benefit from his misdeed. The lower court still has jurisdiction to continue with the proceedings. If a person could secrete an incapacitated ward away in another state and thereby cause termination of the guardianship, the entire purpose of having a guardianship procedure would be nullified. The equities in this case strongly call for the circuit court's continued exercise of jurisdiction. The statutes provide for termination of a guardianship upon a change in domicile of the ward where another state has appointed a guardian, but the statute requires that the change in domicile be accomplished by the legal guardian with prior approval of the court. Affirmed.

Adult Communities Total Services Inc. v. Estate of Zimmerman, 2007 Fla. App. LEXIS 11406 (Fla. 4th D.C.A. July 25, 2007).

Summary judgment entered in favor of appellees, awarding an entrance fee refund, with credits, arising after the termination of a resident contract with a continuing care facility.

Under the terms of the contract, a resident's entitlement to a refund depended upon the "termination" of the contract; termination did not become effective until the later of either 30 days after receipt of notice of termination or surrender of the unit. Appellant waived the requirement of written notice, but not the "30 day" or "surrender" requirements necessary to complete a termination of the contract. Resident died nine days

after her daughter gave oral notice of termination. Reversed.

Ripoll v. Comprehensive Personal Care Services, Inc., 2007 Fla. App. LEXIS 10977 (Fla. 3d D.C.A. July 18, 2007).

Adversary action brought in a guardianship proceeding by guardian of the property, Comprehensive Personal Care Services Inc. (CPCS), to remove the successor guardian of the person, Ripoll. CPCS alleged guardian of the person improperly took money from the guardianship to purchase a home for her personal use. The trial court ordered guardian of the person (in the presence of her husband) not to mortgage, hypothecate or encumber this home in any way. Two days later, the Ripolls mortgaged the home. CPCS moved to remove Ripoll as guardian for violating the court's order. The court ordered Ripoll to bring documentation that reflected the proceeds from the mortgage. Ripoll invoked a Fifth Amendment privilege and refused to produce any documents or answer any questions about the mortgage. The trial court froze all of the Ripolls' assets.

A circuit court has the inherent authority to monitor a guardianship and to take action it deems necessary to preserve the assets for the benefit of the beneficiaries. The court has the authority to issue temporary injunctions freezing assets claimed to belong to a guardianship even though ultimate ownership of those assets may be in dispute. Affirmed.

Paul v. Gonzalez, 2007 Fla. App. LEXIS 10773 (Fla. 4th D.C.A. July 11, 2007).

Plaintiff filed a negligence action *pro se* arising out of an auto accident. During the discovery phase, the trial court granted plaintiff's motion for protective order, finding plaintiff did not have the capacity to understand the nature of the lawsuit. The trial court ordered plaintiff's sons, who attended the hearing, to open a guardianship proceeding, and if the sons were not successful in opening a guardianship, and if no action was

taken to resolve or move the case forward within the next year from the date of the order, then the case could be dismissed for lack of prosecution. The trial court, after issuing a notice of failure to prosecute pursuant to Florida Rule of Civil Procedure 1.420(e), then dismissed the action for failure to prosecute.

Under Fla. R. Civ. P. 1.210, when the unrepresented plaintiff in this action became incompetent, the trial court itself should have either appointed a guardian ad litem or entered such other order as it deemed proper for the protection of the incompetent plaintiff. The court should ensure that the interests of the incompetent party will be protected until someone is qualified to succeed to his interests. The dismissal clock began ticking on plaintiff's lawsuit without any representative capable of understanding the lapse of time and the consequent effect on his legal rights. It is a denial of due process to dismiss the claim of a person who is then incompetent without the presence of someone in the case able to prosecute or prevent dismissal for lack of prosecution. The "limitations" period of Fla. R. Civ. P. 1.420(e) cannot be fairly applied against a party who is incapable of complying. Reversed.

Bryan v. Dethlefs, 32 Fla. L. Weekly D 1269 (Fla. 3d D.C.A. May 16, 2007). Half-sister asserted that the assets of a revocable living trust vested with the settlor's grandson, who was also her half-brother, at the time of the settlor's death, and that those assets were therefore part of the half-brother's estate when the half-brother died. Potential beneficiaries asserted that the trust assets vested at the time of their distribution, and assets not distributed at the time of half-brother's death were not part of his estate and had to be distributed to them as the settlor's remaining descendants. Trial court granted summary judgment in favor of half-sister.

The trust assets could only have vested in the half-brother upon the settlor's death. The clause "if he is living at the time of distribution" did not establish a requirement that the assets be distributed before the half-brother's right vested. Affirmed.



THE
FLORIDA
BAR
CLE

The Florida Bar Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section present

Estate Administration Issues Resulting from Good Planning, Bad Planning or No Planning

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Video Replays (7 locations): October 12, 2007 - October 25, 2007

Course No. 0543R

SEMINAR TOPICS:

8:00 a.m. – 8:25 a.m. Late Registration & Check-in

Opening Remarks

Homestead: Diamond in the Rough or Coal in Your Stocking

After the Discount - Administering the FLP Interest in the Partner's Estate

Potpourri of Death Settlement Tax and Income Allocation Issues... Not from A to Z, but from C to J to K to S

Valuation Issues – You think that Property Interest is Worth How Much?

Thank Heaven for Little Girls and Disclaimers

IRAs Can Be Hazardous to an Estate Administration

3:10 p.m. – 4:00 p.m. The Way to Dusty Death – Florida Law Regarding Disposition of Human Remains

CLER PROGRAM

(Max. Credit: 7.0 hours)

General: 7.0 hours

Ethics: 0.0 hours

CERTIFICATION PROGRAM

(Max. Credit: 7.0 hours)

Elder Law: 7.0 hours

Tax Law: 7.0 hours

Wills, Trusts & Estates: 7.0 hours

LOCATIONS / DATES:

Ft. Lauderdale*	Oct. 12, 2007	(122)	Broward County Bar Association
Jacksonville*	Oct. 18, 2007	(136)	Hyatt Regency
Orlando*	Oct. 18, 2007	(071)	Sheraton Orlando Downtown Hotel
Tallahassee*	Oct. 19, 2007	(054)	The Florida Bar Annex
W. Palm Beach*	October 24, 2007	(232)	Palm Beach County Bar Assn.
Ft. Myers*	Oct. 25, 2007	(295)	Clarion Hotel
Pensacola*	Oct. 25, 2007	(040)	Escambia/Santa Rosa Bar Assn.

*Video Replay

REGISTRATION FEES:

- Member of the Real Property, Probate and Trust Law Section: \$165
- Non-section member: \$190
- Full-time law college faculty or full-time law student: \$95
- Persons attending under the policy of fee waivers: \$0

Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.)



To REGISTER, go to FLORIDABAR.ORG and search by course number 0543R.

FAIR HEARINGS REPORTED

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

The reports are mailed on a monthly basis but it takes approximately 30 to 60 days after the month's end to receive the opinions, so mailings will typically be several months behind.

You will not receive previous mailings, so order now!

FULL-YEAR: January 2008 - December 2008: \$150

Fair Hearings Reported ORDER FORM

NAME: _____ Bar # _____

ADDRESS: _____

CITY/STATE/ZIP: _____

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 _____

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

ED007

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

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43