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A Primer on Florida Attorneys' Ethical Obligation to Avoid Assisting in the Unlicensed Practice of Law — Florida Bar Staff Opinion 24894

By Keith S. Kromash, Esq., Frese, Nash & Hansen, P.A., Melbourne, Florida

To maintain the integrity of the legal profession in Florida, The Florida Bar and all of its attorneys have an interest in insuring that non-lawyers and out-of-state lawyers do not impermissibly practice law in the State of Florida. More and more, however, Florida attorneys are receiving correspondence and telephone calls from out-of-state attorneys who are not licensed to practice in the State of Florida on legal matters involving individuals who may own property in Florida but who

live in Florida as well as in other states. Frequently, these out-of-state attorneys endeavor to represent such individuals even though such representation involves the interpretation of Florida real estate documents and Florida law in general. Similarly, out-of-state attorneys frequently draft estate planning documents for their "snow bird" clients who may be part-time Florida residents, and they may then ask a Florida attorney to review the

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Section Comments on Advance Notice of Proposed Rulemaking – Anti-Money Laundering Requirements for Persons Involved in Real Estate Closings and Settlements

By Norwood Gay, Attorneys' Title Insurance Fund, Inc., Orlando, Florida

On June 9, 2003, The Real Property, Probate and Trust Law Section of The Florida Bar ("the Section") submitted comments in response to an advance notice of proposed rulemaking issued on April 10, 2003¹. The material in this article is a condensed version of the Section's June 9, 2003 comment letter, which was prepared and offered for the Section's use by Carl A. Fornaris, Esq., of Greenberg Traurig, P.A., in Miami. The Section is grateful to Mr. Fornaris for his contribution.

In determining which real estate-related businesses and professionals should be deemed to be "persons involved in real estate closings and settlements" – which, by virtue of Section 352 of the USA PATRIOT Act, would require such persons to establish a formal anti-money laundering ("AML") program – Treasury and FinCEN solicited comment on whether real estate attorneys must implement AML practices when representing a client in a real estate closing.

See "Closings and Settlements," page 19

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documents. As Florida attorneys, should we communicate with these out-of-state attorneys with respect to Florida legal issues? Should we review such estate planning documents? Or is such practice akin to assisting or encouraging in the unlicensed practice of law? In Florida Bar Staff Opinion 24894 (Sept. 3, 2003), the Florida Bar ethics counsel issued an informal advisory opinion on this issue and stated that Florida attorneys should not communicate with out-of-state attorneys on matters involving Florida law. Moreover, Florida attorneys should alert out-of-state practitioners to the Florida rules regarding the unlicensed practice of law.

This article will address Florida attorneys' ethical responsibility with respect to out-of-state attorneys who engage in the unlicensed practice of law in the State of Florida. Additionally, this article will address Florida Bar Staff Opinion 24894 (Sept. 3, 2003) with attention to its applicability to both real estate practices and to wills, trusts and estates practices.

The unlicensed practice of law, as it relates to out-of-state attorneys, is addressed in several places in the Rules Regulating the Florida Bar. For example, Rule 4-5.5, Rules of Professional Conduct, provides as follows:

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unlicensed practice of law.

Moreover, the comments to Rule 4-8.5, Rules of Professional Conduct state as follows:

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdic-

tion is substantial and continuous, it may constitute practice of law in that jurisdiction. See rule 4-5.5

Finally, in the Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law, the term "unlicensed practice of law" is defined. In particular, Rule 10-2.1(a), Rules Governing Unlicensed Practice of Law provides that the unlicensed practice of law includes "the practice of law, as prohibited by statute, court rule, and case law of the state of Florida." Additionally, Rule 10-2.1(c), Rules Governing Unlicensed Practice provides that "a nonlawyer or nonattorney is an individual who is not a member of the Florida Bar. This includes, but is not limited to lawyers admitted in other jurisdictions...."

Based upon the foregoing, an out-of-state attorney, who is not licensed to practice law in the State of Florida, is a "nonlawyer" and is not authorized to practice law in Florida. See Rule 10-2.1(c), Rules Governing Unlicensed Practice; See also *The Florida Bar v. Rapaport*, 845 So. 2d 874 (Fla. 2003) (Attorney who was not member of state bar was a nonlawyer, and thus, injunction was warranted to enjoin him from engaging in the practice of law in state, including the representation of parties in securities arbitration proceedings in state). Such a "nonlawyer" who provides his or her clients with advice as to how Florida law affects their interests and who communicates with members of the Florida Bar as to these matters has clearly engaged in the unlicensed practice of law. See *The Florida Bar v. Sperry*, 140 So. 2d 587 (Fla. 1962) (the practice of law includes the giving of legal advice and counsel to others as to their rights and obligations under the law although such matters may not then or ever be the subject of proceedings in a court).

Moreover, Rule 4.4-5(b), Rules of Professional Conduct states that Florida attorneys should not assist such out-of-state attorneys in the performance of activity that constitutes the unlicensed practice of law. This interaction between the unlicensed practice of law by out-of-state attorneys and Florida attorneys' ethical obligations under to Rule 4.4-5(b), Rules of Professional Conduct is the crux of Florida Bar Staff Opinion 24894.

In Florida Bar Staff Opinion 24894, a member of The Florida Bar (the "inquirer") requested an advisory ethics opinion based upon the fact that in the inquirer's practice, out-of-state attorneys are giving legal advice based upon Florida law to their clients and are sending demand letters or other correspondence to the inquirer's clients interpreting Florida real estate documents, Florida condominium documents and Florida law in general. In the past, the inquirer has responded to such communications from out-of-state attorneys with the following:

It is inappropriate for me to communicate with unadmitted attorneys regarding the interpretation of Florida law and Florida real estate documents. Accordingly, I respectfully demand that you cease and desist from communication with my client. Any further communication regarding this issue should be handled through a Florida-admitted attorney, addressed to my attention. We will continue to respond to your client through your office until we receive your consent to communicate directly with him/her or until we are advised that he/she is represented by Florida counsel. We assume you will forward our correspondence as appropriate.

The Florida Bar ethics counsel indicated that the above quoted response to out-of-state attorneys who attempt to practice law in the State of Florida was entirely appropriate because it alerted such out-of-state practitioners to the Florida rules regarding the unlicensed practice of law. Moreover, it was consistent with Florida attorneys' ethical obligation to avoid assisting others in the unlicensed practice of law.

Clearly, this advisory ethics opinion has applicability to real estate practices. Indeed, the inquirer requested the opinion in the context of real estate matters involving individuals who own Florida real property but who spend part of the year in other jurisdictions and who engage attorneys in those jurisdictions to represent them with respect to their Florida real property. Given the number of "snow birds" who own Florida condominiums or other Florida real property, this ethics advisory opinion

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provides significant ethical guidance to Florida real estate practitioners who may face this issue.

However, this ethics advisory opinion also has applicability with respect to trust and estate matters. For example, it is not uncommon for an out-of-state beneficiary of a trust or an estate to contact his or her local attorney regarding his or her rights as a beneficiary. It is also not uncommon for the out-of-state attorney to then contact the attorney for the Florida trustee or personal representative regarding the beneficiary's rights. If, in giving the beneficiary advice, the out-of-state attorney interprets Florida law with respect to wills, trusts or estates, that attorney will have engaged in the unlicensed practice of law. Therefore, when the out-of-state attorney contacts the attorney for the trustee or personal representative, it is clear that the Florida ethical rules governing attorney conduct mandate a response substantially similar to the response reproduced in Florida Bar Staff Opinion 24894 and quoted above.

In short, since advising beneficiaries of Florida trusts or estates involves the giving of legal advice as to the beneficiaries' rights or obligations under Florida law, it is clear that Florida attorneys should not communicate with such out-of-state attorneys because to do so would assist such out-of-state attorneys in the unlicensed practice of law. Rather, Florida attorneys must insist that beneficiaries obtain attorneys who are licensed to practice law in the State of Florida.

However, when an out-of-state attorney asks a Florida attorney to review estate planning documents prepared by the out-of-state attorney for a "snow bird" client, the question arises as to whether the review of such documents by the Florida attorney is akin to the assistance or encouragement in the unlicensed practice of law. The answer to this question is not necessarily clear. As a technical matter, it would appear that the out-of-state lawyer who has drafted a document designed to comply with Florida law has engaged in the unlicensed practice of law. *See* Rule 10-2.1(a), Rules Governing Un-

licensed Practice of Law. Moreover, it is clear that the unlicensed practice of law is prohibited, and Florida lawyers should not assist individuals who are not a member of the Florida Bar in the unlicensed practice of law. *See* Rule 4-5.5, Rules of Professional Conduct; Rule 4.4-5(b), Rules of Professional Conduct.

On the other hand, the ACTEC Commentary on MRPC 2.1 states that where a lawyer lacks the expertise in a particular matter, the lawyer should recommend that the client consult with an expert in that field. It would seem that by having a Florida attorney, who is presumably an expert in Florida law as it relates to Florida estate planning documents, review the documents prepared by the out-of-state lawyer, the out-of-state lawyer is complying with the spirit of the ACTEC Commentary on MRPC 2.1, not to mention Rule 4-2.1, Rules of Professional Conduct. In other words, the out-of-state lawyer is taking those steps necessary to insure that the client's Florida documents are prepared in accordance with Florida law. Query whether the client has been disadvantaged in this context. Of course, both the applicable ethical rules and Florida Bar Staff Opinion 24894 clearly state that Florida attorneys should not assist or encourage in the unlicensed practice of law. Therefore, it would appear that a literal reading of the rules and Florida Bar Staff Opinion 24894 leads to the conclusion that the Florida attorney should probably not review estate planning documents

prepared by an out-of-state attorney because such a practice is akin to assisting or encouraging in the unlicensed practice of law.

As Florida attorneys, we face many difficult legal and ethical issues every day. However, when faced with inquiries from out-of-state attorneys regarding Florida legal issues, it should not be difficult to respond to such inquiries. That is, Florida Bar Staff Opinion 24894, provides us with a model response to such impermissible inquiries and reminds members of The Florida Bar that the Rules Regulating the Florida Bar prohibit Florida attorneys from assisting out-of-state attorneys in the unlicensed practice of law. Indeed, Florida Bar Staff Opinion 24894 also encourages members of The Florida Bar to advise such out-of-state attorneys of the Florida rules regarding the unlicensed practice of law. On the other hand, it is not as clear whether reviewing estate planning documents prepared by out-of-state attorneys is akin to assisting or encouraging in the unlicensed practice of law. Nevertheless, a safe course of action would indicate that the Florida attorney should not review such documents, and Florida Bar Staff Opinion 24894 also supports this. In short, by conforming our practices to Florida Bar Staff Opinion 24894 when applicable, we help to minimize the unlicensed practice of law in Florida, and we thereby help to protect the interests of the general public and to preserve the integrity of the legal profession in the State of Florida.

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What Florida Lawyers Should Know About Organ and Tissue Donation

by Peter C. Wolk, Esq., Lawyer Education Outreach Program, Washington, DC

To satisfy the legal requirements to become an organ and tissue donor, people only have to sign a donor card. But in practice, the anatomical gift will likely fail unless the individuals **tell their families**.

Nationally, about **63** people receive an organ transplant every day, but another **15** people on the waiting list die because not enough organs are available. **In Florida alone**, 273 people died last year waiting for an organ donation and 3,002 people are currently awaiting organ and tissue transplants.

One individual organ donor can save or improve the quality of life for more than 50 people who suffer from organ failure, congenital defects, bone cancer, orthopedic injuries, burns or blindness.

Though not legally required, hospitals will rarely take organs or tissue without permission from the family, regardless of a decedent's wishes. Regrettably, anatomical gifts can fail because family members who are unaware of their loved one's wishes to be an organ donor withhold authorization.

In fact, a national study conducted by Gallup indicates that **when family members know of their family member's wishes, 94% of such families will honor the request**. But, when the family does not know, of their family member's wish, only 54% of such families will donate the relative's organs. Indeed, of all the causes for organs being unavailable from people who wanted to be donors, 37% are lost due to the family's refusal to consent. Those lost organs (from people who wanted to be organ donors!) could save many lives.

Whether someone decides to be or not to be an organ donor is a personal decision that is respected; the purpose here is to ensure that people who want to make anatomical gifts do not have their wishes thwarted. Having the would-be organ donor tell his or her family has the additional beneficial effect of sparing surviving family members from having to make a difficult decision at an emotional time.

The American Bar Association

supports more client education about organ donation issues:

RESOLVED, That the American Bar Association urges all attorneys to raise with their clients, when appropriate, the topic of organ and tissue donations and to provide donation forms to those clients who indicate an interest in making a donation.

Summary of Action of the House of Delegates, American Bar Association 1992 Mid-Year Meeting, Dallas, Texas, p. 30 (February 3-4, 1992). (Full text of the Resolutions and additional organ donor information is printed in the ABA pamphlet: "A Legacy for Life" (free on the ABA website: <http://www.abanet.org/rppt>).)

In sum, to provide adequate advice, attorneys must now advise those clients who want to be organ donors to tell their family about their wishes.

Organ and Tissue Donation Information: Typical Questions and Answers

Who can become a donor?

All individuals can indicate their intent to donate (persons under 18 years of age must have parent's or guardian's consent). Medical suitability for donation is determined at the time of death.

Are there age limits for donors?

There are no age limitations on who can donate. The deciding factor on whether a person can donate is the person's physical condition, not the person's age. Newborns as well as senior citizens have been organ donors. Persons under 18 years of age must have their parent's or guardian's consent.

How do I express my wishes to become an organ and tissue donor?

1. Indicate your intent to be an organ and tissue donor on your driver's license.

2. Carry an organ donor card.

3. Most important, **DISCUSS YOUR DECISION WITH FAMILY MEMBERS AND LOVED ONES.**

If I sign a donor card or indicate my donation preferences on my driver's license, will my wishes be carried out?

Even if you sign a donor card it is **ESSENTIAL THAT YOUR FAMILY KNOWS** your wishes. Your family may be asked to sign a consent form in order for your donation to occur.

If you wish to learn how organ donation preferences are documented and honored where you live, contact your local organ procurement organization (OPO). The OPO can advise you of specific local procedures, such as joining donor registries, that are available to residents in your area.

What can be donated?

- Organs: heart, kidneys, pancreas, lungs, liver, and intestines
- Tissue: cornea, skin, bone marrow, heart valves, and connective tissue
- Bone marrow

If I sign a donor card, will it affect the quality of medical care I receive at the hospital?

No! Every effort is made to save your life before donation is considered.

Will donation disfigure my body? Can there be an open casket funeral?

Donation does not disfigure the body and does not interfere with having a funeral, including open casket services.

Why should minorities be particularly concerned about organ donation?

Some diseases of the kidney, heart, lung, pancreas and liver are found more frequently in racial and ethnic minority populations than in the general population. Successful transplantation often is enhanced by the matching of organs between members

continued, next page

of the same ethnic and racial group.

Are there any costs to my family for donation?

The donor's family does NOT pay for the cost of the organ donation. All costs related to donation of organs and tissues are paid by the recipient, usually through insurance, Medicare or Medicaid.

Can I sell my organs?

No! The National Organ Transplant Act (Public Law 98-507) makes it **ILLEGAL** to sell human organs and tissues. Violators are subject to fines and imprisonment. Among the reasons for this rule is the concern of Congress that buying and selling of organs might lead to inequitable access to donor organs with the wealthy having an unfair advantage.

How are organs distributed?

Patients are matched to organs based on a number of factors including blood and tissue typing, medical urgency, time on the waiting list, and geographical location.

How many people are currently waiting for each organ to become available so they can have a transplant?

For current figures, see the website for United Network for Organ Sharing: <http://www.unos.org/>

Can I be an organ and tissue donor and also donate my body to medical science?

Total body donation is an option, but not if you choose to be an organ and tissue donor. If you wish to donate your entire body, you should directly contact the facility of your choice to make arrangements. Medi-

cal schools, research facilities and other agencies need to study bodies to gain greater understanding of disease mechanisms in humans. This research is vital to saving and improving lives.

Where can I get additional information about organ and tissue donation?

Statistics and additional information about organ and tissue donation are available at: United Network for Organ Sharing www.unos.org and at the Division of Transplantation, U.S. Department of Health and Human Services website: www.organdonor.gov.

Information on minorities and organ donation and transplantation is available at the website of the Minority Organ Tissue Transplantation Education Program: www.nationalmottep.org.

Information about the American Bar Association's efforts with regard to organ donation, the Third National Health Care Decisions Week (October 20-26, 2002), and the ABA pamphlet entitled "A Legacy for Life" may be found at: <http://www.abanet.org/rppt>; "A Legacy for Life;" and RPPT | National Health Care Decisions Week Home Page.

Information about local Organ Procurement Organizations and local activities and facts about organ donation may be found at: Organ Procurement Organizations (Organ procurement organizations coordinate activities relating to organ procurement in a designated service area. They evaluate potential donors, discuss donation with family members, and arrange for the surgical removal of donated organs. OPOs also are responsible for preserving organs and arranging for their distribution according to national organ sharing policies. There

are currently 59 organ procurement organizations throughout the U.S.), and, the Association of Organ Procurement Organizations (The Association of Organ Procurement Organizations (AOPO) is a private, nonprofit organization that is recognized as a national representative of organ procurement organizations.)

Information about the Uniform Health- Care Decisions Act (UHCDA) (approved by the Uniform Law Commissioners in 1993) is available at www.nccusl.org.

Local Information - Florida Organ Procurement Organizations:

Life Alliance Organ Recovery Agency
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Miami, Florida 33136
Phone: 305-243-7588

LifeLink of Florida
(Western Florida)
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***Peter C. Wolk** is working on a Lawyer Education Outreach Project for the Division of Transplantation within the U.S. Department of Health and Human Services. He may be reached at: 1735 20th Street, NW, Washington, DC 20009; (tel) 202-462-4500; (fax) 202-462-1001; nonprofitlaw@aol.com.*

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Changes in accessing Florida State Court records through Clerk of Court websites

On November 25, 2003, the Florida Supreme Court issued Administrative Order AOSC03-49, entitled IN RE: COMMITTEE ON PRIVACY AND COURT RECORDS. The entire order can be read at <http://tpa-ntra1/DOCS/sc03-49.pdf>.

What does this mean for you?

Among other things, it ordered that "Any existing Internet or dial-up access systems, including existing subscription access agreements, must be terminated as soon as practicable, but in any event shall not continue beyond January 1, 2004."

The order also stated that "effective immediately and until further order of this Court, no court record as defined by Rule of Judicial Administration 2.051 (b)(1)(a) shall be released in any electronic form by any Florida clerk of court except as provided herein."

So far, each county has interpreted this administrative order differently. Some are closing down their public access (such as Charlotte County) and making no mention at all of reopening it. Others (such as Sarasota County) brought their online public

access down for a few days and released a newly created website to comply with this order. Some counties have not yet released any announcements on their plans.

Exceptions

There were ten (10) exceptions listed to the order beginning with page 8, as follows:

1. A court record which has become an "official record" as defined by Florida law;
2. A court record in a case may be transmitted to a party or an attorney of record in that case;
3. A court record may be transmitted to a governmental agency or agent authorized by law, court rule, or court order to have access to that record;
4. A court record which has been solitarily and individually requested, provided it has been manually inspected by the clerk of court or deputy clerk of court and no information which is confidential or exempt is released;
5. A court record in a case which the chief judge of the jurisdiction has designated to be of significant public interest, provided it has been manually inspected by the clerk of court or deputy clerk of court and no information which is confidential or exempt is released;
6. Progress dockets limited to: case numbers and case type identification; party names, addresses and dates of birth; names and addresses of counsel; lists or indices of any judgments, orders, pleadings, motions, notices or other documents in the court file; court events, clerk actions and case dispositions, provided no confidential or exempt information is released;
7. Schedules and court calendars;
8. Court records regarding traffic cases;
9. Appellate court briefs, orders and opinions; and
10. Court records which have been inspected by the clerk of court or deputy clerk of court may be viewed via a public view terminal within an office of a clerk of court, provided no confidential or exempt information may be viewed.

RPPTL Executive Council Meeting in Pensacola Beach, November 6-9, 2003

By S. Dresden Brunner, Esq., Steel, Hector & Davis, LLP, Naples, FL

Chair, Louis Guttman, returned to his home town with the Executive Council meeting in Pensacola Beach from November 6-9, 2003. A fourth generation Pensacolian, Louis and his wife, Paula, hosted an interesting and productive weekend.

The Thursday evening, November 6, welcome reception was at historic Ft. Pickens, built in the early 1800's. The National Park Service Rangers conducted a candle lantern tour of the Fort sharing its rich history with

the group.

Section committee meetings were held throughout the day on Friday, November 7. Roundtable lunches were held for the Real Property Division and the Probate and Trust Division. Spouses and guests visited the arts festival held in Seville Square in historic Pensacola and had lunch at Jamie's Restaurant. The day concluded with a New Orleans Cajun feast hosted at the beautiful home of Tom and Jennie Smith.

On Saturday, the RPPTL Top Guns visited the U.S. Navy's top guns — The Blue Angels. The Executive Council meeting was held at the Mustin Beach Officers Club on base of the Pensacola Naval Air Station. At the conclusion of the meeting, the entire group went to Sherman Air Field to view the Blue Angels' homecoming air show.

It was a top-notch weekend for Section work and for enjoying the Blue Angels' work.

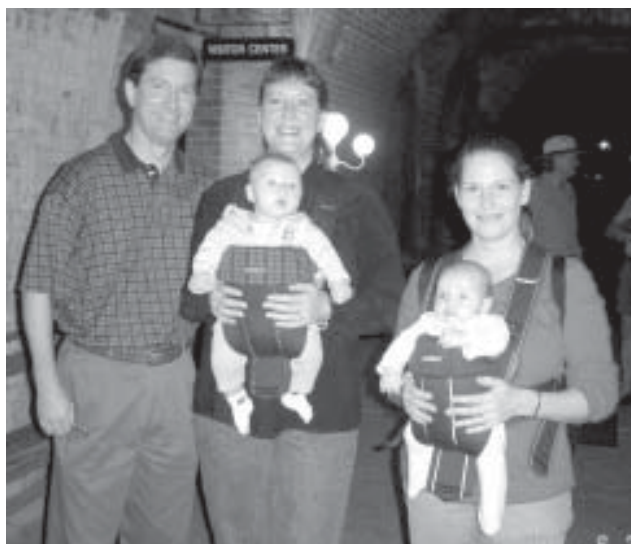
See photos, pages 12 - 14.

Another Great Section Executive Council Meeting in Pensacola Beach

November 2003



Committee meetings were held on Friday, November 7, 2003 (above and left).



Young "Section members" are encouraged (and welcome)!



Executive Council Meeting on Saturday, November 8, 2003.

Photos by John Neukamm, Bonnie Bevis,
Michael Gelfand and Sylvia Rojas.

It's "Up, Up and Away!" with the Navy's Blue Angels



The Blue Angels perform in formation overhead.



Enjoying the Saturday afternoon outing to see the Blue Angels.



Sherry and Rob Freedman enjoy the air show.



Peggy Rolando imagines what it would be like to fly her own plane.

Photos by John Neukamm, Bonnie Bevis, Michael Gelfand and Sylvia Rojas.



Paula and Louis Guttman enjoyed the Thursday night outing.



Some spouses enjoyed lunch on Friday, November 7, 2003, at Jamie's Restaurant in historic Pensacola.



Section Administrator, Bonnie Bevis (left) and Bill Haley (center) are welcomed to the Friday evening dinner by host, Tom Smith (right).



Linda Bruton, Laurie Lile and Kathy Neukamm enjoy the dinner at Tom and Jennie Smith's home.



The "RPPTL Singers" provide their own after-dinner entertainment on Friday evening.

Photos by John Neukamm, Bonnie Bevis, Michael Gelfand and Sylvia Rojas.

RPPTL, Elder Law and Health Law Section Members Sought To Speak on Living Wills and End of Life Issues

The Florida Bar and the Florida Medical Association have agreed to conduct a public service campaign to educate the public about the benefits of preparing living wills and end of life issues.

Bar President Miles A. McGrane, III, and President-elect Kelly Overstreet Johnson request that members of the RPPTL, Elder Law and Health Law Sections join The Florida Bar Speakers Bureau as volunteer speakers to address civic and community organizations throughout the state on this vital topic. Living will forms will be made available to all speakers as an electronic communication to copy and distribute.

If you would be willing to assist with this project, you may register by going to The Florida Bar's website at

www.flabar.org, click on consumer services, page down to speaker form, complete the form and FAX the form only, back to Gail Grimes, fax # 850/

561-5733. If you have additional questions you may email ggrimes@flabar.org, or telephone 850/561-5767.

Advertise in *ActionLine* !!

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DATE: January 22, 2004
TO: All Members of the Real Property, Probate & Trust Law Section of The Florida Bar
FROM: **David C. Brennan, Chair, Forms Committee**
RE: **FLSSI Probate & Guardianship Forms, Revised January 1, 2004**

The new forms are ready!!

Your non-profit corporation, Florida Lawyers Support Services, Inc. (FLSSI), has the 2004 forms printed and ready for purchase. The licensees have integrated the changes into their software and the forms are thus available to you on computer as a part of their service.

No less than two members of the Forms Committee reviewed each and every form and made such changes as were deemed appropriate or necessary to correct errors, to conform the forms to statutory, rule and case law changes, and to improve language and format. As with any other forms, you, the practitioner, must make the final decision as to whether a particular form fits your purpose and complies with the law and the rules.

This year there are five new Probate forms and four new Guardianship forms. Fourteen of the Probate forms and twenty seven of the Guardianship forms have been revised substantively, while a great number of the forms in each classification have changes that were not considered sufficiently material to list them as "revised."

Considering the scope of these changes, it is imperative that you obtain your own copies of both the probate and the guardianship forms.

You may request copies of the new order blanks for the probate and guardianship forms by visiting FLSSI's Web Site at www.flssi.org or by writing to FLSSI at Post Office Box 5647, Tallahassee, Florida 32314 (Phone 850/656-7590 or 1-800-404-9278).

While I have your attention, I must call to your attention the greatest bargain since the penny all-day sucker -- Professor Powell's EPTC PLUS+ 2004 software, which is also available from FLSSI. You can subscribe for \$200.00 or, if you are already a subscriber, you can get the current up-date for \$100.00. It includes the NEW PROBATE CODE and RULES, (not FLSSI's probate forms) with complete coverage of EGTRRA, (OK, you can look that up), and a Users Guide.

One final note: The Committee will greatly appreciate you calling to our attention any typographical or other errors you may detect. Despite the Committee's best efforts there always seem to be some editorial gremlins or needed changes which have not yet been recognized. You can "chat" with the FLSSI staff by phone or Internet/e-mail at info@flssi.org or with me at dcblaw@intellistar.net.

David C. Brennan
Chair, Forms Committee

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Estate and Trust Tax Planning Committee Meeting Minutes — Abbreviated

January 23, 2004

The original committee minutes have been abbreviated for space purposes to highlight only the major issues discussed.

The Estate and Trust Tax Planning Committee ("Committee") held its meeting on Friday, January 23, 2004 at the Hilton Hotel, Ocala, Florida.

Disclaimer Statute.

Rick Gans led a discussion concerning the draft of the Disclaimer Statute previously circulated by e-mail to committee members. A number of issues were discussed concerning the draft, including but not limited to, the definition of person, the coordination with the guardianship statutes, and in particular, dealing with the role of the natural guardian and the ongoing question about whether the disclaimer should be recorded or not. The discussion lasted in excess of two hours. A motion was made by Pam Price and seconded by Henry Cohen to continue revisions to the draft of the Disclaimer Statute. The motion passed unanimously.

Rick Gans will continue to work on the draft with the goal being to present the proposed statute to the Executive Council at the May meeting at the Hilton Resort in Key West. Rick will circulate drafts prior to that

meeting so the same can be studied.

December Seminar

Charlie Nash stated that the December seminar in Ft. Lauderdale was cancelled due to the small number of attendees. The Tampa Seminar did occur as planned and was well attended. Charlie felt that the reason for the cancellation of Ft. Lauderdale was because the seminar had not been timely advertised by The Florida Bar. He did not believe it received the attention that it deserved in light of the hard work that had

been done by the seminar presenters.

Notwithstanding what happened or didn't happen in Ft. Lauderdale, it is anticipated that the committee will do another seminar in November or December of this year.

Next meeting.

The next meeting will be held on May 28th at the Hilton Resort and Marina, Key West, Florida.

There being no further business the meeting was adjourned by the chair at approximately 10:30 a.m.

*Respectfully submitted,
Guy S. Emerich*

Nominees for Section Officers, 2004 - 2005

The Section's Long-Range Planning Committee met on February 13, 2004 and reports for publication the following slate of officers to be voted on at the Election Meeting during the Friday luncheon (May 28) which is a part of the RPPTL Convention to be held May 27 to 31, 2004 at Key West, Florida.

Chair-Elect

Probate and Trust Law Division Director

Real Property Law Division Director

Circuit Representatives Director

Secretary

Treasurer

Julius J. Zschau

Rohan Kelly

Melissa J. Murphy

George J. Meyer

John B. Neukamm

Charles I. Nash

Circuit representatives and out of state representatives will also be voted upon at the election meeting.

2004 Executive Council Meetings

May 27 - 31, 2004

RPPTL Convention/Executive Council Meeting

Hilton Resort & Marina, Key West

Group Rate: \$175/night or \$205/night (Oceanview)

Reservations: 1-800-HILTONS or 305/ 294-4000

Reservation Cut-Off Date: April 23, 2004

August 4 - 8, 2004

Legislative Update/Executive Council Meeting

The Breakers, Palm Beach, FL

Group Rate: \$149/night

Reservations: 1-800-833-3141

Reservation Cut-Off Date: July 4, 2004

December 1 - 5, 2004

Executive Council Meeting

Colonial Williamsburg, Williamsburg, VA

Group Rate: \$115/\$125/night Woodlands Hotel; \$199

Lodge Deluxe; \$399 Williamsburg Inn

Reservations: 1-800-261-9530

Reservation Cut-Off Date: November 5, 2004

May 26 - 29, 2005

Convention/Executive Council Meeting

Hyatt Regency, Coconut Point, FL

Group Rate: \$159/night

Reservations: 1-800-233-1234 or 239-444-1234



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Section 352 of the landmark USA PATRIOT Act requires every "financial institution" to establish an AML program which must include at least four things: (1) written policies, procedures, and controls; (2) a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test the efficacy of the AML program.² Section 352 also gives Treasury plenary discretion to "exempt from the application of [Section 352 AML] standards any financial institution that is not subject to the provisions of" 31 C.F.R. Part 103.³

The term "financial institution" in Section 352 is undefined, but the Bank Secrecy Act – which the USA PATRIOT Act amends – defines "financial institution" to include, among other things, "persons involved in real estate closings and settlements."⁴ Accordingly, Section 352 of the USA PATRIOT Act requires, among other financial institutions, "persons involved in real estate closings and settlements" to adopt an AML program.

In analyzing what persons could be viewed as being "involved in real estate closings and settlements," the Advance Notice identifies real estate brokers, mortgage brokers, title insurance companies, escrow agents and appraisers as persons that are involved in a typical real estate transaction.⁵ The Advance Notice also identifies real estate attorneys who represent buyers or sellers as "often play[ing] a key role in real estate closings and thus merit consideration . . . in the closing and settlement process."⁶ According to Treasury and FinCEN,

[w]hen engaging in conduct subject to anti-money laundering regulations, attorneys, like other professionals, should take the basic steps

contemplated by section 352 to ensure that their services are not being abused by money launderers.⁷

Therefore, the view espoused by Treasury and FinCEN in the Advance Notice – if enacted into a final rule – could very well require real estate attorneys (ranging from large law firm real estate departments to in-house counsels to solo practitioners) to adopt an AML program that, under Section 352 of the USA PATRIOT Act, would require them to – at a minimum – have written policies telling them what basic client matters should be investigated and what to do when suspicious transactions arise; hire an AML compliance officer; train their office staff in AML compliance on an ongoing basis; and hire an auditor to test the efficacy of the law firm's or lawyer's AML efforts.

The Section responded to two of the four questions raised for comment by the Treasury and FinCEN, namely: (1) whether real estate attorneys should be deemed to be "persons involved in real estate closings and settlements"; and (2) whether real estate attorneys should be exempt from the Section 352 AML program requirement. The following points were made (the full text of the arguments, which may be seen in the June 9, 2003 letter on the FinCEN website, are omitted here):

A. Long-Standing and Well-Settled Principles of Client Confidentiality and the Attorney-Client Privilege Would Be Compromised If Real Estate Attorneys Were Required To Conduct AML Practices In Connection With Real Estate Closings

1. Current Law: The Attorney's Duty To Keep Strictly Confidential Information Related to His or Her Client

2. Imposition of an AML Program Requirement Necessarily Would Impose Upon Real Estate

Attorneys a Duty To Audit Their Client

3. Imposition of an AML Program Requirement Necessarily Would Impose Upon Real Estate Attorneys a Duty To Violate the Attorney-Client Privilege by Reporting Suspicious Activity

B. Imposition of an AML Program Requirement on Real Estate Attorneys Poses Serious Practical Problems

1. Imposition of an AML Program Requirement on Real Estate Attorneys Would Be Duplicative in Light of Existing AML Program Requirements on Financial Institutions That Would Likely Be the First Line of Defense When Clients Deliver Closing Funds to Their Attorneys

2. Imposition of an AML Program Requirement on Real Estate Attorneys Would Add Delay to the Closing Process

3. Imposition of an AML Program Requirement on Real Estate Attorneys Would Add Significant Closing Costs to the Buyer or Seller in a Real Estate Transaction

Since the close of the comment period on June 9, 2003, there has been no further activity on this issue. We will continue to monitor the situation in anticipation of the publication of a proposed rule followed by a comment period.

Endnotes:

¹ Published in 68 Fed. Reg. 17,569 (Apr. 10, 2003) by the United States Department of the Treasury ("Treasury") and the Financial Crimes Enforcement Network ("FinCEN").

² See 31 U.S.C. §5318(n)(1)(a).

³ 31 U.S.C. §5318(h)(2).

⁴ See 31 U.S.C. §5312(a)(2)(U).

⁵ Advance Notice, 68 Fed. Reg. at 17,570.

⁶ *Id.*

⁷ *Id.*, 68 Fed. Reg. at 17,571.

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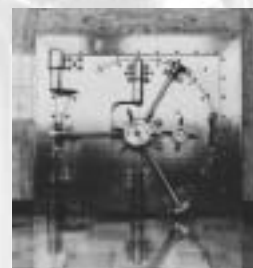
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Section Assists the Florida Housing Coalition-Pro Bono

Florida Housing Coalition members who are in need of legal representation on real estate transactional matters relating to low income housing projects find assistance in RPPTL Section members. Participating Section members, who volunteer on a pro bono basis, are matched with the non-profit members of FHC through

the Pro Bono Committee of the Real Property, Probate and Trust Law Section.

Andrew O'Malley, the Chair of the Pro Bono Committee, states that the Committee has referred RPPTL lawyers to deserving persons over twenty times in the first year of its "Lawyers for Affordable Housing"

program. The RPPTL Section thanks each of the other participating lawyers for their service to the community.

Anyone wishing to become a member of the panel to which matters are referred should contact Andrew O'Malley at 813-250-0577, email aomalley@cowmpa.com.

ActionLine Publication Schedule

ActionLine is in constant need of brief, newsworthy articles, and readers are invited to submit material for publication. Please forward any proposed articles concerning **real estate, estate planning, probate, or articles of general interest** to Dresden Brunner, Steel Hector & Davis, 3003 Tamiami Trail N., Suite 300, Naples, FL 34103. Please include a hard copy of the proposed article, along with a computer diskette containing the article in Word 6.0 or 7.0 format. Alternatively, articles may be E-mailed to dbrunner@steelhector.com. Articles NOT submitted on disk may delay publication. Please do NOT include graphics on the disks, unless they are illustrative charts or graphs. Prospective authors may call Dresden Brunner at (239) 430-1800 to obtain additional publication guidelines.

The publication deadlines for upcoming issues of *ActionLine* are as follows:

ActionLine Issue	Publication Deadline
Summer 2004	April 30, 2004
Fall 2004	July 31, 2004
Winter 2004	October 31, 2004

Persons with comments or suggestions for improvement of *ActionLine* may send them to the above address.

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What's new in the 2004 edition:

Users Guide, a Hypertext Treatise on estate planning; a Tax Library containing relevant sections of the IRC and Regulations, CLE Library; containing CLE articles authored by some of the state's leading practitioners. Including the new probate codes, complete coverage of EGTRRA. New charitable Remainder Trust Model Forms, along with the IRS annotations and alternate provisions.

The 2004 edition of the program no longer requires Hyper shelf. This change has decreased program size and increased program speed. Also the 2004 edition Express utility has been enhanced to include quick access to the many examples in the main treatise. It also provides quick and easy access to the EPTC Plus+ Update Wizard which automatically checks for program updates and enhancements on the EPTC online website. www.dpowell.com.

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ActionLine is looking for writers to help with specific projects. Help is needed with a short-term features writing project that will feature RPPTL Section members. Also, ActionLine is seeking a volunteer to write for a regularly appearing article. If interested in helping out or to get more information, please call S. Dresden Brunner, editor, at 239/430-1800.

THE ANNUAL MEETING OF THE FLORIDA BAR

is scheduled for June 23 - 26, 2004 at the Boca Raton Resort & Club. Watch your Bar Journal and News for details, or visit the bar's website: www.flabar.org.

This space is dedicated to providing space and opportunity to readers to share practice tips and brief items of general interest to the RPPTL reader. Contributions may be submitted to Jo Claire Spear by fax or email: Fax: (727) 576-6407; email: Joclairespearpa@aol.com. Each item should be limited to 100 words or less and should contain your name.

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