

COMMITTEE REPORTS

To keep you focused this quarter, the Mentoring Committee is taking a look into this often overlooked area. We have sought out Lois Lepp, who formerly worked for The Florida Bar as an attorney in the Ethics Licensure Prosecution Division (now an elder law attorney), to assist us.

The first and foremost area of concern for any elder law attorney is a clear understanding of who your client is. Lois says it is important to avoid the appearance of a conflict. For example, she says if an insurance company wishes for you to represent a client, she has the client call her to avoid the appearance that she is an arm of the insurance company. We both agree that having a document such as a fee agreement or a retainer is a good way for the family and the attorney to understand who represents whom.

Another area of concern is competency. We have all experienced the situation where the family brings Mom in and tells us what she wants (which typically cuts someone out). What do you do? Lois recommends that "you not be afraid to ask for a letter from the doctor." If they don't have anything to hide, they will understand you are trying to help make the document stronger, not cause the family trouble. How do you handle a client with diminished capacity? Lois recommends reviewing the rules often, specifically Florida Rules of Professional Conduct 4-1.4; 4-1.14. She says one should respect the client's circumstances and try to honor his or her wishes as much as reasonably possible. Don't assume that because of an examining committee report, you can ignore your client's wishes.

If someone hires you with a power of attorney, do not assume it is valid. You need to read the power of attorney to make sure it is still valid and that it does what the client wants it to do. Does it allow you to draft an irrevocable trust or allow for self dealing?

If you are meeting with a family that is, well, out of the ordinary, and there are red flags going up in your head, you should slow down the process. Think of how to protect your

client. If you don't feel comfortable, don't be afraid to turn away the client. Lois recommends documenting what you believe happened at the meeting. Keep good records because it could be years before you are asked to recount the encounter.

In the end, good ethics may be as simple as we once believed. Do right by your client (you just need to know who that person is first), help him or her accomplish his or her goal (you can only obtain what the person has a right to) and sleep well at night (well ... ethically you have the right to).

I hope you will join us for our next Tricks of the Trade teleconference where we will continue our conversation with Lois Lepp. One hour of CLE credits will be available. Watch for an email giving you additional information.

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Resident/Facility Rights Special Committee

John Griffin, chair

SB 1102 & HB 817: A first step toward protecting ALF residents

by Aubrey Posey

Imagine being asked to leave your home for arguing with a neighbor, organizing a group of neighbors to advocate for change or complaining to state agencies about your landlord's actions. What if you were asked to leave because you did not "mesh" with the community? Sadly, being asked to leave one's home under these circumstances is a reality for many assisted living facility (ALF) residents.

Current law requires that residents be given 45-days' notice of a relocation from an ALF and that reasons for the relocation be written; it does not specify the terms in which a resident will be notified. It provides no guidance as to when a resident can be relocated, other than those provided under emergency

circumstances.¹ While many facilities provide written notice directly to the resident, many do not.

The Long-Term Care Ombudsman Program has advocated for several years for legislative change to address the issue, specifically for requirements that would provide notice specifically to ALF residents and their legal representatives and the opportunity to challenge a relocation or termination.

This year, Mike Fasano (S-11) and Rep. Tom Anderson (H-45) filed SB 1102 and HB 817 to address these concerns. The bills require the Department of Elder Affairs to draft a standard form for the relocation or termination of a resident. The form will include the grounds for relocation or termination and specific facts related to the resident supporting those grounds. Only six specified reasons will permit relocation or termination. Even though broadly worded, the list of reasons provides assurance to residents that they cannot be discharged for arbitrary and discriminatory reasons.

The form will list the effective date of relocation and the right to request the local ombudsman to review the notice. This form will be provided to the resident and/or his or her legal representative 45 days in advance. The legislation only reinforces the resident's right to contact the program and does not include a full appeals process, which the Elder Law Section supports. The potential to resolve an issue and to allow the resident to continue to reside in his or her home is important.

ALF residents typically rent a unit, often referred to as an "apartment"; however, they have none of the protections or recourse available under Chapter 83, part II, F.S.² Although many have care needs similar to nursing home residents due to the increasing use of waivers and participation in the diversion program, they have none of the protections available under state and federal laws to quickly challenge inappropriate or discriminatory discharges.³ This makes no sense. SB 1102 and HB 817 present a first

COMMITTEE REPORTS

step toward achieving some protection for these vulnerable residents.

Aubrey Posey is the legal advocate for Florida's Long-Term Care Ombudsman Program, which identifies, investigates and resolves complaints made by or on behalf of long-term care residents. She is a member of the Resident/Facility Rights Special Committee.

Endnotes:

1. § 429.28(1)(k), F.S. (2009).
2. § 83.42(1), F.S. (2009).
3. 42 U.S.C. § 1395i-3(c)(2) (2006); § 400.0255, F.S. (2009)

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Unlicensed Practice of Law Committee

John R. Frazier, chair

The UPL Committee holds a monthly teleconference on the third Tuesday of each month at 4 p.m.

Since the last report, our committee finalized an alert that was published in the Fall 2009 edition of *The Elder Law Advocate*. The alert summarized some of the basic activities that constitute UPL and encouraged attorneys as well as their clients to report alleged instances of UPL to The Florida Bar. I have also been in recent communication with Al Rothstein, who is working with the Academy of Florida Elder Law Attorneys on a UPL project. The AFELA project includes a slideshow that provides information to nursing facilities and to the public to increase awareness regarding the unlicensed practice of law in Florida. I provided Mr. Rothstein with a copy of an unpublished article I previously had written regarding UPL, which outlines the UPL problem and the risks to the public associated with using non-attorneys for Medicaid planning. Mr. Rothstein will use some of the information in the article to supplement the UPL project he is working on.

A primary goal of the UPL Com-

mittee is to increase and maintain awareness of the UPL problem, both to attorneys and the public. Since the Florida Bar UPL investigative process is "complaint driven," it is critical for attorneys and their clients to be willing to file UPL complaints when alleged instances of UPL are encountered. Therefore, it is a primary goal of the UPL Committee to encourage and facilitate the filing of UPL complaints with The Florida Bar.

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Death Care Industry Committee

Philip M. Weinstein, chair

The Death Care Industry Committee is alive and well. Please find below a summary of the legislation that will affect the industry. All of the major funeral and cemetery organizations have supported this legislation.

continued, next page

The Florida Bar's Haiti relief efforts

The people of Haiti need our help. The recent earthquake killed an estimated 70,000 people and left the country's infrastructure in ruins. Many survivors do not have access to food, water, medicine and the basic necessities that we often take for granted.

As Florida's legal community, we have an opportunity to assist the people of Haiti in their recovery and rebuilding efforts. The American Red Cross has set up an account to receive donations from all members of The Florida Bar directed to relief and development efforts in Haiti. Assistance provided by the American Red Cross may include sending relief supplies, mobilizing relief workers and providing financial resources.

The Florida Bar International Law Section is leading this effort and is seeking the help and support of every Florida Bar member, section and voluntary bar association.

To donate, please visit: <http://american.redcross.org/floridabar-emp>.

Any donation amount will help make a difference. The International Law Section is encouraging members to donate the equivalent of one billable hour. Given our numbers, this effort by Florida's legal profession can raise millions of dollars. Together, we have that power.

If you know of others who are willing to assist us, please forward this information to them. For more information about the Red Cross, please visit www.redcross.org. Thank you.

Jesse Diner
President, The Florida Bar

Francisco A. Corrales
Chair, The Florida Bar
International Law Section