The Florida Bar

The Elder Law Advocate

www.eldersection.org

Vol. XV, No. 2 ***"Serving Florida's Elder Law Practitioners"*** **Winter 2007**

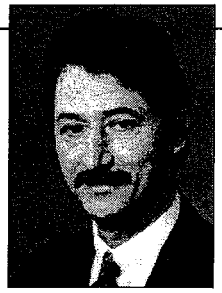
INSIDE:

Section Annual Meeting
June 29, 2007
Orlando World Center Marriott
Orlando
Executive Council Meeting, Awards Luncheon
Round Table Discussion

* * *

Elder Law Section Retreat
July 5-7, 2007, The Breakers
Palm Beach

The state of affairs


John W. Staunton

Message from the chair

As elder law attorneys and members of the Elder Law Section, our state of affairs is in good order and moving forward in a positive direction. Even the implementation date of the Deficit Reduction Act (DRA) in Florida, which has been the most significant issue for many of our members, has been in a state of suspended animation. As was true when I was writing my last message for *The Elder Law Advocate*, we still have no certain date as to when the Florida Department of Children and Families (DCF) might implement the DRA. The DCF's formal rulemaking procedure has been taken off track somewhat by events such as the prospect of political change in Cuba, our state elections and the installation of Gov. Charlie Crist's new administration. Other than noting that the DCF still has not targeted a clear implementation date, I do not want to use any more space here for further comments on the DRA since the Joint Public Policy Taskforce

See "State of affairs," page 2

Implementation of the Deficit Reduction Act in Florida

by Angela N. Warren

By now you are familiar with the Deficit Reduction Act (DRA). More than likely you are familiar with Vice President Cheney's Senate tie-breaking flight back from the Middle East; the narrow three-vote victory in the House; and President Bush signing the DRA into law on Feb. 8, 2006. You have studied the DRA and the changes to Medicaid, including changes to the look-back period, penalty start date, annuities and homestead exemption.

The Department of Children and Families (DCF) is in the process of drafting administrative rules that will make implementation of the DRA in Florida a reality. Some portions of the DRA have already been implemented, such as the citizenship requirement; however, the more controversial issues have not. This article does not purport to answer questions regarding when the remainder of the DRA will be implemented. In fact, it could be in effect by the time this article goes to print. Rather, this article is intended to increase your understanding of the rulemaking process in Florida by providing a brief overview of the guidelines for developing administrative rules.

Chapter 120, Florida Statutes, sets forth the Administrative Procedure Act and the guidelines for developing administrative rules for the DCF and all agencies in the state of Florida. Keep in mind the DRA is a law enacted by the federal government and enforced by state governments. States have some discretion regarding implementation

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State of affairs
from page 1

continues to monitor events, work with DCF representatives and keep all of us updated via the Academy of Florida Elder Law Attorneys listserv. You'll also find an update about DRA implementation on page 1.

Regarding the section's positive efforts, I am pleased to announce we will have a new website in the very near future. The section's longtime webmaster unfortunately moved on to other responsibilities last summer, and during the time that new webmasters were being interviewed, it became apparent our website needed a technical reworking. This technical reworking quickly revealed some inherent complications that could not be anticipated, but the good news is the section now has a new webmaster who has worked through these complications and has submitted several designs for approval. The result is you can expect to see a newly designed and updated website with a members-only area that will allow us to share information and a limited number of forms or sample documents.

There are also additional opportunities being created for section members to participate in advocacy and other related matters that affect our clients and our practices. For the immediate future, you will find an article in this edition of the *Advocate* submitted by Ellen Morris, who is chairwoman of the section's Legislative Committee. You will see that Ellen's article is a real how-to guide for anyone interested in advocacy in their own backyard. She even provides handouts that can be given to legislators explaining what elder law is all about as well as the section's current legislative positions. I encourage anyone who has any interest in legislative or advocacy matters to follow the direction in Ellen's article or to simply give her a call if you have any reservations. Since she is a member of the Joint Public Policy Task Force by virtue of being legislative chairwoman, your becoming a member of the Legislative Committee, or otherwise working with Ellen on legislative matters in any capacity, means you will play a contributing role in helping shape the section's advocacy efforts in conjunction with the Academy of Florida Elder Law Attorneys.

Continuing on the theme of advocacy, I would be remiss if I did not officially recognize and congratulate Elaine Schwartz on her recent election to the Florida House of Representatives. Elaine is a longtime section member and represents District 99, which is in Broward County. In the short time since she took office, Elaine is already serving on the Committee on Healthy Seniors, the Committee on Constitution and Civil Law, the Committee on Ethics and Elections and the Healthcare Council. As a practitioner who is passionate about representing her clients and advocating on their behalf, the section has a new friend and ally in Tallahassee who can add another dimension to our advocacy efforts.

Looking at more long-term opportunities, the Executive Council voted at its last meeting in Orlando on Jan. 26, 2007, to form an ad hoc committee that will be chaired by our current chairwoman-elect, Emma Hemness. Under Emma's direction, the committee will be exploring and working on issues relating to the Long-term Care Insurance Partnership Program and the Long-term Care Compact. Both programs are based on somewhat similar models in that each program is grounded on the concept of giving individuals the assurance of knowing they will receive Medicaid benefits for the payment of their long-term care after meeting some pre-agreed threshold of personal responsibility. The section has the good fortune to have members such as Charlie Robinson and Rebecca Morgan who have examined long-term care partnerships in the past. The section has the additional good fortune to have a member who worked on the Long term Care Compact in New York. Howard Krooks, who is a past chairman of the Elder Law Section of the New York State Bar Association, was instrumental in developing the idea of the compact along with several other elder law attorneys in New York.

Emma will be working to build on the experience gained by the past efforts of Charlie Robinson, Becky Morgan and Howie Krooks, in addition to seeking out any section members who are interested in working on this project. Her committee will be analyzing both the partnership and the compact, comparing their relative strengths and weakness, considering how to combine the best of both programs and exploring the viability of implementing a program that can work in Florida. Along the way, all of these efforts will require continued coordination with the taskforce members and in particular with Ken Plante and Tom Batchelor who serve as lobbyist and legislative consultant, respectively.

All in all, these are exciting time for our section. In light of the change that has been imposed by the DRA, we have the unique opportunity of being proactive in shaping the future instead of sitting passively on the sidelines and being overtaken by forces beyond our control. I urge everyone reading this to give serious thought to becoming involved in the section's activities. You can call me or anyone on the Executive Committee if you would like to learn more about becoming involved without having to make a commitment beforehand. If you would prefer someone to contact you, our administrator, Arlee Colman, can easily make arrangements if you email her at *acolman@flabar.org*. Either way, please realize your efforts can go a long way in helping to effect positive change. After all, the welfare of your clients and your practice hangs in the balance.

Find what you need on The Florida Bar's Website:
www.FloridaBar.org

Legislative Update

by Ellen S. Morris, chairwoman Legislative Committee

Congratulations to one of our own elder law attorneys, Elaine Schwartz, on her recent election to the Florida House of Representatives. Elaine is sitting on the Healthy Seniors Committee, and we know she will effectively represent seniors and persons with disabilities. Best of luck, Elaine!

Call to action for grassroots advocacy

Pertinent info and how-to guide for advocating on elder law issues in your home districts:

Every individual can effectively advocate, and the need has never been greater! Following is a step-by-step road map. It's as easy as 1, 2, 3.

1. Learn which senators and representatives cover your home and/or business address and how to contact them.

Go to *www.flsenate.gov*. On the left side of the homepage scroll down to the "Find your legislators" and enter your ZIP code(s). For the Senate, click on your district hot button and the senator's page with local office contact information will pop up. For the House, note your district and scroll down to the representative, click on his or her name and the representative's page will pop up.

2. Schedule a meeting!

If your legislators are unavailable, meet with their assistants. Email me about your meeting, and I will send you the documents below. One or two days in advance of your meeting, drop off or send our prepared statements: "Elder Law Section Legislative Positions" and "What Is Elder Law?" (These statements are included within this newsletter for your convenience.) Bring extra copies to the meeting as well as your business cards to leave with them. Describe the legislation you'd like them to support or oppose and explain why as stated within our talking points material. Be positive and go in knowing each legislator's background. Seek an affirmative commitment on how each legislator stands on the issue.

3. After your meeting, send a thank you.

The Florida legislative session begins Tuesday, Mar. 6, and ends Friday, May 4. The new U.S. Congress has already begun. Although our Florida session doesn't formally start until March, the legislators are in committee meetings and beginning to flesh out legislation.

In the Senate, Group VI is where many of our issues land, and the Health Policy Committee will likely deal with Medicaid. If any of these legislators are in your district, your meeting will be especially important and effective.

GROUP VI Social Responsibility Policy and Calendar Committee Children, Families, and Elder Affairs

Ronda Storms, chairwoman
Gwen Margolis, vice chairwoman
Carey Bake
Mike Haridopolos
Anthony Hill
Evelyn Lynn
Nan Rich
Alex Villalobos

Health Policy Committee

Mandy Dawson, chairwoman
Victor Crist, vice chairman
Nancy Argenziano
Paula Dockery
Rudy Garcia
Arthenia Joyner
Burt Saunders

Health Regulation Committee

Jeffrey Atwater, chairman
Gary Siplin, vice chairman
J.D. Alexander
Dave Aronberg
Mike Fasano
Dennis Jones
Al Lawson
Durell Peaden.

In the House, the Healthcare Council will deal with most of our issues.

Healthcare Council

Aaron Bean, chairman
Juan Zapata, vice chairman
Tom Anderson
Bill Galvano
Rene Garcia
Hugh Gibson
Gayle Harrell
D. Alan Hays
Ed Hooper
Jimmy Patronis
Loranne Ausley
Ari Porth
Elaine Schwartz
Kelly Skidmore
Priscilla Taylor

Committee on Healthy Seniors

Hugh Gibson, chairman
Thomas Anderson, vice chairman
Donald Brown
Richard Glorioso
Richard Machek
Juan-Carlos Planas
Elaine Schwartz
James Waldman
Trudi Williams

We would like to keep track of who has visited with their legislators, so please fill out the contact form that follows (page 4) and fax it to me after your meeting. Call or email me with any questions or for guidance or moral support!

Ellen S. Morris, Esq.
ELDER LAW ASSOCIATES
7000 W. Palmetto Park Rd., Ste. 310
Boca Raton, FL 33433
561/750-3850
561/750-4069 Fax
emorris@elderlawassociates.com

Photocopy this page and use it to report your contact with a legislator.

REPORT OF GRASSROOTS LEGISLATIVE CONTACT

Legislator:_____

Member Making Contact:_____

Date of Contact:_____

Method of Contact: ___Letter (please attach) ___Phone ___In Person

Purpose of Initial Contact (legislative bill or issue):

_____

_____

_____

Legislator's Position:

_____

_____

Additional information requested by legislator, if any:

_____

_____

_____

Your suggestions for follow-up action, if any:

_____

_____

_____

Please fax to:
Ellen S. Morris, Esq.
561/750-4069 fax
561/750-3850 phone
emorris@elderlawassociates.com

Photocopy this page to use as a handout to help inform legislators and other policymakers.

What Is Elder Law?

Elder Law is a special practice area that caters to the needs of older clients and people with disabilities. It frequently involves advice and counsel related to:

- Medicare, Medicaid, managed care, and payment for health care needs;
- Social Security and retirement income planning;
- Disability planning;
- Long-term care and nursing home care planning;
- Housing options, such as assisted-living and residential homes for the aged and disabled;
- Financial and health care decision-making through the use of durable powers of attorney and advance directives;
- End-of-life decision-making through the use of living wills;
- Probate and estates;
- Special Needs Trusts, and Revocable living trusts and wills;
- Incapacity questions and Guardianship; and
- Remedies for exploitation or abuse of older clients or people with disabilities.

Elder Law is the only area of law defined by the clients we serve rather than the areas of law in which we practice. We like to deal "holistically" with our clients in talking about long-term planning for health care and financial viability, family dynamics, end-of-life decisions, personal values and personal preferences.

With 80 million baby boomers moving into their "golden years," and one person attaining age 50 every seven seconds, there is a great demand for information and counsel. Elder Law Attorneys are committed to providing advice and seeking remedies for older clients and people with disabilities and are dedicated to staying informed as laws and rules change.

Elder Law Attorneys seek to understand the problem from the client's perspective, in keeping with the client's family, moral, and religious belief structure. The client and the Elder Law Attorney frequently form strong, enduring relationships in the work that is undertaken to meet the client's diverse needs.

Many Elder Law Attorneys joke that we are part "social worker," and that is proven time and again in our work as we research and gather resources to help our clients.

We look forward to being a resource to the Members of this delegation in areas affecting older people and people with disabilities.

Photocopy this page to use as a handout to help inform legislators and other policymakers.

Elder Law Section Legislative Positions

1. Supports legislation that protects individual rights by removing all barrier language which imposes greater restrictions on incapacitated persons, as discussed in Browning.
2. Opposes legislation that would limit awards, attorney's fees and costs in liability actions brought against nursing homes or assisted living facilities.
3. Supports legislation that would increase staffing ratios, governmental oversight and Medicaid reimbursement rates to improve the general quality of care for elderly and disabled persons residing in nursing homes.
4. Opposes legislation that would restrict or revoke driving privileges based solely upon aging factors.
5. Supports legislation that would enhance enforcement of existing provisions to revoke driving privileges from persons who are determined to be impaired.
6. Opposes any legislative effort which would eliminate or diminish the rights of residents of nursing homes and other long term care facilities, as currently provided under Chapter 400, F.S.
7. Opposes any legislation that would allow the Clerks of Court in any and/or all circuits to assess and collect audit fees or other fees in guardianship or probate cases that would be a percentage of the total amount or value of the respective guardianship or probate estate.
8. Opposes any legislation that would decrease current Court authority and control over guardianship or probate matters while increasing, correspondingly or otherwise, the Clerk of Courts authority over these same matters.
9. Supports adding public guardians to the definition of professional guardians, and streamlining the registration process for professional guardians.
10. Supports SB 472 (2006) regarding Florida's Guardianship law as originally filed on 10/25/05, with two exceptions: (1) the proposed amendments to §744.441(19), Florida Statutes; and (2) the proposed amendments to §744.474(20) Florida Statutes.
11. Supports creating Chapter 736, Florida Statutes, to codify the law of trusts and makes conforming revisions to other Florida Statutes.

Examining Committee training — an update

by Enrique Zamora

The Guardianship Task Force in its final report to the governor presented in January 2004 recognized the need for educating Examining Committee members. The taskforce recognized the importance that the persons serving as Examining Committee members maintain the highest degree of knowledge regarding the assessment of the capacity of alleged incapacitated persons in incapacity proceedings. In its final report, the taskforce recommended that all Examining Committee members be required to have a minimum of four hours of initial training and two hours of continuing education every two years.

During 2005, the Guardianship Committee of the Elder Law Section concluded that a training program for the Examining Committee members was likely to be required pursuant to the Guardianship Task Force's recommendations, and undertook the development of a training program that would meet such requirements. Enrique Zamora, Esq., as chairman of the Guardianship Committee, and Jacqueline Schneider, Esq., a member of the Executive Council and CLE chairwoman of the Elder Law Section, developed this training program, which was presented to the Executive Council at its last meeting of the year in 2005. This manual was approved by the Executive Council and was forwarded to Michelle Hollister, Esq., executive director of the Statewide Public Guardianship Office.

On July 1, 2006, HB 457, which incorporated most of the taskforce's recommendations, became law. This bill amended Section 744.331 of the Florida Statutes by requiring that all Examining Committee members complete a minimum of four hours of initial training as well as two hours of continuing education during each two-year period after the initial training. In addition, the amendment required that the initial training and the continuing education program had to be developed under the supervision of the Statewide Public Guardianship Office in consultation with the Florida Conference of Circuit Court Judges, the Elder Law Section and the Real Property Probate and Trust Section of The Florida Bar, the Florida State Guardianship Association and the Florida Guardianship Foundation.

Pursuant to this amendment, a committee was created with representatives from each one of the said entities. Elder Law Section Chairman John Staunton, Esq., appointed to this committee Enrique Zamora, Esq., co-chairman of the Guardianship Committee of the Elder Law Section; and Ed Boyer Esq., a longtime member of the Elder Law Section, former member of the Guardianship Task Force and a recognized expert in the area of guardianship as well as elder law in general.

During its first meeting, the committee decided to develop a training program that would consist of four distinct modules. Module 1 would cover the adjudicatory process, Module 2 would examine the role of the examining committee, Module 3 would cover the legal and clinical assessment models and Module 4 would be dedicated to the local procedures and best practices within each individual jurisdiction.

Following the first meeting of the committee, it was decided to form subcommittees charged with developing the four modules. Module 1 and Module 2 were assigned to a subcommittee with the following members: The Honorable Cindy McCormick, general magistrate for the 6th Judicial Circuit; David Brennan, Esq., as representative of the Real Property Probate and Trust Law Section of The Florida Bar; and Enrique Zamora, Esq., and Ed Boyer, Esq., as representatives of the Elder Law Section of The Florida Bar.

At the request of Michelle Hollister, copies of the training program developed by the Elder Law Section were provided to all members of this subcommittee. The members of the subcommittee concluded that the training program developed by the Elder Law Section would be the basis of Module 1 and Module 2. The training program was reviewed by the subcommittee members as well as by Professor Randy Otto from the University of South Florida and Dr. Jane Ansley, a psychologist and one of the Examining Committee members from the 11th Judicial Circuit. After several revisions, the training program developed by the Elder Law Section became Modules 1 and 2, and they were presented to the full committee. On December 19, 2006, Modules 1 and 2 were approved and incorporated into the Examining Committee member training manual, final edition.

Enrique Zamora, Esq., *is a partner with the firm of Zamora, Hillman and Veres with offices in Coconut Grove. Mr. Zamora's practice focuses in elder law with an emphasis in the areas of probate administration and litigation, guardianship administration and litigation, trusts administration and estate planning. He is chairman of the Guardianship Committee and a member of the Executive Council of the Elder Law Section. He is a member and former Executive Council member of the Real Property, Probate and Trust Law Section. He is also a certified civil mediator. Mr. Zamora is an adjunct professor at St. Thomas University School of Law, where he teaches elder law.*

Unique partnership allows AFELA and NAELA to educate baby boomer grandparents

by Al Rothstein, AFELA Public Relations Consultant

The Academy of Florida Elder Law Attorneys (AFELA) and the Elder Law Section of The Florida Bar, in conjunction with the Joint Public Policy Task Force, have developed a productive partnership to help educate grandparents and their families. *Grand* magazine (*www.grandmagazine.com*) is a glossy, national publication that has been featured on the *Late Show with David Letterman* and *Larry King Live.* It strives to be "The Official Magazine of Grandparents" and devotes itself to the lifestyle of baby boomers who are becoming grandparents. The magazine has agreed to publish two articles, one from an AFELA member and one from the National Academy of Elder Law Attorneys (NAELA), in exchange for our members subscribing to the publication. (The subscription is free of charge to members.)

AFELA's Chris Likens of Sarasota, who contributed the first article, which appeared in the magazine's January/February issue, says, "We want to take the complex role we play and make that understandable for clients and potential clients. This can be done by taking advantage of our media opportunities to let people know how we can help them."

"Publications such as *Grand* are read by people who are constantly looking for ways to improve their lives, and this is an opportunity for us to contribute to that," says AFELA President Mike Pyle of Daytona Beach.

Likens' article focuses on a couple that had been looking forward to celebrating their golden years, but had their dreams interrupted by a parent in declining health and a daughter suffering from depression. The readers see that they could experience similar life events. Likens takes readers through an examination of legal and long-term care issues, including social, family, psychological, medical and financial implications. He also gives tips that will help readers outline and organize their own situations. Likens shows the readers how the services of an elder law attorney can help them get their finances in order, obtain assistance through existing community programs and still achieve their retirement goals.

An article submitted by NAELA member Karen Hays Weber, who serves clients in Missouri and Kansas, is targeted for the publication's May/June issue. She writes about the importance of estate planning, including living wills, power of attorney, guardianship and last will and testament. She also asks readers to consult their own legal advisors to make sure her ideas are applicable to their situations.

"I'm thrilled that NAELA and AFELA have partnered with us at *Grand* for this mutually beneficial relationship. Families across the generations have much to gain by planning ahead and meeting their legal and medical decision-making needs so that stress is reduced and communications are enhanced. Providing free *Grand* subscriptions via the *www.grandmagazine.com/NAELA* link is our contribution to this partnership," says Jack Levine, *Grand's* partnership director.

Many members of AFELA and the Elder Law Section of The Florida Bar have subscribed to receive their complimentary issues of the publication, but every elder law attorney needs to take advantage of this offer! With our members displaying *Grand* magazine in their offices, the member-written articles will be read by clients who will learn even more about how the elder law attorney can serve them. We certainly hope they will pass the magazines and the information along to their families, friends and business colleagues.

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

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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 SPRING ISSUE is May 15, 2007. Articles on any topic of interest to the practice of elder law should be submitted via e-mail as an attachment in rich text format (RTF) to Patricia I. "Tish" Taylor, Esquire, *pit@mcsumm.com*, or call

Representing the guardian of a former client

The column "I've Got This Case ..." posed the following question:

Question: *I represented a couple in their estate planning process. The husband passed away, and the wife became incapacitated. The family initiated an incapacity and guardianship proceeding against the wife. I was not involved. I referred the family to another attorney since attorneys are discouraged from initiating incapacity/guardianship proceedings against clients or former clients. A family member was appointed guardian. Now, the guardian is looking for a new attorney. That alone may be enough reason to say no. However, can I now represent the guardian?*

Answer: It would be imprudent to represent the guardian of a former estate planning client.

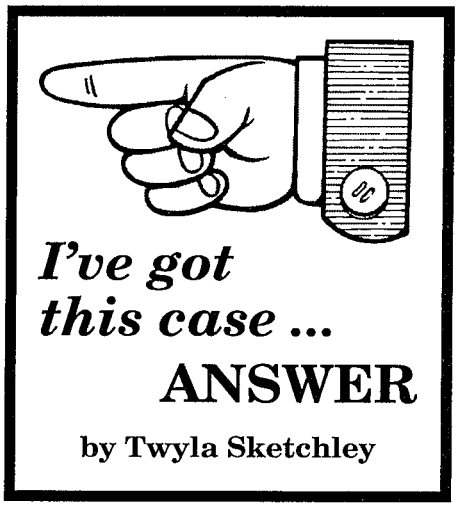
Analysis of this issue must be done in the context of the unique relationships created by guardianship. Guardianship in Florida is an adversarial proceeding as demonstrated by the numerous rights and protections allotted alleged incapacitated persons and adjudicated wards under Florida Statutes Chapter 744. Even though adversarial, according to Atty. Gen. Op. 96-94 (Nov. 20, 1996), the attorney representing a guardian also owes a duty to the ward, which further complicates the relationship. There is no statutory prohibition on the representation described above. However, there may be an ethical prohibition. The Rules Regulating The Florida Bar provide a framework upon which to begin to analyze the issue.

Because the wife is a former client, Rule 4-1.9 should apply:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

According to the comment, the purpose of this rule is to protect the clients. The former client, the incapacitated person, should be given special consideration since she is forced to rely on the guardian, the guardian's attorney and her own counsel to advocate on her behalf.

Analysis should begin with 4-1.9(a). Although the guardianship is not the same matter, it may be substantially related. According to the comment, a substantially related matter is one that involves "the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client."



The attorney should analyze the purpose and scope of the estate plan, the directives expressed in that plan and the individuals affected by the plan, including the guardian. Additionally, the attorney must determine whether representing the guardian could put the attorney in a position to attack or call into question the estate plan she drafted on behalf of the former client.

Initially, representing a guardian may appear to have no relation to the estate plan or even to be in accordance with the former client's desires. However, the guardian may take actions later during the guardianship administration that challenge the estate plan. At that time, the attorney may be representing the guardian with interests materially adverse to the interests of the former client, and might have to withdraw.

To determine whether the interests of the guardian would be adverse to the former client, the comment to Rule 4-1.9 states that the principles of 4-1.7 apply. As stated above, the analysis of adverse interests should be done in the context of guardianship, which, as discussed above, is unique.

By representing the guardian of a former client, the attorney is representing a person with interests materially adverse to the former client, whether or not the representation is in a substantially related matter. If the attorney determines that the estate planning representation and the guardianship are substantially related matters, then the representation is prohibited. Consent by the former client is irrelevant, since she is incapacitated and cannot give informed consent.

Even if the representation might be possible under Florida Statutes Chapter 744 and Rule 4-1.9(a), the attorney must look to Rule 4-1.9(b). Will information, other than that which is allowed by Rule 4-1.6, regarding the former client and procured during the estate planning representation be used to the disadvantage of the former client? If possible, then the representation may be prohibited.

Problems frequently arise during the course of the guardianship administration, which can last many years. Even if the attorney believes she can overcome the ethical hurdles established by Chapter 744 and Rule 4-1.9, the attorney's representation may later be challenged. If the guardian breaches her duty to the ward, it is conceivable that the guardian (or anyone assigned with the protection of the ward) may later raise the conflict of interest issue as additional evidence of the attorney's breach of the appropriate standard of care to the guardian or the ward.

Would you analyze the problem differently? If yes, please send your responsive article to twyla@sketchleylaw.com for inclusion in next issue.

The Guardianship Committee needs you!

by Twyla Sketchley and Enrique Zamora, Co-chairs, Guardianship Committee

The Guardianship Committee needs you. The committee is active in the education of Examining Committee members and attorneys under the recent changes to Fla. Stat. §744.331. It participates in legislative projects and cooperative projects with state agencies, educational institutes and other sections of The Florida Bar. The committee is currently working on guardianship ethical issues, surveys of disaster planning requirements for guardians and continuing education for attorneys.

If you are interested in guardianship, incapacity, attorney education, improving the practice and/or assisting in any way, please join us. We are currently scheduling our 2007 meetings. The schedule will be available on the Elder Law Section website and distributed to the committee membership via email.

To join the Guardianship Committee, send your contact information, including your current email address, to Twyla Sketchley at *twyla@sketchleylaw.com* or call 850/894-0152. If you are a current member with suggestions and ideas, forward them to *twyla@sketchleylaw.com*.

You do well by doing good

Tips & Tales

Nicola Jaye Boone

A. Stephen Kotler

The tip:

You do well by doing good.

The tale:

In 1994, I attended my first Elder Law Section council meeting. I stood at the edge of the room bewildered by the discussion of "REPTILES" and a dizzying array of other topics but nevertheless excited to be part of a legal movement that had such passion and promise. A man came over to me, introduced himself and began talking about the practice of elder law— about the clients, their problems and the commitment of a roomful of strangers who would later become my mentors, colleagues and friends. Then, as he began to walk away, he paused and said "You know, Nikki, you will do well by doing good." That man was Jerry Solkoff, one of the founding fathers of this legal area of practice. I have practiced for the past 13 years with that advice as my guiding motto. As a result, I have prospered both financially and spiritually. I now pass that sage advice on to all of you to use as successfully in your own practices as I have used it in mine.

With past President Richard Milstein's blessing, I started this column in 1996. At that time, I was a solo practitioner, and it seemed I was forever stumbling across— through experience unfortunately— some tidbit that would be beneficial to share. I am quite thrilled that as I leave the practice of elder law to pursue a longstanding dream of teaching in the state of North Carolina, I can leave this column in the more than capable hands of A. Stephen Kotler, an AV rated attorney with Willman Gehrke & Solomon PA in Naples. For those of you who actively monitor the listserv, you will know that Stephen readily posts both compelling questions and thoughtful and comprehensive answers. I have no doubt this column will continue to be of great benefit to all with Stephen as its editor.

***Nicola Jaye Boone** is a partner with McCarthy Summers Bobko Wood Sawyer & Perry PA in Stuart. Ms. Boone is board certified as an elder law specialist by The Florida Bar.*

***A. Stephen Kotler** is with Willman 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 is AV rated, received his JD from Emory Law School and has an LLM in estate planning from the University of Miami.*

Substantive committees keep you current on practice issues
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Medicaid
Jana E. McConnaughhay, Tallahassee
850/222-8121
jemcconnaughhay@mcconnaughhay.com

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

Newsletter
Tish Taylor, Stuart
561/286-1700
pit@mcsumm.com

Susan Trainor, Editor
2105 Crestdale Drive
Tallahassee, FL 32308
850/878-7760
editor@ctf.nu

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

Jason Penrod, Lake Wales
863/676-6000
jasonpenrod@lakewaleslaw.net

CLE Representative
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 Weinstein, N. Lauderdale
954/722-9000
philip.weinstein@alderwoods.com

Estate Planning
Steven Edward Quinnell, Pensacola
850/434-3601
qlawflorida@aol.com

(Alan) Stephen Kotler, Naples
239/598-1221
skotler@fowlerwhite.com

Ethics
Mike Shalloway, West Palm Beach
561/686-6200
mail@shalloway.com

Abuse and Neglect
Carolyn Holman Sawyer, Orlando
407/354-0888
chsawyer1@aol.com

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

Council of Sections Representatives
Nikki Boone, Stuart
772/286-1700
njb@mcsumm.com

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

NAELA Representative
Mike Shalloway, West Palm Beach
561/686-6200
mail@shalloway.com

Guardianship
Enrique Zamora, Miami
305/285-0285
ezamora@zhlaw.net

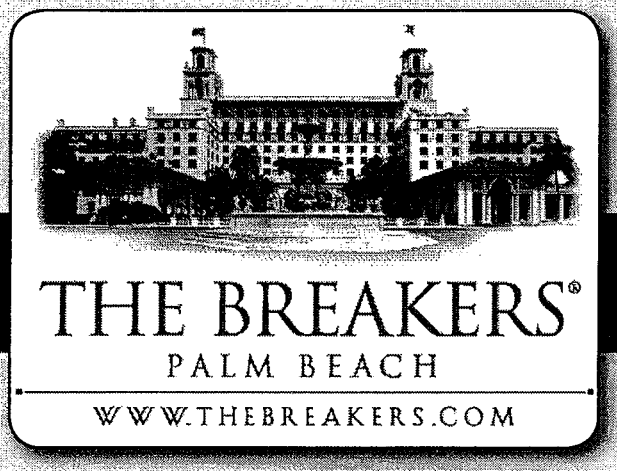
Twyla Sketchley, Tallahassee
850/894-0152
twyla@sketchleylaw.com

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

Tom Batchelor, Tallahassee
850/878-2850
tombatchelor05@comcast.net

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

Website
Jana E. McConnaughhay, Tallahassee
850/222-8121
jemcconnaughhay@mcconnaughhay.com



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Fundamentals of Elder Law I

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Video Replays (5 locations): May 3, 2007 - June 14, 2007

Course No. 0448R

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Late Registration

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Welcome and Introduction

8:40 a.m. – 9:30 a.m.
Elder Law Practice: Where Are We Headed?
Lauchlin Waldoch, Tallahassee

9:30 a.m. – 10:20 a.m.
Advance Health Care Directives: Drafting and Application
Ken Rubin, Coral Springs

10:20 a.m. – 10:30 a.m.
Break

10:30 a.m. – 11:20 a.m.
Estate Planning for the Potentially Impaired or Influenced Client
Rohan Kelley, Fort Lauderdale

11:20 a.m. – 12:10 p.m.
Ethical Issues in Elder Law
Rebecca Morgan, St. Petersburg

12:10 p.m. – 1:10 p.m.
Lunch (on your own)

1:10 p.m. – 2:00 p.m.
Guardianship
Ed Boyer, Sarasota

2:00 p.m. – 2:50 p.m.
Medicaid Planning & the DRA
Travis Finchum, Clearwater

2:50 p.m. – 3:00 p.m.
Break

3:00 p.m. – 3:30 p.m.
Qualified Income Cap Trusts; Drafting, Funding & Administering
Linda Chamberlain, Clearwater

3:30 p.m. – 4:40 p.m.
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Summary of selected caselaw

by Audrey Ehrhardt

Weinberg v. Weinberg, 31 Fla. L. Weekly D2094 (4th Dist. Ct. App. August 9, 2006)

In 1992, husband and wife executed a revocable trust agreement in Palm Beach County, Florida. The corpus consisted of personal property and a Palm Beach County condominium. At the husband's death, the trust provided that the wife would receive a fee simple interest in the condominium and 50 percent of the remaining trust assets while the sons of the husband's first marriage would receive the other 50 percent of the remaining trust assets. When the husband died on Aug. 17, 2005, the wife executed a document on Aug. 23, 2005, purporting to revoke the trust. The wife then moved to Miami-Dade County. When the sons brought a complaint in Palm Beach County for declaratory action, breach of trust and breach of fiduciary duty, the wife moved to dismiss for improper venue. The standard of review for an order on a motion to dismiss or transfer for improper venue is abuse of discretion, but when there are no disputed facts and the venue order turns on a question of law, there is no judicial discretion to be exercised and the appellate review is de novo. Pursuant to Section 47.011, F.S. (2006), the general venue statute, actions may be brought in the county where the defendant resides, where the cause of action accrued or where the property in litigation is located; and it is the prerogative of plaintiff to select. The appellate court affirmed the trial court's non-final order denying the motion to dismiss the plaintiffs' complaint for improper venue, because the sons brought the suit in the county where the cause of action accrued.

Bush v. Webb, 31 Fla. L. Weekly D 2529 (1st Dist. Ct. App. October 11, 2006)

The decedent died on Feb. 16, 2002, and her will directed that her estate pay her just debts and funeral expenses. More than two years later, her children filed claims for her funeral expenses, and the trial court granted the children's bill. The appellant appealed under Section 733.710(1), F.S., that states the personal representative and the beneficiaries shall not be liable for any claims or causes of action against the decedent after two years have passed. The appellate court overturned the trial court by finding that since the two years had passed the children were barred from bringing their claim for funeral expenses, and the decedent's directive to pay for her funeral expenses did not bar the obligation to timely file since this would defeat the purpose of the statute.

Morgan v. Cornell, 31 Fla. L. Weekly D 2632 (2nd Dist. Ct. App. October 20, 2006)

Julia Morgan and Timothy Cornell, Sr., were longtime unmarried companions. Before his death on April 6, 2003, Cornell executed a will that stated Morgan would receive a life estate interest in his homes at his death. When Cornell died, his heirs challenged Morgan's life estate stating that because Cornell's specific devise stated that Morgan was left a life estate in the homes Cornell "owned" at his death, this was unclear in extent, nature and meaning. Specifically, the word "own" could mean whatever interest Cornell had at death or it could be interpreted strictly to property solely owned. The trial court agreed with the children that if Cornell did not own the property 100 percent at death, then the specific devise to Morgan failed. The appellate court agreed with the trial court that the language had no ambiguity, but found that the plain language meaning was that Cornell "owned" an undivided part of the parcels as a tenant in common, and he validly passed a life estate in his undivided half interest to Morgan as intended. Hence the appellate court reversed and remanded for further proceedings consistent with its opinion.

Donohue v. Brightman, 31 Fla. L. Weekly D 2661 (4th Dist. Ct. App. October 25, 2006)

Donohue and her husband leased a condominium in 1988 until the owner asked them if they wished to purchase it. They agreed to purchase it with their great-nephew Brightman, who convinced them they should put the property in his name alone and he would hold their interest in trust for them. The Donohues then would pay half the cash needed to close and thereafter pay half the mortgage, taxes, maintenance and assessments to Brightman. This continued until Mr. Donohue died in April 2004, when Mrs. Donohue learned that Brightman was in default on the mortgage and brought the mortgage current. When Mrs. Donohue learned that Brightman planned to sell the property and use the proceeds to pay his federal tax lien, she sought a declaratory motion to determine her rights and alleged he had breached his duties as trustee by not making mortgage payments from money she paid to him, allowing her interest to be encumbered by his personal tax lien and attempting to sell the property and divest her of her equitable interest. Despite the facts that Brightman never answered the complaint and Donohue moved for default and Brightman's ex-wife filed a complaint against him confirming the facts alleged by Donohue, the court denied the motion for final judgment and granted Brightman's motion for the case to be excused from the standard pretrial mediation. The appellate court overturned the trial court's finding for Brightman and stated that under FLA. Rule Civ. Pro. 1.500(a) Donohue had obtained a default against Brightman for his failure to answer the complaint and reversed and remanded for Donohue.

Pisciotti v. Stephens, 31 Fla. L. Weekly D 2736 (4th Dist. Ct. App. November 1, 2006)

When the father of two children died, his will left everything to them equally. Although never formally appointed, the sister began acting as personal representative, but when the brother found three undisclosed checks and statements made by her regarding the parents' bank accounts, the brother moved to have her removed as PR and accused her of stealing money by forging names

on checks. To resolve the matter the sister agreed to resign as PR, but n her first and second depositions she asserted her Fifth Amendment right and refused to answer questions posed by the brother. The trial court granted the brother's motion to compel her to answer and file an accounting. The sister appealed, saying the trial court's ordering her to answer the deposition questions violated her Fifth Amendment privilege against self incrimination, especially in light of her brother threatening criminal prosecution. The appellate court reversed the trial court, stating that the sister would have reasonable fear from the brother and should be allowed to protect herself and her accountings, which are tied to her role as PR, although typically the Fifth Amendment privilege does not apply to documents the PR is required to prepare as part of fiduciary duty. In this case, it would not achieve the correct effect.

Baldwin v. Estate of Winters, 31 Fla. L. Weekly D2868 (4th Dist. Ct. App. November 15, 2006)

In her last will and testament and revocable trust agreement, the testatrix included a paragraph indicating that she might leave a tangible personal property list. In her first list and on Feb. 9, 1998, in her first codicil, the testatrix made no mention of Allan Baldwin. However, on April 24, 1999, the testatrix made two handwritten notes that instructed the personal representative to give Baldwin a car from her estate (the first was witnessed, and the second was not). On May 22, 1999, the testatrix typed a letter stating the same intent and had it witnessed and notarized. When the testatrix died on Dec. 25, 2003, the probate court entered an order admitting the will and codicil but not the letter. Baldwin filed a petition for compulsory distribution, claiming to be a beneficiary of the estate, and he chose a $50,000 Mercedes Benz. The probate court denied the petition, stating that Section 732.515, F.S., did not instruct the PR to surrender the cash value of a Mercedes Benz to Baldwin. Baldwin's counsel appealed by stating the letter was actually a codicil. The estate objected, saying this argument was precluded because it was not argued initially, and the probate court agreed. The appellate court agreed that because the letter had a devise of a monetary amount it could not be effectuated under the 1997 version of Section 732.515, F.S., but because the Supreme Court has said the polestar is the intent of the testator, the case was reversed and remanded to determine if the letter constituted a valid codicil.

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Fair hearings reported

by Audrey Ehrhardt

Florida Department of Children and Families; Lee; District 8; Unit 88805; Appeal No. 06F-02396

The petitioner received benefits through the Medicaid Institutional Care Program (ICP), and the community spouse requested her income allowance be raised for exceptional circumstances. Pursuant to Fl. Admin. Code Rule 65A-1.716(5)(c)(3), "The community spouse's shelter expenses must exceed 30 percent of the Minimum Monthly Maintenance Income Allowance (MMMIA) to be considered excess shelter expenses to be included in the maximum income allowance: MMMIA x 30% = Excess Shelter Expense Standard." The department subtracted 30 percent of the MMMIA ($482) from her shelter expenses ($549.36) and established her excess shelter cost as $67.36. This amount was added to the MMMIA of $1,604 for an allowable shelter deduction of $1,671.36. However, the community spouse asserted that this was insufficient to pay her monthly expenses and provided a list totaling monthly expenses in the amount of $1,526.54. The community spouse also stated that this figure did not include expected further costs of car repairs, clothes and household supplies. Pursuant to Fl. Admin. Code Rule 65A-1.712(4)(f), the couple must prove the existence of exceptional circumstances that result in a significant inadequacy of income allowance to meet their needs before the income allowance may be upwardly revised. The standard used to define "needs" must be consistent with the intent of the public assistance programs, specifically the ICP program. The hearing officer applied this methodology and denied her appeal by recalculating her expenses to be $1,120.54 per month by eliminating cable, payments of life insurance (insurance payments counted only when health or dental), storage unit, newspaper, church and haircuts.

Florida Department of Children and Families; Duval; District 4; Unit 88369; Appeal No. 06F-03682

The petitioner was granted Medicaid Institutional Care Program (ICP) benefits. However, at a redetermination of eligibility, the department became aware that the petitioner was listed as a joint account holder on accounts that were over the $2,000 eligibility limit and closed the petitioner's eligibility for benefits. The petitioner's power of attorney had transferred her Social Security income to a joint checking account with him in order to save her the monthly bank fee. The petitioner had no access to this account, but the department did not allow the petitioner to have any opportunity to rebut the presumption of ownership of the funds in the account. The hearing officer reversed and remanded the department's termination of the petitioner's eligibility because it was prematurely terminated and the department had not followed its policy for adult-related Medicaid. According to policy, when a joint account holder disagrees with the presumption of ownership, he or she must be given the opportunity for the rebuttal of the presumption of ownership so the department may properly determine which portion of the assets belong to the petitioner. (20 C.F.R. 416.1208; Integrated Policy Manual 165-22, Section 1640.0302.01, et.seq., and 1640.0302.04)

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Call for papers — *Florida Bar Journal*

John Staunton is the contact person for publications for the Executive Council of the Elder Law Section. Please e-mail John at *jstaunton@earthlink.net* 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.

DRA
from page 1

as long as they are consistent with the federal act. This creates a number of gray areas since the DRA must go through Florida's rulemaking process.

An agency must provide notice by publication in the Florida Administrative Weekly of the development of proposed rules as long as the rule is not a repeal. (Fla. Stat. §120.54(2)(a) (2007)) Public workshops for the purpose of. developing rules may be held by agencies. (Fla. Stat. §120.54(2)(c) (2007)). If an interested person requests a workshop in writing, it must be held unless the agency can show, in writing, that it is unnecessary. (Fla. Stat. §120.54(2)(c) (2007)). An agency may also use negotiated rulemaking when strong opposition is expected or complex rules are being drafted by using a committee of interested persons to negotiate drafting a mutually acceptable proposed rule. (Fla. Stat. §120.54(2)(d)(1) (2007)).

The DCF is in the preliminary stages of implementing the admin-strative rules for the DRA and has already applied some of these techniques in drafting the proposed administrative rules. Notice of intent to enter into the rulemaking process has been published. Workshops have been held to allow public input before drafting the administrative rules. One such workshop was on the citizenship issue. Additional workshops may be necessary in the future.

In addition, the DCF is using the negotiated rulemaking strategy to receive input from different individuals and groups. One such group is the Joint Public Policy Task Force. I recently had the opportunity to speak with John Gilroy, an administrative law attorney working with the taskforce, regarding the rulemaking process. According to Gilroy, "The taskforce is working in contact with [the DCF] to provide information to help the agency develop fair and consistent rules." (For more information on the Joint Public Policy Task Force, visit *www.afela.org* or *www.lderlawsection.org*.)

Once the proposed administrative rules have been drafted, the agency must publish notice of its intended action in the Florida Administrative Weekly no less than 28 days from the intended action. (Fla. Stat. §120.54(3)(a)(1-2) (2007)). The notice should include among other things an explanation of the action and a complete text of the proposed administrative rule. (Fla. Stat. §120.54(3)(a)(1) (2007)). The agency must then file with the Administrative Procedures Committee a copy of the proposed administrative rule for adoption as well as statements related to the following: estimated regulatory costs; the extent to which the rule relates to federal rules on the same subject; and satisfaction of the notice requirement 21 days prior to the adoption date. (Fla. Stat. §120.54(3)(a)(4) (2007)).

The agency may hold public hearings on the proposed administrative rules. A hearing may also be requested by affected persons under narrow circumstances. (Fla. Stat. 120.54(3)(c) (2007)). After the public hearing or if time for requesting the public hearing has expired and there have been no changes or only technical changes to the proposed administrative rule, the agency must file a notice with the Administrative Procedures Committee to that effect at least seven days prior to filing the rule for adoption. (Fla. Stat. §120.54(3)(d)(1) (2007)). If changes not deemed technical are made, then a notice of change must be filed with the Administrative Procedures Committee and published in the Florida Administrative Weekly at least 21 days prior to adoption. (Fla. Stat. §120.54(3)(d)(1) (2007)).

The timeframe for filing the rule for adoption can vary from 14 to up to 90 days depending upon a number of factors, such as whether or not a public hearing or a notice of change was required. (Fla. Stat. §120.54(3)(3)(2) (2007)). To finalize adoption, the agency must file the proposed rules with either the Department of State or the agency head depending upon whether or not the agency's rules are filed in the Florida Administrative Code. (Fla. Stat. §120.54(3)(e)(1) (2007)) Once filed the rule becomes effective 20 days after being filed or on the date required by the rule or statute. (Fla. Stat. §120.54(3)(e)(6) (2007)).

With all of these hoops to jump through as well as the various time frames, it is not surprising that full implementation of the DRA has not taken effect in Florida. According to Victoria Heuler, co-chair, the taskforce has been closely monitoring each step in the process on our behalf and will continue to do so until Florida has successfully implemented each part of this important act.

Angela N. Warren *is an associate with McConnaughhay, Duffy, Coonrod, Pope & Weaver PA in Pensacola. She works in the firm's elder law section including planning for incapacity, healthcare surrogate documents, living wills, durable powers of attorney, guardianship and healthcare cost planning. She frequently speaks on issues related to the elderly and disabled.*

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