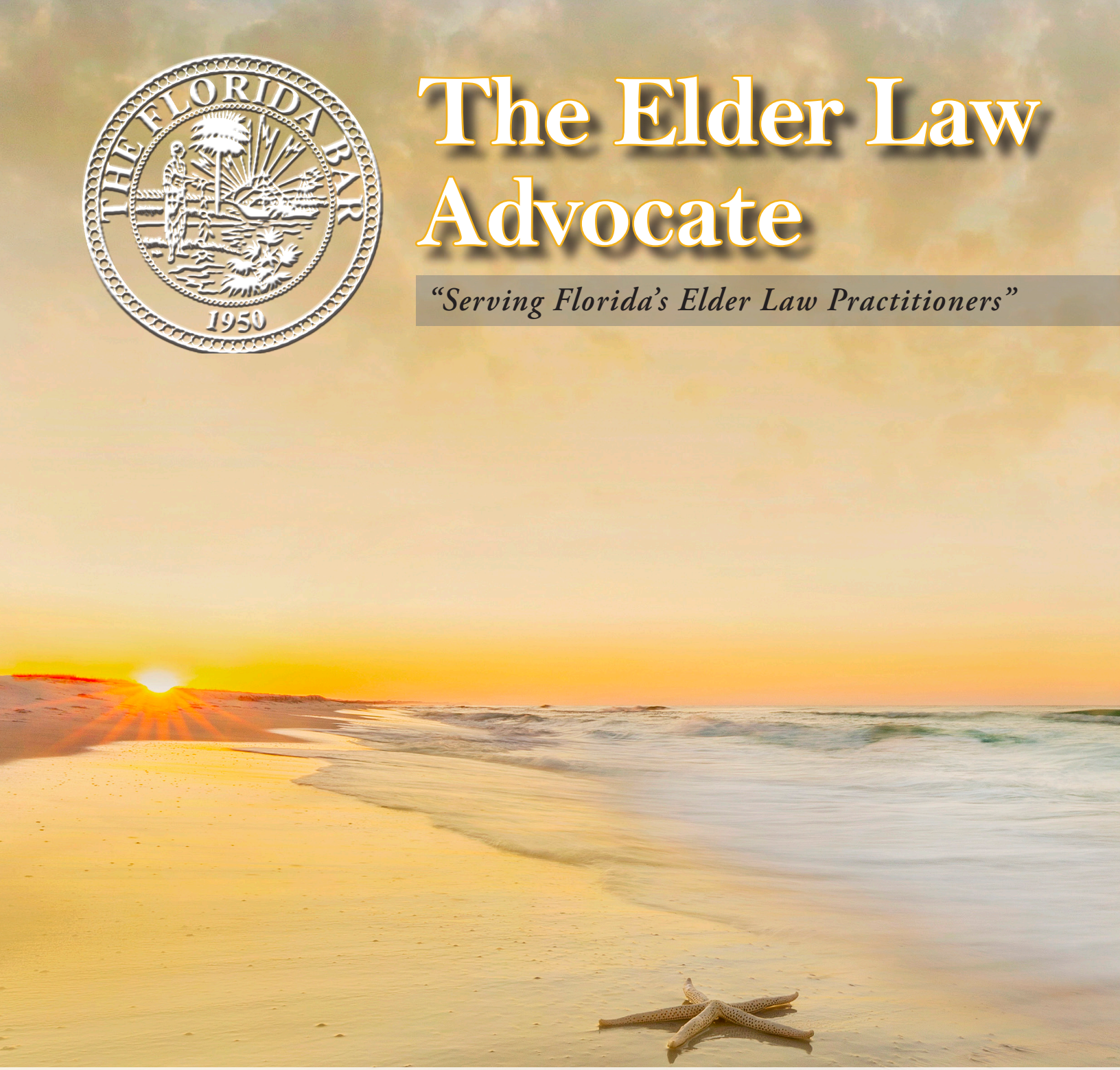
The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"



Featuring:

- *Your fire power to argue for more HCBS waiver home care hours*
- *Lions, tigers, and bears – Tax Scams and Desk Reference Reporting Guide*
- *Garn-St. Germain Act*

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ON THE COVER

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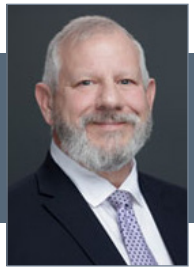
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Submit Articles

The deadline for the WINTER 2025 EDITION is OCTOBER 15, 2024. Articles on any topic of interest to the practice of elder law should be submitted via email as an attachment in MS Word format to Genny Bernstein at gbernstein@jonesfoster.com, or call Emily Young at 850/561-5650 for additional information.



Message From the Chair
by William A. Johnson r

Start me up!

I recently attended the Rolling Stones Hackney Diamonds '24 tour at Camping World Stadium in Orlando. The Stones led off their set with the song "Start Me Up" off their "Tattoo You" album of years past. Sitting in the stands I realized I had attended a Stones concert at the exact same place (though called the Citrus Bowl back then) some 43 years earlier while in high school. At the 1981 concert, the Stones led off with "Start Me Up" as well. Back in 1981, a little known band called Van Halen was the opening act.

I tell this story for two reasons. The first is that I have attained the age of our clients! The second is that the reason the Stones open with "Start Me Up" is that it is a catchy tune that gets the audience all pumped up for what's to come. And that is my message to you.

Let's get pumped up for what's to come this year!

The Elder Law Section has been improving each and every year of the nine years I have been involved in leadership. Last year, under the stewardship of Victoria Heuler, we tackled some tough budget issues. This year I have put the Sponsorship Committee Chair Heidi Brown, the Membership Committee Chair Max Solomon, and the CLE Committee Chair Heather Samuels on a mission to raise even more money. Because at the end of the day, there are really only three ways the section makes money: sponsorships, memberships, and CLEs. If you can be of any assistance in those areas, please get in contact with Heidi, Max, or Heather.



Bill Johnson and Victoria Heuler celebrate the traditional passing of the gavel.

And speaking of membership, yes you reading this, it is time to get involved! The Elder Law Section has a variety of committees that want you. It is through participation that these committees thrive and do great things. There is a committee out there for you. The committee chairs are listed in this publication and on our website. Reach out and ask to join. We are only as good as our membership makes us.

On another note, the Elder Law Section is still dealing with a few issues that have carried over from last year. We are closely monitoring the bankruptcy of the Center for Special Needs Trust Administration. As usual, the ELS/AFELA Task Force is continuously dealing with issues related to Medicaid, DCF, and AHCA. The ELS Public Relations Committee is still intact though we will definitely miss having Sachs Media on our team. And lastly, The Florida Bar announced in June that all sections will now have to fund their Bar staff employee.

The Elder Law Section Retreat will be in London, England this year. I look forward to seeing many of you there. The events include a London scavenger hunt, a proper British pub crawl, and a tour of the Inns of Court. I am sure you colonials will have a great time. (I am a native since I was born there.)

I am looking forward to working with all of you this year. Please feel free to contact me with any questions or concerns at wjohnson@floridaelderlaw.net.

The opening song has ended—let's get pumped up for what's to come!



Message From the Past Chair
by Victoria E. Heuler

Goodbye

Goodbye. Wow, that sounds so serious and final! For those of you who are now cheering, you are going to need to take a pause—I am not really saying goodbye, just "see you later!" Our Elder Law Section bylaws state that I will continue to serve on our Executive Committee one more year in my capacity as immediate past chair. I have been told this is the best job ever! So, you see, I am not going anywhere just yet. However, I *have* passed the gavel to William "Bill" Johnson who will be your fearless chair for 2024-2025.

A little bit about Bill: He is a Florida Gator through and through (unlike me, a double Florida State graduate—Go Noles!), having graduated undergrad and law school from the University of Florida. Bill has his own law practice in Melbourne, Florida and the surrounding areas and his daughter, Danielle Johnson, works with Bill in the practice. Proud papa, for sure. Bill is also board certified in elder law and has the distinction of being a two-time recipient of the section's Member of the Year. In his free time, Bill hangs out with his three white cats (white cats rule!), teaches martial arts, and attends virtual meetings while bike riding. Bill—welcome to your role as chair. I will be here to help you whenever you need me.

Being chair of our amazing section has been a huge privilege and pleasure. Our section, which some describe as "small but mighty," is being noticed for our hard work and dedication to our members and to the clients we serve. We have elevated our profile at The Florida Bar and are now well known. We have made strides to be present at The Florida Bar Board of Governors meetings, to ask questions, and to be heard on various issues. We have a wonderful Board of Governors liaison, Amy Farrior, who is always looking for ways to help us further our mission. We have been an active part of The Florida Bar's Council of Sections (COS) and participate regularly in COS meetings. We recently participated in a round table at the COS meeting to discuss our goal to have a section policies and procedures handbook to help guide future section leaders, to capture historical memory, and to stop reinventing the wheel every few years. Many sections were interested in our thoughts and goals for a handbook. Our Executive Committee will meet all day on August 2 to start drafting policies and procedures.

Our section has been very enthusiastic about engaging with other Florida Bar sections to share ideas, to speak up about issues concerning our sections, and to collaborate on continuing education on shared member interests. Equally, our strong relationship with The Florida Bar Young Lawyers Division (YLD) has generated a lot of energy for our section and has furthered our section's membership and continuing education goals. We look forward to our engagement with the YLD for many years to come.

Leadership development is a priority for our section. We will continue our intentional work to develop leaders within the section and to provide future leaders meaningful opportunities to participate and lead in our section's activities. Some of our future leaders include our Elder Law Section Fellows. Sylvana Rosende was our very first Fellow and is now in her second year of the two-year fellowship. We recently chose our new Fellows class for 2024-2026 and are pleased to announce that Elan Wechsler (Miami), Natasha Allen (Fanning Springs), and Kevin Albaum (Lakeland) are our new Elder Law Section Fellows. You will see them and hear from them throughout the next two years as they involve themselves in section activities and advance their special projects, per the program requirements. Each Fellow is assigned an Elder Law Section past chair as a leadership mentor to help guide them and further their leadership development.

Speaking of our past chairs, we have a terrific and engaged Past Chairs Committee. Yes, that's right, many of our past chairs still want to be involved and engaged to lend their experience and enthusiasm for our section's growth. This committee is a little atypical in that it only meets quarterly, but it does engage throughout the year via email. As our immediate past chair, it will be my role to chair this wonderful committee and to utilize this brain trust to help guide leadership and also participate in events that contribute to some of our section goals. The Past Chairs Committee is discussing a possible special event to be held in conjunction with our Essentials and Annual Update program in early 2025 that will be geared toward practitioners with 20 or more years in the practice of elder law. We hope to pair this event with a wine tasting! We may also participate in a mentoring activity in conjunction with the Essentials program. More information to come, but know that the Past Chairs Committee is just one more way we are adding value to your membership!

As chair of our wonderful section, I was blessed to have a top-notch executive team with me and could not have done it without them: Howie Krooks, Bill Johnson, Shannon Miller, Amy Fanzlaw, Debi Slater, and Travis Finchum. I always felt supported and guided by our team, and it made a huge difference in my ability to carry out our mission. Although Howie is now rolling off (but will always be around the corner and on our Past Chairs Committee), we are excited that Danielle Faller will be joining the team as our new secretary. Danielle led our CLE Committee for several years and will be a terrific addition to our Executive Committee.

Our Executive Committee met twice monthly and is part of the larger Executive Council, the backbone of our section. The Council consists of all administrative and substantive committee chairs, chairs of our special committees, and past chairs for the five preceding years. Our committees are the core of our section and the heart of our ability to accomplish our goals. Each committee chair dedicates her or his time to leading the committee agenda, working with executive leadership, and carrying out the section's strategic plan. Our committee chairs work very hard and bring a profound level of dedication to our leadership core that makes my heart full. I appreciate all of our committee chairs and their commitment to our section!

I cannot end without thanking our section administrator, Emily Young, who was always quick to respond to my flurry of emails, quick to connect me to other people I needed to speak with to further our section's goals, and a font of knowledge and energy that was impressive! Thank you, Emily, for your eternal patience and your dedication to our section.

See you all soon—remember that being together in person is invaluable and Zoom is no substitute for being together. Hanging out with each other is one of the most valuable things we can do together as we grow, learn, and build our section and our practices. Our annual retreat in London will be a terrific way to be together at a discounted hotel rate in the heart of London with planned activities! Join us in London September 26-28, 2024. If you cannot make it to London, join us in Orlando in February 2025 for our Essentials and Annual Update (exact dates to be determined soon). Thank you for allowing me the privilege of being your chair.



Your fire power to argue for more HCBS waiver home care hours

by Jason Neufeld
on behalf of the Medicaid/Public Benefits/VA Committee

Here is the scenario: you have successfully protected your client's assets, minimized time they spent on the waitlist, and obtained a NOCA (notice of case action) indicating Medicaid waiver/HCBS approval. The client is grateful.

But after enrolling in an HCBS/LTC Medicaid managed care organization (MCO), your client discovers that not all their needed home care hours have been approved.

To add insult to injury, the MCO case worker insinuates (or even has the gall to explicitly state) that if additional hours are needed beyond what they approve, then "perhaps it's time to start looking into a long-term care facility."

This approach, which is rampant among MCOs, is highly inappropriate.

Not everyone realizes that the Medicaid waiver/SMMC-LTC program a/k/a Home and Community Based Services (HCBS) is a substitute, *not* a stepping-stone, to institutionalized care.

In other words, just because your client's MCO only approved 20 hours a week of care does not mean your client must accept this allocation if, indeed, additional hours are needed.

This concept is enshrined in both federal and Florida law.

The United States Supreme Court in *Olmstead v. LC*, 527 U.S. 582 (1999), notes that unnecessary institutionalization is a violation of Title II of the Americans with Disabilities Act of 1990.

F.A.C. 56G-4.192 provides that all MCOs must comply with the provisions of the Statewide Medicaid Managed Care Long-Term Care Program Coverage Policy (LTC Coverage Policy)[1] administered by the Florida Agency for Health Care Administration (AHCA).

Right up top, LTC Coverage Policy Section 1.1 states that the MCO is "required to provide an array of HCBS that enable enrollees to live in the community and to avoid institutionalization."

Appropriate services are those that enable the enrollee to access the benefits of community living, achieve person-centered goals, and *live in the setting of their choice*.[2]

In short, the MCO must provide all the home care hours needed that are: (a) medically necessary; (b) not in excess of the Medicaid recipient's needs; and (c) not merely for the convenience of the recipient or their built-in natural supports.

Let's break this down further:

"Medically necessary" is essentially defined as services that are individualized, specific, and consistent with symptoms or confirmed diagnosis … and not in excess of the patient's needs.[3]

"Natural supports" are defined as unpaid and voluntary care provided in lieu of HCBS[4] (e.g., family who live in or near the Medicaid recipient's home who are willing to assist).

This is where the MCOs try to save money—by denying in part or in full personal care, homemaker services, companion care, respite care, and more on the basis of two arguments: (1) the services are not medically necessary; or (2) the services can be provided by natural supports.

However, MCOs are not only required to evaluate the amount of time an enrollee can safely be left alone but must also consider the actual ability of natural supports to assist in the enrollee's needs, including [the natural support's] work and other responsibilities, stress, medical limitations, and willingness to participate in care.[5]

The advocate's job is to bring forth evidence to prove that the Medicaid recipient's requested number of home care hours are both medically necessary and are not otherwise available from (or burdensome to) natural supports. The evidence should be presented via internal appeal with the MCO and subsequently (if unsuccessful) via fair hearing with AHCA.

I highly recommend the Fair Hearing Workshop CLE organized by Nancy Wright and myself (with the help of Disability Rights Florida, Florida Health Justice Project, and other talented elder law attorneys) for step-by-step instructions, discovery templates, sample letters, case studies, and more to show you how you can help your clients obtain the home care hours they truly deserve. This CLE is available on-demand at the AFELA.org website.



***Jason Neufeld, Esq.**, is the founder of Elder Needs Law, PLLC, based in South Florida. He focuses his practice on Medicaid planning and estate planning. He is also affiliated with Neufeld, Kleinberg & Pinkiert, PA, a personal injury litigation law firm with main offices in Aventura and Lakeland.*

Endnotes

1 https://ahca.myflorida.com/content/download/5952/file/59G-4.192_LTC_Program_Policy.pdf.

2 LTC Coverage Policy 1.3.14(b) (emphasis added).

3 LTC Coverage Policy 1.3.14.

4 LTC Coverage Policy 1.3.16.

5 LTC Coverage Policy 6.2.1.

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Missing piece in advanced planning: Mental health

by Alexandria Cook

Mental health and the elderly

Putting together end-of-life care is like completing a puzzle. A person has stories, property, family, and legal situations that make up small pieces of their life. When drafting advanced planning documents, attorneys place these pieces together to form a cohesive picture. However, an often-forgotten piece of the puzzle is mental health.

Twenty percent of people 55 years of age and older have experienced a mental health issue.[1] Mental health issues can stem from many causes, such as the loss of a spouse or a child or uncertainty from a medical diagnosis. Depression and anxiety are the most prevalent mental health issues among seniors.[2] If mental health issues are left untreated, it can lead to a decrease in physical and cognitive functioning, diminished quality of life, and higher use of primary health care services.[3]

Despite its prevalence, older adults tend to have a stigma toward discussing mental health.[4] Family members may have a difficult time bringing up mental health issues to a loved one out of fear they will offend them. However, discussing this information is necessary to determine what should happen if a loved one suffers from a mental health issue and is incapacitated.

What is a mental health advance directive?

A mental health advance directive, also referred to as a psychiatric advance directive, is one solution to ease planning mental health care decisions in case of potential future incapacity. Notably, voluntary or involuntary hospitalization for mental illness does not lead to an inference of incapacity.[5] The document serves a similar purpose as a designation of health care surrogate by appointing a person to serve as a surrogate for mental health treatment decisions.[6] It can also act similarly to a living will by providing specific information about the type of mental health treatment, medication, facilities, and physicians that a person does or does not want to receive.[7]

The Florida Department of Children and Families provides a sample of a mental health advance directive on its website.[8] Florida law does not have a statute addressing mental health or psychiatric advance directives. Instead, the law of health care advance directives incorporates it.[9]

Why should a mental health advance directive be used?

Mental health advance directives can provide a separate surrogate to make mental health decisions, other than the surrogate named in a designation of health care surrogate.[10] This can be beneficial if an elderly person trusts one person to make decisions regarding their mental treatment and another for their physical health. Otherwise, a designation of health care surrogate presumptively permits the surrogate to make decisions about mental health care, aside from treatment like electroshock therapy, psychosurgery, or voluntary admission to a mental health facility.[11]

If a client determines they want the same surrogate to make both physical health and mental health care decisions for them, then including mental health treatment preferences in a designation of health care surrogate or a living will is essential to help family members avoid frustration and stress when determining how to help a family member handle their mental illness. While most of the focus in advanced planning is on physical health, mental health challenges can affect the elderly and family members in the same way. Incorporating mental health is an essential piece to complete the puzzle.



Alexandria Cook *is a 2L student at Florida State University College of Law. During the spring 2024 semester, she was a student advocate in the Claude Pepper Elder Law Clinic.*

Endnotes

1 *The State of Mental Health and Aging in America*, CDC (2008), https://www.cdc.gov/aging/pdf/mental_health.pdf.

2 *Id.*

3 *Id.*

4 Carlos Augusto de Mendonça Lima & Gabriel Ivbijaro, *Mental Health And Wellbeing Of Older People: Opportunities And Challenges*, Ment Health Fam Med. 125 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3822658/.

5 Fla. Stat. § 765.204(1).

6 Planning for the Elderly in Florida § 13.12.

7 *Id.*

8 Mental Health Advance Directive, https://www.myflfamilies.com/sites/default/files/2022-11/mhadvdir.pdf.

9 § 765.202(5).

10 Planning for the Elderly in Florida § 13.12.

11 *Florida Advanced Directive Planning for Important Health Care Decisions*, AARP, (2012), https://www.aarp.org/content/dam/aarp/relationships/caregiving/2011_01/ad/Florida.pdf.

Protecting the DPOA agent as fiduciary and caregiver

by Veronica G. Hernandez

The durable power of attorney[1] (DPOA) is an important legal document in elder law matters. While at the Elder Law Clinic at the Florida State University College of Law and as a summer associate at an elder law firm, I saw two issues with implementing a DPOA. Usually, the agent was the principal's friend or family member who did not understand being a fiduciary. Also, the DPOA did not protect the agent from fiduciary breach claims when creating a personal service contract (PSK), a promissory note, or a trust[2] for Medicaid benefits eligibility. This article offers a solution to protect an agent from fiduciary breach claims when implementing Medicaid eligibility strategies.

The Florida Power of Attorney Act[3] (Act) states that an agent is a fiduciary of the principal.[4] Most agents don't know what a fiduciary is, nor do they understand the duties imposed on a fiduciary. An agent has mandatory duties[5] to act in good faith[6] and not to act contrary to the principal's best interest.[7] An agent has default duties to act loyally for the sole benefit of the principal[8] and to avoid conflicts of interest that impair the agent's ability to act impartiality in the principal's best interest.[9]

An agent may inadvertently breach these duties when developing Medicaid eligibility strategies. Examples include when an agent transfers the principal's assets to the agent as consideration in a PSK, or when an agent creates a promissory note to "loan" the principal's assets to the agent or creates an irrevocable trust holding the principal's assets. Most DPOA instruments state that the agent is a fiduciary.[10] But few agents know what it means to be a fiduciary or a "prudent person using reasonable care, skill, and caution."[11] Even if the attorney explains these concepts to a principal, the principal's agent may be unaware of them.

An agent may be protected if the DPOA states that an agent acting in good faith for the principal's interest or benefit won't face liability for a breach of fiduciary duty. Also, the principal should sign a notice acknowledging that the agent may act accordingly when implementing Medicaid eligibility strategies. Through these additions, a principal protects the well-intended agent from civil liability when implementing Medicaid eligibility strategies for the principal's benefit. Ultimately, the agent avoids being a victim of the common maxim that "no good deed goes unpunished."



Veronica G. Hernandez *is a May 2024 graduate from the FSU College of Law. She participated in the Claude Pepper Elder Law Clinic and is anticipated to start as an associate attorney at The Hernandez Law Firm PA, located in Clearwater, Florida, concentrating in the areas of elder law and estate planning.*

Endnotes

1 As defined in Fla. Stat. § 709.2102(9) (2023) and Fla. Stat. § 709.2102(4) (2023).

2 Referred to as Medicaid eligibility strategies.

3 Chapter 709, Part II, Florida Statutes.

4 Fla. Stat. § 709.2114(1) (2023).

5 Duties that the agent must follow regardless of provisions to the contrary in the DPOA. Fla. Stat. § 709.2114(1) (2023).

6 Fla. Stat. § 709.2114(1)(a)2 (2023).

7 Fla. Stat. § 709.2114(1)(a)3 (2023).

8 Fla. Stat. § 709.2114(2)(a) (2023).

9 Fla. Stat. § 709.2114(2)(b) (2023).

10 The DPOA form used in the Elder Law Clinic states that an agent "shall exercise all powers in a fiduciary capacity in good faith, as a prudent person would using reasonable care, skill, and caution."

11 *Id.*

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Before the money disappears: Bill passes to protect seniors against scams

by Abby Kaplan

As technology has improved and given us greater ability to connect with people all over the world, it has also given scammers a larger reach and enhanced tools to use against vulnerable people. Mass emails can be sent at the click of a button, and robo-dialers are used to reach people by phone quicker than ever, purporting to be the IRS, Publisher's Clearing House, or a potential victim's banking institution.

Steve Jordan fell victim to the "grandparents scam" and handed over envelopes containing $8,000 worth of cash after being told his grandson could escape criminal charges in exchange for the money. Luckily for him, the money was returned to him after the scammer became nervous about the possibility of facing charges himself.[1] While awareness of these scams has increased, many have been left without recourse after falling victim to one.

It is important to set up protections to aid individuals being scammed before the money leaves their account since recovery is difficult and uncertain once the money is in the hands or accounts of the scammer. In the course of the scheme, victims often interact with bank tellers to withdraw or transfer the funds. This puts bank tellers in a unique position to help, but they currently lack the tools to do so in a meaningful way. Florida legislators have been working to change that.

In the 2024 session, the Florida Legislature passed a bill that allows financial institutions to delay a transaction in the event that they suspect financial exploitation of a vulnerable adult. The bill itself uses the term *specified adults*, but the authority to delay the transaction comes from a suspicion of financial exploitation pursuant to Section 415.1034, Florida Statutes, which mandates reporting of abuse, neglect, or exploitation of vulnerable adults. *Vulnerable adult* is defined by Section 415.102 (29), Florida Statutes, as "a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging."

Upon delay of a transaction, the financial institution must conduct an internal review of the facts and circumstances that caused an employee of the financial institution to report suspected financial exploitation.[2] They must also give notice to anyone authorized to conduct business on the account and any trusted contact, unless they are suspected of exploitation of the vulnerable adult. The delay expires after 15 business days, but can be extended for up to 30 more business days, so long as the financial institution continues to have reasonable suspicion of exploitation. This allows for thorough review of the circumstances and allows time for court intervention if necessary.

Jeffrey Merry, community resource deputy for Greater Sun City Center, speaking in support of the bill to the Banking and Insurance Committee on January 16, 2024, said, "Just my little area suffers $8 to $10 million worth of loss every single year, and that's only 20 to 24%. Seniors don't report this crime."[3] He continued to talk about the mechanics of some of the scams, such as requiring the victim to take money out of their accounts at their bank and go to another bank and deposit it into another account. In those instances, this bill gives two chances for an employee to notice and flag the exploitation and protect the victim before the money disappears.

The governor signed SB 556 on May 28 2024, and the new law will go into effect on January 1, 2025.



***Abby Kaplan** is a graduating 3L at Florida State University College of Law and a student advocate in the Claude Pepper Elder Law Clinic.*

Endnotes

1 John MacLauchlan, *Oakland Park man accused of taking part in "grandparent scam*," CBS News (Jan. 25, 2024), https://www.cbsnews.com/miami/news/oakland-park-man-accused-of-taking-part-in-grandparents-scam/.

2 HB. 515, 2024 Leg., Reg. Sess. (Fla. 2024). Ultimately, the companion bill, SB 556, was passed and signed by the governor.

3 *Committee Meeting*, HB 515, Comm. on Banking & In., 2024 Leg., Reg. Sess. (Fla. 2024).



Is your EMAIL ADDRESS current?

Log on to The Florida Bar's website (www.FLORIDABAR.org) and go to the Member Profile" link under "Member Tools."

Opinion: Suicide is not the same for all people

by William D. Slicker

Editor's note: The opinions expressed in this article are those of the author and not of The Florida Bar or the Elder Law Section.

Due to both the internet and technological developments, suicide is in the news.

Suicide is the second leading cause of death for adolescents and young people aged 15-24.[1] Suicide is the eighth leading cause of death for people aged 55-64.[2] However, there are significant differences as to why young people versus older people choose to end their own lives.

Teens often end their lives due to transitory feelings of being unloved or unwanted or rejected.[3] The lyrics of a recent song captured these teenage feelings of alienation:

Do you ever feel like breaking down?
Do you ever feel out of place?
Like somehow you just don't belong
And no one understands you?
Do you ever want to run away?
Do you lock yourself in your room?
With the radio on and turned up so loud
That no one hears you screaming?
No you don't know what it's like
When nothing feels alright
You don't know what it's like to be like me
To be hurt, to feel lost
To be left out in the dark
To be kicked when you're down
To feel like you've been pushed around
To be on the edge of breaking down
And no one there to save you.
No you don't know what it's like
Welcome to my life.[4]

Most survivors of suicide attempts based on such temporary feelings of being unloved, unwanted, or rejected go on to live full, rewarding lives.[5] Unfortunately, it is becoming easier for young people to be successful in their suicide attempts. A website entitled Sanctioned Suicide, the link of which is intentionally not cited to, provides a forum where people discuss ways of committing suicide and post their real time actions while they are committing suicide. The most discussed method on that website is a preservative, sodium nitrite.[6] It impairs the delivery of oxygen to tissues, resulting in death.[7] The intentional ingestion of sodium nitrite was first reported in 2010 and has been increasingly used as a method of suicide.[8] A person can even order a sodium nitrite suicide kit on the internet.[9]

On the other end of the spectrum are the elderly. Among males, the highest suicide rate is for those age 75 or older.[10] The elderly usually want to die for different reasons than the young. For the elderly, it is loss of dignity and the loss of the ability to control their own lives.[11] This may arise due to diseases such as amyotrophic lateral sclerosis (ALS or Lou Gehrig's disease) or accidents causing paraplegia, which make people unable to move and care for themselves; or it may arise due to the problems of old age and the person not wanting to end their life in a nursing home.[12] One well-known example is actor Robin Williams who had Lewy body dementia and chose to end his life.[13] To assist people in these conditions, nine countries: The Netherlands, Austria, Belgium, Luxemburg, Switzerland, Columbia, Canada, Spain, and New Zealand allow medical aid in dying.[14] In the United States, 10 states and the District of Columbia allow medical aid in dying.[15] Presently, Switzerland uses the ingestion of liquid sodium pentobarbital;[16] however, that may change. Dr. Philip Nitschke of Exit International has created what is called the Sarco capsule, a pod in which a person lies down, closes the airtight door, and presses a button to flood the capsule with nitrogen, rapidly depleting the oxygen level to 1% in about 30 seconds. The person loses consciousness and dies of oxygen deprivation.[17] The capsule can then be used as a sarcophagus. If approved for use, the Sarco capsule will be restricted to people over the age of 50.

Opinions about medical aid in dying in cases of the terminally ill or those in constant pain are changing. There are now 72 Right to Die Societies throughout the world, and 57 of them are members of the World Federation.[18] That Federation has designated November 2 as World Right to Die Day. There is a push to add the United Kingdom to those countries that allow medical aid in dying based on a report that showed 78% of U.K. residents support allowing medical aid in the deaths of terminally ill patients.[19]

Here in Florida, in 2023, a bill was introduced to allow death with dignity.[20] In 2024, the bill died in committee.

This shift in aiding death in certain circumstances is based on acceptance that we cannot solve death, and additionally, some have come to believe that some things, such as living with chronic pain, are fates worse than death.[21]

So, maybe we need to stop thinking about suicide as being the same for all people. Of course, we should do all we can to help stop suicides among those who need to weather temporary emotional setbacks. At the same time, there is an argument for making medically assisted dying legal and as painless as possible for those whose pain or disabilities are not temporary. We should let the young and the physically well know that the emotional darkness they feel will pass and they can lead dignified lives. Perhaps the law in our state needs to change so we can also let the old and painfully infirm know that they can end their lives with dignity.



William D. Slicker *assists people with estate planning and estate administration in St. Petersburg, Florida.*

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Endnotes

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2 https://www.cdc.gov/suicide/facts/index.html.

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Capitol Update
by Brian Jogerst

2024 Legislature adopts $117 billion-plus budget

Plus, a preview of the 2025 Legislative Session

The 2024 Legislature adjourned on March 8. We previously provided a snapshot of the session, and the following update provides additional information on the state budget as well as a look ahead to the 2025 Legislative Session.

Session statistics

1,957 bills and proposed committee bills filed

2,196 amendments filed

3,051 votes taken

325 bills passed both chambers

Source: LobbyTools

Budget and budget summary

The budget adopted by the Legislature grew to $117.46 billion, just under $1 billion larger than the budget for the current fiscal year and about $24 billion—or roughly 26%—larger than the state spending plan was just four years ago. The following is an overview of key provisions in the final state budget (*prior to any gubernatorial vetoes*):

Health and human services appropriations

Total budget: $46.5 billion; 32,129.76 positions

Agency for Health Care Administration

Total: $34.7 billion; 1,616 positions

- Individuals with Developmental Disabilities Pilot Program – $38.4 million
- Medicaid Provider Rate Increases – $333.1 million
- Assistive Care Services – $1.3 million
- Federally Qualified Health Centers and Rural Health Clinics – $19 million
- Maternal Fetal Medicine – $3.5 million
- Medical Foster Care – $0.5 million
- Nursing Homes – $247.9 million
- Statewide Inpatient Psychiatric Program – $7.6 million
- Therapeutic Group Home – $0.3 million
- Behavioral Health Collaborative Care – $8.3 million
- Graduate Medical Education – $10.5 million
- Program of All-Inclusive Care for the Elderly – $29.7 million

Agency for Persons with Disabilities

Total: $2.4 billion; 2,753 positions

- Home and Community Based Services Pre-Enrollment to Waiver – $64.8 million
- Pre-Enrollment to Waiver Slots for Siblings – $16.9 million
- Dually Diagnosed Program – $6.5 million
- Adult Pathways Waiver – $0.3 million
- Information Technology – $9.3 million
- Fixed Capital Outlay for Persons with Developmental Disabilities – $12.5 million

Department of Children and Families

- Total: $4.7 billion; 12,974.75 positions
- Independent Living Programs Eligibility Expansion – $8.1 million
- Adoption Incentive Benefit Increase and Eligibility Expansion – $9.4 million
- Adoption, Guardianship, and Foster Care Subsidies – $26.4 million
- Homeless Housing Opportunities – $10 million
- Domestic Violence Services – $10 million
- Human Trafficking Emergency Bed Expansion – $5 million
- Optional State Supplementation Personal Needs Allowance Increase – $6.7 million
- Opioid Settlement – Treatment, Prevention, and Recovery Services – $83.9 million
- State Mental Health Treatment Facilities – $88.8 million
- Integrated Behavioral Health Clinics – $7 million
- Behavioral Qualified Residential Treatment Program – $5.7 million
- Community-Based Mental Health/Substance Abuse Services – $21.5 million
- Florida System and Child Welfare Information System Modernization – $54.1 million
- Economic Self Sufficiency (ESS) Call Center – $12.3 million
- Fixed Capital Outlay for State Mental Health Treatment Facilities – $6.5 million

Department of Elder Affairs

Total: $482.4 million; 431 positions

- Florida Alzheimer's Center of Excellence – $2.1 million; 2 positions

continued, next page

Capitol Update . .
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- Serve Additional Clients in the Home Care for the Elderly and Community Care for the Elderly Programs – $11 million
- Alzheimer Disease Initiative – $6 million
- Office of Professional and Public Guardians Waitlist – $1.4 million
- Electronic Client Information and Registration Tracking System (eCIRTS) Project Implementation – $2.8 million

Department of Health

Total: $4.1 billion [$948.2 million GR; $3.2 billion TF]; 12,849 positions

- Statewide Fetal Alcohol Spectrum Disorder Program – $1.7 million
- Florida Cancer Innovation Fund – $40 million
- Sickle Cell Treatment and Research – $10 million
- Rural Hospital Capital Improvement Grant Program – $10 million
- Mary Brogan Breast and Cervical Early Detection Program – $1.7 million
- Fixed Capital Outlay for Public Health Laboratories – $9.7 million

2025 Legislative Session

The 2025 Legislative Session is the late session, meaning committee meetings will be held January–February 2025, with the 2025 Legislative Session beginning on March 4 and ending on May 2.

The Legislative Committee, led by Michelle Kenney and Travis Finchum, is actively reviewing legislative proposals for the 2025 Session.

- Substitute Service – During the final weeks of the 2024 Session, the Elder Law Section and AFELA (Elder Law) actively worked with the legislators drafting an amendment to further strengthen protections for vulnerable seniors and adults. We are well aware that the financial exploitation industry is getting more sophisticated in their methods to exploit victims. By hiding behind internet walls or apps, the exploiters have become quite adept at avoiding detection, identification, and prosecution. The amendment permitted serving the alleged exploiters via the same communication style the respondent used to correspond with the victim. Once served in this manner, the respondent would have 30 days to appear to assert the non-exploitive nature of the transaction. Because of the limited amount of time remaining during the session, the language was not finalized and not offered. However, Elder Law will be pursuing the issue during the 2025 Session.
- Special Needs Trust – In early 2024, the Center for Special Needs Trust Administration filed for bankruptcy protection. Based upon public reports, the owner/manager of the trust borrowed more than $100 million in funds, which were to provide care for the disabled. Like many, Elder Law was both shocked and saddened by the reports and is actively monitoring the bankruptcy proceedings. In addition, we are looking at legislative solutions to ensure the beneficiaries are protected

Visit the Elder Law Section on Facebook

We are happy to announce that the Elder Law Section has created a Facebook page. The page will help promote upcoming section events as well as provide valuable information related to the field of elder law.

Part of the section's mission is to "cultivate and promote professionalism, expertise, and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs…" We see this Facebook page as a way of helping to promote information needed by our members.

We need your help. Please take a few moments and "Like" the section's page. You can search on Facebook for "Elder Law Section of The Florida Bar" or visit *facebook.com/FloridaBarElderLaw-Section/*.

If you have any suggestions or would like to help with this social media campaign, please contact:

Amy L. McGarry
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THE FLORIDA BAR
ELDER LAW SECTION

in the future. Elder Law has met with key legislative staff and will be briefing legislators on recommended solutions.

- Guardianship Rewrite – Elder Law opposes any comprehensive rewrite of Florida's guardianship laws that does not include the substantial adoption of the Uniform Adult Guardianship Jurisdiction Act such that the state of Florida would not be considered an adoptee of the Adult Guardianship and Protective Proceedings Jurisdiction Act.
- Guardianship – Legislation was filed during the 2024 Session making significant revisions to Florida's guardianship laws. The legislation is said to be based upon Karilyn's Law, and Elder Law had significant concerns with the bill as it would require visitation, increase risk of exploitation, and increase the burden on the courts, including requiring a jury trial for guardianship and a redetermination every three years with a different judge. Elder Law reached out to the sponsors of the bills and expressed these concerns. The bill likely will return for the 2025 Session.

Patient Directed Doctors Orders (PDDO) – Similar to Physician Orders for Life Sustaining Treatments (POLST), legislation was filed for the 2024 Session to create PODD and to authorize EMTs and certain health care professionals to withhold or withdraw cardiopulmonary resuscitation or other medical interventions if presented with a PDDO form that contains an order not to resuscitate. Elder Law had concerns with the bill—which did not receive a hearing in the House or Senate—and will be meeting with proponents of the bill to share comments/concerns. The bill likely will return for the 2025 Session.

Your help is needed

This past session, the Legislative Committee reviewed more than 54 bills and countless amendments and revisions.

If you want to participate on a substantive committee or review/comment on the bills that are filed, please contact the leadership of the ELS Legislative Committee:

Michelle Kenney

michelle@gapsattorneys.com

Travis Finchum

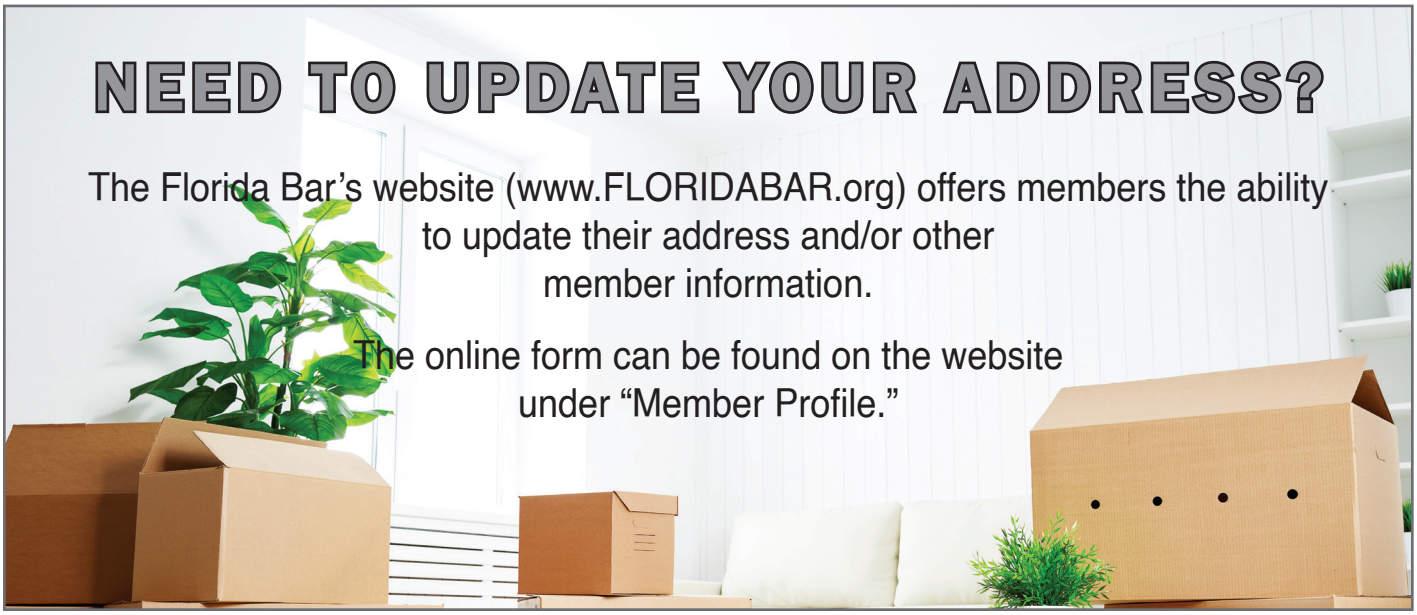
travis@specialneedslawyers.com

The Legislative Committee meets bi-weekly during the legislative committee weeks and *every* Friday at 8:00 a.m. during session to discuss issues reviewed by the ELS substantive committees.

We have enjoyed success on legislative issues by working with legislators and providing feedback to them as well as by testifying at committee hearings. It is imperative that we continue to have thorough and timely responses available during the Interim Committee Weeks and Legislative Session as meeting notices leave minimal time to respond. We are grateful for the grass-roots support we have received and for the difference that makes when working with legislators.

You can also help by meeting with your local legislators and being a local resource to them. If you do not know your legislator, we remain willing to facilitate an introduction with the legislator and/or their staff. Continued relationship-building with legislators, the state's policy makers, is a critical component of our advocacy efforts because the local relationships and outreach to legislators from trusted sources helps Elder Law be a trusted voice and improves our advocacy efforts.

Brian Jogerst *is the founder of BH & Associates, a Tallahassee-based governmental consulting firm. Recently recognized as a Health Care Influencer in Florida Politics'* INFLUENCE *magazine, he has more than 30 years' experience lobbying on health care and related legal issues. He is under contract with the Academy of Florida Elder Law Attorneys and the Elder Law Section of The Florida Bar for lobbying and governmental relations services in the State Capitol.*



Sharpening their swords: Claude Pepper Elder Law Moot Court Competition

The Claude Pepper Elder Law Moot Court Competition, hosted by the Florida State University College of Law's Claude Pepper Elder Law Clinic, is rapidly becoming a premier forum for future elder law advocates. This exciting competition, now in its second year, offers law students a valuable opportunity to hone their legal skills while grappling with critical issues facing our aging population.

A legacy of advocacy

The competition is named after the esteemed Senator Claude Pepper, a champion for elder rights throughout his long career. Pepper, who served Florida in the U.S. Senate for nearly two decades, later chaired the House Committee on Aging. His dedication to protecting the vulnerable continues to inspire a new generation of elder law attorneys through this innovative competition.

A platform for emerging talent

The competition draws law students from across the country, fostering a vibrant exchange of ideas and legal strategies. Last year's inaugural event saw teams from prestigious institutions like George Washington University, Mercer University, Baylor University, Florida International University, and Stetson University battle it out in the Advocacy Center, once home to Florida's First District Court of Appeal. The students presented compelling arguments on pressing elder law topics including undue influence, exploitation, and standing in guardianship cases.

The competition's format provides a realistic courtroom experience. Teams meticulously prepare briefs outlining their arguments and then face experienced judges, often elder law experts, in simulated court hearings. This allows students to showcase their legal reasoning, research skills, and courtroom presence—all crucial assets for future success in elder law.

Beyond the gavel

The competition extends beyond courtroom battles. A welcome reception featuring prominent lawyers and policy specialists in aging and elder law fosters crucial connections for students. This networking opportunity allows guests and competitors to learn from established professionals and gain valuable insights into the practical realities of elder law practice.

Looking ahead: 2024 and beyond

The 2024 competition promises to be even bigger and better. It is scheduled for November 7-9 in Tallahassee, and the final round that will be live-streamed for a wider audience. The competition problem focuses on age discrimination in employment.

The Claude Pepper Elder Law Moot Court Competition is a win-win for the elder law community. Law students gain invaluable experience and exposure to a growing area of law while the profession welcomes a new generation of passionate advocates equipped to safeguard the rights of our most vulnerable citizens. As the competition continues to flourish, we can expect to see these talented students translate their courtroom victories into real-world success, ensuring a brighter future for our aging population.

How to get involved

Elder law attorneys can play a vital role in shaping the future of elder law by contributing their expertise to the Claude Pepper Elder Law Moot Court Competition. Volunteer opportunities abound, from grading briefs to serving as judges during the on-site competition. Sponsorship opportunities are also available, allowing firms to directly support this critical event and showcase their commitment to the elder law community.

If you would like to become involved as a volunteer and/or sponsor, please email Tazara Weilhammer at elderlawmootcourt@gmail.com.





Scenes from the 2023 Claude Pepper Elder Law Moot Court Competition

Elder Law Section announces new Fellows

by Chanté Jones

The Elder Law Section is pleased to announce three new fellows to participate in the Elder Law Section Fellows Program: Kevin Albaum of Lakeland, Florida; Natasha Allen of Fanning Springs, Florida; and Elan Wechsler of Miami, Florida.

The mission of the Elder Law Section Fellows Program is to cultivate dynamic and diverse leaders within the section by attracting attorneys who are new to the practice of elder law, providing them with meaningful opportunities to develop leadership skills through section activities, and encouraging their continued involvement in the section. "The inaugural year of the section's Fellows Program has been a resounding success, marked by valuable learning experiences that will pave the way for continued growth and success," said Chanté Jones, chair of the section's Inclusion, Diversity, & Engagement Committee.

"We are thrilled to welcome three exceptional new Fellows into our program, where their passion and talent will undoubtedly enrich our journey ahead," said Victoria Heuler, 2023-2024 chair of the Elder Law Section.

You may direct any questions to Chanté Jones at cejjones@aarp.org or Emily Young at eyoung@floridabar.org.



***Chanté Jones, Esq.**, is the associate state director of advocacy for AARP Florida and a registered lobbyist. She develops and implements advocacy strategies at the local and state levels. Ms. Jones earned a JD from Barry University. She is the chair of the Inclusion, Diversity, & Engagement Committee of the Elder Law Section of The Florida Bar.*

Meet the 2024 Elder Law Section Fellows



Kevin Albaum earned his law degree from Stetson University College of Law and is a shareholder with Clark, Campbell, Lancaster, Workman & Airth PA.



Elan Wechsler earned his law degree from St. Thomas University School of Law and is an associate attorney at Scott R. Bugay PA.



Natasha Allen earned her law degree from University of Florida, Fredric G. Levin College of Law and is a sole practitioner focusing her practice in rural counties in the state.

Congratulations
to our 2024 award recipients!

Each year the members of the Elder Law Section gather during the Annual Florida Bar Convention to recognize members who have made exceptional contributions to the practice, the community, and the section. Congratulations to our 2024 honorees:



CASSANDRA JELINCIC
EXCEPTIONAL SERVICE AWARD

Cassandra received the Exceptional Service Award for her high level of dedication to the work of the Elder Law Section and always being "at the ready" to educate fellow section members and to offer input and assistance on various committees, all while recently giving birth and raising an infant daughter. Cassandra is a wonderful example of giving back and making a difference for the section!

Then Elder Law Section Chair Victoria Heuler (right) presents the Exceptional Service Award to Cassandra Jelincic during the section's annual meeting in Orlando.



GRADY WILLIAMS
EXCEPTIONAL SERVICE AWARD

Grady received the Exceptional Service Award for his quiet but constant involvement in section policy and legislative matters. Grady's insights are always on point, and he is a dedicated member of the section's Estate Planning and Probate Committee. Grady is not afraid to politely voice his opinions, and he helps remind leadership of potential policy pitfalls regarding various issues faced by the section. We are fortunate to have Grady's commitment to our section's goals!





JOHN FRAZIER AND LEN MONDSCHEIN
CHARLOTTE E. BRAYER PUBLIC SERVICE AWARD

John and Len have been extremely dedicated and persistent in leading the section's Unlicensed Practice of Law (UPL) Committee and in educating our members and the public about what constitutes UPL. Non-lawyers who attempt to "advise" the public regarding Medicaid eligibility or planning are engaging in UPL, which leads to public harm. John and Len are performing the highest level of public service by their commitment to global education and outreach with the goal of protecting all residents in Florida.





ENRIQUE D. ZAMORA AND RIMA NATHAN
MEMBERS OF THE YEAR AWARD

Enrique and Rima received the Members of the Year Award for their accomplishments as our section's Law School Liaisons. Their accomplishments include creating elder law excitement at the law schools where they teach—Florida State University for Rima and St. Thomas for Enrique—and bringing their law students into the section's fold as members. Rima and Enrique have worked to bring more student members into our section, to increase law students' understanding of what elder law is and why it is an exciting practice area, and to encourage law school graduates to seek elder law employment and become dedicated elder law attorneys. Their hard work will pay dividends in the future toward the growth of our section and ensuring there are more elder law attorneys to serve the needs of our state's aging population.



Rep. Allison Tant accepts the Legislator of the Year award at The Florida Bar headquarters on July 15. Pictured on the bottom row are Elder Law Section members Caitlyn Clibbon and Twyla Sketchley, Rep. Allison Tant, and Elder Law Section Immediate Past Chair Victoria Heuler, and on the top row are Alan Abramowitz, CEO of The ARC of Florida, Dina Justice, COO of The ARC of Florida, and Margaret Hooper with the Florida Developmental Disabilities Council, Inc.

REPRESENTATIVE ALLISON TANT
LEGISLATOR OF THE YEAR

Representative Allison Tant received the Legislator of the Year Award because of her tireless advocacy on behalf of persons with disabilities and her insistence on working collaboratively with our section and other stakeholders to create the Supported Decisionmaking Authority bill that is now law in Florida. The new Supported Decisionmaking Authority law is a foundational law that will help people with disabilities plan for their own needs while also authorizing a trusted person to assist them. The law provides a less restrictive alternative to guardianship that allows the person with a disability to remain as independent and autonomous as possible. Rep. Tant's energy and commitment to aging and disability issues is immeasurable, and our section truly appreciates her legislative leadership.

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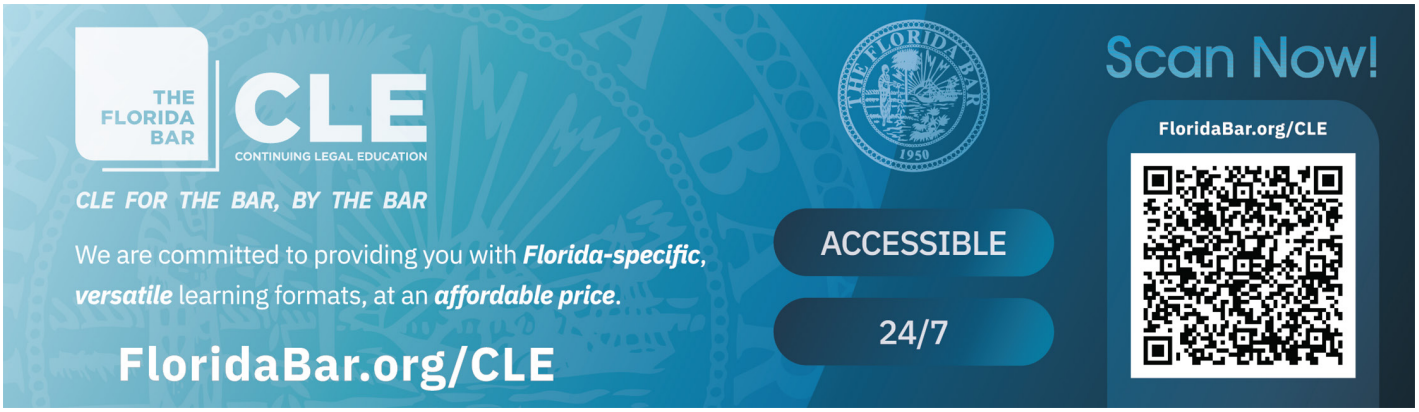
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Practice Management
by Audrey Ehrhardt

Is there such a thing as too many clients for your law firm?

by Audrey Ehrhardt

There should be a magic bullet, I know, but unfortunately there really isn't a one-size-fits-all answer. A critical first step is to understand your own firm's capacity. It's not just about getting the work done, but also about maintaining quality service while creating a buffer that ensures profitability. For many of the attorneys I speak with across the nation, this question also brings to life the age-old conundrum: should I build the system or case prospective clients?

If you are starting to ask the "how many is too many" question, or have been asking it for a while with no real answer, there are a couple of places we can begin to evaluate your firm's capacity with profitability in mind.

We can start by understanding your law firm's structure. While there is no one way to run a practice, the structure of your law firm significantly impacts how many clients you can handle effectively. Are you a solo practitioner managing all aspects from intake to case resolution, or does your firm have multiple seasoned attorneys and a legal team? Do you have a strong practice management system that can run a case, with AI, from intake through closure?

Evaluating your law firm's support structure is critical. The efficiency of your support team, from tech to employees to associates to partners to vendors, can dramatically enhance your firm's ability to handle more clients successfully and more profitably. For example, tasks handled by paralegals, legal assistants, and administrative staff can free up attorneys to focus on higher-value aspects of legal work, directly affecting the bottom line. If administrative tasks consume too much of anyone's time, profitability dips, which is a clear indicator that it might be time to expand the support team.

Ensuring that your legal team is effectively utilized and not overburdened is key. There is no question that overworked teams can lead to burnout and turnover, which in turn can hurt your firm's efficiency and profitability.

Next, you do need to consider the types of clients you work with and the nature of their cases, as they influence both efficiency and profitability. Long, complex cases may be more profitable if billed appropriately, but they also tie up resources for extended periods and can lead to client management challenges. Conversely, quicker in duration legal services might be less profitable individually but can provide a steady flow of income without an extensive time investment. Balancing the types of cases you bring in can help stabilize cash flow and maintain profitability.

There is no question the balance between client quantity and service quality is crucial for maintaining a sustainable practice. Poor service, especially in the age of reviews, can lead to increased dissatisfaction and higher acquisition costs. An effective strategy is to maintain a manageable client load that allows you to provide excellent services that can lead to repeat business and referrals, which are often more cost-effective sources of revenue.

Don't forget the added benefit we have now through leveraging technology for increased profitability and efficiency. Automation of routine tasks reduces errors and frees up your legal team's time, allowing your firm to handle a greater number of clients without additional hires. By analyzing performance and profitability metrics through these systems, you can also pinpoint where improvements should be made. If your analysis shows that your firm is operating at full capacity while demand continues to grow, making strategic decisions about expanding your team or specializing further can help manage an increased client load successfully.

Determining the right number of clients for you and your law firm involves a delicate balance between operational capacity, legal service quality, client management, and profitability. When you focus on working on the practice and continuously assessing these factors and adapting your strategies accordingly, you can ensure that your firm grows the way you want it to in today's competitive legal landscape.

***Audrey Ehrhardt, Esq., CBC**, builds successful law firms and corporations across the country. A former Florida elder law attorney, she is the founder of Practice42 LLC, a strategic development firm for attorneys. She focuses her time creating solutions in the four major areas of practice development: business strategy, marketing today, building team, and the administrative ecosystem. Join the conversation at www.practice42.com.*



Tips & Tales
by Kara Evans

Garn-St. Germain and the 'Bank of Animus'

The tale: William lived with his Uncle Bill and was his caregiver for the past three years. William gave up his apartment to move in with Uncle Bill when he realized his uncle needed 24/7 care. Now, Uncle Bill's last will and testament has left the home to William.

William hoped he would receive the home free of the mortgage, but the last will and testament did not so specify. He learned the hard way about F.S. 733.803, which states: "The specific devisee of any encumbered property shall be entitled to have the encumbrance on devised property paid at the expense of the residue of the estate only when the will shows that intent. A general direction in the will to pay debts does not show that intent." William got the house, but the money went to Uncle Bill's estranged son.

There was a mortgage on the home with a 3% interest rate. William thinks he can swing the current payments and stay in the house; however, the bank says he cannot assume the mortgage but must refinance. The bank is citing a "due on sale clause" in the mortgage. William is not sure what a "due on sale clause" is, but he has bad credit and the lowest rate he can get is 9%. He cannot afford to keep the home under these circumstances. William will be left homeless if he has to refinance. What can he do? He is just one person against a very large bank.

The tip: You explain to William that a "due on sale clause" is defined in 12 U.S.C. § 1701j-3-(a)(1) as " a contract provision which authorizes a lender, at its option, to declare due and payable sums secured by the lender's security instrument if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender's prior written consent."

Lenders like these clauses because they can force a refinance when a property with a low-interest mortgage changes hands in a high-interest environment. When interest rates were low, the bank issued mortgages at low rates. However, as interest rates increase, depositors must be paid higher interest rates to keep their money in the bank. If the bank has a large portfolio of low-interest loans, it will not earn enough money to pay those higher rates—hence the push to refinance lower interest loans when property changes hands.

This is happening right now, and it also happened in the 1970s. It was much worse in the 1970s. At the end of that decade, interest rates were over 12%, and some states prohibited enforcement of "due on sale clauses." Then came the Garn-St. Germain Depository Institutions Act.

Named for the bill's sponsors, Senator Jake Garn (R-UT) and Congressman Fernand St. Germain (D-RI), and signed into law by President Reagan on October 15, 1982, this bill was intended to help the banks avoid the instability caused by low-interest loans in a high-interest environment. This law allowed the banks to enforce a "due on sale clause" even if state law prohibited such clauses.

But you have good news for William. There are exceptions to the enforcement of "due on sale clauses" in the Garn-St. Germain Act, and his situation is one of the exceptions. The Act prohibits the exercise of the "due on sale clause" when the transfer is to a relative resulting from the death of a borrower. (12 U.S.C. § 1701j-3-(d)(5)). William can continue the existing mortgage, and the bank cannot require him to refinance the loan.

The same is true for a spouse or a child (12 U.S.C. § 1701j-3-(d)(6)). Be a champion for your clients, and do not let the big, bad bank bully them into a refinance they cannot afford.

***Kara Evans, Esq.**, is a sole practitioner with offices located in Tampa, Lutz, and Spring Hill, Florida. She is board certified in elder law and concentrates her practice in elder law, wills, trusts, and estates.*

CORRECTION AND RETRACTION
Personal service contract article

I have a very big eraser, which is appropriate for very big mistakes. I am figuratively using that big eraser now. Please note that the Tips & Tales article published in Vol. XXXI, No. 2 Spring 2024 entitled "Personal service contract with a trust or an escrow agreement" included some errors. Some big errors. The entire section dealing with Sarah's SSI benefit and her ability to earn money was incorrect and should be disregarded. Sarah would lose her benefit under the circumstances described in the article. Furthermore, a pooled trust trustee can agree to have two successive beneficiaries. If that happens, then Sarah could be the beneficiary of the pooled trust funds after her mother died and her issue would be solved quite simply. I apologize for any confusion my article may have caused.

Thank you to David Lillesand and indirectly to Travis Finchum and Steven Hitchcock for your assistance and for your tireless work and dedication.

Following is the article with the needed corrections made:

Personal service contract with a trust or an escrow agreement

A complex mission*

The tale: Ms. Sarah has a problem. She has been her mother's caregiver for the past several years. Mother's needs have been increasing, and Ms. Sarah needs assistance to keep her mother at home. She has heard that Medicaid has a long-term care program that will provide help at home for zero out-of-pocket cost. But Mother has $226,236 in a savings account. That money, along with Mother's and Sarah's small income, is used to pay the home expenses, including taxes and insurance. If that money is lost, Mother and Sarah will eventually become homeless. Sarah needs you to find a way for her to get help for her mother and preserve those funds.

You suggest a personal service contract. After all, Sarah has been providing care all along. She can and should be paid for her services. You explain to Sarah that a personal service contract is a legal agreement which sets out the responsibilities, duties, and obligations that she will be performing. The contract must be for a stated period of time not to exceed the life expectancy of the individual that will be receiving the services. This is a fair market value exchange. Payment to Sarah is compensation for services and should be claimed on her tax return. Once the funds are in Sarah's name, she can use them to maintain the home. Sarah is very concerned about the amount of tax due on the money. After all, these are services she will be providing over her mother's lifetime. Why should she pay the taxes on the full amount in the first year?

Your mission, should you choose to accept it, is to find a way to get Sarah's mother the long-term care benefits under Medicaid and preserve the funds so Sarah can keep her home, without having Sarah pay tax on the full amount in the first year.

The tip: You want to recommend a personal service contract with some kind of trust or escrow agreement to hold the funds and pay them out as the services are provided. This will allow Sarah to earn enough money to pay the home expenses but still spread the taxable income over the life of the contract. You must navigate several obstacles on your way to completing this mission.

There are no real guidelines on how to create an escrow/trust arrangement for a personal service contract. However, there are Fair Hearings denying these agreements that should be taken into consideration.

The Fair Hearings cited here are from between 2011 and 2016, but the laws and rules the denials are based upon have not changed and should be carefully reviewed when attempting to use this technique. Highlights from select hearings are summarized below, with mostly red flag emojis (🚩) and one thumbs up emoji (👍) for emphasis.

Appeal No. 11F-03529

- Care trust was established by Medicaid applicant's children and stated that the Medicaid applicant was the "Life Beneficiary." The trust also included disbursements for "supplemental nursing care, physical therapy care, rehabilitative care and similar care." 🚩
- At the hearing, testimony was given that the funds were not used to pay for personal service but were used to pay for the nursing facility, home maintenance, taxes, and insurance. 🚩
- Language (dicta?) in the hearing transcript states that the respondent (DCF) has "no issue with the existence of the Trust or the Contract for Personal Services. Both trusts and contracts have a reasonable place in accommodating ICP eligibility at times." 👍

Ultimately, it was the fact that the trust allowed the funds to be used for the Medicaid applicant's expenses that made the trust an available resource.

continued, next page

Correction and retraction. . .
from previous page

Appeal No. 12F-08233

- In this case, the personal service contract stated that the care provider "will pay all costs and expenses of Client's care entertainment, household, housing, personal needs and obligations out of Client's funds to the extent such funds are available to Provider." In addition, the escrow/trust agreement stated, "any portion of the Escrow Account may be applied for Client's 'Supplemental Needs,' which includes without limitation unreimbursable dental care, unreimbursable medical expenses, nonmedical equipment, unreimbursable rehabilitative therapy, supplemental nursing care, personal care and assistance." ▶

This contract and escrow agreement read more like a supplemental needs trust than an escrow arrangement to compensate for personal services. DCF agreed, citing F.S. 409.910, which provides "It is the intent of the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid." Again, the trust was deemed an available resource due to the language allowing the funds to be used for the benefit of the Medicaid applicant.

Appeal No. 16F-03799

- The Medicaid applicant is listed as the grantor of the trust. ▶ The trust document defined the services to be provided as "personal care, support and maintenance." ▶
- The trust also stated, "The Grantor intends that he or she be treated as the owner of the Trust. Estate (both income and principal) for the income tax purposes … Accordingly, at any time, the Grantor may borrow the income or corpus of the Trust without adequate interest or security … The Grantor shall have a substitution power or right to reacquire any assets of the Trust by substitution of other assets of equivalent value." ▶
- Citing "1640.0312.01 Availability of Trusts (MSSI, SFP). The availability of funds held in a trust depends on the conditions (wording) of the trust and whether the individual is the trustee or beneficiary of the trust." The conclusion stated that because the trustee had "the ability and responsibility to use the money in the Trust to pay for support and maintenance services," the trust was an available resource under both 42 USC 1396p(d)(3) and POMS SI 1730.048, which state, "If there are any circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, the portion of the principal from which (or income on that principal) payment to the individual could be made is considered resources." ▶

The availability of the trust assets to pay for support and maintenance coupled with the rights reserved by the grantor in the trust principal made this trust an available resource.

If the purpose of the arrangement is to provide for the Medicaid applicant's home expenses, personal care, support, and maintenance, as the above cases illustrate, the proper strategy is a pooled trust or a self-settled supplemental needs trust. A personal service contract, used with or without an escrow arrangement, is the wrong tool for the job.

The purpose of a personal service contract is to compensate the individual providing services. Any language directing the funds to be used to provide for the Medicaid applicant will violate the intent of this valuable tool. And yet, there are situations where a personal service contract is the right tool as well as situations where an escrow arrangement is not only desirable but necessary. So, how can we help Ms. Sarah?

The above cases rely heavily on the law cited below to determine that the assets in the trust/escrow agreements were available resources to the Medicaid applicant:

- F.S. 409.910 provides the intent of the Legislature that Medicaid be the payor of last resort.
- 20 CFR 416.1201(a) counts assets an individual owns and could convert to cash to be used for their support and maintenance.
- 42 USC 1396p(d) discusses funds transferred to a trust. (c) Funds transferred into a trust, other than a trust specified in 42 U.S.C. § 1396p(d)(4), by a person or entity specified in 42 U.S.C. § 1396p(d)(2) on or after October 1, 1993, shall be considered available resources or income to the individual in accordance with 42 U.S.C. § 1396p(d)(3) if there are any circumstances under which disbursement of funds from the trust could be made to the individual or to someone else for the benefit of the individual. If no disbursement can be made to the individual or to someone else on behalf of the individual, the establishment of the trust shall be considered a transfer of resources or income.

All of the above cases were denied because DCF was able to prove that the assets in the trust were countable to the Medicaid applicant by virtue of language in the documents that directed the funds be used to pay the Medicaid applicant's expenses. Not one of the decisions discusses an uncompensated transfer. We know that personal care trusts, properly written, are considered to be a transfer for value. That is not where the problem lies. The problem is the direction to use the funds for the benefit of the Medicaid applicant.

Elder law attorneys are using escrow/

trust arrangements. The question is, what are they doing (or not doing) that was done (or not) in the above instances?

Again, there are no real guidelines on how to create an escrow/trust arrangement for a personal service contract. However, here are four things to be taken into consideration when attempting to complete this mission.

1. The grantor should not be the Medicaid applicant.
2. The lump sum should be paid directly to the escrow holder or trustee.
3. The language in the trust/escrow agreement should prohibit the Medicaid applicant from accessing the income or principal of the trust for any reason; from being a trustee, becoming a trustee, or changing the trustee; and from amending or revoking the trust or having any reversionary interest in the trust.
4. The document should provide for a schedule of payments to the caregiver based on the terms of the personal service contract or require invoices for disbursement of funds.

It is always possible that DCF will interpret the words from 42 U.S.C. § 1396p(d)(3) "if there are any circumstances under which disbursement of funds from the trust could be made to the individual or to someone else for the benefit of the individual" to mean that payment for a caregiver is a direction to use the funds for the benefit of the Medicaid applicant. However, the Fair Hearings cited above give no such indication. I take heart from the language in Appeal No. 11F-03529 that states, "trusts and contracts have a reasonable place in accommodating ICP eligibility at times." But it is a fine line.

Sarah is thrilled that she will be able to get additional services to help manage her mother's care. She is thrilled to be able to earn enough money each year to pay the home expenses, and she is beyond thrilled that the taxes can be paid as the income is earned.

Mission accomplished!

**There is no guarantee that an escrow/trust agreement written in accordance with the information in this article will be successful. In addition, there are numerous income tax issues not addressed herein that need to be considered. Please see Michael Lampert's article published in Vol. XXXI, No. 2 Spring 2024 edition for more insights on this complicated topic.*

Call for papers – Florida Bar Journal

Emily Young is the contact person for publications for the Executive Council of the Elder Law Section. Please email eyoung@floridabar.org for information on submitting elder law articles to The Florida Bar Journal for 2023-2024.

A summary of the requirements follows:

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





Tax Tips
by Michael A. Lampert

Lions, tigers, and bears

Tax scams and other bad schemes for attorneys and their clients to avoid

Fraudsters and other bad actors are out there. Some merely spout incorrect information. Others are true fraudsters and are charging clients for clearly improper activities. And perhaps the worst are scammers that are simply trying to steal from you and your clients. Making it even more challenging are direct phishing and other attacks on practitioners, along with errors and delays by the IRS itself.

This article will address some of the many schemes that impact the tax arena. It is a bit longer than usual, but I hope it will help the elder law attorney to become more alert to these challenges.

Each year, the IRS issues what they call the "Dirty Dozen." In this list, the IRS presents common scams that taxpayers (and even practitioners) may encounter. While occasionally I find that a few of them are not quite the scam the IRS believes they are, most are spot on. Let's take a look at the Dirty Dozen, with some of my additions and comments. (Note that some content is lifted directly from various IRS releases.)

1. Bogus tax strategies and fraudulent offshore schemes

The Foreign Account Tax Compliance Act (FATCA) plays a key part in combating tax evasion by U.S. persons holding accounts and other financial assets offshore. It requires most U.S. taxpayers holding financial assets outside the United States to report those assets to the IRS. It also requires certain foreign financial institutions to report directly to the IRS about financial accounts held by U.S. taxpayers. These institutions include not only banks, but also other financial institutions, such as investment entities, brokers, and certain insurance companies. Reporting requirements carry penalties for failure to file.

Unscrupulous promoters continue to lure U.S. persons into placing their assets in offshore investment accounts and structures, claiming the assets are out of reach of the IRS and do not need to be reported. This is almost always not true, unless the offshore accounts in the aggregate are very small. Remember that the obligation to report the accounts and offshore entities is separate from the obligation to pay the tax. Accounts, trusts, and other entities may need to be reported, even if no income is generated or distributed. Further, the IRS can identify and track anonymous transactions of foreign financial accounts.

Clients may want to invest funds outside the U.S. for non-tax reasons. Some like to do so for creditor protection purposes. All of this is OK—so long as the accounts, entities, and income are properly reported.

There are also schemes regarding pension accounts in Malta (and other countries) as well as digital assets. Remember that most pension accounts and digital assets must be reported. And yes, the IRS

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increasingly has the ability to track digital assets, and the income earned needs to be reported.

Sometimes a client is scammed into investing in one of these transactions; the funds are essentially stolen by the scammer, and the client is fearful of reporting it when they realize that what they did (not reporting it) was also improper. Even worse, sometimes the "invested" funds were withdrawn from the client's IRA or similar account, leading to current income tax due on the scammed funds.

2. Charitable trusts

Charitable trusts are legitimate planning tools and can also significantly benefit charities. But the rules need to be followed. Some promoters are improperly advising clients to place highly appreciated assets into a charitable remainder annuity trust (CRAT). The CRAT sells the donated asset, improperly claiming no gain. The trust then purchases an annuity. As the annuity pays out, the current beneficiary (donor) claims only a small amount of interest paid as income rather than taking into account the capital gain on the sale of the donated asset. This looks great on paper, but it is wrong.

3. Art donations and sales

Promoters are also selling art priced at a "discount." The promoter may even provide services such as storage, obtaining an appraisal, and donating the art. A very high appraisal valuation is obtained and the art is donated to charities, generating a large charitable deduction. In all cases, make sure the proper paperwork (donation receipt, appraisals, etc.) is obtained. This scam fails if the valuation appraisal is wrong; and yes, the IRS has appraisers to help with auditing appraisals that are artificially inflated.

4. Art sales and installment notes

Another scheme is to "sell" the highly appreciated asset to an intermediary/promoter for an installment note. The intermediary who sells the asset receives the installment note with a balloon payment years later. The original seller receives most of the funds up front, yet on paper it looks like the taxable gain on the sale is postponed.

5. Phishing and "new client" scams

Phishing refers to emails or text messages designed to steal personal information directly or by clicking on an embedded link or attachment. Spear-phishing is a type of phishing that targets specific individuals, organizations, or businesses, typically using malicious emails. The IRS warns tax professionals about spear-phishing because if a tax preparer falls victim to a data breach, the potential for harm is much greater. A successful spear-phishing attack can lead to theft of client data and identity theft of the tax preparer. This could potentially enable the attacker to file fraudulent returns.

New client scam

The "new client" scam, which involves spear-phishing attempts, continues to be a concern for the IRS and its Security Summit partners. Cybercriminals impersonate new, potential clients to trick tax preparers into responding to their emails. Once the preparer responds, the scammer sends a malicious attachment or URL that can compromise the preparer's computer systems and allow the attacker to access sensitive client information. While these attacks can peak around tax season, they remain a year-round threat.

This situation has gotten so bad that the IRS is putting certain tax practitioners' access to the Centralized Authorization File (CAF) in suspension. Why? Often not because of anything the practitioner did, but because their CAF information and credentials may have been compromised.

How to avoid being a victim of spear-phishing:

- Never click suspicious links or download attachments from unknown senders, including potential clients.
- Call the potential client to confirm the email originated from them.
- Send only password-protected and encrypted documents through email.
- Protect email accounts with strong passwords and two-factor authentication.
- Use security software products with anti-phishing tools.
- Be vigilant year-round, not just during tax filing season.

There are warning signs that should raise red flags and cause you to question an email's legitimacy. Individuals, including tax and legal professionals, should always be cautious and look out for any suspicious requests or unusual behavior before sharing sensitive information or responding to an email. Warning signs include poorly constructed sentences and unusual word choices.

I have had these attempts happen to me multiple times. Some are very good! Be aware that by gaining access to a hacked email account, scammers can locate a genuine email from a previous victim's email account sent to their tax professional. This email may *not* contain spelling or grammatical errors and may refer to genuine tax issues. Note also that some of these attempts work in reverse. The scammers will masquerade as the tax preparer or attorney to obtain confidential information directly from the client.

6. Bad advice on social media

People on TikTok and other social media platforms share wildly inaccurate tax advice. Some involve urging people to misuse common tax documents like Form W-2 or more obscure ones like Form 8944 involving a technical e-file form not commonly used by taxpayers. These schemes encourage people to submit false information in hopes of getting a refund. This can also lead to identity theft.

Examples of these schemes include:

Fraudulent advice on Form W-2

This scheme, circulating on social media, encourages people to use tax software

continued, next page

to manually fill out Form W-2, Wage and Tax Statement, and include false income information. In this W-2 scheme, scam artists suggest people make up large income and withholding figures, as well as the employer that is paying it. Scam artists then instruct people to file the bogus tax return electronically in hopes of getting a substantial refund—sometimes as much as five figures—due to the large amount of withholding.

There are two other variations of the W-2 scheme. Both involve misusing Form W-2 wage information in hopes of generating a larger refund:

Fraudulent Form 7202. This scheme involves encouraging people to use Form 7202, Credits for Sick Leave and Family Leave for Certain Self-Employed Individuals, to claim a credit based on income earned as an employee and not as a self-employed individual. These credits were available for self-employed individuals for 2020 and 2021 during the pandemic; they are not available for 2023 tax returns.

Fraudulent Schedule H. Another scheme encourages people to invent fictional household employees and then file Schedule H (Form 1040), Household Employment Taxes, to claim a refund based on false sick and family medical leave wages they never paid.

The IRS, along with the Security Summit partners in the tax industry and the states, are actively watching for this scheme. In addition, the IRS works with payroll companies and large employers—as well as the Social Security Administration—to verify W-2 information.

Form 8944 scheme

Another example of bad advice circulating on social media involves Form 8944, Preparer e-file Hardship Waiver Request. Wildly inaccurate claims made about this form include its use by taxpayers to receive a refund from the IRS, even if the taxpayer has a balance due. This is false information. Form 8944 is for tax professionals' use only.

While Form 8944 is a legitimate IRS tax form, it is intended for tax return preparers who are requesting a waiver so they can file tax returns on paper instead of electronically. It is not a form the average taxpayer can use to avoid tax bills.

Taxpayers who intentionally file forms with false or fraudulent information can face serious consequences, including civil and criminal penalties, like criminal prosecution for filing a false tax return and a frivolous return penalty of $5,000.

As part of my practice, I have defended some of these tax return preparers. Some of them really tried to do it correctly. Some are incompetent. Some are far worse—stealing refunds and identities. Sorting this out for clients can be challenging.

Some of the warning signs of a bad preparer include:

Shady fees. Taxpayers should always ask about service fees. Shady tax preparers might ask for a cash-only payment without providing a receipt. They are also known to base their fees on a percentage of the taxpayer's refund.

False income. Untrustworthy tax preparers may also invent false income to try to get their clients more tax credits or claim fake deductions to boost the size of the refund.

Wrong bank account. Taxpayers should be wary of a tax preparer attempting to convince them to deposit the taxpayer's refund into the preparer's bank account rather than the taxpayer's account.

Good preparers ask to see all relevant documents like receipts, records, and tax forms. They also ask questions to determine the client's total income, deductions, tax credits, and other documentation. Taxpayers should never hire a preparer who e-files a tax return using a pay stub instead of a Form W-2. This is against IRS e-file rules.

A common problem seen annually during tax season, "ghost preparers" pop up to encourage taxpayers to take advantage of tax credits and benefits for which they don't qualify. These preparers can charge a large percentage fee of the refund or even steal the entire tax refund. After the tax return is prepared, these ghost preparers simply disappear, leaving well-meaning taxpayers to deal with the consequences. These scammers prey on seniors and underserved communities.

Remember that paid preparers must sign and include a valid preparer tax identification number (PTIN) on every tax return. A ghost preparer doesn't sign the tax returns they prepare. These unethical tax return preparers should be avoided, especially if they refuse to sign a complete paper tax return or digital form when filing electronically.

Taxpayers should make sure they are taking advantage of available credits and deductions, like the Earned Income Tax Credit (EITC), which is refundable and can help low-to-moderate income workers receive up to $7,340 based on their qualifications. Taxpayers need to make sure they understand which credits and deductions they are eligible to claim and keep records to show their eligibility. Taxpayers will often shop tax preparers for the best refund, not truly considering if the refund is valid. The most vulnerable are often the ones taken in by these bad practitioners.

Note: What often then happens is that the client has a tax problem. If the preparer is in business, the preparer often says, "I will take care of it." Records are often lacking, and response deadlines are missed. Be alert for these situations.

7. Fake charities

During times of disasters, fake charities become a concern. Scammers create fraudulent organizations to solicit money intended for disaster victims and to steal personal information to victimize individuals through identity theft.

When taxpayers decide to contribute funds or goods to an organization, they

may qualify for a deduction on their tax return, but only if they itemize their deductions. It is important to remember that charitable donations are valid only when directed toward IRS-recognized tax-exempt organizations. Individuals intending to donate can utilize the Tax-Exempt Organization Search (TEOS) tool on IRS.gov to ensure legitimacy.

Beware of scammers who use email communications or manipulate caller IDs to deceive people into donating funds to charities. These fraudsters often target groups such as seniors and those with limited English language proficiency.

Here are some helpful tips to help clients avoid getting scammed:

Don't give in to pressure. Scammers often create situations to get people to make payments. Genuine charities are always grateful for donations. Donors should take their time and research before making a charitable contribution.

Exercise caution when making donation payments. Avoid any charity that requests gift card numbers or wire transfers. It's better to pay by credit card or check after ensuring the charity's authenticity.

Verify the legitimacy of the charity. Scammers often use similar-sounding names for charities to confuse people. Before donating, potential donors need to ask the fund-raiser for the charity's name, website, and mailing address so they can independently verify its authenticity. Use the special IRS TEOS tool to verify if an organization is a legitimate tax-exempt charity.

Avoid sharing too much information. Scammers are always on the lookout for both money and personal data. Never disclose Social Security numbers, credit card numbers, or personal identification numbers. Only provide bank or credit card details after confirming the charity's legitimacy.

Some states are increasingly regulating, or attempting to regulate, GoFundMe pages (California and Hawaii most recently).

8. Offer in compromise (OIC) mills

As in past years, companies running OIC mills continue heavily advertising their promises to settle taxpayer debt for pennies on the dollar. While OIC is a legitimate IRS program, many taxpayers do not meet the technical requirements for the tax resolution program, often leaving them facing excessive fees from the promoters for information. There is a free online Offer in Compromise Pre-Qualifier tool on the IRS.gov website where taxpayers can obtain some of that same information. (Although sometimes some planning and legitimate advocacy can be done even if the Pre-Qualifier says no!)

Offers in compromise are legitimate. We do them. Selectively and carefully. It is not like on TV where all the tax debt can be resolved for pennies on the dollar.

As the IRS notes: Taxpayers should be cautious of OIC mills, which make exaggerated claims through radio and TV ads about settling tax debts inexpensively. In reality, these mills often charge excessive fees for little actual service.

9. Fake fuel tax credit scams

Really?! This tax credit is for off-highway business and farming uses. While we might have had a client or two eligible for this tax credit, for most of our clients, their off-road use is merely parking on an unpaved lot at the fairgrounds or at the beach. These do not qualify!

10. Online account access

Taxpayers can set up an online account with the IRS. It can be very helpful. They can check the status of accounts, make payments, etc. It is easy enough that scammers offer to help set up the online account. Talk about an invitation for identity theft. The scammers steal IDs and tax refunds. Again, just set up the account yourself on IRS.gov. Do not share sensitive personal data over the phone, email, or social media.

There are similar scams to assist in Corporate Transparency Act (CTA) filings. Many of them are just an attempt to obtain confidential information. Some are merely a way to get you or your client to pay funds to do a filing, asking for so little information that they could not even properly do the filing. Note that there are some legitimate companies that assist with handling filings as many CPAs and attorneys will not do CTA filings for their clients.

11. Employee Retention Credit

The IRS continues to warn businesses and others to stay clear of unscrupulous and aggressive promoters of questionable claims for the Employee Retention Credit (ERC). The IRS has a moratorium on claims processing and is pursuing criminal and civil investigations and audits.

Warning signs an ERC claim is incorrect:

- **Too many quarters claimed.** Some promoters have urged employers to claim the ERC for all quarters the credit was available. Qualifying for all quarters is uncommon, and this could be a sign of an incorrect claim.
- **Government orders that don't qualify.** Some promoters have falsely told employers they can claim the ERC if any government order was in place in their area, even if their operations weren't affected or if they chose to suspend their business operations voluntarily.
- **Too many employees and wrong calculations.** Employers should be cautious about claiming the ERC for all wages paid to every employee on their payroll. The law changed throughout 2020 and 2021. There are dollar limits and varying credit amounts, and employers need to meet certain rules for wages to be considered qualified wages, depending on the tax period.
- **Business citing supply chain issues.** Qualifying for the ERC based on a supply chain disruption is very

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uncommon. A supply chain disruption by itself doesn't qualify an employer for the ERC.

- **Business claiming the ERC for too much of a tax period.** It's uncommon for an employer to qualify for the ERC for the entire calendar quarter if their business operations were fully or partially suspended due to a government order during a portion of a calendar quarter.
- **Business didn't pay wages or didn't exist during eligibility period.** Employers can only claim the ERC for tax periods when they paid wages to employees.
- **Promoter says there's nothing to lose.** Businesses should be on high alert with any ERC promoter who urges them to claim the ERC because they "have nothing to lose." Businesses that incorrectly claim the ERC risk repayment requirements, penalties, interest, audit, and potential expenses of hiring someone to help resolve the incorrect claim.

12. Identity theft and tax system compromises

Identity theft and tax system compromises are common. I doubt that any reader of this article has avoided having some of their own data compromised. The IRS itself has had significant improper releases of taxpayer information (data breaches). Tax preparers, law firms, CPA firms, and others get hacked regularly.

Tax professionals need to call the Practitioner Priority Service to request that transcripts be deposited into their Secure Object Repository (SOR) mailbox. What this means is that many of the IRS call center employees, such as on the 800 number, may not be allowed to deposit transcripts into the SOR mailbox.

In addition, if the IRS is not able to identify the caller, transcripts will be sent directly to the taxpayer's address of record rather than the repository.

In addition, the IRS has said that fraudsters might use a compromised CAF number to steal transcripts and other taxpayer ID information for fraud and other crimes. As a reminder and, as noted above, the CAF is the Centralized Authorization File. It posts powers of attorney and other authorizations to access clients' information. Those with access have a "CAF" number. The agency places CAF numbers that it suspects have been compromised into a suspended status pending further review. The owner of the CAF number will be contacted to confirm if the number has been compromised. In a recent committee meeting (the national Tax Exempt and Government Entities Council of all places), one of the practitioners discussed her attempts to regain CAF access after her number was suspended. She did not receive any notification and only found out about the suspension while contacting the IRS on a routine matter for a client.

Be careful. Practitioners are tempting targets. Be careful of emails and other contacts that look like they are from the IRS, etc.

13. IRS data breach

Yes, it has happened and likely will continue to happen. Some are smaller improper access cases. Others are large data breaches. Yet, unlike the private sector, which normally notifies those affected, the IRS often does not. And while there are potentially significant penalties on the private sector for not properly responding to data breaches (and sometimes for disclosure itself), the IRS is generally not bound by these rules. Instead, it is bound by different rules that make it more difficult for an injured taxpayer to seek relief.

In January 2024, Charles Little John was sentenced to five years for what has been described as one of the largest data thefts in U.S. government history. As an IRS contractor, he obtained data on thousands, including some of the wealthiest individuals and entities in the U.S. Of course, he then gave the information to Pro Publica. This went on from June 2018 to 2020, and only now are breach notifications being sent. Why so short of a sentence? He was only charged with one count with a five-year penalty maximum. Congress is considering increasing the penalty, both in terms of how the offense is charged (one versus thousands of counts) as well as the maximum penalty.

What do we do to protect our clients?

If identity theft is suspected where there may be compromised Social Security numbers), an IP pin can be obtained from the IRS at IRS.gov/ippin. Make sure clients keep this number safe. It can be used to prevent fraudulent tax return filing and refund claims.

IRS transcripts can also be obtained and reviewed.

The client can also put in place credit freezes and utilize identity protection services (make sure they are legitimate).

Clients can also file suits for the IRS data breach, although the filing statute may be a short two years from discovery.

Yes, this article is long. I hope it has made you more aware of some of the many tax-related scams out there that impact us as practitioners as well as our clients. I have provided listings for reporting scams in the Desk Reference on page 33. I hope you find it useful.

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

Desk Reference: Lampert's Guide on Reporting Tax Scams



Report spear-phishing and other scams

Individuals should report scams by sending the suspicious email or a copy of the text/SMS as an attachment to phishing@irs.gov. The report should include the sender's email address, caller's phone number, date, time, and the phone number or email address that received the message.

The Report Phishing and Online Scams page at IRS.gov provides more information on what to look out for and how to report phishing and scams.

Taxpayers can also report scams to the Treasury Inspector General for Tax Administration (TIGTA) or the Internet Crime Complaint Center. Another useful tool is the Federal Communications Commission's Smartphone Security Checker.

Report abusive tax schemes and tax return preparers

Report fraud: The IRS encourages people to report individuals who promote improper and abusive tax schemes as well as tax return preparers who deliberately prepare improper returns.

To report an abusive tax scheme or a tax return preparer, people should use the online Form 14242 – Report Suspected Abusive Tax Promotions or Preparers, or mail or fax a completed Form 14242 and any supporting material to the IRS Lead Development Center in the Office of Promoter Investigations:

Internal Revenue Service Lead Development Center

Stop MS5040

24000 Avila Road

Laguna Niguel, CA 92677-3405

Fax: 877-477-9135

Taxpayers and tax practitioners may also send the information to the IRS Whistleblower Office for a possible monetary award.

Rev. 06/2024

Editor's note: *Keep this reference handy so you'll have this information at your fingertips when you need it.*



Case Law
by Elizabeth J. Maykut

Trust document was sufficient to convey homestead to surviving spouse.

Fuentes v. Link, --- So. 3d --- (2024); 2024 WL 3049415 (Fla. 3d DCA June 19, 2024)

Issue: Whether a revocable living trust containing conveyance language that was recorded after the grantor's death was sufficient to convey homestead.

Answer: Yes.

The grantor executed a revocable living trust agreement (the RLT) naming his wife as trustee and beneficiary. The trust agreement included language stating that, with regard to the homestead, the grantor "conveys, transfers, assigns, and delivers to trustee . . . the property described in Exhibit A . . . ." The RLT was signed by two witnesses and the wife who accepted her trusteeship, but it was not recorded until after the grantor's death.

The grantor's daughter (from a previous marriage) petitioned for quiet title to the homestead, alleging the conveyance in the RLT was invalid and therefore the homestead should pass via Florida's intestate laws, under which she was entitled to at least a one-half interest.

The trial court granted summary judgment in favor of the wife finding the trust agreement effectively functioned as a deed because it contained all the required elements for a valid conveyance.

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Case Law. . .
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Upon appeal, the Third District agreed. Although the general rule in section 689.01(1), Florida Statutes, is that real property may only be conveyed by a deed executed in the presence of two witnesses, Florida courts have held that there are no strict form requirements for a deed nor is there any requirement that the document be labeled "deed." *See Saltzman v. Ahern*, 306 So. 2d 537, 539 (Fla. 1st DCA 1975); *see also Flinn v. Devere*, 502 So. 2d 454, 456 (Fla. 3d DCA 1986) (trust documents can serve as a "deed" if they comply with the necessary formalities and contain an adequate legal description). Of course, a deed is only effective if it is "delivered." A recorded deed is presumed delivered. Here, even though the deed wasn't recorded until after the grantor's death, the wife's signature in acceptance of her position as trustee was sufficient to show delivery.

Practice tip: Real property can be transferred in a revocable living trust agreement as long as that instrument is in compliance with the requirements necessary to convey real property, but using this option may raise questions later and, in doing so, the grantor relinquishes a certain amount of privacy as the entire trust agreement must be recorded. Based on these considerations, it seems most prudent to use a separate deed when transferring real property to a RLT.

Substantial compliance with IRA custodial agreement not sufficient for beneficiary designation change.

Sobel v. Sobel, 49 Fla. L. Weekly D854 (Fla. 4th DCA April 17, 2024)

Issue: Whether the beneficiary designation for an individual retirement account (IRA) completed in 2013 at the testator's attorney's office that did not appear in the IRA custodian's records was sufficient to demonstrate a change of beneficiary as substantial compliance with the custodial agreement.

Answer: No.

The trustee brought a complaint for declaratory judgment seeking to establish the validity of a 2013 beneficiary designation for Sobel's IRA. The trial court upheld the validity of the 2013 designation, but the appeals court reversed.

The agreement with Sobel's IRA custodian stated that beneficiary designations were governed by "the last form accepted" by the custodian before the contributor's death. In 2008, Sobel effected a beneficiary change by sending a completed form to the custodian, which later communicated that it had "approved, stamped and accepted" it. In 2013, Sobel prepared a new beneficiary designation, and his attorney mailed it to the custodian but did not require proof of receipt. When Sobel died, the custodian showed no record of the 2013 designation.

In determining which designation controlled, the Fourth District Court reviewed Florida law, which provides that a beneficiary on an IRA, like a beneficiary under a life insurance policy, may only be changed by strict compliance with the conditions set forth in the policy or contract. *See Brown v. DiPetta*, 448, So. 2d 561, 562 (Fla. 3d DCA 1984). Here, the agreement provided that the last form accepted by the IRA custodian controlled. In holding that the 2008 designation controlled, the court rejected the trustee's argument that the substantial compliance doctrine overrode the failure to demonstrate that the custodian had received the document because, based on the plain language of the contract, the custodian's acceptance of a new beneficiary designation was a material term of the agreement.

Practice tip: Since the contract governs how a change of beneficiary must be made, the actual contract must be analyzed if there is any question as to whether a beneficiary was changed. Moreover, attorneys should strictly comply with the custodian's or insurer's requirements when assisting clients in changing beneficiary designations, always submit such designations using a method that produces proof of delivery, and should caution clients to confirm in writing that a change has been accepted.

Elizabeth J. Maykut *is a Florida Bar board certified elder law attorney who focuses her practice on guardianship, Medicaid planning, estate planning, and probate, and is of counsel with the law firm of King & Wood PA in Tallahassee, Florida. A graduate of San Diego State University (BA, 1988) and Florida State University College of Law (JD, 1994) who is AV-rated by Martindale-Hubbell, her prior experience includes several years practicing Florida administrative law with a large multinational firm that represented the Florida secretary of state in the 2000 presidential election litigation.*


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