Opal Sands Resort
Clearwater, Florida

Saturday, June 1, 2019
9:30 am

BRING THIS AGENDA TO THE MEETING

NOTE: The Agenda will be posted to the meeting APP.

Real Property, Probate and Trust Law Section
Executive Council Meeting
Opal Sands
Clearwater Beach, Florida,
Saturday, June 1, 2019

Agenda

Note: Agenda Items May Be Considered on a Random Basis

I. **Presiding** — Debra L. Boje*, Chair*

II. **Attendance** — Sarah Swaim Butters*, Secretary*

III. **Minutes of Previous Meeting** — Sarah Swaim Butters*, Secretary*

Motion to approve the minutes of March 16, 2019 meeting of Executive Council held at the Amelia Island Plantation, Amelia Island, Florida. **pp. 11-36**

IV. **Chair's Report** — *Debra L. Boje, Chair*

1. Recognition of Guests

2. Milestones

3. Introduction and comments from sponsors of Executive Council meeting.

4. Presentation of Contribution to The Florida Bar Foundation

5. Acknowledgement of General Sponsors and Friends of the Section **pp. 37-39**

6. Recognition of Section's 65th Anniversary

7. Fellows Graduation

8. Recognition of Award Recipients for 2018-19.

9. Thank you to Convention Coordination Committee (Angela McClendon Adams, Tae Kelley Bronner, and Linda S. Griffin)

10. Report of Interim Actions by the Executive Committee

    A. Given the importance of the issue of probate law to our Section and the time sensitivity inherent during the legislative process, on March 22, 2019, the Executive Committee adopted the follow as a Section legislative position:

For the 2019 Legislative Session, support a shortened time period, not less than 25 months, for the presumption of unclaimed property for smaller financial accounts if proof of death is established.; find that this position is within the Section's purview; and, authorize the expenditure of funds in support of the position.

See white Paper attached at **pp. 40 - 41**

B. Given the importance of the issue of Construction Law to our Section and the time sensitivity inherent during the legislative process, on April 5, 2019, the Executive Committee adopted the follow as a section legislative position:

Support changes to Florida law to allow contractors to collect reasonable attorney fees for claims on payment and performance bonds, which presently does not exist under Section 627.756, Fla. Stat., however, the Section opposes changes to Florida law that impose increased requirements for claimants seeking payment for unpaid construction work on bonded public and private projects, including the changes proposed in HB 1247 and SB 1200; find that this position is within the Section's purview; and, authorize the expenditure of funds in support of the position.

See white Paper attached at **pp. 42 - 71**

C. Given the importance of the issue of Condominium and Planned Development Law to our Section and the time sensitivity inherent during the legislative process, on April 8, 2019, the Executive Committee adopted the follow as Section legislative positions:

Oppose requiring any insurance policy issued to an individual condominium unit owner to prohibit the right of subrogation against the condominium association, including a change to Fla. Stat. 627.714(4); find that this position is within the Section's purview; and, authorize the expenditure of funds in support of the position. **pp. 72 - 76**

Oppose continuing to allow fines in excess of $1,000.00 in homeowner associations to become liens for non-monetary damages against the parcel that can be foreclosed, including a change to Fla. Stat. 720.305(2); find that this position is within the Section's purview; and, authorize the expenditure of funds in support of the position. **pp. 77 - 80**

Further, the Executive Committee authorized opposition to HB 1075 in its entirety if it continues, after further negotiation with the stakeholders, to continue provisions for (1) requiring any insurance policy issued to an individual condominium unit owner to prohibit the right of subrogation against the condominium association and (2) which continue to allow fines in excess of $1,000.00 in homeowner associations to become liens for non-monetary damages against the parcel that can be foreclosed, including changes to Fla. Stat. 627.714(4) and 720.305(2); find that this position is within the Section's purview; and, authorize the expenditure of funds in support of the position. **pp. 81 - 82**

V. Liaison with Board of Governors Report — Steven W. Davis

VI. **Chair-Elect's Report** — *Robert S. Freedman, Chair- Elect*

2019-2020 Meeting Schedule. **p.84**

VII. **Treasurer's Report** — *Wm. Cary Wright, Treasurer*

Statement of Current Financial Conditions. **p.85**

VIII. **Director of At-Large Members Report** — *Lawrence Jay Miller, Director*

IX. **CLE Seminar Coordination Report** — *Steven H. Mezer (Real Property)* and *John C. Moran (Probate & Trust), Co-Chairs*

Report on pending CLE programs and opportunities **p. 86**

X. **Legislation Committee –** *S. Katherine Frazier and Jon Scuderi, Co-Chairs*

Report on results of 2019 regular session of Florida Legislature and RPPTL Section's legislative proposals and proposals of interest to Section emanating from outside the Section. **pp. 87 - 93**

XI. **General Standing Division** — *Robert S. Freedman, General Standing Division Director and Chair-Elect*

Action Item:

1. **Sponsorship Coordination** – J. Eric Virgil and Jason J. Quintero, Co-Chairs

Motion to approve, in accordance with past Section practice, the waiver of general sponsorship fees for The Florida Bar Foundation for fiscal year 2019-2020, and allowing The Florida Bar Foundation to have exhibitor space at the 2019 Legislative Update and the 2020 Convention without paying an exhibitor fee if space is available after registration of paying exhibitors.

Informational Items:

1. **Convention Coordination** — *Linda S. Griffin, Chair; Angela McLendon Adams, Tae Kelley Bronner and Darby Jones, Co-Vice Chairs*

   Report on the Convention

2. **Liaison with Clerks of the Court** – *Laird A. Lile*

   Update on matters of interest.

3. **Liaison with the ABA** – *Robert S. Freedman*

   Report on the ABA RPTE National CLE Conference in Boston

4. **Law School Mentoring & Programing** – *Lynwood F. Arnold, Jr., Chair*

Update on committee activities.

5. **Fellows –** *Benjamin Frank Diamond and Jennifer J. Bloodworth, Co-Chairs*

Report on new Fellows for the 2019-2020 Bar year

6. **Information and Technology** – *Neil Barry Shoter, Chair*

Update on website modifications and changes.

7. **Membership and Inclusion -** *Annabella Barboza and Brenda Ezell, Co-Chairs*

Report on committee activities.

8. **Professionalism and Ethics** – *Gwynne A. Young, Chair*

Ethics vignette with related materials **pp. 94 - 142**

9. Strategic Planning Committee - Debra L. Boje and Robert S. Freedman, Co-Chairs

Preliminary report on strategic planning process, including description of task forces, subjects considered, process of arriving at goals and recommendations and discussion of plan timing of submission of final report. **pp. 143 - 187**

XII. Probate and Trust Law Division Report — *William T. Hennessey, Director*

Information Items:

1. IRA, Insurance, and Employee Benefits – *L. Howard Payne and Alfred J. Stashis, Jr., Co-Chairs*

Motion to (A) adopt as a Section legislative position support for proposed legislation to change F.S. 221.21(2)(c) to clarify that an ex-spouse's interest in an IRA which is received in a transfer incident to divorce is exempt from the claims of the transferee ex-spouse's creditors; (B) find that such legislative position is within the purview of the RPPTL Section; and (c) expend Section funds in support of the proposed legislative position. pp. 188 - 192

2. Trust Law Committee - *Angela Adams, Chair*

Motion to (A) adopt as a Section legislative position support for proposed legislation to amend F.S. 736.0417(1) to authorize pro rata or non-pro rata funding of separate trusts created by severance; (B) find that such legislative position is within the purview of the RPPTL Section; and (c) expend Section funds in support of the proposed legislative position. **pp. 193- 197**

3. Probate and Trust Litigation Committee - *J. Richard Caskey, Chair*

Motion to (A) adopt as a Section legislative position support for proposed amendments to F.S. 733.212, which governs the contents of a notice of administration, to require additional language to provide adequate notice that a party may be waiving their right to contest a trust if they fail to timely contest the will; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position. **pp. 198 - 202**

4. **Ad Hoc Guardianship Law Revision Committee -** *Nicklaus Curley and Sancha Whynot, Co-Chairs*

Motion to (A) adopt as a Section legislative position support for adoption of the new Florida Guardianship Code chapter 745, Florida Statutes which improves upon Florida's current guardianship code (Chapter 744); (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position**. pp. 203-374**

XIII. **Real Property Law Division Report** — *Robert S. Swaine, Division Director*

Action Items:

1. **Title Issues and Title Standards Committee** - *Christopher Smart, Chair*

Motion to approve proposed Title Standards 6.10, 6.11, and 6.12 for Enhanced Life Estate Deeds regarding homestead and non-homestead real property. **pp. 375 - 380**

2. **Title Issues and Title Standards Committee** - *Christopher Smart, Chair*

Motion to: (A) adopt as a Section legislative position support for proposed legislation to create Section 95.2311, which would establish a method of correcting obvious typographical errors in legal descriptions contained in real property deeds; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position. **pp. 381 - 389**

3. **Real Property Finance and Lending Committee** - *David R. Brittain and Richard McIver, Co-Chairs*

Motion to approve Statement of Opinion Practices. **pp. 390 - 396**

4. **Real Property Finance and Lending Committee**: *David R. Brittain and Richard McIver, Co-Chairs*

Motion to: (A) adopt as a Section legislative position support for proposed legislation to clarify that the one-year statute of limitations on a mortgage foreclosure; deficiency action begins on the issuance of the certificate of title; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position. **pp. 397 - 401**

5. **Residential Real Estate and Industry Liaison:** Salome J. Zikakis, Chair

Motion to approve the FR/BAR Comprehensive Rider: "CC. Miami-Dade County Special Taxing District Disclosure". **p. 402**

Information Items:

1. **Real Property Finance and Lending Committee**: *David R. Brittain and Richard McIver, Co-Chairs*

   Proposed repeal of Florida Statute 83.561 based on conflict with federal Protecting Tenants at Foreclosure Act of 2009. **pp. 403 - 408**

XIV. Probate and Trust Law Division Committee Reports — *William T. Hennessey, Director*

1. **Ad Hoc Guardianship Law Revision Committee** — David C. Brennan, Chair; Nicklaus J. Curley, Stacey B. Rubel and Sancha Brennan Whynot, Co-Vice Chairs

2. **Ad Hoc Committee on Electronic Wills —** Sarah S. Butters, Chair; Angela McClendon Adams, Thomas M. Karr, Co-Vice-Chairs

3. **Ad Hoc Florida Business Corporation Action Task Force** — Brian C. Sparks and M. Travis Hayes, Co-Chairs

4. **Ad Hoc Study Committee On Professional Fiduciary Licensing —** Angela McClendon Adams and Darby Jones, Co-Chairs

5. **Ad Hoc Study Committee on Estate Planning Conflict of Interest —** William T. Hennessey, Chair; Paul Edward Roman, Vice-Chair

6. **Ad Hoc Study Committee on Due Process, Jurisdiction & Service of Process —** Barry F. Spivey, Chair; Sean W. Kelley and Christopher Q. Wintter, Co-Vice Chairs

7. **Asset Protection** — Brian M. Malec, Chair; Richard R. Gans and Michael A. Sneeringer, Co-Vice-Chairs

8. **Attorney/Trust Officer Liaison Conference** — Tattiana Patricia Brenes-Stahl, Chair; Tae Kelley Bronner, Stacey L. Cole (Corporate Fiduciary), Patrick C. Emans, Gail G. Fagan and Mitchell A. Hipsman, Co-Vice Chairs

9. **Elective Share Review Committee** — Lauren Young Detzel and Charles I. Nash, Co-Chairs; Jenna Rubin, Vice-Chair

10. **Estate and Trust Tax Planning** — Robert L. Lancaster, Chair; Tasha K. Pepper-Dickinson and Jenna G. Rubin, Co-Vice Chairs

11. **Guardianship, Power of Attorney and Advanced Directives** — Nicklaus Joseph Curley, Chair; Brandon D. Bellew, Darby Jones, and Stacey Beth Rubel Co-Vice Chairs

12. **IRA, Insurance and Employee Benefits** — L. Howard Payne Chair; Charles W. Callahan, III and Alfred J. Stashis, Co-Vice Chairs

13. **Liaisons with ACTEC** — Elaine M. Bucher, Bruce M. Stone, and Diana S.C. Zeydel

14. **Liaisons with Elder Law Section** — Charles F. Robinson and Marjorie Ellen Wolasky

15. **Liaisons with Tax Section** — Lauren Young Detzel, William R. Lane, Jr., and Brian C. Sparks

16. **Principal and Income** — Edward F. Koren and Pamela O. Price, Co-Chairs, Joloyon D. Acosta and Keith Braun, Co-Vice Chairs

17. **Probate and Trust Litigation** — John Richard Caskey, Chair; James R. George and R. Lee McElroy, IV, Co-Vice Chairs

18. **Probate Law and Procedure** — M. Travis Hayes, Chair; Amy B. Beller, Theodore S. Kypreos and Cristina Papanikos, Co-Vice Chairs

19. **Trust Law** — Angela McClendon Adams, Chair; Tami Foley Conetta, Jack A. Falk, Mary E. Karr, and Matthew H. Triggs, Co-Vice Chairs

20. **Wills, Trusts and Estates Certification Review Course** — Jeffrey S. Goethe, Chair; J. Allison Archbold, Rachel Lunsford, and Jerome L. Wolf, Co-Vice Chairs

XV. Real Property Law Division Reports — *Robert S. Swaine, Director*

1. **Attorney-Loan Officer Conference** — Robert G. Stern, Chair; Kristopher E. Fernandez and Wilhelmina F. Kightlinger, Co-Vice Chairs

2. **Commercial Real Estate** — Adele Ilene Stone, Chair; E. Burt Bruton, R. James Robbins, Jr. and Martin A. Schwartz, Co-Vice Chairs

3. **Condominium and Planned Development** — William P. Sklar, Chair; Alexander B. Dobrev, Vice Chair

4. **Condominium and Planned Development Law Certification Review Course** — Richard D. DeBoest, II and Sandra Krumbein, Co-Chairs

5. **Construction Law** — Scott P. Pence, Chair; Reese J. Henderson, Jr. and Neal A. Sivyer, Co-Vice Chairs

6. **Construction Law Certification Review Course** — Melinda S. Gentile and Deborah B. Mastin, Co-Chairs; Elizabeth B. Ferguson and Gregg E. Hutt, Co-Vice Chairs

7. **Construction Law Institute** — Sanjay Kurian, Chair; Diane S. Perera, Jason J. Quintero and Bryan R. Rendzio, Co-Vice Chairs.

8. **Development & Land Use Planning** — Julia L. Jennison, Chair; Colleen C. Sachs, Vice Chair

9. **Insurance & Surety** — Scott P. Pence and Michael G. Meyer, Co-Chairs; Frederick R. Dudley, Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs

10. **Liaisons with FLTA** — Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alan B. Fields and James C. Russick, Co-Vice Chairs

11. **Real Estate Certification Review Course** — Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach and Brian W. Hoffman, Co-Vice Chairs

12. **Real Estate Leasing** — Brenda B. Ezell, Chair; Richard D. Eckhard and Christopher A. Sajdera, Co-Vice Chairs

13. **Real Estate Structures and Taxation** — Michael A. Bedke, Chair; Deborah Boyd and Lloyd Granet, Co-Vice Chairs

14. **Real Property Finance & Lending** — David R. Brittain and Richard S. McIver, Co-Chairs; Bridget M. Friedman and Robert G. Stern, Co-Vice Chairs

15. **Real Property Litigation** — Marty J. Solomon, Chair; Amber E. Ashton, Manuel Farach and Michael V. Hargett, Co-Vice Chairs

16. **Real Property Problems Study** — Lee A. Weintraub, Chair; Mark A. Brown, Jason Ellison, Stacy O. Kalmanson, and Susan Spurgeon, Co-Vice Chairs

17. **Residential Real Estate and Industry Liaison** — Salome J. Zikakis, Chair; Raul P. Ballaga, Louis E. “”Trey” Goldman, James Marx and Nicole M. Villarroel, Co-Vice Chairs

18. **Title Insurance and Title Insurance Liaison** — Brian W. Hoffman, Chair; Cynthia A. Riddell, Vice Chair

19. **Title Issues and Standards** — Christopher W. Smart, Chair; Robert M. Graham, Brian W. Hoffman, Melissa Sloan Scaletta and Karla J. Staker, Co-Vice Chairs

XVI. General Standing Committee Reports — *Robert S. Freedman, General Standing Division Director and Chair-Elect*

1. **Ad Hoc Florida Bar Leadership Academy** — Kristopher E. Fernandez and Brian C. Sparks, Co-Chairs; J. Allison Archbold, Vice Chair

2. **Amicus Coordination** — Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman and John W. Little, III, Co-Chairs

3. **Budget** — Wm. Cary Wright, Chair; Linda S. Griffin, Tae Kelley Bronner, and Pamela O. Price, Co-Vice Chairs

4. **CLE Seminar Coordination** — Steven H. Mezer and John C. Moran, Co-Chairs; Alexander H. Hamrick, Hardy L. Roberts, III, Paul E. Roman (Ethics), Silvia B. Rojas, Yoshimi O. Smith, Co-Vice Chairs

5. **Convention Coordination** — Linda S. Griffin, Chair; Angela McLendon Adams, Tae Kelley Bronner and Darby Jones, Co-Vice Chairs

6. **Fellows** — Jennifer Jones Bloodworth and Benjamin Diamond, Co-Chairs; Joshua Rosenberg and Angel Santos, Co-Vice Chairs

7. **Florida Electronic Filing & Service** — Rohan Kelley, Chair

8. **Information Technology** — Neil Barry Shoter, Chair; Erin Christy, Alexander B. Dobrev, Jesse Friedman, Keith S. Kromash, William A. Parady, Hardy Roberts, and Michael Sneeringer, Co-Vice Chairs

9. **Homestead Issues Study** — Jeffrey S. Goethe (Probate & Trust) and J. Michael Swaine (Real Property), Co-Chairs; Michael J. Gelfand, Melissa Murphy and Charles Nash, Co-Vice Chairs

10. **Law School Mentoring & Programing —** Lynwood F. Arnold, Jr., Chair; Phillip A. Baumann, Guy Storms Emerich and Elizabeth Hughes, Co-Vice Chairs

11. **Legislation** — Jon Scuderi (Probate & Trust) and S. Katherine Frazier (Real Property), Co-Chairs; Theodore S. Kypreos and Robert Lee McElroy, IV (Probate & Trust), Manuel Farach and Art Menor (Real Property), Co-Vice Chairs

12. **Legislative Update (2018)** — Stacy O. Kalmanson, Chair; Brenda Ezell, Michael Travis Hayes, Thomas Karr, Kymberlee Curry Smith, Jennifer S. Tobin and Salome J. Zikakis, Co-Vice Chairs

13. **Legislative Update (2019)** — Stacy O. Kalmanson and Thomas Karr, Co-Chairs; Brenda Ezell, Theodore Stanley Kypreos, Jennifer S. Tobin and Salome J. Zikakis, Co-Vice Chairs

14. **Liaison with:**

    a. **American Bar Association (ABA)** — Edward F. Koren, Julius J. Zschau, George J. Meyer and Robert S. Freedman
    b. **Clerks of Circuit Court** — Laird A. Lile
    c. **FLEA / FLSSI** — David C. Brennan and Roland D. “Chip” Waller
    d. **Florida Bankers Association** — Mark T. Middlebrook
    e. **Judiciary** — Judge Linda R. Allan, Judge Jaimie R. Goodman, Judge Hugh D. Hayes, Judge Margaret Hudson, Judge Janis B. Keyser, Judge Maria M. Korvick, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Morris Silberman, Judge Mark Speiser, Judge Richard J. Suarez, Judge Patricia V. Thomas, and Judge Jessica J. Ticktin
    f. **Out of State Members** — Nicole Kibert Basler, John E. Fitzgerald, Jr., and Michael P. Stafford
    g. **TFB Board of Governors** — Steven W. Davis
    h. **TFB Business Law Section** — Gwynne A. Young and Manuel Farach
    i. **TFB CLE Committee** — Steven H. Mezer
    j. **TFB Council of Sections** — Debra L. Boje and Robert S. Freedman
    k. **TFB Pro Bono Committee** — Melisa Van Sickle

15. **Long-Range Planning** — Robert S. Freedman, Chair

16. **Meetings Planning** — George J. Meyer, Chair

17. **Membership and Inclusion** — Annabella Barboza and Brenda Ezell, Co-Chairs; S. Dresden Brunner, Vinette Dawn Godelia, and Kymberlee Curry Smith

18. **Model and Uniform Acts** — Bruce M. Stone and Richard W. Taylor, Co-Chairs

19. **Professionalism and Ethics** — Gwynne A. Young, Chair; Alexander B. Dobrev, Andrew B. Sasso, and Laura Sundberg, Co-Vice Chairs

20. **Publications (ActionLine)** — Jeffrey Alan Baskies and Michael A. Bedke, Co-Chairs (Editors in Chief); George D. Karibjanian, Sean M. Lebowitz, Paul E. Roman and Lee Weintraub, Co-Vice Chairs.

21. **Publications (Florida Bar Journal)** — Jeffrey S. Goethe (Probate & Trust) and Douglas G. Christy (Real Property), Co-Chairs; Brian Sparks (Editorial Board — Probate & Trust), Cindy Basham (Editorial Board — Probate & Trust), Michael A. Bedke (Editorial Board — Real Property), Homer Duvall (Editorial Board — Real Property) and J. Allison Archbold (Editorial Board), Co-Vice Chairs

22. **Sponsor Coordination** — Jason J. Quintero and J. Eric Virgil, Co-Chairs; Patrick C. Eman, Marsha G. Madorsky, Deborah L. Russell, J. Michael Swaine, and Arlene C. Udick, Co-Vice Chairs

23. **Strategic Planning** — Debra L. Boje and Robert S. Freedman, Co-Chairs

XVII. **Adjourn**: Motion to Adjourn.

WPB_ACTIVE 9396008.2

Real Property, Probate and Trust Law Section
Executive Council Meeting
The Omni Plantation
Amelia Island, Florida,
March 16, 2019

Minutes

I. Call to Order — Debra L. Boje, Chair

The Meeting was called to order by Debra L. Boje, Chair.

II. Attendance — Sarah Butters, Secretary

The attendance sheet was passed by Sarah Butters, Secretary.

III. Approval of Minutes of Previous Meeting — Sarah Butters, Secretary

Sarah presented the Minutes of the December 8, 2018 meeting of Executive Council held at the Four Seasons, Orlando, Florida. A motion to approve the minutes passed unanimously.

IV. Chair's Report — *Debra L. Boje, Chair*

1. Recognition of Guests – The Chair welcomed Mike Tanner and Steve Davis with the Florida Bar.

2. Milestones - Adele Stone was recently awarded the Women Pioneers of Law award. Mike Bedke received the Florida Bar Foundation Metal of Honor Award for his dedication and service to the Bar. John and Kathy Neukamm became a grandparents last night with the birth of their new granddaughter Nora.

3. Recognition of General Sponsors and Friends of the Section - The Chair recognized the Section's sponsors and friends. The Chair also thanked Jamie Mendelson with Asher Group who recently presented at the IRA committee.

4. Report of Interim Action by the Executive Committee – Chair Boje gave the following reports on interim action taken by the Executive Committee since the last section meeting.

   A. **Comments to Proposed IRS Proposed Section 2010 Regulations –** Chair Boje reported that the executive committee had approved a submission of Joint Tax Section and RPPTL Section comments to the Internal Revenue Service Proposed Section 2010 Regulations proposed by the Estate & Trust Tax Planning Committee.

   B. **Amicus Brief** - Chair Boje reported that the committee had approved submission of an amicus brief in the case of *Johnson v. Townsend, et. al*. pending in the Fourth DCA.

Bob Goldman gave an update on the pending motion to file an amicus brief, which supports the position that community property is vested in the surviving spouse and therefore there is no need for the spouse to file a creditor claim in the probate estate.

C. **Uniform Guardianship and Protective Proceedings Jurisdiction Act** - Chair Boje reported that the committee had approved the following Legislative Position proposed by the Guardianship, Power of Attorney and Advanced Directives Committee.

(A) To Oppose Florida's adoption of the Uniform Guardianship and Protective Proceedings Jurisdiction Act (including the Florida Guardianship and Protective Proceedings Jurisdiction Act) unless the act is substantially revised to provide for better due process protections for incapacitated individuals more consistent with Florida's laws and rewritten with vocabulary consistent with Florida's guardianship laws, (B) that this position is within the Section's purview; and, (C) authorize the expenditure of funds in support of the position.

D. **Family Trust Companies Act -** Chair Boje reported that the committee had approved the following Legislative Position proposed by the Estate & Trust Tax Planning Committee:

(A)To support proposed legislation removing the scheduled repeal of the public records exemption for certain information held by the Office of Financial Regulation relating to a family trust company, licensed family trust company, or foreign licensed family trust company, (B) find that this position is within the Section's purview; and, (C) authorize the expenditure of funds in support of the position.

E. **Presumed Reasonable Fee Provisions §§733.6171 and 736.1007, Florida Statutes** – Chair Boje reported that the committee had approved the following Legislative Position regarding new legislation proposed by Senator Bean, which would eliminate the presumed reasonable fee for fiduciaries contained within the probate and trust code:

` (A)To oppose amendments to the personal representative and trustee attorney fee compensation statutes contained in the Florida Probate Code and the Florida Trust Code; (B) find that this position is within the Section's purview; and,(C) authorize the expenditure of funds in support of the position.

Jon Scuderi explained the background on this legislation and the impact it could have on fiduciary fees. A motion was then made and seconded to modify the position as follows:

Modified position: Oppose amendments to the personal representative and trustee attorney fee compensation statutes contained in the Florida Probate

Code and the Florida Trust Code unless the amendments preserve the policies currently reflected in each of those codes.

The motion passed.

5. **Ad Hoc Florida Bar Leadership Academy** – *Kristopher E. Fernandez and Brian E. Sparks, Co-Chairs*

Chair Boje reported that the committee had approved sponsoring Ashley Zohar as the Section's representative for the next Leadership Academy class, conditioned on Ms. Zohar being accepted by The Florida Bar into the class.

Kris Fernandez explained the application process and the committee's conclusion that Ashley was well qualified and will represent the Section well, if accepted.

6. **Upcoming Executive Council Meetings**

Annual Convention at Opal Sands – Angela Adams gave a report on the upcoming convention planning. Events will include an visit to an aquarium that doubles as a rehab facility for marine wildlife – including a dolphin with a prosthetic tail. The Section will also be going to the Marina Cantina for dinner. The Section will have the entire hotel for the weekend. There will be a seminar on homestead and other hot topics.

The annual awards dinner will be followed by a casino night. Tae Kelley Bronner, Linda Griffin and Angela Adams are the convention planning committee. Chair Boje thanked them for their hard work in putting the convention and CLE together.

V. Liaison with Board of Governors Report — Steven W. Davis

Steve gave a report on 4 items:

1. Sandy Diamond and the BOG are working on policies that will make it easier for sections to amend their bylaws.
2. Steve also reported that annual Bar dues will stay the same for next year.
3. Bar referral services are now accessible through an online platform that allows people to match with a lawyer online through a county by county selection process. This used to be done by phone but is now available online.
4. The Bar has also been studying mental health issue and has put out a couple of videos showing people who have struggled with mental health issues in an effort to de-stigmatize mental health issues.

Mike Tanner also gave a report on the *Janus* case. Florida is a mandatory bar state, meaning that the FL Bar is an arm of the Florida Supreme Court for purposes of lawyer regulation. Because FL is a mandatory bar, there are constitutional limits to what the Bar can do in terms of regulating lawyers. The *Janus* case overturned a lot of jurisprudence regarding what mandatory bars can do, including in the political arena in terms of influencing legislation and elections.

VI. Chair-Elect's Report — *Robert S. Freedman, Chair- Elect*

Rob noted that the upcoming 2019-2020 Meeting Schedule can be found at page 100 of the Agenda. More information can be found on the Section's Facebook page. Also, a separate Facebook page now exist for the RPPTLs upcoming Amsterdam trip (April 1-5, 2020)

and there is a new RPPTL Facebook page for spouses/guests called RPPTLs Plus One.

The Section is taking a different approach to the July Breakers meeting. Registration will begin mid-May. Once you are registered, you will get the room link. If you can't get in the room block, please put your name on the waitlist. We can normally accommodate everyone on the list eventually through cancelations.

Rob reported that the Section had established two new General Standing Division Committees:

A. Disaster and Emergency Preparedness and Response Committee will be led by Brian Sparks. The purpose of this Committee is to get resources on our website to help lawyers prepare for a hurricane or related emergency and second to provide support after an emergency.

B. Strategic Planning Implementation, which will be chaired by Michael Gelfand with the vice-chairs being Debbie Goodall, Drew O'Malley, Mike Dribin and Peggy Rolando. This committee will monitor the implementation of the Strategic Plan and advise the various committees and leaders in such regard. The concept is that this committee will be comprised of past chairs.

Chair Boje recognized the large number of law school students in attendance at this meeting.

VII. Treasurer's Report — *Wm. Cary Wright, Treasurer*

Cary gave a report that Section is in great financial condition. The most current financial statements can be found at page 101 of the Agenda.

VIII. Director of At-Large Members Report — *Lawrence Jay Miller, Director*

Larry gave report on the No Place Like Home project. For more information on the project and how to volunteer, please check out the ALMs webpage on the RPPTL site. ALMs are working on better coverage for smaller circuits by asking the larger circuits to chip in.

ALMs are also working to support committees and programs of the Section by volunteering in those committees.

IX. CLE Seminar Coordination Report — *Steven H. Mezer (Real Property)* and *John C. Moran (Probate & Trust), Co-Chairs*

John reported that there a full CLE schedule in the Agenda at page 102. They are putting out a bunch of one hour webinars, which have been really popular. These are easy to download and listen to on a daily commute or road trip.

Steve gave a report about upcoming cert review, and 11 other CLEs being offered right now. Many are in person but there are a lot of online ones as well. There is alot of availability for new CLEs and programs if you have a good idea for a presentation.

Note that many of the CLE focus on broad based topics like mindfulness, legal writing and other topics that are useful to the entire section, not just one division.

FL Bar report shows that RPPTL produced 21 CLEs this year and all but 1 was profitable. Congrats to everyone who worked hard to accomplish this success.

X. Legislation Committee – *S. Katherine Frazier and Jon Scuderi, Co-Chairs*

Jon and Katherine deferred to Pete Dunbar for the legislative report. Pete reports that 2 weeks of session is now concluded. They are tracking 41 items, including many that are our initiative and many that we are just providing technical advice. It is too early to know what is viable and what is not, but the Legislative Team continues to monitor and will provide weekly reports.

Sarah Butters provided an update on the Electronic Documents legislation. Sarah gave detailed report on the history of this legislation over the last 3 legislative sessions and the Section's efforts to conform the legislation to the Section's legislative position. Currently the legislation is in good shape for remote notarization of transactional documents, but not where the Section wants it to be for testamentary documents.

The Elder Law Section has worked to address its priorities, including securing an increase in the qualified custodian bond. A strike-all amendment was filed this week that resulted in the Elder Law Section affirmatively supporting the legislation. The RPPTL continues to have concerns but does not have a seat at the table to address those.

Chair Boje gave a reminder of the Section's conflict of interest policy, and requested that any Council members leave the room for the remainder of the discussion if they feel that their personal or professional commitments create a conflict with their Executive Council membership. Chip Waller expressed concern about the request and the proposed application of the conflict of interest policy because so the legislation affects so many people's practices. Chip indicated that he believes everyone's insight should be included in the discussion. Chair Boje reminded everyone that members were not prohibited from being involved in discussions, only voting. Chair Elect Freedman reminded everyone that this was a personal decision that each member of the Council had to make for themselves and that the Section was not compelling anyone to leave the room. Fletch Belcher commented that members should avoid the appearance of bias or prejudice, and if his/her firm has been hired or has hired lobbyist to pursue a particular position, then a perceived conflict of interest exists.

Once those who decided to leave the discussion exited the room, a motion was made and seconded to waive Article VIII Section 4(A) of the Section Bylaws, which requires that proposed legislative positions be placed on the agenda and supporting documentation distributed to the Executive Council at least one week prior to the Executive Council meeting, to permit the Section to consider the revised Section position stated below. The Motion passed by over a 2/3 vote.

A Motion was then made by Chip Waller and seconded by Bob Goldman as follows:

(A) amend the current position of RPPTL Section relating to electronic wills to read as follows:

Opposes legislation, including 2019 Florida Senate Bill 548 and House Bill 409, that would permit remote notarization or remote witnessing of all estate and incapacity planning instruments and related spousal waivers (including electronic wills, powers of

attorney, living wills, advance directives, and trust instruments having testamentary aspects), unless such legislation is amended: (a) to safeguard the citizens of Florida from fraud and exploitation; (b) to include protections to ensure the integrity, security, and authenticity of a remotely notarized or remotely witnessed instrument; and (c) to require witnesses be physically present with the testator when such documents are executed or other procedures to protect the citizens of Florida, particularly vulnerable adults and the elderly who may have diminished mental capacity or be susceptible to fraud, undue influence, coercion, or duress; .

(B) find that such legislative position is within the purview of the RPPTL Section; and

(C) expend Section funds in support of the proposed legislative position.

Sarah gave some background on this year's Electronic Documents bill, and that it is broader than just remote notarization of transactional documents. It includes testamentary documents. That was likely done strategically to force an all or nothing application of remote notarization. The Section tried multiple times to bifurcate the transactional type of documents (loans and real estate closing) from estate planning documents (wills, trusts, powers of attorney). Rep. Diamond recently filed an amendment that would carve out estate planning documents but that amendment failed to pass. At this point, the Section's lobbyists believe that the Bill will pass, with Elder Law's blessing. Our historic hard line position that we must have 2 witness present with the testator has led to us being boxed out of the discussion entirely. Many believe that in order to making the Bill less dangerous for the vulnerable adults is more important that sticking to our firm (and continued) belief that 2 witnesses is the best way to prevent exploitation.

David Akins offered an amendment to the motion to clarify that (c) should strike the term "with the testator". Chip accepted the proposed amendment to the motion.

Rohan Kelley asked why we are modifying the standard legislative position. Fletch asked for discussion from those in favor of position and then those against. Rohan concurred.

Sarah noted that the Section continues to worry that the Bill will pass with virtually not protections for the vulnerable and elderly persons. And while we have stood firm that 2 live witnesses is the best way to protect vulnerable adults, we are losing that argument with the legislators. Simply, legislators have been convinced that videotaping the execution is better than in-person witnessing because the video is better than personal memory. Accordingly, we would prefer to be able to make that video the best it can be, but need to soften our position on in-presence witnessing if we are going to be invited back into the discussion.

Chip Waller commented that he believed the legislation will pass this year, so if the Section wants to provide some input, it needs to vote to soften its position.

Michael Gelfand commented that the legislation is pretty bad in its current form. We need to be a part of the discussion to mitigate the damage that could occur.

Burt Bruton commented that at this point, the legislation is in good form for "dirt" issues. So this is really a probate/trust division issue. He suggested that members not vote just because they want to see the bill pass – that will likely happen regardless. Instead, he suggested that members consider what position was best for the entire group and the public generally.

Pete Dunbar commented that he was asked by one of the Bill's sponsors and by one of the Chairs of a Senate committee for our comments. They want our concerns to be addressed and have stalled hearings on the Bill so we can have a chance to discuss our position today. Pete Dunbar noted that Elder Law, the Clerks and all other stakeholders have had their concerns addressed. But we cannot address our other concerns because of our hardline position on in-presence witnessing. Pete echoed that he believes this Bill will pass, so he encourages us to make it the best we can, even if we don't get everything we believe is best.

George Meyer asked if we approve motion, are we ready to go with our list of priorities. Sarah noted that the Ad Hoc E-Wills Committee has a running list of priorities ready to go. Sarah clarified the proposed position was not to support the legislation like Elder Law has done. Instead, we envision trying to work towards revisions that could make us comfortable enough to stand down and remain neutral. We did not believe the Section should ever affirmatively support the legislation as Elder Law has done.

Jason Ellison commented that he was on the fence. He would like to hear from probate people about why we should continue the hardline stand.

Bruce Stone reminded members that e-wills are here already. Florida must deal with them and establish its own process. This issue has been before us for several years and even passed once already. The goal of this motion is to get us back in the discussion to make sure the legislation protects those vulnerable to abuse. Elder Law has done what it can to do that, but we must be able to articulate our concerns and add those protections that we deem necessary to achieve that goal.

Rohan Kelley spoke on his alternative viewpoint. Eventually Rohan may be in favor of e-wills, but not today. He believes that these are untested concepts in the laws and would prefer that we wait for a uniform product before incorporating in Florida. Rohan points out that this legislation is an economic product driven by e-commerce companies. It is not intended to serve citizens of Florida. In 2017, we had seat at table and negotiated but did not get what we wanted. Luckily, the Bill was vetoed because we opposed that bad bill. Rohan thinks we need to remain strong on our policy position rather than putting the Section's fingerprints on this Bill. Rohan also noted his concern for waiving the rules because members were not given adequate time to properly consider the issues. Rohan reminded members of the Statute of Wills, which has worked in Florida for a century and need not be compromised now.

Diana Zeydell commented that she does not believe it is tenable to continue to hang onto the Statute of Wills. She believes that technology is already here and is used for the disposition of a large majority of a person's wealth. So traditional statute of wills arguments are not a persuasive reason to oppose this. She thinks this legislative position change allows the Section to be able to participate and weigh in with our concerns. We should be able to help people handle disposition of their property in accordance with their wishes.

Fletch Belcher commented that the RPPTL stands for good public policy and principles. Requiring the physical presence of witnesses is a key principle to protect against fraud and undue influence. Fletch believes that the Section is saving on this key principle. Fletch notes that there is no real concern about remote witnessing for transactions, and hopes that those who are motivated to see that pass will abstain from voting on this issue that primarily effects testamentary documents.

Bob Goldman noted nothing objectionable in the new legislative position. We need to rely on legislative consultant's advice and Pete believes he needs a softer position to get a seat at the table.

The Motion was called to question, as amended by David Akin's proposal. Sarah reminded everyone of the conflict of interest policy.

Motion passed by a vote of 112/17 (over 2/3rds required).

XI. **General Standing Division** — *Robert S. Freedman, General Standing Division Director and Chair-Elect*

Informational Items:

1. **Liaison with Clerks of the Court –** *Laird A. Lile*

No Report.

2. **Law School Mentoring & Programing** – *Lynwood F. Arnold, Jr., Chair*

Lynwood Arnold reported on committee activities. Sam Houston from FSU Student RPPTL section reported on the activities at FSU. Attendees from all local law schools were present for this meeting.

3. **Ad Hoc Florida Bar Leadership Academy** – *Kristopher E. Fernandez and Brian E. Sparks, Co-Chairs*

No report other than as noted earlier in the minutes.

4. **Model and Uniform Acts —** *Bruce M. Stone and Richard W. Taylor, Co-Chairs*

Written report of the committee can be found at page 103 – 105 of the Agenda.

5**.** **Liaison with TFB Council of Sections** - *Debra L. Boje and Robert S. Freedman*

Michael Dribin gave a report on Council of Sections' Proposal for Changing the Requirements for Amendments to Section By-Laws.

6. **Convention Coordination** - *Linda S. Griffin, Chair; Angela McClendon Adams and Tae Kelley Bronner, Co-Vice Chairs*

See previous update on Convention activities to be held at Opal Sands, Clearwater Beach, Florida - May 30 – June 2, 2019.

7. **Fellows** – *Benjamin Frank Diamond and Jennifer Bloodworth, Co-Chairs*

Jen Bloodworth gave a report on the upcoming deadline for applications for Fellows. The committee is looking for future leaders of the Section and will provide financial support to make participation more affordable.

8. Strategic Planning Committee - *Debra L. Boje and Robert S. Freedman, Co-Chairs*

In the interest of time, Michael Gelfand deferred to the draft of 2019 Strategic Plan for a more detailed review at a future meeting. Michael recognized the subcommittee chairs who lead the discussions and the committee planners and participants.

XII. Probate and Trust Law Division Report — *William T. Hennessey, Director*

Bill recognized the Division's committee sponsors and thanked them for their support.

Action Items:

1. Probate Law and Procedure Committee — *M. Travis Hayes, Chair*

Travis explained the current notice requirements for notices to a surviving spouse and that it is not a notice unique to spousal rights generally. This proposal will give a surviving spouse more detailed notice regarding rights and actions that may need to be taken.

> A motion was made to: (A) adopt as a Section legislative position support for proposed legislation to improve notice of administration to surviving spouse to include notice that an extension of the deadline for taking an elective share may be requested prior to the expiration of the deadline for making the election, including changes to Fla. Stat. § 733.212(2)(e); (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position.

Motion passed unanimously.

2. Trust Law Committee — *Angela Adams, Chair*

Angela reported that the directed trust proposed item has been pulled for consideration so the committee can make further changes based on the real property division's comments. This item should be ready for consideration at the next Section meeting.

3. Probate and Trust Litigation Committee — *J. Richard Caskey, Chair*

Rich and Cady Huss gave an explanation that the proposed legislation will clarify who has the right to pursue a cause of action on behalf of an estate. This is a result of an opinion that came out of the *Parker v. Parker* case.

> A Motion was made to: (A) adopt as a Section legislative position support for proposed amendments clarifying the personal representative's exclusive authority to pursue causes of action on behalf of the estate, including but not limited to claims for the return of probate assets wrongfully transferred prior to the decedent's death, including changes to Fla. Stat. §§ 731.201(32),

733.607(1), 733.612(20), and 733.802(2); (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position.

Motion passed unanimously.

Information Items:

1. **Ad Hoc Guardianship Law Revision Committee-** *Nicklaus Curley, Vice Chair*

Sancha gave the presentation on the proposed draft. The draft is years of work and includes many mechanical and substantive fixes to improve chapter 744. They are accepting comments through May 1, 2019 at their email address: guardianshipcode@gmail.com

2. **Charitable Planning and Exempt Organizations –** *Seth Kaplan and Jason Havens, Co-Chairs*

Bill announced the creation of a new committee within the Probate and Trust Law Division to focus on charitable planning. The Committee is going to focus on educational programs. This committee previously existed but was dissolved for inactivity years ago. There is a significant interest in re-establishing the committee and the Section is thankful to have Seth and Jason's leadership. Please reach out to Seth and Jason if you want to participate.

XIII. Real Property Law Division Report — *Robert S. Swaine, Division Director*

Bob recognized the Division's committee sponsors and thanked them for their support.

Information Item:

1. **Title Issues and Title Standards Committee** — *Christopher Smart, Chair*
Chris gave a summary of the proposal to clarify and give guidance to practitioners who encounter Lady Bird deeds.

Discussion was has on the proposed Title Standards for Enhanced Life Estate Deeds, regarding homestead and non-homestead real property.

XVII. Adjourn: The meeting was then adjourned.

ATTENDANCE ROSTER

REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2018-2019

Executive Committee	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Boje, Debra Lynn Chair		√	√	√	√	√	
Freedman, Robert S. Chair-Elect & General Standing Div. Director	√		√	√	√	√	
Hennessey, William Probate & Trust Law Div. Director		√	√		√	√	
Swaine, Robert S. Real Property Div. Director	√		√			√	
Butters, Sarah S. Secretary		√	√		√	√	
Wright, Wm. Cary Treasurer	√		√	√	√	√	
Frazier, S. Katherine Legislation Co-Chair Real Property	√		√		√	√	
Scuderi, Jon Legislation Co-Chair Probate		√	√		√	√	
Moran, John C. CLE Co-Chair Probate		√	√		√	√	
Mezer, Steven H. CLE Co-Chair Real Property	√		√		√	√	
Miller, Lawrence J. Director, At Large Members		√			√	√	
O'Malley, Andrew **Immediate Past Chair**	√				√	√	

Executive Council Members	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Acosta, Jolyon Delphin		√	√		√	√	
Adams, Angela M.		√	√		√	√	
Akins, David J.		√	√	√	√	√	
Allan, Hon. Linda R.							
Altman, Stuart H.		√	√		√	√	

Executive Council Members	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Archbold, J. Allison		√	√		√	√	
Arnold, Jr., Lynwood	√		√		√	√	
Aron, Jerry E. **Past Chair**	√		√				
Ashton, Amber E.	√		√		√	√	
Awerbach, Martin S.	√		√			√	
Bald, Kimberly A.		√	√	√		√	
Ballaga, Raul P.	√				√		
Barboza, Annabella	√		√		√		
Basham, Cindy		√					
Baskies, Jeffrey		√	√			√	
Batlle, Carlos A.		√	√		√	√	
Baumann, Phillip A.		√	√	√	√	√	
Beales, III, Walter R. **Past Chair**	√		√				
Bedke, Michael A.	√		√				
Belcher, William F. **Past Chair**		√	√		√	√	
Bell, Kenneth B.	√						
Bell, Rebecca Coulter		√		√	√	√	
Beller, Amy		√	√		√	√	
Bellew, Brandon D.		√	√		√	√	
Bloodworth, Jennifer J.	√		√			√	
Bonevac, Judy B.		√	√		√	√	
Bowers, Elizabeth A.		√	√		√	√	
Boyd, Deborah	√		√		√		
Braun, Keith Brian		√	√		√	√	

Executive Council Members	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Brenes-Stahl, Tattiana		√	√		√		
Brennan, David C. **Past Chair**		√	√				
Brittain, David R.	√		√		√	√	
Bronner, Tae K.		√	√		√	√	
Brown, Mark A.	√		√		√	√	
Brown, Shawn	√		√		√	√	
Brunner, S. Dresden		√			√	√	
Bruton, Jr., Ed Burt	√		√		√	√	
Bucher, Elaine M.		√	√		√		
Butler, Johnathan		√	√		√	√	
Callahan, Chad W. III		√			√	√	
Carlisle, David R.		√					
Caskey, John R.		√	√		√	√	
Christiansen, Patrick **Past Chair**	√		√	√			
Christy, Douglas G. III	√		√		√	√	
Christy, Erin Hope	√		√		√	√	
Cohen, Howard Allen	√		√		√	√	
Cole, Stacey L.		√	√			√	
Conetta, Tami F.		√	√		√	√	
Cope, Jr., Gerald B.	√		√	√		√	
Cornett, Jane Louise	√					√	
Costello, T. John, Jr.		√					
Curley, Nick		√	√	√	√	√	
Davis, Steven W.	√		√			√	

Executive Council Members	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
DeBoest II, Richard Dearborn	√		√		√	√	
Detzel, Lauren Y.		√			√	√	
Diamond, Benjamin F.		√	√		√		
Diamond, Sandra F. **Past Chair**		√			√		
Direktor, Kenneth S.	√						
Dobrev, Alex	√		√		√	√	
Dollinger, Jeffrey	√				√	√	
Dribin, Michael **Past Chair**		√	√		√	√	
Dudley, Frederick R.	√						
Duffey, Patrick J.		√	√		√	√	
Duvall, III, Homer	√		√		√	√	
Duz, Ashley Nichole		√	√		√	√	
Eckhard, Rick	√				√		
Ellison, Jason M.	√		√		√	√	
Emans, Patrick C		√	√		√	√	
Emerich, Guy S.		√	√		√	√	
Ertl, Christene M.	√		√			√	
Ezell, Brenda B.	√		√	√	√	√	
Fagan, Gail		√	√	√	√	√	
Falk, Jr., Jack A.		√	√		√	√	
Farach, Manuel	√		√		√	√	
Faulkner, Debra Ann		√				√	
Felcoski, Brian J. **Past Chair**		√	√		√		
Ferguson, Elizabeth B.	√		√				

Executive Council Members	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Fernandez, Kristopher E.	√		√		√	√	
Fields, Alan B.	√				√		
Fitzgerald, Jr., John E.		√			√	√	
Flood, Gerard J.		√	√			√	
Foreman, Michael L.		√	√		√	√	
Freeman, Gill				√			
Friedman, Bridget	√		√		√		
Friedman, Jesse B.		√	√		√		
Galler, Jonathan		√	√		√	√	
Gans, Richard R.		√	√		√	√	
Gelfand, Michael J **Past Chair**	√		√	√	√	√	
Gentile, Melinda S.	√				√		
George, James		√	√			√	
George, Joseph P.		√	√	√	√	√	
Godelia, Vinette D.	√					√	
Goethe, Jeffrey S.		√	√		√	√	
Goldman, Louis "Trey"	√		√		√	√	
Goldman, Robert W. **Past Chair**		√	√			√	
Goodall, Deborah P. **Past Chair**		√	√	√	√		
Goodman, Hon. Jaimie Randall							
Graham, Robert M.	√		√		√	√	
Granet, Lloyd	√		√		√		
Griffin, Linda S.		√	√	√	√		
Grimsley, John G. **Past Chair**		√					

Executive Council Members	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Grosso, Jennifer		√			√	√	
Gunther, Eamonn W.		√	√		√		
Gurgold, Eric		√	√		√	√	
Guttmann, III, Louis B **Past Chair**	√		√			√	
Hamrick, Alexander H		√	√		√	√	
Hancock, Patricia J.	√						
Hargett, Michael Van	√		√		√	√	
Harriett-Wartenberg, Stephanie		√					
Hayes, Hon. Hugh D.			√				
Hayes, Michael Travis		√	√		√	√	
Hearn, Frederick "Ricky"		√	√		√	√	
Hearn, Steven L. **Past Chair**		√	√	√	√	√	
Heckert, Katie	√		√		√		
Henderson, Jr., Reese J.	√		√				
Henderson, III, Thomas N.	√				√		
Heuston, Stephen P.		√	√		√	√	
Hipsman, Mitchell Alec		√	√		√	√	
Hoffman, Brian W.	√		√	√	√	√	
Horstkamp, Julie A.	√		√			√	
Hudson, Hon. Margaret "Midge"			√			√	
Hughes, Elizabeth		√	√		√	√	
Hutt, Gregg Evan	√		√		√		
Isphording, Roger O. **Past Chair**		√		√	√	√	
Jennison, Julia Lee	√		√		√		

Executive Council Members	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Johnson, Amber Jade		√	√		√		
Jones, Darby		√	√		√	√	
Jones, Frederick W.	√		√	√		√	
Jones, Patricia P.H.	√		√	√		√	
Judd, Robert B.		√	√		√		
Kalmanson, Stacy O.	√		√		√	√	
Kangas, Michael R.		√			√	√	
Karibjanian, George		√					
Karr, Mary E.		√	√				
Karr, Thomas M.		√	√		√	√	
Kayser, Joan B. **Past Chair**		√				√	
Keane, Cristin C.	√						
Kelley, Rohan **Past Chair**		√		√	√	√	
Kelley, Sean W.		√			√	√	
Kelley, Shane		√	√		√	√	
Keyser, Hon. Janis Brustares							
Khan, Nishad	√		√	√	√	√	
Kibert-Basler, Nicole	√		√		√	√	
Kightlinger, Wilhelmina F.	√						
Kinsolving, Ruth Barnes, **Past Chair**	√				√		
Koren, Edward F. **Past Chair**		√	√				
Korvick, Hon. Maria			√	√			
Kotler, Alan Stephen		√	√		√		
Kromash, Keith S.		√				√	

Executive Council Members	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Krumbein, Sandra Elizabeth	√		√		√		
Kurian, Sanjay	√		√			√	
Kypreos, Theodore S.		√	√		√		
LaFemina, Rose M.		√	√		√	√	
Lancaster, Robert L.		√	√		√	√	
Lane, Jr., William R.		√	√		√		
Larson, Roger A.	√		√			√	
Leathe, Jeremy Paul		√			√	√	
Lebowitz, Sean M.		√	√		√	√	
Leebrick, Brian D.	√						
Lile, Laird A. **Past Chair**		√	√	√	√		
Lindsey, Hon. Norma							
Little, III, John W.	√		√				
Lopez, Sophia A.		√		√	√		
Lunsford, Rachel Albritton		√		√	√		
Madorsky, Marsha G.		√		√	√	√	
Malec, Brian		√	√		√	√	
Malfeld, Mariela	√		√		√		
Marger, Bruce **Past Chair**		√					
Marshall, III, Stewart		√	√		√	√	
Marx, James A.		√	√		√		
Mastin, Deborah Bovarnick	√		√				
McCall, Alan K.	√		√				
McElroy, IV, Robert Lee		√	√		√		

Executive Council Members	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
McIver, Richard	√		√		√	√	
McRae, Ashley E.	√		√		√	√	
Melanson, Noelle M.		√	√		√	√	
Menor, Arthur J.	√				√	√	
Meyer, George F. **Past Chair**	√		√		√	√	
Meyer, Michael	√		√			√	
Middlebrook, Mark T.		√	√	√	√	√	
Mize, Patrick		√				√	
Moule, Jr., Rex Everet		√					
Muir, Hon. Celeste H.			√		√	√	
Murphy, Melissa J. **Past Chair**	√		√	√	√	√	
Nash, Charles I.		√					
Neukamm, John B. **Past Chair**	√		√		√		
Nguyen, Hung V.		√	√			√	
Papanikos, Cristina		√	√		√	√	
Parady, William A.	√		√		√		
Payne, L. Howard		√	√			√	
Pence, Scott P.	√		√		√	√	
Pepper-Dickinson, Tasha K.		√	√		√		
Perera, Diane	√				√		
Pilotte, Frank		√	√		√	√	
Pleus, Jr., Hon. Robert							
Pollack, Anne Q.	√		√		√		
Price, Pamela O.		√					

Executive Council Members	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Pyle, Michael A.		√					
Quintero, Jason	√		√		√		
Redding, John N.	√		√		√	√	
Rendzio, Bryan	√				√		
Reynolds, Stephen H.		√					
Riddell, Cynthia	√				√		
Rieman, Alexandra V.		√	√		√	√	
Robbins, Jr., R.J.	√		√		√		
Roberts, III, Hardy L.	√					√	
Robinson, Charles F.		√			√		
Rodstein, David William	√						
Rojas, Silvia B.	√		√	√	√	√	
Rolando, Margaret A. **Past Chair**	√		√	√	√	√	
Roman, Paul E.		√	√		√		
Rosenberg, Joshua		√	√			√	
Rubel, Stacy		√	√		√	√	
Rubin, Jenna		√	√		√		
Russell, Deborah L.		√					
Russick, James C.	√		√		√		
Rydberg, Marsha G.	√		√			√	
Sachs, Colleen C.	√		√		√	√	
Santos, Angela		√	√				
Sajdera, Christopher	√		√		√	√	
Sasso, Andrew	√		√		√		

Executive Council Members	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Scaletta, Melissa Sloan	√		√		√	√	
Schwartz, Martin	√		√		√		
Schwartz, Robert M.	√		√		√		
Schwinghamer, Jamie		√	√		√		
Seaford, Susan	√				√		
Seigel, Daniel A.	√		√			√	
Sheets, Sandra G.		√	√		√	√	
Sherrill, Richard		√	√		√	√	
Shoter, Neil B.	√		√		√		
Silberman, Hon. Morris							
Silberstein, David M.		√					
Sivyer, Neal Allen	√		√				
Sklar, William P.	√		√		√	√	
Smart, Christopher W.	√		√		√	√	
Smith, Kymberlee C.	√		√		√		
Smith, G. Thomas **Past Chair/Honorary Member**	√						
Smith, Yoshimi O.		√	√		√	√	
Sneeringer, Michael		√	√		√	√	
Solomon, Marty	√				√	√	
Sparks, Brian C.		√	√	√	√		
Speiser, Hon. Mark A.							
Spivey, Barry F.		√	√		√	√	
Spurgeon, Susan K.	√		√		√	√	
Stafford, Michael P.		√	√	√	√	√	

Executive Council Members	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Staker, Karla J.	√		√		√	√	
Stashis, Alfred Joseph		√	√		√	√	
Stern, Robert G.	√		√		√	√	
Stone, Adele I.	√		√		√		
Stone, Bruce M. **Past Chair**		√	√			√	
Suarez, Hon. Richard							
Sundberg, Laura K.		√	√			√	
Swaine, Jack Michael **Past Chair**	√		√				
Taylor, Richard W.	√		√		√		
Thomas, Hon. Patricia			√		√	√	
Thornton, Kenneth E.	√		√		√	√	
Ticktin, Hon. Jessica J.							
Tobin, Jennifer S.	√		√		√	√	
Triggs, Matthew H.		√	√		√		
Tschida, Joseph John	√		√		√	√	
Tucker, Kristine L.		√			√	√	
Udick, Arlene C.	√		√	√		√	
Van Dien, Lisa Barnett	√		√		√		
Van Lenten, Jason Paul		√	√		√	√	
Van Pelt, Kit E.		√	√	√	√	√	
VanSickle, Melissa	√		√				
Villarroel, Nicole Marie	√		√		√	√	
Villavicencio, Stephanie		√					
Virgil, Eric		√	√		√		

Executive Council Members	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Waller, Roland D. **Past Chair**	√		√	√	√	√	
Weintraub, Lee A.	√		√		√	√	
Wells, Jerry B.		√			√	√	
White, Jr., Richard M.		√	√		√	√	
Whynot, Sancha B.	√		√		√	√	
Wilder, Charles			√		√	√	
Williams, Margaret A.	√		√		√	√	
Williamson, Julie Ann **Past Chair**	√						
Wintter, Christopher		√			√	√	
Wohlust, Gary Charles		√	√		√		
Wolasky, Marjorie E.		√		√	√	√	
Wolf, Jerome L.		√	√		√		
Young, Gwynne A.		√	√	√	√	√	
Zeydel, Diana S.C.		√	√		√	√	
Zikakis, Salome J.		√	√	√	√	√	
Zschau, Julius J. **Past Chair**	√		√				

RPPTL Fellows	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Abukodeir, Samah		√	√				
Barr, James C.	√				√	√	
Cazobon, Denise		√	√			√	
Coleman, Jami		√				√	
de la Riva, Lian		√	√			√	
Jackson, Gabrielle	√		√		√	√	

RPPTL Fellows	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
McDermott, Daniel L.		√	√	√	√		
Peregrin, Jacqueline J.	√		√		√		

Legislative Consultants	Division		July 28 Breakers	Sept. 29 Italy	Dec. 8 Orlando	March 16 Amelia	June 1 Clearwater
	RP	P&T					
Brown, French		√	√		√		
Dobson, Michael	√		√		√		
Dunbar, Peter M.	√		√	√	√	√	
Edenfield, Martha Jane	√	√	√	√	√	√	
Finkbeiner, Brittany		√	√		√		
Roth, Cari L.			√				

Guest sign in	Division	
	RP	P&T
Alaimo, Marve Ann – Breakers, Orlando		√
Amaro, M. Barbara – Italy		√
Behar, Jacobeli J. – Breakers, Orlando		√
Broadwater, Carolyn – Breakers	√	
Calers, Perla – Italy	√	
Cervo, Lourdes – Breakers, Italy	√	
Davis, Steven BOG Liaison – Breakers	√	
Finchum, Travis – Breakers, Orlando		√
Finler, Erin Farrington – Italy, Orlando, Amelia		√
Foster-Morales, Dori BOG - Breakers	n/a	n/a
Groover, Lea Anne – Breakers, Amelia	√	
Hall, Thomas – Breakers		√
Kleinknecht, Robert – Italy		√
Noll, R. Dale – Breakers		√
Zayas, Angelica – Italy		√
Huss, Cady – Orlando, Amelia		√

Pratt, Brandon – Orlando, Amelia	√	
McClure, Anthony - Orlando		
Hatcher, Mary P. – Orlando		
Skrande, Gutman - Orlando		
Baker, B. Paige – Orlando, Amelia		
Persante, Robert – Orlando, Amelia	√	
Stotts, Darren – Orlando		
Zurowesk, Zach - Orlando		
Monexil, Jovani – Orlando (Law Student)		
McCall, Alan - Orlando		
Marzan, Jacqueline – Amelia	√	
Oliver, Rachel – Orlando, Amelia		√
Galvani, Lauren – Amelia	√	
Tanner, Mike – Amelia	√	
Shanks, David - Amelia		
Grimaldi, Melinda – Amelia		
Abukhodeir, Samah – Amelia		
Leon, Jose – Amelia		
Bowdish, James - Amelia		

Thank you to Our General Sponsors

Event Name	Sponsor	Contact Name	Email
App Sponsor	**WFG National Title Insurance Co.**	Joseph J. Tschida	jtschida@wfgnationaltitle.com
Thursday Grab and Go Lunch	**Management Planning, Inc.**	Roy Meyers	rmeyers@mpival.com
Thursday Night Reception	**JP Morgan**	Carlos Batlle	carlos.a.batlle@jpmorgan.com
Thursday Night Reception	**Old Republic Title**	Jim Russick	jrussick@oldrepublictitle.com
Friday Reception	**Wells Fargo Private Bank**	Mark Middlebrook	Mark.T.Middlebrook@wellsfargo.com
Friday Reception	**Westcor Land Title Insurance Company**	Renee Bourbeau	rbourbeau@wltic.com
Friday Night Dinner	**First American Title Insurance Company**	Alan McCall	Amccall@firstam.com
Spouse Breakfast	**Attorneys Title Fund Services, LLC**	Melissa Murphy	mmurphy@thefund.com
Real Property Roundtable	**Fidelity National Title Group**	Karla Staker	Karla.Staker@fnf.com
Probate Roundtable	**Stout Risius Ross Inc.**	Kym Kerin	kkerin@srr.com
Probate Roundtable	**Guardian Trust**	Ashley Gonnelli	ashley@guardiantrusts.org
Executive Council Meeting Sponsor	**The Florida Bar Foundation**	Michelle Fonseca	mfonseca@flabarfndn.org
Executive Council Meeting Sponsor	**Stewart Title**	David Shanks	David.Shanks@stewart.com
Saturday Night Dinner	**Winston Art Group**	Rachel Doorly Killeman	Doorly@winstonartgroup.com
Overall Sponsor/Leg. Update	**Attorneys Title Fund Services, LLC**	Melissa Murphy	mmurphy@thefund.com
Overall Sponsor/Leg. Update	**Attorneys Title Fund Services, LLC**	Melissa Murphy	mmurphy@thefund.com

Thank you to Our Friends of the Section

Sponsor	Contact	Email
Amtrust Title	Deborah B. Boyd	carlos.rodriguez@amtrustgroup.com
Business Valuation Analysts, LLC	Tim Bronza	tbronza@bvanalysts.com
CATIC	Christopher J. Condie	ccondie@catic.com
Jones Lowry	Bonnie Barwick	planning@joneslowry.com
North American Title Insurance Company	Valerie Grandin	vjahn-grandin@natic.com
Valley National Bank	Jacquelyn McIntosh	jmcintosh@valleynationalbank.com
Valuation Services, Inc.	Jeff Bae	Jeff@valuationservice.com
Wilmington Trust	David Fritz	dfritz@wilmingtontrust.com

Thank you to our Committee Sponsors

Sponsor	Contact	Email	Committee
BNY Mellon Wealth Management	Joan Crain	joan.crain@bnymellon.com	Estate and Trust Tax Planning
BNY Mellon Wealth Management	Joan Crain	joan.crain@bnymellon.com	IRA, Insurance and Employee Benefits
Coral Gables Trust	John Harris	jharris@cgtrust.com	Probate and Trust Litigation
Coral Gables Trust	John Harris	jharris@cgtrust.com	Probate Law Committee
First American Title	Alan McCall	Amccall@firstam.com	Condominium and Planned Development
First American Title	Wayne Sobian	wsobien@firstam.com	Real Estate Structures and Taxation
Management Planning Inc.	Roy Meyers	rmeyers@mpival.com	Estate and Trust Tax Planning
Attorneys Title Fund Services, LLC	Melissa Murphy	mmurphy@thefund.com	Commercial Real Estate
Business Valuation Analysts, LLC	Tim Bronza	tbronza@bvanalysts.com	Trust Law
Northern Trust Bank of Florida	Tami Conetta	tfc1@ntrs.com	Trust Law
Kravit Estate Appraisal	Bianca Morabito	bianca@kravitestate.com	Estate and Trust Tax Planning
Pluris Valuation Advisors	Monique Jeffries	mjeffries@pluris.com	Asset Protection Committee
Hopping Green & Sams	Vinette D. Godelia	vinetteg@hgslaw.com	Development and Land Use
AmTrust Financial Services	Felice Shapiro	felice.shapiro@amtrustgroup.com	Residential Real Estate and Industry Liaison
Steel in the Air	Gypsy Mims	gypsy@steelintheair.com	Real Estate Leasing Committee
Grove Bank and Trust	Marta Goldberg	mgoldberg@grovebankandtrust.com	Guardianship and Advanced Directives
Attorneys' Real Estate Councils of Florida, Inc.	Rene Rutan	RRutan@thefund.com	Residential Real Estate and Industry Liaison

A bill to be entitled

An act relating to unclaimed property; amending s. 717.106, F.S.; revising criteria for presuming as unclaimed certain deposits and funds held by a banking or financial organization; providing requirements for proof of death for purposes of determining specified accounts as unclaimed property; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (6) is added to section 717.106, Florida Statutes, to read:

717.106 Bank deposits and funds in financial organizations.—

(6) Notwithstanding the 5-year time period specified in subsection (1), when the value of the account is $10,000 or less, the presumption of unclaimed property under this section arises before the expiration of such time period if proof of death is established for each owner and at least 25 months have passed since the death of the last surviving owner. For purposes of this subsection, proof of death may be established by:

(a) Presentation of an original or certified copy of the death certificate; or

(b) Comparison of the banking or financial organization's

record of ownership against the United States Social Security Administration Death Master File or any database or service that the department determines is at least as comprehensive as the United States Social Security Administration Death Master File for the purpose of indicating that a person has died. The comparison must use the name and either the social security number or the date of birth of the owner. An owner is presumed deceased if the date of his or her death is indicated by the comparison made under this paragraph unless the banking or financial organization has in its records competent and substantial evidence that the person is living, including, but not limited to, a contact made by the banking or financial organization with such person or his or her legal representative.

Section 2. This act shall take effect upon becoming a law.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Sean Mickley, Vice-Chair, Construction Law Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date_____, 20___)

Address 15 W. Church St., Suite 301 Orlando, Florida 32801
Telephone: 407-590-8764

Position Type Construction Law Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

S. Katherine Frazier, Hill Ward Henderson, 101 East Kennedy Boulevard, Suite 3700, Tampa, Florida 33602, Telephone: (813) 227-8480, Email: Katherine.frazier@hwhlaw.com
Peter M. Dunbar, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: pdunbar@deanmead.com
Martha J. Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: medenfield@deanmead.com

Appearances Before Legislators (N/A)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (N/A)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following SB 1200 and HB 1247 (companion bills)
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support _____ Oppose __X___ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

The Construction Law Committee supports changes to Florida law to allow contractors to collect reasonable attorney fees for claims on payment and performance bonds, which presently does not exist under Section 627.756, Fla. Stat. The Construction Law Committee, however, vehemently opposes changes to Florida law that impose increased requirements for claimants seeking payment for unpaid construction work on bonded public and private projects, including the changes proposed in HB 1247 and SB 1200."

Reasons For Proposed Advocacy:

The existing process for laborers, suppliers, and subcontractors seeking payment for unpaid

materials provided and/or work performed on a construction project is to provide a statutory Notice of Non-Payment to the contractor and bond surety within 90 days of final furnishing work. The purpose is so the contractor and surety knows that a claim for non-payment exists, and the claimant can perfect a bond claim. The requirements imposed by HB 1247 and SB 1200 are duplicative and unnecessary as Sections 255.05(8) and 713.16(4), Fla. Stat. already provide the contractor a mechanism for obtaining the information in the form of a Sworn Statement of Account. Further, the proposed changes in SB 1200 and HB 1247 would require more information to perfect a bond claim than a claim of lien, which clouds title to real property. Increasing the information required to initiate a claim will increase the likelihood of bond claimants failing to perfect claims, thereby leaving a large segment of the construction industry without security for payment. Because a bond replaces a lien as security for payment, such a result would be counter to the purpose of requiring a bond in the first instance. Moreover, the proposed changes in SB 1200 and HB 1247 will inevitably create an abundance of litigation between the contractor and the bond claimants concerning whether the Notice of Non-Payment is enforceable.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

SB 1200 and HB 1247 – Construction Law Committee's Position

I. SUMMARY

The Construction Law Committee requests that the RPPTL Section take a formal position to oppose SB 1200 and HB 1247 in their entirety with the exception of the proposed changes adding contractors to the list of parties that may be awarded attorney fees under section 627.756, Fla. Stat. for claims on performance and payment bonds. The Construction Law Committee supports changes to Florida law to allow contractors to collect reasonable attorney fees for claims on payment and performance bonds; however, it vehemently opposes changes to Florida law that imposes increased requirements for claimants to perfect a payment bond claim for unpaid construction work, including opposing the changes proposed to Sections 255.05 and 713.23, Fla. Stat. contained with HB 1247 and SB 1200.

II. CURRENT SITUATION

The proposed changes and additions to SB 1200 and HB 1247 seek to require significantly greater hurdles for claimants on statutory payment bonds under Sections 255.05, Fla. Stat. and 713.23, Fla. Stat. Currently, a claimant may submit a Notice of Non-Payment on a statutory payment bond (1) without verifying the claim, and (2) without listing numerous items of work performed, contract amount, amounts paid, and amounts due. Prior to the proposed changes in these bills, the purpose of a Notice of Non-Payment to the contractor and surety was to provide notice of and security for a claim of non-payment, much like a claim of lien under Florida's Construction Lien Law, which is also a simple statutory form.

Under Section 255.05(2)(a)2., Fla. Stat., a claimant who is not in privity with the contractor must only provide a Notice of Non-Payment within 90 days of final furnishing of work, labor, or supplies on the project. There is no requirement that the claimant provide any detail on the work performed or unperformed. The only exception is retainage, which must be set forth separately in the Notice.

Under Section713.23(1)(d), Fla. Stat. a claimant perfects its payment bond rights in the same way as under 255.05(2)(a)2., Fla. Stat., but does not have to specific set out retainage being withheld. Section 713.23(1)(d), Fla. Stat. does, however, provide a form of Notice of Non-Payment in the following form:

NOTICE OF NONPAYMENT

To (name of contractor and address)

(name of surety and address)

The undersigned notifies you that he or she has furnished (describe labor, services, or materials) for the improvement of the real property identified as (property description) . The amount now due and unpaid is $.

(signature and address of lienor)

Additionally, in Sections 255.05(8) and 713.23(16)(4), Fla. Stat. already provide a statutory procedure for obtaining the information that SB 1200 and HB 1247 want to add into Sections 255.05(2)(a)2. and 713.23(1)(d), Fla. Stat. That procedure is called a Sworn Statement of Account and it carries with it significant penalties for failure to provide the information, including the loss of lien or bond rights.

III. EFFECT OF PROPOSED CHANGES

A. Changes to Section 255.05, Fla. Stat.

a. Primarily, the proposed changes to 255.05, Fla. Stat. in both SB 1200 and HB 1247 will require that a Notice of Non-Payment on a statutory payment bond on public works project list the following:

- **i.** (a) the nature of the labor or services performed;
- **ii.** (b) the materials furnished;
- **iii.** (c) the materials to be furnished, if known;
- **iv.** (d) the amount paid on account to date;
- **v.** (e) the amount due; and
- **vi.** (f) the amount to become due.

b. If the claimant negligently includes wrong information in the Notice of Non-Payment, it does not operate to defeat a valid bond claim **so long as** the information does not prejudice the contractor. Any gross negligence or willful overstatement will be grounds to defeat the bond claim, including any information that was negligently included or not included.

c. First, the proposed requirements to be set forth in the Notice of Non-Payment are akin to requiring a claimant to submit a Sworn Statement of Account pursuant to Section 255.05(8), Fla. Stat. **The procedure for seeking a Sworn Statement of Account exists. The proposed changes would be duplicative and unnecessary**. This is significant because if the claimant does not comply with each item required in the proposed requirements, then it could be grounds to attack the validity of the bond claim. The proposed requirements will make it vastly more difficult for a claimant to perfect a bond claim. Indeed, the proposed requirements will make submitting a payment bond claim more onerous than a claim of lien, which clouds title to real property.

d. Second, the proposed requirements will inevitably create an abundance of litigation as to whether a Notice of Non-Payment was properly prepared and served in order to perfect a bond claim.

e. Lastly, the contractor's right to argue that it is prejudiced by the negligent inclusion of wrong information will give contractors and surety many new grounds to argue that subcontractors and other claimants have submitted a wrongful claim, refuse to pay the claimant, and promote litigation.

B. Changes to 627.756, Fla. Stat.

a. The Construction Law Committee agrees with the changes proposed to Section 627.756, Fla. Stat. seeking to allow contractors to collect reasonable attorney fees for claims on payment and performance bonds. This would be a welcome change to the current disparate treatment of contractors with respect to attorney fees and bond claims.

C. Changes to 713.23, Fla. Stat.

a. The same analysis provided for Section 255.05, Fla. Stat. above applies equally here, with the exception that the applicable statute for Sworn Statement of Account is located at Section 713.16(4), Fla. Stat.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None that the Construction Law Committee is aware of as bonds are provided because public lands are not subject to lien claims.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The Legislative analysis of both bills is as follows:

Unknown. It is unclear if the additional provisions required in order to serve a notice of nonpayment will have an effect on the private sector. **The new provisions may make it more difficult for a subcontractor to file a notice of non-payment**. Other provisions may make it easier for a prevailing contractor to collect attorney fees in a claim against the surety insurer.

The Construction Law Committee's position is as follows:

The proposed changes to 255.05 and 713.23 will make it significantly more difficult for bond claimants to secure a payment claim on projects where the property is not subject to liens. As a result, many potential bond claimants in the construction industry may be without any secure recourse for payment on jobs. **This could have a considerable impact on the construction**

industry, including many business failures in the construction industry and potentially increasing unemployment.

VI. CONSTITUTIONAL ISSUES

None that the Construction Law Committee is aware of at this time.

VII. OTHER INTERESTED PARTIES

The contractor and surety lobbies will certainly want these bills passed; however, the overall impact of these bills would be adverse to the construction industry as a whole.

VIII. EXPEDITED REVIEW AND VOTE

The Construction Law Committee requests that the RPPTL Section expedite review and vote in opposition to SB 1200 and HB1247 because it is soon to be voted on the floor of the house and is being scheduled for its final committee in the Senate.

By Senator Stargel

22-00242A-19 20191200__

A bill to be entitled

An act relating to construction bonds; amending s. 255.05, F.S.; requiring a notice of nonpayment to be verified; requiring the notice to contain certain statements; requiring a claimant to attach certain documents to a notice of nonpayment; specifying that a claimant who serves a fraudulent notice of nonpayment forfeits his or her rights under a bond; providing that the service of a fraudulent notice of nonpayment is a complete defense to the claimant's claim against the bond and entitles the prevailing party to attorney fees; requiring a notice of nonpayment to be in a prescribed form; amending s. 627.756, F.S.; providing that a provision relating to attorney fees applies to certain suits brought by contractors; deeming contractors to be insureds or beneficiaries in relation to bonds for construction contracts; reenacting s. 627.428, F.S., relating to attorney fees; amending s. 713.23, F.S.; requiring a lienor to serve a verified notice of nonpayment to specified entities during a certain period of time; requiring a notice of nonpayment to contain certain statements; requiring a lienor to attach certain documents to a notice of nonpayment; specifying that a lienor who serves a fraudulent notice of nonpayment forfeits his or her rights under the bond; providing that the service of a fraudulent notice of nonpayment is a complete defense to the lienor's claim against the bond and entitles the prevailing party to attorney

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

fees; requiring a notice of nonpayment to be in a prescribed form; amending s. 713.245, F.S.; providing that a contractor may record a notice identifying a project bond as a conditional payment bond before project commencement to make the duty of a surety to pay lienors coextensive with the contractor's duty to pay; providing that failure to list or record a bond as a conditional payment bond does not convert such a bond into a common law bond or a bond furnished under a specified provision; revising the statement that must be included on a conditional payment bond; providing applicability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (2) of section 255.05, Florida Statutes, is amended to read:

255.05 Bond of contractor constructing public buildings; form; action by claimants.—

(2)(a)1. If a claimant is no longer furnishing labor, services, or materials on a project, a contractor or the contractor's agent or attorney may elect to shorten the time within which an action to enforce any claim against a payment bond must be commenced by recording in the clerk's office a notice in substantially the following form:

NOTICE OF CONTEST OF CLAIM
AGAINST PAYMENT BOND

To: ...(Name and address of claimant)...

You are notified that the undersigned contests your notice of nonpayment, dated ....., ..., and served on the undersigned on ....., ..., and that the time within which you may file suit to enforce your claim is limited to 60 days after the date of service of this notice.

DATED on ....., ...

Signed: ...(Contractor or Attorney)...

The claim of a claimant upon whom such notice is served and who fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of such notice is ~~shall be~~ extinguished automatically. The contractor or the contractor's attorney shall serve a copy of the notice of contest to the claimant at the address shown in the notice of nonpayment or most recent amendment thereto and shall certify to such service on the face of the notice and record the notice.

2. A claimant, except a laborer, who is not in privity with the contractor shall, before commencing or not later than 45 days after commencing to furnish labor, services, or materials for the prosecution of the work, serve ~~furnish~~ the contractor with a written notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment for furnishing his or her labor, services, or materials shall serve a written notice of nonpayment on ~~deliver to~~ the contractor and on ~~to~~ the

surety ~~written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment~~. The notice of nonpayment shall be verified in accordance with s. 92.525 and served during the progress of the work or thereafter but may not be served earlier than 45 days after the first furnishing of labor, services, or materials by the claimant or later than 90 days after the final furnishing of the labor, services, or materials by the claimant or, with respect to rental equipment, ~~not~~ later than 90 days after the date that the rental equipment was last on the job site available for use. The notice of nonpayment must state the nature of the labor or services performed; the nature of the labor or services to be performed, if known; the materials furnished; the materials to be furnished, if known; the amount paid on account to date; the amount due; and the amount to become due, if known. All such information given must be current as of the stated date of the notice. Any notice of nonpayment served by a claimant who is not in privity with the contractor which includes sums for retainage must specify the portion of the amount claimed for retainage. The claimant shall also include, as attachments to the notice of nonpayment, copies of the following documents to substantiate the amount claimed as unpaid in the notice, if such documents exist: the claimant's contract or purchase order and any amendments or change orders directed thereto; invoices, pay requests, bills of lading, delivery receipts, or similar documents, as applicable; and a statement of account reflecting all payments requested and received for the labor, services, or materials. An action for the labor, materials, or supplies may not be instituted against the contractor or the surety unless

the notice to the contractor and notice of nonpayment have been served, if required by this section. Notices required or permitted under this section must ~~shall~~ be served in accordance with s. 713.18. A claimant may not waive in advance his or her right to bring an action under the bond against the surety. In any action brought to enforce a claim against a payment bond under this section, the prevailing party is entitled to recover a reasonable fee for the services of his or her attorney for trial and appeal or for arbitration, in an amount to be determined by the court, which fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions. The time periods for service of a notice of nonpayment or for bringing an action against a contractor or a surety shall be measured from the last day of furnishing labor, services, or materials by the claimant and may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. A claimant who serves a fraudulent notice of nonpayment forfeits his or her rights under the bond. A notice of nonpayment is fraudulent if the claimant has willfully exaggerated the amount due, willfully included a claim for work not performed or materials not furnished for the subject improvement, or prepared the notice with such willful and gross negligence as to amount to a willful exaggeration. However, a minor mistake or error in a notice of nonpayment, or a good faith dispute as to the amount due, does not constitute a willful exaggeration that operates to defeat an otherwise valid claim against the bond. The service of a fraudulent notice of nonpayment is a complete defense to the claimant's claim against the bond, entitling the prevailing

party to attorney fees under this subparagraph. The notice of nonpayment under this subparagraph must be in substantially the following form:

NOTICE OF NONPAYMENT

To: ...(name of contractor and address)...
...(name of surety and address)...
The undersigned claimant notifies you that:

1. Claimant has furnished ...(describe labor, services, or materials)... for the improvement of the real property identified as ...(property description).... The corresponding amount now due and unpaid is $ .....

2. Claimant has been paid on account to date the amount of $ .... for previously furnishing ...(describe labor, service, or materials)... for this improvement.

3. Claimant expects to furnish ...(describe labor, service, or materials)... for this improvement in the future (if known), and the corresponding amount expected to become due is $ .... (if known).

Under penalties of perjury, I declare that I have read the foregoing Notice of Nonpayment and that the facts stated in it are true.

DATED on ....., ...

...(signature and address of claimant)...

Section 2. Subsection (1) of section 627.756, Florida

Statutes, is amended to read:

627.756 Bonds for construction contracts; attorney fees in case of suit.—

(1) Section 627.428 applies to suits brought by owners, contractors, subcontractors, laborers, and materialmen against a surety insurer under payment or performance bonds written by the insurer under the laws of this state to indemnify against pecuniary loss by breach of a building or construction contract. Owners, contractors, subcontractors, laborers, and materialmen shall be deemed to be insureds or beneficiaries for the purposes of this section.

Section 3. Section 627.428, Florida Statutes, is reenacted to read:

627.428 Attorney's fee.—

(1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

(2) As to suits based on claims arising under life insurance policies or annuity contracts, no such attorney's fee shall be allowed if such suit was commenced prior to expiration of 60 days after proof of the claim was duly filed with the insurer.

(3) When so awarded, compensation or fees of the attorney

shall be included in the judgment or decree rendered in the case.

Section 4. Paragraph (d) of subsection (1) of section 713.23, Florida Statutes, is amended to read:

713.23 Payment bond.—

(1)

(d) In addition, a lienor who has not received payment for furnishing his or her labor, services, or materials must ~~is required~~, as a condition precedent to recovery under the bond, ~~to~~ serve a written notice of nonpayment to the contractor and the surety. The notice must be verified in accordance with s. 92.525 and must be served during the progress of the work or thereafter, but may not be served earlier than 45 days after the first furnishing of labor, services, or materials by the lienor or ~~not~~ later than 90 days after the final furnishing of labor, services, or materials by the lienor, or, with respect to rental equipment, later than 90 days after the date the rental equipment was last on the job site and available for use. The notice of nonpayment must state the nature of the labor or services performed; the nature of the labor or services to be performed, if known; the materials furnished; the materials to be furnished, if known; the amount paid on account to date; the amount due; and the amount to become due, if known. All such information given must be current as of the stated date of the notice. A notice of nonpayment that includes sums for retainage must specify the portion of the amount claimed for retainage. The lienor must also include, as attachments to the notice of nonpayment, copies of the following documents to substantiate the amount claimed as unpaid in the notice, if such documents

exist: the lienor's contract or purchase order and any amendments or change orders directed thereto; invoices, pay requests, bills of lading, delivery receipts, or similar documents, as applicable; and a statement of account reflecting all payments requested and received for the labor, services, or materials. The required~~. A written~~ notice satisfies this condition precedent with respect to the payment described in the notice of nonpayment, including unpaid finance charges due under the lienor's contract, and with respect to any other payments which become due to the lienor after the date of the notice of nonpayment. The time period for serving a ~~written~~ notice of nonpayment shall be measured from the last day of furnishing labor, services, or materials by the lienor and may ~~shall~~ not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. The failure of a lienor to receive retainage sums not in excess of 10 percent of the value of labor, services, or materials furnished by the lienor is not considered a nonpayment requiring the service of the notice provided under this paragraph. If the payment bond is not recorded before commencement of construction, the time period for the lienor to serve a notice of nonpayment may at the option of the lienor be calculated from the date specified in this section or the date the lienor is served a copy of the bond. However, the limitation period for commencement of an action on the payment bond as established in paragraph (e) may not be expanded. A lienor who serves a fraudulent notice of nonpayment forfeits his or her rights under the bond. A notice of nonpayment is fraudulent if the lienor has willfully exaggerated

the amount due, willfully included a claim for work not performed or materials not furnished for the subject improvement, or prepared the notice with such willful and gross negligence as to amount to a willful exaggeration. However, a minor mistake or error in a notice of nonpayment, or a good faith dispute as to the amount due, does not constitute a willful exaggeration that operates to defeat an otherwise valid claim against the bond. The service of a fraudulent notice of nonpayment is a complete defense to the lienor's claim against the bond, entitling the prevailing party to attorney fees under s. 713.29. The notice under this paragraph must ~~may~~ be in substantially the following form:

NOTICE OF NONPAYMENT

To ...(name of contractor and address)...
...(name of surety and address)...
The undersigned lienor notifies you that:

1. The lienor ~~he or she~~ has furnished ...(describe labor, services, or materials)...for the improvement of the real property identified as ...(property description).... The corresponding amount now due and unpaid is $.....

2. The lienor has been paid on account to date the amount of $.... for previously furnishing ...(describe labor, services, or materials)... for this improvement.

3. The lienor expects to furnish ...(describe labor, service, or materials)... for this improvement in the future (if known), and the corresponding amount expected to become due is $.... (if known).

Under penalties of perjury, I declare that I have read the foregoing Notice of Nonpayment and that the facts stated in it are true.

DATED on ....., ...

...(signature and address of lienor)...

Section 5. Subsection (1) of section 713.245, Florida Statutes, is amended to read:

713.245 Conditional payment bond.—

(1) Notwithstanding any provisions of ss. 713.23 and 713.24 to the contrary, if the contractor's written contractual obligation to pay lienors is expressly conditioned upon and limited to the payments made by the owner to the contractor, the duty of the surety to pay lienors will be coextensive with the duty of the contractor to pay, if the following provisions are complied with:

(a) The bond is listed in the notice of commencement for the project as a conditional payment bond and is recorded together with the notice of commencement for the project before ~~prior to~~ commencement of the project, or the contractor records a notice identifying the bond for the project as a conditional payment bond, with the bond attached, before commencement of the project. Failure to comply with this paragraph does not convert a conditional payment bond into a common law bond or into a bond furnished under s. 713.23.

(b) The words "conditional payment bond" are contained in the title of the bond at the top of the front page.

(c) The bond contains on the front page, capitalized and in at least 10-point type, the statement: "THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES, OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT."

Section 6. The amendments made by this act to ss. 627.756 and 713.245, Florida Statutes, apply only to payment or performance bonds issued on or after October 1, 2019.

Section 7. This act shall take effect October 1, 2019.

A bill to be entitled

An act relating to construction bonds; amending s. 255.05, F.S.; requiring a notice of nonpayment to be under oath; requiring the notice to contain certain statements; specifying that a claimant who serves a fraudulent notice of nonpayment forfeits his or her rights under a bond; providing that the service of a fraudulent notice of nonpayment is a complete defense to the claimant's claim against the bond; requiring a notice of nonpayment to be in a prescribed form; amending s. 627.756, F.S.; providing that a provision relating to attorney fees applies to certain suits brought by contractors; deeming contractors to be insureds or beneficiaries in relation to bonds for construction contracts; amending s. 627.428, F.S.; revising terminology; amending s. 713.23, F.S.; requiring a notice of nonpayment to be under oath; requiring the notice to contain certain statements; specifying that a lienor who serves a fraudulent notice of nonpayment forfeits his or her rights under a bond; providing that the service of a fraudulent notice of nonpayment is a complete defense to the lienor's claim against the bond; requiring a notice of nonpayment to be in a prescribed form; providing applicability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (2) of section 255.05, Florida Statutes, is amended to read:

255.05 Bond of contractor constructing public buildings; form; action by claimants.—

(2)(a)1. If a claimant is no longer furnishing labor, services, or materials on a project, a contractor or the contractor's agent or attorney may elect to shorten the time within which an action to enforce any claim against a payment bond must be commenced by recording in the clerk's office a notice in substantially the following form:

NOTICE OF CONTEST OF CLAIM
AGAINST PAYMENT BOND

To: ...(Name and address of claimant)...

You are notified that the undersigned contests your notice of nonpayment, dated ....., ..., and served on the undersigned on ....., ..., and that the time within which you may file suit to enforce your claim is limited to 60 days after the date of service of this notice.

DATED on ....., ...

Signed: ...(Contractor or Attorney)...

The claim of a claimant upon whom such notice is served and who fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of such notice is ~~shall be~~ extinguished automatically. The contractor or the contractor's attorney shall serve a copy of the notice of contest to the claimant at the address shown in the notice of nonpayment or most recent amendment thereto and shall certify to such service on the face of the notice and record the notice.

2. A claimant, except a laborer, who is not in privity with the contractor shall, before commencing or not later than 45 days after commencing to furnish labor, services, or materials for the prosecution of the work, serve ~~furnish~~ the contractor with a written notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment for furnishing his or her labor, services, or materials shall serve a written notice of nonpayment on ~~deliver to~~ the contractor and on ~~to~~ the surety ~~written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment~~. The notice of nonpayment shall be under oath and served during the progress of the work or thereafter but may not be served

earlier than 45 days after the first furnishing of labor, services, or materials by the claimant or later than 90 days after the final furnishing of the labor, services, or materials by the claimant or, with respect to rental equipment, ~~not~~ later than 90 days after the date that the rental equipment was last on the job site available for use. The notice of nonpayment must state the nature of the labor or services performed; the materials furnished; the materials to be furnished, if known; the amount paid on account to date; the amount due; and the amount to become due, if known. All such information given must be current as of the stated date of the notice. Any notice of nonpayment served by a claimant who is not in privity with the contractor which includes sums for retainage must specify the portion of the amount claimed for retainage. An action for the labor, services, or materials~~, or supplies~~ may not be instituted against the contractor or the surety unless the notice to the contractor and notice of nonpayment have been served, if required by this section. Notices required or permitted under this section must ~~shall~~ be served in accordance with s. 713.18. A claimant may not waive in advance his or her right to bring an action under the bond against the surety. In any action brought to enforce a claim against a payment bond under this section, the prevailing party is entitled to recover a reasonable fee for the services of his or her attorney for trial and appeal or for arbitration, in an amount to be determined by the court, which

fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions. The time periods for service of a notice of nonpayment or for bringing an action against a contractor or a surety shall be measured from the last day of furnishing labor, services, or materials by the claimant and may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. The negligent inclusion or omission of any information in the notice of nonpayment that has not prejudiced the contractor or surety does not constitute a default that operates to defeat an otherwise valid bond claim. A claimant who serves a fraudulent notice of nonpayment forfeits his or her rights under the bond. A notice of nonpayment is fraudulent if the claimant has willfully exaggerated the amount due, willfully included a claim for work not performed or materials not furnished for the subject improvement, or prepared the notice with such willful and gross negligence as to amount to a willful exaggeration. However, a minor mistake or error in a notice of nonpayment, or a good faith dispute as to the amount due, does not constitute a willful exaggeration that operates to defeat an otherwise valid claim against the bond. The service of a fraudulent notice of nonpayment is a complete defense to the claimant's claim against the bond. The notice of nonpayment under this subparagraph must be in substantially the following form:

NOTICE OF NONPAYMENT

To: ...(name of contractor and address)...
...(name of surety and address)...
The undersigned claimant notifies you that:

1. Claimant has furnished ...(describe labor, services, or materials)... for the improvement of the real property identified as ...(property description)... The corresponding amount now due and unpaid is $ .....

2. Claimant has been paid on account to date the amount of $ .... for previously furnishing ...(describe labor, service, or materials)... for this improvement.

3. Claimant expects to furnish ...(describe labor, service, or materials)...for this improvement in the future (if known), and the corresponding amount expected to become due is $ .... (if known).

I declare that I have read the foregoing Notice of Nonpayment and that the facts stated in it are true to the best of my knowledge and belief.

DATED on ....., ...

...(signature and address of claimant)...

STATE OF FLORIDA

COUNTY OF

The foregoing instrument was sworn to (or affirmed) and subscribed before me this.....day of.....(year)...(name of signatory)....

(Signature of Notary Public-State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known.....OR Produced Identification.....

Type of Identification Produced.....

Section 2. Subsection (1) of section 627.756, Florida Statutes, is amended to read:

627.756 Bonds for construction contracts; attorney fees in case of suit.—

(1) Section 627.428 applies to suits brought by owners, contractors, subcontractors, laborers, and materialmen against a surety insurer under payment or performance bonds written by the insurer under the laws of this state to indemnify against pecuniary loss by breach of a building or construction contract. Owners, contractors, subcontractors, laborers, and materialmen shall be deemed to be insureds or beneficiaries for the purposes of this section.

Section 3. Section 627.428, Florida Statutes, is amended to read:

627.428 Attorney fees ~~Attorney's fee~~.—

(1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

(2) As to suits based on claims arising under life insurance policies or annuity contracts, no such attorney fees ~~attorney's fee~~ shall be allowed if such suit was commenced prior to expiration of 60 days after proof of the claim was duly filed with the insurer.

(3) When so awarded, compensation or fees of the attorney shall be included in the judgment or decree rendered in the case.

Section 4. Paragraph (d) of subsection (1) of section 713.23, Florida Statutes, is amended to read:

713.23 Payment bond.—

(1)

(d) In addition, a lienor who has not received payment for

furnishing his or her labor, services, or materials must ~~is required~~, as a condition precedent to recovery under the bond, ~~to~~ serve a written notice of nonpayment to the contractor and the surety. The notice must be under oath and served during the progress of the work or thereafter, but may not be served ~~not~~ later than 90 days after the final furnishing of labor, services, or materials by the lienor, or, with respect to rental equipment, later than 90 days after the date the rental equipment was on the job site and available for use. The notice of nonpayment must state the nature of the labor or services performed; the nature of the labor or services to be performed, if known; the materials furnished; the materials to be furnished, if known; the amount paid on account to date; the amount due; and the amount to become due, if known. All such information given must be current as of the stated date of the notice. A notice of nonpayment that includes sums for retainage must specify the portion of the amount claimed for retainage. The required~~. A written~~ notice satisfies this condition precedent with respect to the payment described in the notice of nonpayment, including unpaid finance charges due under the lienor's contract, and with respect to any other payments which become due to the lienor after the date of the notice of nonpayment. The time period for serving a ~~written~~ notice of nonpayment shall be measured from the last day of furnishing labor, services, or materials by the lienor and may ~~shall~~ not be

measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. The failure of a lienor to receive retainage sums not in excess of 10 percent of the value of labor, services, or materials furnished by the lienor is not considered a nonpayment requiring the service of the notice provided under this paragraph. If the payment bond is not recorded before commencement of construction, the time period for the lienor to serve a notice of nonpayment may at the option of the lienor be calculated from the date specified in this section or the date the lienor is served a copy of the bond. However, the limitation period for commencement of an action on the payment bond as established in paragraph (e) may not be expanded. The negligent inclusion or omission of any information in the notice of nonpayment that has not prejudiced the contractor or surety does not constitute a default that operates to defeat an otherwise valid bond claim. A lienor who serves a fraudulent notice of nonpayment forfeits his or her rights under the bond. A notice of nonpayment is fraudulent if the lienor has willfully exaggerated the amount due, willfully included a claim for work not performed or materials not furnished for the subject improvement, or prepared the notice with such willful and gross negligence as to amount to a willful exaggeration. However, a minor mistake or error in a notice of nonpayment, or a good faith dispute as to the amount due, does not constitute a

willful exaggeration that operates to defeat an otherwise valid claim against the bond. The service of a fraudulent notice of nonpayment is a complete defense to the lienor's claim against the bond. The notice under this paragraph must ~~may~~ be in substantially the following form:

NOTICE OF NONPAYMENT

To ...(name of contractor and address)...
...(name of surety and address)...
The undersigned notifies you that:

1. The lienor ~~he or she~~ has furnished ...(describe labor, services, or materials)...for the improvement of the real property identified as ...(property description).... The corresponding amount now due and unpaid is $.....

2. The lienor has been paid on account to date the amount of $.... for previously furnishing ...(describe labor, services, or materials)...for this improvement.

3. The lienor expects to furnish ...(describe labor, service, or materials)...for this improvement in the future (if known), and the corresponding amount expected to become due is $ .... (if known).

I declare that I have read the foregoing Notice of Nonpayment and that the facts stated in it are true to the best of my

knowledge and belief.

DATED on ....., ...

...(signature and address of lienor)...

STATE OF FLORIDA
COUNTY OF

The foregoing instrument was sworn to (or affirmed) and subscribed before me this.....day of.....(year)...(name of signatory)....
(Signature of Notary Public-State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known.....OR Produced Identification.....

Type of Identification Produced.....

Section 5. The amendment made by this act to s. 627.756, Florida Statutes, applies only to payment or performance bonds issued on or after October 1, 2019.

Section 6. This act shall take effect October 1, 2019.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By William P. Sklar, Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date: April 8, 2019)

Address 525 Okeechobee Blvd., Suite 1200, West Palm Beach, FL 33401
Telephone: (561)650-0342

Position Type RPPTL Section of The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

S. Katherine Frazier, Hill Ward Henderson, 101 East Kennedy Boulevard, Suite 3700, Tampa, Florida 33602, Telephone: (813) 227-8480, Email: Katherine.frazier@hwhlaw.com
Peter M. Dunbar, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: pdunbar@deanmead.com
Martha J. Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: medenfield@deanmead.com

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following CS/CS/HB 1075 (Bill or PCB #) Anthony Rodriguez (Bill or PCB Sponsor)

Indicate Position Support _____ Oppose __X___ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

"Oppose requiring any insurance policy issued to an individual condominium unit owner to prohibit the right of subrogation against the condominium association, including a change to Fla. Stat. 627.714(4)."

Reasons For Proposed Advocacy:

The elimination of the right of subrogation places an inordinate financial burden on individual condominium unit owners for the negligence of their condominium association. Elimination of the right of subrogation will also likely increase the insurance costs for individual condominium unit owners, along with limiting the ability to obtain insurance. The reduction in the availability of insurance and the resulting increase in cost will impact the affordability of housing.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

Public Interest Law Section of The Florida Bar - Pending

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

BILL TO AMEND TO ELIMINATE THE RIGHT OF SUBROGATION IN INDIVIDUAL CONDOMINIUM UNIT OWNER INSURANCE POLICIES - PROPOSED REVISION TO SECTION 627.714(4)

1. SUMMARY

The proposed bill will serve to eliminate the right of subrogation from individual insurance policies issued to condominium unit owners against the condominium association. "Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right." *West Am. Ins. Co. v. Yellow Cab Co. of Orlando, Inc.,* 495 So.2d 204, 206 (Fla. 5th DCA 1986). Florida recognizes two types of subrogation: conventional or contractual subrogation and equitable or legal subrogation. *Dade County Sch. Bd. v. Radio Station WQBA,* 731 So.2d 638 (Fla.1999). Conventional or contractual subrogation arises from a contract between the parties establishing an agreement that the party paying the debt will have the rights and remedies of the original creditor. Equitable or legal subrogation is not created by a contract but by the legal consequences of the acts and relationships of the parties. *Id.* at 646. The doctrine is based on the policy that no person should benefit by another's loss, and it "may be invoked wherever justice demands its application, irrespective of technical legal rules." *West Am. Ins. Co.,* 495 So.2d at 207." *State Farm Mut. Auto Ins. Co. v. Johnson*, 18 So.3d 1099, 1100 (Fla. 2d DCA 2009). The proposed bill addresses the contractual right of subrogation. The proposed bill does not set out any public policy reasons as to why there is a need to eliminate the right of subrogation and the ability to hold parties liable for their negligence.

2. CURRENT SITUATION

Since 2010, individual insurance policies issued to unit owners have allowed for the right of subrogation against the condominium association. The right of subrogation has allowed individual unit owner insurance policies to seek to recoup losses incurred due to the negligent maintenance of components maintained by the association. There has been no evidence presented to show if allowing individual unit owner insurance policies the right to subrogate against the condominium association has lowered costs for unit owners or increased costs to condominium associations. Anecdotal statements have indicated the costs to insurers has increased due to the number of claims paid out (in excess of 10,000 claims paid out has been asserted without supporting documentation) due to the right of subrogation being allowed to exist in individual unit owner insurance policies.

3. EFFECT OF PROPOSED CHANGE

The proposed change deletes the right individual condominium unit owners have enjoyed for almost a decade. The draft proposal deletes the contractual right of subrogation from individual unit owner insurance policies. The draft will likely increase the costs of insurance to individual unit owners as they are forced to bear the expense for losses incurred. There has been no indication that any of the proposed savings insurance carriers will likely receive due to the elimination of the right of subrogation will be passed on in the form of lower insurance premiums. The elimination of the right of subrogation from individual unit owner insurance policies will likely increase the costs of housing due to insurance carriers requiring higher premiums to offset the potential losses due to the inability to subrogate. The elimination of the right of subrogation could also limit, and in some older building potentially preclude, the ability of individual unit owners t to obtain insurance. With associations starting to adopt covenants requiring owners to maintain insurance, this change has the potential to set up battles between associations and unit owners over the failure to have insurance. The proposed change also effectively prevents a party from being held liable for their negligence, which is contrary to the long-standing policy in Florida of parties being liable for their negligent acts or omissions.

4. ANALYSIS

The following describes the changes being proposed:

a. Section 627.714(4) is amended to provide that any insurance policy issued to an individual unit owner may not provide for the right of subrogation against the condominium association.

5. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a direct fiscal impact on state and local governments. There may be an unknown long-term impact if the increased costs of individual unit owner insurance policies limits the affordability of condominium units.

6. DIRECT IMPACT ON PRIVATE SECTOR

This proposal will require insurance carriers that issue individual unit insurance policies to factor the inability to subrogate against the condominium association, potentially increasing insurance costs to unit owners. Older condominium buildings that are more likely to suffer from a failed common element resulting in a casualty loss may be classified by insurance carriers as “high risk”, resulting in unit owners paying higher premiums. These higher premiums will impact Floridians, potentially making condominium units harder to afford. Insurance carriers that provide master policies for condominium associations will likely see a reduction in claims, but there is nothing to show the reduction in claims will result in savings to condominium associations.

7. CONSTITUTIONAL ISSUES

There are no constitutional issues.

8. OTHER INTERESTED PARTIES

The Florida Association of Realtors, Florida Banker's Association, Public Interest Law Section, Fannie Mae, Institutional Lenders, Insurance Carriers and Agents.

DRAFT OF APRIL 5, 2019

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By William P. Sklar, Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date: April 8, 2019)

Address 525 Okeechobee Blvd., Suite 1200, West Palm Beach, FL 33401
Telephone: (561)650-0342

Position Type RPPTL Section of The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

S. Katherine Frazier, Hill Ward Henderson, 101 East Kennedy Boulevard, Suite 3700, Tampa, Florida 33602, Telephone: (813) 227-8480, Email: Katherine.frazier@hwhlaw.com
Peter M. Dunbar, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: pdunbar@deanmead.com
Martha J. Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: medenfield@deanmead.com

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following CS/CS/HB 1075 (Bill or PCB #) Anthony Rodriguez (Bill or PCB Sponsor)

Indicate Position Support _____ Oppose __X___ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

"Oppose continuing to allow fines in excess of $1,000.00 in homeowner associations to become liens for non-monetary damages against the parcel that can be foreclosed, including a change to Fla. Stat. 720.305(2)."

Reasons For Proposed Advocacy:

The elimination of the ability of homeowner associations to convert fines into assessments for which a claim of lien can be recorded and then foreclosed will close the loophole in the statute and restore the statute to its pre-2010 language. This enhances the protections for lot owners by eliminating the potential foreclosure of their homestead property for non-monetary violations such as paint colors, landscaping, and leaving trash cans out. The change takes fines back to being a coercive punishment to obtain compliance versus a punitive punishment and eliminates the incentive for homeowner associations to view fines as a source of revenue. Additional explanations are provided in the White Paper.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

Public Interest Law Section of The Florida Bar - Pending

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

BILL TO AMEND TO ELIMINATE THE RIGHT OF FINES IN EXCESS OF $1,000 FROM BECOMING LIENS IN HOMEOWNERS ASSOCIATION - PROPOSED REVISION TO SECTION 720.305(2)

1. SUMMARY

The proposed bill contains the continuation of the language in Section 720.305(2), Florida Statutes that allows for fines that are in excess of $1,000.00 to become a lien against the parcel. The change that allowed fines in excess of $1,000.00 to become a lien against a parcel came into effect in 2010. Since 2010, homeowner associations have been able to levy fines against a parcel for violations of the declaration, bylaws or rules of the association by the parcel owner and occupants, licensees or invitees. This change has allowed for homeowner associations to foreclose on parcels for violations such as improper mailbox colors, landscape violations and other non-monetary breaches by parcel owners. There is no limitation to the amount a fine can reach and there are minimal due process protections for parcel owners to prevent abuse by homeowners associations. Many associations use the fining process as a revenue source that is outside the normal budgeting process and as a way to keep assessments artificially low. The deletion of this "loophole" will take fines back to the original intent of being a coercive measure to ensure compliance with the governing documents rather than being a punitive measure.

2. CURRENT SITUATION

Since 2010, homeowner associations have been able to "convert" fines in excess of $1,000.00 into assessments by filing a claim of lien against the parcel. This has led to situations where parcel owners faced foreclosure, with may losing their home in the foreclosure process, due to non-monetary violations such as mailbox color, trash cans, landscaping and mildew/mold on the home. There are numerous instances of associations having fines accruing in excess of $10,000.00 for non-monetary breaches. Fines have now become a significant revenue source for associations and allow associations to artificially keep assessments low by using fine revenue to pay for common expenses. There are limited due process protections for parcel owners during the fining process and challenges to fines once a foreclosure action has been started are often difficult due to the lack of documentation. Many associations have effectively "outsourced" the fining process to their management companies and attorneys, allowing for them to generate fees and revenue by charging costs and attorney's fees to parcel owners.

3. EFFECT OF PROPOSED CHANGE

The proposed change deletes the ability for fines in excess of $1,000.00 to become assessments by removing the ability to lien for fines in excess of $1,000.00. This would restore fines to the status that existed prior to 2010, when fines were a coercive measure to get parcel owners to maintain their parcel rather than becoming a significant revenue source for associations. This change will also severely curtail parcel owners from facing foreclosure and the loss of their home due to non-monetary breaches of the governing documents of the association.

4. ANALYSIS

The following describes the changes being proposed:

a. Section 720.305(2) is amended to remove the ability of fines in excess of $1,000.00 to become liens against parcels and converting fines into assessments.

5. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a direct fiscal impact on state and local governments. There may be an unknown long-term impact due to decreased filing and recording fees from homeowner associations that file liens against parcels for fines in excess of $1,000.00 and then seek to foreclose on those liens for fines.

6. DIRECT IMPACT ON PRIVATE SECTOR

This proposal will require associations to utilize the fining process to bring violating parcel owners into compliance with the governing documents and not as a revenue source. Management companies and some law firms would see a reduction in revenue due to the inability to lien and foreclose fines in excess of $1,000.00. Parcel owners would not face the loss of their home due to a non-monetary violation of the governing documents. The inability to lien for fines in excess of $1,000.00 may indirectly lead to higher assessments against parcel owners since associations would no longer have the revenue source generated by the fining process.

7. CONSTITUTIONAL ISSUES

There is a potential constitutional issue if the statute is applied retroactively to pending fines that have become liens or are in the foreclosure process.

8. OTHER INTERESTED PARTIES

The Public Interest Law Section.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By William P. Sklar, Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date: April 8, 2019)

Address 525 Okeechobee Blvd., Suite 1200, West Palm Beach, FL 33401
Telephone: (561)650-0342

Position Type RPPTL Section of The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

S. Katherine Frazier, Hill Ward Henderson, 101 East Kennedy Boulevard, Suite 3700, Tampa, Florida 33602, Telephone: (813) 227-8480, Email: Katherine.frazier@hwhlaw.com
Peter M. Dunbar, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: pdunbar@deanmead.com
Martha J. Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: medenfield@deanmead.com

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following CS/CS/HB 1075 (Bill or PCB #) Anthony Rodriguez (Bill or PCB Sponsor)

Indicate Position Support _____ Oppose __X___ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

"Oppose HB 1075 in its entirety for requiring any insurance policy issued to an individual condominium unit owner to prohibit the right of subrogation against the condominium association and continuing to allow fines in excess of $1,000.00 in homeowner associations to become liens for non-monetary damages against the parcel that can be foreclosed, including changes to Fla. Stat. 627.714(4) and 720.305(2)."

Reasons For Proposed Advocacy:

The elimination of the right of subrogation places an inordinate financial burden on individual condominium unit owners for the negligence of their condominium association. Elimination of the right of subrogation will increase the insurance costs for individual condominium unit owners, while limiting the ability to obtain insurance. The reduction in the availability of insurance and the resulting increase in cost will impact the affordability of housing. The continuation of the ability of homeowner associations to convert fines into assessments for which a claim of lien can be recorded and then foreclosed retains the loophole in the statute allowing fines to become assessments. This places lot owners at risk for the foreclosure of their homestead

property for non-monetary violations such as paint colors, landscaping, and leaving trash cans out. . Additional explanations are provided in the White Paper.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

Public Interest Law Section of The Florida Bar - Pending

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

RPPTL 2019-2020
Executive Council Meeting Schedule
Rob Freedman's Year

Limit 1 reservation per registrant, additional rooms will be approved upon special request. Each hotel has a 30-day cancellation policy on all individual room reservations.

Date	Location
July 24 – July 28, 2019	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Room Rate (Deluxe Room – King): $225 Premium Room Rate: $280
November 6 – November 10, 2019	**Executive Council & Committee Meetings** JW Marriott Marquis Miami Miami, FL Standard Guest Room Rate: $269 (single/double)
January 29 – February 2, 2020	**Executive Council & Committee Meetings** Grand Hyatt Tampa Bay Tampa, FL Standard Guest Room Rate: $225 (single/double)
April 1 – April 5, 2020	**Out of State Executive Council Meeting** **Hotel Okura Amsterdam** Amsterdam, The Netherlands Room Rates: Superior Guest Room (2 twins/1 king): €295 single, €320 double (inclusive of breakfast) Executive Junior Suite: €385 single, €420 double (inclusive of breakfast)
May 28 – May 31, 2020	**Executive Council Meeting & Convention** Loews Sapphire Falls Orlando, FL Standard Guest Room Rate (two queens): $209 (single/double), $234 (triple), $259 (quad)

RPPTL Financial Summary from Separate Budgets

2018-2019 [July 1 - April 30] YEAR

TO DATE REPORT

General Budget	YTD
Revenue	$ 1,494,035
Expenses	$ 1,017,029
Net:	$ 477,006

Attorney Loan Officer	YTD
Revenue	$ 15,250
Expenses	$ 43,525
Net:	$ (28,275)

CLI	YTD
Revenue	$ 318,284
Expenses	$ 73,448
Net:	$ 244,836

Trust Officer Conference	
Revenue	$ 278,444
Expenses	$ 175,303
Net:	$ 103,141

Legislative Update	
Revenue	$ 49,769
Expenses	$ 79,593
Net:	$ (29,824)

Convention	
Revenue	$ 73,366
Expenses	$ 4,739
Net:	$ 68,627

Roll-up Summary (Total)		
Revenue:		$ 2,229,148
Expenses		$ 1,393,637
Net Operations		$ 835,511

Beginning Fund Balance:	$ 1,823,263
Current Fund Balance (YTD):	$ 2,658,774
Projected June 2019 Fund Balance	$ 1,678,493

1 This report is based on the tentative unaudited detail statement of operations dated 04/30/19 (prepared 05/24/19)

Date of Seminar	Course Number	*Title*	Location	Program Chair
6/11/2019	3294	*RPPTL Audio Webcast: FR/Bar Residential Contract: Divine before you sign*	Audio Webcast	Kris Fernandez
6/14/2019	2982	*Estate and Trust Planning and Wealth Preservation*	Renaissance Fort Lauderdale Cruise Port Hotel	Rob Lancaster / Brian Malec
6/18/2019	3196	*RPPTL Audio Webcast: Charitable Pledges in an Estate*	Audio Webcast	John Moran
6/19/2019	3193	*RPPTL Audio Webcast: Operating Multi, Phased or Series Condominium Developments – What You Need to Know*	Audio Webcast	Steve Mezer/Peggy Rolando
6/20/2019	3197	*RPPTL Audio Webcast: Recent Developments in Planning for IRAs, Insurance & Employee Benefits*	Audio Webcast	John Moran/Al Stashis
07/26/2019	3240	https://www.eventbrite.com/e/39th-annual-rpptl-legislative-update-tickets-55872575377	The Breakers, Palm Beach	Tom Karr/Stacey Kalmanson
08/22/2019	3274	Attorney Trust Officer Conference	The Breakers, Palm Beach	Tattiana Stahl

INITIAL 2019 POST SESSION REPORT

NUMERICAL INDEX SUMMARY OF 2019 LEGISLATIVE ISSUES

Katherine Frazier and Jon Scuderi, Legislative Committee Co-Chairs
and
Peter Dunbar, Martha Edenfield, Cari Roth, Brittany Finkbeiner,
Michael Dobson and French Brown
RPPTL Legislative Counsel

May 24, 2019

The *initial* post-Session report follows below. The Section's initiatives and bills where the Section provided technical assistance appear in the first part of the summary. The part of the report following the list of Section initiatives includes other items of interest that passed, as well as the items of interest that did not pass.

The Governor has not taken final action on all the measures, but where he has the appropriate Session Law number follows the summary of the bill in **bold type**. The full texts of each enrolled bill, as well as applicable legislative staff reports, are available on the legislative web sites (www.flsenate.gov; www.myfloridahouse.com; and www.leg.state.fl.us.). A summary of each measure that passed appears below by category in numerical bill order.

I. SECTION INITIATIVES AND TECHNICAL ASSISTANCE

Lis Pendens: CS/CS/HB 91 by Representative Altman and Senator Powell contains the Section's initiative amending s. 48.23 to clarify that a valid recorded notice of lis pendens remains in effect through the recording of an instrument transferring title unless it has expired, been withdrawn or discharged. CS/CS/HB 91 has passed the Legislature and is pending action by the Governor. **(Chapter 2019-____, *Laws of Florida*.)**

Real Property Legal Descriptions: CS/CS/CS/SB 248 by Senator Hooper directs that the legal description, home address and any other identifying information of law enforcement personnel and civilian personnel employed by a law enforcement agency to be redacted from the public records by the Clerk. The legislation has been amended to address the Section's concerns, and the information can be released upon written consent of the protected individual. **(Chapter 2019-12, *Laws of Florida*.)**

Electronic Legal Documents: CS/CS/HB 409 by Representative Perez is the legislation authorizing remote notarization and prescribing online procedures for implementing the remote authority. The final version of the legislation was amended to provide protections for vulnerable adults consistent with the Section's concerns. CS/CS/HB 409 has passed the Legislature and is pending action by the Governor. **(Chapter 2019-____, *Laws of Florida*.)**

Open and Expired Permits: CS/CS/HB 447 by Representative Diamond and Senator Perry is the legislation containing the Section's initiative to provide procedures for the closing of open permits and satisfying any applicable permit requirements of said permits. Among its provisions, the legislation authorizes counties to provide notice of expiring permits; it authorizes a one-time search fee; and provides for closing of permits after 6 years in the absence of a final inspection. CS/CS/HB 447 has passed the Legislature and is pending action by the Governor. **(Chapter 2019-____, *Laws of Florida*.)**

Real Property--Right of Entry: CS/CS/HB 767 by Representative Robinson and Senator Simmons contains the Section's proposed revisions that add limitations on the right of entry by any local government, water management district or other state agency to explore for mineral rights on small parcels of property consisting of less than 20 acres. **(Chapter 2019-____, *Laws of Florida*.)**

Business Organizations: CS/CS/HB 1009 by Representative Byrd is the Business Law Section initiative that revises the chapters governing Florida corporations, Florida limited liability companies, Florida corporations not-for-profit, and Florida limited partnerships. The Section provided technical assistance on the initiative, and the final version is consistent with the Section's assistance. Among the provisions in the 527-page bill the legislation:

a.) Modernizes the applicable chapters and makes technical updates that include clarifying definitions;

b.) Provides that electronic notice may be authorized in the articles of incorporation and that notices must be provided in English unless otherwise agreed to;
c.) Revises language relating to records inspection and the regulation of registered agents and registered offices;
d.) Provides revised provisions relating to corporate mergers, conversions, domestication dissolution, and derivative actions;
e.) Permits remote participation at shareholders meetings and electronic transmission of information to directors; and
f.) Revises provisions indemnification and the fiduciary standards for officers and directors.

CS/CS/HB 1009 has passed the Legislature and is pending action by the Governor. **(Chapter 2019-___, *Laws of Florida*.)**

Family Trust Companies: HB 7033 by the House Oversight Subcommittee is a Section-supported initiative that removes the scheduled repeal of the public records exemption in chapter 662 for Family Trust Companies. HB 7033 has passed the Legislature and is pending action by the Governor. **(Chapter 2019-____, *Laws of Florida.*)**

Inter-Spousal Transfers: CS/HB 7123 by the House Ways and Means Committee and Representative Avila is the session's annual tax package. Among its provisions, the legislation eliminates the 1-year limitation on the Section's 2018 initiative exempting inter-spousal transfers of homestead property from doc stamp charges; it reduces the sales tax on commercial leases to 5.5 percent; it authorizes "sales tax holidays" for back-to-school supplies and disaster preparedness; and it provides for the refund of sales tax paid for fencing replacements damaged by Hurricane Michael. **(Chapter 2019-42, *Laws of Florida*.)**

II. INITIATIVES OF INTEREST

Residential Properties—Vegetable Gardens: CS/SB 82 by Senator Bradley will prohibit local governments from regulating vegetable gardens on residential properties, and it defines "vegetable gardens" to include growing plots that include herbs, fruits, flowers or vegetables for human ingestion. CS/SB 82 has passed the Legislature and is pending action by the Governor. **(Chapter 2019-____, *Laws of Florida*.)**

Motor Vehicle Title Transfer: CS/CS/HB 87 by Representative Ponder revises the procedures for motor vehicle registration, and among its provisions it provides that if a surviving spouse does not present a death certificate for the transfer of a vehicle, the Department of Highway Safety and Motor Vehicles may verify the necessary information through the electronic file of death records maintained by the Department of Health. **(Chapter 2019-____, *Laws of Florida*.)**

Dependent Children: CS/SB 124 by Senator Bean specifies the venue for the appointment of a guardian for a dependent child or dependent young adult shall be the

county where the child or young adult resides. The legislation also provides that a child under the jurisdiction of a dependency court may receive and consider any information provided by the Guardian Ad Litem Program or the child's attorney ad litem. The Section has offered technical assistance for portions of the legislation. **(Chapter 2019-10, *Laws of Florida*.)**

Lost or Abandoned Property: SB 180 by Stargel provides specific exemptions from Florida's unclaimed property act for lost or abandoned property that has been found on the premises of a theme park, entertainment complex, public lodging establishment, or food service establishment. For the exempt establishments, the unclaimed property that has not been claimed by the owner within 30 days cannot be sold, but may be disposed of or donated to a charitable institution that is exempt form federal income tax under s. 501 (c) (3) of the IRS Code. **(Chapter 2019-6, *Laws of Florida.*)**

Impact Fees: CS/HB 207 by Representative Donald provides revised conditions and restrictions on the ability of a local government to impose impact fees. Among the bills provisions, a local government cannot require payment of a fee prior to issuance of a building permit; the impact must be reasonably related to impact of the proposed new construction; the expenditure of the impact fee must be reasonably related to benefits. CS/HB 207 has passed the Legislature and is pending action by the Governor. **(Chapter 2019-___, *Laws of Florida*.)**

County Court Jurisdiction: CS/CS/HB 337 by Representative Leek makes a variety of revisions to the state court system, and among its provision are staged increases in the jurisdictional limits for county courts. Effective January 1, 2020, the jurisdictional sum will be increased to $30,000; and effective January 1, 2023, the jurisdictional sum will be increased to $50,000. **(Chapter 2019-___, *Laws of Florida*.)**

Community Development Districts: CS/CS/HB 437 by Representative Buchanan provides that a petition for creation of a new CDD of less than 2,500 acres may identify future contiguous lands to be included within the CDD, and it provides the procedures for such inclusion. The legislation also authorizes a CDD to merge with another type of special district created by special act or by filing a petition for establishment of a new CDD. **(Chapter 2019-___, *Laws of Florida*.)**

Wetland Mitigation: CS/HB 521 by Representative McClure modifies s. 373.4135 to permit a local government to allow a permittee to provide restoration or enhancement of lands owned by a local government when mitigation bank credits are otherwise not available. CS/HB 521 has passed the Legislature and is pending action by the Governor. **(Chapter 2019-___, *Laws of Florida*.)**

Military Base Buffering Easements: CS/CS/SB 620 by Senator Broxson enacts a series of military-friendly initiatives, and among its provisions, the legislation provides that easements buffering a military installation created under s. 288.980 (2) (b) survive a tax deed sale. **(Chapter 2019-___, *Laws of Florida*.)**

Qualified Blind Trusts—Repealed: SB 702 by Senator Lee repealed a provision in the Code of Conduct for Public Officers and Employees that provided a format for blind trusts that could be used by public officials in lieu of the statutory financial disclosure requirements. The provision is now no longer available for that purpose. **(Chapter 2019-___, *Laws of Florida*.)**

Attorney Fees and Costs: CS/CS/CS/HB 829 by Representative Sabatini provides for the award of prevailing party attorney fees and costs in a proceeding that successfully challenges the adoption or enforcement of a local county or municipal ordinance on the grounds that the subject matter is expressly preempted by the state constitution or state law. **(Chapter 2019-___, *Laws of Florida*.)**

Property Rights: CS/HB 1159 by Representative La Rosa creates a generic Property Owner Bill of Rights to be posted on the website of the property appraiser's office. The Property Owner Bill of Rights offers a non-exclusive outline of rights and protections for property owners. The legislation also preempts local tree ordinances and permits tree trimming and tree removal by a residential property owner who obtains an arborist's or landscape architect's certificate that the tree presents a danger to persons or property. **(Chapter 2019-___, *Laws of Florida*.)**

Construction Bonds: CS/CS/HB 1247 by Representative Perez revises the claims procedures under construction bonds. Among its provisions, the legislation requires the notice of nonpayment to be provided under oath; it provides a prescribed form for the notice of nonpayment; it provides that a person filing a fraudulent notice forfeits his or her rights under the bond; and it provides that the service of fraudulent notice of nonpayment is a complete defense to the lienor's claim against the bond. **(Chapter 2019-___, *Laws of Florida*.)**

Comprehensive Plan Amendments: HB 6017 by Representative Duggan removes the acreage limitation that applies to small-scale amendments to a local government comprehensive plan. HB 6017 has passed the Legislature and is pending action by the Governor. **(Chapter 2019-___, *Laws of Florida*.)**

Depositions: CS/SB 7006 by the Senate Judiciary Committee enacts the Uniform Interstate Deposition Act. Among the provision in the Act are requirements for a party to submit a foreign subpoena to a clerk in this state; for the clerk to promptly issue a subpoena for whom the foreign subpoena is directed; and that the subpoena be served in compliance with Florida law. **(Chapter 2019-13, *Laws of Florida*.)**

Vaping: CS/SB 7012 by Senate Committee on Innovation, Industry and Technology implements the recent constitutional amendment by adding vaping to the Florida Clean Indoor Air Act and imposing the same restrictions on vaping in indoor work places that currently apply to smoking. **(Chapter 2019-14, *Laws of Florida*.)**

Assignment of Benefits: CS/CS/HB 7065 by the House Judiciary Committee creates a new regulatory format for the assignment of insurance benefits under a property

insurance contract. Among its provisions, the legislation provides that any assignment must be in writing; its provides for mandatory content and warning notices; it eliminates any add-on fees; it permits an insurer to restrict the assignment of benefits; and it provides for prevailing party attorney's fees when a dispute moves into court. CS/CS/HB 7065 has passed the Legislature and is pending action by the Governor. **(Chapter 2019-57, *Laws of Florida*.)**

Community Development: CS/CS/HB 7103 by the House Judiciary Committee and Representative Fischer revises the permitting process for community development and housing projects. Among the provisions, the legislation imposes timely review standards on development applications; it authorizes ordinances providing incentives for affordable housing that require set-asides or contributions to a housing fund; it provides that impact fees cannot be required before issuance of a building permit; and it provides that impact fees must have a rational nexus to the impact of the development. The legislation also contains provisions that extend the deadline for the retrofit of fire sprinklers in residential condominiums in excess of 75 feet until January 1, 2024, and it exempts balconies from the sprinkler requirement. CS/CS/HB 7103 has passed the Legislature and is pending action by the Governor. **(Chapter 2019-___, *Laws of Florida*.)**

III. INITIATIVES OF INTEREST THAT FAILED

POLST: SB 206 by Senator Brandes authorizes a doctor to withhold life sustaining treatment to a patient (POLST). The Section has a standing position against this version of the POLST legislation without sufficient procedural safeguards that currently were not included in SB 206. This initiative died in committee upon adjournment of the 2019 Session.

Condominiums: CS/CS/SB 610 by Senator Pizzo and HB 1259 by Representative Fernandez are companion bills that created new criminal penalties for officers and directors of condominiums who fail to create or maintain association records or refused to release or produce association records. The legislation also revised the ban on the use of debit cards by officers and directors of an association under limited circumstances; and the bill created a new s. 718.129 defining fraudulent voting activities related to association elections and provided criminal penalties for the activities. This initiative died in committee upon adjournment of the 2019 Session.

Guardianship: HB 677 by Representative Duggan and SB 1168 by Senator Gruters are companion bills that would have created a new Part IX of chapter 744 to be known as the Florida Guardianship and Protective Proceedings Jurisdiction Act. The Act was intended to avoid jurisdictional competition and conflicts with other states in matters of guardianship. The Section opposed the legislation in its current form. This initiative died in committee upon adjournment of the 2019 Session.

Surviving Successor—Payments: CS/HB 837 by Representative Burton and CS/SB 1184 by Senator Baxley were companion bills that permitted a financial institution to make payment to a surviving successor from a qualified depository account or certificate of

deposit without a pay-on-death or survivor designation. CS/HB 837 was amended to address the Section's concerns and passed the House, but was pending in Messages in the Senate when the Legislature adjourned.

Community Associations: CS/CS/HB 1075 by Representative A. Rodriguez and CS/SB 1362 by Senator Gruters are companion bills containing the recommendations from CAI. Among the provisions in both bills, language initially contained the Section's initiatives to replace arbitration with pre-suit mediation and to define cooperative unit to be an interest in real property. The arbitration provision was amended out of both bills. The initiative also modified records maintenance obligations for condominium associations; it revised insurance coverage requirements for condominiums; and it made conforming changes to the Cooperative and Homeowners Association Acts. The legislation also contained two provisions opposed by the Section, and the Section opposed the bill while these provisions remain. The first is current law allowing fines to become a lien on parcel in an HOA, and the other provision eliminated rights of subrogation against a master insurance policy in a condominium. This initiative died in committee upon adjournment of the 2019 Session.

Guardianship: CS/HB 1085 by Representative Geller and SB 1338 by Senator Rodriguez are companion bills that contain the *Rothman* Fix, provisions relating to venue for minor guardianship proceedings and the confidentiality of guardianship records/comma fix. SB 1338 passed the Senate, but was pending in Messages in the House when the Legislature adjourned and did not pass.

Probate: CS/SB 1154 by Senator Berman and CS/HB 1307 by Representative Driskell are companion bills and contained 4 of the Probate Division's initiatives including (1) clarification that coins and bullion are tangible personal property; (2) clarification that formal notice under the Probate Code does not confer *in personam* jurisdiction; (3) expansion of the categories of conflicts of interest for personal representatives; and (4) codification of client disclosure requirements for fiduciaries. CS/HB 1307 passed the House, but was pending in Messages in the Senate when the Legislature adjourned and did not pass.

Bank Property of Decease Accountholders: CS/SB 1144 by Senator Baxley would have authorized financial institutions to disburse funds of deceased account holders to family members of the deceased depositor. The Section opposed the bill, and the legislation died in committee when the Legislature adjourned.

Attorney's Fees—Probate: HB 1195 by Representative Overdorf and SB 1276 by Senator Bean are companion bills that would have required a fee disclosure statement signed by a person administering an estate and repealed the statutory fee structure for services rendered in a formal estate administration. The legislation made similar revisions for attorney's fees for a trustee. The Section opposes the legislation. This initiative died in committee upon adjournment of the 2019 Session.

****

Ethics Vignette
June 1, 2019

Facts

Larry the Lawyer is a real estate attorney who just finished representing Betty the Buyer at the closing of the sale of her house. Betty is now purchasing a new house from Sal the Seller, a real estate developer. Larry is handling the closing and during such time, the parties question who is Larry the Lawyer's client, what duties and obligations does Larry owe to such client and to the other party to the transaction.

4 PREAMBLE - A LAWYER'S RESPONSIBILITIES

PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., rules 4-1.12 and 4-2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See rule 4-8.4.

In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or by law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct and in substantive and procedural law. A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Zealous advocacy is not inconsistent with justice. Moreover, unless violations of law or injury to another or another's property is involved, preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and heed their legal obligations, when they know their communications will be private.

In the practice of law, conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal profession. The Rules of Professional Conduct often prescribe terms for resolving these conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has

been granted powers of self-government. Self-regulation helps maintain the legal profession's independence from undue government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility.

Thus, every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

Scope:

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms of "must," "must not," or "may not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of that discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative. Thus, comments, even when they use the term "should," do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law. The comments are sometimes used to alert lawyers to their responsibilities under other law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, for example confidentiality under rule 4-1.6, which attach when the lawyer agrees to consider whether a client-lawyer relationship will be established. See rule 4-1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating a substantive legal duty. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of a breach of the applicable standard of conduct.

Terminology:

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "consultation" denotes communication of information reasonably

sufficient to permit the client to appreciate the significance of the matter in question.

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See "informed consent" below. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time.

"Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in the legal department of a corporation or other organization.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Lawyer" denotes a person who is a member of The Florida Bar or otherwise authorized to practice in any court of the State of Florida.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is

obligated to protect under these rules or other law.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

"Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in writing

If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time.

Firm

Whether 2 or more lawyers constitute a firm above can depend on the specific facts. For example, 2 practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by 1 lawyer is attributed to another.

With respect to the law department of an organization, including the government,

there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

Fraud

When used in these rules, the terms "fraud" or "fraudulent" refer to conduct that has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed consent

Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., rules 4-1.2(c), 4-1.6(a), 4-1.7(b), and 4-1.18. The communication necessary to obtain consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type

involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, these persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules state that a person's consent be confirmed in writing. See, e.g., rule 4-1.7(b). For a definition of "writing" and "confirmed in writing," see terminology above. Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., rule 4-1.8(a). For a definition of "signed," see terminology above.

Screened

This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under rules 4-1.11, 4-1.12, or 4-1.18.

The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake these procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening.

[Revised: 10/01/2015]

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with the Rules Regulating The Florida Bar; or

(6) to detect and resolve conflicts of interest between lawyers in different firms arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal confidential information, a lawyer may first exhaust all appellate remedies.

(e) Inadvertent Disclosure of Information. A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to,

information relating to the representation of a client.

(f) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 4-1.9(c) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and rules 4-1.8(b) and 4-1.9(b) for the lawyer's duties with respect to the use of confidential information to the disadvantage of clients and former clients.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See terminology for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based on experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose confidential information except as authorized or required by the Rules Regulating The Florida Bar or by law. However, none of the foregoing limits the

requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure adverse to client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by the client is encouraged, several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In this situation the lawyer has not violated rule 4-1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer must reveal information in order to prevent these consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

Subdivision (b)(2) contemplates past acts on the part of a client that may result in present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule 4-1.6(b)(2) would now require the lawyer to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8(b) nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b).

Dispute concerning lawyer's conduct

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure this advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, subdivision (c)(5) permits this disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary

to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of complicity has been made. Subdivision (c) does not require the lawyer to await the commencement of an action or proceeding that charges complicity, so that the defense may be established by responding directly to a third party who has made the assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. A charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subdivision (c) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures otherwise required or authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against a supersession.

Detection of Conflicts of Interest

Subdivision (c)(6) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, for example, when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See comment to rule 4-1.17. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. The disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, subdivision (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these rules.

Any information disclosed under this subdivision may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. This subdivision does not restrict the use of information acquired by means independent of any disclosure under this subdivision. This subdivision also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, for example, when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

Acting Competently to Preserve Confidentiality

Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See rules 4-1.1, 4-5.1 and 4-5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of

a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forgo security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, for example state and federal laws that govern data privacy or that impose notification requirements on the loss of, or unauthorized access to, electronic information, is beyond the scope of these rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see the comment to rule 4-5.3.

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule. Whether a lawyer may be required to take additional steps in order to comply with other law, for example state and federal laws that govern data privacy, is beyond the scope of these rules.

Former client

The duty of confidentiality continues after the client-lawyer relationship has terminated. See rule 4-1.9 for the prohibition against using such information to the disadvantage of the former client.

[Revised: 10/01/2015]

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b)Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.

(d) Lawyers Related by Blood, Adoption, or Marriage. A lawyer related by blood, adoption, or marriage to another lawyer as parent, child, sibling, or spouse must not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except with the client's informed consent, confirmed in writing or clearly stated on the record at a hearing.

(e)Representation of Insureds. Upon undertaking the representation of an insured

client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Comment

Loyalty to a client

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. For specific rules regarding certain conflicts of interest, see rule 4-1.8. For former client conflicts of interest, see rule 4-1.9. For conflicts of interest involving prospective clients, see rule 4-1.18. For definitions of "informed consent" and "confirmed in writing," see terminology.

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 4-1.3 and scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a)(1) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a)(1) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially

interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and consent

A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (a)(2) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in litigation

Subdivision (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subdivisions (a), (b), and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the

risk of adverse effect is minimal and the requirements of subdivisions (b) and (c) are met.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of person paying for a lawyer's service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other conflict situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the 2 roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict charged by an opposing party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See scope.

Family relationships between lawyers

Rule 4-1.7(d) applies to related lawyers who are in different firms. Related lawyers in the same firm are also governed by rules 4-1.9 and 4-1.10. The disqualification stated in rule 4-1.7(d) is personal and is not imputed to members of firms with whom the lawyers are associated.

The purpose of Rule 4-1.7(d) is to prohibit representation of adverse interests, unless

informed consent is given by the client, by a lawyer related to another lawyer by blood, adoption, or marriage as a parent, child, sibling, or spouse so as to include those with biological or adopted children and within relations by marriage those who would be considered in-laws and stepchildren and stepparents.

Representation of insureds

The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.

Consent confirmed in writing or stated on the record at a hearing

Subdivision (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing or clearly stated on the record at a hearing. With regard to being confirmed in writing, such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See terminology. If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time afterwards. See terminology. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

[Revised: 06/01/2014]

RULE 4-1.9 CONFLICT OF INTEREST; FORMER CLIENT

RULE 4-1.9 CONFLICT OF INTEREST; FORMER CLIENT

A lawyer who has formerly represented a client in a matter must not afterwards:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;

(b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or

(c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Comment

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this rule. The principles in rule 4-1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of rule 4-1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Matters are "substantially related" for purposes of this rule if they involve the same

transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client. For example, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

Lawyers owe confidentiality obligations to former clients, and thus information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client without the former client's consent. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Information that has been widely disseminated by the media to the public, or that typically would be obtained by any reasonably prudent lawyer who had never represented the former client, should be considered generally known and ordinarily will not be disqualifying. The essential question is whether, but for having represented the former client, the lawyer would know or discover the information.

Information acquired in a prior representation may have been rendered obsolete by the passage of time. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

The provisions of this rule are for the protection of clients and can be waived if the former client gives informed consent. See terminology.

With regard to an opposing party’s raising a question of conflict of interest, see comment to rule 4-1.7. With regard to disqualification of a firm with which a lawyer is associated, see rule 4-1.10.

[Revised: 06/01/2014]

RULE 4-4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

RULE 4-4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

Comment

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see rule 4-8.4.

Statements of fact

This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or fraud by client

Under rule 4-1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Subdivision (b) states a

specific application of the principle set forth in rule 4-1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under subdivision (b) the lawyer is required to do so, unless the disclosure is prohibited by rule 4-1.6.

[Revised: 05/22/2006]

RULE 4-4.3 DEALING WITH UNREPRESENTED PERSONS

RULE 4-4.3 DEALING WITH UNREPRESENTED PERSONS

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

Comment

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see rule 4-1.13(d).

This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

[Revised: 05/22/2006]

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 65-34
June 15, 1965

A seller's attorney who prepares all of the documents used in a real estate transaction should not present a statement to the buyer for a portion of the attorney's fee for these services when the buyer did not employ the attorney or agree to pay him a fee.

Canons: 6, 12

Chairman Smith stated the opinion of the committee:

A member of The Florida Bar poses the following inquiry for our response. A is selling real estate to B. A portion of the consideration is to be financed by a purchase money mortgage to be given to A by B. A insists that his attorney prepare all legal instruments involved. B has an attorney, however, and this attorney examines the title and represents B at the closing. A's attorney prepares the contract for sale, the deed, the promissory note, the mortgage and the closing statement. There is no dispute as to the type of contract, deed, note and mortgage to be used. Subsequent to the closing, B receives from A's attorney a statement for one-half of the costs of the preparation of the instruments prepared by A's attorney. Prior to that time, neither the parties nor the attorneys involved had discussed payment of fees and/or costs.

The position of this Committee is asked regarding the procedure outlined above. Presumably the inquiry is primarily as to the ethical propriety of A's attorney submitting the statement to B without prior contract or agreement.

A majority of the Committee has construed this inquiry as posing, primarily, a question of law and not of legal ethics. This Committee, of course, is not authorized to answer questions of law.

A seller of real estate may, if he wishes, insist that his attorney draw all papers involved in the transaction. The buyer, in turn, may execute or refuse to execute these papers. Who pays an attorney is a matter of contract. If the seller employs the attorney he is primarily liable for the fees. Unless the buyer in some way contracts to pay these fees, he is under no obligation to do so.

The Committee agrees that an attorney should not send a statement for costs and professional services to one who has not become legally obligated to pay that bill. However, since the person receiving the statement may simply refuse to pay it, it is our opinion that no substantial violation of the Canons of Ethics is involved.

[Revised: 08-24-2011]

OPINION 89-5
(November 1, 1989)

A law firm may permit a paralegal or other trained employee to handle a real estate closing at which no lawyer in the firm is present if certain conditions are met.

RPC: 4-5.5(b)
Opinion: 73-43
Case: Cooperman v. West Coast Title Company, 75 So.2d 818 (Fla. 1954)

In Opinion 73-43, this Committee concluded that it was permissible for a lawyer to have a legal assistant prepare real estate documents under the lawyer's supervision, but that it would be improper for the legal assistant to attend closings at which no attorney in the firm was present. The committee reasoned that there was no purpose for the legal assistant to attend closings except to give legal advice and that the legal assistant's presence could be construed by the clients as answering unasked questions about the propriety or legality of the closing documents.

The Unlicensed Practice of Law Committee has requested that we reconsider the issue of whether a legal assistant or other nonlawyer employee with real estate expertise may be permitted to conduct or otherwise participate in a closing in place of a lawyer in the firm. That committee does not agree with the premise of Opinion 73-43: that conducting a closing necessarily involves the giving of legal advice, in fact or by implication. That committee notes that title companies are permitted by the supreme court to conduct closings. Cooperman v. West Coast Title Company, 75 So.2d 818 (Fla. 1954). The committee also points out that the typical residential real estate transaction is nonadversarial and that allowing a trained paralegal to handle the closing will enable a law firm to assist in real estate transactions at a lower cost to clients.

The majority of this Committee (seven members dissent) now concludes that law firms should be permitted to have trained nonlawyer employees conduct closings at which no lawyer in the firm is present if certain conditions are met. Accordingly, this Committee recedes from Opinion 73-43.

Rule 4-5.5(b), Rules Regulating The Florida Bar, forbids a lawyer to assist a person who is not a member of the Bar in the performance of activity that constitutes the unlicensed practice of law. But, as the comment states, this rule "does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work."

The majority of this Committee concludes that under Rule 4-5.5(b), a law firm may permit a nonlawyer employee to conduct or attend a closing if the following conditions are met:

1. A lawyer supervises and reviews all work done up to the closing;

2. The supervising lawyer determines that handling or attending the closing will be no more than a ministerial act. Handling the closing will constitute a ministerial act only if the supervising lawyer determines that the client understands the closing documents in advance of the closing;

3. The clients consent to the closing being handled by a nonlawyer employee of the firm.

This requires that written disclosure be made to the clients that the person who will handle or attend the closing is a nonlawyer and will not be able to give legal advice at the closing;

4. The supervising lawyer is readily available, in person or by telephone, to provide legal advice or answer legal questions should the need arise;

5. The nonlawyer employee will not give legal advice at the closing or make impromptu decisions that should be made by the supervising lawyer.

When a law firm's involvement in a real estate transaction is limited to issuing title insurance as an agent for a title insurance company, and does not involve representation of either party to the transaction, condition number 3 does not apply. However, the law firm should take care that the parties understand that the firm does not represent their interests.

[Revised: 08-24-2011]

OPINION 97-2
(May 1, 1997)

An attorney may not ethically act as "closing agent" for a transaction where material terms of the contract have not been agreed to or have not been discussed by the parties.

RPC: Rule 4-1.7(a), Rule 4-1.7, Rule 4-1.7(b), Model Rule 1.7(b), Model Rule 2.2,

Cases: *The Florida Bar v. Reed* , 644 So.2d 1355 (Fla. 1994), *The Florida Bar v. Belleville* , 591 So.2d 170 (Fla. 1991), *The Florida Bar v. Teitelman* , 261 So.2d 140 (Fla. 1972), *People v. McDowell* , 718 P.2d 541 (Colo. 1986), *Stark Co. Bar Ass'n v. Ergazos* , 442 N.E.2d 1286 (Ohio 1982), *Baldasarre v. Butler* , 625 A.2d 458 (N.J. Sup. Ct. 1993)

Opinions: 65-34, Maine Ethics Opinion 106, Connecticut Informal Opinion 91-14, New York State Opinion 611, Massachusetts Bar Opinion 1990-3, West Virginia Opinion 89-1, Maryland Bar Opinion 84-85

A member of The Florida Bar has requested an advisory ethics opinion as to whether he can represent both buyer and seller in the closing of the sale of a business in Florida, acting as "closing agent" for the transaction. The inquirer had been requested by a licensed business broker to act as a "closing agent" for the sale and transfer of business assets. The member explains that the majority of these sales are a sale of assets only and not of a corporate entity. The business brokers envision a "closing agent" as an attorney who will prepare all closing documents and other instruments that may be required by the terms and conditions of the transaction. The buyer and seller would each agree to pay 50% of the closing agent's fees and expenses. The inquiring attorney asks whether it would be ethically permissible for him to act as a "closing agent" under the circumstances set forth above.

The member has particular concerns regarding the financing of these transactions. He would be required to prepare promissory notes and security agreements which, although somewhat standardized documents, must be negotiated between buyer and seller as to interest rate, payment terms, and especially as to the extent of the security given to the seller for the financing and the terms and conditions imposed upon the purchaser in the event of a default. Under these circumstances, could one attorney handle such negotiations and drafting for both parties as part of acting as "closing agent" for the sale of a business?

Rule 4-1.7(a), Florida Rules of Professional Conduct generally provides that attorneys may not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

(1) the lawyer reasonably believes the representation of that client will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

(2) each client consents after consultation.

As set forth in the Comment to Rule 4-1.7, loyalty to a client prohibits an attorney from undertaking representation directly adverse to that client or another client's interests without the affected client's consent. A client may consent to representation where there is some conflict or potential conflict after full disclosure and consent of the affected clients. However, as stated in the Comment, "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved

cannot properly ask for such agreement or provide representation on the basis of the client's consent."

The Comment to Rule 4-1.7 specifically addresses common representation of multiple parties to a negotiation, such as the question now before the Committee:

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Court decisions from Florida and other states are useful in determining the types of transactions in which the parties are "fundamentally antagonistic" such that common representation is not possible. In The Florida Bar v. Reed , 644 So.2d 1355 (Fla. 1994) the Court found an attorney's attempt to represent both buyer and seller of the same property and to assume multiple roles in the transaction to be unethical and suspended the attorney for six months. Similarly, in The Florida Bar v. Belleville , 591 So.2d 170 (Fla. 1991), the Court found it improper for the attorney representing the buyer in a real estate transaction to ask the seller to pay all or part of his fees. The attorney was disciplined for improper representation of conflicting interests. See also The Florida Bar v. Teitelman , 261 So.2d 140 (Fla. 1972) (attorney reprimanded for representing mortgage and title companies in real estate closings, but charging unrepresented sellers a portion of his attorney's fee); Florida Ethics Opinion 65-34 (seller's attorney who prepares all documentation in sale of property may not charge buyer for a portion of the attorneys' fees when the buyer did not employ the attorney or agree to pay him a fee; attorney erred in not explaining adverse nature of transaction and attorney's loyalty to seller).

Ethics opinions and caselaw from other states dealing directly with the ethics of an attorney acting as closing agent for the sale of a business have found an irreconcilable conflict between the interests of buyers and sellers of businesses, prohibiting dual representation of both parties by the same lawyer. Maine Bar Ethics Opinion 106, May 25, 1990, ruled that an attorney or law firm may not act as escrow agent or closing agent for both parties involved in sale of a business. A Maine firm had attempted to act as a neutral "closing agent" in the sale of a business, telling both parties it would not 'represent' either of them, but would draft documents to complete the sale. The committee found that the attorneys involved had improperly represented two parties with conflicting interests and that disclosure could not cure the violation. Accord , People v. McDowell , 718 P.2d 541 (Colo. 1986) (held unethical for attorney to represent both buyer and seller in sale of a business; court found attorney would be unable to maintain independent professional judgment required by Model Rule 1.7(b) [Florida Rule 4-1.7(b)]; Stark Co. Bar Ass'n v. Ergazos , 442 N.E.2d 1286 (Ohio 1982)(lawyer could not ethically represent buyer and seller of business where the parties had conflicting interests regarding assumption of existing debts of the business). See also , Baldasarre v. Butler , 625 A.2d 458 (N.J. Sup. Ct. 1993) (attorney cannot represent both buyer and seller in "complex commercial real estate transaction;" consent of clients is immaterial; conflict cannot be waived).

Other state bar ethics opinions have only allowed one attorney to close a sale of business transaction between buyer and seller where there was little or no adversity between the parties and buyer and seller have already agreed to all critical terms of financing and security agreements. Connecticut Bar Informal Opinion 91-14. The Connecticut opinion allowed one attorney to draft the sales contract and handle the closing of the sale of a

business between two longstanding clients, where both parties agreed to the dual representation. However, the opinion deals with the very narrow factual situation where both buyer and seller are long time clients of the same attorney and relies upon Model Rule of Professional Conduct 2.2, allowing an attorney to act as intermediary between two clients under certain specified circumstances.

Other state bar opinions allowing dual representation of buyer and seller at a closing, deal only with sales of real estate, not sales of entire businesses. See , New York State Bar Association Opinion 611(attorney may represent both buyer and seller in same real estate transaction if the parties are in agreement on price, time, manner of payment and security; if the parties' interests diverge, attorney must withdraw); Massachusetts Bar Association Opinion 1990-3 (lawyer may represent both borrower and lender in real estate purchase, provided that there are no apparent disputes or conflicts between the parties and both parties consent in writing after full disclosure); West Virginia State Bar Opinion 89-1(lawyer may represent multiple parties in same real estate transaction if full disclosure to all parties and written consent; lawyer may not represent any of the parties in subsequent litigation relating to the transaction); Maryland State Bar Opinion 84-85 (attorney may represent all parties to a real estate closing, with proper disclosures and waivers as to all parties).

It is an unavoidable fact that the sale of a business, even in the friendliest of circumstances, is by its very nature an adversarial process. The buyer is relying upon sales and profit figures produced by the seller as well as projections of future profits based upon those figures. Security and financing are critical issues in any business purchase and, particularly in the case of smaller businesses, such transactions are often financed by the seller. The closing often includes the transfer of licenses or applications by the new owners for special licenses, zoning changes, and so forth. Such closings often include assumption of existing debts of the selling corporation and representations by the seller as to other actual and potential claims against the seller. Such transactions are fraught with adversity and conflict, even for the most scrupulous attorney in the friendliest of deals.

The facts presented by the inquirer reference the typical situation in which some or all terms of the sale, particularly elements of financing, must be negotiated between buyer and seller. Where there is disagreement or material terms of an agreement have not been addressed between buyer and seller as to financing, security, consulting agreements with the seller, title defects, or any other material matter relating to the sale, conflicts may exist or develop. Under the foregoing circumstances, it would be unethical for a Florida attorney to represent both buyer and seller in the closing of the sale of a business in Florida, acting as "closing agent" for the transaction. A member of The Florida Bar may not be involved in negotiations of the parties to a sale of a business and then attempt to represent both parties to the transaction at closing of the sale. Under the foregoing circumstances, such representation presents a nonwaivable conflict under Rule 4-1.7(a) and (b) and is ethically prohibited.

[Revised: 08-24-2011]

Page 140

261 So.2d 140
68 A.L.R.3d 959
THE FLORIDA BAR, Complainant,
v.
Harry H. TEITELMAN, Petitioner.
No. 41290.
Supreme Court of Florida.
April 5, 1972.

Page 141

Lyle D. Holcomb, Jr., Edward J. Atkins, Miami, Earl Drayton Farr, Jr., Punta Gorda, and Norman A. Faulkner, Tallahassee, for complainant, The Florida Bar.

Leo Greenfield, of Street & Greenfield, Miami, for petitioner, Harry H. Teitelman.

DEKLE, Justice.

Although this is a disciplinary proceeding for a 'private' reprimand pursuant to Integration Rule of The Florida Bar, Art. XI, Rule 11.09(3)(f), 32 F.S.A., it has apparently reached us with an overriding purpose of prevailing upon this Court to render an opinion which will be helpful to the members of The Bar regarding the issues involved. Such goal apparently transcends the disciplinary recommendation by the Referee and The Florida Bar. (It is only for such higher purpose that we render this opinion, for, if affirmed, it would not be published, since any reprimand would otherwise not be 'private'.)

We recognize the conscientious concern which is expressed and therefore proceed with this opinion to crystalize in the affected area, what action constitutes the practice of law and improper professional conduct under the canons involved. We have also given the petition 'precedence over all other civil causes in the Supreme Court' in accordance with Integration Rule 11.09(4).

The situation which arose involves real estate closings for a mortgage company. Petitioner-attorney regularly represents the title insurance company and mortgage company involved, in a large volume of residential closings, set one after the other in his law offices. He is apparently representing the buyer as well (who is getting the loan) in most instances. Many times the seller is not represented; on other occasions,

Page 142

as here, he has an attorney. In either instance there are fixed forms which petitioner urges are required of the seller by his lending institution. He prepares and furnishes these in a 'package form' to be executed by sellers. For this he charges an 'attorney's fee of $25.00, for preparation of legal documents.' It is so listed on the closing statement. The attorney (petitioner) estimates that for a period of years now he has closed approximately 300 such loans per year. (At $25.00 per closing--if a seller's attorney's fee were received in each case--this would amount to $7,500 a year.) Petitioner testified that under Federal Housing Authority Rules (most closings) he is 'allowed' to charge the Buyer $25.00 for a 'package' of documents (consisting of mortgage, note, various affidavits, etc.). The charge allowed has since been raised. An expert witness testified that as to the Seller, however, FHA has no control over the charges and fees and that '(I)t is open season on the seller. . . .'

Testimony also reflected that usually there is no notice to the seller prior to closing that he will be responsible for certain documents nor that a fee will be charged him for them; that usually there is no question raised and the matter proceeds without any problem; that where the seller has an attorney the petitioner usually ignores any documents the seller's attorney has prepared and asks him to use instead the 'package' documents; that if there is any objection to the $25.00

charge for the documents then petitioner usually deletes the charge.

That this is what might be termed a 'workship' approach to a transaction which has apparently been treated here as almost a mechanical procedure, with time and money the principal concerns, is reflected by petitioner's testimony that in his opinion it is to a seller's advantage to attend the closing without an attorney because 'no attorney would go to a closing for $25.00 and prepare all those documents.' He rejects the Grievance Committee's position which would require him to advise sellers they may have attorneys at closing, because it would 'make a hardship upon the sellers.' (See Canon 7, 32 F.S.A., footnote 2, infra).

In this particular case the seller had engaged his own attorney, who likewise recognized the limited amount of time that was justified for the fee which he felt he could charge the seller. He prepared certain documents for the closing, to which he sent a law clerk in the office with the documents and closing instructions. A copy of a closing statement had been requested by him but was not furnished. At the closing petitioner informed the law clerk (in line with his usual practice) that he preferred to use his 'package' of forms and the law clerk agreed to this but questioned that there should be any charge (the $25.00) for them. Petitioner said this was his standard charge. The seller also personally questioned this charge being levied in addition to that of her own attorney. The law clerk appeased her by saying that they should go ahead and that the attorney in his office would take care of the problem when he got back. The seller testified that she was angry at the additional charge being made; that she understood the petitioner at the closing to say that the FHA would not accept her attorney's papers and that she signed petitioner's documents 'under protest.' Petitioner denied seller's objection being made in his presence, stating that he would have taken the charge out had she done so, but confirmed that her attorney's documents would have been unacceptable. He was concerned with a gap of 14 days between execution of the no-lien affidavit which had been brought and the date of closing, during which repairs might have been made.

It becomes apparent that all of this, in the seller's presence and under these circumstances, was at the very least most unseemly in the practice of law on the high level which is demanded by the profession. The reaction of the seller as a client is proof of the bad effect which this type of 'closing mill' has upon our public image and the standing of attorneys at law. For

Page 143

many members of the public, a real estate transaction is one of the few contacts which they have with the law and with attorneys personally, so that it is the only opportunity they have to form an impression from direct contact. It is therefore important that such transactions be treated on the same high professional standard as litigation in the courts, preparation of contracts and other legal procedures. Despite the pressures and temptations present, and at times the limited remuneration, an attorney must not allow the $ mark to blind or even to dim the guiding light from our profession's polar star--the legal ethic.

Opportunity should be afforded to have an attorney's representation, no matter the amount of the recompense or whether the attorney finds it more expedient to use 'package' instruments in the transaction. Lawyer referral services by Bar groups over the state fulfill this very purpose. The profession's image and standing are more important than the expediency which supposedly demands mass production procedures.

There is no doubt whatever that petitioner's use of the 'package' forms, or any

related forms of a legal nature, clearly constitutes the practice of law. The challenge of that fact by an attorney seems almost a reflection upon an understanding of the law and of professional ethics. The suggestion that it is merely a 'scrivener's' task borders on the presumptuous. In the completion of legal forms it is what may be left out as well as that included which can be a very serious consequence. The advices essential to the completion of such documents almost invariably place their completion in the realm of the practice of law. It requires one skilled in the law for a proper completion of such matters, particularly those dealing with transactions involving real property which are treated by the law upon the highest level as requiring the greatest formalities and safeguards.

As we have said in the early case on the subject, Keyes Co. v. Dade County Bar Ass'n., 46 So.2d 605 at 606 (Fla.1950):

'(T)he preparation and execution of the instruments effectuating the transfer should be under the lawyer's supervision, if the parties decide that they need expert advice and service.'

There is evidence in this record that petitioner prepared legal documents to be executed by the seller in furtherance of her contract to sell land, which documents were in fact employed by the seller for that purpose and petitioner charged the seller a fee therefor. This is unmistakably representing the seller.

Where the seller is represented by other counsel there is no justification for an attorney for the buyer or lender charging any fee to the seller unless it is definitely agreed between the attorneys with the express agreement of the seller. And where the seller is NOT so represented, he can be charged NO fee by the buyer's or lender's attorney absent 1) a client-attorney relationship between such attorney and the seller, 2) together with a full disclosure that the attorney also represents adverse interests in the closing, of which full disclosure must be made to the seller of all circumstances, relationships and interests involved and 3) after such full disclosure the attorney obtains the consent of the seller for an agreed representation by the attorney and only then 4) a fee which must be agreed upon between them prior to undertaking any services. [1] This is so basic to the practice of law and ethical considerations of the profession that the present

Page 144

emphatic renunciation of it should place the matter at rest for all time.

Opinion 64--56 (Sept. 29, 1964), Selected Opinions, Professional Ethics Committee, The Florida Bar, 1959--67, pp. 237, 238, holds as follows:

'It is improper for the mortgage company attorney to charge Seller an attorney's fee In the absence of any agreement between the attorney and Seller. It is not improper for the attorney to collect a reasonable fee for his services provided Seller has agreed with Buyer to pay all closing costs and providing the fee is part of the closing costs.

'Further, Seller should be fully advised of the circumstances because the attorney represents the lending institution, not the Seller, and the interest of these parties could well be in conflict. Preferably, Seller should be represented by an attorney of his own choice.' (Emphasis ours.)

Opinion 65--34, p. 298 (June 15, 1965), Professional Ethics Committee of The Florida Bar, points out the same rule applying in the reverse circumstances:

'A seller of real estate may, if he wishes, insist that his attorney draw all papers involved in the transaction. The buyer, in turn, may execute or refuse to execute these papers.

Who pays the attorney is a matter of contract. If the seller employs the attorney he is primarily liable for the fees. Unless the buyer in some way contracts to pay these fees, he is under no obligation to do so.' (Emphasis ours.)

Other states hold likewise. The Standing Committee on Legal Ethics of the Virginia State Bar in its Opinion No. 70 (Feb. 13, 1957) dealt with representation of conflicting interests in holding the following:

'Should there be no apparent conflict of interest between the parties at the time of their joint employment of Mr. X, the Committee is of the opinion that it is proper for him to undertake such employment, Provided a full disclosure of that fact is made to all parties.' (Emphasis ours.)

The State Bar of Michigan's Committee on Professional and Judicial Ethics in Opinion 98 (Nov.1946), involving a lawyer employed full time by a bank to draw deeds and handle transactions for the bank held the following:

'Confusion is apt to be caused over reimbursement of the bank-lawyer's fee when such reimbursement is not made directly to the bank but is, at its direction, paid by the borrower directly to the bank's lawyer. The borrower may easily gain the impression that such lawyer represents him, either individually or jointly with the bank.

'It is the active duty of the bank's lawyer under these circumstances to make clear to the borrower that he represents solely the bank in all of the legal incidents of such transaction. . . .'

'(W)e have not overlooked the possibility of conflicting interest which the lawyer may be called upon to represent in case the borrower should attempt to employ the same lawyer to represent him in the transaction. . . . It seems probable that if the borrower were frankly informed that the lawyer was already on the bank's payroll, or in its constant employ, he might reasonably object to paying an additional fee, presumably equal to what would be charged by a disinterested lawyer of his own choice. In short, the 'full disclosure' contemplated by Canon 6 would probably be fatal to such employment in a large number of cases. The lawyer who thus acts for both the bank and the borrower must bear the burden, if the matter is ever questioned, of showing that every relevant fact was disclosed by him to the borrower before he undertook such dual representation.' (Reported in 29 Mich.St.Bar J. No. 5, at pages 124--126.)

Except for the unusual circumstances and apparent misunderstandings involved between the attorneys in this particular case, there would likewise appear to be a breach

Page 145

of Canon 7, [2] regarding interference with employment to other counsel.

This has been the clear holding of other states throughout the Union. To cite just a typical example we refer to Pioneer Title Ins. & Trust Co. v. State Bar of Nevada, 74 Nev. 186, 326 P.2d 408 (1958), enjoining company stenographers from preparing deeds, mortgages, notes and like instruments from printed forms previously approved by the company attorney and thereafter checked by him. The court held at p. 411:

'The difficulty with the company's position is that its services did not end with the clerical preparation of the instruments by the escrow officer and stenographer. It was the company itself which judged of the Legal sufficiency of the instruments to accomplish the agreement of the parties. In the drafting of any instrument, simple or complex, This exercise of judgment distinguishes the legal from the clerical service.' (Emphasis ours.)

To like effect are: Indiana ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Ass'n., Inc., 244 Ind. 214, 191 N.E.2d 711 (Ind.1963); State Bar of Michigan v. Kupris, 366 Mich. 688, 116 N.W.2d 341 (Mich.1962); In Re Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (Mass.1935).

In light of the inconclusive and unusual circumstances giving rise to the unfortunate developments here, and in the higher interest of devoting an opinion to higher standards, we conclude that the recommendation for and issuance of private reprimand in these circumstances was not warranted and accordingly the Private Reprimand of the Eleventh Judicial Circuit Grievance Committee 'F' on April 14, 1970, pursuant to Integration Rule of The Florida Bar, Article XI, Rule 11.04 'C', and the confirming Private Reprimand by The Florida Bar on April 27, 1971, are hereby quashed.

It is assumed that the principles herein announced will be fully recognized and followed hereafter by petitioner. Any future deviation therefrom would in any subsequent proceeding be weighed in the light of this clear admonition.

It is so ordered.

ROBERTS, C.J., and ERVIN, CARLTON and McCAIN, JJ., concur.

---

1 Canon 6 (representing differing interests; disclosure). Now in Canon 5, DR 5--101(A), 5--105(C); EC 5--14, 5--15, 5--16, 5--19, 32 F.S.A. See Cross Ref. Table of Canons, The Florida Bar Journal, Oct. 1969, pp. 1210--12; 32 F.S.A. Pocket Part.

DR 5--105(C): '(A) lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.'

2 Now encompassed in Canon 2, DR 2--103(A), 2--104(A), 2--107 and EC 2--2, 2--3, 2--4 and 2--8. Excerpts:

'DR 2--103 Recommendation of Professional Employment.

'(A) A lawyer Shall not recommend employment, as a private practitioner, of Himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.' (Emphasis ours.)

'DR 2--104 Suggestion of Need of Legal Services.

'(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: . . .' (not applicable here).

Page 170

591 So.2d 170
THE FLORIDA BAR, Complainant,
v.
Walter J. BELLEVILLE, Respondent.
No. 75116.
591 So.2d 170, 16 Fla. L. Week. S770
Supreme Court of Florida.
Dec. 5, 1991.

Page 171

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and Jan Wichrowski, Bar Counsel, Orlando, for complainant.

Dennis F. Fountain, Longwood, for respondent.

PER CURIAM.

We have this case on complaint of The Florida Bar for review of a referee's report recommending that Walter J. Belleville, an attorney licensed in Florida, be found not guilty of alleged ethical violations. We have jurisdiction. Art. V, Sec. 15, Fla. Const.

In the summer of 1988, Belleville was retained as counsel for Bradley M. Bloch. Bloch had entered into an agreement with James F. Cowan to purchase property owned by the latter. Cowan was an elderly man, eighty-three years of age, who had a third-grade education. While the evidence showed that Cowan had substantial prior experience in selling real estate when he was younger, neither party to this cause disputes that the various written documents alleged to constitute the agreement overwhelmingly favored the buyer, Mr. Bloch. Cowan, in fact, has subsequently disputed that he ever agreed to some of the terms embodied in these documents. [1]

Although Cowan and Bloch had negotiated only for the sale of an apartment building, the documents stated that Cowan was selling both the apartment building and his residence, which was located across the street from the apartments. The referee specifically found that Cowan had no intention of selling his residence and did not know that it was included in the sale. The record substantially supports this finding, which accordingly must be accepted as fact by this Court. The Fla. Bar v. Bajoczky, 558 So.2d 1022 (Fla.1990).

It is unclear whether Belleville knowingly participated in his client's activities or merely followed the client's instructions without question. Whatever the case, Belleville drafted the relevant documents to include the legal description of Cowan's house in the instruments of sale. Cowan then apparently signed the documents without realizing he was transferring title to his house. No one at the closing explained the significance of the legal description to him. Belleville only sent a paralegal to the closing and did not attend it himself. In fact, he had never met Cowan to this point in time.

In exchange for the apartment and his residence, Cowan received only a promissory note, not a mortgage. The loan thus was unsecured. This note provided for ten percent interest amortized over twenty-five years. However, the first payment was deferred for four months with no apparent provision for interest to accumulate during this time, and the note by its own terms will become unenforceable upon Cowan's death. Finally, the documents called for Cowan to pay the closing costs, which Bloch and Belleville construed as including Belleville's attorney fee of $625.

When Cowan received the promissory note and closing documents, he realized that their terms varied from the agreement he thought he had entered. Cowan contacted an attorney, who wrote a letter to Belleville explaining the points of disagreement. The

next day, Bloch attempted to evict Cowan from his home.

The referee recommended no discipline based on his conclusion that Belleville owed no attorney-client obligation to Cowan. The Board of Governors of The Florida Bar voted to appeal this decision, and the Bar now seeks a thirty-day suspension.

While it is true that the factual findings of a referee may not be disturbed unless clearly and convincingly wrong, Bajoczky, we do not find that the present case turns on a dispute about the facts. The essential facts are not in question; and Belleville himself concedes with some understatement that "Mr. Cowan did not have a particularly good deal as a result of his negotiations with Mr. Bloch." Rather, the disagreement in this case is over Belleville's guilt and the appropriate discipline, if any.

Page 172

This is a question entirely of law that we must decide. As former Chief Justice Ehrlich has noted, a referee's recommendation "is a recommendation and nothing more. It does not carry the authority or weight of a finding of fact by the referee." Bajoczky, 558 So.2d at 1025.

Based on the facts, we cannot accept the referee's recommendation about guilt and punishment. The referee's factual findings established that Cowan had negotiated to sell the apartment, that he did not intend to sell anything other than the apartment, and that he did not know that the documents of sale would result in the loss of his residence. It also is clear Belleville should have harbored suspicions about the documents he was preparing, because the documents established on their face a transaction so one-sided as to put Belleville on notice of the likelihood of their unconscionability.

When faced with this factual scenario, we believe an attorney is under an ethical obligation to do two things. First, the attorney must explain to the unrepresented opposing party the fact that the attorney is representing an adverse interest. Second, the attorney must explain the material terms of the documents that the attorney has drafted for the client so that the opposing party fully understands their actual effect. [2] When the transaction is as one-sided as that in the present case, counsel preparing the documents is under an ethical duty to make sure that an unrepresented party understands the possible detrimental effect of the transaction and the fact that the attorney's loyalty lies with the client alone. R. Regulating Fla.Bar 4-1.7.

We recognize that The Florida Bar relies on The Florida Bar v. Teitelman, 261 So.2d 140 (Fla.1972), which is somewhat distinguishable from the present case. Teitelman dealt with those situations in which an attorney, while representing one party, also directly bills the other party a fee for preparing legal documents. In the present case, the parties themselves contractually agreed that one would pay the other's attorney's fee. [3]

We do not believe Teitelman stands for the proposition that an agreement by one party to pay the other party's attorney fee always makes the payor a client of the attorney, provided dual representation has not occurred and provided the payor either is represented by counsel or is given the warnings required in this opinion if the payor is relying on legal statements or documents prepared by the attorney for the client. However, Teitelman does stand for the proposition that an attorney must avoid the appearance of simultaneously representing adverse interests, especially where the opposing party may be unfairly induced to rely on the attorney's advice or skill in preparing legal documents. Here, Belleville breached that duty. R. Regulating Fla.Bar 4-1.7.

For the foregoing reasons, we adopt the referee's findings of fact but reject the recommendations regarding guilt and discipline. The violation Belleville committed is a serious one in light of the fact that he previously has been disciplined for an ethical violation. The Fla. Bar v. Belleville, 529 So.2d 1109 (Fla.1988). Accordingly, we grant the request of The Florida Bar. Walter J. Belleville is hereby suspended from the practice of law for a period of thirty days, commencing on January 6, 1992. Belleville shall take all steps necessary to protect his present clients' interests and shall provide them with notice of his suspension, as required by the Rules Regulating The Florida Bar. He shall accept no new business from the date this opinion is issued. Judgment for costs in the amount of $1,220.30 is entered against Belleville in

Page 173

favor of The Florida Bar, for which sum let execution issue.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, BARKETT, GRIMES, KOGAN and HARDING, JJ., concur.

---

1 The Florida Bar has not charged Belleville with any fraud-related violation, and we accordingly express no opinion as to whether such a violation occurred.

2 We limit this holding to the facts of this case. We have no intent to mandate that an attorney who has prepared documents for a real estate closing always must be present at the closing to explain the documents to the respective parties.

3 We do not imply that such an agreement existed here in an enforceable form. Cowan has disputed many of the terms of the alleged agreement. We assume solely for resolving the ethical issues of this case that Cowan had agreed to pay Bloch's attorney fees.

Page 1355

644 So.2d 1355
19 Fla. L. Weekly S506
THE FLORIDA BAR, Complainant,
v.
Yvonne E. REED, Respondent.
No. 79766.
Supreme Court of Florida.
Oct. 6, 1994.
Rehearing Denied Nov. 22, 1994.

Page 1356

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and Kevin P. Tynan, Bar Counsel, Fort Lauderdale, for complainant.

Louis M. Jepeway, Jr. of Jepeway and Jepeway, P.A., Miami, for respondent.

PER CURIAM.

Yvonne E. Reed, a member of The Florida Bar, petitions this Court for review of a referee's report recommending she be suspended from the practice of law for two years. [1] We have jurisdiction pursuant to article V, section 15 of the Florida Constitution.

Reed's misconduct arose from her involvement in a real estate transaction that went bad. In August of 1990, Michael and Kathie Heller were selling their home in Lighthouse Point, Florida. Dimetrio Garcia and Carol Sullivan wanted to purchase the Hellers' home. Ultimately, Garcia, Sullivan and the Hellers reached an agreement under which Garcia and Sullivan agreed to pay $290,000 in cash for the Hellers' home. Reed acted as both realtor and attorney for Garcia and Sullivan.

On August 30, 1990, the Hellers executed a warranty deed and all other documents necessary to perfect the sale of their home. Reed prepared all closing documents, including a warranty deed executed by the Hellers to conclude the sale of the property. On August 31, 1990, Sullivan and Garcia informed Reed that they were having difficulties in securing the cash necessary to close on the transaction. Sullivan and Garcia communicated to Reed that they had only $90,000 to bring to closing. However, they further represented to Reed that they would have the balance of the cash within a few days.

Notwithstanding Garcia's and Sullivan's failure to secure all $290,000 for the closing, the Hellers demanded to close by August 31, 1990. In response to that demand, Reed restructured the parties' agreement such that Garcia and Sullivan would pay $90,000 at closing and take the property subject to two mortgages which were to be satisfied within thirty days of closing. Pursuant to the restructured agreement, the closing proceeded and Sullivan took title to the property. [2]

On August 31, 1990, Reed instructed Sullivan to execute a quit claim deed in which the space for designating the grantee was left blank. On September 25, 1990, Reed was advised that the cashier's check received from Garcia was in fact a $90.00 cashiers check which had been altered. The relevant bank made a claim for return of the $90,000. Reed immediately began to liquidate assets to assure that the bank's threatened action against her trust account would not affect other clients' monies held in trust. Reed stopped writing checks against the $90,000 until the bank informed her that the problem was resolved and funds were available.

On October 25, 1990, Reed inserted her name as grantee on the quit claim deed and took title to the property without tendering any consideration for the property. On October 31, 1990, Reed had Garcia and Sullivan served with a notice of eviction. Sullivan and Garcia left the property. Shortly thereafter, Reed marketed the property for

resale and leased the property while it was on the market. In November of 1990, with the knowledge that the actual ownership of the $90,000 was in dispute, Reed began to write checks against the $90,000. Reed made mortgage payments from the $90,000 in order to avoid foreclosure on the property. Further, Reed

Page 1357

expended additional portions of the $90,000 in order to conserve the property. In January of 1991, Reed sold the property to Roseanna Martino for $265,000, and both outstanding mortgages on the property were satisfied.

The Hellers filed a complaint against Reed with The Florida Bar, alleging that Reed had engaged in certain unethical acts during the sale of their home to Garcia and Sullivan. The Bar investigated Reed. Ultimately, the Bar filed a four-count complaint against Reed. In count I, the Bar alleged that Reed violated various enumerated ethical rules based on her handling of the $90,000 cashier's check. [3] In count III, the Bar alleged that Reed violated various enumerated ethical rules based on her dual representation in the Heller to Sullivan and Garcia transaction. Finally, in count IV, the Bar alleged that Reed violated various enumerated ethical rules based on conflict born of Reed's attempt to perform multiple roles--Sullivan's and Garcia's realtor; Sullivan and Garcia's attorney; the Hellers' attorney to a limited extent; closing agent; escrow agent; property owner; and landlord. The referee found Reed guilty on counts I, III, and IV. [4]

The referee recommended as an appropriate discipline that Reed be suspended from the practice of law for a period of two years and that costs be taxed against her. A referee's recommendation for discipline is persuasive. However, it is ultimately our task to determine the appropriate sanction. See The Florida Bar v. Anderson, 538 So.2d 852, 854 (Fla.1989). Reed contends that the recommended discipline is too harsh. [5] We agree.

Upon review of the record, we are firmly convinced that Reed is guilty of the conduct alleged in counts I, III, and IV, as well as the exercise of extremely poor judgment. Reed should not have undertaken to serve more than one party to the same transaction. That decision seems to be the genesis

Page 1358

of many of the problems which emerged as the transaction began to unravel. However, there is nothing in the record to suggest that Reed intentionally violated ethical rules in order to enrich herself. To the contrary, the Bar concedes that after all expenses, Reed made no more than $5,904.58. This amount obviously does not reflect the time Reed devoted to this matter. Moreover, as the referee noted, Reed "took the only rational path that would conserve the property and would reduce the exposure of all parties[,]" and her "actions ensured that the least harm would come to the most people from a situation ... which she was neither responsible for, nor did she promote." While we do not countenance Reed's ethical violations, we cannot say that her conduct warrants a two-year suspension. In The Florida Bar v. Lord, 433 So.2d 983 (Fla.1983), we enumerated the three purposes of disciplining unethical conduct by a member of The Florida Bar:

First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Id. at 986. We conclude that the purposes of disciplining Reed would be fulfilled by a six-month suspension.

Accordingly, Yvonne E. Reed is hereby suspended from the practice of law for a period of six months. Reed is suspended effective thirty days from the date of this opinion to allow her time to wind up her practice and attend to the protection of her clients' interests. She shall provide her clients with notice of her suspension, as required by rule 3-5.1(g) of the Rules Regulating The Florida Bar. Further, she shall accept no new business from the date this opinion issues. Judgment for costs of this proceeding is hereby entered against Yvonne E. Reed in the amount of $2,728.18, for which sum let execution issue.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN and HARDING, JJ., concur.

WELLS, J., recused.

---

1 Reed challenges the propriety of the referee's recommendation for discipline, not the referee's findings of guilt.

2 Even though Garcia supplied the $90,000, he was not named in the warranty deed.

3 Because Reed was found not guilty on count II, we need not be distracted by the allegations contained in count II.

4 As to count I, the referee concluded that:

By reason of the misuse of trust account monies, the Respondent has technically violated Rules 3-4.2 [Violation of the Rules of Professional Conduct is cause for discipline.] and 3-43 [The commission of any act contrary to honesty and justice may be cause for discipline.] of the Rules of Discipline; Rules 4-1.15(a) [A lawyer shall hold in trust, funds belonging to clients or third parties.], 4-1.15(c) [When a lawyer is in possession of disputed funds, those funds must be held in trust], 4-1.15(d) [An attorney shall comply with the Rules Regulating Trust Accounts.], 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct and Rule 5-1.1 [Money entrusted for a specific purpose must only be used for that specific purpose.] of the Rules Regulating Trust Accounts. However Respondent took the only rational path that would conserve the property and would reduce the exposure of all parties. Respondent's actions ensured that the least harm would come to the most people from a situation for which she was neither responsible for, nor did she promote.

As to count III, the referee concluded that:

By reason of the conflict of interest caused by the aforesaid dual representation, the Respondent has violated Rules 3-4.2 [Violation of the Rules of Professional Conduct is cause for discipline.] and 3-4.3 [The commission of any act contrary to honesty and justice may be cause for discipline.] of the Rules of Discipline and Rules 4-1.7(a) [A lawyer shall not represent a client if the representation will be directly adverse to the interests of another client.], 4-1.16(a) [A lawyer shall withdraw from representation if the representation will result in violation of the Rules of Professional Conduct.] and 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct. Although disclosures were made, the prudent lawyer should have mentioned the potential adverse consequences and its implications.

As to count IV, the referee concluded that:

Based upon the conflict of interest, caused by the Respondent's interests being adverse to her clients, the Respondent has violated Rules 3-4.2 [Violation of the Rules of Professional Conduct is cause for Discipline.] and 3-4.3 [The commission of any act contrary to

honesty and justice may be cause for discipline.] of the Rules of Discipline and Rules 4-1.7(b) [A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment may be materially limited by the lawyer's own interests.], 4-1.8(a) [A lawyer shall not enter into a business transaction with a client or secure an ownership interest adverse to the client unless certain enumerated steps are taken.] and 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct.

5 Reed challenges the two-year suspension, not the costs taxed against her.

The Engagement Letter and the Residential Real Estate Attorney

By Scott A. Marcus, Becker & Poliakoff, P.A., Fort Lauderdale, Florida


S. MARCUS

Introduction

In most legal scenarios, the reason an attorney is sought out and eventually hired by a client is to assist that client with a specific legal need. For example, a person charged in a criminal action hires counsel (or has counsel appointed by the State) to defend him or her against criminal prosecution. In a contract dispute, the attorney is retained by a client to seek money damages or an equitable remedy. Those who wish to prepare for death (life's inevitable end), retain counsel to prepare their estate - and consequently attempt to alleviate their loved ones from legal complications which could arise upon their passing. The real estate attorney's practice, however, can be unlike other practices of law. Each real estate transaction could potentially contain a number of non-real estate related legal components - all of which could affect the ownership of the real property, the client, as well as the attorney. So why is it that so many real estate law practitioners fail to obtain even the most simplified form of written engagement letter or fail to adequately define the *scope of their engagement* with their clients? Although the above scenario is not limited to the *residential real estate practitioner* (attorneys handling commercial transactions are certainly not immune to these same issues), this article is tailored for the attorney handling residential real estate transactions on a regular basis. Retainer agreement, engagement letter, whatever you want to call them. Have one.[1]

The General Rule Regarding Written (and Signed) Engagement Letters

With the exception of contingent fee cases,[2] the Rules Regulating the Florida Bar ("Rules" or "Rule") do not require that the attorney-client relationship be reduced to a written contract, signed by both attorney and client. Rather, in circumstances where the attorney has not regularly represented the client, prior to or within a reasonable time after commencing the representation, the Rules establish *a preference* for written communication between the attorney and the client as to the basis or rate of the fee as well as the costs.[3] In addition, where a legal fee is *nonrefundable*, the Rules require that the nature and amount of the nonrefundable fee be *confirmed* in writing.[4] This confirmation does not however require the attorney to obtain a signed acknowledgment from the client memorializing the terms of the fee. A letter from the attorney to the client setting forth the basis or rate of the fee and the intent of the parties in regards to the nonrefundable nature of the fee is sufficient to meet the requirements of this rule.[5]

Contingency Fee Arrangements

The Florida Bar has well established rules by which engagement letters in contingency fee cases are governed. Rule 4-1.5(f)(1) states that:

> [a] contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.[6]

In addition, Florida Bar Rule 4-1.5(f)(2) states that

> [e]very lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered...whereby the lawyer's compensation is to be...contingent in whole or in part upon the successful prosecution or settlement thereof **shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer**....[7] (Emphasis added)

The Rules provide parameters governing the percentage the attorney is entitled to collect for his or her fee in addition to how those fees can be divided between lawyers in different law firms.[8]

The Unique Role of the Residential Real Estate Attorney

As alluded to in the preamble of this article, the residential real estate attorney's practice can be rather ambiguous. When dissected, a standard real estate transaction has potentially many components in addition to contract and title law. There are aspects of community association law, corporate law, tax law (both foreign and domestic), estate planning and asset protection that could all affect any particular transaction. While the attorney need not be versed in all of the above areas of law, it is the duty of the attorney to identify the aspects of the transaction which could potentially impact the client and allow the client to determine how he or she would like to address those areas not serviced by the attorney. The client may choose to retain the services of a Certified Public Accountant to address the tax-related issues or the client may choose to retain separate counsel for the services not covered under the attorney's scope of representation. It is also possible that the client may decide that he or she is not concerned with any of the additional aspects of the transaction and forego that type of representation all together. At a minimum, however, the

client should clearly comprehend the scope of representation offered by the attorney and have the choice to expand that scope either with the assistance of the attorney or through alternate means. Based on the breadth of any one residential real estate transaction, the potential for attorney malpractice can be significant based on the damage potential to the client; yet it is all too common for the residential real estate practitioner to forge head-on into a matter without even the most informal confirmation to the client (written or otherwise) setting forth the aspects of the transaction the attorney *is*, and more importantly, *is not* handling.

Transitioning to the Engagement Letter as a Standard Practice

Why would a real estate attorney willingly assume legal liability on a transaction by failing to properly outline the scope of engagement in writing to the client? I was guilty of this practice during my early years in private practice; however, upon taking refuge in a large firm with strict governance policies and procedures, it became evident that my days of handling a transaction without even so much as a handshake were, by mandate, a thing of the past. This was not an easy transition. Clients whom I had serviced for years were at first confused by the formal nature of the engagement letter process. They attributed the additional layer of "bureaucracy" to the large firm culture and equated this new procedure to increased fees. This was an incorrect assessment made by the client and served to reinforce, for me, that part of a lawyer's role is to educate clients on non-billable procedural matters as well as to abate any fears associated therewith. Clear and effective communication became a cornerstone of each new engagement. After some discussion, clients realized the benefits of the engagement letter for both the attorney and the client and it generally has avoided confusion and misunderstanding as to the role of the attorney in the transaction.

You know it is needed, so what's stopping you?

Timing. If you have practiced in the area of residential real estate law long enough, you have most likely been on the receiving end of the following statement from a potential client: "I purchased a house and I would like to know how much you would charge to represent me." Knowing exactly what was meant by the statement, my response is always the same: "If you've already *purchased* a house, you don't need me." This prompts the potential client to rephrase with what they believe sets them apart from other clients. "No (chuckle) I signed a contract, I just want to know how much you will charge to represent me." My reply is no less cynical: "So you've served as your own counsel for the contractual phase - now you want me to step in and handle the rest?" This primes a discussion which usually starts with the potential client saying "isn't it just a form?" and ending with the client feeling - shall we say - a tad bit humbled. Point being, the nature of our practice is that we often are faced with picking up where our "lawyer-clients" leave off. *What can go wrong, right? It is just a form.* The above scenario could give the attorney a false sense of informality that they are merely needed to make sure title is marketable. Stop. Take a moment and realize this is more (not less) of a reason to require an engagement letter. You want to make it clear to the client that they arrived at your doorstep with an already executed contract. If you did not assist the client with this portion of the service, why would you want to assume responsibility for the client's work?

The Title Company Dilemma. In Florida, a "title insurance agent" is a defined term under § 626.841, F.S. In order to be licensed to act as a title insurance agent, one need not be an attorney; the applicant need only pass a state exam to become licensed.[9] An attorney may issue title insurance without the requirement of licensure due to an exemption contained in the chapter.[10] The implication is that an attorney is not required to take the state licensing exam due to the fact that the attorney passed the Florida Bar exam. The involvement of non-attorney owned or non-attorney managed title agencies in the residential real estate arena has blurred the line between *legal representation* and *title insurance*. While this portion of the article is not intended as an attack on non-attorney owned title agencies, there is a stark difference between comprehensive legal representation and merely confirming title is insurable. Title agencies do not provide legal representation. However, they have become the norm in residential closing circles. The formality involved with the engagement letter process is a necessary break from that norm. The attorney who subscribes to a level of informality on par with title agencies is forgetting that the title agency protects itself with disclosure documents outlining their limited role. If it is important enough for a title agency to disclose to a customer that the agency is not providing legal representation, it is even more critical for the attorney to disclose to the client the scope of the attorney's representation.

Referral Sources. The typical real estate attorney acquires a significant number of his or her matters from licensed real estate agents. This referral source, when correctly educated by the attorney, can be a blessing. Where the real estate agent is not properly briefed by the attorney on both the importance of timing and the difference between legal representation and title insurance, the referral source can actually impede timely and effective representation, potentially damaging the client and the transaction. I have learned that it is critical to educate my referral sources on timing their referrals properly and that the terms of art in the industry of "closing agent" and "settlement agent" do not automatically denote legal representation. The correct timing to refer a buyer or seller of real property to an attorney is in advance of that person making an offer or accepting that offer, whichever is the case. While this may seem like a rather obvious consideration, real estate agents are often under significant pressures from

the buyer and seller as well as other realtors to expedite the process. The suggestion of attorney involvement during the negotiation phase could be perceived by those involved as an additional impediment to a binding contract. To overcome these negatives, the attorney must be responsive, in addition to knowledgeable. In larger law firms, the system for conflicts checks needs to be streamlined to avoid delaying the attorney's ability to converse with a potential client. In smaller firms without the same level of formality, managing a business as well as practicing law can be overwhelming and prevent the attorney from responding in a timely fashion. Whether large firm or small firm practice, the role of the attorney with respect to the referral source is the same. Specifically, the lawyer should educate the referral source on the benefits to the client and the referral source of the involvement of a competent real estate attorney prior to having a binding contract, the difference between legal representation and title insurance as well as your process of engagement. These should all be concepts your referral sources are versed in so the referral is smooth.

Fear of Judgment. Too often, attorneys expand their services to include real estate transactions and title work without much knowledge of the area. This is due in part to survival and, in some cases, greed. To those facing either or both scenarios, "don't take on work for the money [without the appropriate experience]."[11] You are not doing your clients or the practice any favors. Whatever your reason for practicing in this area without significant training, remember, this is not just another real estate transaction. A real estate acquisition (residential or commercial) is often the largest financial investment a client will make. The client's needs must be paramount. Only practice in this arena once you have a firm grasp of contract, real estate and title law. In addition, at a minimum, know enough to know the other aspects of law which impact the prospective transaction and do not fear telling a client "I don't do that work."[12] Use the engagement letter as a tool to define the scope of your involvement and do not allow your moral compass to waiver.

The Template Engagement Letter and Conclusion

The Residential Real Estate and Industry Liaison ("RREIL") Committee of the RPPTL Section of the Florida Bar, through a subcommittee chaired by this author, has drafted a sample form engagement letter which addresses most elements present within a residential real estate transaction. The template is available to all members of the RPPTL Section by accessing the member login at www.rpptl.org and proceeding to the RREIL Committee's web page.

The county in which the property is located will, along with the contract, dictate whether the buyer or the seller is responsible for selecting and paying the Closing Agent[13] for the title insurance premium and as such, the role of the attorney will fluctuate depending on the location of the property, the contract and the services selected by the client. This particular template was drafted with a "buyer-pay" contract in mind, and is intended as a starting point for the residential real estate attorney to tailor to the specific needs of the transaction and the client. At a minimum, the template engagement letter should define the scope of representation as well as detail the services not included in that scope.

A fee and/or cost retainer should become a standard practice, particularly to avoid violating the unlawful inducements rules of the Florida Department of Financial Services.[14] The Template Engagement Letter also addresses that any costs advanced by the attorney on behalf of the client would be reimbursed by the client. These provisions were added to clarify that the attorney is not advancing these costs as part of an unlawful inducement to obtain business and that the intention is for the attorney to be reimbursed for these costs. Provisions pertaining to granting consent to the title underwriter's audit of the firm's trust account and consent to electronic communication were included in response to avoid ethical concerns.

In sum, a retainer agreement/engagement letter can (in addition to all of the reasons discussed in this article) be a marketing opportunity used to differentiate yourself from a title agency and from other attorneys. Use it to show your value to your prospective clients.

Scott A. Marcus, is a shareholder at Becker & Poliakoff, P.A, where he manages the firm's residential real estate department as well as the firm's affiliated title agency, Association Title Services. His law practice focuses almost exclusively in residential transactions since 1995. He is sought out by some of the top-producing real estate agents in Broward County to handle transactions for their customers. His clients include first-time home buyers, real estate investors, institutional and private owners and developers. He frequently lecturers to real estate brokerage companies on contractual compliance issues.

Endnotes

1 Brian Tannebaum, *The Practice* (American Bar Association, 2015).

2 R. Reg. Fla. Bar 4-1.5(f).

3 R. Reg. Fla. Bar 4-1.5(e).

4 R. Reg. Fla. Bar 4-1.5(e), "A fee for legal services that is nonrefundable in any part **shall be** confirmed in writing...." (Emphasis added).

5 R. Reg. Fla. Bar 4-1.5 Editors' Notes.

6 R. Reg. Fla. Bar 4-1.5(f)(1).

7 R. Reg. Fla. Bar 4-1.5(f)(2).

8 R. Reg. Fla. Bar 4-1.5(f)(4) (B) and 4-1.5(g).

9 §626.8417(3)(a) and (b), F.S. contain the full requirements for licensure.

10 §626.8417, F.S., states: "Title insurers or attorneys duly admitted to practice law in [Florida] and in good standing with The Florida Bar are exempt from the provisions of this chapter **related to title insurance licensing and appointment requirements.**" (Emphasis Added). Note, the exemption only applies to the licensing and appointment requirements, not the Chapter's entirety.

11 Brian Tannebaum, *The Practice* (American Bar Association 2015).

12 *Id.*

13 Defined term in the FAR/BAR Purchase and Sale Contract.

14 Fla. Admin. Code 69B-186.010, interpretation of §626.9541(1)(h)3, F.S.

GELFAND & ARPE, P.A.

ATTORNEYS AT LAW

1555 PALM BEACH LAKES BLVD.
SUITE 1220
WEST PALM BEACH, FL 33401

Telephone (561) 655-6224
Facsimile (561) 655-1361
www.gelfandarpe.com

MICHAEL J. GELFAND*
MARY C. ARPE

*BOARD CERTIFIED IN REAL ESTATE LAW
& CONDOMINIUM AND PLANNED DEVELOPMENT LAW

ILISA L. CARLTON
TANIQUE G. LEE
GABRIELLE N. JACKSON
TAMELA K. EADY*
OF COUNSEL

May 10, 2019

VIA EMAIL ONLY: dboje@gunster.com
Debra L. Boje, Chair

VIA EMAIL ONLY: rfreedman@carltonfields.com
Robert S. Freedman, Chair-Elect

Re: Real Property Probate and Trust Law Section /Strategic Planning (2019)

Dear Ms. Boje and Mr. Freedman:

This letter transmits the Report of the Section's Strategic Planning Committee.

On behalf of the Strategic Planning Committee, thank you for the opportunity to chart the Sections future. The process was innovative and deliberative, intending to utilize lessons of the past, gleaning best practices and incorporating new concepts.

Organizing nearly a year ago when you designate vice-chairs, the strategic planning process commenced at last year's Annual Convention when the entire Strategic Planning Committee gathered to announce Group Leaders, and provide a charge to Committee members. The list of members, the subject matter Groups and Group Leaders is attached to the Report.

The Groups met, generally monthly and usually by conference call, after The Breakers' "Legislative Update" meetings, the Group meetings. In the fourth quarter of last year each Group submitted a preliminary report. These preliminary reports were then circulated among all Groups. Advance Group meetings and circulation of preliminary reports sought to avoid criticisms following many not for profit strategic planning efforts: that a plan was cobbled together during a one or two day retreat without advance forethought, deliberation or interaction among different interests.

Our early and monthly Group meetings created thoughtful deliberation to refine issues and recommendations. Circulation of preliminary reports generated input from all perspectives. Seeking further deliberation, Groups were encouraged to meet in December and early January to

consider other Groups' input. Further, and perhaps most innovative, Group Leaders were encouraged to directly communicate with each other for further perspective of overlapping issues and then the Groups engaged in further drafting.

The Strategic Planning Committee, forty-nine of the fifty-one members, gathered in Tampa actual for face to face meetings on Friday, February 8 and Saturday, February 9, 2019. As traditionally undertaken, each Group met individually to confirm their then current recommendations, and consider issues to be raised with other Groups. Then non-traditional meetings progressed, two Groups meeting together. Then three Groups would meet together. This allowed better airing of views, fuller exchanges of information and recommendations.

At the end of the day on Friday, Groups met individually to re-draft their recommendations. Each Group's recommendations were circulated to all Committee members.

The Committee reconvened in one room Saturday morning to discuss each Group's recommendations, highlighting significant recommendations. Debates occurred, and where there were significant differing opinions, a consensus vote sought. After the meeting adjourned, Groups incorporated the consensus from the meeting into their written reports.

Bullet point strategic recommendations are vitally important to the Sections ability to address the significant changes facing the Section, especially in the manner which individuals communicate and participate, generally and in the legal profession. The process also brought a number of unanticipated benefits. First, the concept of a standing Committee to assist the Section in implementing the strategic plan, allowing Section leadership to continue focusing on their responsibilities. Second, by inviting relatively new Executive Counsel members to participate, leadership has been able to vet potential new committee chairs and successors.

My personal acknowledgment of appreciation to the other Committee vice chairs without whose participation support and guidance helped ensure a successful effort. Great appreciation is also provided to all of the Committee members for their sacrifice of considerable time to help ensure the vitality of the Section, and the Section's dedication to the ethos of our profession upon which much of the State's success is predicated, and providing a foundation for the protection of our rights, property and personal rights.

Respectfully submitted,

Michael J. Gelfand

MJG/cmh

F:\MJG-OD\WP\RPPTL\190510ctaBoje&Freedmanmjg.docx

STRATEGIC PLANNING COMMITTEE 2018-19

Debra L. Boje - Co-Chair
Robert S. Freedman –Co-Chair

SUB-COMMITTEES

Logistics
Sancha Brennan Whynot – Co-Chair
Salome J. Zikakis – Co-Chair

Substantive
Deborah Packer Goodall – Co-Chair
Michael J. Gelfand – Co-Chair
Andrew M. O'Malley – Co-Chair

WORKING GROUPS

Membership/Communications/ Inclusion/Technology:

- Michael Bedke - Chair
- Jeffrey Baskies
- Brenda B. Ezell
- Travis Hayes
- Robert Lancaster
- Lawrence Jay Miller
- Neil Shoter
- Tattiana Brenes-Stahl

Legislative:

- William "Bill" Sklar – Chair
- Sarah S. Butters
- S. Katherine Frazier
- William T. Hennessy, III
- Peggy Ann Rolando
- Jon Scuderi

Financial/Budgeting:

- Robert S. Swaine – Chair
- Linda Griffin
- Steven H. Mezer
- John C. Moran
- Pamela Price
- W. Cary Wright

WORKING GROUPS

Structure/Administration/Organization/ Leadership/Succession/ByLaws:

- Nicklaus Curley – Chair
- Debra L. Boje
- Ed "Burt" Bruton
- Sandy Diamond
- Michael J. Gelfand
- Brian Hoffman
- Melissa Murphy

Meeting Planning/Facilities/Logistics:

- Tae Bronner – Chair
- Robert S. Freedman
- Vinette Godelia
- George Meyer
- Andrew M. O'Malley

Committees:

- Adele Stone – Chair
- Angela Adams
- Tami Conetta
- Manuel Farach
- Lee Weintraub

STRATEGIC PLANNING COMMITTEE 2018-19

Debra L. Boje - Co-Chair
Robert S. Freedman –Co-Chair

SUB-COMMITTEES

Logistics
Sancha Brennan Whynot – Co-Chair
Salome J. Zikakis – Co-Chair

Substantive
Deborah Packer Goodall – Co-Chair
Michael J. Gelfand – Co-Chair
Andrew M. O'Malley – Co-Chair

WORKING GROUPS

Membership/Communications/ Inclusion/Technology:

- Michael Bedke - Chair
- Jeffrey Baskies
- Brenda B. Ezell
- Travis Hayes
- Robert Lancaster
- Lawrence Jay Miller
- Neil Shoter
- Tattiana Brenes-Stahl

Legislative:

- William "Bill" Sklar – Chair
- Sarah S. Butters
- S. Katherine Frazier
- William T. Hennessy, III
- Peggy Ann Rolando
- Jon Scuderi

Financial/Budgeting:

- Robert S. Swaine – Chair
- Linda Griffin
- Steven H. Mezer
- John C. Moran
- Pamela Price
- W. Cary Wright

WORKING GROUPS

Structure/Administration/Organization/ Leadership/Succession/ByLaws:

- Nicklaus Curley – Chair
- Debra L. Boje
- Ed "Burt" Bruton
- Sandy Diamond
- Michael J. Gelfand
- Brian Hoffman
- Melissa Murphy

Meeting Planning/Facilities/Logistics:

- Tae Bronner – Chair
- Robert S. Freedman
- Vinette Godelia
- George Meyer
- Andrew M. O'Malley

Committees:

- Adele Stone – Chair
- Angela Adams
- Tami Conetta
- Manuel Farach
- Lee Weintraub

TABLE OF CONTENTS

REPORTS OF THE SUBCOMMITTEES

REPORT OF THE
MEMBERSHIP/COMMUNICATION/INCLUSION/TECHNOLOGY
SUBCOMMITTEE OF THE
RPPTL STRATEGIC PLANNING COMMITTEE

General Recommendations:

- **Improve communication of and compliance with the Strategic Plan.**
- **Increase membership of Section with a focus on targeting underrepresented constituencies.**
- **Improve Section communications with members and enhance the use of technology.**

Discussion:

I. Improve communication of and compliance with the Strategic Plan:

A. Appoint Strategic Plan Coordinators to monitor the compliance with and adherence to the Strategic Plan once it is adopted. We believe this will increase membership. Though it may require a further financial investment in technology, this is anticipated to enhance member communications.

B. The Strategic Plan should be summarized in a one page bullet outline for easy reference by chairs, officers, and other Section leaders.

C. Leadership Orientation – the Strategic Plan should be discussed at new leader orientations.

D. Align resources - The officers should follow the Strategic Plan to prioritize and align resources for Strategic Plan implementation.

E. Committee chairs' annual committee reports should specifically address implementation and compliance with the Strategic Plan.

II. Increase membership of Section with a focus on targeting underrepresented constituencies.

A. Continue the letter campaign to recruit, welcome, remind, and say we want you back to dropped members.

B. Membership Chair should create a calendar and following the calendar send the reminders to the appropriate persons (Section Chair/ALMs Director) to remind of dates that letters are sent. Letters must be sent automatically by a specified date.

C. A survey should be sent to dropped members inquiring as to why the member dropped, and requesting their reconsideration.

D. At Large Members (ALMs) should send letters to welcome new members recognizing that personalized grass roots campaigns best communicate this message.

E. Locations of meetings should be studied, including historical attendance records, to determine whether location impedes Section membership generally, Executive Council membership specifically, and the impact of location on increasing diversity in membership.

F. Executive Council (EC) members should be made aware of Section membership numbers across the state. Membership and Inclusion Committee (MIC) chair and ALMs Director should work together to create this report.

G. Branding of EC meetings should be reinforced, including changing the title to Section Committee Meetings and EC Meeting to inform members that they are welcome to attend, avoiding current labeling which may be

perceived as exclusionary, and doing so in a manner which avoids a significantly adverse impact the committee processes, administration and finances.

H. Engage in a listening tour with respect to underrepresented areas and improve outreach to voluntary bar associations and young lawyers. We need to engage with attorneys in underrepresented areas and voluntary bar associations and young lawyers on a face to face level.

I. Videos on the website should be updated for use by ALMs and other members to introduce young lawyers and law students to the Section's activities.

III. Improve Section communications with members and enhance the use of technology.

A. Creating a downloadable form bank for members to use will add value to membership and further competent and professional practices. Existing forms posted on committee pages may be copied or moved to the forms bank page or linked. Committees should discuss how to expand the forms, including from the Probate and Trust Division, while enhancing and ensuring competency and professionalism.

B. Encourage committee chairs to ensure use of fair and equitable meeting voting processes, balancing the need to have representative decisions, avoid encouraging members attending just to vote on one issue, and allowing newer members to participate.

C. Further develop new members and incorporate their energy and perspectives, generally, and specifically promote inclusion. Committees should encourage member participation, including considering voting and non-voting classes of members.

D. Committees that have not done so should develop substantive discussion forum listserves easily accessible to members, allowing any Section member to subscribe. The purging of the listserves should be discouraged, except for those who have dropped Section membership. The annual Committee Chair's report should have the question regarding purging deleted.

E. We should personalize and customize communications to members.

REPORT OF THE
LEGISLATIVE SUB-COMMITTEE OF THE
RPPTL STRATEGIC PLANNING COMMITTEE

General Recommendations:

- **Institute Standards for Legislative Proposals, including the threshold standard of "Is the proposal worthy based upon compelling public policy?"**
- **Reduce the need for Glitch bills.**
- **React to third-party legislative proposals, but do not redraft.**
- **Always respect the Section brand.**
- **Empower the Executive Committee and Legislative Co-Chairs to consult and advise Committee Chairs before legislation is drafted.**
- **Annual mandatory Committee Chair training as to process and standards.**
- **Update, archive and make accessible legislative positions and white papers.**
- **Encourage continuity from year to year on Legislative Committee to assure historical knowledge base.**

Discussion:

I. Legislative Role of the Section – Proactive vs. Reactive –

A. Institute quality controls vs. quantity of legislative proposals. Resist the impulse to address every issue with a legislative proposal.

B. Improve drafting to reduce the number of "Glitch" bills that are proposed to conserve Section resources and avoid overstraining legislative resources.

C. Involve the Section more in big picture policy work than case-specific/isolated problem solving, unless the case involves a significant long term broad public policy warranting a Section-sponsored legislative proposal.

D. Dispel the notion that Section substantive committees are pressured to produce legislation to justify their existence. The existence of committee-mandated legislative liaisons or legislative vice-chairs does not compel, or imply the need to produce legislative proposals before discussing and debating policy. The focus should be on long term broad policy goals, not on a short term fix to an isolated situation.

E. Legislative committee and staff proposals driven by non-Section constituencies require the time and attention of the Legislation Committee, but Section responses should be contained within the scope of long-term public policy necessities consistent with the Section's legislative positions and referred to appropriate substantive Section committees for rapid review and recommendations. Substantive committees in coordination with their Division Directors should prospectively team with outside trade groups or other stakeholders to preempt legislative proposals inconsistent with good public policy. If the Section fundamentally disagrees with another group's statement of public policy to advance a proposal, the Section should communicate its position and its rationale, but not redraft the proposal. The Section shall work with other stakeholders to achieve favorable public policy.

II. Identifying Criteria or Determinants of What is "Worthy" of Legislative Response and the Expenditure of Section Time and Funds –

A. Is there a "Compelling Public Policy Reason" to justify the expenditure of Section resources concerning another's proposal?

B. Determine before proposing a position whether the position is worthy of risking the Section's reputation, the RPPTL brand.

C. Should the Section have legislative proposals advocated and adopted as a "tag along" to other Section(s) and trade group policies?

D. Be reminded that the Section's reputation and importance comes from the fact that we are active participants in the legislative process, any scale-back of participation must not diminish the Section's importance and reputation since that could invite challenges to our positions and reputation; thus, we should seek more collaborative effort with stakeholders to reduce the Section's role as the front-runner. As the Probate and Trust Division continues to pursue policy partnering with bankers, the Elder Law Section, and the Family Law Section, among others, to both preempt opposition and be a co-leader in joint proposals, policy partnering should be developed in the Real Property Division with the bankers, among others.

The Section must be more flexible. Following The Florida Bar Board of Governors' requirement to affirmatively disclose in our legislative position requests with whom we have consulted, including other stakeholders and Sections of the Bar and their positions, and noting we are one of the few Sections that does actively consults others on a continuing regular basis, the Section and its representatives on the Board of Governors should remind other Sections of their obligation and encourage collaboration and consultation.

More vigorous early consultation with stakeholders should reduce the number of glitch bills and help prioritize proposals. Also, we must continue to be cognizant of the legislative process of "horse trading" bills to assure that our important initiatives are advanced.

E. Adopt a Legislative Committee Policy Statement and Procedures to Ensure Continuity.

To provide guidance and appropriate expectations to those seeking support for legislative positions, the Section should adopt a policy statement concerning adopting legislative positions. The Section's Amicus Committee's policy may serve as a template:

"The Section's appearance as a friend of the court is the rare exception, not the rule. Indeed, the strength of the Section's appearance as an *amicus* stems in large part from the Section's unwillingness to yield to the siren songs of our members every time they sense an injustice is upon us. Our ability to befriend a court is a privilege. To the extent we abuse it, our words, now carefully considered, will lose their significance. When we draw near, we will *not* be heard. We purposefully address every amicus request with skepticism, as we must in order to protect the Section's credibility with the courts. But, know that every request is carefully considered."

F. The Legislative Committee should have the authority to make a substantive recommendation to the Executive Committee as well as advise Committee Chairs as to whether a proposal is needed and consistent with the Section's current policies.

G. The Section's Executive Committee should evaluate whether legislative proposals are consistent with current Section policies, and recommend to Committee Chairs as to whether a legislative proposal is worthy of Section adoption.

H. Standardize and make available prior legislative tracking charts, including hyperlinks to the referenced documents to assure continuity of information. The Fellows should complete this project, and update on a regular and timely basis.

I. Legislative Committee terms should continue with two-year staggered terms to ensure continuity and transfer of historical knowledge. Legislative Committee vice chairs should be selected with greater protocol to reduce the handicap resulting from transitions when significant substantive knowledge is lost with each transition. Actively and continually recruit new legislative committee members from the substantive committee legislative liaisons and legislative vice-chairs because they have some degree of experience, although perhaps limited to their particular committee's area. Selection should be cognizant of the Section's legislative consultants' expression of desire that the Legislation Committee be staffed with individuals having legislative experience and historical knowledge, analogous to the Amicus Committee, noting the Legislation Committee has a much heavier lift on a continuing basis than the sporadic amicus proposal of the Section undertaking an amicus position from time-to-time. Outgoing Legislative Committee chairs should continue for some time as ex-officio members as a resource to their successors.

III. Educating Committees and Their Leadership as to both the Process and Role of the Section –

An annual educational program for all designated legislative liaisons and legislative vice-chairs with mandatory attendance should be provided at a designated EC meeting to address the inconsistency of the level of activities of the legislative liaisons, many not having current experience on how to move an action item/proposal through the process. The program should be led by the Legislation Committee and our legislative consultants. All substantive committee chairs should also be required to attend.

IV. The Role of and Relationship with Legislative Consultants –

A. Tracking Charts. Tracking Charts should be expanded to include the succeeding week's committee meetings, if the agenda has been posted by the time of publication of the Tracking Charts, noting that Committee agenda notices become abbreviated late in the session. More emphasis on the review of weekly listed bills following the Tracking Charts should be communicated to committee chairs, legislative liaisons and vice-chairs, with

prompt communication if there are bills of interest to be moved to the Tracking Chart.

B. Positions. No Section legislative position should be stated on any matter unless consistent with the established positions enumerated by the Section. If the Section is neutral on an issue, such neutrality should be expressed by our legislative consultant. The Section's legislative positions should be continually tagged and updated

The Legislative Co-Chairs and the legislative consultants should discuss in advance of any Legislative Committee meeting where a bill containing a Section initiative will be on the agenda for the meeting to avoid any misunderstandings as to the Section's position and plan. The discussion should include a decision as to whether the Section will be in support/opposition or making a statement at the meeting.

Legislative white papers and positions should be categorized and archived to make them easily accessible to the Section.

C. Succession and Conflict Planning –

The Executive Committee, in conjunction with the Legislative Committee, should consult with our current legislative consultant to obtain a realistic timeline relative to succession planning. It is understood that such timeline may be extended or otherwise modified. As to conflicts, the Legislative Subcommittee of the Strategic Planning Committee recommends the Executive Committee consider whether it would be worthwhile to engage a second legislative consulting firm for conflict purposes who is known to and respected by our current legislative consultants, but available to step in as determined by the Executive Committee when perceived conflicts exist.

D. Management of Legislative Consultant –

1. The Legislative Subcommittee recommends a discussion among the Executive Committee as to the broader issue of whether, and to what extent, if any, the Section's legislative consultants should be managed vs. trusting the judgment and discretion of the legislative consultants.

   If a more managed approach is adopted, procedures for dealing with the legislative consultants should be adopted.

2. Legislative Bill Sponsors – The legislative consultant and the Legislative Co-Chairs should discuss specific bill sponsors with the Real Property and Probate Division Directors before a potential sponsor is approached so that all Section efforts can be coordinated and the Section can make an informed decision on its options.

Similarly, the sponsor's understanding and support of the substantive positions of the bill for which they are being solicited to sponsor should be confirmed prior to their sponsorship to avoid confusion or lackluster promotion of a Section position because of lack of understanding or support for such position by the sponsor.

3. Communications - Clear communication of expectations of our legislative consultants from Legislative Co-Chairs and Committee Chairs is necessary to assure timely and effective participation in the legislative process. When legislation bill drafting is requested from our legislative consultant, a clear statement of scope and deadlines must occur. All communications should be conducted with respect and dignity, recognizing the Section's members are volunteering their time and expertise.

REPORT OF THE FINANCIAL/BUDGETING SUBCOMMITTEE OF THE RPPTL STRATEGIC PLANNING COMMITTEE

General Recommendations:

- **The Minimum General Fund Balance should be a minimum of 50% of the next budgeted year's operating expenses with consideration of long-term contracts.**
- **Establish an Excess Fund Spending Policy for special projects once the June 30th General Fund Balance exceeds 90% of the next budgeted year's operating expenses.**
- **Track ActionLine revenue and expenses.**
- **Treasurer should receive copies of the hotel and meeting event contracts at the time the invoices are submitted for payment.**
- **The Section Administrator should provide the Treasurer a report listing the Section Sponsors and the sponsorship amounts committed, and track when the amounts are collected and recorded by the Section.**

Discussion:

I. Minimum General Fund. A target range should be set for the Section's General Fund, a minimum of 50% of the next budgeted year's operating expenses, taking into consideration the Section's long-term contracts. This requires the Section's long-term liabilities to be tracked by The Florida Bar, especially because these contract totals will likely increase over time.

II. Excess Fund Spending Policy. The Section should create an Excess Fund Spending Policy to address the utilization of year end General Fund balances that exceed the upper limit of the target range. The excess funds should be utilized for the benefit the Section members, but also recognizing that those needs may vary over time. The policy might use as a model the ABA Forum on Construction's "Reserve Spending Policy" which funds special projects ideas submitted by its members that its Finance Committee approves.

III. ActionLine. ActionLine should be budgeted and reported as if ActionLine was a separate operating unit to allow accurate profit & loss calculations which are difficult with commingled line items.

IV. Hotel and Meeting Event Contracts. The Treasurer should be provided copies of the Executive Council meeting contracts with hotels and event providers to compare the budget for meetings and events before the fact, rather than the current review after the fact.

V. Treasurer Tracks Sponsorship Commitments and Collections. The Section Administrator should regularly provide to the Section Treasurer a list of each sponsor's commitment, tracking when revenues are collected and recorded by the Section.

VI. Carry over items from the 2013 Strategic Planning Meeting.

A. The Section Administrator should provide to the Section Treasurer monthly copies of the Florida Bar financial statements showing the comparison of year-to-date versus budget within five (5) days of receipt by the Section Administrator from the Florida Bar Finance and Accounting Division. A balance sheet should be provided with the Bar financial statements.

B. The Section Administrator should provide to the Section Treasurer in advance of each Executive Council meeting a Section financial summary, including an attachment with the most current roll up budget only with a comparison of year to date versus budget, in the form approved by the Treasurer, for review and approval by the Treasurer

as well as certain other designated officers. Once approved, this financial summary will be incorporated in the agenda as Treasurer's Report for most meetings.

C. The Section Administrator should provide year-end figures and a draft preliminary budget for the upcoming Bar year by mid-August so that the Budget committee can begin working on the upcoming budget.

D. Within forty-five (45) days after each Executive Council meeting, the Section Administrator shall deliver to the Section Treasurer a hotel costs summary sheet with defined categories (i.e., room, food, equipment and committees).

E. The Section Administrator shall update after each meeting a spreadsheet of historical annual meeting expenses and meal/event charges for the past six (6) years, and work with the Florida Bar to prepare an annual estimated meeting budget based upon estimated budgets with defined categories (i.e., room, food and equipment) with suggested estimated totals for a typical in state meeting and reflecting typical attendance at certain events and suggested rates for event charges. This allows the Chair to know costs before charging for an event. This could be accomplished if the Section Administrator and Section Treasurer complete the meeting expense/facility chart designed by Michael Gelfand.

F. Quarterly, starting July 1, the Section Administrator should deliver to the RPPTL Section CLE Chair/Co-Chairs and the Section Treasurer an accounting of income and expenses for each CLE for all active CLEs.

REPORT OF THE
STRUCTURE / ADMINISTRATION / ORGANIZATION / LEADERSHIP / SUCCESSION AND BYLAWS SUBCOMMITTEE
OF THE RPPTL STRATEGIC PLANNING COMMITTEE

General Recommendations:

- **Ensure the section is a resource for other sections of the Bar.**
- **Renewed focus on training of Executive Council members.**
- **Improve training procedures for substantive committee chairs and vice-chairs.**
- **Succession planning and preservation and transmission of institutional knowledge for Committee Chairs and Executive Committee Members.**
- **Encourage a new generation of membership while maintaining the high standards for leadership and participation.**
- **Continued focus on implementation of the Strategic Plan.**
- **Decrease Executive Council size without sacrificing functionality and brain power.**

Discussion:

I. Ensure the Section is a resource for other sections of the Bar

It is in the best interest of the Section for the Section to be a resource for other sections of the Bar, and it furthers the Section's goal of facilitating communication with other sections of the Bar. Furthermore, the Section should hold itself out as a resource so that when issues within, or on the periphery of, the Section's purview are addressed, the Section is in the best possible position to ensure its goals are met and to provide technical input. The Section should be available legislatively as well as in other venues, such as legal education for members of the Bar and the community at large. To further this general goal, the subcommittee has the following recommendations:

Instruct our Section lobbyists to remain vigilant in reviewing legislation for matters relevant to the Section's purview. In addition, lobbyists and leadership need to make themselves available to other sections for questions and to assist when appropriate and consistent with Section goals.

The Section should identify other Bar sections and committees for more active participation by Section members. As to each of these sections, the Section should ensure an appropriate liaison to actively participate during meetings of such other identified section(s) to ensure the Section's presence and availability is noted. These liaisons should also be active in reporting back to the Section so that appropriate Section personnel can assist when appropriate.

The Section should increase recruitment of Section members to serve on Bar committees which most impact the Section's goals. Some examples of potential Bar committees for Section participation include Probate Rules, Rules Governing the Florida Bar, Judicial Nominating Commissions, Continuing Legal Education, Professional Ethics, and Civil Rules.

The Section's website should be updated to give a more pronounced presence for chairs of substantive committees and Executive Council members so that non-members can find contact information when needed. Ease of leader identification on the website will help facilitate communication when a non-member is seeking Section input.

II. Renewed focus on training of Executive Council members

The Section should better define the responsibility of Executive Council members and ensure that Executive Council members understand these responsibilities,

allowing informed Council members to be better able to fully participate in Section business both during and away from meetings. To that end, the following recommendations are being made:

The Executive Council Meeting Agenda should be distributed to Executive Council members at least ten days prior to all meetings.

It should be made clear at each meeting and round table that the expectation is for all Executive Council members to have reviewed and digested the materials in advance of meeting so that Executive Council members can make informed inquiries and decisions on all matters.

It should be made clear with the distribution of agendas and at each meeting and round table that Executive Council members are encouraged to reach out to the proponent of an issue to provide direct feedback prior to the meeting. Discussion during the meeting should NOT be the first option, rather discussions (particularly inquiries and technical or grammatical suggestions) should occur prior to the meeting so that everyone can be better prepared, can make more informed decisions and alterations, and time is put to good use.

III. Improve training procedures for substantive committee chairs and vice-chairs

One of the most important goals for the Section is to maintain its high level of excellence. To that end, the Section cannot lose focus on training the next generation of Section leaders, and ensure smooth leadership transitions among Executive Committee positions and of committee chairs and vice-chairs. Overall, it is imperative to the continue sustainability of the Section that those in leadership positions understand their roles, the general structure of the Section, and the resources available to leadership as well as members at large. The subcommittee recommends the following steps to facilitate these goals:

Annual Training - The Section should hold an annual training meeting for chairs and vice-chairs. During this meeting, points of emphasis will include: (i) the duties and responsibilities of committee leadership, (ii) reporting requirements to the Executive Council, (iii) expectations of responsiveness to Executive Council members such a legislative chair, (iv) an overview of recommended committee structure including attendance, initiatives, conflicts, and size, and (v) CLE requirements for the committees. In addition, the meeting will double as initial training for incoming chairs and vice-chairs. This meeting should be mandatory and should be led by Executive Committee Members.

The Section should prepare a booklet to annually be distributed to the chairs and vice chairs laying out duties and requirements of their position, contact information for inquiries, reporting deadlines (annual and otherwise), and any other general information the Executive Committee believes the chairs and vice-chairs should know. This booklet should also be made available on the Section's website.

IV. Succession planning and preservation and transmission of institutional knowledge for Committee Chairs and Executive Committee Members

Overarching goals of the Section are grooming leadership for the future and ensuring smooth leadership transitions. The Section excellently identifies leadership potential and encourages active involvement, but the following are recommendations for leadership transition:

Members entering into a chair position should be identified and informed at least three months in advance of advancing to the position. Over the three month period, the incoming chair should maintain close contact with the outgoing chair to allow the incoming member to better understand the role, the current projects, the active members of the committee, the best methods to facilitate committee meetings, and the position as a whole.

Outgoing chairs should be required to prepare an exit memorandum detailing all pertinent information, including projects, subcommittees, contacts, recommended agenda for the upcoming year, and any other information which the Executive Committee feels should be included in these memoranda. The Division Directors should prepare a form memorandum for use by outgoing chairs with questions to facilitate the needed information.

All Executive Committee positions should have a notebook of materials which lay out the duties and responsibilities of the position. Each officeholder is tasked with maintaining and updating the notebook in a fashion that allows immediate transition in case of emergency, as well as the ability to deliver this notebook to a successor. Information should include, among other things, all critical dates and deadlines. Any incoming successor should specifically request this notebook of the outgoing member. These notebooks should be prepared and maintained with an eye towards preserving the Section's institutional knowledge.

The Section Treasurer's term should be reviewed by the Long Range Planning Committee to determine if the position's term should be multiple years in order to allow for better understanding of the position. The subcommittee believes annual turnover of the Treasurer would have a negative impact on the Section as a whole.

Another option may be to create an “assistant treasurer” position and to give specific duties to the assistant treasurer that allows the assistant treasurer to assist the treasurer and advise the Executive Committee.

V. Encourage a new generation of membership while maintaining the high standards for leadership and participation

The Section, as do all Bar sections, needs to strive to be as inclusive as possible in order to encourage attendance and active participation. On the other hand, the Section needs to maintain the high quality standards and expectations for those that seek to rise into a leadership position with the Section. It is important that the Section be diligent in evaluating the talent pool to identify those that demonstrate leadership potential. In order to facilitate Section growth and high-quality leadership, the subcommittee makes the following recommendations:

The Section should have open, public methods for those looking to become more involved with the Section’s committees. This should include a uniform method for joining committees, designated individuals in each committee to meet and assist new members, and designated jobs/positions for new members which will ingrain them with the committee and members (i.e. secretary or mandatory subcommittee participation).

The Section should have a more open process for selecting leadership candidates. This needs to include a more conspicuous experience requirement for joining leadership (i.e. subcommittee participation, ALMs, subcommittee chairmanship, legislative involvement, tenure, etc.).

In order to encourage attendance but also to maintain utility within the committees, each committee should be made up of members and voting members. Voting members should be chosen based on participation and merit. Only voting members should be given the ability to vote on committee matters.

Leadership should be chosen based on merit and should not be influenced by political pressure or because of membership in specific firms. The subcommittee believes that the Section has done an excellent job of choosing leadership based on merit, however the Section should continue to be aware of perception.

Each meeting should include a new member social get together which is either free or very inexpensive. Attendance at this meeting should be mandatory for all committee chairs and Executive Committee members, and other Executive Council members should be encouraged to attend as well to give new members a

forum for questions and socializing. Alternatively, new members could be given access to the Thursday reception free of charge or at a significantly reduced fee.

Executive Council Members' Meeting expense should be maintained. The Section should ensure that Executive Council members can attend without significant cost acting as a barrier to entry. That being said, the Section should also strive to maintain the overall class of the meetings and locations. While this may seem inapposite, the Section should do its best to meet both goals. As an example, the subcommittee recommends alternative lodging near the meeting hub recommended to members and the inclusion of at least one free or inexpensive social event at each meeting. Additionally, the subcommittee recommends establishing a price point for the Thursday night social event in order to encourage attendance among members of all levels, including Executive Council, new, and ongoing members. Finally, the subcommittee recommends investigating potential Friday night dinners that allow for multiple venues or multiple options that give way to multiple price points (i.e. "dine around town" dinners, separate cocktails and dinner, or a la carte pricing).

VI. Continued Focus on Implementation of the Strategic Plan

The Section must do a better job of implementing its Strategic Plan and maintain focus on the Strategic Plan during the intervening years. In years past, Strategic Planning meetings have been held, a Strategic Plan created, and then it is effectively put on a shelf. The Strategic Plan needs to more often be consulted and the initiatives should become more of a focus for the Section. In order to push for more focused implementation, the subcommittee recommends:

Executive Committee members should be encouraged to rely upon and even cite to the Strategic Plan regularly as authority for specific actions. This gives the Strategic Plan more of an ongoing presence and will ensure that the Executive Council does not lose sight of its goals.

The Strategic Plan should be presented to the Executive Council in a presentation which highlights the Strategic Plan's important aspects, the reasoning behind the recommendations, the immediate actions being taken, and the importance of this Strategic Plan to the Section. The subcommittee is of the belief that many Executive Council members have little or no understanding of the Strategic Plan and thus it should be presented as an education item to the Executive Council members.

The Strategic Plan should be posted on the Section website in a conspicuous place so that members are reminded of its existence and are encouraged to consider it when appropriate.

The Section should create a new general standing committee with a focus on monitoring implementation of the Strategic Plan and making recommendations to the Executive Committee on how to facilitate implementation on an ongoing basis. All past chairs serving in the previous five years should be asked to participate on the committee as members. The chair-elect, current Section chair, and Division Directors should be required to participate as members on the committee, with the chair-elect acting as chairman with primary responsibility for ensuring implementation of the Strategic Plan. In addition, a past chair should be appointed as the "champion of the Strategic Plan" with a responsibility for reminding and cajoling leadership to implement the Strategic Plan.

Annually, the newly formed Strategic Planning Committee should present a report card in which it examines each of the Strategic Plan recommendations and goals and rates the implementation of that goal.

The newly formed Strategic Planning Committee's responsibilities should include implementation of the Strategic Plan as well as training of Executive Council members and committee leadership as laid out above. Utilizing former chairs to lead these training exercises will allow for better transfer of institutional knowledge.

The annual chairs' report should be modified to include additional questions directly relating to the Strategic Plan in order to ensure compliance as well as to provide an additional reminder to chairs of the need to comply with the Strategic Plan.

VII. Decrease council size without sacrificing functionality and brain power

The subcommittee is in general agreement with the other subcommittees that the Executive Council's size needs to continue to be monitored. At this time, the subcommittee does believe that the Executive Council is inflated and may need reduction (currently 286 members). The Executive Council's size should be maintained at a level that ensures on one hand that all of the Section's best minds are given a forum to participate, while on the other hand not growing to a level that the Executive Council's work cannot be performed due to an oversized membership. Furthermore, if the Executive Council continues to grow, the Section may find that venues will be increasingly difficult to locate and costs will be

unsustainable. In order to maintain a workable size, the subcommittee recommends the following:

The Executive Council's size should be decreased. This is an aspirational goal that, if not met, the subcommittee believes will have adverse consequences for the Executive Council and Section as a whole. The subcommittee believes that this reduction should take place in order to reduce overall subsidies, to maintain options in venue, to maintain healthy discussion, and to ensure the goals of the Section can efficiently be met.

Members should be reminded that not being on Executive Council is not a bar to active membership or getting significant benefits from attending meetings, including substantive knowledge as well as social interaction with peers outside of the Saturday meeting.

To effect the recommended reduction, the Executive Committee should review the committees annually, consult with the current committee chair, and determine the appropriate number of chairs and vice-chairs for each committee. The subcommittee recommends that Section committees have a limitation of 2 vice-chairs as a default, fluctuating up or down when appropriate. A fluctuation may be appropriate, for instance in cases of large committees. A fluctuation down may be appropriate in cases of committees primarily responsible for a significant event (i.e. ATO or Legislative Update), with emphasis that participating on those committees do not require vice-chair label, rather regular members have duties. The goal is to ensure that the vice-chair position is a pipeline for eventual leadership of the committee and slots should be maintained for that purpose, rather than to allow for continued Executive Council attendance.

Further, the number of ALMs members should be decreased. The subcommittee recommends a maximum number of sixty ALMS members. The membership should have a general goal of diversity in location throughout the state and in background; however, members should primarily be selected based on merit. The subcommittee recommends that the reduction take place over a three year period, with decreases of approximately 1/3 of the needed spots each year. The Strategic Planning Committee should review this reduction on or before December 31st each year to determine if further reduction is necessary or if the reduction should be suspended.

Additionally, the review of liaisons called for above should result in a reduction of members. The Executive Committee should review liaison positions annually,

confirm their ongoing viability, review the number of members acting in that liaison role, and confirm the member acting in that role should continue to act.

The Fellows program should be maintained but the goals and description of the program should be reviewed to highlight participation and involvement.

The Executive Committee should review the membership of the Executive Council on an ongoing basis with an eye on eliminating positions which no longer have usefulness. The position should be reviewed, not the person in the position, as we should seek to eliminate “parking spots”. The Executive Committee is urged to address underperforming and nonperforming Executive Council members.

The Executive Committee should annually review the number of Section committees to ensure that committees that have served their purpose are eliminated or merged rather than continuing past their usefulness.

The Executive Council may create a select number of “honorary member”[1] positions, which carry the same responsibilities and powers as a voting member of the Executive Council. This position would be awarded to members demonstrating their dedication to the section over a significant period of time, but whom may no longer wish to serve in a committee leadership position. This would have an added benefit of likely opening up additional positions for up and coming members as well as eliminating “parking spot” committee positions. The creation of honorary members slots should not slow the progress of the main goal of decreasing the size of the Council as a whole. Rather these slots should be used sparingly.

[1] The Subcommittee on Committees references this position as an Emeritus member.

REPORT OF THE
MEETING PLANNING/ FACILITIES/ LOGISTICS SUBCOMMITTEE OF THE
RPPTL STRATEGIC PLANNING COMMITTEE

General Recommendations:

- **Executive Council meeting space must accommodate committee meetings and attendees.**

- **Executive Council meeting space needs to have sufficient power strips and free Wi-Fi for members as base standard for meeting rooms.**

- **Take into account the overlap of the number of Executive Council meeting attendees and the number of committees meeting.**

- **Re-educating committee chairs at the Annual Convention or the Breakers' meeting on procedures for scheduling committee meetings, realistically estimating meeting time and size requirements, accepting new members, and utilizing alternative meeting arrangements, and emphasizing better follow up by Division Directors to assure compliance by committee chairs.**

- **Updating the suitable Executive Council meeting venue list and limiting chairs to select venues primarily from suitable venue list.**

- **Continue practice of moving Executive Council meeting venues around state with strong focus on conveniently accessible locations with affordable back up hotels near the venue.**

- **Implement new Executive Council meeting booking procedure which requires registration for events to obtain link to hotel reservations and implement a 35-day cancellation policy to permit re-allocation of room block. Provide link to committee chairs before providing to other Executive Council members.**

- **For social events at Executive Council meeting meetings, preserve the Thursday night reception, explore alternatives for Friday event, guarantee one affordable social event to encourage inclusion of younger members and re-establish a spousal event at each meeting, particularly Breakers and Convention.**

- **Continue tradition of holding an annual Section Convention; but, require a CLE component to distinguish from other Executive Council meetings.**

- **Seminar venues should be determined by the CLE committee based upon the type and audience of the CLE, including the profitability factor.**

Discussion:

I. Executive Council Meeting Planning:

A. How is our planner doing? The company (located in Orlando) the Section is using is going a fairly good job! The Section appears fairly happy with our new contact but the Section needs to work with the planner to attune the planner to Section's goals and priorities for meeting arrangements, and re-evaluate after this year.

B. Should planning target be 24 months in advance? Yes, but this should not be a steadfast rule, rather a best practice goal. Because the Section is booking so far in advance sometimes the person selecting locations has not been elected as chair-elect. A best practice may be for the Division Director who is selecting locations for their meetings 24 or more months in advance to seek Executive Committee feedback before a contract is finalized, allowing the "would be chair" to select their own meeting locations but allowing input from the pool of individuals who are in the leadership track.

C. When should Section members be permitted to access reservation systems? Booking should tie into meeting registration allowing registration for a meeting which provides a link to the hotel to book your room. Without an overall meeting registration fee, members may not sign up for anything, but they still attend the meeting as an Executive Council member and should have priority to book a room. Registration should open at least 10 weeks in advance, which means committee schedules and all events should aim to be finalized 12 weeks in advance. Currently the Section releases the link to book rooms in stages based upon priority, but people are sharing the link and therefore thwarting the priority levels. This is an improvement over booking all rooms for the year at the beginning of the bar calendar year, but still not working perfectly.

D. Contract template evaluation, updating. George Meyer has created an extensive meeting protocol list to consider when signing contracts, particularly for the Breakers contracts. George also reviews the contracts as the senior member of the Meetings Planning committee. The Section has come a long way since the previous strategic planning meeting and The Florida Bar does allow the Section to become more involved in contract negotiation, so this is working well.

E. Distribution of Registration to Non-Executive Council members: The Section has developed a separate registration sheet for non-Executive Council members, but needs to better provide non-Executive Council

members with the registration information and directing them to the online registration system so they understand the need to pre-register for events such as lunches during committee meetings and the Thursday cocktail reception.

F. Cancellation period. A 35-day cancellation policy is recommended where the member is required to lose a one day deposit if they cancel, provided the deposit is credited to the Section's tab, not to the hotel to prevent the hotel to profit off of a cancellation and resell the room while still holding the Section to our attrition terms. A member should not have to forfeit the cost of the entire stay for a cancellation outside the normal hotel policy.

G. Do we have an ongoing attrition problem? The Section is still having problems with attrition. The cancellation policy will help this, but the Section also need to include not only cancellations but also changes to reservations in this category. For example, when a member drops a Saturday night or a Wednesday night, they prevented another member from booking that night because the booking member did not bother to confirm plans before booking the room, and then the Section drops below the venue contract guarantee number or the Section must increase our block unnecessarily.

H. Out of State Meeting: As a best practice the Section chair should consider the deadline for legislation when scheduling this out of state meeting. The out of state meeting should be, for the most part, self-supporting, minimizing subsidies because the meeting is often out of the country. Events should be priced so that registration fees will mostly, if not completely, cover the event. The cancellation policy should be sufficient to avoid the large attrition problem that we have seen in the past. Perhaps consider a 60 to 90-day cancellation policy for this meeting. The Section can absorb meeting costs of the Executive Council meeting that occurs at the out of state meeting but within reason.

I. Alternative/Overflow Hotel Suggestions: The Section should provide a list of alternative/overflow hotels suggestions on the registration sheet, particularly the committee registration forms. There will be no block at the overflow hotel, but the Section should investigate shuttles or other transportation services links to the main hotel.

J. Meetings Locations and Times: The Legislative Update should remain at the Breakers for the foreseeable future and Convention at another family friendly resort sometime in May. The Section has transitioned to holding other Executive Council meetings at a business type hotel and related facilities, but it is recognized that to some extent the Section is limited in

location of meetings due to the size of the group. Business type hotels are not necessarily feasible for a group our size. But, the best practice is to choose two less expensive, more business focused locations for two meetings.

II. Annual Convention:

A. What is its purpose, other than an election? The Section is not required to have a convention pursuant to our Bylaws. The Bylaws just say that the chair designates the "annual meeting" each year, which is the election meeting and must be held prior to July 1st (Article VII, Meetings). The Section should have a convention because it is the one time we really reach out to the over 10,000 members and invite them in to join the Executive Council. Not everyone does attend, of course, but we do see some local attorneys who do not come any other time. It is better that the convention has been moved off the Memorial Day weekend so that prices for the rooms are less expensive and most school age children are out of school for the summer. The convention should be a family friendly event so it should be at a time that encourages Section members to bring their families.

B. Do we need a convention, and if so, then is location an issue? The convention is good for the Section. For location, the Section is limited somewhat by the size of our membership, but as indicated above, the convention should be more family friendly and the location should lend itself to that. But, the chair should be able to choose the location.

C. Should the convention include a CLE component? The Convention should include a CLE component because that is the only thing that makes it a convention vs just a meeting with an election. CLE should be coordinated by CLE committee, not the convention committee.

III. Seminar Venues:

A. Live Seminars: The sub-committee defers to the CLE committee. Decisions are typically made on a case by case basis given the history of the seminar and the target audience.

B. Still Necessary/Purpose? Limit CLE to those seminars that have a consistent in person audience and the same people attend every year. The seminar is profitable and therefore justifies the in person component. Also, there are special seminars, such as ATO or CLI, for which marketing and networking is a major component of the seminar.

C. What Venues are Necessary? Again, the sub-committee defers to the CLE committee because this issue must be addressed on a case by case basis.

IV. Committees (physical meeting space)

A. Consider room arrangements, alternative set ups to reduce space: The Section Administrator does a great job of maximizing the space dependent on the committees and the Section is open to the alternative arrangements to reduce space. The large committees keep getting larger and the Section will end up significantly limiting where meetings can be held if the Section cannot use alternative set ups.

B. Shifting expenses from room revenue to Section expenses. This issue can be explored during contract negotiations, but in the experience of the members of the subcommittee, the actual benefit to the Section member is insignificant. It is recommended using the Breakers as a test case to determine if the Section were willing to pay a fee for meeting room rentals if the hotel would reduce the room rates. In past, the hotel has only been willing to reduce room rates by $5 or $10 a night which did not justify the meeting room rental fee.

C. Do Committees Need To Meet? Whether committees need to meet in person at each in-state Executive Council Meeting should be considered because the large number of committees makes it is difficult to schedule all of them. Smaller committees should consider meeting outside of the formal setting by phone or using a "go to meeting" type internet program. The number of committees should be reduced.

D. AV Needs: The Section Administrator is doing a great job in negotiating outside vendors to come in and provide services and to purchase items for Section use. The Administrator has then been able to sell used equipment to smaller Sections when the Section upgrades. Power strips should be added to the list of equipment needed as a priority!

1. Projectors.
2. Speakerphones. The never-ending debate, but when needed the Section should have them! Always the issues of how many committee members attend by phone and even if they do, what percentage of the meeting discussion do they actually hear.
3. Microphones. Important for large committees – some member's voices do not carry in large rooms and the Section has older members who cannot hear well. At events it is important to let the sponsor make their announcements to be

heard over the crowd, and the Section needs to provide the microphones.

E. Timing of Roundtables: The Section has tested the concept of Friday roundtables with success on those in-state meetings where no full day seminar program is presented on Thursday or Friday. However, this choice should be left to the discretion of the chair based upon the meeting, the number of committees that must meet during that time period and other factors.

F. Scheduling Committee Meetings for future EC meetings in advance: The Section is still working towards a best practice of having the schedule finalized and provided to members with adequate notice in advance of when registration opens for the meeting so that all members know when they will need to be at the hotel before they make their hotel reservations.

V. Communicating to Members. Work with the media consultants to refine how the Section communicates with members. Emails work but they can be annoying, though they are the only way that has consistently obtained responses from our members. The Section should prioritize who can send out emails so that emails are not unnecessarily duplicated; and, consider bundling our email messages where possible (e.g., a weekly e-blast with all messages in it for that week?). Communication should be made through the ALMS to the larger membership to convey the good work the Section does on a regular basis and have more consistent communication.

VI. Social Events:

A. What is necessary? There should be a Thursday Reception and a Friday Event but with a consistent policy for pricing. One event should always be an affordable event. The Thursday night reception should remain constant, but for Friday event, the chair should consider alternative events at some meetings such as dine around dinners which have worked. Moving from sponsorships of specific events to sponsorship levels will provide more flexibility in pricing and planning events. The formal Friday night cocktail party and sit-down dinner is expensive which some members very much enjoy so that should be kept for some meetings; but, employ the dine-around at others. Perhaps keep the formal reception and dinner at the Breakers; but, have the dine-around at the December meeting.

B. Younger member's involvement? The Section needs to encourage young member involvement. See comments above about Thursday night. Also, by making the convention family friendly, this will be more attractive to younger members. There should not be an objection to members, younger

or otherwise, making alternative arrangements for dinner or receptions among themselves for Friday or Saturday nights.

C. Role of Saturday Dinner? The Saturday night dinner provides the chair the ability to plan a smaller, more intimate "fun" event. It also provides members a chance to relax and get to know each other in a smaller setting. The chair should have flexibility to eliminate the Saturday night event where appropriate.

D. Role of Sunday Dinner? This should refer to Sunday Brunch. But the committee felt Sunday brunch is unnecessary and not well attended. The Section typically does not offer and it does not need to return.

E. Spouse Events. At least one spouse event should be added on a consistent and regular basis, particularly at the Breakers and the Convention. The spouse event is important to help maintain our members and build relationships among the member's families. The event should serve as a "kick off" for the weekend and should be held consistently at the same time each meeting.

REPORT OF THE SUBCOMMITTEE ON COMMITTEES OF THE RPPTL STRATEGIC PLANNING COMMITTEE

General Recommendations:

- **Every 2-3 years, Section leadership should review all committees and liaison positions to determine whether any need to be added, dissolved, subdivided, merged, etc.**
- **Committee meeting times should be rotated.**
- **Identify four to six core committees which cannot be scheduled opposite each other under any circumstances.**
- **Within 30 days of the last meeting, committee chairs should deliver preliminary agendas for their next meeting and inform the Division Director how much time is anticipated to be required for their next committee meeting.**
- **The Section should standardize nomenclature and usage of committee titles (committee, subcommittee, task forces, ad hoc committees, etc.) amongst the different committees and between the two Divisions.**
- **Division Directors should periodically meet or confer with committee chairs to reinforce and educate the chairs about their respective roles and also to get feedback.**
- **Support the Legislative Subcommittee proposals as follows:**
    - **Encourage committees to de-emphasize legislative action in favor of professional enrichment.**
    - **Proposed legislation must first be vetted by the Legislative Committee, the Division Director and the Executive Committee.**
    - **Require a compelling need and a reasonable likelihood of successful passage of the proposed legislation.**
    - **Each committee should have a legislative subcommittee.**
- **To control the size of the Executive Council, to create a path to leadership for Section members, and to allow opportunities for active contributing members, the Section should (recognizing that one size does not fit all):**

- **Limit the number of vice-chairs for each committee to a maximum number of two unless otherwise warranted, e.g., the Amicus Committee.**

- **One person per liaison position except sitting judges.**

- **Guidelines shall be created for the creation of an Emeritus position on the Executive Council.**

- **The Executive Committee should proactively remove inactive Executive Council members.**

- **For substantive committees, an application for voting membership and determination of number of voting members on a committee by committee basis. The maximum number of voting members for each committee should be determined by the Executive Committee in consultation with the Division Directors and committee chairs.**

- **Grandfathering of committee membership shall be based on the committee chair's discretion subject to the additional discretion of the Executive Committee.**

- **Each committee chair should have the discretion to create at least two listserves: a listserve of voting members and a listserve of non-voting members.**

Discussion:

I. GOAL: Establish a procedure to review the efficacy of Section Committees, establishment of new Committees, and dissolution of existing Committees.

A. Topic or Issue: Are there too many Committees, are new Committees too easily formed, and what should be the test to dissolve a Committee?

B. Discussion: The Section's Bylaws, Article VI, Section 1, gives the Section Chair broad discretion to establish and dissolve Committees; however, in at least one instance, we would have preferred that a Committee not be dissolved but rather made a General Standing Committee, specifically, the Integrity Awareness and Coordination Committee should not have been dissolved. The mission of this Committee was "to preserve the Section's reputation for integrity by promoting awareness and understanding of applicable conflict of interest principles and bylaw provisions among components of the Section, coordinating the uniform and consistent application of these principles and provisions within components of the Section, and by other appropriate means." This Committee, composed primarily of past Section Chairs, could have remained a General Standing Committee available to the Executive Committee, and possibly Committee chairs, to address conflict of interest questions within the Section and to monitor for possible conflicts.

C. Conclusion or Proposal: While the Bylaws provide broad discretion to the Section Chair to establish new Committees and dissolve existing ones (the wording also infers that the Executive Council could vote to reinstate a dissolved Committee), we believe that approximately every 2-3 years, Section leadership should review all Committees and Liaisons to determine whether any need to be added, dissolved, subdivided, merged, or otherwise addressed. A recommendation would then be made to the Section Chair, who could ratify or veto the recommendation and a 2/3'ds vote of the Executive Council would override the Section Chair's decision.

II. GOAL: Minimize Duplication of Discussions with Same Speaker and Audiences

A. Topic or Issue: How can we avoid or minimize duplicating discussions with the same speaker(s) and audiences?

B. Discussion: Most of the chairs interviewed did not consider this a problem and recognized that some duplication is inevitable because many topics overlap the different committees. With respect to proposed legislation, most chairs thought that the vetting process for proposed legislation is important to producing the best product and to being more inclusive. Some chairs also recognized that although the majority of the audiences may be the same, there are some people who only attend one committee meeting.

There was some discussion of using the multiple committees vetting process less and using the Division Roundtables for that purpose. However, Roundtables are typically only attended by Executive Council members and solely using the Roundtable process risks eliminating input from non-Executive Council committee members.

Committee CLE presentations rarely overlap, but proposed legislation is intentionally circulated among various interested committees. This vetting process, used by both Divisions, helps to identify and address issues before the proposed legislation becomes an action item and allows for a large number of individuals to consider and comment on the proposed legislation.

C. Conclusion or Proposal:

1. There does not appear to be an issue with respect to "committee CLE"/recent case law presentations.

2. On the Probate and Trust side; probate rules updates should be limited to two committees and the Roundtable: Probate Law & Procedure and either Trust Law or Probate and Trust Litigation. Additionally, any new or proposed rules affecting guardianship should be discussed in the Guardianship committee.

3. For "committee CLE" of interest to multiple committees or proposed legislation which needs to be vetted among multiple committees, the Section should create a 30 minute time-block (perhaps at the beginning or end of one of the interested committee's meetings) and have all members of all of the interested committees attend the one presentation, ask questions, and provide comments. After the presentation, the committees can separate to allow the host committee to continue its business.

III. GOAL: Avoiding Conflicting Meeting Schedules

A. Topic or Issue: How do we schedule committee meetings so they do not conflict with or cannibalize each other's attendance?

B. Discussion: Interviews revealed that conflicting meeting schedules is a bigger problem in the Real Property division than the Probate and Trust division.

C. Conclusion or Proposal: Committee times should be rotated from Executive Council meeting to meeting so a committee with a bad timeslot in one meeting would be guaranteed a better timeslot on the next meeting. The Division Directors should circulate a proposed committee schedule among committee chairs so the chairs can provide input. Consideration should be given to encouraging joint meetings between committees to reduce conflicts and increase interaction. Some committees also do not need to meet in person at every Executive Council meeting and should be encouraged to meet telephonically, or virtually, at least once a year so as to reduce the number of in-person meeting conflicts. Where conflicts are unavoidable, conflicts should be scheduled between substantive and general standing committees rather than between substantive committees only.

The Section should consider identifying four to six core committees which cannot be scheduled opposite each other under any circumstances. The Section should also avoid simultaneous scheduling opposite each other of meetings that have scheduled speakers, so attendees can attend as many speaker presentations as possible.

IV. GOAL: Define the Purpose and/or Use of Subcommittees, Ad Hoc Committees, and Task Forces

A. Topic or Issue: What is the difference between subcommittees, ad hoc committees, and task forces? Are these groups currently distinguished in their use, and what is the appropriate use for each?

B. Discussion: Subcommittees are smaller working groups assigned to a particular issue or project being addressed by a particular Section committee. They are created by the committee chair, given their assignment by the committee chair, and are dissolved by the committee chair. Some Real Property Division committees have "standing subcommittees" for CLE, legislation, and continuing issues (e.g., the super priority lien subcommittee of the Condo and Planned Development Committee). With respect to General Standing Committees, the chairs interviewed only use subcommittees rather than ad hoc committees or task forces. Interestingly, the two divisions interpret and use ad hoc committees and task forces differently.

At least some of the Real Property substantive committees use sub-groups as follows: Task forces are created for short-term, focused projects dealing with one particular issue. When the issue has been addressed, the task force is dissolved. Ad Hoc subcommittees are created to study, report, and address longer-term projects. When the project is completed, the ad hoc subcommittee is dissolved. Subcommittees are created as "standing" subcommittees to handle recurring events such as an annual CLE seminar/webinar or to follow ongoing issues such as bulk buyer and super priority liens. In other words, within a single substantive Real Property Division committee, all three groups may exist. Other Real Property committees use only subcommittees, and some of those chairs did not know what, if anything, distinguishes ad hoc committees from task forces.

Probate and Trust substantive committees use and appoint only subcommittees. The duration of the subcommittee depends on the complexity of the issue assigned to it. For complex issues that touch multiple substantive committees in the Probate Division or which require immediate attention (such as a quick legislative fix), the Section Chair and/or Probate and Trust Division Director will create a separate substantive ad hoc committee. Those ad hoc committees are under the supervision of the Probate and Trust Division Director, typically address issues that would be of interest to or within the scope of multiple substantive committees, and typically are dissolved when the project is complete. Of the committee chairs interviewed, those in the Probate and Trust Division understand that task forces are created to review and respond to non-Section initiatives. This is an entirely different use and understanding of a task force than how it is used and understood in the Real Property Division.

NOTE: There are some Section committees that are labeled "ad hoc" that are actually continuing committees and should be renamed to delete the "ad hoc" title, e.g. Ad Hoc Leadership Academy, Ad Hoc Committee on Jurisdiction & Service of Process.

C. Conclusion or Proposal:

1. There are no misunderstandings or issues as to the use of subcommittees by Section committees.

2. Section ad hoc committees are created and should continue to be created to study and/or address topics that overlap multiple committees (e.g., Estate Planning Conflict of Interest and Discretionary Spendthrift Trusts); are large and complex in scope (i.e., Guardianship Revision and Elective Share); or are time-sensitive matters (e.g., POLST).

3. There is no clear understanding among Section chairs or members as to the distinction between an ad hoc committee and a task force, and there is no need to use two different terms. “Ad Hoc” is used most often and is generally understood; therefore, abandon the use of “task force.” However, if within a substantive committee, the committee chair seeks to use different labels for what are in essence subcommittees, that should be their prerogative, with the understanding that those labels and distinctions are not universally used by all Section committees. The nomenclature and usage amongst the different committees should be standardized.

V. GOAL: Identify the Purposes and Uses of Committees and Maximize their Ability to Fulfill these Purposes and Uses

A. Topic or Issue: What are the purposes of committee operations as part of Executive Council functions, how well have the committees achieved these, and how does the Section maximize the effectiveness of the committee structure?

B. Discussion: Committees are used to isolate and focus on issues warranting changes, provide continuing legal education programs (both internally in the Executive Council and externally among our membership), and bring people with different perspectives together to work on common problems (which also creates camaraderie and connections and reinforces professionalism). The Executive Council membership is too large to accomplish these goals without a focused committee structure. Since 1991, committee structure has become tighter and has included less social networking, morphing instead into a more program-oriented regimen. The accountability of committee chairs has also increased. This tighter framework has allowed for the creation of more committees because oversight is more structured and regimented. However, we must guard against creating too many committees or oversight will suffer.

C. Conclusion or Proposal: We are likely at the optimal number of committees. We must watch committee activities and not be afraid to sunset or retire committees when they become unnecessary or not as effective as leadership anticipated. If committees cannot draw sufficient attendance on a regular basis, it is a sign of limited interest or lack of a leadership plan for growing the committee. In the meantime, committees should continue their focus on educating members about developments in case law and statutes, pursuing legislative activities, and educating members on substantive issues. We should also identify opportunities to coordinate with other sections of The Florida Bar. The research suggests we have successfully fulfilled these goals so far.

To maximize relationships among the committees, it is recommended that the Division Directors meet twice per year with committee chairs to reinforce and educate the chairs about their respective roles and get feedback from the chairs.

The Legislative Subcommittee proposals are supported as follows:

1. Encourage committees to de-emphasize legislative action in favor of professional enrichment.
2. Before a committee drafts proposed legislation, the proposed legislation goal must first be vetted by the Legislative Committee, the Division Director and the Executive Committee.
3. Adoption of a standard by which the proponent of the legislative initiatives must demonstrate a compelling need for the legislation and a reasonable likelihood of successful passage.
4. Each substantive committee should have a legislative subcommittee.

VI. GOAL: Committee Chairs and Vice Chairs should have Limited Roles on Other Committees while Serving as Chair or Vice-Chair of a Committee

A. Topic or Issue: Are too many committee chairs serving multiple roles on other committees and if so, what is the solution?

B. Discussion: Overall, interviews indicated there was not a strong feeling that committee chairs and vice chairs have too many concurrent leadership roles. However, there was recognition that many of the same people are tapped to be chairs and vice chairs of different committees from year to year. As a chair's "term" is up, that chair is added to another committee as a chair or vice-chair and so on. As a result, there may be 3 vice-chairs on a committee to accommodate active members who don't want to leave the Executive Council. There are a number of reasons for this process, one of which is that those appointed as chairs or vice-chairs have exhibited leadership skills and a willingness to do the "heavy lifting" and the number of members who are willing to take on these positions are insufficient to cycle out existing chairs/vice chairs. Not incidentally, the other reasons expressed are: (i) the Section should not lose the benefit of the institutional knowledge and expertise of chairs and vice-chairs when their terms are up, and (ii) the chairs and vice chairs, having given of their time and resources, should be rewarded with continuing membership in the Executive Council if they want to remain active. Fostering leadership has been a challenge as discussed above with respect to committee membership, but once leaders are identified and take on chair and vice-chair positions, these individuals typically want to remain on the Executive Council after their initial committer leadership terms are up. One committee chair who was interviewed appreciated the value of the "veteran" Executive Council members but thought that a system which fostered "cycling off" committee chairs after a period of time is healthy for an organized body, especially one like the Executive Council which maintains institutional knowledge and continuity through the involvement of former Section Chairs.

C. Conclusion or Proposal: As leaders among committee members are identified, they will ultimately be offered chair and vice-chair positions, which will result in having to cycle off existing Executive Council members in those positions. This is the "natural order" of any committee system, but solving for the cycling off by continuing to add vice-chair positions is not ideal. However, there was an acknowledgement that there should be a place for these valued members of the Executive Council and one committee chair suggested that those chairs whose term has expired on the last committee he/she will serve on can serve for a period of time as a chair emeritus. In this manner, each committee can continue to have a chair and vice-chair (or two, if desired), but a committee chair member who has occupied a chair position(s) and no longer wishes to do so or has reached term limits, will still have a place on the Executive Council as an committee chair emeritus and be an emeritus member on a maximum number of committees (to be determined), in appreciation of his/her service. We believe that an Emeritus

member position(s) should be created by the Executive Council, and it is not necessary to identify such a position as a chair emeritus.

VII. GOAL: Optimize the Size of Committees with Active Committee Members

A. Topic or Issue: How does the Section optimize the size of committees with active, involved committee members?

B. Discussion: This topic was addressed in the 2014-2019 Strategic Planning Report under "Goal II." In its discussion, the prior Report identified certain concerns, including the size of a committee impacting its productivity. The 2014-2019 Report recognized that committees should be as large "as we have people who want to be involved", but rules need to be imposed to allow each committee to accomplish its purpose. The prior Report recommended strict enforcement of an attendance policy, a limitation on voting members and creation of an application for committee membership as a voting member, the latter of which would be a universal application for all committees.

This subcommittee believes that the recommendations of the earlier Strategic Planning Report should be adopted, with some modification. Committee chairs stated that although many committees have large numbers of members, for some of these committees a relatively small percentage of members attend meetings on a regular basis (either personally or telephonically if permitted) or volunteer for lectures, articles or special task forces. One committee chair described the impressive numbers of committee members as being "a mile wide and an inch deep." In most cases, the large committee roster is nothing more than a listserve for many members, but each participant on the listserve is given the privilege of listing themselves as a committee member.

Even if a committee adopts voting and non-voting member status, the fact remains that a non-voting member will still be entitled to the benefits of being a member without having to contribute. Moreover, recognizing that the chairs and vice-chairs of committees are volunteers with demanding work schedules, it is increasingly difficult and time consuming for them to find committee members who will volunteer for the core needs of the committees. And so the chairs call upon the same members time and time again. While recognizing that "one size does not fit all", there should be some qualifications for admitting members to Section committees and correspondingly, there should be some "investment" by a committee member to earn member status. An application in which a prospective member commits to attend a certain number of meetings either personally or telephonically (recognizing that some members' personal attendance is not financially supported) and commits to lecturing, writing an article, participating in a task force or the like will serve to facilitate the role of the committees within the Section. Such a policy will create a more active and committed core committee membership and may very well foster innovation to give even more value to membership in the Section. In this regard, each committee can still maintain a listserve which serves to stream

out information, CLEs, articles and so forth to those Section members who have an interest in a topic but no time to volunteer as a committee member. It is hoped that within that listserve group, a number of potential committee members will surface as they see the benefits of being a committee member, and that in turn will foster the next "generation" of leadership for the Section.

C. Conclusion or Proposal. Committees should be as large as the Executive Council determines is appropriate given the nature of each committee, with input from the committee chair(s). This number can be reviewed periodically and can vary from committee to committee. But the common goal of each committee can be better served by engaged committee members and so this subcommittee recommends the implementation of an application for membership used for each committee and existing committee members should also complete the application. The application need only be completed one time, but once a member signs on for membership, the committee must review the members' actual commitment (i.e. attendance, lectures or other volunteer activities) on a periodic basis (we would recommend every two years). Each committee should decide if telephonic attendance "counts" as attendance. The Executive Council should decide if non-paid CLEs to a committee's listserv members are appropriate, since presently CLEs are provided at no cost to all members of a committee offering same at its meeting, so a member who does nothing more than sign up for a committee can call in for a free CLE. In recommending this application process, this subcommittee recognizes that if those who currently are allowed to be committee members with no commitment, have to now commit to active involvement, what will motivate them to do so? The desire to be a part of a committee whose members are active and produce articles, CLEs, lectures, develop best practices and/or participate in the direction of legislation is in the nature of lawyers and we believe that even with an application process there will still be a number of lawyers who will agree to the terms of committee membership.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By — **L. Howard Payne & Alfred J. Stashis, Jr.**, Co-Chairs, IRA, Insurance & Employee Benefits Committee of the Real Property Probate & Trust Law Section

Address — **L. Howard Payne**, The Payne Law Group PLLC, 766 Hudson Avenue, Suite C, Sarasota, FL 34236, Telephone: (941)487-2800

Alfred J. Stashis, Jr., Dunwody White & Landon, PA, 4001 Tamiami Trail North, Suite 200, Naples, FL 34103, Telephone: (239) 263-5885

Position Type — IRA, Insurance & Employee Benefits Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

Jon Scuderi, Goldman Felcoski & Stone, P.A., 850 Park Shore Drive, Suite 203, Naples, Florida 34103, Telephone: (239) 436-1988, Email: jscuderi@gfsestatelaw.com

Peter M. Dunbar, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: pdunbar@deanmead.com

Martha J. Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: medenfield@deanmead.com

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support __X__ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

Support legislation to change Fla. Stat. 222.21(2)(c) to clarify that an ex-spouse's interest in an IRA which is received in a transfer incident to divorce is exempt from the claims of the transferee ex-spouse's creditors.

Reasons For Proposed Advocacy:

Fla. Stat. 222.21(2)(c) provides that interests in IRAs are exempt from the claims of creditors of owners, beneficiaries, and participants. The proposed change would clarify that an ex-spouse's interest in an IRA which is received in a tax-qualified transfer incident to divorce is likewise exempt from the claims of creditors of the transferee ex-spouse.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

Real Property, Probate and Trust Law Section of The Florida Bar
White Paper
Proposed Amendments to
Section 222.21 (2)(c), Florida Statutes

I. SUMMARY

The proposed legislation would amend Section 222.21(2)(c), Florida Statutes, to clarify that interests in an individual retirement account ("IRA") received in a transfer incident to divorce described in Section 408(d)(6) of the Internal Revenue Code retain their creditor-exempt status after the transfer.

II. CURRENT SITUATION

Section 222.21(2)(c) provides that interests in IRAs are exempt from the claims of creditors of owners, beneficiaries, and participants. The statute provides that the exemption is not lost "by reason of a direct transfer or eligible rollover that is excluded from gross income under the Internal Revenue Code of 1986...."

In *In re: Lerbakken*, (Bankr. 8th Cir, 2018), the United States Bankruptcy Appellate Panel for the Eighth Circuit concluded that the interest in the debtor's ex-wife's IRA to be transferred to the debtor pursuant to the couples' stipulated property settlement was not exempt from the claims of the debtor's creditors in bankruptcy. The debtor claimed his interest in the IRA was exempt under the federal bankruptcy law exemptions. The court rejected the debtor's argument, citing the United States Supreme Court's decision in *Clark v. Rameker*, 134. S. Ct. 2242 (2014) for the proposition that the debtor's interest in his ex-wife's IRA were not the debtor's retirement funds.

Florida is an "opt-out" state; thus, federal bankruptcy exemptions are not available to Florida debtors in bankruptcy. Instead, the exemptions available to a Florida debtor in bankruptcy for IRAs are governed by state law; in particular by Section 222.21, Florida Statutes. Section 222.21(2)(d) clearly exempts interests in a retirement plan subject to ERISA (e.g., a 401(k) plan) received by a non-participant ex-spouse from the claims of the non-participant ex-spouse's creditors pursuant to a "qualified domestic relations order" described in Section 414(p) of the Internal Revenue Code. However, the Florida exemption statute is less precise about whether the interest received in an IRA received in a transfer incident to divorce is exempt from the claims of the non-participant spouse.

III. EFFECT OF PROPOSED CHANGES GENERALLY

The proposed change would clarify that the interest of an ex-spouse in an IRA received in a tax-qualified transfer incident to divorce is exempt from the claims of the transferee spouse's creditors.

IV. ANALYSIS

The *Lerbakken* decision does not by itself require attention because it is based on federal bankruptcy law exemptions that are not available to Florida debtors. The decision is notable in

Florida for the light it shines on our exemption statute, Section 222.21, Florida Statutes, and how clearly, or unclearly, the exemption for interests in IRAs applies to interests received by a transfer incident to divorce.

The proposed statute would clearly exempt interests in IRAs transferred incident to divorce within the meaning of Section 408(d)(6) of the Internal Revenue Code. That Section provides that a transfer of an interest in an IRA (including an interest in a Roth IRA or in an individual retirement annuity) pursuant to a "divorce or separation instrument" described in another Code Section[i] are not subject to income tax. Section 408(d)(6) continues by noting that, after the transfer, the transferred interest is "to be treated as an individual retirement account" of the transferee ex-spouse, and not of the owner spouse, and that "[t]hereafter, the account or annuity for purposes of this subtitle [i.e., the federal income tax] is to be treated as maintained for the benefit of [the transferee ex-spouse]."

Section 222.21(2)(c) provides that "an interest in any fund or account that is exempt from claims of creditors of the owner, beneficiary, or participant..." (e.g., an IRA or an individual retirement annuity) "does not cease to be exempt after the owner's death by reason of a direct transfer or eligible rollover that is excluded from gross income under the Internal Revenue Code of 1986..." The subsection does not address divorce. Section 222.21(c) is where practitioners, and citizens, will look to determine whether a debtor's interest in an IRA originally established by someone else is exempt from the claims of the debtor's creditors.

Because Code Section 408(d)(6) treats an interest in an IRA received in a transfer incident to divorce described in that Section as the transferee's IRA, the subcommittee believes that such an interest would be exempt from the claims of the transferee's creditors under Section 222.21(a), Florida Statutes, which exempts interests of an owner, participant or beneficiary in tax-qualified retirement plans; however, the subcommittee also believes that the clarity added by the proposed changes to subsection (2)(c) of Section 222.21, Florida Statutes, would be beneficial to Florida lawyers and citizens having to apply what is a very technical statute.

The proposed change would be retroactive to all transfers made incident to divorce within the meaning of the statute, whenever made. For the reason stated in the preceding paragraph, the subcommittee believes the proposed change clarifies, but does not modify, existing law.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS - None.

VI. DIRECT IMPACT ON PRIVATE SECTOR - None.

VII. CONSTITUTIONAL ISSUES - None apparent.

VIII. OTHER INTERESTED PARTIES - The Family Law, Elder Law and Business Law Sections of The Florida Bar, and the Florida Bankers Association.

---

[1] Code Section 71(b)(2) for instruments executed before December 31, 2018; clause (i) of Code Section 121(d)(3)(C) for instruments executed after.

A bill to be entitled

An act clarifying that interests received incident to divorce in certain retirement accounts are exempt from the claims of the transferee's creditors

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 222.21(2)(c), Florida Statutes, is revised to read:

222.21(2)(c). Any money or other assets or any interest in any fund or account that is exempt from claims of creditors of the owner, beneficiary, or participant under paragraph (a) does not cease to be exempt after the owner's death by reason of a direct transfer or eligible rollover that is excluded from gross income under the Internal Revenue Code of 1986, including, but not limited to, a direct transfer or eligible rollover to an inherited individual retirement account as defined in s. 408(d)(3) of the Internal Revenue Code of 1986, as amended. Any interest in any fund or account received in a transfer incident to divorce described in s. 408(d)(6) of the Internal Revenue Code of 1986, as amended, continues to be exempt after the transfer. This paragraph is intended to clarify existing law, is remedial in nature, and shall have retroactive application to all inherited individual retirement accounts, and to all such transfers incident to divorce, without regard to the date an account was created or date the transfer was made.

Section 2. This act shall take effect upon becoming law.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Angela M. Adams, Chair, Trust Law Committee, of the Real Property Probate & Trust Law Section
(RPPTL Approval Date_____, 2019)

Address
Angela M. Adams
540 4th Street N
St. Petersburg, FL 33701
Telephone: (727) 821-1249

Position Type Trust Law Committee, Real Property, Probate, & Trust Law Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

Jon Scuderi, Goldman Felcoski & Stone, P.A., 850 Park Shore Drive, Suite 203, Naples, FL 34103, Telephone: (239) 436-1988, Email: jscuderi@gfsestatelaw.com

Angela M. Adams, Law Office of Wm. Fletcher Belcher, 540 4th Street N, St. Petersburg, FL 33701, Telephone: (727) 821-1249, Email: amemadams@gmail.com

Peter M. Dunbar, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email: pdunbar@deanmead.com

Martha J. Edenfield, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email: medenfield@deanmead.com

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support __X__ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

Support proposed legislation to amend F.S. 736.0417(1) to authorize pro rata or non-pro rata funding of the separate trusts created by severance.

Reasons For Proposed Advocacy:

The proposed revisions to F.S. 736.0417(1) will avoid potentially adverse federal income tax consequences resulting when the trusts created by a severance pursuant to this statute are funded with disproportionate shares of assets in kind.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position None known

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

None known

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

Tax Section of the Florida Bar

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

Proposed Change to F.S. § 736.0417

Section 736.0417 of the Florida Trust Code ("FTC") permits a trustee, after notice to qualified beneficiaries, to combine two or more trusts into a single trust or to divide a trust into two or more separate trusts, if the result does not impair the rights of any beneficiary or adversely affect the achievement of the purposes of the trusts or trust, respectively.

Section 736.816(22) of the FTC authorizes a trustee, on distribution of trust property or the division of a trust, to make distributions in divided or undivided interests, to allocate particular assets in proportionate or disproportionate shares, to value the trust property for those purposes, and to adjust for resulting differences in valuation.

It is not clear, however, that the authority under Section 736.816(22) to allocate assets proportionately or disproportionately when funding a divided trust applies in the case where a trustee engages in a discretionary division of a trust or combination of two or more trusts pursuant to Section 736.0417, as opposed to a division or distribution that is required by the governing instrument.

It is possible for the discretionary severance of a trust to have Federal income tax consequences. In the case where a trust is divided into per stirpital shares, for example, and the separate trusts are funded disproportionately with assets in kind, the beneficiaries, by agreeing to a disproportionate funding, could be treated as having engaged in a sale or exchange under Section 1001 of the Internal Revenue Code. Treasury Regulation § 1.1001-1(h) creates an exception to the treatment of a trust severance as an exchange of property differing materially, either in kind or extent if:

> "(i) An applicable state statute or the governing instrument authorized or directs the trustee to sever the trust: and
>
> (ii) Any non-pro rata funding of the separate trusts resulting from the severance (including non-pro rata funding as described in § 26.2642-6(d)(4) or § 25.2654-1(b)(1)(ii)(C) of this chapter [dealing with severances for generation-skipping transfer tax purposes]), whether mandatory or in the discretion of the trustee, is authorized by an applicable state statute or the governing instrument."

To avoid an inadvertent, and potentially adverse, Federal income tax consequence resulting from the exercise of a trustee's discretionary authority to divide a trust or to combine trusts pursuant to FTC § 736.0417, clear statutory authority to do so either pro rata or non-pro rata is needed to fit within the safe harbor of Treasury Regulation § 1.1001-1(h). To that end, we propose adding the following underlined words to Section 736.0417:

736.0417 Combination and division of trusts.—

> (1) After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, <u>and may fund such separate trusts on a pro rata or a non pro rata basis,</u> if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trusts or trust, respectively.

(2) Subject to the terms of the trust, the trustee may take into consideration differences in federal tax attributes and other pertinent factors in administering the trust property of any separate account or trust, in making applicable tax elections, and in making distributions. A separate trust created by severance must be treated as a separate trust for all purposes from the date on which the severance is effective. The effective date of the severance may be retroactive to a date before the date on which the trustee exercises such power.

The proposed additional language would make it clear that a trustee, who engages in a discretionary division of a trust, is authorized to fund the separate trusts resulting from the division with assets pro rata or non-pro rata so long as the rights of the beneficiaries are not impaired and there is no adverse effect on the achievement of the purposes of the trust.

ADMIN 34936866v1

A bill to be entitled

An act relating to the administration of trusts; amending s. 736.0417(1).

Be it Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 736.0417, Florida Statutes, is amended to read:

736.0417 Combination and division of trusts.—

(1) After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, and may fund such separate trusts on a pro rata or a non pro rata basis, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trusts or trust, respectively.

(2) Subject to the terms of the trust, the trustee may take into consideration differences in federal tax attributes and other pertinent factors in administering the trust property of any separate account or trust, in making applicable tax elections, and in making distributions. A separate trust created by severance must be treated as a separate trust for all purposes from the date on which the severance is effective. The effective date of the severance may be retroactive to a date before the date on which the trustee exercises such power.

Section 2. This act shall take effect July 1, 2020.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By J. Richard Caskey, Chair, Probate & Trust Litigation Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date_____, 20___)

Address J. Richard Caskey, P.A., One Harbour Place,777 S. Harbour Island, Blvd., Suite 215, Tampa, FL 33602
Telephone: (813) 443-5709

Position Type Probate & Trust Litigation Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

Jon Scuderi, Goldman, Felcoski & Stone, P.A., 850 Park Shore Drive, Suite 203, Naples, FL 34103, Telephone: (239) 436-1988; Email: jscuderi@gfsestatelaw.com
Peter M. Dunbar, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: pdunbar@deanmead.com
Martha J. Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email:medenfield@deanmead.com

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support __X__ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

Support amending Section 733.212, Florida Statutes, which governs the contents of a notice of administration, to require additional language to provide adequate notice that a party may be waiving their right to contest a trust if they fail to timely contest the will.

Reasons For Proposed Advocacy:

When a trust is incorporated by reference in a will, case law provides that the failure to timely contest the will bars a contestant from challenging a trust. Many view this as unfair due to the differing deadlines to contest a will and trust as well as the lack of appropriate notice. Moreover, this creates inconsistency since a party may receive a trust limitations notice (authorized by Florida Statute Section 736.0604) stating there is a 6 month deadline to object to the trust as well as a notice of administration stating there is a 3 month deadline to object to the will (per Florida Statute Section 733.212). Notwithstanding receiving these notices, the party would only have 3 months (not 6 months) to object to the trust if that trust was incorporated by reference into

the will. The proposed legislation would provide notice to parties that they may be required to timely contest the will if they seek to challenge the trust.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position [NONE]

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

[NONE]

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

[List here other Bar sections, committees or attorney organizations]

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

PROPOSED BILL TO AMEND PART II OF CHAPTER 733, FLORIDA STATUTES

SECTION 733.212 – NOTICE OF ADMINISTRATION

This White Paper relates to the proposed amendment to Part II of Chapter 733 of the Florida Statutes by amending Section 733.212, which governs the contents of a notice of administration, to require additional language to provide adequate notice that a party may be waiving their right to contest a trust if they fail to timely contest the will.

I. SUMMARY

The purpose of amending Section 733.212 is to ensure that parties and attorneys are noticed that they may be required to timely contest a will if they intend to contest that decedent's trust. When a trust is incorporated by reference in a will,[1] case law provides that the failure to timely contest the will bars a contestant from challenging a trust. Many view this as unfair due to the differing deadlines to contest a will and trust as well as the lack of appropriate notice. Moreover, some opine that this is confusing and even misleading since a party may receive a trust limitations notice (authorized by Florida Statute Section 736.0604) stating there is a 6 month deadline to object to the trust as well as a notice of administration stating there is a 3 month deadline to object to the will (per Florida Statute Section 733.212). In fact, notwithstanding receiving these notices, the party would only have 3 months (not 6 months) to object to the trust if that trust was incorporated by reference into the will.

II. CURRENT SITUATION

Currently, a timely will contest is required to challenge a trust that is incorporated in a will. A party seeking to contest a will has 20 days to respond to a petition for administration or three months from the date of service of a notice of administration to object to the validity of the will. Yet if a trust is incorporated by reference into the will, and the party seeks to contest the trust, a timely will contest is likely required, even if the contestant does not contest the validity of the will apart from the terms that purport to incorporate the terms of the contested trust into the will by reference. This may cause confusion among unwary beneficiaries and counsel as the deadlines provided under the Florida Trust Code to contest a trust are not connected to the above deadlines to file a will contest under the Florida Probate Code and are generally longer (i.e. the earlier of 6 months, if proper notice is issued, or the time provided in Chapter 95, which is likely 4 years from the decedent's date of death). In addition to confusion, the current situation appears unfair since a party may receive a trust limitations notice stating there is a 6 month deadline to object to the trust as well as a notice of administration stating there is a 3 month deadline to object to the will. Notwithstanding receipt of these notices, the party would have 3 months (not 6 months) to object to the trust if that trust was incorporated by reference into the will.

[1] Which is authorized per Section 732.512, Florida Statutes.

By way of example, in *Pasquale*,[2] a party was served with a notice of administration. The party filed a trust complaint, alleging the trust was invalid, but did not file a Petition to Revoke Probate within the 3 month deadline (after receiving a notice of administration). The terms of the will were incorporated in the trust. The fiduciaries moved to dismiss the trust complaint with prejudice because of the plaintiffs' failure to timely contest the will. The probate court agreed. However, the Fourth District Court of Appeal reversed, finding the trust complaint also constituted a will contest. The appellate court, however, confirmed that when a will incorporates the terms of the trust, a contestant is required to timely contest both documents

III. EFFECT OF PROPOSED CHANGES

Proposed additions to Section 733.212 would simply assist to provide proper notice to parties of the time deadlines to contest a will and trust by adding language to a notice of administration.[3] Now, when a party receives a notice of administration or formal notice to a petition for administration, it will contain the following language: "Under certain circumstances, by failing to contest the will, you may be waiving the right to contest the validity of a trust or other writing incorporated by reference into a will."

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None.

V. DIRECT FISCAL IMPACT ON PRIVATE SECTOR

None.

VI. CONSTITUTIONAL ISSUES

None.

VII. OTHER INTERESTED PARTIES

None.

[2] **Error! Main Document Only.** *Pasquale v. Loving, et. al.*, 82 So. 3d 1205 (Fla. 4th DCA 2012).

[3] It is also contemplated that a similar change would be made to the formal notice to a petition for administration by the Florida Bar Probate Rules Committee.

A bill to be entitled

An act relating to the Notice of Administration served in a probate proceeding and the contents of the notice relating to a party’s notice that their failure to contest the will, they may be waiving certain rights, amending section 733.212(2) by adding a new subsection(f).

Be it Enacted by the Legislature of the State of Florida:

Section 1. Section 733.212(2), Florida Statutes, is amended to read:

733.212. Notice of Administration; filing of objections.-

(2) The notice shall state:

(f) Under certain circumstances, by failing to contest the will, you may be waiving the right to contest the validity of a trust or other writing incorporated by reference into a will.

Section 2. This bill shall take effect on October 1, 2020 and shall apply to all notices served after its effective date.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By David Brennan, Chairman, Ad Hoc Guardianship Law Revisions Committee of the Real Property Probate & Trust Law Section

Address David Brennan, Esq., PO Box 2706, Orlando, FL 32802-2706
Phone: (407) 893-7888

Position Type Real Property, Probate and Trust Law Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

David Brennan, Esq., PO Box 2706, Orlando, FL 32802-2706, Telephone: (407) 893-7888
Jon Scuderi, Goldman Felcoski & Stone, 850 Park Shore Drive, Suite 203, Naples, Florida 34103, Telephone: (239) 436-1988
Peter M. Dunbar, Dean Mead, 215 S. Monroe, St, Ste 815, Tallahassee FL 32301, Telephone (850) 999-4100
Martha J. Edenfield, Dean Mead, 215 S. Monroe, St, Ste 815, Tallahassee FL 32301, Telephone (850) 999-4100

Appearances

Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following [NONE]
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support _X___ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

Support adoption of the new Florida Guardianship Code chapter 745, Florida Statutes which improves upon Florida's current guardianship code (Chapter 744).

Reasons For Proposed Advocacy:

Florida's Guardianship Code was last updated more than 20 years ago and the Ad Hoc committee was created to review Florida's guardianship laws and improve upon them with a focus on improving the system, confirming and improving the due process protections given to those within the guardianship system, reviewing the system to reduce economic hardship, and overall improvements on Florida's already heralded guardianship laws. The proposed Florida Chapter 745 is the culmination of the Ad Hoc committee's more than 7 years of work and will be a significant improvement on Florida Chapter 744.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position [NONE]

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

[NONE]

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

[NONE]

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

A bill to be entitled

An act relating to the Florida Guardianship Code; creating parts I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, and XV of chapter 745, F.S.; providing a short title; providing general provisions and definitions; providing for venue; providing for proceedings to determine incapacity; providing for proceeding to restore the rights of an individual no longer incapacitated; providing for the qualifications of a guardian; providing for the appointment of a guardian; providing provisions relating to different types of guardians; providing provisions relating to the duties of guardians; providing provisions relating to the powers of guardians; providing oversight and monitoring of wards and guardians; providing provisions relating to the resignation and discharge of guardians; providing for the removal of guardians; providing for miscellaneous provisions relating to a guardian's authorities, the authority of multiple guardians; the effect of a guardianship proceeding on a power of attorney or trust, and prohibitions on abuse by a guardian; provisions relating to the Office of Public and Professional Guardians; provisions relating to Veteran Guardianships; repealing ch 744; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Part I of chapter 745, Florida Statutes, consisting

of sections 745.101, 745.102, 745.103, 745.104, 745.105, 745.106, 745.107, 745.108, 745.109, 745.110, 745.111, 745.112, 745.113, and 745.114, is created to read:

PART I

GENERAL PROVISIONS

745.101 Short title.

This chapter may be cited as the "Florida Guardianship Code" and for purposes of this chapter is referred to as the "code".

745.102 Legislative intent.

The Legislature recognizes the importance of protecting vulnerable adults and minors in the state of Florida; and also finds that:

(1) Adjudicating an adult totally incapacitated deprives such person of important legal rights and that such deprivation may be unnecessary.

(2) It is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of providing for their needs; and that alternatives to guardianship and less restrictive means of assistance be explored.

(3) By recognizing that every person has unique needs and differing abilities, it is the purpose of this code to promote the public welfare by establishing a legal system that permits incapacitated persons to participate as fully as possible in decisions affecting them, assists them in meeting the essential requirements for their physical health and safety, protects their rights and dignity, manages their assets and financial resources, provides a mechanism for them to regain their rights and abilities to the maximum extent possible, and provides personal and financial care and protection while preserving their right to privacy of their personal, financial, medical and mental health information to the same extent

as persons who are not incapacitated; and that accomplishes these objectives by providing, in each case, the form of assistance that least interferes with their capacity to act on their own behalf. This code shall be liberally construed to accomplish this purpose.

745.103 Applicability.
This code shall take effect on _____. The substantive rights of all persons that vested prior to the effective date of this code shall be determined as provided in Chapter 744 as it existed prior to the effective date of this code. The procedures for enforcement of substantive rights shall be as provided in the Florida Probate Rules.

745.104 Rules of evidence.
The Florida Evidence Code is applicable in incapacity and guardianship proceedings unless otherwise provided by this code.

745.105 Construction against implied repeal.
This code is intended as unified coverage of its subject matter. No part of it shall be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

745.106 Definitions.
As used in this code, the term:
(1) “Accounting” means that verified document filed by a guardian pursuant to s. 745.805 or 745.806.
(2) "Attorney for the alleged incapacitated person" means an attorney authorized by court order to represent a person in proceedings for determination of the person’s incapacity and guardianship to the extent specified in this code. The attorney

shall advocate the preferences expressed by the alleged incapacitated person, to the extent consistent with the rules regulating The Florida Bar.

(3) “Audit" means a systematic review of inventories, accountings and substantiating documents to ensure compliance with this code and the Florida Probate Rules.

(4) “Clerk" means the clerk or deputy clerk of the court.

(5) “Corporate guardian" means a corporation authorized to exercise fiduciary or guardianship powers in this state and includes a nonprofit corporate guardian.

(6) “Court" means the circuit court in which the incapacity or guardianship proceeding is pending.

(7) “Developmental disability” shall have the meaning specified in s. 393.063.

(8) “Emergency temporary guardian” means a guardian appointed in accordance with s. 745.701, to serve until letters of guardianship are issued or until otherwise ordered by the court.

(9) “Examiner” means a professional or other person qualified in accordance with s. 745.306 and authorized and directed by the court to assess available information and to conduct an evaluation of a ward or alleged incapacitated person, and render a written opinion in an incapacity or restoration proceeding as provided in this code.

(10) “Financial institution” means a trust company, a state banking corporation or state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary powers in this state may act as guardian of the property of the ward.

(11) “Foreign guardian" means a guardian appointed by a court of another state, territory or country.

(12) “Guardian" means an individual or entity appointed by the court to act on behalf of a ward's person or property, or both, and includes an emergency temporary guardian.

(a) “Limited guardian" means a guardian of person, property, or both who has been appointed by the court to exercise some, but not all, delegable rights and powers of a ward.

(b) “Plenary guardian" means a guardian of person, property, or both who has been appointed by the court to exercise all delegable legal rights and powers of a ward.

(13) “Guardian ad litem" means a person who is appointed by the court having jurisdiction of the guardianship, or a court in which a particular legal matter is pending, to represent a ward in a particular proceeding.

(14) “Guardian advocate" means a person appointed by the court to represent a person with developmental disabilities under s. 393.12. As used in this chapter, the term does not apply to a guardian advocate appointed for a person determined incompetent to consent to treatment under s. 394.4598.

(15) "Guardianship monitor" means a person appointed by the court under s. 745.1008 or 745.1009 to provide the court with information concerning a ward.

(16) “Guardianship Plan” means the document filed by a guardian within 60 days after letters of guardianship are issued that provides for the initial plan of care to meet the medical, mental health, social, residential, personal care and other needs of the ward, in accordance with s. 745.810.

(17) “Guardianship Report” means the document filed annually by a guardian of person that provides information regarding the

treatment, services and care provided to the ward during the reporting period and the plan for addressing the ongoing or anticipated needs of the ward, in accordance with s. 745.811, 745.812, and 745.813.

(18) “Incapacitated person" means a person who has been judicially determined to lack the capacity to manage at least some of the person’s property or to provide for at least some of the person’s health and safety requirements.

(19) “Information Statement” means the verified document filed by a proposed guardian pursuant to s. 745.601.

(20) “Interested person” means any person who may reasonably be expected to be affected by the outcome of a guardianship or incapacity proceeding. A guardian is always deemed an interested person in proceedings that affect the ward. A person is not deemed interested solely because of an anticipated expectancy of personal benefit. A person is not deemed interested solely because of having filed a request for copies and notices of proceedings. The meaning may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.

(21) “Inventory” means the verified document filed by a guardian of property pursuant to s. 745.803.

(22) “Letters” means authority granted by the court to a guardian to act on behalf of the ward.

(23) “Manage property" means to make lucid decisions necessary to secure, safeguard, administer, and dispose of real and personal property, contractual rights, benefits, and income of a ward.

(24) “Meet requirements for health or safety" means to make lucid decisions necessary to provide for a person’s health care, food, shelter, clothing, personal hygiene, or other care needs of a ward.

(25) “Minor" means a person under 18 years of age whose disabilities have not been removed by marriage or otherwise.

(26) “Natural guardians.” The parents, jointly, are natural guardians of their children (including their adopted children), in accordance with s. 745.712.

(27) “Next of kin" means those persons who would be heirs at law of the ward or alleged incapacitated person if that person was deceased and the lineal descendants, per stirpes, of the ward or alleged incapacitated person.

(28) “Nonprofit corporate guardian" means a not for profit corporation organized under the laws of this state for religious or charitable purposes and authorized to exercise the powers of a professional guardian.

(29) “Preneed guardian" means a guardian designated by a competent adult or by the natural guardian of a minor, to serve as guardian in the event of the adult’s incapacity or the need for a court appointed guardian of a minor. The designation and appointment of a preneed guardian shall be as specified in s. 745.705 and s. 745.706.

(30) “Professional guardian" means a person who is serving as guardian for a non-relative and who has met the requirements of the Office of Public and Professional Guardians to qualify to serve as a guardian for unrelated wards, as specified in this code.

(31) “Property" means both real and personal property or any interest in it and anything that may be the subject of ownership. It includes rights of use under contractual arrangements and digital assets as defined in Chapter 740.

(32) “Public guardian” means a guardian who has been appointed by, or has a contract with, the Office of the Public and Professional Guardians to provide guardianship services.

(33) “Relative” of a ward means, for purposes related to professional guardians, a spouse, adopted child, anyone related by lineal or collateral consanguinity or a spouse of any such relative.
(34) “Standby guardian" means a guardian designated by a currently serving guardian and appointed by the court to assume the position of guardian if the current guardian ceases to act. The appointment of a standby guardian shall be as specified in s. 745.702 and 745.703.
(35) “Surrogate guardian" means a guardian appointed for temporary service in accordance with s. 745.1311.
(36) “Totally incapacitated" means incapable of exercising any of the rights enumerated in s. 745.303(2) and 745.303(3).
(37) “Voluntary guardian” is a guardian of property appointed by the court pursuant to s. 745.707.
(38) “Ward" means a person for whom a guardian has been appointed.

745.107 Additional definitions.
The definitions contained in the Florida Probate Code and the Florida Probate Rules shall be applicable to actions under this code, unless the context requires otherwise, insofar as such definitions do not conflict with definitions contained in this code.

745.108 Verification of documents.
When verification of a document is required in this code or by rule, the document filed shall include an oath or affirmation or the following statement: "Under penalties of perjury, I declare that I have read the foregoing and the facts alleged are true to the best of my knowledge and belief." Any person who shall

willfully include a false statement in the document shall be guilty of perjury and upon conviction shall be punished accordingly.

745.109 Costs.
In all guardianship proceedings, costs may be awarded. When the costs are to be paid out of the property of the ward, the court may direct from what part of the property the costs shall be paid.

745.110 Notice and service.
The methods of providing notice of proceedings under this code are those specified in the Florida Probate Rules except as provided in s. 745.302. When the ward or alleged incapacitated person has an attorney of record in the guardianship or incapacity proceeding, service on the ward or alleged incapacitated person shall be completed by service on the attorney in compliance with the Rules of Judicial Administration.

745.111 Recording of hearings.
(1) All hearings related to appointment or removal of a guardian, adjudication of incapacity, or restoration of capacity must be electronically or stenographically recorded by the clerk.
(2) If an appeal is taken from any of these proceedings, a transcript must be furnished to an indigent ward at public expense.

745.112 Confidentiality of guardianship records.
(1) Unless otherwise ordered by the court, all records relating to incapacity, guardianship, or the settlement of a minor's claim if a guardianship has not yet been established, are confidential and exempt from the provisions of s.119.07(1) and s. 24(a), Art. I of

the State Constitution. The following persons shall have access to the records without court order:

(a) The court;

(b) The clerk;

(c) The guardian;

(d) The guardian's attorney;

(e) The ward's attorney;

(f) A guardian ad litem appointed on behalf of a ward;

(g) The Office of Public and Professional Guardians or its designee pursuant to s 745.1414; and

(h) A ward who is an adult and has not been adjudicated totally incapacitated.

(2) The court may order release of all or part of the record for good cause shown. Unless waived by court order, the confidential status of the court record shall not be lost by either authorized or unauthorized disclosure to any person, organization, or agency.

(3) Notwithstanding the provision of subsection (1), letters of guardianship shall be recorded by the clerk.

745.113 Guardian and professional's fees and expenses.

(1) A guardian, attorney, accountant, appraiser, financial advisor or other professional who has rendered services to the ward or to the guardian to assist the guardian in providing services to the ward and complying with this code, is entitled to a reasonable fee for services rendered and to reimbursement for costs incurred on behalf of the ward.

(2) Fees, costs and administration expenses may be paid as incurred and shall be itemized on the guardian's annual accounting. Itemized statements of guardian and attorney fees must provide the detail specified in subsection (8). For other professional services, the

accounting must include statements demonstrating the fee arrangement and method of charging for the services rendered.

(3) On audit of the guardian's accounting pursuant to s. 745.1001, the court may require the guardian to justify the fees paid.

(4) The court may, on a case by case basis, require a petition for approval of guardian's and professional's fees in advance of payment. The court may not unreasonably limit the frequency of such petitions and shall hear such petitions on an expedited basis.

(5) When fees for a guardian or attorney are submitted to the court for determination, the court shall consider the following criteria:

(a) The time and labor required;

(b) The novelty and difficulty of the questions involved and the skill required to perform the services properly;

(c) The likelihood that the acceptance of the particular employment will preclude other employment of the person;

(d) The fee customarily charged in the locality for similar services;

(e) The nature and value of the incapacitated person's property, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person;

(f) The results obtained;

(g) The time limits imposed by the circumstances;

(h) The nature and length of the relationship with the incapacitated person; and

(i) The experience, reputation, diligence, and ability of the person performing the service.

(6) In awarding fees to attorney guardians, the court must clearly distinguish between fees and expenses for legal services and fees and expenses for guardian services and must have determined that no conflict of interest exists.

(7) Fees for legal services may include customary and reasonable charges for work performed by paralegals and legal assistants employed by and working under the direction of the attorney. Fees may not include general clerical and office administrative services and services that are unrelated to the guardianship. A petition for fees may not be approved without prior notice to the guardian and to the ward, unless the ward is a minor or is totally incapacitated.

(8) Fees for a professional guardian’s services may include customary and reasonable charges for work performed by employees of a guardian for the benefit of the ward. A petition for fees may not be approved without prior notice to the ward, unless the ward is a minor or is totally incapacitated.

(9) Unless otherwise ordered by the court, all petitions for guardian's and attorney's fees must be accompanied by an itemized statement of the services performed for the fees sought to be recovered. The itemized statement shall specify the name and title of the person providing the service, the nature of services, date of performance, time spent on each task and the fees for each entry.

(10) When court proceedings are instituted to review or determine a guardian’s or an attorney’s fees pursuant to subsection (4), such proceedings are part of the guardianship administration process and the costs, including fees and costs for the guardian and guardian’s attorney, an attorney appointed under s. 745.305, or an attorney who has rendered services to the ward, shall be determined by the court and paid from the assets of the guardianship unless the court finds the requested compensation to be substantially unreasonable.

(11) The court may determine that a request for compensation by the guardian, the guardian’s attorney, an attorney appointed under s.

745.305, an attorney who has rendered services to the ward or other professional employed by the guardian is reasonable without receiving expert testimony. An interested person or party may offer expert testimony for or against a request for compensation after giving notice to interested persons. Reasonable expert witness fees shall be awarded by the court and paid from the assets of the guardianship estate using the standards established in subsection (10).

745.114 Jurisdiction of the court.
The circuit court has jurisdiction to adjudicate all matters in incapacity and guardianship proceedings.

Section 2. Part II of chapter 745, Florida Statutes, consisting of sections 745.201, 745.202, 745.203, and 745.204, is created to read:

PART II

VENUE

745.201 Venue.
(1) Venue in proceedings for determination of incapacity shall be the county in which the alleged incapacitated person resides or is located.
(2) Venue in proceedings for appointment of a guardian shall be:
(a) If the incapacitated person or minor is a resident of this state, the county in which the incapacitated person resides provided, however, that if the adjudication of incapacity occurs in a county other than the county of residence pursuant to subsection (1), venue for appointment of guardian shall be the county in which the adjudication occurred.

(b) If the incapacitated person or minor is not a resident of this state, any county in this state in which property of the person is located.

745.202 Residence of ward.

The residence of a Florida resident ward is the county in which the ward resides. Residence or domicile shall not be deemed to be changed when a ward is moved to another county for medical care or rehabilitation.

745.203 Change of venue.

When the residence of a ward is changed to another county, the guardian shall petition to have venue of the guardianship changed to the county of the acquired residence, except as provided in s. 745.204.

745.204 Change of ward's residence.

(1) A guardian who has power pursuant to this code to determine the residence of a ward may not, without court approval, change the residence of the ward from this state to another, or from one county of this state to another, unless such county is adjacent to the county of the ward's current residence. A guardian who seeks to change the residence of a ward from the ward's current county of residence to another county which is not adjacent to the ward's current county of residence must obtain court approval prior to such change. In considering the petition, the court shall determine that such relocation serves the best interest of the ward.

(2) A guardian who changes the residence of a ward from the ward's current county of residence to another county adjacent to the ward's county of residence shall notify the court having

jurisdiction of the guardianship and next of kin whose addresses are known to the guardian within 15 days after relocation of the ward. Such notice shall state the reasons for the change of the ward's residence. Venue need not be changed unless otherwise ordered by the court.

(3) When the residence of a resident ward has changed to another state, in accordance with this section, and the foreign court having jurisdiction over the ward at the ward's new residence has appointed a guardian and that guardian has qualified and posted a bond in an amount required by the foreign court, the guardian in this state may file the final report and close the guardianship in this state, pursuant to s.745.1105.

Section 3. Part III of chapter 745, Florida Statutes, consisting of sections 745.301, 745.302, 745.303, 745.304, 745.305, 745.306, 745.307, 745.308, 745.309, 745.310, 745.311, and 745.312, is created to read:

PART III

INCAPACITY

745.301 Petition to determine incapacity.

(1) A petition to determine incapacity of a person may be executed by an adult with personal knowledge of the information specified in the petition.

(2) The petition must be verified and must:

(a) State the name, and residence address of the petitioner and petitioner's relationship to the alleged incapacitated person;

(b) State the name, age, county of residence, residence address and current location of the alleged incapacitated person;

(c) Specify the primary language spoken by the alleged incapacitated person, if known, and if the person speaks English;

(d) Allege that the petitioner believes the alleged incapacitated person to be incapacitated and specify the factual information on which such belief is based;
(e) State the name and address of the alleged incapacitated person's attending or primary care physician and other medical and mental health professionals regularly treating the alleged incapacitated person, if known;
(f) State which rights enumerated in s. 745.303 the alleged incapacitated person is incapable of exercising, to the best of petitioner's knowledge. If the petitioner has insufficient experience to make such judgment, the petition must so state; and
(g) State the names, relationships, and addresses of the next of kin of the alleged incapacitated person, so far as are known, specifying the ages of any who are minors.

745.302 Notice of petition to determine incapacity and for appointment of guardian.
(1) Notice of filing a petition to determine incapacity and a petition for the appointment of a guardian, if any, and copies of the petitions must be personally served on the alleged incapacitated person. The notice and copies of the petitions must be served by the clerk on the attorney for the alleged incapacitated person within 5 days of filing the petitions, and by the petitioner on all next of kin identified in the petition. The notice must state the time and place of the hearing on the petitions; that an attorney has been appointed to represent the alleged incapacitated person; and that, if the person is determined to be incapable of exercising certain rights, a guardian may be appointed to exercise those rights on the person’s behalf.

(2) The attorney for the alleged incapacitated person shall serve the notice and petition on the alleged incapacitated person within 5 days of the attorney's appointment.

745.303 Rights of persons determined incapacitated.

(1) A person who has been determined to be incapacitated retains the right:

(a) To have an annual review of guardianship accountings and plans;

(b) To have continuing review of the need for restriction of his or her rights;

(c) To be restored to capacity at the earliest possible time;

(d) To be treated humanely, with dignity and respect, and to be protected against abuse, neglect, and exploitation;

(e) To have a qualified guardian;

(f) To remain as independent as possible, including having his or her preference as to place and standard of living honored, either as expressed or demonstrated prior to the determination of incapacity or as he or she currently expresses such preference, insofar as such request is reasonable and financially feasible;

(g) To be properly educated;

(h) To receive prudent financial management for his or her property and to be informed how his or her property is being managed to the extent feasible, if he or she has lost the right to manage property;

(i) To receive services and rehabilitation necessary to maximize his or her quality of life;

(j) To be free from discrimination because of his or her incapacity;

(k) To have access to the courts;

(l) To counsel;

(m) To receive visitors and communicate with others;
(n) To notice of all proceedings related to determination of capacity and appointment of a guardian; and
(o) To privacy, including privacy of incapacity and guardianship proceedings.
(2) Rights that may be removed from a person by an order determining incapacity but not delegated to a guardian include the right:
(a) To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval;
(b) To vote;
(c) To have a driver's license and operate motor vehicles;
(d) To travel and make decisions concerning travel; and
(e) To seek or retain employment.
(3) Rights that may be removed from a person by an order determining incapacity and which may be delegated to a guardian include the right:
(a) To contract;
(b) To sue and defend lawsuits;
(c) To apply for government benefits and deal with all government entities, including taxing authorities;
(d) To exercise all rights with regard to ownership and management of property;
(e) To make any gift or disposition of property;
(f) To determine his or her residence;
(g) To consent to medical and mental health treatment and rehabilitation services;
(h) To make decisions about his or her social environment or other social aspects of his or her life; and
(i) To make decisions about travel and visitation.

(4) A person who has been found to be totally incapacitated shall be deemed to have lost all rights other that those specified in subsection (1) and the guardian shall be deemed to have succeeded to all delegable rights, unless otherwise limited by this code or determined by the court.

745.304 Conduct of Hearing.

At any hearing under this code, the alleged incapacitated person or the adjudicated ward has the right to:

(1) Testify;

(2) Remain silent and refuse to testify. The person may not be held in contempt of court or otherwise penalized for refusing to testify. Refusal to testify may not be used as evidence of incapacity;

(3) Present evidence;

(4) Call witnesses;

(5) Confront and cross-examine all witnesses; and

(6) Have the hearing open to the public or closed to the public as she or he may choose. After a person has been determined to be incapacitated, this decision shall be made by the person's guardian, unless otherwise determined by the court.

745.305 Attorney for the alleged incapacitated person.

(1) The court shall appoint a qualified attorney to represent each alleged incapacitated person in all proceedings on petitions for determination of incapacity and appointment of guardian within 5 days of filing the petitions. The alleged incapacitated person may substitute an attorney of his or her choice for the court appointed counsel with court approval. At any time prior to entry of an order allowing substitution, the court may hold a hearing to determine

whether the alleged incapacitated person has the capacity to enter into a contract to retain an attorney and whether the alleged incapacitated person understands the nature and extent of the representation by the proposed attorney. The court may allow the court appointed counsel and private counsel chosen by the alleged incapacitated person to serve as co-counsel. Any attorney seeking to substitute as counsel for the alleged incapacitated person must be qualified pursuant to the requirements of subsection (4).

(2) When a court appoints an attorney for an alleged incapacitated person, the court must appoint the office of criminal conflict and civil regional counsel or a private attorney as prescribed in s. 27.511(6). A private attorney must be one who is included in the attorney registry compiled pursuant to s. 27.40. Appointments of private attorneys must be made on a rotating basis, taking into consideration conflicts arising under this code.

(3) An attorney representing an alleged incapacitated person may not serve as guardian of the alleged incapacitated person or as counsel for the guardian of the alleged incapacitated person or the petitioner.

(4) An attorney representing an alleged incapacitated person under this section must have completed a minimum of 8 hours of education in guardianship. A court may waive the initial training requirement.

(5) The attorney for the alleged incapacitated person shall be entitled to examine all medical and mental health records of the alleged incapacitated person and consult with the alleged incapacitated person’s physicians.

(6) Unless extended by the court, the court appointed attorney’s duties end upon issuance of letters of guardianship and the attorney shall be deemed discharged without further proceedings.

745.306 Appointment and qualification of examiners.

(1) Within 5 days after a petition for determination of incapacity has been filed, the court shall appoint three (3) qualified persons to examine the alleged incapacitated person. One must be a psychiatrist or other physician. The remaining examiners must be either a psychologist, another psychiatrist or other physician, a registered nurse, nurse practitioner, licensed social worker, attorney or a person with an advanced degree in gerontology from an accredited institution of higher education. Examiners must have knowledge, skill, experience, training, or education which, in the court's discretion, qualifies them to render an opinion in an incapacity proceeding. The court shall determine that at least one of the examiners has knowledge of the type of incapacity alleged in the petition to determine incapacity unless waived for good cause. Unless good cause is shown, the alleged incapacitated person's attending or primary care physician may not be appointed as an examiner. Any physician for the alleged incapacitated person shall provide records and information, verbal and written, to an examiner upon the examiner's written request.

(2) Examiners may not be related to or associated with one another, with the petitioner, with counsel for the petitioner or the proposed guardian, or with the person alleged to be totally or partially incapacitated. An examiner may not be employed by any private or governmental agency that has custody of, or furnishes services directly or indirectly, to the person or the family of the person alleged to be incapacitated or for whom a guardianship is sought. A petitioner may not serve as an examiner.

(3) Examiners must be able to communicate, either directly or through an interpreter, in the language that the alleged

incapacitated person speaks or in a medium understandable to the alleged incapacitated person if she or he is able to communicate.

(4) The examiners shall be appointed from a roster of qualified persons maintained by the clerk of court and may not be chosen or recommended by the petitioner.

(5) A person who has been appointed to serve as an examiner may not thereafter be appointed as a guardian for the person who was the subject of the examination.

(6) An examiner must complete a minimum of 4 hours of initial training. The examiner must complete 2 hours of continuing education during each 2-year period after the initial education. The initial and continuing education programs must be approved by or developed under the supervision of the Office of Public and Professional Guardians in consultation with the Florida Conference of Circuit Court Judges, the Elder Law and the Real Property, Probate and Trust Law sections of The Florida Bar and the Florida State Guardianship Association. The court may waive the initial education requirement for a person who has served for not less than 5 years as an examiner. An examiner who wishes to obtain continuing education on the Internet or by video course, must first obtain the approval of the chief judge in the county of the examiner's residence.

(7) Each person appointed for the first time as an examiner must file an affidavit with the court stating that he or she has completed the required courses or will do so no later than 4 months after his or her initial appointment unless waived by the court. Each year, the chief judge of the circuit must prepare a list of persons qualified to be examiners.

(8) The clerk shall serve notice of the appointment to each examiner no later than 3 days after appointment.

745.307 Examination of alleged incapacitated person.

(1) Each examiner shall interview the alleged incapacitated person and must determine the alleged incapacitated person's ability to exercise those rights specified in s. 745.303. In addition to the examination, each examiner shall have access to, and may consider, previous medical and mental health examinations of the person, including, but not limited to, habilitation plans, school records, psychological and psychosocial reports and other related information voluntarily offered for use by the alleged incapacitated person or the petitioner. The examiners may communicate among themselves as well as with the attorney for the alleged incapacitated person and the petitioner’s counsel. In addition, the examiners shall be provided a copy of the petition to determine incapacity.

(2) Each examiner shall, within 15 days after appointment, prepare and file with the clerk a report which describes the manner of conducting the examination and the methodology employed by the examiner. The examination must include:

(a) If deemed relevant to the examinations and allowed by the alleged incapacitated person, a physical examination (which shall only be conducted by an examiner who is a physician). An examiner who is not a physician may conduct a visual examination of the alleged incapacitated person’s physical appearance to determine if there are any visible signs of abuse, injury or illness;

(b) A mental health examination, which may consist of, but not be limited to, questions related to orientation, current events and personal identification; and

(c) A functional assessment to evaluate the alleged incapacitated person’s ability to perform activities of daily living which

include: preparing food, eating, bathing, dressing, ambulation, toileting and mobility.

If any of these aspects of the examination is not reported or cannot be accomplished for any reason, the written report must explain the reasons for its omission.

745.308 Examination reports.

(1) Each examiner's written report must be verified and include, to the extent of the examiner's skill and experience:

(a) A diagnosis, prognosis, and recommended level of care perceived to be appropriate.

(b) An evaluation of the ward or alleged incapacitated person's ability to retain her or his rights, including, without limitation, the rights to marry; vote; contract; manage or dispose of property; have a driver's license; determine her or his residence; consent to medical treatment; and make decisions affecting her or his social environment.

(c) The results of the examination and the examiner's assessment of information provided by the attending or primary care physician, if any, and of any other reports or written material provided to the examiner. The examiner must consult the alleged incapacitated person's primary care physician or explain the reason why such consultation was not held.

(d) A description of any functional areas in which the person lacks the capacity to exercise rights, the extent of that incapacity, and the factual basis for the determination that the person lacks that capacity.

(e) The names of all persons present during the time the examiner conducted his or her examination. If a person other than the person who is the subject of the examination supplies answers posed to the

alleged incapacitated person, the report must include the response and the name of the person supplying the answer. The examiner may require that no one else be present at the time of the examinations, unless otherwise ordered by the court.

(f) The date, place and time the examiner conducted his or her examination. (2) The clerk must serve each examiner's report on the petitioner and on the attorney for the alleged incapacitated person within 3 days after the report is filed and at least 10 days before the hearing on the petition, and shall file a certificate of service in the incapacity proceeding.

(3) If any examiners' reports are not completed and served timely, the petitioner and attorney for the alleged incapacitated person may waive the 10 day service requirement and consent to the consideration of the report by the court at the adjudicatory hearing or may seek a continuance of the hearing.

745.309 Consideration of examination reports.

(1) Unless there is objection by the alleged incapacitated person or petitioner, the court shall consider the written examination reports without requiring testimony of the examiners.

(2) The petitioner and the alleged incapacitated person may object to the introduction into evidence of all or any portion of the examination reports by filing and serving a written objection on the other party no later than 5 days before the adjudicatory hearing. The objection must state the basis upon which the challenge to admissibility is made. If an objection is timely filed and served, the court shall apply the rules of evidence in determining the reports' admissibility. For good cause shown, the court may extend the time to file and serve the written objection.

(3) If all examiners conclude that the alleged incapacitated person is not incapacitated in any respect, the court shall dismiss the petition unless a verified motion challenging the examiners' conclusions is filed by petitioner within 10 days after the last examination report is filed and served. The verified motion must make a reasonable showing by evidence in the record or proffered, that a hearing on the petition to determine incapacity is necessary. The court shall rule on the verified motion as soon as practicable. The court shall hold a hearing to consider evidence concerning the propriety of dismissal or the need for further examination of the alleged incapacitated person. If the court finds that the verified motion is filed in bad faith, the court may impose sanctions under s. 745.312(3).

745.310 Adjudicatory hearing.

(1) Upon appointment of the examiners, the court shall set the date for hearing of the petition and the clerk shall serve notice of hearing on the petitioner, the alleged incapacitated person, and next of kin identified in the petition for determination of incapacity. The date for the adjudicatory hearing must be set no more than 20 days after the required date for filing the reports of the examiners, unless good cause is shown. The adjudicatory hearing must be conducted in a manner consistent with due process and the requirements of part III of this code.

(2) The alleged incapacitated person has the right to be present at the adjudicatory hearing and may waive that right.

(3) In the adjudicatory hearing on a petition to determine incapacity, a finding of limited or total incapacity of the person must be established by clear and convincing evidence.

745.311 Order determining incapacity.

(1) If the court finds that a person is incapacitated, the court shall enter an order specifying the extent of incapacity. The order shall specify the rights described in s. 745.303 (2) and (3) that the person is incapable of exercising.

(2) In determining that a person is totally incapacitated, the order must contain findings of fact demonstrating that the individual is totally without capacity to meet essential requirements for the person's health and safety and manage property.

(3) An order adjudicating a person to be incapacitated constitutes proof of such incapacity until further order of the court. To the extent the order finds that a person is incapacitated to make decisions concerning property, it shall constitute a rebuttable presumption that the person is incapacitated to create documents having testamentary effect.

(4) After the order determining incapacity has been filed, the clerk must serve the order on the incapacitated person.

(5) Orders determining incapacity shall be recorded by the clerk in the public records in the county in which the order was entered. The recording of the order is notice of the incapacity.

745.312 Fees in incapacity proceedings.

(1) The examiners and attorney appointed under this part are entitled to reasonable fees to be determined by the court.

(2) If a guardian is appointed, the fees awarded under paragraph (1) shall be paid by the guardian from the property of the ward or, if the ward is indigent, by the state. The state shall have a creditor's claim against the ward's property for any amounts paid under this section. The state may file its claim within 90 days

after the entry of an order awarding attorney and examiner fees. If the state does not file its claim within the 90-day period, the state is thereafter barred from asserting the claim. Upon petition by the state for payment of the claim, the court shall enter an order authorizing payment by the guardian from the property of the ward in the amount determined by the court, if any. The state shall keep a record of the payments.

(3) If the petition to determine incapacity is dismissed, costs and attorney's fees of the proceeding may be assessed against the petitioner if the court finds the petition to have been filed in bad faith. The petitioner shall also reimburse the state courts system for any amounts paid under subparagraph 4 upon a finding of bad faith.

(4) If the petition to determine incapacity is dismissed without a finding of bad faith on the part of the petitioner, or there is a finding of incapacity but no guardian is appointed, the emergency temporary guardian, the attorney for emergency temporary guardian, and the court appointed attorney shall be paid a reasonable fee in the same manner as the payment made to private court-appointed counsel set forth in s. 27.5304. The fees of the examiners shall be paid upon court order as expert witness fees under s. 29.004(6).

Section 4. Part IV of chapter 745, Florida Statutes, consisting of sections 745.401, 745.402, 745.403, 745.404, and 745.405, is created to read:

PART IV

RESTORATION TO CAPACITY

745.401 Suggestion of capacity.

(1) Venue.--A suggestion of capacity must be filed in the court in which the guardianship is pending.

(2) Suggestion of Capacity.--
(a) A guardian, the ward, or any other interested person, may file a suggestion of capacity. The suggestion of capacity must describe the changed circumstances which would indicate that the ward is currently capable of exercising some or all of the rights which were removed. If filed by a person other than the ward, the suggestion of capacity must be verified.
(b) Within 5 days after a suggestion of capacity if filed, the clerk shall serve notice of the filing of the suggestion of capacity and a copy of the suggestion on the ward, the guardian, the attorney for the ward, if any, the ward's known next of kin, and any other interested persons designated by the court. Notice need not be served on the person who filed the suggestion of capacity.
(c) The notice must specify that any objections to the suggestion or to restoration of the ward must be filed within 15 days after the examination report required in s. 745.402 is served.

745.402 Examination of ward.
(1) Within 5 days after a suggestion of capacity is filed, the court shall appoint a physician who is qualified to be an examiner under 745.306 to examine the ward. The physician may have previously served as an examiner in the ward's incapacity proceeding. The physician must examine the ward and file a verified report with the court within 15 days after appointment. The examination shall be conducted and the report prepared in the manner specified under s. 745.307.
(2) Within 5 days after filing the report, the clerk shall serve the report on the guardian, the ward and on the ward's known next

of kin and interested persons who were served notice of the suggestion of capacity.

745.403 Objection and hearing.
(1) Objection to the examination report or to restoration of the ward must be filed within 10 days after service of the report.
(2) If an objection is timely filed, or if the examination report suggests that full restoration is not appropriate, the court shall set the matter to be heard within 30 days after the examination report is filed, unless good cause is shown.
(3) If the ward does not have an attorney, the court shall appoint one to represent the ward.
(4) Notice of the hearing and copies of the objections and medical examination reports shall be served on the ward, the guardian, the ward's next of kin, and any other interested persons as directed by the court.
(5) The court shall give priority to a hearing on suggestion of capacity and shall advance the cause on the calendar.

745.404 Consideration of examination report.
(1) Unless an objection is timely filed by the person who filed the suggestion or the incapacitated person and served on other interested persons, the court may consider the examination report without requiring testimony of the examiner. Any objection must be filed and served on all other interested persons at least 5 days prior to any hearing at which the report is to be considered.
(2) The person who filed the suggestion and the incapacitated person may object to the introduction into evidence of all or any portion of the examination report by filing and serving a written objection on the other party no later than 5 days before the

adjudicatory hearing. The objection must state the basis upon which the challenge to admissibility is made. If an objection is timely filed and served, the court shall apply the rules of evidence in determining the report's admissibility. For good cause shown, the court may extend the time to file and serve the written objection.

745.405 Order restoring capacity.

(1) If the examination report concludes that the ward should be restored to full capacity, there are no objections timely filed, and the court is satisfied that the examination report establishes by a preponderance of the evidence that restoration of all or some of the ward's rights is appropriate, the court shall enter an order restoring all or some of the rights which were removed from the ward without hearing. The order must be entered within 10 days after expiration of the time for objection.

(2) At the conclusion of any hearing to consider restoration of capacity, the court shall make specific findings of fact, and based on a preponderance of the evidence enter an order denying the suggestion of capacity or restoring all or some of the rights of the ward.

(3) If only some rights are restored to the ward, the order must state which rights are restored and amended letters shall be issued to reflect the changed authority of the guardian. A guardian of the person shall prepare a new guardianship plan which addresses only the remaining rights retained by the guardian. The guardian must file a copy of the new plan with the court within 60 days after issuance of amended letters.

(4) Additional rights may not be removed from a ward in a proceeding to consider a suggestion of capacity.

Section 5. Part V of chapter 745, Florida Statutes, consisting of sections 745.501, 745.502, 745.503, 745.504, and 745.504, is created to read:

PART V

QUALIFICATIONS OF GUARDIANS

745.501 Who may be appointed guardian of a resident ward.

(1) Unless disqualified as provided in s. 745.502:

(a) Any resident of this state who is sui juris and is 18 years of age or older is qualified to act as guardian of a ward.

(b) A nonresident of the state may serve as guardian of a resident ward if the non-resident is:

1. Related by lineal consanguinity to the ward;

2. A legally adopted child or adoptive parent of the ward;

3. A spouse, brother, sister, uncle, aunt, niece, or nephew of the ward, or someone related by lineal consanguinity to any such person; or

4. The spouse of a person otherwise qualified under this section.

(2) No judge shall act as guardian, except when he or she is related to the ward by blood, marriage, or adoption, or has maintained a close relationship with the ward or the ward's family, and serves without compensation.

745.502 Disqualified persons.

(1) No person who has been convicted of a felony or who, due to incapacity or illness, is incapable of discharging guardianship duties shall be appointed to act as guardian. Further, no person who has been judicially determined to have committed abuse, abandonment, or neglect against a child as defined in s. 39.01 or s. 984.03(1), (2), and (37), or who has been found guilty of, or entered a plea of nolo contendere or guilty to, any offense

prohibited under s. 435.03, chapter 825 or under any similar statutes of another jurisdiction, shall be appointed to act as a guardian.

(2) Except as provided in subsection (3) or subsection (4), a person providing substantial services or products to the proposed ward in a professional or business capacity may not be appointed guardian and retain that previous professional or business relationship.

(3) A creditor or provider of health care services to the ward, whether direct or indirect, may not be appointed the guardian of the ward, unless the court finds that there is no conflict of interest with the ward.

(4) A person may not be appointed a guardian if he or she is in the employ of any person, agency, government, or corporation that provides services to the proposed ward in a professional or business capacity, except that a person so employed may be appointed if he or she is the spouse, adult child, parent, or sibling of the proposed ward or the court determines that any potential conflict of interest is insubstantial and that the appointment would be in the proposed ward's best interest.

(5) The court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.

(6) Any time a guardian who was qualified to act at the time of appointment knows that the guardian would not be qualified for appointment if application for appointment were then made, the guardian shall within 20 days file a resignation and notice of disqualification. A guardian who fails to comply with this section may be personally liable for costs, including attorney fees, incurred in any removal proceeding if the guardian is removed. This liability extends to a guardian who does not know, but should have

known, of the facts that would have required the guardian to resign or to file and serve notice as required herein. This liability shall be cumulative to any other provided by law.

745.503 Nonprofit corporate guardian.
A nonprofit corporation organized for religious or charitable purposes and existing under the laws of this state may be appointed guardian for a ward. The corporation must employ at least one professional guardian.

745.504 Credit and criminal investigation.
(1) Within 3 days of filing a petition for appointment of a non-professional guardian, the proposed guardian shall submit to an investigation of the guardian's credit history and a level 2 background screening as required under s. 435.04. The court may consider the credit and background screening reports before appointing a guardian. (2) For nonprofessional guardians, the court may require the satisfactory completion of a criminal history record check as described in this subsection. A nonprofessional guardian satisfies the requirements of this section by undergoing a state and national criminal history record check using fingerprints. A nonprofessional guardian required to submit fingerprints shall have fingerprints taken and forwarded, along with the necessary fee, to the Department of Law Enforcement for processing. The results of the fingerprint criminal history record check shall be transmitted to the clerk, who shall maintain the results in the court file of the nonprofessional guardian's case. (3) For professional and public guardians, the court and Office of Public and Professional Guardians shall accept the satisfactory completion of a criminal history record check by any method

described in this subsection. A professional guardian satisfies the requirements of this section by undergoing an electronic fingerprint criminal history record check. A professional guardian may use any electronic fingerprinting equipment used for criminal history record checks. The Office of Public and Professional Guardians shall adopt a rule detailing the acceptable methods for completing an electronic fingerprint criminal history record check under this section. The professional guardian shall pay the actual costs incurred by the Federal Bureau of Investigation and the Department of Law Enforcement for the criminal history record check. The entity completing the record check must immediately transmit the results of the criminal history record check to the clerk and the Office of Public and Professional Guardians. The clerk shall maintain the results in the court file of the professional guardian's case.

(4)(a) A professional guardian, and each employee of a professional guardian who has a fiduciary responsibility to a ward, must complete, at his or her own expense, a level 2 background screening as set forth in s. 435.04 before and at least once every 5 years after the date the guardian is registered with the Office of Public and Professional Guardians. A professional guardian, and each employee of a professional guardian who has direct contact with the ward or access to the ward’s assets, must complete, at his or her own expense, a level 1 background screening as set forth in s. 435.03 at least once every 2 years after the date the guardian is registered. However, a professional guardian is not required to resubmit fingerprints for a criminal history record check if the professional guardian has been screened using electronic fingerprinting equipment and the fingerprints are retained by the

Department of Law Enforcement in order to notify the clerk of any crime charged against the person in this state or elsewhere.

(b) All fingerprints electronically submitted to the Department of Law Enforcement under this section shall be retained by the Department in a manner provided by rule and entered in the statewide automated biometric identification system authorized by s. 943.05(2)(b). The fingerprints shall thereafter be available for all purposes and uses authorized for arrest fingerprints entered in the Criminal Justice Information Program under s. 943.051.

(c) The Department of Law Enforcement shall search all arrest fingerprints received under s. 943.051 against the fingerprints retained in the statewide automated biometric identification system under paragraph (b). Any arrest record that is identified with the fingerprints of a person described in this paragraph must be reported to the clerk. The clerk must forward any arrest record received for a professional guardian to the Office of Public and Professional Guardians within 5 days of receipt. Each professional guardian who elects to submit fingerprint information electronically shall participate in this search process by paying an annual fee to the Statewide Public Guardianship Office of the Department of Elderly Affairs. The amount of the annual fee to be imposed for performing these searches and the procedures for the retention of professional guardian fingerprints and the dissemination of search results shall be established by rule of the Department of Law Enforcement. At least once every 5 years, the Office of Public and Professional Guardians must request that the Department of Law Enforcement forward the fingerprints maintained under this section to the Federal Bureau of Investigation.

(5)(a) A professional guardian, and each employee of a professional guardian who has direct contact with the ward or access to the

ward’s assets, must allow, at his or her own expense, an investigation of his or her credit history before and at least once every 2 years after the date of the guardian's registration with the Office of Public and Professional Guardians.

(b) Office of Public and Professional Guardians shall adopt a rule detailing the acceptable methods for completing a credit investigation under this section. If appropriate, the office may administer credit investigations. If the office chooses to administer the credit investigation, it may adopt a rule setting a fee, not to exceed $25, to reimburse the costs associated with the administration of a credit investigation.

(6) Office of Public and Professional Guardians may inspect, at any time, the results of any credit or criminal history record check of a public or professional guardian conducted under this section. The office shall maintain copies of the credit or criminal history record check results in the guardian's registration file. If the results of a credit or criminal investigation of a public or professional guardian have not been forwarded to the Office of Public and Professional Guardians by the investigating agency, the clerk of the court shall forward copies of the results of the investigations to the office upon receiving them.

(7) The requirements of this section do not apply to a trust company, a state banking corporation or state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary powers in this state.

(8) At any time, the court may require a guardian or the guardian's employees to submit to an investigation of the person's credit history and complete a level 1 background screening as set forth in

s. 435.03. The court may consider the results of any such investigation when considering removal of a guardian.
(9) The clerk shall maintain a file on each professional guardian appointed by the court and retain in the file documentation of the result of any investigation conducted under this section. A professional guardian must pay the clerk of the court a fee of up to $7.50 for handling and processing professional guardian files. Such documentation for a nonprofessional guardian shall be maintained as a confidential record in the case file for such guardianship.

745.505 Guardian education requirements.
(1) Each ward is entitled to a guardian competent to perform the duties of a guardian necessary to protect the interests of the ward.
(2) Each person appointed by the court to be a guardian, other than a parent who is the guardian of the property of a minor child, must receive a minimum of 8 hours of instruction and training which covers:
(a) The legal duties and responsibilities of the guardian;
(b) The rights of the ward;
(c) The availability of local resources to aid the ward; and
(d) The preparation of guardianship plans, reports, inventories, and accountings.
(3) Each person appointed by the court to be the guardian of the property of his or her minor child must receive a minimum of 4 hours of instruction and training that covers:
(a) The legal duties and responsibilities of a guardian of property;

(b) The preparation of an initial inventory and guardianship accountings; and

(c) Use of guardianship assets.

(4) Each person appointed by the court to be a guardian must complete the required number of hours of instruction and education within 4 months after appointment. The instruction and education must be completed through a course approved by the chief judge of the circuit court and taught by a court-approved person or organization. Court-approved organizations may include, but are not limited to, community or junior colleges, guardianship organizations, and local bar associations or The Florida Bar.

(5) Expenses incurred by the guardian to satisfy the education requirement may be paid from the ward's estate, unless the court directs that such expenses be paid by the guardian individually.

(6) The court may waive some or all of the requirements of this section or impose additional requirements. The court shall make its decision on a case-by-case basis and, in making its decision, shall consider the experience and education of the guardian, the duties assigned to the guardian, and the needs of the ward.

(7) The provisions of this section do not apply to professional guardians.

Section 6. Part VI of chapter 745, Florida Statutes, consisting of sections 745.601, 745.602, 745.603, 745.604, 745.605, 745.606, 745.607, 745.608, 745.609, 745.610, and 745.611, is created to read:

PART VI

APPOINTMENT OF GUARDIANS

745.601 Proposed guardian’s information statement.

(1) At the time of filing a petition for appointment of guardian, every proposed guardian must file a verified information statement which provides the following:

(a) details sufficient to demonstrate that the person is qualified to be guardian pursuant to s. 745.501;

(b) the names of all wards for whom the person is currently acting as guardian or has acted as guardian in the previous five years, identifying each ward by court file number and circuit court in which the case is or was pending, and stating whether the person is or was acting as limited or plenary guardian of the person or property or both;

(c) any special experience, education or other skills that would be of benefit in serving as guardian;

(d) the proposed guardian's relation to the ward, including whether the person is providing any services to the ward, holds any joint assets with the ward, or, if known, is beneficiary of any part of the ward's estate.

(2) Subsection (1) does not apply to nonprofit corporate guardians and public guardians.

(3) Nonprofit corporate guardians and public guardians must file quarterly with the clerk statements that contain the information required under subsection (1), rather than filing an information statement with each petition to be appointed guardian.

745.602 Considerations in appointment of guardian.

(1) If the person designated is qualified to serve pursuant to s.745.501, the court shall appoint any standby guardian or preneed guardian, unless the court determines that appointing such person is contrary to the best interest of the ward.

(2) If a guardian cannot be appointed under subsection (1), the court may appoint any person who is fit and proper and qualified to act as guardian, whether related to the ward or not. The court shall give preference to the appointment of a person who:

(a) is related by blood or marriage to the ward;

(b) has educational, professional, or business experience relevant to the nature of the services sought to be provided;

(c) has the capacity to manage the assets involved; or

(d) has the ability to meet the requirements of the law and the unique needs of the ward.

(3) The court shall also:

(a) consider the wishes expressed by an incapacitated person as to who shall be appointed guardian.

(b) consider the preference of a minor who is age 14 or over as to who should be appointed guardian.

(c) consider any person designated as guardian in any will in which the ward is a beneficiary.

(d) consider the wishes of the ward's next of kin, when the ward cannot express a preference.

(4) When a guardian is appointed, the court must make findings of fact to support why the person was selected as guardian. Except when a guardian is appointed under subsection (1), the court must consider the factors specified in subsections (2) and (3).

(5) The court may hear testimony on the question of who is qualified and entitled to preference in the appointment of a guardian.

(6) The court may not give preference to the appointment of a person under subsection (2) based solely on the fact that such person was appointed to serve as an emergency temporary guardian.

745.603 Petition for appointment of guardian; contents.
(1) A petition to appoint a guardian must be verified by an adult with personal knowledge of the information in the petition alleging:
(a) the name, age, residence address, and mailing address of the alleged incapacitated person or minor and the nature of the incapacity, if any;
(b) the extent of guardianship proposed, either plenary or limited;
(c) the residence address and mailing address of the petitioner;
(d) the names and mailing addresses of the next of kin of the incapacitated person or minor, if known to the petitioner;
(e) the name of the proposed guardian and relationship of the proposed guardian to the ward;
(f) the reasons why the proposed guardian should be appointed;
(g) the nature and value of property subject to the guardianship, if any; and
(h) the identity of any pre-need guardian designation, healthcare surrogate designation, and power of attorney, purportedly executed by the alleged incapacitated person, the identity and county of residence of any person designated to act under such documents, and the efforts to locate such documents or persons designated to act.
(2) If a willing and qualified guardian cannot be located, the petition must so state.
(3) The petition for appointment of a professional guardian must comply with the provisions of subsection (1), and must state that the nominated guardian is a professional guardian.

745.604 Notice of petition for appointment of guardian and hearing.
(1) When a petition for appointment of guardian for an incapacitated person is heard at the conclusion of the hearing in

which the person is determined to be incapacitated, the court shall hear the petition without further notice provided that notice of hearing of the petition to appoint guardian was timely served. If the petition is heard on a later date, reasonable notice of the hearing must be served on the incapacitated person, any guardian then serving, the person's next of kin, and such other interested persons as the court may direct.

(2) When a petition for appointment of guardian of a minor is filed, formal notice must be served on the minor's parents. When a parent petitions for appointment as guardian for the parent’s minor child, formal notice shall be served on the other parent, unless the other parent consents to the appointment. If the proposed guardian has custody of the minor and the petition alleges that, after diligent search, a parent cannot be found, the parent may be served by informal notice, delivered to the parent’s last known address.

745.605 Order on petition for appointment of guardian.

(1) At the hearing on a petition for appointment of guardian, the court may consider evidence of less restrictive alternatives available to serve the needs of the incapacitated person, as grounds for denying the petition in whole or in part.

(2) The order appointing a guardian must state the nature of the guardianship as either plenary or limited. If limited, the order must state that the guardian may exercise only those delegable rights which have been removed from the incapacitated person and delegated to the guardian. The order shall specify the powers and duties of the guardian.

(3) A plenary guardian of person shall exercise all delegable rights and powers of the incapacitated person as it relates to

person and a plenary guardian of property shall exercise all delegable rights and powers of the incapacitated person as it relates to property.

(4) A ward for whom a limited guardian has been appointed retains all legal rights except those that have been specifically delegated to the guardian in the court's written order.

(5) The order appointing a guardian must contain a finding that guardianship is the least restrictive alternative that is appropriate for the ward, and must reserve to the incapacitated person the right to make decisions in all matters commensurate with the person's ability to do so.

(6) If a petition for appointment of guardian has been filed, the court shall rule on the petition contemporaneously with the order adjudicating a person to be incapacitated unless good cause is shown to defer ruling. If a guardian is not appointed contemporaneously with the order adjudicating the person to be incapacitated, the court may appoint an emergency temporary guardian in the manner and for the purposes specified in s. 745.701.

(7) The order appointing a guardian must specify the amount of bond to be given by the guardian and must state whether the guardian must place all, or part, of the property of the ward in a restricted account in a financial institution designated pursuant to s. 69.031.

745.606 Oath of guardian.

Before exercising authority as guardian, every guardian shall take an oath that he or she will faithfully perform the duties as guardian. This oath is not jurisdictional.

745.607 Bond of guardian.

(1) Before exercising authority as guardian, a guardian of the property of a ward shall file a bond with surety as prescribed in s. 45.011 to be approved by the clerk or by the court. The bond shall be payable to the Governor of the state and the Governor's successors in office, conditioned on the faithful performance of all duties by the guardian. In form the bond shall be joint and several. For good cause, the court may waive bond.

(2) When the sureties on a bond are natural persons, the guardian shall be required to file, with the annual guardianship report, proof satisfactory to the court that the sureties are alive and solvent.

(3) All bonds required by this part shall be in the sum that the court deems sufficient after considering the value and nature of the assets subject to guardianship.

(4) For good cause, the court may require, or increase or reduce, the amount of bond or change or release the surety.

(5) When considering bond of professional guardians, the court may take into account the blanket bond provided by such guardian, provided that proof of insurance and effectiveness of the bond is on file with the clerk. Additional bond may be required.

(6) Financial institutions and public guardians authorized by law to be guardians shall not be required to file bonds.

(7) The premium of a guardian’s required bond shall be paid as an expense of the guardianship.

(8) When it is expedient in the judgment of the court having jurisdiction of any guardianship property, because the size of the bond required of the guardian is burdensome, or for other cause, the court may order, in lieu of a bond or in addition to a lesser bond, that the guardian place all or part of the property of the

ward in a designated financial institution under the same conditions and limitations as are contained in s. 69.031. A designated financial institution shall also include a dealer, as defined in s. 517.021(6), if the dealer is a member of the Security Investment Protection Corporation and is doing business in the state.

745.608 Validity of bond.
No bond executed by any guardian shall be invalid because of an informality in it or because of an informality or illegality in the appointment of the guardian. The bond shall have the same force and effect as if the bond had been executed in proper form and the appointment had been legally made.

745.609 Liability of surety.
No surety for a guardian shall be charged beyond the property of the ward.

745.610 Alternatives to guardianship.
(1) In each proceeding in which a guardian is appointed under this chapter, the court shall make a finding whether the ward, prior to adjudication of incapacity, has executed an advance directive under chapter 765 or durable power of attorney under chapter 709. If any advance directive or durable power of attorney exists, the court shall specify in the order appointing guardian and letters what authority, if any, the guardian shall exercise over the ward or the ward’s assets and what authority, if any, the surrogate or agent shall continue to exercise over the ward or the ward’s assets.
(2) Upon verified petition by an interested person or if requested in a petition for appointment of guardian with notice to the

surrogate, agent, and interested persons, the court may suspend, modify, or revoke the authority of the surrogate or agent to make health care or financial decisions for the ward. Any order suspending, modifying, or revoking the authority of an agent or surrogate must be supported by written findings of fact.
(3) If a durable power of attorney, health care surrogate designation, trust or other relevant financial or personal care document is discovered after issuance of letters of guardianship, any interested person may file a petition seeking a determination of the effect of any such document and what, if any, changes should be made to the powers of the guardian.

745.611 Letters of guardianship.
(1) Letters of guardianship shall be issued to the guardian and shall specify whether the guardianship pertains to the ward's person, property, or both.
(2) The letters shall state whether the guardianship is plenary or limited. If limited, the letters shall specify the powers and duties of the guardian.
(3) The letters shall state whether or not, and to what extent, the guardian is authorized to act on behalf of the ward with regard to any advance directive under chapter 765 or durable power of attorney under chapter 709 previously executed by the ward.
(4) The duties and powers of the guardian accrue on the date letters are issued and not the date the order appointing guardian is entered.

Section 7. Part VII of chapter 745, Florida Statutes, consisting of sections 745.701, 745.702, 745.703, 745.704, 745.705, 745.706, 745.707, 745.708, 745.709, 745.710, 745.711, 745.712,

745.713, and 745.714, is created to read:

PART VII

TYPES OF GUARDIANSHIP

745.701 Emergency temporary guardianship.

(1) A court, prior to appointment of a guardian but after a petition for determination of incapacity has been filed, may appoint an emergency temporary guardian for the person, property, or both, of an alleged incapacitated person. The court must find that there appears to be imminent danger that the physical or mental health or safety of the person will be seriously impaired or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken. The alleged incapacitated person or an interested person may apply to the court in which the proceeding is pending for appointment of an emergency temporary guardian. The powers and duties granted must be described in the order appointing the emergency temporary guardian consistent with s. 745.605(2).

(2) The court shall appoint counsel to represent the alleged incapacitated person during any such proceedings. An emergency temporary guardian may be appointed only after hearing with at least 3 days' notice to the alleged incapacitated person, unless the petitioner demonstrates that substantial harm to the alleged incapacitated person would occur if the 3 days' notice is given and that reasonable notice, if any, has been provided.

(3) If no guardian is appointed at the time an order determining incapacity is entered, the court may appoint an emergency temporary guardian on its own motion after hearing with notice to the incapacitated person, and the person's next of kin, and such interested persons as the court may direct.

(4) Upon a filing of notice of resignation by a guardian, if no petition to appoint a successor has been filed by the time of the resignation, the court may appoint an emergency temporary guardian on its own motion after hearing with notice to the ward, the resigning guardian, and such other interested persons as the court may direct.

(5) The authority of an emergency temporary guardian expires upon the issuance of letters to a succeeding guardian, upon a determination that the ward is not incapacitated as to the rights and abilities specified in the order appointing emergency temporary guardian, or upon the death of the ward, whichever occurs first.

(6) An emergency temporary guardian of property whose authority has expired shall distribute assets only with prior court order approving distribution.

(7) The emergency temporary guardian shall be discharged and relieved of further responsibility upon approval of the final accounting or report as specified in subsection (12) and distribution of assets, if any, as directed by the court.

(8) The court may issue an injunction, restraining order, or other appropriate writ to protect the physical or mental health or safety or property of the person who is the ward of an emergency temporary guardianship.

(9) The emergency temporary guardian shall take an oath to faithfully perform the duties of a guardian before letters of emergency temporary guardianship are issued.

(10) Before exercising authority as guardian, the emergency temporary guardian of the property may be required to file a bond in accordance with s. 745.607.

(11) An emergency temporary guardian's authority and responsibility begins upon issuance of letters of emergency temporary guardianship in accordance with s. 745.611.

(12)(a) An emergency temporary guardian of property shall file a petition for distribution and discharge and final accounting no later than 45 days after the issuance of letters to the succeeding guardian, death of the ward, or entry of an order denying the petition to appoint guardian. The provisions of s. 745.1102 shall apply. The final accounting must consist of a verified inventory of the property, as provided in s. 745.803, as of the date letters of emergency temporary guardianship were issued and an accounting that complies with the requirements of the Florida Probate Rules.

(b) An emergency temporary guardian of person shall file a petition for discharge and a final report no later than 45 days after the issuance of letters to the succeeding guardian, death of the ward, or entry of an order denying the petition to appoint guardian. The provisions of s. 745.1106 shall apply. The final report shall summarize the activities of the temporary guardian with regard to residential placement, medical care, mental health and rehabilitative services, and the social condition of the ward to the extent of the authority granted to the temporary guardian in the letters of emergency temporary guardianship. Upon the death of the ward, s. 745.1107(5) shall apply.

(c) A copy of the final accounting or report of the emergency temporary guardian shall be served on the succeeding guardian, the ward if no guardian is appointed, or the personal representative of the ward’s estate.

745.702 Standby guardian of minor.

Upon petition by the natural guardians or a guardian appointed under s. 745.713, the court may appoint a standby guardian of the person or property of a minor. The court may also appoint an alternate to the guardian to act if the standby guardian does not serve or ceases to serve after appointment. Notice of hearing on the petition must be served on the natural guardians and on any guardian currently serving unless the notice is waived in writing by them or waived by the court for good cause shown.

745.703 Standby guardian of adult.

Upon petition by a currently serving guardian, a standby guardian of the person or property of an incapacitated person may be appointed by the court. The court may also appoint an alternate to act if the standby guardian does not serve or ceases to serve after appointment. Notice of hearing must be served on the ward's next of kin.

745.704 Appointment and powers of standby guardian.

(1) Upon filing a guardian’s oath and designation of resident agent and acceptance, a standby guardian or alternate may assume the duties of guardianship immediately on the death, removal, or resignation of an appointed guardian of a minor, or on the death or adjudication of incapacity of the last surviving natural guardian of a minor, or upon the death, removal, or resignation of the guardian for an adult. A standby guardian of the property may only safeguard the ward’s property before issuance of letters.

(2) A standby guardian shall petition for confirmation of appointment and shall file an oath, designation of resident agent and acceptance. Each proposed guardian shall post bond as set forth

in 745.607 and shall submit to a credit and a criminal history record check as set forth in s. 745.504. If the court finds the standby guardian to be qualified to serve as guardian under s. 745.501, the standby guardian shall be entitled to confirmation of appointment as guardian. Letters must then be issued in the manner provided in s. 745.611.

(3) After the assumption of duties by a standby guardian, the court shall have jurisdiction over the guardian and the ward.

745.705 Preneed guardian for adult.

(1) A competent adult may name a preneed guardian by executing a written declaration that names a guardian to serve in the event of the declarant's incapacity.

(2) The declaration must be signed by the declarant in the presence of two subscribing witnesses as defined in s. 732.504. A declarant unable to sign the instrument may, in the presence of witnesses, direct that another person sign the declarant’s name as required herein. The person designated as preneed guardian shall not act as witness to the execution of the declaration. At least one person who acts as a witness shall be neither the declarant’s spouse nor blood relative.

(3) The declarant may file the declaration with the clerk in declarant’s county of residence at any time. When a petition for appointment of guardian is filed, the clerk shall produce the declaration and serve a copy on the proposed ward and the petitioner.

(4) Production of the declaration in a proceeding for appointment of guardian shall constitute a rebuttable presumption that the preneed guardian is entitled to serve as guardian. The court shall

not be bound to appoint the preneed guardian if the person is found to be disqualified to serve as guardian.

(5) If the preneed guardian is unwilling or unable to serve, a written declaration appointing an alternate preneed guardian constitutes a rebuttable presumption that the alternate is entitled to serve as guardian. The court is not bound to appoint the alternate preneed guardian if the person is found to be disqualified to serve as guardian.

745.706 Preneed guardian for minor.

(1) Natural guardians may nominate a preneed guardian of person or property or both of their minor child by executing a written declaration that names such guardian to serve if the minor's last surviving natural guardian becomes incapacitated or dies or if the natural guardian is disqualified. The declarant may also name an alternate to the guardian to act if the designated preneed guardian is unwilling or unable to serve.

(2) The declaration must specify the child's full legal name and date of birth, the relationship of the declarant to the child, and the proposed preneed guardian.

(3) The declaration must be signed at the end by all of the natural guardians or the name of the natural guardians must be subscribed at the end by another person in the natural guardians' presence and at the natural guardians' direction. The natural guardians' signing, or acknowledgement that another person has subscribed his or her name to the declaration, must be in the presence of all natural guardians and in the presence of two subscribing witnesses as defined in s. 732.504. The person designated as preneed guardian shall not act as witness to the execution of the declaration. At

least one person who acts as a witness shall be neither of the natural guardians' spouse nor blood relative.

(4) The declarant may file the declaration with the clerk in the county of the child's residence, at any time. When a petition for appointment of guardian for the minor is filed, the clerk shall produce the declaration and serve a copy on the minor and petitioner.

(5) The declaration constitutes a rebuttable presumption that the designated preneed guardian is entitled to serve as guardian. The court is not bound to appoint the designated preneed guardian if the person is found to be disqualified to serve as guardian.

(6) If the preneed guardian is unwilling or unable to serve, a written declaration appointing an alternate preneed guardian constitutes a rebuttable presumption that the alternate is entitled to serve as guardian. The court is not bound to appoint the person if the alternate is found to be disqualified to serve as guardian.

(7) The clerk shall maintain all declarations filed pursuant to this section until the minor child named in the declaration has reached the age of majority. The clerk may dispose of such written declarations in accordance with law.

745.707 Voluntary guardianship of property.

(1) Upon petition by the proposed ward, the court shall appoint a guardian of property of a resident or nonresident person who, though of sufficient mental capacity, chooses to have a guardian manage all or part of his or her property. The petition shall be accompanied by a written statement from a licensed physician specifying that the physician has examined the petitioner and that the petitioner has capacity to understand the nature of the guardianship and the delegation of authority. The examination must

have been conducted within 60 days prior to filing the petition. Notice of hearing on any petition for appointment shall be served on the petitioner and on any person to whom the petitioner requests that notice be given. Such request may be made in the petition for appointment of guardian or in a subsequent written request for notice signed by the petitioner.

(2) If requested in the petition for appointment of a guardian brought under this section, the court may direct the guardian to take possession of less than all of the ward's property and of the rents, income, issues, and profits from it. In such case, the court shall specify in its order the property to be included in the guardianship. The duties and responsibilities of the guardian appointed under this section will extend only to such property.

(3) Unless the voluntary guardianship is limited pursuant to subsection (2), any guardian appointed under this section has the same duties and responsibilities as are provided by law for plenary guardians of the property.

(4) The guardian’s accounting, any petition for authority to act and notice of hearing shall be served on the ward and on any person to whom the ward has requested that notice be given, in a notice filed with the court.

(5) A guardian must include in the annual accounting filed with the court a written statement from a licensed physician who examined the ward not more than 60 days before the accounting is filed with the court. The certificate must specify whether the ward has capacity to understand the nature of the guardianship and the delegation of authority.

(6) If the physician’s written statement specifies that the ward no longer has the capacity to understand the nature of the guardianship or the ward’s delegation of authority, the guardian

shall file a petition to determine incapacity and shall continue to serve as guardian pending further order of the court.

(7) A voluntary guardianship may be terminated by a ward who has sufficient capacity filing a notice with the court that the voluntary guardianship is terminated. The notice shall be accompanied by a written statement from a licensed physician specifying that the ward has the capacity to understand the nature of the guardianship and the ward's delegation of authority. A copy of the notice must be served on the guardian and such other persons as the ward may specify.

(8) Upon a filing of notice of termination by the ward, the guardian shall account and petition for discharge as specified in s. 745.1102.

745.708 Relocation of ward to Florida.

(1) Within 60 days of the residence of an adult ward of a foreign guardian being moved to this state, the foreign guardian shall file a petition for determination of incapacity of the ward, a petition for appointment of guardian, and a certified copy of the guardian's letters of guardianship or equivalent with the clerk in the county in which the ward resides.

(2) Within 60 days of the of a minor ward of a foreign guardian being to this state, the foreign guardian shall file a petition for appointment of guardian and a certified copy of the guardian's letters of guardianship or equivalent with the clerk in the county in which the ward resides.

(3) Until a guardian is appointed in this state for the ward or the ward is determined to not require a guardian, the foreign guardian's authority shall be recognized and given full faith and credit in the courts of this state, provided the guardian is

qualified to serve as guardian of a resident ward. A foreign guardian who fails to comply with the requirements of this section shall have no authority to act on behalf of the ward in this state.
(4) This section does not foreclose the filing of a petition for determination of incapacity or petition for appointment of guardian by persons other than a foreign guardian.

745.709 Foreign guardian of nonresident ward.
(1) A guardian of property of a nonresident ward, is not required to file a petition under this section in order to manage or secure intangible personal property.
(2) A guardian of property of a nonresident ward, duly appointed by a court of another state, territory, or country, who desires to manage or serve any part or all of the real or tangible personal property of the ward located in this state, may file a petition showing his or her appointment, describing the property, stating its estimated value, and showing the indebtedness, if any, existing against the ward in this state, to the best of the guardian's knowledge and belief.
(3) A guardian required to petition under subsection (2) shall designate a resident agent, as required by the Florida Probate Rules, file certified copies of letters of guardianship or other authority and the guardian’s bond or other security, if any. The court shall determine if the foreign bond or other security is sufficient to guarantee the faithful management of the ward's property in this state. The court may require a guardian's bond in this state in the amount it deems necessary and conditioned on the proper management of the property of the ward coming into the custody of the guardian in this state.

(4) The authority of the guardian of a nonresident ward shall be recognized and given full faith and credit in the courts of this state. A guardian appointed in another state, territory, or country may maintain or defend any action in this state as a representative of the ward unless a guardian has been appointed in this state.
(5) Thereafter, the guardianship shall be governed by this code.

745.710 Resident guardian of property of nonresident ward.
(1) The court may appoint a person qualified under s. 745.501 as guardian of a nonresident ward's Florida property upon the petition of a foreign guardian, next of kin, or creditor of the ward, regardless of whether the ward has a foreign guardian.
(2) The petition for appointment of a guardian of property of a nonresident ward shall comply with requirements of s. 745.603.
(3) If it is alleged that the person has been adjudicated to be incapacitated, the petition shall be accompanied by a certified copy of the adjudication of incapacity from the court having jurisdiction in the state, territory, or country in which the incapacitated person resides and shall state the incapacitated person’s residence and the name and residence of any guardian, conservator or other fiduciary appointed for the ward.
(4) If a nonresident is temporarily residing in this state and is not under an adjudication of incapacity made in some other state, territory, or country, the procedure for determination of incapacity and appointment of a guardian of the nonresident's property shall be the same as for a resident of this state.
(5) When the ground for the appointment of a guardian is incapacity for which the person has been adjudicated in another state, territory, or country, formal notice of the petition and notice of

hearing on the petition shall be served on the foreign guardian or other fiduciary appointed for the ward, if any, and on the ward.

(6) In the appointment of the guardian, the court shall be governed by s. 745.602.

(7) The duties, powers, and liabilities of the guardian shall be governed by this code.

745.711 Guardian advocates.

The court may appoint a guardian advocate, without adjudication of incapacity, for a person with developmental disabilities if the person is only partially incapacitated. Unless otherwise specified, the proceeding shall be governed by the Florida Probate Rules. In accordance with the legislative intent of this code, courts are encouraged to consider appointing a guardian advocate, when appropriate, as a less restrictive alternative to guardianship.

745.712 Natural guardians.

(1) Parents jointly are natural guardians of their minor children including their adopted children, unless the parents' parental rights have been terminated pursuant to chapter 39. If a child is the subject of any proceeding under chapter 39, the parents may act as natural guardians under this section unless the court division with jurisdiction over guardianship proceedings finds that it is not in the child's best interest. If one parent dies, the surviving parent remains the sole natural guardian even if the parent remarries. If the marriage between the parents is dissolved, both parents remain natural guardians unless the court awards sole custody to one parent, in which case the parent awarded custody shall be the sole natural guardian. If the marriage is dissolved and neither parent is given custody of the child, neither shall act

as natural guardian of the child. The mother of a child born out of wedlock is the natural guardian of the child and is entitled to primary residential care and custody of the child unless the parents marry or until an order determining paternity is entered by a court of competent jurisdiction. In such event, the father shall also be deemed a natural guardian.

(2) Natural guardians are authorized, on behalf of their minor child if the total net amounts received do not exceed $25,000.00, to:

(a) Settle and consummate a settlement of any claim or cause of action accruing to the minor child for damages to the person or property of the minor child;

(b) Collect, receive, manage, and dispose of the proceeds of any such settlement;

(c) Collect, receive, manage, and dispose of any real or personal property distributed from an estate or trust;

(d) Collect, receive, manage, and dispose of and make elections regarding the proceeds from a life insurance policy or annuity contract payable to, or otherwise accruing to the benefit of, the child; and

(e) Collect, receive, manage, dispose of, and make elections regarding the proceeds of any benefit plan as defined by s. 710.102, of which the minor is a beneficiary, participant, or owner, without appointment, authority, or bond.

(3) A guardianship shall be required when the total net amounts received by, or on behalf of, the minor exceed $50,000.00. When the total net amounts received by, or on behalf of, the minor exceed $25,000.00 but does not exceed $50,000.00, the court has the discretion to determine whether the natural guardians are

authorized to take any actions enumerated in subsection (2) of this statute or whether a guardianship is required.
(4) All instruments executed by a natural guardian for the benefit of the ward under the powers specified in subsection (2) shall be binding on the ward. The natural guardian may not, without court order, use the property of the ward for the guardian's benefit or to satisfy the guardian's support obligation to the ward.
(5) Prior to taking possession of any funds or other property as authorized by subsection (2), a natural guardian must file with the clerk in the county of the ward’s residence a verified statement identifying the child, nature and value of the property, and the name, relationship, and current residence address of the natural guardian.

745.713 Guardians of minors.
(1) Upon petition of a parent, brother, sister, next of kin, or other person interested in the welfare of a minor, a guardian for a minor may be appointed by the court without the necessity of adjudication pursuant to chapter 745 Part III.
(2) Upon petition, the court may determine if the appointment of a guardian of property of a minor is necessary as provided in s. 745.712(3).
(3) A minor is not required to attend the hearing on the petition for appointment of a guardian, unless otherwise directed by the court.
(4) In its discretion, the court may appoint an attorney to represent the interests of a minor at the hearing on the petition for appointment of a guardian.
(5) A petition to appoint guardian may be filed and a proceeding to determine incapacity under chapter 745 Part III may be commenced

for a minor who is at least 17 years and 6 months of age at the time of filing. The alleged incapacitated minor under this subsection shall be provided all the due process rights conferred upon an alleged incapacitated adult pursuant to this chapter and applicable court rules. The order determining incapacity, order appointing guardian, and the letters of guardianship may take effect on or after the minor’s 18th birthday.

745.714 Claims of minors.

(1)(a) If no guardian has been appointed pursuant to this code, the court having jurisdiction over a claim may appoint a guardian ad litem to represent the minor's interest before approving a settlement of the minor's portion of the claim in any case in which a minor has a claim for personal injury, property damage, wrongful death, or other cause of action in which the proposed gross settlement of the claim for all claimants, including immediate and deferred benefits, exceeds $25,000.

(b) The court shall appoint a guardian ad litem to represent the minor's interest before approving a settlement of the minor's claim in any case in which the proposed gross settlement of the claim, for all claimants, including immediate and deferred benefits, exceeds $50,000.

(2) No bond shall be required of the guardian ad litem.

(3) The duty of a guardian ad litem is to protect the minor's interests as described in this code.

(4) A court shall not appoint a guardian ad litem for the minor if a guardian of the minor has previously been appointed and the guardian has no potential adverse interest to the minor.

(5) The court shall award reasonable fees and costs to the guardian ad litem to be paid out of the gross proceeds of the settlement.

(6) All records relating to settlement of a claim pursuant to this section is subject to the confidentiality provisions of s. 745.112.

Section 8. Part VIII of chapter 745, Florida Statutes, consisting of sections 745.801, 745.802, 745.803, 745.804, 745.805, 745.806, 745.807, 745.808, 745.809, 745.810, 745.811, 745.812, 745.813, and 745.814, is created to read:

PART VIII

DUTIES OF GUARDIAN

745.801 Liability of guardian.

A guardian is not personally liable for the debts, contracts or torts of the ward. A guardian may be liable to the ward for failure to protect the ward within the scope of the guardian's authority.

745.802 Duties of guardian of property.

(1) A guardian of property is a fiduciary and may exercise only those rights that have been removed from the ward and delegated to the guardian. The guardian of a minor's property shall exercise the powers of a plenary guardian of property.

(2) A guardian of property of the ward shall:

(a) Protect and preserve the property and invest it prudently as provided in chapter 518.

(b) Apply the property as provided in s. 745.1304.

(c) Keep clear, distinct, and accurate records of the administration of the ward's property.

(d) Perform all other duties required of a guardian of property by law.

(e) At the termination of the guardianship, deliver the property of the ward to the person lawfully entitled to it.

(3) A guardian is a fiduciary who must observe the standards in dealing with guardianship property that would be observed by a prudent person dealing with the property of another, and, if the guardian has special skills or is appointed guardian on the basis of representations of special skills or expertise, the guardian is under a duty to use those skills.

(4) A guardian of property, if authorized by the court, shall take possession of the ward's property and of the income from it, whether accruing before or after the guardian's appointment, and of the proceeds arising from the sale, lease, or mortgage of the property. All of the property and the income from it are assets in the hands of the guardian for the payment of debts, taxes, claims, charges, and expenses of the guardianship and for the care, support, maintenance, and education of the ward or the ward's dependents, as provided by law.

(5) A guardian of property shall file a verified inventory of the ward’s property as required by s. 745.803 and annual accountings in accordance with s. 745.805. This requirement also applies to a guardian who previously served as emergency temporary guardian for the ward.

(6) A guardian shall act within the scope of the authority granted by the court and as provided by law.

(7) A guardian shall act in good faith.

(8) When making decisions on behalf of a ward, a guardian of property shall exercise reasonable care, diligence, and prudence. The guardian of property shall base all decisions on substituted judgment if there is evidence of what the ward would have wanted and the decision promotes the ward’s best interest. If there is no evidence to support substituted judgment or the decision does not

promote the ward’s best interest, then the decision shall be made based on the ward’s best interest.

(9) When two or more guardians have been appointed, the guardians shall consult with each other on matters of mutual responsibility.

745.803 Verified inventory.

(1) A guardian of property shall file a verified inventory of the ward's property within 60 days of issuance of letters.

(2) The verified inventory must specify and describe the following:

(a) All property of the ward, real and personal, that has come into the guardian's control or knowledge, including a statement of all encumbrances, liens, and other claims on any item, including any cause of action accruing to the ward, and any trusts of which the ward is a beneficiary.

(b) The location of the real and personal property in sufficient detail so that it may be identified and located.

(c) A description of all sources of income, including, without limitation, social security benefits and pensions.

(d) The location of any safe-deposit boxes held by the ward individually or jointly with any other person.

(e) identification by name, address, and occupation, of witnesses present, if any, during the initial examination of the ward's tangible personal property.

(3) Along with the verified inventory, the guardian must file a copy of statements of all of the ward's cash assets from all institutions in which funds are deposited. Statements must be for the period ending closest in time to the issuance of letters.

(4) If the ward is a beneficiary of a trust, the inventory must identify the trust and the trustee.

(5) The inventory shall specify whether the guardian of property will file the annual accounting on a designated fiscal year or calendar year basis. .

(6) If a guardian of property learns of any property that is not included in the inventory, the guardian shall file an amended or supplemental inventory to report such property within 60 days after the discovery.

745.804 Audit fee for inventory.

(1) When the value of the ward's property, excluding real property, equals or exceeds $25,000, a guardian shall pay from the ward's property to the clerk an audit fee of up to $75, at the time of filing the verified inventory. Upon petition by the guardian, the court may waive the audit fee upon a showing of insufficient cash assets in the ward's estate or other good cause.

(2) An audit fee may not be charged to any ward whose property, excluding real property, has a value of less than $25,000.

745.805 Annual accounting.

(1) A guardian of property must file an annual accounting with the court.

(2) An annual accounting must include:

(a) A full and correct itemization of the receipts and disbursements of all of the ward's property in the guardian’s control or knowledge at the end of the accounting period and a statement of the ward's property in the guardian’s control or knowledge at the end of the accounting period. If the guardian does not have control of an asset, the accounting must describe the asset and the reason it is not in the guardian’s control. If the ward is a beneficiary of a trust, the accounting must identify the

trust and the trustee, but they need not list the receipts and disbursements of the trust.

(b) A copy of statements demonstrating all receipts and disbursements for each of the ward's cash accounts from each of the institutions in which cash is deposited.

(3) A guardian must obtain a receipt, canceled check, or other proof of payment for all expenditures and disbursements made on behalf of the ward. A guardian must preserve all evidence of payment, along with other substantiating papers, for a period of 7 years after the end of the accounting year. The receipts, proofs of payment, and substantiating papers need not be filed with the court but shall be made available for inspection at such time and place and before such persons as the court may order for cause, after hearing with notice to the guardian.

(4) Unless otherwise directed by the court, a guardian of property may file the first annual accounting on either a fiscal year or calendar year basis. The guardian must notify the court as to the guardian's filing intention on the guardian’s inventory. All subsequent annual accountings must be filed for the same accounting period as the first annual accounting. The first accounting period must end within 1 year after the end of the month in which the letters were issued to the guardian of property.

(5) The annual accounting must be filed on or before the first day of the fourth month after the end of the accounting year.

(6) Unless the guardian is a plenary guardian of property or the requirement is otherwise waived by the court, the annual accounting must be served on the ward. The guardian shall serve a copy of the annual accounting on interested persons as the court may authorize or require.

(7) The court may waive the filing of an accounting if it determines the ward receives income only from social security benefits and the guardian is the ward's representative payee for the benefits.

745.806 Simplified accounting.

(1) In a guardianship of property, when all assets of the estate are in designated depositories under s. 69.031 and the only transactions that occur in that account are interest accrual, deposits from a settlement, financial institution service charges and court authorized expenditures, the guardian may elect to file an accounting consisting of:

(a) Statements demonstrating all receipts and disbursements of the ward's account from the financial institution; and

(b) A statement made by the guardian under penalty of perjury that the guardian has custody and control of the ward's property as shown in the year-end statement.

(2) The accounting allowed by subsection (1) is in lieu of the accounting and auditing procedures under s. 745.805. However, any interested party may seek judicial review as provided in s. 745.1002.

745.807 Audit fee for accounting.

(1) A guardian shall pay, from the ward's property, to the clerk an audit fee based upon the following graduated fee schedule at the time of filing the annual accounting:

(a) For property having a value of $25,000 or less, there shall be no audit fee.

(b) For property with total value of more than $25,000 up to and including $100,000 the clerk may charge a fee of up to $100.

(c) For property with total value of more than $100,000 up to and including $500,000 the clerk may charge a fee of up to $200.
(d) For property with a value in excess of $500,000 the clerk may charge a fee of up to $400.
(2) Upon petition by the guardian, the court may waive the auditing fee upon a showing of insufficient cash assets in the ward's estate.

745.808 Safe-deposit box.
(1) A guardian’s initial access to any safe-deposit box leased or co-leased by the ward must be conducted in the presence of an employee of the institution where the box is located. A written inventory of the contents of the safe-deposit box also must be compiled in the presence of the employee. The employee and guardian must then confirm the contents of the safe-deposit box by executing the safe-deposit box inventory in accordance with Florida Probate Rule 5.020. The contents must then be replaced in the safe-deposit box and the guardian must file the verified safe-deposit box inventory within 10 days after the box is opened.
(2) A guardian of property must provide any co-lessee a copy of each signed safe-deposit box inventory. A copy of each verified safe deposit box inventory must also be provided to the ward unless the guardian is a plenary guardian of property or unless otherwise directed by the court.
(3) Nothing may be removed from the ward's safe-deposit box by the guardian of property without court order.

745.809 Duties of guardian of person.
(1) A guardian of the person is a fiduciary and may exercise only those rights that have been removed from the ward and delegated to

the guardian. A guardian of a minor shall exercise the powers of a plenary guardian.

(2) A guardian of the person shall make decisions necessary to provide medical, mental health, personal and residential care for the ward, to the extent of the guardian’s authority.

(3) A guardian of the person must ensure that each of the guardian's wards is personally visited by the guardian or, in the case of a professional guardian, by one of the guardian's professional staff at least once each calendar quarter. During the personal visit, the guardian or the guardian's professional staff person shall assess:

(a) The ward's physical appearance and condition.

(b) The appropriateness of the ward's current residence.

(c) The need for any additional services and for continuation of existing services, taking into consideration all aspects of the ward’s social, psychological, educational, direct service, health, and personal care needs.

(d) The nature and extent of visitation and communication with the ward’s family and others.

(4) A guardian of the person shall file an initial guardianship plan as required by s. 745.810 and annual plans as required by s. 745.813.

(5) A guardian shall act within the scope of the authority granted by the court and as provided by law.

(6) A guardian shall act in good faith.

(7) When making decisions on behalf of a ward, a guardian of person shall act in a manner consistent with the ward’s constitutional rights of privacy and self-determination, making health care decisions based on substituted judgment if there is evidence of what the ward would have wanted. If there is no evidence of what

the ward would have wanted, health care decisions shall be based on the ward's best interest.

(8) A guardian of person is a fiduciary who must observe the standards that would be observed by a prudent person making decisions on behalf of another, and, if the guardian has special skills or expertise, or is appointed in reliance upon the guardian's representation that the guardian has special skills or expertise, the guardian is under a duty to use those special skills or expertise when acting on behalf of the ward.

(9) A guardian of the person shall implement the guardianship plan.

(10) When two or more guardians have been appointed, the guardians shall consult with each other on matters of mutual responsibility.

(11) Recognizing that every individual has unique needs and abilities, a guardian who is given authority over a ward's person shall, as appropriate under the circumstances: (a) Consider the expressed desires of the ward as known by the guardian when making decisions that affect the ward.

(b) Allow the ward to maintain contact with family and friends unless the guardian believes that such contact may cause harm to the ward.

(c) Not restrict the physical liberty of the ward more than reasonably necessary to protect the ward or another person from serious physical injury, illness, or disease.

(d) Assist the ward in developing or regaining capacity, if medically possible.

(e) Notify the court if the guardian believes that the ward has regained capacity and that one or more of the rights that have been removed should be restored to the ward.

(f) To the extent applicable, make provision for the medical, mental, rehabilitative, or personal care services for the welfare of the ward.
(g) To the extent applicable, acquire a clear understanding of the risks and benefits of a recommended course of health care treatment before making a health care decision.
(h) Evaluate the ward's medical and health care options, financial resources, and desires when making residential decisions that are best suited for the current needs of the ward.
(i) Advocate on behalf of the ward in institutional and other residential settings and regarding access to home and community-based services.
(j) When not inconsistent with the person's goals, needs, and preferences, acquire an understanding of the available residential options and give priority to home and other community-based services and settings.

745.810 Guardianship plan.
(1) Each guardian of person, including a guardian who served as emergency temporary guardian, shall file a guardianship plan within 60 days after letters of guardianship are issued.
(2) The guardianship plan shall include the following:
(a) The needed medical, mental health, rehabilitative and personal care services for the ward;
(b) The social and personal services to be provided for the ward;
(c) The kind of residential setting best suited for the needs of the ward;
(d) The ward's residence at the time of issuance of the letters of guardianship, any anticipated change of residence and the reason therefor;

(e) The health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health, or other services provided to the ward; and

(f) Any physical and mental examinations necessary to determine the ward's medical and mental health treatment needs.

(3) The guardianship plan for an incapacitated person must consider any recommendations specified in the court appointed examiners' written reports or testimony.

(4) Unless the ward has been found to be totally incapacitated or is a minor, the guardianship plan must contain an attestation that the guardian has consulted with the ward and, to the extent reasonable, has honored the ward's wishes consistent with the rights retained by the ward.

(5) The guardianship plan may not contain requirements which restrict the physical liberty of the ward more than reasonably necessary to protect the ward from decline in medical and mental health, physical injury, illness, or disease and to protect others from injury, illness or disease.

(6) A guardianship plan continues in effect until it is amended or replaced by an annual guardianship report, until the restoration of capacity or death of the ward, or until the ward, if a minor, reaches the age of 18 years whichever first occurs. If there are significant changes in the capacity of the ward to meet the essential requirements for the ward's health or safety, the guardian may modify the guardianship plan and shall serve the amended plan on all persons who served with the plan.

745.811 Annual guardianship report for minor.

(1) An annual guardianship report for a minor ward shall provide current information about ward. The report must specify the current needs of the ward and how those needs are proposed to be met in the coming year.

(2) Each report filed by the guardian of person of a minor must include:

(a) Information concerning the residence of the ward, including the ward's address at the time of filing the plan, name and address of each location where the ward resided during the preceding year and the length of stay of the ward at each location.

(b) A statement of whether the present residential setting is best suited for the current needs of the ward.

(c) Plans for ensuring that the ward is in the best residential setting to meet the ward's needs.

(d) Information concerning the medical and mental health condition and treatment and rehabilitation needs of the minor, including:

1. A description of any professional medical treatment given to the minor during the preceding year, including names of health care providers, types of care and dates of service.

2. A report from the physician who examined the minor no more than 180 days before the beginning of the applicable reporting period that contains an evaluation of the minor's physical and medical conditions.

(e) Anticipated medical care needs and the plan for providing medical services in the coming year.

(f) Information concerning education of the minor, including:

1. A summary of the minor's educational progress report.

2. The social development of the minor, including a statement of how well the minor communicates and maintains interpersonal relationships.

745.812 Annual guardianship report for adults.

(1) An annual guardianship report for an adult ward shall provide current information about the condition of the ward. The report must specify the current needs of the ward and how those needs are proposed to be met in the coming year.

(2) Each report for an adult ward must, if applicable, include:

(a) Information concerning the residence of the ward, including the ward's address at the time of filing the plan, name and address of each location where the ward resided during the preceding year, and the length of stay of the ward at each location.

(b) A statement of whether the present residential setting is best suited for the current needs of the ward.

(c) Plans for ensuring that the ward is in the best residential setting to meet the ward’s needs.

(d) Information concerning the medical and mental health condition and treatment and rehabilitation needs of the ward, including:

1. A description of any professional medical and mental health treatment given to the ward during the preceding year, including names of health care providers, types of care, and dates of service.

2. The report of a physician who examined the ward no more than 120 days before the beginning of the applicable reporting period. The report must contain an evaluation of the ward's condition and a statement of the current level of capacity of the ward. If the guardian makes a statement in the report that a physician was not reasonably available to examine the ward, the report may be prepared and signed by a physician’s assistant acting pursuant to s. 458.347(4)(d) or s. 459.022(4)(d) or an advanced practice registered nurse acting pursuant to s. 464.012(3).

(e) The plan for providing medical, mental health, and rehabilitative services for the ward in the coming year.

(f) Information concerning the social activities of the ward, including:

1. The social and personal services currently used by the ward.

2. The social skills of the ward, including a statement of the ward's ability to communicate and maintain interpersonal relationships.

(g) Each report for an adult ward must address the issue of restoration of rights to the ward and include:

1. A summary of activities during the preceding year that were designed to improve the abilities of the ward.

2. A statement of whether the ward can have any rights restored.

3. A statement of whether restoration of any rights will be sought.

4. The court, in its discretion, may require reexamination of the ward by an appointed examiner at any time.

745.813 Annual guardianship report - filing.

Unless the court requires filing on a calendar-year basis, each guardian of person shall file an annual guardianship report on or before the first day of the fourth month after the last day of the anniversary month the letters of guardianship were issued, and the report must cover the coming plan year, ending on the last day in such anniversary month. If the court requires calendar-year filing, the guardianship report must be filed on or before April 1 of each year.

745.814 Records retention.

(1) A guardian of property shall maintain documents and records sufficient to demonstrate the accuracy of the initial inventory for

a period of 7 years after filing the inventory. The documents need not be filed but must be available for inspection at such time and place and before such persons as the court may order for cause, after hearing with notice to the guardian. The guardian of property shall also maintain documents and records sufficient to demonstrate the accuracy of the annual accounting for a period of 7 years after filing the accounting.

(2) A guardian of person shall maintain documents and records sufficient to demonstrate the accuracy of the annual report for a period of 4 years after the filing of the respective annual report.

Section 9. Part IX of chapter 745, Florida Statutes, consisting of sections 745.901, 745.902, 745.903, 745.904, 745.905, 745.906, 745.907, and 745.908, is created to read:

PART IX

GUARDIAN POWERS

745.901 Powers and duties of guardian.

The guardian of an incapacitated person may exercise only those rights that have been removed from the ward and delegated to the guardian. A guardian of a minor shall exercise the powers of a plenary guardian.

745.902 Power of guardian of property without court approval.

Without obtaining court approval, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the letters of guardianship, may:

(1) Take possession or control of property owned by the ward;

(2) Obtain the ward’s legal and financial documents and tax records from persons, financial institutions and other entities;

(3) Obtain a copy of any trust or any other instrument in which the ward has a beneficial interest, obtain benefits due the ward as a beneficiary of any trust or other instruments, and bind the ward with regard to any trust consistent with Florida Statutes chapter 736.0303;
(4) Vote stocks or other securities in person or by general or limited proxy or not vote stocks or other securities;
(5) Insure the assets of the estate against damage, loss, and liability and insure himself or herself against liability as to third persons;
(6) Execute and deliver in the guardian’s name, as guardian, any instrument necessary or proper to carry out and give effect to this section;
(7) Pay taxes and assessments on the ward's property;
(8) Pay valid encumbrances against the ward's property in accordance with their terms, but no prepayment may be made without prior court approval;
(9) Pay reasonable living expenses for the ward, taking into consideration the accustomed standard of living, age, health, and financial resources of the ward. This subsection does not authorize the guardian of a minor to expend funds for the ward's living expenses if one or both of the ward's parents are alive;
(10) Exercise the ward’s right to an elective share. The guardian must comply with the requirements of s. 732.2125(2). The guardian may assert any other right or choice available to a surviving spouse in the administration of a decedent's estate;
(11) Deposit or invest liquid assets of the estate, including money received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements, money market mutual funds, or other prudent

investments. The guardian may redeem or sell such deposits or investments to pay the reasonable living expenses of the ward as provided herein;

(12) When reasonably necessary, employ attorneys, accountants, property managers, auditors, investment advisers, care managers, agents, and other persons and entities to advise or assist the guardian in the performance of guardianship duties;

(13) Sell or exercise stock subscription or conversion rights and consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(14) Execute and deliver any instrument that is necessary or proper to carry out the orders of the court;

(15) Hold a security in the name of a nominee or in other form without disclosure of the interest of the ward, but the guardian is liable for any act of the nominee in connection with the security so held;

(16) Pay and reimburse incidental expenses in the administration of the guardianship and for provision of services to the ward including reasonable compensation to persons employed by the guardian pursuant to subsection (12) from the assets of the ward. These payments shall be reported on the guardian’s annual accounting, accompanied by itemized statements describing services rendered and the method of charging for such services;

(17) Provide confidential information about a ward that is related to an investigation arising under s. 745.1001 to the clerk, part XIV of this chapter to an Office of Public and Professional Guardians investigator, or part I of chapter 400 to a local or state ombudsman council member conducting that investigation. Any such clerk, Office of Public and Professional Guardians

investigator, or ombudsman shall have a duty to maintain the confidentiality of the information provided;

(18) Fulfill financial obligations under the ward’s contracts that predate the guardianship;

(19) Maintain and repair the ward’s property and purchase furnishings, clothing, appliances and furniture for the ward;

(20) Pay calls, assessments and other sums chargeable against securities owned by the ward that are obligations predating the guardianship;

(21) Contract for residential care and placement for the ward and for services pursuant to subsection (12); and

(22) Receive payment and satisfy judgments in favor of the ward.

745.903 Powers of guardian of property requiring court approval. After obtaining approval of the court pursuant to a petition for authorization to act, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the letters of guardianship, may:

(1) Compromise, or refuse performance of a ward's contracts that predate the guardianship, as the guardian may determine under the circumstances;

(2) Execute, exercise, or release any non-fiduciary powers that the ward might have lawfully exercised, consummated, or executed if not incapacitated, if the best interest of the ward requires such execution, exercise, or release;

(3) Make extraordinary repairs or alterations in buildings or other structures; demolish any improvements; raze existing walls or erect new, party walls or buildings;

(4) Subdivide, develop, or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust

differences in valuation on exchange or partition by giving or receiving consideration; or dedicate easements to public use without consideration;

(5) Enter into a lease as lessor of the ward's property for any purpose, with or without option to purchase or renew, for a term within, or extending beyond, the period of guardianship;

(6) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(7) Abandon property when it is valueless or is so encumbered or in such condition that it is of no benefit to the ward;

(8) Borrow money, with or without security, and advance money for the protection of the ward;

(9) Effect a fair and reasonable compromise or settlement with any debtor or obligor or extend, renew, or in any manner modify the terms of any obligation owing to the ward;

(10) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the ward and of a guardian in the performance of guardianship duties, including the filing of a petition for dissolution of marriage. Before authorizing a guardian to bring an action described in s. 736.0207, the court shall first find that the action appears to be in the ward's best interest during the ward's probable lifetime. There shall be a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interests if the revocation relates solely to a post-death distribution. This subsection does not preclude a challenge after the ward's death. Any judicial proceeding specified in 736.0201 must be brought as an independent proceeding and is not a part of the guardianship action;

(11) Sell, mortgage, or lease any real or personal property of the ward, including homestead property, or any interest therein for cash or credit, or for part cash and part credit, and with or without security for unpaid balances;
(12) Continue any unincorporated business or venture in which the ward was engaged;
(13) Purchase, in the name of the ward, real property in this state in which the guardian has no interest;
(14) If the ward is married with property owned by the ward and spouse as an estate by the entireties and the property is sold, the proceeds shall retain the same entireties character as the original asset, unless otherwise determined by the court;
(15) Exercise any option contained in any policy of insurance payable to, or inuring to the benefit of, the ward;
(16) Prepay reasonable funeral, interment, and grave marker expenses for the ward from the ward's property;
(17) Make gifts of the ward's property to members of the ward's family for estate and income tax planning purposes or to continue the ward’s prior pattern of gifting;
(18) When the ward's will evinces an objective to obtain a United States estate tax charitable deduction by use of a split interest trust (as that term is defined in s. 736.1201), but the maximum charitable deduction otherwise allowable will not be achieved in whole or in part, execute a codicil on the ward's behalf amending the will to obtain the maximum charitable deduction allowable without diminishing the aggregate value of the benefits of any beneficiary under the will;
(19) Create or amend revocable trusts or create irrevocable trusts of property of the ward that may extend beyond the disability or life of the ward in connection with estate, gift, income, or other

tax planning or to carry out other estate planning purposes. The court shall retain oversight of the assets transferred to a trust, unless otherwise ordered by the court. Before entering an order authorizing creation or amendment of a trust, the court shall appoint counsel to represent the ward in that proceeding. To the extent this provision conflicts with provisions of Chapter 736, Chapter 736 shall prevail;

(20) Renounce or disclaim any interest of the ward received by testate or intestate succession, insurance benefit, annuity, survivorship, or inter vivos transfer;

(21) Enter into contracts that are appropriate for, and in the best interest of, the ward; and

(22) Pay for a minor ward's support, health, maintenance, and education, if the ward's parents, or either of them, are alive.

745.904 Petition for authority to act.

(1) Requests by a guardian for authority to perform, or confirmation of, any acts under s. 745.903 or s. 745.1309 shall be by petition stating facts showing the expediency or necessity for the action; a description of any property involved; and the price and terms of a sale, mortgage, or other contract. The petition must state whether or not the ward has been adjudicated incapacitated to act with respect to the rights to be exercised.

(2) No notice of a petition to authorize sale or repair of perishable or deteriorating property shall be required. Notice of a petition to perform any other acts under s. 745.903 or s. 745.1309 shall be given to the ward, to the next of kin, if any, and to those interested persons whom the court has found to be entitled to notice, as provided in the Florida Probate Rules, unless waived by

the court for good cause. Notice need not be given to a ward who is a minor or who has been determined to be totally incapacitated.

745.905 Order authorizing action.

(1) If a sale or mortgage is authorized, the order shall:

(a) Describe the property;

(b) If the property is authorized for sale at private sale, the price and the terms of sale; and

(c) If the sale is to be by public auction, the order shall state that the sale shall be made to the highest bidder but that the guardian reserves the right to reject all bids.

(2) An order for any other act permitted under s. 745.903 or s. 745.1309 shall describe the permitted act and authorize the guardian to perform it.

745.906 Conveyance of various property rights by guardians of property.

(1)(a) All legal or equitable interests in property owned as an estate by the entireties by an incapacitated person for whom a guardian of the property has been appointed may be sold, transferred, conveyed, or mortgaged in accordance with s. 745.903, if the spouse who is not incapacitated joins in the sale, transfer, conveyance, or mortgage. When both spouses are incapacitated, the sale, transfer, conveyance, or mortgage shall be by the guardians only. The sale, transfer, conveyance, or mortgage may be accomplished by one instrument or by separate instruments.

(b) In authorizing or confirming the sale and conveyance of real or personal property owned by the ward and the ward's spouse as an estate by the entireties or as joint tenants with right of survivorship, the court may provide that one-half of the net

proceeds of the sale shall go to the guardian of the ward and the other one-half to the ward's spouse, or the court may provide for the proceeds of the sale to retain the same character as to survivorship as the original asset.

(c) A guardian of property shall collect all payments coming due on intangible property, such as notes and mortgages and other securities owned by the ward and the ward’s spouse as an estate by the entireties or as joint tenants with right of survivorship, and shall retain one-half of all principal and interest payments so collected and shall pay the other one-half of the collections to the spouse who is not incapacitated. If both spouses are incapacitated, the guardian of either shall collect the payments, retain one-half of the principal and interest payments, and pay the other one-half to the guardian of the other spouse. The court may direct that such payments retain their status as to survivorship or specify that such receipts be allocated in a manner other than equal division.

(d) The guardian of an incapacitated person shall collect all payments of rents on real estate held as an estate by the entireties and, after paying all charges against the property, such as taxes, insurance, maintenance, and repairs, shall retain one-half of the net rents so collected and pay the other one-half to the spouse who is not incapacitated. If both spouses are incapacitated, the guardian of the property of either may collect the rent, pay the charges, retain one-half of the net rent, and pay the other one-half to the guardian of the other spouse. The court may direct that such payments retain their status as to survivorship or specify that such receipts be allocated in a manner other than equal division.

(2) In determining the value of life estates or remainder interests, the American Experience Mortality Tables may be used.
(3) Nothing in this section shall prohibit the court in its discretion from appointing a sole guardian to serve as guardian for both spouses.
(4) Any contingent or expectant interest in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entireties, may be conveyed or released in accordance with s. 745.903.

745.907 Settlement of claims
(1) When a settlement of any claim by or against an adult ward, whether arising as a result of personal injury or otherwise, and whether arising before or after appointment of a guardian, is proposed, but before an action to enforce it is begun, on petition by the guardian of the property stating the facts of the claim or dispute and the proposed settlement, and on evidence that is introduced, the court may enter an order authorizing the settlement if satisfied that the settlement will be in the best interest of the ward. The order shall relieve the guardian from any further responsibility in connection with the claim or dispute when settlement has been made in accordance with the order. The order authorizing the settlement may also determine whether an additional bond is required and, if so, shall fix the amount of it.
(2) In the same manner as provided in subsection (1) or as authorized by s. 745.713, the natural guardians or guardian of a minor may settle any claim by or on behalf of a minor that does not exceed $25,000.00 without bond. A guardianship shall be required when the amount of the net settlement to the ward exceeds $50,000.00. When the amount of the net settlement to the ward

exceeds $25,000.00 but does not exceed $50,000.00, the court has the discretion to determine whether the natural guardians may settle the claim or whether a guardianship shall be required. No guardianship of the minor is required when the amount of the net settlement is less than $25,000.00.

(3) No settlement after an action has been commenced by or on behalf of a ward shall be effective unless approved by the court having jurisdiction of the guardianship.

(4) In making a settlement under court order as provided in this section, the guardian is authorized to execute any instrument that may be necessary to effect the settlement. When executed, the instrument shall be a complete release of the guardian.

745.908 Authority for extraordinary actions.

(1) Without first obtaining authority from the court, as described in this section, a guardian shall not:

(a) Commit a ward with developmental disabilities to a facility, institution, or licensed service provider without formal placement proceeding, pursuant to chapters 393.

(b) Consent on behalf of the ward to the performance on the ward of any experimental biomedical or behavioral procedure or to the participation by the ward in any biomedical or behavioral experiment. The court may permit such performance or participation only if:

1. It is of direct benefit to, and is intended to preserve the life of or prevent serious impairment to the mental or physical health, of the ward; or

2. It is intended to assist the ward to develop or regain the ward's abilities.

(c) Consent on behalf of the ward to termination of the ward's parental rights;
(d) Consent on behalf of the ward to the performance of a sterilization or abortion procedure on the ward.
(2) Before the court may grant authority to a guardian to exercise any of the powers specified in this section, the court must:
(a) Appoint an attorney to represent the ward. The attorney must have the opportunity to meet with the ward and present evidence and cross-examine witnesses at any hearing on the petition for authority to act;
(b) Consider independent medical, psychological, and social evaluations with respect to the ward presented by competent professionals. The court may appoint experts to assist in the evaluations. Unless an objection is filed by the ward or petitioner, the court may consider at the hearing written evaluation reports without requiring testimony. Any objection to such consideration must be filed and served on interested persons at least 3 days prior to the hearing;
(c) Find by clear and convincing evidence that the ward lacks the capacity to make a decision about the issues before the court and that the ward's capacity is not likely to change in the foreseeable future; and
(d) Find by clear and convincing evidence that the authority being requested is consistent with the ward's intentions expressed prior to incapacity or, in the absence of evidence of the ward's intentions, is in the best interests of the ward.

Section 10. Part X of chapter 745, Florida Statutes, consisting of sections 745.1001, 745.1002, 745.1003, 745.1004, 745.1005, 745.1006, 745.1007, 745.1008, and 745.1009, is created to

read:

PART X

OVERSIGHT AND MONITORING

745.1001 Duties of the clerk – General.

In addition to the duty to serve as custodian of guardianship files, the clerk shall have the duties specified below:

(1) Within 30 days after the date of filing an initial guardianship plan or annual report of a guardian of person, the clerk shall examine the initial guardianship plan or annual report to assess whether it provides information required by this code and the Florida Probate Rules. Within such time, the clerk shall provide the court and the guardian a written statement of the clerk's findings.

(2) Within 60 days after the filing of an inventory or annual accounting by a guardian of property, the clerk shall audit the inventory or accounting to assess whether it provides information required by this code and the Florida Probate Rules. Within such time, the clerk shall provide the court and the guardian a written audit report of the clerk's findings.

(3) The clerk shall provide written notice to the court and guardian when an inventory, accounting, plan or report is not timely filed.

(4) If the clerk has reason to believe further review is appropriate, the clerk may request and review records and documents that reasonably impact guardianship assets, including, but not limited to, the beginning inventory balance and any fees charged to the guardianship. As a part of this review, the clerk may conduct audits and may cause the plan and annual guardianship report and accounting to be audited. The clerk shall advise the court of the results of any such audit. Any fee or cost incurred by the guardian

in responding to the review or audit may not be paid or reimbursed by the ward's assets if there is a finding of wrongdoing by the guardian.

(5) If a guardian fails to produce records and documents to the clerk upon request, the clerk may request that the court enter an order pursuant to s. 745.1004 by filing an affidavit that identifies the records and documents requested and shows good cause as to why the documents and records requested are needed to complete the audit.

(6) Upon application to the court pursuant to subsection (5), the clerk may issue subpoenas to nonparties to compel production of books, papers, and other documentary evidence. Before issuance of a subpoena, the clerk must serve notice on the guardian and the ward, unless the ward is a minor or totally incapacitated, of the intent to serve subpoenas to nonparties.

(a) The clerk must attach the affidavit and the proposed subpoena to the notice, and the subpoena must:

1. State the time, place, and method for production of the documents or items, and the name and address of the person who is to produce the documents or items, if known, or, if not known, a general description sufficient to identify the person or the particular class or group to which the person belongs;

2. Include a description of the items to be produced;

3. State that the person who will be asked to produce the documents or items has the right to object to the production under this section and that if an objection is filed the person is not required to surrender the documents or items.

(b) A copy of the notice and proposed subpoena may not be furnished to the person upon whom the subpoena is to be served.

(c) If the guardian or ward serves an objection to production under this subsection within 10 days after service of the notice, the subpoena may not be served on the nonparty until resolution of the objection. If an objection is not made within 10 days after service of the notice, the clerk may issue the subpoena to the nonparty. The court may shorten the period within which a guardian or ward is required to file an objection upon a showing by the clerk by affidavit that the ward's property is in imminent danger of being wasted, misappropriated, or lost unless immediate action is taken.

745.1002 Judicial review of guardianship inventories and accountings.

(1) Within 60 days after the filing of the clerk's audit report, the court shall review guardianship inventories and accountings to ensure that they comply with the requirements of law. The court may appoint a general or special magistrate to assist the court in its review function. Upon examining a guardianship inventory or accounting, the court shall enter an order approving or disapproving such document or requiring the guardian to provide more information or cure deficiencies found in the inventory or accounting.

(2) If the court finds, upon review of the inventory or accounting and the clerk's audit report, that the document complies with the requirements of law, the court may approve the inventory or accounting. If the audit report indicates that there are deficiencies in the inventory or accounting, the court shall notify the guardian, in writing, of the deficiencies determined by the clerk and provide a reasonable time within which the guardian must correct such deficiencies or otherwise respond by written response to the court. If the guardian does not respond within the time

specified by the court, or if the guardian's response indicates a need for further action, the court may conduct a hearing, with notice to the guardian, to determine if a revised inventory or accounting must be filed or if the guardian should provide proof of any matter specified therein.

(3) After a guardian has cured any deficiencies in the inventory or accounting to the satisfaction of the court, the guardian's inventory or accounting may be approved.

(4) If an objection to an inventory or accounting is filed by a person determined to be an interested person, the objector may set the matter for hearing with appropriate notice to the guardian. At the conclusion of the hearing, the court shall enter an order either approving the inventory or accounting or ordering modifications to it. If an objection is found to be substantially without merit, the court may award taxable costs as in chancery actions, including reasonable attorney's fees.

745.1003 Judicial review of guardianship plans and reports.

(1) Within 60 days after the filing of the clerk's written statement, the court shall review guardianship plans and reports to ensure that they comply with the requirements of law. The court may appoint a general or special magistrate to assist the court in its review function. Upon examining a guardianship plan or report, the court shall enter an order approving or disapproving such document or requiring the guardian to provide more information or cure deficiencies found in the plan or report.

(2) If the court finds, upon review of the plan or report and the clerk's written statement, that the document complies with the requirements of law, the court may approve the plan or report. If the clerk's written statement indicates that there are deficiencies

in the plan or report, the court shall notify the guardian, in writing, of the deficiencies determined by the clerk and provide a reasonable time within which the guardian must correct such deficiencies or otherwise respond by written response to the court. If the guardian does not respond within the time specified by the court, or if the guardian's response indicates a need for further action, the court may conduct a hearing, with notice to the guardian, to determine if a revised plan or report must be filed or if the guardian should provide proof of any matter specified therein.

(3) After a guardian has cured any deficiencies in the plan or report to the satisfaction of the court, the guardian's plan or report may be approved.

(4) If an objection to a plan or report is filed by an interested person, the objector may set the matter for hearing with appropriate notice to the guardian. At the conclusion of the hearing, the court shall enter an order either approving the plan or report or ordering modifications to it. If an objection is found to be substantially without merit, the court may award taxable costs as in chancery actions, including reasonable attorney's fees.

745.1004 Order requiring guardianship documents; contempt.

When a guardian fails to file a plan, report, inventory or accounting, the court shall order the guardian to file such document within 15 days after the service of the order on the guardian or show cause, in writing, why the guardian should not be compelled to do so. A copy of the order shall be served on the guardian. If the guardian fails to file the document within the time specified by the order without good cause, the court shall order the guardian to show cause why the guardian should not be

held in contempt of court. At the conclusion of the hearing, the court may sanction the guardian, if good cause is not demonstrated. No fine may be paid from property of the ward.

745.1005 Action on review of guardianship report.

If it appears from the annual guardianship report that:

(1) The condition of the ward requires further examination;

(2) Any change in the proposed care, maintenance, or treatment of the ward is needed;

(3) The ward is qualified for restoration of some or all rights;

(4) The condition or maintenance of the ward requires the performance or doing of any other thing for the best interest of the ward which is not indicated in the plan; or

(5) There is any other action necessary to protect the interests of the ward

the court may direct the guardian to appear at a hearing with appropriate notice to the guardian, to address such issues. The court may enter such order as it finds appropriate to protect the ward.

745.1006 Petition for interim judicial review

(1) At any time, any interested person may petition the court for review alleging that the guardian is not complying with a guardianship plan or report, is exceeding the guardian’s authority under such document, or is acting in a manner contrary to s. 745.809. The petition for review must state the interest of the petitioner, nature of the objection to the guardian's action or proposed action, and facts in support of the petition. Upon the filing of any such petition, the guardian or any interested person may set the petition for hearing, with notice to the guardian.

Upon hearing, the court may prohibit or enjoin any action that is contrary to the guardian's obligations under s. 745.809.

(2) The court may award taxable costs and attorney's fees as in chancery actions.

745.1007 Production of property.

On the petition of an interested person, the court may require a guardian of property to produce satisfactory evidence that the property of the ward for which the guardian is responsible is in the guardian's possession or under the guardian's control. The court may order the guardian to produce the property for inspection by the court or under the court's direction.

745.1008 Guardianship monitors.

(1) The court may, upon petition by an interested person or upon its own motion, appoint a monitor after hearing with notice to the guardian and the ward. The court shall not appoint as a monitor an employee of the court, the clerk, a family member of the ward, or any person with a personal interest in the proceedings.

(2) The order of appointment shall be served on the guardian, the ward, and such interested persons as the court may direct.

(3) The order of appointment shall specify the facts supporting the order, scope of the investigation, powers and duties of the monitor and time frame within which the investigation must be completed.

(4) The monitor shall be deemed an interested person until discharged and may not have ex parte communications with the court.

(5) The monitor may investigate, seek information, examine documents, and interview the ward and guardian and shall file a written report of the monitor's findings and recommendations. The report shall be verified and may be supported by documents or other

evidence. Copies of the report and all documents shall be served on the guardian, the ward, unless the ward is a minor or is totally incapacitated, and such other interested persons as the court may determine. The guardian and the ward may seek information from the monitor using discovery methods authorized in the Florida Probate Rules.

(6) If it appears from the monitor’s report that further action by the court to protect the interests of the ward is necessary, the court shall, after a hearing with notice, enter any order necessary to protect the ward or the ward's property, including requiring the guardian to amend a plan or report, requiring an accounting or amended accounting, ordering production of assets, freezing assets, suspending a guardian, or initiating proceedings to remove a guardian.

(7) Unless otherwise prohibited by law, a monitor may be allowed a reasonable fee as determined by the court and paid from the property of the ward. No full-time state, county, or municipal employee or officer shall be paid a fee for such investigation and report. If the court finds a petition to appoint a monitor or a written communication by a third party which results in appointment of a monitor to have been filed in bad faith, the costs of the proceeding and attorney's fees shall be awarded as in chancery actions.

(8) The court may appoint the office of criminal conflict and civil regional counsel as monitor if the ward is indigent.

745.1009 Emergency guardianship monitor.

(1) The court may, upon petition by an interested person or upon its own motion, appoint a guardianship monitor qualified under s. 745.1008(1) on an emergency basis without notice. The court must

find that there appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.

(2) The order appointing an emergency guardianship monitor shall specify the facts supporting the order, scope of the investigation, powers and duties of the monitor and the time frame within which the investigation must be completed.

(3) The monitor shall file a report of the monitor’s findings and recommendations. The report shall be verified and may be supported by documents or other evidence.

Copies of the report and all documents shall be served on:

(a) the guardian,

(b) attorney for the ward, if any, and

(c) such other interested persons as the court may determine appropriate after the court has made a determination under subsection (4).

(4) Upon review of the report, the court shall determine whether further action is necessary to protect the person or property of the ward.

(5)(a) If the court finds that further action is necessary to protect the person or property of the ward, the court shall issue an order to show cause directed to the guardian or other respondent stating the essential facts constituting the conduct charged action. The notice of hearing shall be served on the guardian, other respondent, if any, and attorney for the ward, if any, and shall provide a reasonable time for the hearing after service of the order.

(b) At any time prior to the hearing on the order to show cause, the court may issue a temporary injunction, a restraining order, or

an order freezing assets; may suspend the guardian; may appoint a guardian ad litem; or may issue any other appropriate order to protect the health, safety, or property of the ward. A copy of all such orders or injunctions shall be transmitted by the court or under its direction to all parties at the time of entry of the order or injunction.

(c) Following a hearing on the order to show cause, the court may impose sanctions on the guardian or other respondent or take any other action authorized by law, including entering a judgment of contempt; ordering an accounting or amended accounting; freezing assets; referring the case to local law enforcement agencies or the state attorney; filing an abuse, neglect, or exploitation complaint with the Department of Children and Family Services; or initiating proceedings to remove the guardian.

Nothing in subsection (5) shall be construed to preclude the mandatory reporting requirements of chapter 39.

(6) Unless otherwise prohibited by law, a monitor may be allowed a reasonable fee as determined by the court and paid from the property of the ward. No full-time state, county, or municipal employee or officer shall be paid a fee for such investigation and report. If the court finds the petition to appoint a court monitor or a written communication by a third party which results in appointment of a monitor to have been filed in bad faith, the costs of the proceeding and attorney's fees, shall be awarded as in chancery.

(7) The court may appoint the office of criminal conflict and civil regional counsel as monitor if the ward is indigent.

Section 11. Part XI of chapter 745, Florida Statutes, consisting of sections 745.1101, 745.1102, 745.1103, 745.1104,

745.1105, 745.1106, 745.1107, 745.1108, 745.1109, and 745.1110, is created to read:

PART XI

RESIGNATION AND DISCHARGE

745.1101 Resignation of guardian.

(1) A guardian may resign at any time.

(2) A resigning guardian shall retain the duties and responsibilities of a guardian until discharged by the court as specified in this part.

(3) A resigning guardian shall file a resignation with the court and, unless waived, serve a notice of resignation on:

(a) next of kin of the ward;

(b) the ward, unless the ward has been found to be totally incapacitated or is a minor; and

(c) a successor or proposed successor guardian, if any.

745.1102 Resignation and discharge of guardian of property.

(1) A successor guardian of property shall be appointed if a guardian dies, becomes incapacitated, resigns or is removed.

(2) A resigning guardian of property shall file a petition for distribution and discharge and final accounting and shall serve such documents and a notice of filing petition for distribution and discharge and final accounting on the persons specified in s. 745.1101. The guardian’s final accounting shall be subject to audit by the clerk in the manner and within the time specified in s. 745.1001, unless waived by an appointed successor guardian. The petition for distribution and discharge shall include a schedule of unpaid expenses of the ward and administration expenses to be paid prior to discharge.

(3) The notice of filing petition for distribution and discharge and final accounting shall specify that interested persons have 30 days from the date of receipt of the notice to file any objections with the court. If no objections are timely filed, the court may enter an order authorizing distribution of assets without further notice or hearing. If objections are timely filed, the objections shall be resolved as provided in the Florida Probate Rules.

(4) Upon approval of a resigned guardian's final accounting and petition for distribution and discharge, the guardian is entitled to distribute assets and be discharged, regardless of whether a successor guardian has been appointed.

(5) If no successor guardian is appointed at the time the petition for distribution and discharge is heard, the court may appoint an emergency temporary guardian.

(6) Prior to discharge, a resigning guardian shall deliver all assets of the ward and copies of all asset records to a successor guardian, an emergency temporary guardian or as otherwise directed by the court.

(7) Upon petition by an interested person or on the court's own motion, an attorney may be appointed to represent the ward in the discharge proceedings. When a court appoints an attorney for the ward, the court must appoint the office of criminal conflict and civil regional counsel or a private attorney as prescribed in s. 27.511(6). A private attorney must be one who is included in the attorney registry compiled pursuant to s. 27.40. Appointments of private attorneys must be made on a rotating basis, taking into consideration conflicts arising under this code. The attorney for the ward shall represent the preferences expressed by the ward, to the extent consistent with the rules regulating the Florida Bar.

The attorney for the ward may assist in locating a successor guardian.

(8) A successor guardian may be appointed and have letters issued after a guardian has resigned and before an order of discharge of the resigned guardian has been entered. The successor guardian succeeds to the powers specified in the letters of guardianship and such guardian's authority shall inure as of the date of issuance of letters.

745.1103 Termination of guardianship of property

(1) When a ward becomes sui juris, has been restored to capacity as to all rights related to the ward's property, or the guardianship has been relocated to an out-of-state jurisdiction, the guardian shall file a final accounting and petition for discharge. The accounting and petition, together with a notice of filing the final accounting and petition for discharge, shall be served on the ward. The ward may waive audit of the guardian's final accounting.

(2) When the ward's property has been exhausted except for clothing and minimal personal effects and the guardian receives no income on behalf of the ward, the guardian may file a final accounting and petition for discharge. The final accounting and petition for discharge, together with a notice of filing the final accounting and petition for discharge, shall be served on the ward, the ward's next of kin, and such persons as the court may direct.

(3) When a ward dies, the guardian must file a final accounting and petition for distribution and discharge within 45 days after the guardian has been served with letters of administration or letters of curatorship of the ward's estate. The petition for distribution and discharge and final accounting and notice of filing shall be served on the personal representative or curator. The personal

representative or curator may waive audit of the guardian’s final accounting.

(4) If no objections are timely filed by the ward, in the case of a ward who has become sui juris or has been restored to capacity, or by the personal representative or curator, in the case of a deceased ward, the guardian may distribute the ward’s assets as directed by the court and, upon proof of such distribution, shall be entitled to discharge.

(5) If objections to the final accounting or petition for discharge are timely filed, the objections shall be resolved as provided in the Florida Probate Rules.

(6) The guardian applying for discharge may retain from the funds in the guardian’s possession a sufficient amount to pay the final costs of administration, including guardian and attorney’s fees.

(7) The court retains jurisdiction over the guardian until the guardian is discharged.

745.1104 Discharge of guardian of property named as personal representative.

(1) A guardian of property who is subsequently appointed sole personal representative of a deceased ward’s estate must serve a copy of the guardian's final accounting and petition for distribution and discharge, together with a notice of filing the final accounting and petition for distribution and discharge, on the beneficiaries of the ward's estate who will be affected by the report. If the beneficiary of the estate is a trust of which the guardian is sole trustee, the final accounting must be served on qualified beneficiaries of the trust as defined in s. 736.0103.

(2) All such beneficiaries shall have 30 days from receipt of the final accounting and petition for distribution and discharge to file objections thereto. If objections are timely filed, the objections shall be resolved as provided in the Florida Probate Rules.
(3) The guardian may not be discharged until:
(a) All objections have been resolved;
(b) The final accounting of the guardian is approved by the court or waived by the persons entitled to notice under subsection (1); and
(c) All property has been distributed to the ward's estate or the persons entitled to it.

745.1105 Termination of guardianship of property on change of residence of ward to foreign jurisdiction.
(1) When the residence of a ward has changed to another state or country, and the foreign court having jurisdiction over the ward at the ward's new residence has issued letters or the equivalent, the guardian of the property in this state may file a final accounting and petition for discharge.
(2) The guardian shall serve the petition for discharge and final accounting on the new guardian, the ward’s next of kin and all known creditors of the ward with a notice directing that any objections must be filed within 30 days. If an objection is timely filed, any interested person may set the objection for hearing. If no notice of hearing is served within 60 days after filing the objection, the objection is deemed abandoned.
(3) Upon disposition of all objections, or if no objection is filed, distribution shall be made by the Florida guardian. On proof that the remaining property in the guardianship has been received

by the foreign guardian, the Florida guardian of property shall be discharged. The entry of the order discharging the Florida guardian previously incurred.

(4) The Florida guardian's final accounting shall not be subject to audit.

745.1106 Disposition of unclaimed funds held by guardian.

(1) When a ward dies and the guardian cannot distribute the ward's property because no estate proceeding has been instituted, the guardian of property shall be considered an interested person pursuant to s. 733.202 and may, after a reasonable time, petition for appointment of a personal representative or curator. In the alternative, the guardian may follow the procedures set forth in subsection (3).

(2) When a guardian is unable to locate the ward after diligent search, the guardian may file a petition pursuant to s. 731.103(3) and, upon a determination of death, may proceed under subsections (1) or (3).

(3) The court may order the guardian of property to sell the property of the ward and deposit the proceeds and cash on hand after retaining the amounts provided for in paragraph (d) with the clerk. The clerk shall acknowledge receipt of the funds and deposit them in the registry of the court, to be disposed of as follows:

(a) If the value of the funds is $500 or less, the clerk shall post a notice for 30 days at the courthouse specifying the amount, the name of the ward, the guardianship court file number, the name and mailing address of the guardian, and other pertinent information that will put interested persons on notice.

(b) If the value of the funds is over $500, the clerk shall publish the notice once a month for 2 consecutive months in a newspaper of general circulation in the county.

(4) Pursuant to subsection (3), after the expiration of 6 months from the posting or first publication, the clerk shall deposit the funds with the Chief Financial Officer after deducting the clerk's fees and the costs of publication.

(a) Upon receipt of the funds, the Chief Financial Officer shall deposit them in a separate fund devoted to the provision of guardianship services to indigent wards. All interest and all income that may accrue from the money while so deposited shall belong to the fund. The funds so deposited shall constitute and be a permanent appropriation for payments by the Chief Financial Officer as required by court orders entered as provided by paragraph (b).

(b) On petition to the court that directed deposit of the funds and informal notice to the Department of Legal Affairs and the ward's next of kin, any person claiming entitlement to the funds may petition for a court order directing the payment of the funds to the petitioner. Such petition must be filed within 5 years after deposit of the funds with the Chief Financial Officer. All funds deposited with the Chief Financial Officer and not claimed within 5 years from the date of deposit shall escheat to the state to be deposited in the Department of Elder Affairs Administrative Trust Fund to be used solely for the provision of guardianship services for indigent wards as determined by the Secretary of the Department of Elder Affairs.

(c) Upon depositing the funds with the clerk, a guardian of property may file a final accounting and petition for discharge under s. 745.1103.

(d) A guardian depositing assets with the clerk is permitted to retain from the assets in the guardian’s possession a sufficient amount to pay the final costs of administration, including guardian and attorney's fees accruing prior to the order of discharge. Any surplus funds so retained must be deposited with the clerk prior to discharge of the guardian of property.

745.1107 Resignation and discharge of guardian of person.

(1) A successor guardian of person shall be appointed if a guardian dies, becomes incapacitated, resigns or is removed.

(2) A resigning guardian of person shall file a resignation and petition for discharge and shall serve the resignation, petition, and a notice of filing on the persons specified in s. 745.1101. The guardian is entitled to discharge upon proof that the guardian has fully discharged the guardian’s duties and proof of delivery to a successor guardian or emergency temporary guardian of copies of all records of medical, personal and residential care for the ward.

(3) Upon petition by an interested person or on the court’s own motion, an attorney may be appointed to represent the ward in the discharge proceedings. When a court appoints an attorney for a ward, the court must appoint the office of criminal conflict and civil regional counsel or a private attorney as prescribed in s. 27.511(6). A private attorney must be one who is included in the attorney registry compiled pursuant to s. 27.40. Appointments of private attorneys must be made on a rotating basis, taking into consideration conflicts arising under this code. The attorney for the ward shall represent the preferences expressed by the ward, to the extent consistent with the rules regulating the Florida Bar. The attorney for the ward may assist in locating a successor guardian.

(4) A successor guardian of person may be appointed and have letters issued after a guardian has resigned and before an order of discharge of the resigned guardian has been entered. The successor guardian shall exercise the powers specified in the letters of guardianship and such guardian's authority inures as of the date of issuance of letters.

745.1108 Termination of guardianship of person.

(1) When a ward becomes sui juris or is restored to capacity, a guardian of person may file a petition for discharge, specifying the grounds therefor.

(2) When the guardian has been unable to locate the ward after diligent search, a guardian of person may file a petition for discharge, specifying the guardian's attempts to locate the ward.

(3) In the case of a ward who has become sui juris or has been restored to capacity, a copy of the petition for discharge and a notice of hearing on said petition shall be served on the ward, unless waived.

(4) If a guardian has been unable to locate the ward, the guardian shall serve the petition for discharge and a notice of hearing on the ward's next of kin and such other persons as the court may, in its discretion, direct.

(5) A guardian of person is discharged without further proceedings upon filing a certified copy of the ward's death certificate, together with a notice of discharge.

(6) The court retains jurisdiction over the guardian until the guardian is discharged.

745.1109 Termination of guardianship of person on change of residence of ward to foreign jurisdiction.

(1) When the residence of a ward has changed to another state or country and the foreign court having jurisdiction of the ward at the ward's new place of residence has issued letters or the equivalent, the guardian of person in this state may file a petition for discharge and serve it on the new foreign guardian and the ward's next of kin with a notice directing that any objections must be filed within 30 days.
(2) If an objection is timely filed, any interested person may set the objection for hearing. If no notice of hearing is served within 60 days after filing the objection, the objection is deemed abandoned.
(3) Upon disposition of all objections, or if no objection is filed, the guardian of person shall be discharged.

745.1110 Order of discharge.
(1) If the court is satisfied that the guardian has faithfully discharged the guardian's duties and, in the case of a guardian of property, has delivered the property of the ward to the person entitled, and that the interests of the ward are protected, the court shall enter an order discharging the guardian from any further duties and liabilities as guardian. The discharge shall also act as a bar to any action against the guardian, as such and individually, or the guardian's surety, as to matters adequately disclosed to interested persons.
(2) As to matters not adequately disclosed to interested persons, any action against the guardian, as such and individually, shall be barred unless commenced within 2 years of entry of the order of discharge.

Section 12. Part XII of chapter 745, Florida Statutes,

consisting of sections 745.1201, 745.1202, 745.1203, 745.1204, 745.1205, and 745.1206, is created to read:

PART XII

REMOVAL OF GUARDIANS

745.1201 Reasons for removal of guardian.

A guardian may be removed for any of the following reasons, and the removal shall be in addition to any other penalties prescribed by law:

(1) Fraud in obtaining appointment.

(2) Failure to discharge guardianship duties.

(3) Abuse of guardianship powers.

(4) An incapacity or illness, including substance abuse, which renders the guardian incapable of discharging the guardian’s duties.

(5) Willful failure to comply with any order of the court.

(6) Failure to account for property sold or to produce the ward's property when so required.

(7) Waste, embezzlement, or other mismanagement of the ward's property.

(8) Failure to give bond or security when required by the court or failure to file with the annual guardianship plan the evidence required by s. 745.607 that the sureties on the guardian’s bond are alive and solvent.

(9) Conviction of a felony.

(10) Appointment of a receiver, trustee in bankruptcy, or liquidator for any corporate guardian.

(11) Development of a conflict of interest between the ward and the guardian.

(12) Having been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense

described in s. 435.04(2), s. 741.28 or under any similar statute of another jurisdiction.

(13) A failure to fulfill the guardianship education requirements.

(14) A material change in the ward's financial circumstances so that the guardian is no longer qualified to manage the finances of the ward, or the previous degree of management is no longer required.

(15) After appointment, the guardian becomes a disqualified person as specified in s. 745.502.

(16) Upon a showing that removal of the current guardian is in the best interest of the ward.

745.1202 Proceedings for removal of a guardian.

A petition to remove a guardian may be filed by any surety, interested person, or by the ward. Formal notice shall be served on the guardian. After hearing, the court may enter an order that is proper considering the pleadings and the evidence.

745.1203 Accounting upon removal.

A removed guardian of property shall file with the court a true, complete, and final accounting of the ward’s property within 30 days after removal and shall serve a copy on the successor guardian, if any; the attorney for the ward, if any; and the ward, unless the ward is a minor or has been determined to be totally incapacitated to manage or dispose of property.

745.1204 Appointment of successor guardian upon removal.

(1) If there is still the need for a guardian of the ward, the court must appoint a successor guardian as permitted under s. 745.501.

(2) If no successor guardian has been appointed when a guardian is removed, the court shall appoint an attorney to represent the ward and the accounting shall be served on the ward. The ward may propose a successor guardian and the court may appoint an emergency temporary guardian to serve until letters are issued to a successor guardian.

745.1205 Surrender of property upon removal.
A removed guardian of property shall deliver to the successor or emergency temporary guardian all property of the ward and copies of all records under the guardian's control within 30 days after notice of issuance of letters to the successor or emergency temporary guardian, unless otherwise ordered by the court.

745.1206 Proceedings for contempt.
If a removed guardian of property fails to file a true, complete, and final accounting or turn over to the successor or emergency temporary guardian the property of the ward and copies of all guardianship records that are in the guardian's control, the court shall issue an order requiring the guardian to show cause for such failure. If reasonable cause is shown by the guardian, the court shall set a reasonable time within which to comply, and, on failure to comply with this or any subsequent order, the removed guardian may be held in contempt. Proceedings for contempt may be instituted by the court, by any interested person, including the ward, or by a successor or emergency temporary guardian.

Section 13. Part XIII of chapter 745, Florida Statutes, consisting of sections 745.1301, 745.1302, 745.1303, 745.1304, 745.1305, 745.1306, 745.1307, 745.1308, 745.1309, 745.1310,

745.1311, 745.1312, 745.1313, 745.1314, and 745.1315, is created to read:

PART XIII

MISCELLANEOUS

745.1301 Suspension of statutes of limitation in favor of guardian.
If a person entitled to bring an action is declared incapacitated before expiration of the time limited for the commencement of the action and the cause of the action survives, the action may be commenced by a guardian of property after such expiration and within 1 year from the date of the issuance of letters or the time otherwise limited by law, whichever is longer.

745.1302 Appraisals.
Upon motion by an interested person, the court may appoint appraisers to appraise property of the ward that is subject to the guardianship. This section does not limit the power of a guardian of property to employ appraisers without court order pursuant to s. 745.902(12).

745.1303 Determination regarding alternatives to guardianship.
(1) Any judicial determination concerning the validity or effect of the ward's power of attorney, durable power of attorney, trust or trust amendment shall be promptly reported in the guardianship proceeding by the guardian of property.
(2) Any judicial determination concerning the validity or effect of the ward’s health care surrogate shall be promptly reported in the guardianship proceeding by the guardian of person.
(3) During the guardianship, an interested person may file a petition alleging that, due to a change in circumstances or the discovery of an alternative not previously considered by the court,

there is an alternative to guardianship which will sufficiently address the problems of the ward and the court shall consider the continued need for a guardian and the extent of the continued need for delegation of the ward's rights, if any.

745.1304 Support of ward’s dependents.

(1) A guardian of property shall first apply the ward's income to the ward's care, support, education, maintenance, health care and cost of funeral and burial or cremation. The guardian shall not use the ward’s property for support of the ward’s dependents unless approved by the court. The court may approve the guardian to use the ward’s income for the care, support, education, maintenance, cost of final illness, and cost of funeral and burial or cremation of the spouse or dependents of the ward, to the extent funds are available for such use, without jeopardizing the needs of the ward, taking into consideration the resources of the spouse or dependents. If the income is not sufficient for these purposes, the court may approve the expenditure of principal for such purposes.

(2) The word "dependents," as used in subsection (1) means, in addition to those persons who are legal dependents of a ward under existing law, the ward’s parents, and persons to whom the ward was providing support prior to the ward’s incapacity.

745.1305 Petition for support of ward’s dependents.

(1) A spouse or dependent of the ward, as defined in s. 745.1304, may petition for an order directing the guardian of property to contribute to the support of the person from the income or property of the ward. The court may enter an order for support of the spouse or dependent out of the ward's income and property that is subject to the guardianship. The grant or denial of an order for support

shall not preclude a further petition for support or for increase, decrease, modification, or termination of allowance for support by either the petitioner or the guardian. Delivery to the recipient shall be a release of the guardian for payments made pursuant to the order.

(2) If the property of the ward is derived in whole or in part from payments of compensation, adjusted compensation, pension, insurance, or other benefits made directly to the guardian by the United States Department of Veterans Affairs, notice of the petition for support shall be given by the petitioner to the office of the United States Department of Veterans Affairs having jurisdiction over the area in which the court is located and the chief attorney for the Department of Veterans' Affairs in this state at least 15 days before the hearing on the petition.

(3) The court may not authorize payments from an incapacitated ward's income or property unless the ward has been adjudicated incapacitated to manage such income or property in accordance with s. 745.311.

(4) In a voluntary guardianship, a petition for support may be granted only upon the written consent of the ward.

745.1306 Payments to guardian of person.

If there is more than one guardian, either guardian may petition for an order directing the guardian of property to pay to the guardian of person periodic amounts for the support, care, maintenance, education, and other needs of the ward. The amount may be increased or decreased from time to time. If an order is entered, proof of delivery to the guardian of person for payments made shall be a sufficient release of the guardian who makes the payments pursuant to the order. The guardian of property shall not

be bound to see to the application of the payments and the guardian of person shall not be required to file an accounting for the funds received, unless otherwise ordered to do so by the court.

745.1307 Actions by and against guardian or ward.
If an action is brought by a guardian against the ward, by a ward against the guardian, or in which the interest of the guardian is adverse to that of the ward, a guardian ad litem shall be appointed to represent the ward in that proceeding. In any litigation between the guardian and the ward, the guardian ad litem may petition the court, as defined by this code, for removal of the guardian.

745.1308 Guardian forbidden to borrow or purchase; exceptions.
(1) A professional guardian may not purchase property or borrow money from the ward.
(2) A guardian who is not a professional guardian may purchase property from the ward if the property is to be purchased at fair market value and the court gives prior authorization for the transaction.
(3) A guardian who is not a professional guardian may borrow money from the ward if the loan is to be made at the prevailing interest rate, with adequate security, and the court gives prior authorization for the transaction.

745.1309 Conflicts of interest; prohibited activities; court approval; breach of fiduciary duty.
(1) The fiduciary relationship which exists between the guardian and the ward may not be used for the private gain of the guardian other than the remuneration for services rendered for the ward. The guardian may not incur any obligation on behalf of the ward which

conflicts with the proper discharge of the guardian's duties.
(2) Unless prior court approval is obtained, or unless such relationship existed prior to appointment of the guardian, a guardian may not:
(a) Have any interest, financial or otherwise, direct or indirect, in any business transaction or activity with the ward;
(b) Acquire an ownership, possessory, security, or other pecuniary interest adverse to the ward;
(c) Be designated as a beneficiary, co-owner or recipient of any property or benefit of the ward unless such designation or transfer was made by the ward prior to the ward’s incapacity; or
(d) Directly or indirectly purchase, rent, lease, or sell any property or services from or to any business entity of which the guardian or the guardian's spouse or any of the guardian's lineal heirs, or collateral kindred, is an officer, partner, director, shareholder, or proprietor, or has any financial interest.
(3) Any activity prohibited by this section is voidable during the term of the guardianship or by the personal representative of the ward's estate, and the guardian is subject to removal and to imposition of personal liability through a proceeding for surcharge, in addition to any other remedies otherwise available.
(4) In the event of a breach by the guardian of the guardian's fiduciary duty, the court shall take action to protect the ward and the ward's assets upon petition by an interested person.

745.1310 Purchasers and lenders protected.
No person or entity purchasing, leasing, or taking a mortgage, pledge, or other lien from a guardian shall be bound to see that the money or other things of value paid to the guardian are actually needed or properly applied. The person or entity is not

otherwise bound as to the proprieties or expediencies of the acts of the guardian.

745.1311 Temporary delegation of authority to surrogate.

(1) A guardian may designate a surrogate guardian to exercise the powers of the guardian if the guardian is unavailable to act. A person designated as a surrogate guardian under this section must be a professional guardian or a member of the Florida Bar qualified to act under s. 745.501.

(2)(a) A guardian must file a petition with the court requesting permission to designate a surrogate guardian.

(b) If the court approves the designation, the order must specify the name and business address of the surrogate guardian and the duration of appointment, which may not exceed 30 days. The court may extend the appointment for good cause shown. The surrogate guardian may exercise all powers of the guardian unless limited by court order. The surrogate guardian must file with the court an oath swearing or affirming that the surrogate guardian will faithfully perform the duties delegated. The court may require the surrogate guardian to post a bond.

(3) This section does not limit the responsibility of the guardian to the ward and to the court. The guardian is liable for the acts of the surrogate guardian. The guardian may terminate the authority of the surrogate guardian by filing a written notice of termination with the court.

(4) The surrogate guardian is subject to the jurisdiction of the court as if appointed to serve as guardian.

745.1312 Multiple guardians.

(1) When separate guardians of person and property have been

appointed, the guardians must consult with each other when the decision of one may affect the duties and responsibilities of the other. If there is disagreement as to a proposed action, the decision of the guardian within whose authority the decision lies shall prevail. The other guardian may petition for judicial review pursuant to s. 745.1006.

(2) If there are two guardians of person or two guardians of property and there are disagreements between the co-guardians as to a proposed action, neither may act as to such proposed action without court order.

(3) If there are three or more guardians of person or property, a majority of them may act. A guardian who serves on all other guardians a written objection to a proposed action shall not be liable for the action taken. Any guardian may petition the court for direction as to such matter.

745.1313 Effect of power of attorney and trust.

(1) An interested person may file a verified petition in a guardianship proceeding seeking authority to file an action to have a ward's trust, trust amendment or power of attorney determined to be invalid pursuant to s. 745.802(10). The petition must allege that the petitioner has a good faith belief that the ward's trust, trust amendment, or durable power of attorney is invalid, and state a reasonable factual basis for that belief.

(2) The petition shall be served on all interested persons by the petitioner.

(3) The court shall consider such petition at a hearing with notice to all interested persons and may, for cause, find that such trust, trust amendment or durable power of attorney is not an appropriate alternative to guardianship of property.

(4) The appointment of a guardian does not limit the court's power to determine that certain authority granted under a durable power of attorney is to remain exercisable by the agent.

745.1314 Suspension of power of attorney before incapacity determination.

(1) At any time during proceedings to determine incapacity but before the entry of an order determining incapacity, the authority granted under an alleged incapacitated person’s power of attorney to a parent, spouse, child, or grandchild is suspended when an interested person files a verified petition stating that a specific power of attorney should be suspended for any of the following grounds:

(a) The agent’s decisions are not in accord with the alleged incapacitated person’s known desires;

(b) The power of attorney is invalid;

(c) The agent has failed to discharge the agent’s duties or incapacity or illness renders the agent incapable of discharging the agent’s duties;

(d) The agent has abused the agent’s powers; or

(e) There is a danger that the property of the alleged incapacitated person may be wasted, misappropriated, or lost unless the authority under the power of attorney is suspended.

Grounds for suspending a power of attorney do not include the existence of a dispute between the agent and the petitioner which is more appropriate for resolution in some other forum or a legal proceeding other than a guardianship proceeding.

(2) The verified petition must:

(a) Identify one or more of the grounds in subsection (1);

(b) Include specific statements of fact showing that grounds exist to justify the relief sought; and

(3) Upon the earlier of (a) the filing of a response to the petition by the agent under the power of attorney, or (b) 10 days after the service of the petition on the agent under the power of attorney, the court shall schedule the petition for an expedited hearing. Unless an emergency arises and the agent's response sets forth the nature of the emergency, the property or matter involved, and the power to be exercised by the agent, notice must be given to all interested persons, the alleged incapacitated person, and the alleged incapacitated person's attorney. The court order following the hearing must set forth what powers the agent is permitted to exercise, if any, pending the outcome of the petition to determine incapacity.

(4) In addition to any other remedy authorized by law, a court may award reasonable attorney fees and costs to an agent who successfully challenges the suspension of the power of attorney if the petitioner's petition was made in bad faith.

(5) The suspension of authority granted to persons other than a parent, spouse, child, or grandchild shall be as provided in s. 709.2109.

745.1315 Abuse, neglect, or exploitation by a guardian.

(1) A guardian may not abuse, neglect, or exploit a ward.

(2) A guardian has committed exploitation when the guardian:

(a) Commits fraud in obtaining appointment as a guardian;

(b) Abuses his or her powers; or

(c) Wastes, embezzles, or intentionally mismanages the assets of the ward.

(3) A person who believes that a guardian is abusing, neglecting, or exploiting a ward shall report the incident to the central abuse hotline of the Department of Children and Families.
(4) This section shall be interpreted in conformity with s. 825.103.

Section 14. Part XIV of chapter 745, Florida Statutes, consisting of sections 745.1401, 745.1402, 745.1403, 745.1404, 745.1405, 745.1406, 745.1407, 745.1408, 745.1409, 745.1410, 745.1411, 745.1412, 745.1413, 745.1414, 745.1415, 745.1416, 745.1417, 745.1418, 745.1419, and 745.1420, is created to read:

PART XIV

PUBLIC AND PROFESSIONAL GUARDIANS

745.1401 Office of Public and Professional Guardians.
There is created the Office of Public and Professional Guardians within the Department of Elderly Affairs.
(1) The Secretary of Elderly Affairs shall appoint the executive director, who shall be the head of the Office of Public and Professional Guardians. The executive director must be a member of The Florida Bar, knowledgeable of guardianship law and of the social services available to meet the needs of incapacitated persons, shall serve on a full-time basis, and shall personally, or through a representative of the office, carry out the purposes and functions of the Office of Public and Professional Guardians in accordance with state and federal law. The executive director shall serve at the pleasure of and report to the secretary.
(2) The executive director shall, within available resources:
(a) Have oversight responsibilities for all public and professional guardians.

(b) Establish standards of practice for public and professional guardians by rule, in consultation with professional guardianship associations and other interested stakeholders, no later than October 1, 2016. The executive director shall provide a draft of the standards to the Governor, the Legislature, and the secretary for review by August 1, 2016.

(c) Review and approve the standards and criteria for the education, registration, and certification of public and professional guardians in Florida.

(3) The executive director's oversight responsibilities of professional guardians must be finalized by October 1, 2016, and shall include, but are not limited to:

(a) Developing and implementing a monitoring tool to ensure compliance of professional guardians with the standards of practice established by the Office of Public and Professional Guardians. This monitoring tool may not include a financial audit as required by the clerk of the circuit court under s. 745.1001.

(b) Developing procedures, in consultation with professional guardianship associations and other interested stakeholders, for the review of an allegation that a professional guardian has violated the standards of practice established by the Office of Public and Professional Guardians governing the conduct of professional guardians.

(c) Establishing disciplinary proceedings, conducting hearings, and taking administrative action pursuant to chapter 120.

(4) The executive director's oversight responsibilities of public guardians shall include, but are not limited to:

(a) Reviewing the current public guardian programs in Florida and other states.

(b) Developing, in consultation with local guardianship offices and other interested stakeholders, statewide performance measures.

(c) Reviewing various methods of funding public guardianship programs, the kinds of services being provided by such programs, and the demographics of the wards. In addition, the executive director shall review and make recommendations regarding the feasibility of recovering a portion or all of the costs of providing public guardianship services from the assets or income of the wards.

(d) By January 1 of each year, providing a status report and recommendations to the secretary which address the need for public guardianship services and related issues.

(e) Developing a guardianship training program curriculum that may be offered to all guardians, whether public or private.

(5) The executive director may provide assistance to local governments or entities in pursuing grant opportunities. The executive director shall review and make recommendations in the annual report on the availability and efficacy of seeking Medicaid matching funds. The executive director shall diligently seek ways to use existing programs and services to meet the needs of public wards.

(6) The executive director may conduct or contract for demonstration projects authorized by the Department of Elderly Affairs, within funds appropriated or through gifts, grants, or contributions for such purposes, to determine the feasibility or desirability of new concepts of organization, administration, financing, or service delivery designed to preserve the civil and constitutional rights of persons of marginal or diminished capacity. Any gifts, grants, or contributions for such purposes

shall be deposited in the Department of Elderly Affairs Administrative Trust Fund.

745.1402 Professional guardian registration.

(1) A professional guardian must register with the Office of Public and Professional Guardians established in part XIV of this chapter.

(2) Annual registration shall be made on forms furnished by the Office of Public and Professional Guardians and accompanied by the applicable registration fee as determined by rule. The fee may not exceed $100.

(3) Registration must include the following:

(a) Sufficient information to identify the professional guardian, as follows:

1. If the professional guardian is a natural person, the name, address, date of birth, and employer identification or social security number of the person.

2. If the professional guardian is a partnership or association, the name, address, and employer identification number of the entity.

(b) Documentation that the bonding and educational requirements of s. 745.1403 have been met.

(c) Sufficient information to distinguish a guardian providing guardianship services as a public guardian, individually, through partnership, corporation, or any other business organization.

(4) Prior to registering a professional guardian, the Office of Public and Professional Guardians must receive and review copies of the credit and criminal investigations conducted under s. 745.504. The credit and criminal investigations must have been completed within the previous 2 years.

(5) The executive director of the office may deny registration to a professional guardian if the executive director determines that the guardian's proposed registration, including the guardian's credit or criminal investigations, indicates that registering the professional guardian would violate any provision of this chapter. If a guardian's proposed registration is denied, the guardian has standing to seek judicial review of the denial pursuant to chapter 120.

(6) The Department of Elderly Affairs may adopt rules necessary to administer this section.

(7) A trust company, a state banking corporation or state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary powers in this state, may, but is not required to, register as a professional guardian under this section. If a trust company, state banking corporation, state savings association, national banking association, or federal savings and loan association described in this subsection elects to register as a professional guardian under this subsection, the requirements of subsections (3) and (4) do not apply and the registration must include only the name, address, and employer identification number of the registrant, the name and address of its registered agent, if any, and the documentation described in paragraph (3)(b).

(8) The Department of Elderly Affairs may contract with the Florida Guardianship Foundation or other not-for-profit entity to register professional guardians.

(9) The department or its contractor shall ensure that the clerks of the court and the chief judge of each judicial circuit receive information about each registered professional guardian.

(10) A state college or university or an independent college or university that is located and chartered in Florida, that is accredited by the Commission on Colleges of the Southern Association of Colleges and Schools or the Accrediting Council for Independent Colleges and Schools, and that confers degrees as defined in s. 1005.02(7) may, but is not required to, register as a professional guardian under this section. If a state college or university or independent college or university elects to register as a professional guardian under this subsection, the requirements of subsections (3) and (4) do not apply and the registration must include only the name, address, and employer identification number of the registrant.

745.1403 Regulation of professional guardians; application; bond required; educational requirements.

(1) The provisions of this section are in addition to and supplemental to any other provision of this code, except s. 745.505.

(2) Each professional guardian who files a petition for appointment after October 1, 1997, shall post a blanket fiduciary bond with the clerk of the circuit court in the county in which the guardian's primary place of business is located. The guardian shall provide proof of the fiduciary bond to the clerks of each additional circuit court in which the guardian is serving as a professional guardian. The bond shall be maintained by the guardian in an amount not less than $50,000. The bond must cover all wards for whom the guardian has been appointed at any given time. The liability of the provider of the bond is limited to the face amount of the bond, regardless of the number of wards for whom the professional guardian has been appointed. The act or omissions of each employee

of a professional guardian who has direct contact with the ward or access to the ward's assets is covered by the terms of such bond. The bond must be payable to the Governor of the State of Florida and the Governor's successors in office and conditioned on the faithful performance of all duties by the guardian. In form the bond must be joint and several. The bond is in addition to any bonds required under s. 745.607. This subsection does not apply to any attorney who is licensed to practice law in this state and who is in good standing, to any financial institution as defined in s. 745.106, or a public guardian. The expenses incurred to satisfy the bonding requirements prescribed in this section may not be paid with the assets of any ward.

(3) Each professional guardian defined in s. 745.106(28) and public guardian must receive a minimum of 40 hours of instruction and training. Each professional guardian must receive a minimum of 16 hours of continuing education every 2 calendar years after the year in which the initial 40-hour educational requirement is met. The instruction and education must be completed through a course approved or offered by the Office of Public and Professional Guardians. The expenses incurred to satisfy the educational requirements prescribed in this section may not be paid with the assets of any ward. This subsection does not apply to any attorney who is licensed to practice law in this state or an institution acting as guardian under s. 745.1402(7).

(4) Each professional guardian must allow, at the guardian's expense, an investigation of the guardian's credit history, and the credit history of employees of the guardian, in a manner prescribed by the Department of Elderly Affairs.

(5) As required in s. 745.504, each professional guardian shall allow a level 2 background screening of the guardian and employees of the guardian in accordance with the provisions of s. 435.04.
(6) Each professional guardian is required to demonstrate competency to act as a professional guardian by taking an examination approved by the Department of Elderly Affairs.
(a) The Department of Elderly Affairs shall determine the minimum examination score necessary for passage of guardianship examinations.
(b) The Department of Elderly Affairs shall determine the procedure for administration of the examination.
(c) The Department of Elderly Affairs or its contractor shall charge an examination fee for the actual costs of the development and the administration of the examination. The examination fee for a guardian may not exceed $500.
(d) The Department of Elderly Affairs may recognize passage of a national guardianship examination in lieu of all or part of the examination approved by the Department of Elderly Affairs, except that all professional guardians must take and pass an approved examination section related to Florida law and procedure.
(7) The Department of Elderly Affairs shall set the minimum score necessary to demonstrate professional guardianship competency.
(8) The Department of Elderly Affairs shall waive the examination requirement in subsection (6) if a professional guardian can provide:
(a) Proof that the guardian has actively acted as a professional guardian for 5 years or more; and
(b) A letter from a circuit judge before whom the professional guardian practiced at least 1 year which states that the

professional guardian had demonstrated to the court competency as a professional guardian.

(9) The court may not appoint any professional guardian who is not registered by the Office of Public and Professional Guardians.

(10) This section does not apply to a professional guardian or the employees of that professional guardian when that guardian is a trust company, a state banking corporation, state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal savings and loan association authorized and qualified to exercise fiduciary powers in this state.

745.1404 Complaints; disciplinary proceedings; penalties; enforcement.

(1) By October 1, 2016, the Office of Public and Professional Guardians shall establish procedures to:

(a) Review and, if determined legally sufficient, investigate any complaint that a professional guardian has violated the standards of practice established by the Office of Public and Professional Guardians governing the conduct of professional guardians. A complaint is legally sufficient if it contains ultimate facts that show a violation of a standard of practice by a professional guardian has occurred.

(b) Initiate an investigation no later than 10 business days after the Office of Public and Professional Guardians receives a complaint.

(c) Complete and provide initial investigative findings and recommendations, if any, to the professional guardian and the person who filed the complaint within 60 days after receipt.

(d) Obtain supporting information or documentation to determine the legal sufficiency of a complaint.
(e) Interview a ward, family member, or interested party to determine the legal sufficiency of a complaint.
(f) Dismiss any complaint if, at any time after legal sufficiency is determined, it is found there is insufficient evidence to support the allegations contained in the complaint.
(g) Coordinate, to the greatest extent possible, with the clerks of court to avoid duplication of duties with regard to the financial audits prepared by the clerks pursuant to s. 745.1001.
(2) The Office of Public and Professional Guardians shall establish disciplinary proceedings, conduct hearings, and take administrative action pursuant to chapter 120. Disciplinary actions may include, but are not limited to, requiring a professional guardian to participate in additional educational courses provided or approved by the Office of Public and Professional Guardians, imposing additional monitoring by the office of the guardianships to which the professional guardian is appointed, and suspension or revocation of a professional guardian's registration.
(3) In any disciplinary proceeding that may result in the suspension or revocation of a professional guardian's registration, the Department of Elderly Affairs shall provide the professional guardian and the person who filed the complaint:
(a) A written explanation of how an administrative complaint is resolved by the disciplinary process.
(b) A written explanation of how and when the person may participate in the disciplinary process.
(c) A written notice of any hearing before the Division of Administrative Hearings at which final agency action may be taken.

(4) If the office makes a final determination to suspend or revoke the professional guardian's registration, it must provide such determination to the court of competent jurisdiction for any guardianship case to which the professional guardian is currently appointed.
(5) If the office determines or has reasonable cause to suspect that a vulnerable adult has been or is being abused, neglected, or exploited as a result of a filed complaint or during the course of an investigation of a complaint, it shall immediately report such determination or suspicion to the central abuse hotline established and maintained by the Department of Children and Families pursuant to s. 415.103.
(6) By October 1, 2016, the Department of Elderly Affairs shall adopt rules to implement the provisions of this section.

745.1405 Grounds for discipline; penalties; enforcement.
(1) The following acts by a professional guardian shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
(a) Making misleading, deceptive, or fraudulent representations in or related to the practice of guardianship.
(b) Violating any rule governing guardians or guardianships adopted by the Office of Public and Professional Guardians.
(c) Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of or the ability to practice as a professional guardian.
(d) Failing to comply with the educational course requirements contained in s. 745.1403.

(e) Having a registration, a license, or the authority to practice a regulated profession revoked, suspended, or otherwise acted against, including the denial of registration or licensure, by the registering or licensing authority of any jurisdiction, including its agencies or subdivisions, for a violation under Florida law or similar law under a foreign jurisdiction. The registering or licensing authority's acceptance of a relinquishment of registration or licensure, stipulation, consent order, or other settlement offered in response to or in anticipation of the filing of charges against the registration or license shall be construed as an action against the registration or license.

(f) Knowingly filing a false report or complaint with the Office of Public and Professional Guardians against another guardian.

(g) Attempting to obtain, obtaining, or renewing a registration or license to practice a profession by bribery, by fraudulent misrepresentation, or as a result of an error by the Office of Public and Professional Guardians which is known by the professional guardian and not disclosed to the Office of Public and Professional Guardians.

(h) Failing to report to the Office of Public and Professional Guardians any person who the professional guardian knows is in violation of this chapter or the rules of the Office of Public and Professional Guardians.

(i) Failing to perform any statutory or legal obligation placed upon a professional guardian.

(j) Making or filing a report or record that the professional guardian knows to be false, intentionally or negligently failing to file a report or record required by state or federal law, or willfully impeding or obstructing another person's attempt to do

so. Such reports or records shall include only those that are signed in the guardian's capacity as a professional guardian.

(k) Using the position of guardian for the purpose of financial gain by a professional guardian or a third party, other than the funds awarded to the professional guardian by the court pursuant to s. 745.113.

(l) Violating a lawful order of the Office of Public and Professional Guardians or failing to comply with a lawfully issued subpoena of the Office of Public and Professional Guardians.

(m) Improperly interfering with an investigation or inspection authorized by statute or rule or with any disciplinary proceeding.

(n) Using the guardian relationship to engage or attempt to engage the ward, or an immediate family member or a representative of the ward, in verbal, written, electronic, or physical sexual activity.

(o) Failing to report to the Office of Public and Professional Guardians in writing within 30 days after being convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction.

(p) Being unable to perform the functions of a professional guardian with reasonable skill by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of substance or as a result of any mental or physical condition.

(q) Failing to post and maintain a blanket fiduciary bond pursuant to s. 745.1403.

(r) Failing to maintain all records pertaining to a guardianship for a reasonable time after the court has closed the guardianship matter.

(s) Violating any provision of this chapter or any rule adopted pursuant thereto.

(2) When the Office of Public and Professional Guardians finds a professional guardian guilty of violating subsection (1), it may enter an order imposing one or more of the following penalties:

(a) Refusal to register an applicant as a professional guardian.

(b) Suspension or permanent revocation of a professional guardian's registration.

(c) Issuance of a reprimand or letter of concern.

(d) Requirement that the professional guardian undergoes treatment, attends continuing education courses, submits to reexamination, or satisfies any terms that are reasonably tailored to the violations found.

(e) Requirement that the professional guardian pay restitution to a ward or the ward's estate, if applicable, of any funds obtained or disbursed through a violation of any statute, rule, or other legal authority.

(f) Requirement that the professional guardian undergo remedial education.

(3) In determining what action is appropriate, the Office of Public and Professional Guardians must first consider what sanctions are necessary to safeguard wards and to protect the public. Only after those sanctions have been imposed may the Office of Public and Professional Guardians consider and include in the order requirements designed to mitigate the circumstances and rehabilitate the professional guardian.

(4) The Office of Public and Professional Guardians shall adopt by rule and periodically review the disciplinary guidelines applicable to each ground for disciplinary action that may be imposed by the Office of Public and Professional Guardians pursuant to this chapter.

(5) It is the intent of the Legislature that the disciplinary guidelines specify a meaningful range of designated penalties based upon the severity and repetition of specific offenses and that minor violations be distinguished from those which endanger the health, safety, or welfare of a ward or the public; that such guidelines provide reasonable and meaningful notice to the public of likely penalties that may be imposed for proscribed conduct; and that such penalties be consistently applied by the Office of Public and Professional Guardians.

(6) The Office of Public and Professional Guardians shall by rule designate possible mitigating and aggravating circumstances and the variation and range of penalties permitted for such circumstances.

(a) An administrative law judge, in recommending penalties in any recommended order, must follow the disciplinary guidelines established by the Office of Public and Professional Guardians and must state in writing any mitigating or aggravating circumstance upon which a recommended penalty is based if such circumstance causes the administrative law judge to recommend a penalty other than that provided in the disciplinary guidelines.

(b) The Office of Public and Professional Guardians may impose a penalty other than those provided for in the disciplinary guidelines upon a specific finding in the final order of mitigating or aggravating circumstances.

(7) In addition to, or in lieu of, any other remedy or criminal prosecution, the Office of Public and Professional Guardians may file a proceeding in the name of the state seeking issuance of an injunction or a writ of mandamus against any person who violates any provision of this chapter or any provision of law with respect to professional guardians or the rules adopted pursuant thereto.

(8) Notwithstanding chapter 120, if the Office of Public and Professional Guardians determines that revocation of a professional guardian's registration is the appropriate penalty, the revocation is permanent.
(9) If the Office of Public and Professional Guardians makes a final determination to suspend or revoke the professional guardian's registration, the office must provide the determination to the court of competent jurisdiction for any guardianship case to which the professional guardian is currently appointed.
(10) The purpose of this section is to facilitate uniform discipline for those actions made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.
(11) The Office of Public and Professional Guardians shall adopt rules to administer this section.

745.1406 Office of Public and Professional Guardians; appointment, notification.
(1) The executive director of the Office of Public and Professional Guardians, after consultation with the chief judge and other circuit judges within the judicial circuit and with appropriate advocacy groups and individuals and organizations who are knowledgeable about the needs of incapacitated persons, may establish, within a county in the judicial circuit or within the judicial circuit, one or more offices of public guardian and, if so established, shall create a list of persons best qualified to serve as the public guardian, who have been investigated pursuant to s. 745.504. The public guardian must have knowledge of the legal process and knowledge of social services available to meet the needs of incapacitated persons. The public guardian shall maintain

a staff or contract with professionally qualified individuals to carry out the guardianship functions, including an attorney who has experience in probate areas and another person who has a master's degree in social work, or a gerontologist, psychologist, registered nurse, or nurse practitioner. A public guardian that is a nonprofit corporate guardian under s. 745.503 must receive tax-exempt status from the United States Internal Revenue Service.

(2) The executive director shall appoint or contract with a public guardian from the list of candidates described in subsection (1). A public guardian must meet the qualifications for a guardian as prescribed in s. 745.501(1)(a). Upon appointment of the public guardian, the executive director shall notify the chief judge of the judicial circuit and the Chief Justice of the Supreme Court of Florida, in writing, of the appointment.

(3) If the needs of the county or circuit do not require a full-time public guardian, a part-time public guardian may be appointed at reduced compensation.

(4) A public guardian, whether full-time or part-time, may not hold any position that would create a conflict of interest.

(5) The public guardian is to be appointed for a term of 4 years, after which the public guardian's appointment must be reviewed by the executive director, and may be reappointed for a term of up to 4 years. The executive director may suspend a public guardian with or without the request of the chief judge. If a public guardian is suspended, the executive director shall appoint an acting public guardian as soon as possible to serve until such time as a permanent replacement is selected. A public guardian may be removed from office during the term of office only by the executive director who must consult with the chief judge prior to said

removal. A recommendation of removal made by the chief judge must be considered by the executive director.

(6) Public guardians who have been previously appointed by a chief judge prior to the effective date of this act pursuant to this section may continue in their positions until the expiration of their term pursuant to their agreement. However, oversight of all public guardians shall transfer to the Office of Public and Professional Guardians upon the effective date of this act. The executive director of the Office of Public and Professional Guardians shall be responsible for all future appointments of public guardians pursuant to this act.

745.1407 Powers and duties.

(1) A public guardian may serve as a guardian of a person adjudicated incapacitated under this chapter if there is no family member or friend, other person, bank, or corporation willing and qualified to serve as guardian.

(2) The public guardian shall be vested with all the powers and duties of a guardian under this chapter, except as otherwise provided by law.

(3) The public guardian shall primarily serve incapacitated persons who are of limited financial means, as defined by contract or rule of the Department of Elderly Affairs. The public guardian may serve incapacitated persons of greater financial means to the extent the Department of Elderly Affairs determines to be appropriate.

(4) The public guardian shall be authorized to employ sufficient staff to carry out the duties of the public guardian’s office.

(5) The public guardian may delegate to assistants and other members of the public guardian’s staff the powers and duties of the office of public guardian, except as otherwise limited by law. The

public guardian shall retain ultimate responsibility for the discharge of the public guardian's duties and responsibilities.

(6) Upon appointment as guardian of an incapacitated person, a public guardian shall endeavor to locate a family member or friend, other person, bank, or corporation who is qualified and willing to serve as guardian. Upon determining that there is someone qualified and willing to serve as guardian, either the public guardian or the qualified person shall petition the court for appointment of a successor guardian.

(7) A public guardian may not commit a ward to a treatment facility, as defined in s. 394.455(47), without an involuntary placement proceeding as provided by law.

(8) When a person is appointed successor public guardian, the successor public guardian immediately succeeds to all rights, duties, responsibilities, and powers of the preceding public guardian.

(9) When the position of public guardian is vacant, subordinate personnel employed under subsection (4) shall continue to act as if the position of public guardian were filled.

745.1408 Costs of public guardian.

(1) All costs of administration, including filing fees, shall be paid from the budget of the office of public guardian. No costs of administration, including filing fees, shall be recovered from the assets or the income of the ward.

(2) In any proceeding for appointment of a public guardian, or in any proceeding involving the estate of a ward for whom a public guardian has been appointed guardian, the court shall waive any court costs or filing fees.

745.1409 Preparation of budget.

Each public guardian, whether funded in whole or in part by money raised through local efforts, grants, or any other source or whether funded in whole or in part by the state, shall prepare a budget for the operation of the office of public guardian to be submitted to the Office of Public and Professional Guardians. As appropriate, the Office of Public and Professional Guardians will include such budgetary information in the Department of Elderly Affairs' legislative budget request. The office of public guardian shall be operated within the limitations of the General Appropriations Act and any other funds appropriated by the Legislature to that particular judicial circuit, subject to the provisions of chapter 216. The Department of Elderly Affairs shall make a separate and distinct request for an appropriation for the Office of Public and Professional Guardians. However, this section may not be construed to preclude the financing of any operations of the office of public guardian by moneys raised through local effort or through the efforts of the Office of Public and Professional Guardians.

745.1410 Procedures and rules.

The public guardian, subject to the oversight of the Office of Public and Professional Guardians, is authorized to:

(1) Formulate and adopt necessary procedures to assure the efficient conduct of the affairs of the ward and general administration of the office and staff.

(2) Contract for services necessary to discharge the duties of the office.

(3) Accept the services of volunteer persons or organizations and provide reimbursement for proper and necessary expenses.

745.1411 Surety bond.
Upon taking office, a public guardian shall file a bond with surety as prescribed in s. 45.011 to be approved by the clerk. The bond shall be payable to the Governor and the Governor's successors in office, in the penal sum of not less than $5,000 nor more than $25,000, conditioned on the faithful performance of all duties by the guardian. The amount of the bond shall be fixed by the majority of the judges within the judicial circuit. In form the bond shall be joint and several. The bond shall be purchased from the funds of the local office of public guardian.

745.1412 Reports and standards.
(1) The public guardian shall keep and maintain proper financial, case control, and statistical records on all matters in which the public guardian serves as guardian.
(2) No report or disclosure of the ward's personal and medical records shall be made, except as authorized by law.
(3) A public guardian shall file an annual report on the operations of the office of public guardian, in writing, by September 1 for the preceding fiscal year with the Office of Public and Professional Guardians, which shall have responsibility for supervision of the operations of the office of public guardian.
(4) Within 6 months of appointment as guardian of a ward, the public guardian shall submit to the clerk of the court for placement in the ward's guardianship file and to the executive director of the Office of Public and Professional Guardians a report on the pubic guardian's efforts to locate a family member or friend, other person, bank, or corporation to act as guardian of

the ward and a report on the ward's potential to be restored to capacity.

(5)(a) Each office of public guardian shall undergo an independent audit by a qualified certified public accountant at least once every 2 years. A copy of the audit report shall be submitted to the Office of Public and Professional Guardians.

(b) In addition to regular monitoring activities, the Office of Public and Professional Guardians shall conduct an investigation into the practices of each office of public guardian related to the managing of each ward's personal affairs and property. If feasible, the investigation shall be conducted in conjunction with the financial audit of each office of public guardian under paragraph (a).

(6) A public guardian shall ensure that each of the guardian's wards is personally visited by the public guardian or by one of the guardian's professional staff at least once each calendar quarter. During this personal visit, the public guardian or the professional staff person shall assess:

(a) The ward's physical appearance and condition;

(b) The appropriateness of the ward's current living situation; and

(c) The need for any additional services and the necessity for continuation of existing services, taking into consideration all aspects of social, psychological, educational, direct service, health, and personal care needs.

(7) The ratio for professional staff to wards shall be 1 professional to 40 wards. The Office of Public and Professional Guardians may increase or decrease the ratio after consultation with the local public guardian and the chief judge of the circuit court. The basis for the decision to increase or decrease the

prescribed ratio must be included in the annual report to the secretary.

745.1413 Public records exemption.

The home addresses, telephone numbers, dates of birth, places of employment, and photographs of current or former public guardians and employees with fiduciary responsibility; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of such persons; and the names and locations of schools and day care facilities attended by the children of such persons are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. As used in this section, the term “employee with fiduciary responsibility” means an employee of a public guardian who has the ability to direct any transactions of a ward’s funds, assets, or property; who under the supervision of the guardian, manages the care of the ward; or who makes any health care decision, as defined in s. 765.101, on behalf of the ward. This exemption applies to information held by an agency before, on, or after July 1, 2018. An agency that is the custodian of the information specified in this section shall maintain the exempt status of that information only if the current or former public guardians and employees with fiduciary responsibility submit to the custodial agency a written request for maintenance of the exemption. This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature.

745.1414 Access to records by the Office of Public and Professional Guardians; confidentiality.

(1) Notwithstanding any other provision of law to the contrary, any medical, financial, or mental health records held by an agency, or the court and its agencies, or financial audits prepared by the clerk of the court pursuant to s. 745.1001 and held by the court, which are necessary as part of an investigation of a guardian as a result of a complaint filed with the Office of Public and Professional Guardians to evaluate the public guardianship system, to assess the need for additional public guardianship, or to develop required reports, shall be provided to the Office of Public and Professional Guardians or its designee upon that office's request. Any confidential or exempt information provided to the Office of Public and Professional Guardians shall continue to be held confidential or exempt as otherwise provided by law.
(2) All records held by the Office of Public and Professional Guardians relating to the medical, financial, or mental health of vulnerable adults as defined in chapter 415, persons with a developmental disability as defined in chapter 393, or persons with a mental illness as defined in chapter 394, shall be confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

745.1415 Direct-support organization; definition; use of property; board of directors; audit; dissolution.
(1) DEFINITION.— As used in this section, the term "direct-support organization" means an organization whose sole purpose is to support the Office of Public and Professional Guardians and is:
(a) A not-for-profit corporation incorporated under chapter 617 and approved by the Department of State;
(b) Organized and operated to conduct programs and activities; to raise funds; to request and receive grants, gifts, and bequests of

moneys; to acquire, receive, hold, invest, and administer, in its own name, securities, funds, objects of value, or other property, real or personal; and to make expenditures to or for the direct or indirect benefit of the Office of Public and Professional Guardians; and

(c) Determined by the Office of Public and Professional Guardians to be consistent with the goals of the office, in the best interests of the state, and in accordance with the adopted goals and mission of the Department of Elderly Affairs and the Office of Public and Professional Guardians.

(2) CONTRACT.— The direct-support organization shall operate under a written contract with the Office of Public and Professional Guardians. The written contract must provide for:

(a) Certification by the Office of Public and Professional Guardians that the direct-support organization is complying with the terms of the contract and is doing so consistent with the goals and purposes of the office and in the best interests of the state. This certification must be made annually and reported in the official minutes of a meeting of the direct-support organization.

(b) The reversion of monies and property held in trust by the direct-support organization:

1. To the Office of Public and Professional Guardians if the direct-support organization is no longer approved to operate for the office;

2. To the Office of Public and Professional Guardians if the direct-support organization ceases to exist;

3. To the Department of Elderly Affairs if the Office of Public and Professional Guardians ceases to exist; or

4. To the state if the Department of Elderly Affairs ceases to exist.

The fiscal year of the direct-support organization shall begin on July 1 of each year and end on June 30 of the following year.

(c) The disclosure of the material provisions of the contract, and the distinction between the Office of Public and Professional Guardians and the direct-support organization, to donors of gifts, contributions, or bequests, including such disclosure on all promotional and fundraising publications.

(3) BOARD OF DIRECTORS.— The Secretary of Elderly Affairs shall appoint a board of directors for the direct-support organization from a list of nominees submitted by the executive director of the Office of Public and Professional Guardians.

(4) USE OF PROPERTY.—The Department of Elderly Affairs may permit, without charge, appropriate use of fixed property and facilities of the department or the Office of Public and Professional Guardians by the direct-support organization. The department may prescribe any condition with which the direct-support organization must comply in order to use fixed property or facilities of the department or the Office of Public and Professional Guardians.

(5) MONIES.—Any monies may be held in a separate depository account in the name of the direct-support organization and subject to the provisions of the written contract with the Office of Public and Professional Guardians. Expenditures of the direct-support organization shall be expressly used to support the Office of Public and Professional Guardians. The expenditures of the direct-support organization may not be used for the purpose of lobbying as defined in s. 11.045.

(6) PUBLIC RECORDS.—Personal identifying information of a donor or prospective donor to the direct-support organization who desires to remain anonymous is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(7) AUDIT.—The direct-support organization shall provide for an annual financial audit in accordance with s. 215.981.
(8) DISSOLUTION.—A not-for-profit corporation incorporated under chapter 617 that is determined by a circuit court to be representing itself as a direct-support organization created under this section, but that does not have a written contract with the Office of Public and Professional Guardians in compliance with this section, is considered to meet the grounds for a judicial dissolution described in s. 617.1430(1)(a). The Office of Public and Professional Guardians shall be the recipient for all assets held by the dissolved corporation which accrued during the period that the dissolved corporation represented itself as a direct-support organization created under this section.

745.1416 Joining Forces for Public Guardianship grant program; purpose.
The Legislature establishes the Joining Forces for Public Guardianship matching grant program for the purpose of assisting counties to establish and fund community-supported public guardianship programs. The Joining Forces for Public Guardianship matching grant program shall be established and administered by the Office of Public and Professional Guardians within the Department of Elderly Affairs. The purpose of the program is to provide startup funding to encourage communities to develop and administer locally funded and supported public guardianship programs to address the needs of indigent and incapacitated residents.
(1) The Office of Public and Professional Guardians may distribute the grant funds as follows:
(a) As initial startup funding to encourage counties that have no office of public guardian to establish an office, or as initial

startup funding to open an additional office of public guardian within a county whose public guardianship needs require more than one office of public guardian.

(b) As support funding to operational offices of public guardian that demonstrate a necessity for funds to meet the public guardianship needs of a particular geographic area in the state which the office serves.

(c) To assist counties that have an operating public guardianship program but that propose to expand the geographic area or population of persons they serve, or to develop and administer innovative programs to increase access to public guardianship in this state.

Notwithstanding this subsection, the executive director of the office may award emergency grants if the executive director determines that the award is in the best interests of public guardianship in this state. Before making an emergency grant, the executive director must obtain the written approval of the Secretary of Elderly Affairs. Subsections (2), (3), and (4) do not apply to the distribution of emergency grant funds.

(2) One or more grants may be awarded within a county. However, a county may not receive an award that equals, or multiple awards that cumulatively equal, more than 20 percent of the total amount of grant funds appropriated during any fiscal year.

(3) If an applicant is eligible and meets the requirements to receive grant funds more than once, the Office of Public and Professional Guardians shall award funds to prior awardees in the following manner:

(a) In the second year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same

county may not exceed 75 percent of the total amount of grant funds awarded within that county in year one.

(b) In the third year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 60 percent of the total amount of grant funds awarded within that county in year one.

(c) In the fourth year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 45 percent of the total amount of grant funds awarded within that county in year one.

(d) In the fifth year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 30 percent of the total amount of grant funds awarded within that county in year one.

(e) In the sixth year that grant funds are awarded, the cumulative sum of the award provided to one or more applicants within the same county may not exceed 15 percent of the total amount of grant funds awarded within that county in year one.

The Office of Public and Professional Guardians may not award grant funds to any applicant within a county that has received grant funds for more than 6 years.

(4) Grant funds shall be used only to provide direct services to indigent wards, except that up to 10 percent of the grant funds may be retained by the awardee for administrative expenses.

(5) Implementation of the program is subject to a specific appropriation by the Legislature in the General Appropriations Act.

745.1417 Program administration; duties of the Office of Public and Professional Guardians.

The Office of Public and Professional Guardians shall administer the grant program. The office shall:

(1) Publicize the availability of grant funds to entities that may be eligible for the funds.

(2) Establish an application process for submitting a grant proposal.

(3) Request, receive, and review proposals from applicants seeking grant funds.

(4) Determine the amount of grant funds each awardee may receive and award grant funds to applicants.

(5) Develop a monitoring process to evaluate grant awardees, which may include an annual monitoring visit to each awardee's local office.

(6) Ensure that persons or organizations awarded grant funds meet and adhere to the requirements of this act.

745.1418 Eligibility.

(1) Any person or organization that has not been awarded a grant must meet all of the following conditions to be eligible to receive a grant:

(a) The applicant must meet or directly employ staff that meet the minimum qualifications for a public guardian under this chapter.

(b) The applicant must have already been appointed by, or is pending appointment by, the Office of Public and Professional Guardians to become an office of public guardian in this state.

(2) Any person or organization that has been awarded a grant must meet all of the following conditions to be eligible to receive another grant:

(a) The applicant must meet or directly employ staff that meet the minimum qualifications for a public guardian under this chapter.

(b) The applicant must have been appointed by, or is pending reappointment by, the Office of Public and Professional Guardians to be an office of public guardian in this state.
(c) The applicant must have achieved a satisfactory monitoring score during the applicant's most recent evaluation.

745.1419 Grant application requirements; review criteria; awards process.
Grant applications must be submitted to the Office of Public and Professional Guardians for review and approval.
(1) A grant application must contain:
(a) The specific amount of funds being requested.
(b) The proposed annual budget for the office of public guardian for which the applicant is applying on behalf of, including all sources of funding, and a detailed report of proposed expenditures, including administrative costs.
(c) The total number of wards the applicant intends to serve during the grant period.
(d) Evidence that the applicant has:
1. Attempted to procure funds and has exhausted all possible other sources of funding; or
2. Procured funds from local sources, but the total amount of the funds collected or pledged is not sufficient to meet the need for public guardianship in the geographic area that the applicant intends to serve.
(e) An agreement or confirmation from a local funding source, such as a county, municipality, or any other public or private organization, that the local funding source will contribute matching funds to the public guardianship program totaling not less than $1 for every $1 of grant funds awarded. For purposes of this

section, an applicant may provide evidence of agreements or confirmations from multiple local funding sources showing that the local funding sources will pool their contributed matching funds to the public guardianship program for a combined total of not less than $1 for every $1 of grant funds awarded. In-kind contributions, such as materials, commodities, office space, or other types of facilities, personnel services, or other items as determined by rule shall be considered by the office and may be counted as part or all of the local matching funds.

(f) A detailed plan describing how the office of public guardian for which the applicant is applying on behalf of will be funded in future years.

(g) Any other information determined by rule as necessary to assist in evaluating grant applicants.

(2) If the Office of Public and Professional Guardians determines that an applicant meets the requirements for an award of grant funds, the office may award the applicant any amount of grant funds the executive director deems appropriate, if the amount awarded meets the requirements of this act. The office may adopt a rule allocating the maximum allowable amount of grant funds which may be expended on any ward.

(3) A grant awardee must submit a new grant application for each year of additional funding.

(4)(a) In the first year of the Joining Forces for Public Guardianship program’s existence, the Office of Public and Professional Guardians shall give priority in awarding grant funds to those entities that:

1. Are operating as appointed offices of public guardians in this state;

2. Meet all of the requirements for being awarded a grant under this act; and

3. Demonstrate a need for grant funds during the current fiscal year due to a loss of local funding formerly raised through court filing fees.

(b) In each fiscal year after the first year that grant funds are distributed, the Office of Public and Professional Guardians may give priority to awarding grant funds to those entities that:

1. Meet all of the requirements of this section and ss. 745.1416, 745.1417, and 745.1418 for being awarded grant funds; and

2. Submit with their application an agreement or confirmation from a local funding source, such as a county, municipality, or any other public or private organization, that the local funding source will contribute matching funds totaling an amount equal to or exceeding $2 for every $1 of grant funds awarded by the office. An entity may submit with its application agreements or confirmations from multiple local funding sources showing that the local funding sources will pool their contributed matching funds to the public guardianship program for a combined total of not less than $2 for every $1 of grant funds awarded. In-kind contributions allowable under this section shall be evaluated by the Office of Public and Professional Guardians and may be counted as part or all of the local matching funds.

745.1420 Confidentiality.

(1) The following are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, when held by the Department of Elderly Affairs in connection with a complaint filed and any subsequent investigation conducted pursuant to this part, unless the disclosure is required by court order:

(a) Personal identifying information of a complainant or ward.
(b) All personal health and financial records of a ward.
(c) All photographs and video recordings.
(2) Except as otherwise provided in this section, information held by the department is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until the investigation is completed or ceases to be active, unless the disclosure is required by court order.
(3) This section does not prohibit the department from providing such information to any law enforcement agency, any other regulatory agency in the performance of its official duties and responsibilities, or the clerk of the circuit court pursuant to s. 745.1001.
(4) The exemption under this section applies to all documents received by the department in connection with a complaint before, on, or after July 1, 2017.
(5) This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 15. Part XV of chapter 745, Florida Statutes, consisting of sections 745.1501, 745.1502, 745.1503, 745.1504, 745.1505, 745.1506, 745.1507, 745.1508, 745.1509, 745.1510, 745.1511, 745.1512, 745.1513, 745.1514, 745.1515, 745.1516, 745.1517, 745.1518, 745.1519, 745.1520, 745.1521, 745.1522, 745.1523, 745.1524, 745.1525, and 745.1526, is created to read:

PART XV

VETERANS' GUARDIANSHIP

745.1501 Short title; scope of part.

(1) This part shall be known and may be cited as the “Veterans’ Guardianship Law.”

(2) The application of this part is limited to veterans and other persons who are entitled to receive benefits from the United States Department of Veterans Affairs. This part is not intended to replace the general law relating to guardianship except insofar as this part is inconsistent with the general law relating to guardianship; in which event, this part and the general law relating to guardianship shall be read together, with any conflict between this part and the general law of guardianship to be resolved by giving effect to this part.

745.1502 Definitions.

As used in this part, the term:

(1) “Adjudication by a court of competent jurisdiction” means a judicial decision or finding that a person is or is not incapacitated as provided in chapter 745 Part III.

(2) “Adjudication by the United States Department of Veterans Affairs” means a determination or finding that a person is competent or incompetent on examination in accordance with the laws and regulations governing the United States Department of Veterans Affairs.

(3) “Secretary” means the Secretary of Veterans Affairs as head of the United States Department of Veterans Affairs or her or his successor.

(4) “Benefits” means arrears of pay, bonus, pension, compensation, insurance, and all other moneys paid or payable by the United States through the United States Department of Veterans Affairs by reason of service in the Armed Forces of the United States.

(5) “Estate” means income on hand and assets acquired in whole or in part with income.

(6) “Guardian” means any person acting as a fiduciary for a ward’s person or the ward’s estate, or both.

(7) “Income” means moneys received from the United States Department of Veterans Affairs as benefits, and revenue or profit from any property acquired in whole or in part with such moneys.

(8) “Person” means an individual, a partnership, a corporation, or an association.

(9) “United States Department of Veterans Affairs” means the United States Department of Veterans Affairs or its predecessors or successors.

(10) “Ward” means a beneficiary of the United States Department of Veterans Affairs.

745.1503 Secretary of Veterans Affairs as party in interest.

The Secretary of Veterans Affairs shall be a party in interest in any proceeding for the appointment or removal of a guardian or for the removal of the disability of minority or mental incapacity of a ward, and in any suit or other proceeding affecting in any manner the administration by the guardian of the estate of any present or former ward whose estate includes assets derived in whole or in part from benefits heretofore or hereafter paid by the United States Department of Veterans Affairs. Not less than 15 days prior to hearing in such matter, notice in writing of the time and place thereof shall be given by mail (unless waived in writing) to the office of the United States Department of Veterans Affairs having jurisdiction over the area in which any such suit or any such proceeding is pending.

745.1504 Procedure for commitment of veteran to United States Department of Veterans Affairs hospital.

The procedure for the placement into a United States Department of Veterans Affairs hospital of a ward hereunder shall be the procedure prescribed in s. 394.4672.

745.1505 Appointment of guardian for ward authorized.

(1) Whenever, pursuant to any law of the United States or regulation of the United States Department of Veterans Affairs, the secretary requires, prior to the payment of benefits, that a guardian be appointed for a ward, the appointment may be made in the manner hereinafter provided.

(2) When a petition is filed for the appointment of a guardian of a minor ward, a certificate of the secretary or the secretary's authorized representative setting forth the age of such minor, as shown by the records of the United States Department of Veterans Affairs, and a statement that the appointment of a guardian is a condition precedent to the payment of any moneys due to the minor by the United States Department of Veterans Affairs are prima facie evidence of the necessity for such appointment.

(3) When a petition is filed for the appointment of a guardian of a mentally incompetent ward, a certificate of the secretary or the secretary's authorized representative, setting forth the fact that the person has been found incompetent and has been rated incompetent by the United States Department of Veterans Affairs, on examination in accordance with the laws and regulations governing the United States Department of Veterans Affairs, and that the appointment of a guardian is a condition precedent to the payment of any moneys due to such person by the United States Department of

Veterans Affairs, is prima facie evidence of the necessity for such appointment.

745.1506 Petition for appointment of guardian.

(1) A petition for the appointment of a guardian may be filed in any court of competent jurisdiction by, or on behalf of, any person who under existing law is entitled to priority of appointment. If no person is so entitled, or if the person so entitled neglects or refuses to file such a petition within 30 days after the mailing of notice by the United States Department of Veterans Affairs to the last known address of such person, indicating the necessity for filing the petition, a petition for such appointment may be filed in any court of competent jurisdiction by, or on behalf of, any responsible person residing in this state.

(2)(a) The petition for appointment shall set forth:

1. The name, age, and place of residence of the ward;

2. The names and places of residence of the nearest relative, if known;

3. The fact that the ward is entitled to receive moneys payable by or through the United States Department of Veterans Affairs;

4. The amount of moneys then due and the amount of probable future payments;

5. The name and address of the person or institution, if any, having actual custody of the ward; and

6. The name, age, relationship, if any, occupation, and address of the proposed guardian.

(b) In the case of a mentally incompetent ward, the petition shall show that the ward has been found incompetent and has been rated incompetent on examination by the United States Department of

Veterans Affairs, in accordance with the laws and regulations governing the United States Department of Veterans Affairs.

745.1507 Notice by court of petition filed for appointment of guardian.

(1) When a petition for the appointment of a guardian has been filed pursuant to s. 745.1506, the court shall cause such notice to be given as provided by the general guardianship law. In addition, notice of the petition shall be given to the office of the United States Department of Veterans Affairs having jurisdiction over the area in which the court is located.

(2) A copy of the petition provided for in s. 745.1506 shall be mailed by the clerk of the court to the person or persons for whom a guardian is to be appointed, the clerk of court mailing the copy of the petition to the last known address of such person or persons not less than 5 days prior to the date set for the hearing of the petition by the court.

745.1508 Persons who may be appointed guardian.

(1) Notwithstanding any law with respect to priority of persons entitled to appointment, or nomination in the petition, the court may appoint some other individual or a bank or trust company as guardian if the court determines that the appointment of the other individual or bank or trust company would be in the best interest of the ward.

(2) It is unlawful for a circuit judge to appoint either herself or himself, or a member of her or his family, as guardian for any person entitled to the benefits provided for in 38 U.S.C., as amended, except in a case when the person entitled to such benefits is a member of the family of the circuit judge involved.

745.1509 Bond of guardian.
When the appointment of a guardian is made, the guardian shall execute and file a bond to be approved by the court in an amount not less than the sum of the amount of moneys then due to the ward and the amount of moneys estimated to become payable during the ensuing year. The bond shall be in the form, and shall be conditioned, as required of guardians appointed under the general guardianship laws of this state. The court has the power to require, from time to time, the guardian to file an additional bond.

745.1510 Inventory of ward's property; guardian's failure to file inventory; discharge; forfeiture of commissions.
Every guardian shall, within 30 days after his or her qualification and whenever subsequently required by the circuit judge, file in the circuit court a complete inventory of all the ward's personal property in his or her hands and, also, a schedule of all real estate in the state belonging to his or her ward, describing it and its quality, whether it is improved or not, and, if it is improved, in what manner, and the appraised value of same. The failure on the part of the guardian to conform to the requirements of this section is a ground for the discharge of the guardian, in which case the guardian shall forfeit all commissions.

745.1511 Guardian empowered to receive moneys due ward from the United States Government.
A guardian appointed under the provisions of s. 745.1506 may receive income and benefits payable by the United States through the United States Department of Veterans Affairs and also has the

right to receive for the account of the ward any moneys due from the United States Government in the way of arrears of pay, bonus, compensation or insurance, or other sums due by reason of his or her service (or the service of the person through whom the ward claims) in the Armed Forces of the United States and any other moneys due from the United States Government, payable through its agencies or entities, together with the income derived from investments of these moneys.

745.1512 Guardian's application of estate funds for support and maintenance of person other than ward.

A guardian shall not apply any portion of the estate of her or his ward to the support and maintenance of any person other than her or his ward, except upon order of the court after a hearing, notice of which has been given to the proper office of the United States Department of Veterans Affairs as provided in s. 745.1513.

745.1513 Petition for support, or support and education, of ward's dependents; payments of apportioned benefits prohibit contempt action against veteran.

(1) Any person who is dependent on a ward for support may petition a court of competent jurisdiction for an order directing the guardian of the ward's estate to contribute from the estate of the ward to the support, or support and education, of the dependent person, when the estate of the ward is derived in whole or in part from payments of compensation, adjusted compensation, pension, insurance, or other benefits made directly to the guardian of the ward by the United States Department of Veterans Affairs. A notice of the application for support, or support and education, shall be given by the applicant to the office of the United States

Department of Veterans Affairs having jurisdiction over the area in which the court is located at least 15 days before the hearing on the application.

(2) The grant or denial of an order for support, or support and education, does not preclude a further petition for an increase, decrease, modification, or termination of the allowance for such support, or support and education, by either the petitioner or the guardian.

(3) The order for the support, or support and education, of the petitioner is valid for any payment made pursuant to the order, but no valid payment can be made after the termination of the guardianship. The receipt of the petitioner shall be a sufficient release of the guardian for payments made pursuant to the order.

(4) When a claim for apportionment of benefits filed with the United States Department of Veterans Affairs on behalf of a dependent or dependents of a disabled veteran is approved by the United States Department of Veterans Affairs, subsequent payments of such apportioned benefits by the United States Department of Veterans Affairs prohibit an action for contempt from being instituted against the veteran.

745.1514 Exemption of benefits from claims of creditors.

Except as provided by federal law, payments of benefits from the United States Department of Veterans Affairs or the Social Security Administration to or for the benefit of a disabled veteran or the veteran’s surviving spouse or dependents are exempt from the claims of creditors and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after the receipt of the payments by the guardian or the beneficiary.

745.1515 Investment of funds of estate by guardian.
Every guardian shall invest the funds of the estate in such manner or in such securities, in which the guardian has no interest, as allowed by chapter 518.

745.1516 Guardian's petition for authority to sell ward's real estate; notice by publication; penalties.
(1) When a guardian of the estate of a minor or an incompetent ward, which guardian has the control or management of any real estate that is the property of such minor or incompetent, deems it necessary or expedient to sell all or part of the real estate, the guardian shall apply, either in term time or in vacation by petition to the judge of the circuit court for the county in which the real estate is situated, for authority to sell all or part of the real estate. If the prayer of the petition appears to the judge to be reasonable and just and financially beneficial to the estate of the ward, the judge may authorize the guardian to sell the real estate described in the petition under such conditions as the interest of the minor or incompetent may, in the opinion of the judge, seem to require.
(2) The authority to sell the real estate described in the petition shall not be granted unless the guardian has given previous notice, published once a week for 4 successive weeks in a newspaper published in the county where the application is made, of his or her intention to make application to the judge for authority to sell such real estate, the guardian setting forth in the notice the time and place and to what judge the application will be made. If the lands lie in more than one county, the application for such authority shall be made in each county in which the lands lie.

(3) The failure on the part of the guardian to comply with the provisions of this section makes the guardian and the guardian's bond agents individually responsible for any loss that may accrue to the estate of the ward involved, and is a ground for the immediate removal of such guardian as to his or her functions, but does not discharge the guardian as to his or her liability or discharge the liabilities of his or her sureties.

745.1517 Guardian's accounts, filing with court and certification to United States Department of Veterans Affairs; notice and hearing on accounts; failure to account.

(1) Every guardian who receives on account of his or her ward any moneys from the United States Department of Veterans Affairs shall annually file with the court on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account under oath, which account is an account of all moneys so received by him or her and of all disbursements from such moneys, and which account shows the balance of the moneys in his or her hands at the date of such filing and shows how the moneys are invested. A certified copy of each of such accounts filed with the court shall be sent by the guardian to the office of the United States Department of Veterans Affairs having jurisdiction over the area in which such court is located. If the requirement of certification is waived in writing by the United States Department of Veterans Affairs, an uncertified copy of each of such accounts shall be sent.

(2) The court, at its discretion or upon the petition of an interested party, shall fix a time and place for the hearing on such account; and notice of the hearing shall be given by the court

to the United States Department of Veterans Affairs not less than 15 days prior to the date fixed for the hearing.

(3) The court need not appoint a guardian ad litem to represent the ward at the hearing provided for in subsection (2). If the residence of the next kin of the ward is known, notice by registered mail shall be sent to such relative. Notice also shall be served on the ward; or, if the ward is mentally incapable of understanding the matter at issue, the notice may be served on the person in charge of the institution where the ward is detained, or on the person having charge or custody of the ward.

(4) When a hearing on an account is required by the court or requested in the petition of an interested party as provided in subsection (2), the judge of the court on the day of the hearing as provided for in subsection (2) shall carefully examine the vouchers and audit and state the account between the guardian and ward. Proper evidence shall be required in support of any voucher or item of the account that may appear to the court not to be just and proper, such evidence to be taken by affidavit or by any other legal mode. If any voucher is rejected, the item or items covered by the disapproval of any voucher or vouchers shall be taxed against the guardian personally. After such examination, the court shall render a decree upon the account, which shall be entered on the record, and the account and vouchers shall be filed. Such partial settlement shall be taken and presumed as correct on final settlement of the guardianship.

(5) If a guardian fails to file any account of the moneys received by him or her from the United States Department of Veterans Affairs on account of his or her ward within 30 days after such account is required by either the court or the United States Department of Veterans Affairs, or fails to furnish the United States Department

of Veterans Affairs a copy of his or her accounts as required by subsection (1), such failure shall be a ground for the removal of the guardian.

745.1518 Certified copies of public records made available.
When a copy of any public record is required by the United States Department of Veterans Affairs to be used in determining the eligibility of any person to participate in benefits made available by the United States Department of Veterans Affairs, the official charged with the custody of such public record shall, without charge, provide to the applicant for such benefits or any person acting on her or his behalf, or to the authorized representative of the United States Department of Veterans Affairs, a certified copy of such record. For each and every certified copy so furnished by the official, the official shall be paid by the board of county commissioners the fee provided by law for copies.

745.1519 Clerk of the circuit court; fees; duties.
Upon the filing of the petition for guardianship, granting of same, and entering decree thereon, the clerk of the circuit court is entitled to the service charge as provided by law, which shall include the cost of recording the petition, bond, and decree and the issuing of letters of guardianship. The certificate of the secretary or the secretary's authorized representative provided for in s. 745.1505 need not be recorded but must be kept in the file. Upon issuing letters of guardianship or letters appointing a guardian for the estate of a minor or incompetent, the clerk of the circuit court shall send to the regional office of the United States Department of Veterans Affairs having jurisdiction in this state two certified copies of the letters and two certified copies

of the bond approved by the court, without charge or expense to the estate involved. The clerk of the circuit court shall also send a certified copy of such letters to the property appraiser and to the tax collector in each county in which the ward owns real property.

745.1520 Attorney's fee.
The fee for the attorney filing the petition and conducting the proceedings shall be fixed by the court in an amount as small as reasonably possible, not to exceed $250. However, this section is not to be interpreted to exclude a petition for extraordinary attorney's fees, properly filed, and if approved by the United States Department of Veterans Affairs, does not necessitate a hearing before the court for approval, but the court shall enter its order for withdrawal of said attorney's fees from the ward's guardianship account accordingly.

745.1521 Guardian's compensation; bond premiums.
The amount of compensation payable to a guardian shall not exceed 5 percent of the income of the ward during any year and may be taken, by the guardian, on a monthly basis. In the event of extraordinary services rendered by such guardian, the court may, upon petition and after hearing on the petition, authorize additional compensation for the extraordinary services, payable from the estate of the ward. Provided that extraordinary services approved by the United States Department of Veteran's Affairs do not require a court hearing for approval of the fees, but shall require an order authorizing the guardian to withdraw the amount from the guardianship account. No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of her or his ward

reasonable premiums paid by the guardian to any corporate surety upon the guardian's bond.

745.1522 Discharge of guardian of minor or incompetent ward.
When a minor ward, for whom a guardian has been appointed under the provisions of this part or other laws of this state, attains his or her majority and, if such minor ward has been incompetent, is declared competent by the United States Department of Veterans Affairs and the court, or when an incompetent ward who is not a minor is declared competent by the United States Department of Veterans Affairs and the court, the guardian shall, upon making a satisfactory accounting, be discharged upon a petition filed for that purpose.

745.1523 Final settlement of guardianship; notice required; guardian ad litem fee; papers required by United States Department of Veterans Affairs.
On the final settlement of the guardianship, the notice provided herein for partial settlement must be given and the other proceedings conducted as in the case of partial settlement, except that a guardian ad litem may be appointed to represent the ward, the fee of which guardian ad litem shall in no case exceed $150. However, if the ward has been pronounced competent, is shown to be mentally sound, appears in court, and is 18 years of age, the settlement may be had between the guardian and the ward under the direction of the court without notice to the next of kin, or the appointment of a guardian ad litem. A certified copy of the final settlement so made in every case must be filed with the United States Department of Veterans Affairs by the clerk of the court.

745.1524 Notice of appointment of general guardian; closing of veteran's guardianship; transfer of responsibilities and penalties to general guardian.

When the appointment of a general guardian has been made in the proper court and such guardian has qualified and taken charge of the other property of the ward, the general guardian shall file notice of such appointment in the court in which the veteran's guardianship is pending and have the veteran's guardianship settled up and closed so that the general guardian may take charge of the moneys referred to and described in ss. 745.1505(2) and (3) and 745.1511. When the appointment of a general guardian, whether for an incompetent or minor child or another beneficiary entitled to the benefits provided in 38 U.S.C., as amended, has been confirmed by the court having jurisdiction, such general guardian is responsible and is subject to the provisions and penalties contained in 38 U.S.C., as amended, as well as the requirements pertaining to guardians as set forth in this part.

745.1525 Construction and application of part.

This part shall be construed liberally to secure the beneficial intents and purposes of this part and applies only to beneficiaries of the United States Department of Veterans Affairs. It shall be so interpreted and construed as to effectuate its general purpose of making the welfare of such beneficiaries the primary concern of their guardians and of the court.

745.1526 Annual guardianship report.

Guardians appointed under the Veterans' Guardianship Law shall not be required to comply with the provisions of s. 745.805 or s. 745.813.

Section 16. Chapter 744 is repealed.

Section 17. This act shall take effect on July 1, 2020 and shall apply to all proceedings pending before such date and all proceedings commenced on or after the effective date.

STANDARD 6.10

ENHANCED LIFE ESTATE DEED FOR NON-HOMESTEAD PROPERTY

STANDARD: **THE HOLDER OF A LIFE ESTATE IN NON-HOMESTEAD PROPERTY, COUPLED WITH THE POWER TO SELL, CONVEY, MORTGAGE AND OTHERWISE MANAGE THE FEE SIMPLE ESTATE, CAN CONVEY OR ENCUMBER THE FEE SIMPLE ESTATE DURING THE LIFETIME OF THE HOLDER WITHOUT THE REMAINDERMAN.**

Problem 1: A remainder in Blackacre was conveyed by John Doe to Jane Smith with John Doe reserving for himself without any liability for waste full power and authority in himself to sell, convey, mortgage or otherwise manage and dispose of the property in fee simple with or without consideration without joinder of the remainderman and full power and authority to retain any and all proceeds generated by such action. John Doe died. Is the conveyance to Jane Smith valid?

Answer: Yes.

Problem 2: Same facts as in Problem 1, except that John Doe, during his lifetime and for his own benefit, by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith?

Answer: Yes.

Problem 3: Same facts as in Problem 1, except that John Doe, during his lifetime and for his own benefit, by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. At the time of the conveyance Creditor had a judgment lien against Jane Smith. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith and Creditor?

Answer: Yes.

Problem 4: Same facts as in Problem 1, except that Creditor has a judgment lien against John Doe. However, Creditor does not levy and execute on his judgment. John Doe dies without conveying the property. Did Jane Smith acquire title to Blackacre free of the judgment lien of Creditor?

Answer: Yes.

Authorities: F.S. 733.706 (2018), F.S. 733.702(4)(a) (2018), *Oglesby v. Lee*, 73 Fla. 39, 73 So. 840 (1917); *Aetna Ins. Co, v. La Gasse*, 223 So.2d 727 (Fla. 1969); 19 Fla. Jur. 2d *Deeds*, § 170

Secondary Authority: Stephanie Emrick, *Transfer on Death Deeds: Is It Time to Establish the Rules of the Game*, 70 Fla. L. Re. 469 (2018)

Comment: This type of enhanced life estate conveyance is commonly referred to as a "Lady Bird Deed." It is used for various purposes, among which is the avoidance of probate by the holder of the life estate. Attempts by the life tenant with enhanced powers during their lifetime to divest the remainderman of their remainder interest may create questions as to who holds fee simple title after the death of the life tenant. For the record to be clear, the prudent practitioner should have the life tenant retain the power to divest the remainderman in the vesting deed creating the enhanced life estate and any conveyance attempting to divest the remainderman should clearly state the life tenant's intent to do so. The wording of a deed reserving the right to resell the property may create a fee simple determinable or estate upon condition subsequent. In *Oglesby* the conveyance from a father to a daughter reserving the right to sell and place the proceeds of the sale in lieu of the property resulted, upon such sale, in divestment of the daughter's interest. A remainderman as to an enhanced life estate during the lifetime of the life tenant holds a vested remainder interest which is subject to divestment by the life tenant and, therefore, any judgment against the remainderman may be similarly divested. However, upon of the death of the life tenant, the lien of judgment against the remainderman would attach to the property.

A judgment against a decedent is not enforceable against real property owned by the decedent at the time of death, but shall be filed in the same manner as other claims against estates of decedent. See F.S. 733.706 If a creditor does not levy and execute on its judgment lien, it is just a general lien on all of the property of the debtor. F.S. 733.702(4)(a) permits enforcement of the lien of mortgages, security instruments or other liens on specific property without the necessity of filing a claim.

Although Lady Bird Deeds are used prevalently in Florida for various purposes among which is the avoidance of probate by the holder of the life estate, there is no Florida Statute governing such conveyances and scant judicial authority supporting the practice. The practitioner should thus be aware that this Standard and its guidance represent the consensus view of the Real Property, Probate, and Trust Law Section of the Florida Bar.

STANDARD 6.11

ENHANCED LIFE ESTATE: LIFE TENANT AND HOMESTEAD PROPERTY

STANDARD: **A LIFE TENANT WITH AN INTEREST IN HOMESTEAD PROPERTY, COUPLED WITH THE POWER TO SELL, CONVEY, MORTGAGE AND OTHERWISE MANAGE THE FEE SIMPLE ESTATE, CAN CONVEY OR ENCUMBER THE FEE SIMPLE ESTATE DURING THE LIFETIME OF THE HOLDER WITHOUT THE REMAINDERMAN.**

Problem 1: A remainder in Blackacre was conveyed by John Doe to Jane Smith with John Doe reserving for himself without any liability for waste full power and authority in himself to sell convey, mortgage or otherwise manage and dispose of the property in fee simple with or without consideration without joinder of the remainderman and full power and authority to retain any and all proceeds generated by such action. During his lifetime and for his own benefit, John Doe by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. John Doe was a single man at the time of the conveyance to Jeffrey Williams. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith?

Answer: Yes.

Problem 2: Same facts as in Problem 1, except that John Doe was married at time of the conveyance to Jeffrey Williams and his spouse joined in that conveyance. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith?

Answer: Yes.

Problem 3: Same facts as in Problem 1, except that at the time of the conveyance Creditor had a judgment lien against Jane Smith. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith and Creditor?

Answer: Yes.

Authorities: Art. X, Sec. 4(c), Fla. Constitution; F.S. 732.401 (2018), and F.S. 732.4017 (2018); *Oglesby v. Lee*, 73 Fla. 39, 73 So. 840 (1917); 19 Fla. Jur. 2d *Deeds* § 170

Comment: This type of conveyance is commonly referred to as a "Lady Bird Deed." It is used for various purposes, among which is the avoidance of probate by the holder of the life estate. Attempts by the life tenant with enhanced powers during their lifetime to divest the remainderman of their remainder interest may create questions as to who holds fee simple title after the death of the life tenant. For the record to be clear, the life tenant must have retained the power to divest the remainderman in the vesting deed creating the enhanced life estate and any conveyance attempting to divest the remainderman should clearly state the life tenant's intent to do so. A conveyance of a homestead residence by the life tenant is subject to the spousal joinder requirements of Art. X, Section 4(c). The restriction on the devise of homestead contained in Art. X, Sec. 4(c), of the Florida Constitution, must be considered after the death of the life tenant if they were survived by a spouse or minor

child. Conveyances from all of the heirs of the deceased life tenant, including the surviving spouse, may be required to convey fee simple title to the remainderman named in the vesting deed that created the enhanced life estate.

The wording of a deed reserving of the right to resell the property may create a fee simple determinable or an estate upon condition subsequent. In *Oglesby*, the conveyance from a father to daughter reserving the right to sell and place the proceeds of the sale in lieu of the property resulted, upon such sale, in divestment of the daughter's interest. A remainderman as to an enhanced life estate during the lifetime of the life tenant holds a vested remainder interest which is subject to divestment by the life tenant, and, therefore, any judgment against the remainderman may be similarly divested. However, upon the death of the life tenant, the lien of the judgment against the remainderman would attached to the property.

Although Lady Bird Deeds are used prevalently in Florida for various purposes among which is the avoidance of probate by the holder of the life estate, there is no Florida Statute governing such conveyances and scant judicial authority supporting the practice. The practitioner should thus be aware that this Standard and its guidance represent the consensus view of the Real Property, Probate, and Trust Law Section of the Florida Bar.

STANDARD 6.12

ENHANCED LIFE ESTATE: REMAINDERMAN AND HOMESTEAD PROPERTY

STANDARD: **THE REMAINDERMAN IN HOMESTEAD PROPERTY, WHEREIN THE LIFE TENANT RESERVED THE POWER TO SELL, CONVEY MORTGAGE AND OTHERWISE MANAGE THE FEE SIMPLE ESTATE, ACQUIRES FEE SIMPLE TITLE UPON THE DEATH OF THE LIFE TENANT ONLY WHEN NOT IN VIOLATION OF CONSTITUTIONAL RESTRICTION ON DEVISE OF HOMESTEAD.**

Problem 1: A remainder in Blackacre was conveyed by John Doe, a single man, to Jane Smith with John Doe reserving for himself without any liability for waste, full power and authority in himself to sell convey, mortgage or otherwise manage and dispose of the property in fee simple with or without consideration, without joinder of the remainderman, and full power and authority to retain any and all proceeds generated by such action. John Doe died without a spouse or a minor child. Upon the death of John Doe, is fee simple title vested in Jane Smith?

Answer: Yes.

Problem 2: Same facts as in Problem 1, except that John Doe died while married to Sally Brown. Upon the death of John Doe, is fee simple title vested in Jane Smith?

Answer: No.

Problem 3: Same facts as in Problem 2, except that the deed is executed on or after July 1, 2018 and John Doe's spouse, Sally Brown, joined in John Doe's deed to Jane Smith and the deed contained the following statement: "By executing or joining in this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me"? John Doe had no minor child at the time of his death. Upon the death of John Doe, is fee simple title vested in Jane Smith?

Answer: Yes.

Problem 4: Same facts as in Problem 1, except that at the time of the conveyance and when John Doe died Jane Smith was his spouse and Jane Smith joined in the deed. John Doe had no minor children at the time of his death. Is the conveyance to Jane Smith valid?

Answer: Yes.

Authorities: Art. X, Sec. 4(c), Fla. Constitution (2018); F.S. 732.401 (2018), F.S. 732.4017 (2018), F.S. 732.7025 (2018), F.S. 733.706 (2018); *Oglesby v. Lee*, 73 Fla. 39, 73 So. 840 (1917); 19 Fla. Jur. 2d *Deeds* § 170

Comment: A spouse on or after July 1, 2018 may waive his or her rights as spouse with respect to restrictions on the devise of homestead under Sec. 4(c), Art. X of the State Constitution when language providing for waiver of the right related to devise as set forth in F.S. 732.7025 (2018) is included in the deed. A judgment against a decedent is not enforceable against real property owned by the decedent at the time of death, but shall be filed in the same manner as other claims against estates of decedents. See F.S. 733.706 (2018).

Although Lady Bird Deeds are used prevalently in Florida for various purposes among which is the avoidance of probate by the holder of the life estate, there is no Florida Statute governing such conveyances and scant judicial authority supporting the practice. The practitioner should thus be aware that this Standard and its guidance represent the consensus view of the Real Property, Probate, and Trust Law Section of the Florida Bar.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By **Christopher Smart, Esq**., Chair, Title Issues and Standards Committee of the Real Property Probate and Trust Law Section (RPPTL Approval ____, ____, 20___)

Address **4221 W. Boy Scout Blvd., Tampa, Florida 33607**
Telephone: (813) 229-4142

Position Type Title Issues and Standards Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

S. Katherine Frazier, Hill Ward Henderson, 101 E Kennedy Blvd., Suite 3700, Tampa, FL 33602-5195, Telephone (813) 221-3900 Email: skfrazier@hwhlaw.com

Peter M. Dunbar, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999 4100, Email:pdunbar@deanmead.com

Martha J. Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999 4100, Email: medenfield@deanmead.com

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support _____ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

Supports proposed legislation to create Section 95.2311, which would establish a method of correcting obvious typographical errors in legal descriptions contained in real property deeds.

Reasons For Proposed Advocacy:

Real estate transactions are delayed because of obvious typographical error in legal descriptions. This statute when applicable would make it unnecessary to obtain a corrective deed or to bring a judicial action to reform deeds containing obvious typographical erroneous.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position [NONE?]

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

[NONE?]

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

[List here other Bar sections, committees or attorney organizations]

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

PROPOSED CREATION OF SECTION 95.2311
FLORIDA STATUTES

Prepared by the Real Property, Probate and Trust Law Section of the Florida Bar

Title Issues and Standards Committee

I. SUMMARY

This bill would create a new section in the Florida Statutes, Section 95.2311. It is intended to cure certain defects and thereby eliminate the necessity to bring law suits to quiet title when there is an obvious typographical error in the legal description of a recorded deed. The theory being that the grantor in a deed intended to convey title to the real property in which the grantor held an interest and did not intend to convey title to real property in which the grantor did not hold an interest within the five years immediately prior to executing the deed containing the erroneous legal description. This period of time will safe guard against the statute being misapplied.

The bill provides that a curative notice which identifies the intended (correct) legal description must be recorded.

The proposed bill has a narrow focus in that it applies only to erroneous deeds and not to transfers of title by judicial order or to quit claim deeds. It also does not apply to deeds that contain a metes and bounds legal description. Finally, the fact that the bill states that the deed containing the legal description may have only one error or omission within identified limited categories of errors will ensure that the bill addresses only the most obvious typographical errors.

It should be noted that there are already several laws on the books in Florida which provide curative periods for errors in recorded instruments and that at least five states (Georgia, North Carolina, Ohio, Texas and Virginia) have laws similar to the proposed legislation which in some cases are significantly more forgiving than this proposal. Florida also already has an adverse possession law. This bill would make such titles marketable without the requirement, expense, and delay of bringing a suit to quiet title if they fall within the narrow parameters of the bill. It will thus facilitate and expedite the real estate transfer process and benefit all parties involved in the transaction and serve a laudable public purpose.

II. SECTION-BY-SECTION ANALYSIS

Section 1 contains the title and substantive subsections of the proposed statute.

Section 1. Section 95.2311, Florida Statutes, is created to read:
95.2311 – Curative Procedure for Certain Description Errors in Deeds

A. Sub-Section 95.2311 (1) states the definitions that are used in the proposed statute. The three terms defined are erroneous deed, intended real property, and scrivener's error. Quit claim deeds are excluded from the definition of erroneous deed and are therefore not covered

by this bill. The definition of scrivener's error contains the types of errors or omissions in the legal description that are covered by the proposed statute.

(1) Definitions:

(a) "Erroneous deed" means any deed containing a scrivener's error, except quit claim deeds.

(b) "Intended real property" means the real property vested in the grantor and intended to be conveyed by the grantor in the erroneous deed.

(c) "Scrivener's error" means a single error or omission in the legal description of the intended real property in no more than one of the following categories:

(1) An error or omission in no more than one of the lot or block identifications of a recorded platted lot; however, the transposition of the lot and block identifications is considered one error; or

(2) An error or omission in no more than one of the unit, building, or phase identifications of a condominium or cooperative unit; or

(3) An error or omission in no more than one of a directional designation or numerical fraction of a tract of land that is described as a fractional portion of a Section, Township or Range; however, an error or omission in the directional description and numerical fraction of the same call is considered one error.

A scrivener's error does not mean multiple errors as this section will not correct multiple errors in the legal description of the intended real property.

B. Sub-Section 95.2311 (2) establishes that an erroneous deed will convey title to the intended real property as if there had been no scrivener's error if certain conditions are met and subject to certain limitations.

(2) As limited by subsections (3)(a)-(c) and if the requirement in subsection (3)(d) is met, the erroneous deed conveys title to the intended real property as if there had been no scrivener's error, and, likewise, each subsequent erroneous deed containing the identical scrivener's error conveys title to the intended real property as if there had been no such identical scrivener's error.

C. Sub-Section 95.2311 (3) states the criteria for the statute to have effect.

(3) Subsection (2) applies only if:

(a) Record title to the intended real property was held by the grantor of the first erroneous deed at the time the first erroneous deed was executed.

(b) Within the five years preceding the recording of the erroneous deed, the grantor held title to no other real property in either (i) the same subdivision, condominium, or cooperative development or (ii) the same section, township and range, described in the erroneous deed.

(c) The intended real property is not described exclusively by a metes and bounds legal description.

(d) A curative notice in substantially the same form as set forth in subsection (4) is recorded in the Official Records of the county in which the intended real property is located, evidencing the intended real property to be conveyed by the grantor.

D. Sub-Section 95.2311 (4) establishes the form of the Curative Notice. The Curative Notice identifies the recording information, and legal description of both the erroneous described property and the intended real property to be conveyed. It also includes an assertion as to the legal description of the real property that was intended to be conveyed.

(4) Curative Notice. A curative notice must be in substantially the following form:

Curative Notice, Per Sec. 95.2311, F.S.
Scrivener's Error in Legal Description

The undersigned does hereby swear and affirm:

1. The deed which transferred title from _____, to _____, dated _____, and recorded on _____ in O.R. ____, Page _____, and/or Instrument No. _____, of the Official Records of _____ County, Florida (herein after referred to as "first erroneous deed"), and contained the following erroneous legal description:

[insert incorrect legal description]

[insert and repeat paragraph 2 to include each subsequent erroneous deeds in the chain of title containing the same erroneous legal description:

2. The deed transferring title from _____ to _____ and recorded on _____ in O.R. ____, Page _____, and/or Instrument No. _____, of the Official Records of _____ County, Florida, contains the same erroneous legal description described in the first erroneous deed.]

3. I have examined the Official Records of the county in which the intended real property is located and have determined that the Deed dated _____, and recorded on _____ in O.R. Book _____, Page_____ and/or Instrument Number _____, Official Records of _____ County, Florida, establishes that record title to the intended real property was held by the grantor of the first erroneous deed at the time the first erroneous deed was executed.

4. This notice is made to establish that the real property described as:

[insert legal description of the intended real property]

(hereinafter referred to as the "intended real property") was the real property that was to have been conveyed in the first erroneous deed [and all subsequent erroneous deeds].

Signature: _____

Printed Name: _____

STATE OF FLORIDA
COUNTY OF

Sworn to (or affirmed), subscribed, and acknowledged before me this day of , (year) , by (name of person making statement) .

(Signature of Notary Public - State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced

F. Sub-Section 95.2311(5) authorizes the clerks of court to accept and record corrective notices in the county in which the intended real property is located.

> *(5) The clerks of the circuit courts where the intended real property is located are hereby authorized to accept and record corrective notices in the form described in subsection (4) as evidence of the intent of the grantor in the erroneous deed to convey the intended real property to the grantee in the erroneous deed.*

G. Sub-Section 95.2311 (6) states that the corrective notice operates as the correction of the first erroneous deed, and all subsequent erroneous deeds, that relates back to the date of the recordation of the erroneous deed.

> *(6) A corrective notice recorded pursuant to this section operates as a correction of the first erroneous deed, and that correction relates back to the date of recordation of the first erroneous deed as if that erroneous deed, and all subsequent erroneous deeds containing the identical scrivener's error, contained the legal description for the intended real property when recorded.*

H. Sub-Section 95.2311 (7) states that the remedies under this section are not exclusive.

> *(7) The remedies under this section are not exclusive and do not abrogate any right or remedy under the laws of Florida other than this section.*

Section 2 provides the effective date of the proposed statute.

Section 2. This act shall take effect upon becoming a law.

A bill to be entitled

An act relating Chapter 95; providing for curative procedures to correct certain errors in legal descriptions in deeds; amending Chapter 95, F.S.; and providing for an effective date.

Be It Enacted by the Legislature of the State of Florida

Section 1. Section 95.2311, Florida Statutes, is created to read:

95.2311 – Curative Procedure for Certain Description Errors in Deeds

(1) Definitions:

(a) "Erroneous deed" means any deed containing a scrivener's error, except quit claim deeds.

(b) "Intended real property" means the real property vested in the grantor and intended to be conveyed by the grantor in the erroneous deed.

(c) "Scrivener's error" means a single error or omission in the legal description of the intended real property in no more than one of the following categories:

(1) An error or omission in no more than one of the lot or block identifications of a recorded platted lot; however, the transposition of the lot and block identifications is considered one error; or

(2) An error or omission in no more than one of the unit, building, or phase identifications of a condominium or cooperative unit; or

(3) An error or omission in no more than one of a directional designation or numerical fraction of a tract of land that is described as a fractional portion of a Section, Township or Range; however, an error or omission in the directional description and numerical fraction of the same call is considered one error.

A scrivener's error does not mean multiple errors as this section will not correct multiple errors in the legal description of the intended real property.

(2) As limited by subsections (3)(a)-(c) and if the requirement in subsection (3)(d) is met, the erroneous deed conveys title to the intended real property as if there had been no scrivener's error, and, likewise, each subsequent erroneous deed containing the identical scrivener's error conveys title to the intended real property as if there had been no such identical scrivener's error.

(3) Subsection (2) applies only if:

(a) Record title to the intended real property was held by the grantor of the first erroneous deed at the time the first erroneous deed was executed.

(b) Within the five years preceding the recording of the erroneous deed, the grantor held title to no other real property in either (i) the same subdivision, condominium, or cooperative development or (ii) the same section, township and range, described in the erroneous deed.

(c) The intended real property is not described exclusively by a metes and bounds legal description.

(d) A curative notice in substantially the same form as set forth in subsection (4) is recorded in the Official Records of the county in which the intended real property is located, evidencing the intended real property to be conveyed by the grantor.

(4) Curative Notice. A curative notice must be in substantially the following form:

Curative Notice, Per Sec. 95.2311, F.S.
Scrivener's Error in Legal Description

The undersigned does hereby swear and affirm:

1. The deed which transferred title from _____, to _____, dated _____, and recorded on _____ in O.R. ____, Page _____, and/or Instrument No. _____, of the Official Records of _____ County, Florida (herein after referred to as "first erroneous deed"), and contained the following erroneous legal description:

[insert incorrect legal description]

[insert and repeat paragraph 2 to include each subsequent erroneous deeds in the chain of title containing the same erroneous legal description:

2. The deed transferring title from _____ to _____ and recorded on _____ in O.R. ____, Page _____, and/or Instrument No. _____, of the Official Records of _____ County, Florida, contains the same erroneous legal description described in the first erroneous deed.]

3. I have examined the Official Records of the county in which the intended real property is located and have determined that the Deed dated _____, and recorded on _____ in O.R. Book _____, Page_____ and/or Instrument Number _____, Official Records of _____ County, Florida, establishes that record title to the intended real property was held by the grantor of the first erroneous deed at the time the first erroneous deed was executed.

4. This notice is made to establish that the real property described as:

[insert legal description of the intended real property]

(hereinafter referred to as the "intended real property") was the real property that was to have been conveyed in the first erroneous deed [and all subsequent erroneous deeds].

Signature: _____

Printed Name: _____

STATE OF FLORIDA
COUNTY OF

Sworn to (or affirmed), subscribed, and acknowledged before me this day of , (year) , by (name of person making statement) .

(Signature of Notary Public - State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification
Type of Identification Produced

(5) The clerks of the circuit courts where the intended real property is located are hereby authorized to accept and record corrective notices in the form described in subsection (4) as evidence of the intent of the grantor in the erroneous deed to convey the intended real property to the grantee in the erroneous deed.

(6) A corrective notice recorded pursuant to this section operates as a correction of the first erroneous deed, and that correction relates back to the date of recordation of the first erroneous deed as if that erroneous deed, and all subsequent erroneous deeds containing the identical scrivener's error, contained the legal description for the intended real property when recorded.

(7) The remedies under this section are not exclusive and do not abrogate any right or remedy under the laws of Florida other than this section.

Section 2. This act shall take effect upon becoming a law.

[As approved by the Legal Opinions Committee of the Business Law Section of the American Bar Association on September 14, 2018 and the Board of the Working Group on Legal Opinions Foundation on October 29, 2018, and distributed to other bar groups and interested parties for approval]

STATEMENT OF OPINION PRACTICES[1]

1 INTRODUCTION

Third-party legal opinion letters ("closing opinions") [2] are delivered at the closing of a business transaction by counsel for one party (the "opinion giver") to another party (the "opinion recipient") to satisfy a condition to the opinion recipient's obligation to close. A closing opinion includes opinions on specific legal matters ("opinions") and, in so doing, serves as a part of the diligence of the opinion recipient. [3]

This Statement of Opinion Practices (this "*Statement*") provides guidance regarding selected aspects of customary practice and other practices generally followed throughout the United States in the giving and receiving of closing opinions. [4]

2 CUSTOMARY PRACTICE

Closing opinions and the opinions included in them are prepared and understood in accordance with the customary practice of lawyers who regularly give those opinions and lawyers who regularly review them for opinion

[1] This *Statement* has been published in *The Business Lawyer* [cite]. At the time of its publication, this *Statement* was approved by the bar associations and other lawyer groups identified in **Schedule I** (the "Schedule of Approving Organizations"). A current Schedule of Approving Organizations can be found at [URL]. Approval of this *Statement* by a bar association or other lawyer group does not necessarily represent approval by individual members of that association or group.

[2] The terms "opinion letters" and "closing opinions" are commonly used to refer to third-party legal opinion letters, defined in this *Statement* as "closing opinions."

[3] References in this *Statement* to an opinion recipient mean the addressee of a closing opinion and any other person the opinion giver expressly authorizes to rely on the closing opinion.

[4] This *Statement* is drawn principally from: Comm. on Legal Op. of the Section of Bus. Law of the Am. Bar Ass'n, *Legal Opinion Principles,* 53 BUS. LAW. 831 (May 1998), and Comm. on Legal Op., *Guidelines for the Preparation of Closing Opinions,* 57 BUS. LAW. 875 (Feb. 2002). It updates the *Principles* in its entirety and selected provisions of the *Guidelines*. The other provisions of the *Guidelines* are unaffected, and no inference should be drawn from omissions from the Guidelines in this *Statement*. Each provision of this *Statement* should be read and understood together with the other provisions of this *Statement*.

recipients.[5] The phrase "customary practice" refers principally to the work lawyers are expected to perform to give opinions ("customary diligence") and the way certain words and phrases commonly used in closing opinions are understood ("customary usage"). Customary practice applies to a closing opinion whether or not the closing opinion refers to it or to this *Statement*.[6]

3 Legal Obligations and Rules of Professional Conduct

When giving closing opinions, lawyers are subject to generally applicable legal obligations and to the rules governing the professional conduct of lawyers.[7]

4 General

4.1 Expression of Professional Judgment

An opinion expresses the professional judgment of the opinion giver regarding the legal issues the opinion addresses. It is not a guarantee that a court will reach any particular result.

4.2 Bankruptcy Exception and Equitable Principles Limitation

The bankruptcy exception and equitable principles limitation apply to opinions even if they are not expressly stated.

4.3 Cost and Benefit

The benefit to the recipient of a closing opinion and of any particular opinion should warrant the time and expense required to give them.

4.4 Golden Rule

Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat closing opinions as if they were part of a business negotiation. An opinion giver should not be expected to give an opinion that counsel for the opinion recipient would not give in similar circumstances if that counsel were the opinion giver and had the requisite

[5] *See Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions,* 63 BUS. LAW. 1277 (Aug. 2008) (the "*Customary Practice Statement*"), which has been approved by the bar associations and other lawyer groups listed at the end of that Statement and by additional groups following publication that can be found at [URL].

[6] *See infra* Section 10 (*Varying Customary Practice*).

[7] These include the duties opinion givers have to their own clients. Counsel to opinion recipients also have duties to their clients, including duties relating to closing opinions.

competence to give the opinion. Correspondingly, before declining to give an opinion it is competent to give, an opinion giver should consider whether a lawyer in similar circumstances would ordinarily give the opinion.

4.5 Reliance by Recipients

An opinion recipient is entitled to rely on an opinion, without taking any action to verify the opinion, unless it knows that the opinion is incorrect or unless its reliance on the opinion is otherwise unreasonable under the circumstances. An opinion recipient is entitled to expect an opinion giver, in giving an opinion, to exercise the diligence customarily exercised by lawyers who regularly give that opinion.[8]

4.6 Good Faith

An opinion giver and an opinion recipient and its counsel are each entitled to presume that the other is acting in good faith with respect to a closing opinion.

5 FACTS AND ASSUMPTIONS

5.1 Reliance on Factual Information and Use of Assumptions

Because the lawyers preparing a closing opinion (the "opinion preparers") typically will not have personal knowledge of all the facts they need to support the opinions being given, an opinion giver ordinarily is entitled to base those opinions on factual information provided by others, including its client, and on factual assumptions.

5.2 Reliance on Facts Provided by Others

An opinion giver is entitled to rely on factual information from an appropriate source unless the opinion preparers know that the information being relied on is incorrect or know of facts that they recognize make reliance under the circumstances otherwise unwarranted.

5.3 Scope of Inquiry Regarding Factual Matters

Opinion preparers are not expected to conduct an inquiry of other lawyers in their law firm or a review of the firm's records to ascertain factual matters, except to the extent they recognize that a particular lawyer is reasona-

[8] *See* the *Customary Practice Statement. See also infra* Section 10 (*Varying Customary Practice).*

bly likely to have or a particular record is reasonably likely to contain information not otherwise known to them that they need to give an opinion.[9]

5.4 Reliance on Representations That Are Legal Conclusions

An opinion giver should not base an opinion on a representation that is tantamount to the legal conclusion the opinion expresses. An opinion giver may, however, rely on a legal conclusion in a certificate of an appropriate government official.

5.5 Factual Assumptions

Some factual assumptions on which opinions are based need to be stated expressly; others do not. Factual assumptions that ordinarily do not need to be stated expressly include assumptions of general application that apply regardless of the type of transaction or the nature of the parties. Examples are assumptions that (i) the documents reviewed are accurate, complete and authentic, (ii) copies are identical to the originals, (iii) signatures are genuine, (iv) the parties to the transaction other than the opinion giver's client (or a non-client whose obligations are covered by the opinion) have the power and have taken the necessary action to enter into the transaction, and (v) the agreements those parties have entered into with the opinion giver's client (or the non-client) are enforceable against them. An opinion should not be based on an unstated assumption if the opinion preparers know that the assumption is incorrect or know of facts that they recognize make their reliance under the circumstances otherwise unwarranted. A stated assumption is not subject to this limitation because stating the assumption puts the opinion recipient on notice of the particular matters being assumed.[10] Stating expressly a particular assumption that could have been unstated does not imply the absence of other unstated assumptions.

5.6 Limited Factual Confirmations and Negative Assurance[11]

An opinion giver ordinarily should not be asked to confirm factual matters, even if the confirmation is limited to the knowledge of the opinion prepar-

[9] References in this *Statement* to a law firm also apply to a law department of an organization.

[10] Basing an opinion on a stated assumption is subject to the generally applicable limitation described in Section 12 (*No Opinion That Will Mislead Recipient*). Even if a stated assumption (for example, one that is contrary to fact) will not mislead the opinion recipient, an opinion giver may decide not to give an opinion based on that assumption.

[11] This *Statement* also applies, when appropriate in the context, to confirmations.

ers.[12] A confirmation of factual matters, for example, the accuracy of the representations and warranties in an agreement, does not involve the exercise of professional judgment by lawyers and therefore is not a proper subject for an opinion even when limited by a broadly-worded disclaimer. This limitation does not apply to negative assurance regarding disclosures in a prospectus or other disclosure document given to assist a recipient in establishing a due diligence defense or similar defense in connection with a securities offering.

6 LAW

6.1 Covered Law

When a closing opinion states that an opinion covers the law of a specific jurisdiction or particular laws, the opinion covers no other law or laws.

6.2 Applicable Law

An opinion on the law of a jurisdiction covers only the law of that jurisdiction that lawyers practicing in the jurisdiction, exercising customary diligence, would reasonably recognize as being applicable to the client or the transaction that is the subject of the opinion. Even when recognized as being applicable, some laws (for example, securities, tax and insolvency laws) are not covered by a closing opinion. A closing opinion also does not cover municipal and other local law. An opinion may, however, cover law that would not otherwise be covered if the closing opinion does so expressly. [13]

7 SCOPE

7.1 Matters Addressed

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters of law that involve the exercise of professional judgment. A closing opinion covers only those matters it specifically addresses.

7.2 Matters Beyond the Expertise of Lawyers

Opinion givers should not be expected to give opinions on matters that are not within the expertise of lawyers (for example, financial statement analysis, economic forecasting and valuation). When an opinion depends on a

[12] A confirmation that is sometimes requested and, depending upon the circumstances and its scope, sometimes given relates to legal proceedings against the client.

[13] *See infra* Section 10 *(Varying Customary Practice)*.

matter not within the expertise of lawyers, an opinion giver may rely on information from an appropriate source or an express assumption with regard to the matter.

7.3 Relevance

Opinion requests should be limited to matters that are reasonably related to the opinion giver's client or the transaction that is the subject of the closing opinion. Depending on the circumstances, limiting assumptions, exceptions and qualifications to those reasonably related to the client, the transaction and the opinions given can facilitate the opinion process.

8 PROCESS

8.1 Opinion Recipient and Customary Practice

An opinion giver is entitled to presume that the opinion recipient is familiar with, or has obtained advice about, customary practice as it applies to the opinions it is receiving from the opinion giver.

8.2 Other Counsel's Opinion

Stating in a closing opinion reliance on an opinion of other counsel does not imply concurrence in the substance of that opinion. An opinion giver should not be expected to express concurrence in the substance of an opinion of other counsel.

8.3 Financial Interest in or Other Relationship with Client

Opinion preparers ordinarily do not attempt to determine whether others in their law firm have a financial interest in, or other relationship with, the client. Nor do they ordinarily disclose any such financial interest or other relationship that they or others in their firm have. If the opinion preparers recognize that such a financial interest or relationship exists, they should consider whether, even if disclosed, it will compromise their professional judgment with respect to the opinions being given.

8.4 Client Consent and Disclosure of Information

If applicable rules of professional conduct require a client's consent to the delivery of a closing opinion, an opinion giver may infer that consent from a provision in the agreement making delivery a condition to closing or from other circumstances of the transaction. Unless a client gives its informed consent, an opinion giver should not give an opinion that discloses information the opinion preparers know the client would not want to be dis-

closed or as to which the opinion giver is otherwise subject to a duty of non-disclosure under applicable rules of professional conduct.

9 DATE

A closing opinion speaks as of its date. An opinion giver has no obligation to update a closing opinion for events or legal developments occurring after its date.

10 VARYING APPLICATION OF CUSTOMARY PRACTICE

The application of customary practice, including those aspects of customary practice described in this *Statement*, to a closing opinion or any particular opinion may be varied by a statement in the closing opinion or by an understanding with the opinion recipient or its counsel.

11 RELIANCE

A closing opinion may be relied on only by its addressee and any other person the opinion giver expressly authorizes to rely.[14]

12 NO OPINIONS THAT WILL MISLEAD RECIPIENT

An opinion giver should not give an opinion that the opinion preparers recognize will mislead the opinion recipient with regard to a matter the opinion addresses.[15]

[14] This section does not address whether anyone else might be permitted to rely as a matter of law. *See also supra* note 3.

[15] An opinion, even if technically correct, can mislead if it will cause the opinion recipient, under the circumstances, to misevaluate the opinion. The risk of misleading an opinion recipient can be avoided by appropriate disclosure. An opinion giver may limit the matters addressed by an opinion through the use of specific language in the closing opinion (including a specific assumption, exception or qualification) so long as the opinion preparers do not recognize that the limitation itself will mislead the recipient. *See supra* Section 10 (*Varying Customary Practice*). Omissions from a closing opinion of information unrelated to the opinions given do not mislead.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Richard McIver, Co-Chair, Real Property Finance & Lending Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date_____, 20___)

Address

Telephone: (___) _____

Position Type The Florida Bar, RPPTL Section, and Real Property Finance & Lending Committee

CONTACTS

Board & Legislation Committee Appearance

S. Katherine Frazier, Hill Ward Henderson, 101 East Kennedy Boulevard, Suite 3700, Tampa, Florida 33602, Telephone: (813) 227-8480, Email: Katherine.frazier@hwhlaw.com

Peter M. Dunbar, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: pdunbar@deanmead.com

Martha J. Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: medenfield@deanmead.com

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support __X___ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

Support a clarification that the one-year statute of limitations on a mortgage foreclosure deficiency action begins on issuance of the certificate of title.

Reasons For Proposed Advocacy:

Currently, the one-year statute of limitations on a foreclosure deficiency action begins "the day after the certificate is issued." Fla. Stat. 95.11(5)(h) (emphasis added). This language is problematic because there are three different certificates issued in a foreclosure case--the certificate of sale, certificate of title and certificate of disbursements, but the statute does not specify. The three certificates are issued at least 10 days apart from the first to the last, which affects when the statute of limitations begins and ends. In cases where objections to sale are filed, the certificate of title may be issued months after the certificate of sale.

The 2013 House Staff Analysis of 95.11(5)(h) seems to indicate that the Legislature intended the one-year period to run from issuance of the certificate of title: "After 10 days, the sale is confirmed by the clerk's issuance of the certificate of title… and the court may, in its discretion, enter a deficiency decree…. The limitations period begins on the 11th day after a foreclosure sale," which is the day after the certificate of title is issued.

The correct event for triggering the one-year statute of limitations is issuance of the certificate of title. Submitted with this Request: Proposed Bill, White Paper, 2013 House Staff Analysis.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

Public Interest Law Section
(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

A bill to be entitled

An act relating to the statute of limitations on a claim of deficiency following a residential mortgage foreclosure; clarifying s. 95.11, F.S.; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (h) of subsection (5) of section 95.11, Florida Statutes, is amended to read:

(5) WITHIN ONE YEAR.—

(h) An action to enforce a claim of a deficiency related to a note secured by a mortgage against a residential property that is a one-family to four-family dwelling unit. The limitations period shall commence on the day after the certificate of title is issued by the clerk of court or the day after the mortgagee accepts a deed in lieu of foreclosure. Nothing in this section affects the provisions of s. 702.06 regarding the date to be used in calculating the maximum limit of the deficiency amount.

Section 2. The effective date of this act shall be July 1, 2019.

Section 3. This act is intended to clarify existing law and shall apply to all deficiency actions pending on the effective date of this act and filed after the effective date of this act.

REAL PROPERTY, PROBATE & TRUST LAW SECTION
OF THE FLORIDA BAR (RPPTL)

White Paper

Proposal To Amend Florida Statutes § 95.11(5)(h)

I. SUMMARY

The proposal would add the words "of title" to § 95.11(5)(h). This change would clarify that issuance of the clerk's certificate of title is the event which triggers the one-year statute of limitations on an action for deficiency following a mortgage foreclosure and not issuance of the certificate of sale.

II. CURRENT SITUATION

The current triggering language of § 95.11(5)(h) is patently ambiguous. It reads: "The limitations period shall commence on the day after the certificate is issued by the clerk of court…" (emphasis added).

The underlined phrase "the certificate" is patently ambiguous because the judicial sale procedure (Fla. Stat. § 45.031) requires the clerk to issue two different certificates on two different dates. First, the clerk issues a certificate of sale, certifying that the sale was held and naming the high bidder that purchased the property. Second, after any objections to the sale are rejected or 10 days pass if no objections are raised, the clerk issues a certificate of title. The certificate of title legally transfers title from the previous owner to the purchaser at the foreclosure sale. Because the statute only refers to "the certificate," the statute is ambiguous and a clarification is required.

Foreclosure practitioners and discerning judges understand that the action for deficiency does not exist until the objections period closes and the certificate of title is issued. *See* 2013 House of Representatives Staff Analysis of H.B. 87, pp. 3, 4. However, the current language of § 95.11(5)(h) leaves the statute patently ambiguous and requires judicial interpretation.

III. EFFECT OF PROPOSED CHANGES

The sole effect of the proposed change would be to clarify that the one-year statute of limitations on a deficiency action begins upon issuance of the clerk's certificate of title in the underlying foreclosure action.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

This proposal will lessen the burden on trial and appellate courts arising from disputes over the meaning of the statute.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

This proposal will have no direct measurable impact on the private sector. However, it will benefit the private sector by increasing certainty about the time period lenders have to pursue a deficiency action following a foreclosure action and by reducing litigation expenses for parties engaged in disputes over the timeliness of a deficiency action.

VI. CONSTITUTIONAL ISSUES

There are no known constitutional issues.

VII. OTHER INTERESTED PARTIES

This proposal is likely to be of interest to the mortgage lending industry, the title underwriting industry, the title examination industry, state and local governments, and consumer advocacy groups.

Comprehensive Rider to the Residential Contract For Sale And Purchase

THIS FORM HAS BEEN APPROVED BY THE FLORIDA REALTORS AND THE FLORIDA BAR

When initialed by all parties, the parties acknowledge that the disclosure set forth below was provided to Buyer on the same date as the parties executed the Florida Realtors®/Florida Bar Residential Contract For Sale And Purchase and the clauses below will be incorporated therein:

_____(SELLER)

and _____ (BUYER)

concerning the Property described as:_____

_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

CC. MIAMI-DADE COUNTY SPECIAL TAXING DISTRICT DISCLOSURE

Seller notifies Buyer that Property is or will be located within a special taxing district and is or will be subject to assessments levied for improvements or services reflected as non-ad valorem tax(es) on the Property tax bill.

Section 18-20.2 of the Code of Miami-Dade County, Florida, requires sellers of "residential property" and "new residential property" (both as defined in Section 18-20.2) to provide this disclosure to buyers under the following circumstances:

(i) A seller of "residential property" shall provide the buyer this notice if the prior year's tax bill for the Property* reflected a special assessment levied for improvements or services within a special taxing district; OR
(ii) A seller of "new residential property" shall provide the buyer this notice of the existence of a special taxing district or of the pendency of a petition to create such a district.

THE PROPERTY WHICH IS THE SUBJECT OF THIS TRANSACTION IS LOCATED WITHIN SPECIAL TAXING DISTRICT

_____

[ENTER NAME OF SPECIAL TAXING DISTRICT]

CREATED BY MIAMI-DADE COUNTY (OR PROPOSED TO THE BOARD OF COUNTY COMMISSIONERS) FOR THE PURPOSE OF PROVIDING LOCAL IMPROVEMENTS AND SERVICES IN THE NATURE OF

_____ .

[ENTER TYPE OF IMPROVEMENTS OR SERVICES]

THE COSTS FOR PROVIDING SUCH IMPROVEMENTS AND SERVICES SHALL BE PAID BY SPECIAL ASSESSMENTS LEVIED AGAINST PROPERTIES WITHIN THE DISTRICT. SAID SPECIAL ASSESSMENTS MAY BE COLLECTED AT THE SAME TIME AND IN THE SAME MANNER AS AD VALOREM TAXES.

*To search for Property tax bill visit http://www.miamidade.gov/pa/

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Richard McIver, Co-Chair, Real Property Finance & Lending Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date_____, 20___)

Address Kass Shuler, P.O. Box 800, Tampa, Florida 33601
Telephone: 813-405-2750

Position Type The Florida Bar, RPPTL Section, and Real Property Finance & Lending Committee

CONTACTS

Board & Legislation Committee Appearance

S. Katherine Frazier, Hill Ward Henderson, 101 East Kennedy Boulevard, Suite 3700, Tampa, Florida 33602, Telephone: (813) 227-8480, Email: Katherine.frazier@hwhlaw.com
Peter M. Dunbar, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: pdunbar@deanmead.com
Martha J. Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: medenfield@deanmead.com

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support __X___ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

Support a repeal of § 83.561, Florida Statutes to: (i) eliminate inconsistencies between it and the more protective federal Protecting Tenants at Foreclosure Act; and, (ii) clarify the rights and obligations of tenants and purchasers of property upon foreclosure sale.

Reasons For Proposed Advocacy:

From May 20, 2009 through December 31, 2014, federal Protecting Tenants at Foreclosure Act, ("PTFA"), provided a nationwide standard of conduct concerning the rights and obligations of tenants and purchasers of property at foreclosure sale. On January 1, 2015, the PTFA expired.

In the 2015 session, the Florida legislature passed HB 779, which created § 83.561. Section 83.561 is similar to but less protective than the PTFA. Section 83.561 does not require foreclosure sale purchasers to honor

existing leases (PTFA does) and allows the purchasers to terminate existing tenancies with 30 days' notice (PTFA requires 90 days).

On June 23, 2018, the PTFA was revived. As a result, the conflicting and less protective provisions of § 83.561 have been preempted by the PTFA. However, § 83.561, Florida Statutes remains on the books, which creates confusion for tenants and for purchasers of properties at foreclosure. Repeal of § 83.561 would eliminate confusion resulting from the inconsistent provisions of the two statutes, leaving in place the more tenant protective PTFA and clarifying the obligations of purchasers at foreclosure.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position _____

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

_____

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

Public Interest Law Section
(Name of Group or Organization) (Support, Oppose or No Position)

_____
(Name of Group or Organization) (Support, Oppose or No Position)

_____
(Name of Group or Organization) (Support, Oppose or No Position)

_____
(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

REAL PROPERTY, PROBATE & TRUST LAW SECTION
OF THE FLORIDA BAR

White Paper

Proposal to Repeal § 83.561, Florida Statutes

I. SUMMARY

This proposal would repeal § 83.561, Florida Statutes, which provides for the termination of rental agreements upon foreclosure. Repeal of this statute would eliminate inconsistencies between it and the federal Protecting Tenants and Foreclosure Act and clarify the rights and obligations of tenants and persons purchasing property upon foreclosure sale.

II. HISTORICAL BACKGROUND AND CURRENT SITUATION

The federal legislation known as the Protecting Tenants at Foreclosure Act (the "PTFA") was initially enacted as part of the Helping Families Save Their Homes Act of 2009. *See* Pub. Law No. 111-22, Div. A, Title VII, §§ 702-704, 123 Stat. 1660 (2009), 12 U.S.C. § 5220, note.[1] The PTFA took effect on May 20, 2009 and was originally scheduled to sunset on December 31, 2012. On July 21, 2010, prior to the expiration of the PTFA, the Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted, extending the sunset provision, by two years, to December 31, 2014. *See* Pub. Law No. 111-203, Title XIV, § 1484, 124 Stat. 2204 (2010). (A copy of the text of the PTFA is attached hereto as Exhibit "A".)

The PTFA provided a nationwide standard of conduct concerning the rights and obligations of tenants and persons acquiring a property at foreclosure sale. The PTFA was designed to ensure that bona fide tenants facing eviction from a foreclosed property would have adequate time to make other housing arrangements. Primarily, the PTFA required purchasers to honor existing bona fide leases and/or to provide bona fide tenants with ninety (90) days' notice to vacate. For more than five years, from May 20, 2009 through December 31, 2014, the rights and obligations of tenants and persons purchasing property upon foreclosure sale in Florida, were governed by the PTFA. However, on January 1, 2015, the PTFA expired.

Shortly after the expiration of the PTFA, on June 2, 2015, the Florida legislature passed HB 779 (2015), which created § 83.561, Florida Statutes.[2] (A copy of the text of § 83.561, Florida Statutes is attached hereto as Exhibit "C".) In some respects, § 83.561, Florida Statutes mirrored the PTFA. Both statutes applied to the same types of

[1] The PTFA is codified as a note to 12 U.S.C. § 5220.

[2] The House of Representatives Final Bill Analysis for HB 779 recognized the void left by expiration of the PTFA as the driving force behind this legislation, noting, "The matter of tenants being forced out of foreclosed home on short notice is not unique to Florida. In the recent economic downturn, Congress passed the Protecting Tenants in [*sic*] Foreclosure Act of 2009, a nationwide law that required the winning bidder at most foreclosure sales to honor an existing bona fide lease or, in the alternative, give the tenant at least 90 days' notice to vacate. The act expired December 31, 2014." (A copy of the House of Representatives Final Bill Analysis for HB 779 is attached hereto as Exhibit "B".)

properties, leases, tenants and tenancies. However, § 83.561 was less protective of tenants than the expired PTFA in significant ways, including without limitation, the following:

Notice Required to Terminate Tenancy After Foreclosure

- Thirty (30) days under § 83.561, Florida Statutes. *See* Fla. Stat. § 83.561(1)(a).

- Ninety (90) days under the PTFA. *See* Pub. Law No. 111-22, Div. A, Title VII, § 702(a)(1), 123 Stat. 1660 (2009).

Whether Purchaser of Foreclosed Property Must Honor the Terms of an Existing Lease

- Not under § 83.561, Florida Statutes. The purchaser upon foreclosure can apply to the court for a writ of possession at the end of the 30-day notice period if the tenant does not vacate. *See* Fla. Stat. § 83.561(2). Section 83.561(1)(b), Florida Statutes does entitle the tenant to the protections of § 83.67, Florida Statutes during the 30-day notice period and until an eviction occurs, *i.e.*, the purchaser cannot: terminate utilities; prevent access; discriminate against tenants that are service members; prevent the display of a United States flag; or, remove doors, windows, roofs, or the tenant's personal property.

- Generally, yes under the PTFA. A tenant under a bona fide lease may continue to occupy the property until the end of the remaining term of the lease, unless the property is sold to person who intends to occupy the property as a primary residence. *See* Pub. Law No. 111-22, Div. A, Title VII, § 702(a)(2)(A), 123 Stat. 1660 (2009).[3]

On May 24, 2018, the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 was signed into law. Among other amendments to the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 restored "the notification requirements and other protections related to eviction of renters in foreclosed properties" as provided in §§ 701 through 703 of the PTFA and repealed § 704 of the PTFA the sunset provision. *See* Pub. Law No. 115-74, Title III, § 304, __ Stat. __ (2018).

The revival of the PTFA was effective June 23, 2018. Since that time, the less protective provisions of § 83.561, Florida Statutes, have for all intents and purposes been preempted. However, § 83.561 remains on the books as Florida law, which creates confusion for tenants and the purchasers of properties at foreclosure alike.

The PTFA expressly provides, "that nothing under this section shall affect . . . any State or local law that provides longer time periods or other additional protections for tenants."

[3] Note that a residential lease terminable at will under state law, could be terminated on 90 days' notice under the PTFA. *Id*. at § 702(a)(2)(B). *See also Joel v. HSBC Bank USA*, 420 Fed.Appx. 928, 931 (11th Cir. 2011). In this scenario as well, 90 days' notice would be more protective than Florida law which would provide between 7- and 60-days' notice depending on the specific term of the residential lease. *See* Fla. Stat. § 83.57(1)-(4).

See Pub. Law No. 111-22, Div. A, Title VII, § 702(a)(2)(b), 123 Stat. 1660 (2009). "Thus, the PTFA, by its own terms, does not preempt state law that provide greater protections for tenants. However, it does preempt state law that is less protective of tenants, such as the provisions of Kentucky law at issue here." *Mik v. Federal Home Loan Mortg. Corp.*, 743 F.3d 149 (6th Cir. 2014) *citing PNC Bank, Nat'l Ass'n v. Branch*, No. CV 11-596, 2011 WL 2981806, at *1 (D. Ariz. July 22, 2011). Upon the revival of the PTFA, there can be little, if any doubt, that the less protective provisions of § 83.561, Florida Statutes governing notice and honoring the existing terms of bona fide leases have been preempted.

III. EFFECT OF PROPOSED CHANGES

Repeal of § 83.561, Florida Statutes, would eliminate confusion for tenants and the purchasers of property at foreclosure regarding the divergent requirements of state and federal law, leaving in place the more protective PTFA. By doing so, repeal of § 83.561 would also reduce the potential for preemption litigation, would ensure the greater protections of the PTFA for tenants, and would encourage third party purchasers to buy at foreclosure sales. It would also avoid the need for the Florida judiciary to rule that § 83.561 is federally preempted—a ruling that courts approach with reluctance owing to the comity due to the Legislature.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

This proposal will lessen the burden on trial and appellate courts arising from disputes over the conflicting provisions of the two (2) statutes involving lenders, tenants, and third-party purchasers at foreclosure sales.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

This proposal will have no direct measurable impact on the private sector. However, it will indirectly benefit the private sector by increasing certainty about the rights and obligations that tenants and purchasers of properties have following a foreclosure action and by reducing litigation expenses attendant thereto.

VI. CONSTITUTIONAL ISSUES

Repealing § 83.561 would avoid the constitutional clash of Florida § 83.561 against the federal PTFA.

VII. OTHER INTERESTED PARTIES

A bill to be entitled

An act relating to rental agreements; repealing s. 83.561, F.S., relating to the termination of residential rental agreements after foreclosure; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 83.561, Florida Statutes, is repealed.

Section 2. This act shall take effect July 1, 2019.