JW Marriott Marquis
Miami, Florida

Saturday, November 9, 2019
9:45 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
JW Marriott Marquis
Miami, Florida
Saturday, November 9, 2019

Agenda

Note: Agenda Items May Be Considered on a Random Basis

I. **Presiding** — *Robert S. Freedman, Chair*

II. **Attendance** — *Steven H. Mezer, Secretary*

III. **Minutes of Previous Meeting** — *Steven H. Mezer, Secretary*

1. Motion to approve the minutes of the July 27, 2019, meeting of the Executive Council held at The Breakers, Palm Beach, Florida. **p. 11-22**

IV. **Chair's Report** — *Robert S. Freedman, Chair*

1. Recognition of Guests

2. Introduction and comments from sponsors of Executive Council meeting. **p. 23-25**

3. Milestones

4. Report of Interim Actions by the Executive Committee: **p. 26-27**

   a. Approval of resolution to honor Past Chair Lewis Kanner on his passing. **p. 28**

   b. Authorization given to the Ad Hoc E-Wills Committee to appoint ambassadors to consult with the Florida Court Clerks and Comptrollers on matters pertaining to electronic wills.

   c. Appointment of Erin Christy to serve as the RPPTL Section's representative to the Diversity & Inclusion Committee of The Florida Bar.

   d. Approval of the contract with Dean Mead to serve as the Section's Legislative Consultant for the period September 1, 2020 - August 31, 2022.

   e. Approval of the Section position to approve proposed changes to Rules 6-30.2, 6-30.3 and 6-30.4, Rules Regulating The Florida Bar, pertaining

to composition of the membership of the Condominium and Planned Development Law Certification Committee and standards for peer review for certification and recertification of candidates. **p. 29-33**

f. Approval of the Section position to oppose proposed amendments to Rules 5.181, 5.182, 5.183, 5.184 and 5.185, Florida Probate Rules, pertaining to mediation/arbitration provisions. **p. 34-37**

g. Approval of the Section position to oppose the Florida Commission on Access to Civil Justice's proposal to expand the Florida Registered Paralegal Program (Chapter 20, Rules Regulating The Florida Bar) through amendments. **p. 38-51**

h. Authorization of the Section Chair to vote at the upcoming Council of Sections videoconference meeting to increase the Section's annual dues from $300.00 to $500.00.

5. 2019-2020 Executive Council meetings. **p. 52**

6. Tampa and Amsterdam updates

7. Convention update

V. **Liaison with Board of Governors Report** — *Michael G. Tanner*

VI. **Chair-Elect's Report** — *William T. Hennessey, III, Chair-Elect*

1. 2020-2021 Executive Council meetings **p. 53**

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

1. Statement of Current Financial Conditions. **p. 54**

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

IX. **CLE Seminar Coordination Report** — *Wilhelmina F. Kightlinger (Real Property) and John C. Moran (Probate & Trust), Co-Chairs*

1. Report on pending CLE programs and opportunities **p. 55**

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

XI. **General Standing Division Report** — *William T. Hennessey, III, General Standing Division Director and Chair-Elect*

Action Item:

1. **2020-2021 Budget** — *Wm. Cary Wright, Treasurer and Chair, Budget Committee*

a. Motion to approve the proposed Real Property, Probate and Trust Law Section Budget for the fiscal year 2020–2021. **p. 56-63**

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

   a. Finalization of 2019 Strategic Plan (update after Breakers). **p. 64-105**

3. **Professionalism and Ethics**- *Gwynne A. Young, Chair*

   a. Motion to (A) adopt as a Section position support for proposed changes to Rule 4-1.14 (sc. Client Under a Disability) of the Rules Regulating The Florida Bar; (B) find that such position is within the purview of the RPPTL Section; and (c) expend Section funds in support of the proposed position. **p. 106-110**

Informational Items:

1. **Council of Sections** – *Robert S. Freedman and William T. Hennessey, III*

   a. Report on Board of Governors' approval of streamlined process for amending Section Bylaws. **p. 111-134**

2. **Homestead Issues Study Committee**, *Jeffrey S. Goethe and J. Michael Swaine, Co-Chairs*

   a. Report on status of current RPPTL Section Position on legislation concerning homestead held in revocable trusts and a proposed compromise which will be proposed in the current legislative session. **p. 135-158**

3. **Professionalism and Ethics**- *Gwynne A. Young, Chair*

   a. Ethics Vignette: When Does a Current Client Become a Former Client? **p. 159-161**

4. **Ad Hoc Florida Bar Leadership Academy-** *Kristopher E. Fernandez and J. Allison Archbold, Co-Chairs*

   a. Report on application process and scholarship availability

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

   a. Update on matters of interest.

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

   a. Update on committee activities and RPPTL Law School Liaisons. **p. 162-167**

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

   a. Update on committee activities.

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

   a. Report on committee activities

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

   a. Discussion concerning study of the Uniform Partition of Heirs Property Act and Proposed HB349. **p. 168-183**

10. **Liaison With Business Law Section**- *Manuel Farach and Gwynne Young*

    a. Report on items of potential interest, **p. 184-186**

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

Action Items:

1. **Condominium and Planned Development Committee** – *William P. Sklar and Joseph E. Adams, Co-Chairs*

   a. Motion to: (A) adopt as a Section legislative position support for amendment to §718.111, Florida Statutes, to clarify that a condominium association has the right to represent its unit owner members in a group; (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. **p. 187-193**

2. **Construction Law Committee –** *Reese J. Henderson, Jr., Chair*

   a. Motion to: (A) adopt as a Section legislative position support for amendments to Ch. 255 and 713, Florida Statutes to (1) expand the definition of contractor under Section 713.01, F.S. to include construction managers; (2) correct ambiguity in improper payments made by an owner prior to abandonment of a project by contractor; (3) requiring a tenant's information on a notice of commencement where a tenant is contracting for leasehold improvements; (4) statutorily bringing attorney fees under Chapter 713 back to the net judgment rule as opposed to the prevailing party standard set forth in *Trytek v. Gale Industries*; (5) clearing up ambiguity in Section 337.18, F.S. as it relates to waiver and release of payment bond claims in public transportation projects; (6) repealing Section 255.05(7), F.S., which allows for cash to serve as an alternative form of security on public projects as opposed

to payment bonds; and (7) repealing Section 713.245, F.S., which created conditional payment bonds; (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. **p. 194-210**

XIII. Probate and Trust Law Division Report — *Sarah Butters, Division Director*

Action Item:

1. Trust Law Committee - *Matthew Triggs, Chair*

a. Motion to (A) adopt as a Section legislative position support of the "Florida Directed Trust Act", a modified version of the Uniform Directed Trust Act, which clarifies and changes various aspects of the Florida Statutes relating to directed trusts. (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. **p. 211-246**

Informational Item:

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

a. Consideration of potential changes to the Guardianship Code that would (1) require court approval of a guardian's consent to a DNR unless a pre-existing DNR was signed prior to incapacity; (2) broaden a guardian's duty to disclose conflicts of interest; and (3) prohibit a professional guardian from petitioning for his/her own appointment absent extraordinary circumstance.

XIV. Probate and Trust Law Division Committee Reports — *Sarah Butters, Division Director*

1. **Ad Hoc Guardianship Law Revision Committee** — Nicklaus J. Curley, and Sancha Brennan Whynot, Co-Chairs; David C. Brennan and Stacey B. Rubel, Co-Vice Chairs
2. **Ad Hoc Committee on Electronic Wills —** Angela McClendon Adams, Chair; Frederick "Ricky" Hearn and Jenna G. Rubin, Co-Vice Chairs
3. **Ad Hoc Study Committee on Professional Fiduciary Licensing —** Angela McClendon Adams, Chair; Yoshimi Smith, Vice Chair
4. **Ad Hoc Study Committee on Estate Planning Conflict of Interest —** William T. Hennessey, III, Chair; Paul Edward Roman, Vice-Chair
5. **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
6. **Asset Protection** — Brian M. Malec, Chair; Richard R. Gans and Michael A. Sneeringer, Co-Vice-Chairs

7. **Attorney/Trust Officer Liaison Conference** — Tattiana Patricia Brenes-Stahl and Cady Huss, Co-Chairs; Tae Kelley Bronner, Stacey L. Cole (Corporate Fiduciary), Patrick C. Emans, Gail G. Fagan and Mitchell A. Hipsman, Co-Vice Chairs
8. **Charitable Planning and Exempt Organizations Committee** — Seth Kaplan, Chair and Jason Havens, Vice-Chair
9. **Elective Share Review Committee** — Lauren Young Detzel, Chair; Cristina Papanikos and Jenna G. Rubin, Co-Vice-Chairs
10. **Estate and Trust Tax Planning** — Robert L. Lancaster, Chair; Richard Sherrill and Yoshimi O. Smith, Co-Vice Chairs
11. **Guardianship, Power of Attorney and Advanced Directives** — Nicklaus Joseph Curley, Chair; Brandon D. Bellew, Stacey Beth Rubel, and Jamie Schwinghammer, Co-Vice Chairs
12. **IRA, Insurance and Employee Benefits** — L. Howard Payne and Alfred J. Stashis, Co-Chairs; Charles W. Callahan, III, Vice Chair
13. **Liaisons with ACTEC** — Elaine M. Bucher, Shane Kelley, Charles I. Nash, Tasha K. Pepper-Dickinson, and Diana S.C. Zeydel
14. **Liaisons with Elder Law Section** — Travis Finchum 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; Angela McClendon Adams, James R. George and R. Lee McElroy, IV, Co-Vice Chairs
18. **Probate Law and Procedure** — M. Travis Hayes, Chair; Amy B. Beller, Jeffrey S. Goethe, Christina Papanikos and Theodore S. Kypreos, Co-Vice Chairs
19. **Trust Law** — Matthew H. Triggs, Chair; Tami Foley Conetta, Jack A. Falk, Jenna G. Rubin, and Mary E. Karr, Co-Vice Chairs
20. **Wills, Trusts and Estates Certification Review Course** — Jeffrey S. Goethe, Chair; J. Allison Archbold, Rachel A. Lunsford, and Jerome L. Wolf, Co-Vice Chairs

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

1. **Attorney-Loan Officer Conference** – Robert G. Stern, Chair; Kristopher E. Fernandez, Wilhelmina F. Kightlinger, and Ashley McRae, Co-Vice Chairs
2. **Commercial Real Estate** – Jennifer J. Bloodworth, Chair; E. Burt Bruton, E. Ashley McRae, R. James Robbins, Jr. and Martin A. Schwartz, Co-Vice Chairs
3. **Condominium and Planned Development** – William P. Sklar and Joseph E. Adams, Co-Chairs; Alexander B. Dobrev, Vice Chair
4. **Condominium and Planned Development Law Certification Review Course** – Sandra Krumbein, Chair; Jane L. Cornett and Christene M. Ertl, Co-Vice Chairs
5. **Construction Law** – Reese J. Henderson, Jr., Chair; Sanjay Kurian, Vice Chair

6. **Construction Law Certification Review Course** – Melinda S. Gentile and Elizabeth B. Ferguson Co-Chairs; Gregg E. Hutt and Scott P. Pence, Co-Vice Chairs
7. **Construction Law Institute** – Jason J. Quintero, Chair; Deborah B. Mastin and Brad R. Weiss, Co-Vice Chairs
8. **Development & Land Use Planning** – Julia L. Jennison, Chair; Jin Liu and Colleen C. Sachs, Co-Vice Chairs
9. **Insurance & Surety** – Michael G. Meyer, Chair; 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, Lloyd Granet 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 Property Finance & Lending** – Richard S. McIver, Chair; Deborah Boyd and Jason M. Ellison, Co-Vice Chair
14. **Real Property Litigation** – Michael V. Hargett, Chair; Amber E. Ashton, Manuel Farach and Christopher W. Smart, Co-Vice Chairs
15. **Real Property Problems Study** – Lee A. Weintraub, Chair; Stacy O. Kalmanson, Susan K. Spurgeon and Adele Ilene Stone, Co-Vice Chairs
16. **Residential Real Estate and Industry Liaison** – Nicole M. Villarroel and Salome J. Zikakis, Co-Chairs; Raul Ballaga, Louis E. "Trey" Goldman, and James A. Marx, Co-Vice Chairs
17. **Title Insurance and Title Insurance Liaison** – Brian W. Hoffman, Chair; Mark A. Brown, Alan B. Fields, Leonard Prescott and Cynthia A. Riddell, Co-Vice Chairs
18. **Title Issues and Standards** – Christopher W. Smart, Chair; Robert M. Graham, Brian W. Hoffman, Karla J. Staker, and Rebecca Wood, Co-Vice Chairs

XVI. **General Standing Division Committee Reports** — *William T. Hennessey, III, General Standing Division Director and Chair-Elect*

1. **Ad Hoc Florida Bar Leadership Academy** — Kristopher E. Fernandez and J. Allison Archbold, Co-Chairs; Bridget Friedman, Vice Chair
2. **Ad Hoc Remote Notarization** – E. Burt Bruton, Jr., Chair
3. **Amicus Coordination —** Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman and John W. Little, III, Co-Chairs
4. **Budget** — Wm. Cary Wright, Chair; Tae Kelley Bronner. Linda S. Griffin, and Pamela O. Price, Co-Vice Chairs
5. **CLE Seminar Coordination** — Wilhelmina F. Kightlinger and John C. Moran, Co-Chairs; Alexander H. Hamrick, Hardy L. Roberts, III, Paul E. Roman (Ethics), Silvia B. Rojas, and Yoshimi O. Smith, Co-Vice Chairs
6. **Convention Coordination** — Sancha Brennan, Chair; Bridget Friedman, Nishad Khan and Alexander H. Hamrick, Co-Vice Chairs

7. **Disaster and Emergency Preparedness and Response** – Brian C. Sparks, Chair; Jerry E. Aron, Benjamin Frank Diamond and Colleen Coffield Sachs, Co-Vice Chairs
8. **Fellows** —Benjamin Frank Diamond and Christopher A. Sajdera, Co-Chairs; Joshua Rosenberg and Angel Santos, Co-Vice Chairs
9. **Florida Electronic Filing & Service** — Rohan Kelley, Chair
10. **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
11. **Information Technology & Communication** — Neil Barry Shoter, Chair; Erin H. Christy, Alexander B. Dobrev, Jesse B. Friedman, Keith S. Kromash, Patrick F. Mize, Hardy L. Roberts, III, and Michael A. Sneeringer, Co-Vice Chairs
12. **Law School Mentoring & Programing** — Lynwood F. Arnold, Jr., Chair; Phillip A. Baumann, Guy Storms Emerich, Elizabeth Hughes and Kymberlee Curry Smith, Co-Vice Chairs
13. **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 Arthur J. Menor (Real Property), Co-Vice Chairs
14. **Legislative Update (2019-2020)** — Stacy O. Kalmanson and Thomas M. Karr, Co-Chairs; Brenda Ezell, Theodore Stanley Kypreos, Jennifer S. Tobin and Salome J. Zikakis, Co-Vice Chairs
15. **Legislative Update (2020-2021)** —Thomas M. Karr, Chair; Brenda Ezell, Theodore Stanley Kypreos, Gutman Skrande, Jennifer S. Tobin, Kit van Pelt and Salome J. Zikakis, Co-Vice Chairs
16. **Liaison with**:
    a. **American Bar Association (ABA)** — Robert S. Freedman, Edward F. Koren and Julius J. Zschau
    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 Catherine Catlan, Judge Jaimie Goodman, Judge Mary Hatcher, Judge Hugh D. Hayes, Judge Margaret Hudson, Judge Celeste Hardee Muir, Judge Bryan Rendzio, Judge Janet C. Thorpe and Judge Jessica Jacqueline Ticktin
    f. **Out of State Members** — Nicole Kibert Basler, John E. Fitzgerald, Jr., and Michael P. Stafford
    g. **TFB Board of Governors** — Michael G. Tanner
    h. **TFB Business Law Section** — Gwynne A. Young and Manuel Farach
    i. **TFB CLE Committee** — John C. Moran (alt: Wilhelmina F. Kightlinger)
    j. **TFB Council of Sections** — Robert S. Freedman and William T. Hennessey, III
    k. **TFB Diversity & Inclusion** – Erin H. Christy
    l. **TFB Pro Bono Committee** — Melisa Van Sickle
17. **Long-Range Planning** — William T. Hennessey, III, Chair
18. **Meetings Planning** — George J. Meyer, Chair
19. **Membership and Inclusion** — Annabella Barboza and Brenda Ezell, Co-Chairs; S. Dresden Brunner, Vinette Dawn Godelia, and Roger A. Larson, Co-Vice Chairs

20. **Model and Uniform Acts** — Bruce M. Stone and Richard W. Taylor, Co-Chairs; Patrick J. Duffey and Adele Irene Stone, Co-Vice Chairs
21. **Professionalism and Ethics** — Gwynne A. Young, Chair; Alexander B. Dobrev, Andrew B. Sasso, Hon. Mark Alan Speiser and Laura Sundberg, Co-Vice Chairs
22. **Publications (ActionLine)** — Jeffrey Alan Baskies and Michael A. Bedke, Co-Chairs (Editors in Chief); Richard D. Eckhard, Jason M. Ellison, George D. Karibjanian, Sean M. Lebowitz, Daniel L. McDermott, Jeanette Moffa and Paul E. Roman, Co-Vice Chairs
23. **Publications (Florida Bar Journal)** — Jeffrey S. Goethe (Probate & Trust) and Douglas G. Christy (Real Property), Co-Chairs; J. Allison Archbold (Editorial Board – Probate & Trust), Homer Duvall, III (Editorial Board — Real Property), Marty J. Solomon (Editorial Board — Real Property), and Brian Sparks (Editorial Board — Probate & Trust), Co-Vice Chairs
24. **Sponsor Coordination** — J. Eric Virgil, Chair; Patrick C. Emans, Marsha G. Madorsky, Jason J. Quintero, J. Michael Swaine, and Arlene C. Udick, Co-Vice Chairs
25. **Strategic Planning** — Robert S. Freedman and William T. Hennessey, III, Co-Chairs
26. **Strategic Planning Implementation** - Michael J. Gelfand, Chair; Michael A. Dribin, Deborah Packer Goodall, Andrew M. O'Malley and Margaret A. “Peggy” Rolando, Co-Vice Chairs

XVII. Adjourn: Motion to Adjourn.

Real Property, Probate and Trust Law Section
Executive Council Meeting
The Breakers
Palm Beach, Florida,
July 27, 2019

Minutes

I. **Presiding** — *Robert S. Freedman, Chair*

9:45 A.M. The Meeting was called to order by Robert S. Freedman. Mr. Freedman requested a moment of silence in honor of William A. "Bill" Parady.

II. **Attendance** — *Steven Mezer, Secretary*

The light blue attendance sheet was passed by Mr. Mezer.

III. **Minutes of Previous Meeting** — *Steven Mezer, Secretary*

Mr. Mezer presented the Minutes of the June 1, 2019 meeting of Executive Council held at the Opal Sands Resort, Clearwater Beach, Florida. A motion to waive the reading of the minutes and approve the minutes was made, seconded and passed unanimously.

IV. **Chair's Report** —*Robert S. Freedman, Chair*

1. **Recognition of Guests** – None recognized.

Mr. Freedman welcomed new Executive Council members and each introduced herself or himself:

Rebecca Wood, Co-Vice Chair Title Issues and Standards Committee, Jin Liu, Co-Vice Chair Development and Land Use Committee, Katie Lutz, Co-Chair ATO. Joseph Adams, Co-Chair Condominium and Planned Development Law Committee and Chair of Condominium and Planned Development Board Certification Committee, Rachel Oliver, At-Large Member, Travis Finchum, Liaison Elder Law Section, Jamie Everett At Large Member, Daniel McDermott, Co-Vice Chair, ActionLine Committee, Len Prescott, Co-Vice Chair, Title Insurance Committee, Brad White, Co-Vice Chair Construction Law Institute, Seth Kaplan, Chair of Charitable and Planned Giving Committee, Jason Havens, Vice-Chair Charitable and Planned Giving Committee, Hon. Mary Hatcher, Judicial Liaison, and Hon. Janet Thorpe, Judicial Liaison.

Mr. Freedman recognized and thanked Tom Karr and Stacy Kalmanson for their tremendous job leading the Legislative Update Committee. Stacy Kalmanson introduced the full committee and gave special thanks to Chris Smart and Salome Zikakis who could not attend. Thanks to Brenda Ezell, Jennifer Tobin, Co-Chair

Tom Karr, and Theodore (Theo) Kypreos, and her mentors (as her term on the Committee has ended) – Drew O'Malley, Michael Gelfand, Bob Swaine, Debra Boje, Jim Robbins, Stuart Altman, Peggy Rolando, Rob Freedman, Mary Ann Obos, Debbie S. Goodall and Sangeeta Banatee from Fidelity.

2. **Milestones** - Mr. Freedman recognized the following milestones:

Manny Farach was named the recipient of the 2019 Justice Harry Lee Anstead Award as Florida Bar Board Certified lawyer of the year. Manny is one of 15 triple Board Certified attorneys.

Mike Bedke was named the 2019 Medal of Honor Recipient from The Florida Bar Foundation based on dedication to pro-bono.
Michael Gelfand's daughter, Sarah, is engaged to be wed. The wedding is at The Breakers next year, at the same time as our Executive Council Meeting, and all are invited. This was Mr. Freedman's little joke, which Mr. Gelfand likely did not appreciate.

David Carlisle's wife Maria passed away on Tuesday.
Judge Speiser's fiancée, Dr. Iris Drelich, passed away on July 3rd.
Brian Malec was congratulated on the recent birth of his baby girl.

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

Mr. Freedman recognized: The Friends of the Section

AmTrust Title, Business Valuation Analysts, CATIC, Cumberland Trust, Fiduciary Trust International South, HeirSearch.com, Heritage Investment Group, Jones Wiley, North American Title Insurance, Valuation Services, Inc. and Wilmington Trust.

The General Sponsors –

Event App Sponsor: WFG National Title Insurance Company
Thursday Grab N' Go Lunch: Management Planning: mpi Business Valuation & Advisory
Thursday night's reception: J.P. Morgan Private Bank and Old Republic National Title Insurance
Friday reception: Wells Fargo Private Banking and Westcor Land Title Insurance Company
Friday night dinner: First American Title Insurance Company and Phillips
Real Property Roundtable: Fidelity National Title Group
Probate Roundtable: Stout, Regis Roth and Guardian Trust
Executive Council Meeting: The Florida Bar Foundation and Stewart Title
Mr. Freedman recognized David Shanks from Stewart Title who expressed appreciation to the Section. The Chair also recognized Melissa Murphy, from Attorney's Title Insurance Fund, a Section General Sponsor as well as the sponsor of the Spouse Breakfast and the Legislative Update. Ms. Murphy said that "The Fund" is proud to be affiliated with the Section.

4. **2019-2020 Executive Council meetings**:

Mr. Freedman indicated that the Directory will be mailed in the next few weeks.

Section Meeting Registration and Hotel Reservations – Mr. Freedman indicated that the registration and reservation system worked for The Breakers and thanked everyone for complying with the one room per Executive Council member policy, as it allowed Executive Council members to get rooms. The room block was expanded this year and will be expanded for next year.
Mr. Freedman provided updates regarding the Miami and Amsterdam meetings.

Miami Registration – November 6-9, 2019 - JW Marriott Marquis – registration will open middle-to-end of August. CLE on Friday. Saturday planning – One week before. Please do not e-mail asking when. Please do not call Mary Ann Obos or Hilary Stephens.
New Section wide luncheon will be held on Friday with free CLE re: Cyber Security and will offer 1 hour of technology CLE credit. Attendees will need to pay for lunch.
There will be a reception on Thursday evening and dine arounds on Friday evening.

Tampa – January 29 - February 2, 2020 Grand Hyatt Hotel, Tampa Bay.

Amsterdam – April 1 – April 5, 2020 – Hotel Okura Amsterdam, The Netherlands. Hotel and registration should be opened around the end of September or early October. Information to be emailed mid-September, registration to follow two weeks later. Mr. Freedman asked for a show of hands – more than 120 with spouses responded – 74 rooms in room block.
Registration fee – Includes Thursday evening reception and dinner at Dutch West Indies House.
Executive Council meeting at The Hague and museums – flat fee includes:
Thursday trip to Keukenhof – Tulip gardens and Saturday evening dinner and reception. Breakfast included with room registration.
Optional Tours: April 1 Excursions – optional tour of windmills but will be offered other days, if you miss it.
April 2 Executive Council meeting at The Hague with CLE– In the afternoon 3 different museums with lunch included.
April 3 Saturday optional excursions.
April 3 Saturday Night will be a big blowout reception and dinner at the National Maritime Museum.
As for the Anne Frank House – they currently do not book tours – individual tickets may be purchased 90 days in advance – there will be a refund of the cost of afternoon excursion, if you are able to purchase Anne Frank tickets.
Registration fee is not set. Please do not forward e-mails regarding Amsterdam outside of Executive Council members as reservations of Non-Executive Council Members will be cancelled and may not later be available. Additional information will be in e-mails.
Orlando, FL. - May 27-30, 2020 - Annual Convention - Loews' Sapphire Falls Resort

5. **Report of Interim Action by the Executive Committee - Waivers of Attendance Requirement under the By-Laws**: Robert S. Freedman

In accordance with the provisions of Article V, Section 4 of the Section's By-Laws, the Executive Committee, having found good cause for absences during the 2018-2019 Bar year, granted waivers of the By-Laws attendance requirements for the following individuals, thereby enabling such individuals to serve on the Executive Council for the 2019-2020 Bar year: Raul P. Ballaga; Kenneth B. Bell; David R. Carlisle; John G. Grimsley; Hon. Hugh Hayes; Reese J. Henderson, Jr.; George D. Karabjanian; Wilhelmina F. Kightlinger; Hon. Norma S. Lindsey; John W. Little, III; Deborah B. Mastin; Charles I. Nash; Pamela O. Price; Angela K. Santos; Hon. Mark A. Speiser; Hon. Jessica J. Ticktin; Melissa VanSickle; and Julie A.S. Williamson.
Addition to above motion made Wednesday, July 24, 2019 by Executive Committee to also waive attendance requirements of Articles V, Section 4 of the Bylaws as to Judge Jaimie Goodman. Motion passed unanimously.

6. **Section Calendar** The calendar is on the Website and shows conflicts and meetings. Mr. Freedman also addressed Florida Bar Policy on WiFi at CLE Programs - Policy of The Florida Bar that at CLE programs is that WiFi is not permitted as part of the program. Please remember to download materials before attending CLEs.

V. Liaison with Board of Governors Report — *Mike G. Tanner*

Mike Tanner thanked Section for opportunity to be Section liaison. He gave a report on the Key Largo meeting of the Board of Governors:
Of interest to Section – the BoG approved two legislative requests from the Section: From the Title Issues and Standards Committee to advocate regarding legislative procedures to correct obvious error in legal descriptions in deeds, and from the Real Property Finance and Lending Committee to advocate for clarity-current one year statute of limitation for deficiency claims in mortgage foreclosures; now: one year of certificate of title. Per Section 95.115(1)(h) of the Florida Statutes, 1 year of issuance certificate - there are 3 certificates - clarify to be 1 year of certificate of tile.

Board of Governors adopted new procedure to amend Section By-Laws. It is a comprehensive re-write.
Board of Governors heard Rules Committee Report – Probate Rules to change out of cycle – approved and will go to Supreme Court for oral argument and comment.
Mr. Tanner provided Rules of Judicial Administration Committee – Rules are on Bar's website
Information Items:

(1) Disqualification of trial judges and protection of Judicial Branch records.

(2) Protection of Judicial Branch records

Notice period closes August 1, 2019 for above two items.

The BOG is currently debating final report of a Committee on Cannabis Law to Business Law Section. They met at convention and engaged in long debate – now "down in the weed".

Mr. Freedman thanked Mary Ann Obos and Hillary Stephens for the Breakers Section meeting going off without a hitch.

VI. Chair-Elect's Report — *William T. Hennessey, III, Chair- Elect*

Mr. Freedman recognized Mr. Hennessey. Mr. Hennessey reported on the scheduled Section meetings for 2020-2021.

Breakers – July 21-26, 2020

Out of state – Jackson Hole – (September 29 – October 4, 2020): The out of state meeting will take place at the Four Seasons in Teton Village/Jackson Hole. The meeting will include National Park tours, wild life safaris, scenic rafting trips, as well as much more. Our Friday night dinner will be at the Diamond Cross Ranch which overlooks Grand Teton National Park. Mr. Hennessey noted there are two out of state meetings in 2020. Amsterdam in the spring and Jackson Hole in the fall.
Yacht Club Disney (December 2-6, 2020): The meeting includes events on Disney properties, including a reception on the beach, as well at Animal Kingdom theme park.
Hammock Beach Resort – Palm Coast February 3-7, 2021. Daytona/St. Augustine area resort with two golf courses – family friendly – all rooms 1, 2, 3B/R suites with full kitchens overlooking the ocean.
Convention JW Marriot – Marco Island June 3-6, 2021.

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

1. **Statement of Current Financial Conditions.**

Mr. Freedman recognized Cary Wright.

Mr. Wright reported that it was a great year to be treasurer. Financials reflect about $190,000 better than budget. ALO-Conference a loss $28,000 which was expected. Almost $110,000 profit for CLI, a testament to Sanjay Kurian/Jason Quintero being creative on advertising with exhibitors and they ran a commercial for an exhibitor on loop during a break.

Attorney Trust Officer (ATO) conference -$104,000 to bottom line – Net operations for the Section through May 31, 2019 – $403,751.
June convention – $110,000 – $115,000 expenses not shown – however expect $300,000 profit for last fiscal year is anticipated.
Fund balance – projected by The Florida Bar on the report to be $1,678,493, however Mr. Wright projects that it will be $1,978,493 at the fiscal year.

A special thanks to Debra Boje – She went to Sam's Club and Costco to reduce the costs. Shopped for candy and other items at discount.
Sam's Club card has been given to Rob.

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

Mr. Freedman recognized Lawrence "Larry" Miller.

Mr. Miller reported that ALMS met Thursday afternoon - welcomed new At Large Members – formed committee to address sunsetting of funding for No Place Like Home project and the need to find state-wide funding and spread the program state wide. Mr. Miller thanked Christine Tucker and Lynwood Arnold for meet and greet new attendees. ALMs will reach out to local Section members for brain-storming on resources.

IX. CLE Seminar Coordination Report — *Wilhelmina F. Kightlinger (Real Property)* and *John C. Moran (Probate & Trust), Co-Chairs*

1. **Report on pending CLE programs and opportunities**

Mr. Freedman recognized John Moran.

Mr. Moran expressed accolades to those who worked on Legislative Update – "cool vibe" – thank you to everyone who worked on it. Kick off meeting was held August 6 with CLE Committee Vice Chairs – Hardy Roberts, Alex Hamrick, Paul Roman, Silvia Rojas and Yoshimi Smith. Initiatives for the year: Continue to develop and Practice Series and Webinars. Growing library of content – Mr. Moran gave examples of upcoming CLE: e-wills, and notarization. Homestead, ala carte of Board Certification speakers, Real Estate Leasing – Shared space and suites. Mediation and ADR seminar. See page 53 particularly as to dates.

October, 2020 plans being made for a full day Charitable Symposium – Tentative CLE Schedule is on **page 53 of the Agenda.**
Mr. Moran reminded that ATO conference will be held at The Breakers August, 22-24, 2019.

Probate Law Seminar 11/15/2019

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

No report from Legislation Committee
Stacy Rubel was asked by Mr. Freedman to explain the difference between confident and confidential, based upon her presentation at yesterday's Legislative Update.

Mr. Freedman advised that the various action items and information items would not be done per Division, but rather the order would be mixed up.

Mr. Freedman recognized William Hennessey, Chair Elect and Division Director, General Standing Division.

a. New Matter – Proposed Change to F.R.C.P. Mr. Hennessey presented a proposed rule change to Florida Rules of Civil Procedure and the Florida Family Law Rules concerning mediation and the selection of mediators.
The ADR Committee of the Florida Dispute Resolution Center has proposed rule changes which would permit the Court to appoint a mediator "who has completed a Supreme Court

of Florida certified elder mediation training" when elder law issues are involved in the dispute or upon the request of all parties. Comments are due July 31, 2019.
This matter only recently came to our attention and is not on the agenda. Michael Gelfand moved to waive the Rules to consider the proposal and discuss a response. Mr. Mezer seconded. Motion passed unanimously. Mr. Gelfand introduced the issue and his proposed alternative.

Mr. Gelfand made a motion to oppose the Committee's proposal and to adopt substitute to allow the court to appoint a Board Certified attorney in lieu of blind selection process or the proposed mediator with expertise in elder law and that the purview of Section and authorize use of Section funds. Motion was seconded. Discussion was had.
Comments – currently if parties cannot agree – the court appoints based on a blind selection. The concept of "elder law issue" is overbroad-–cannot identify issues that qualify. Further, what is elder law mediation training? Is course relevant on expertise or professionalism? Are there any currently qualified and will that lack of qualified mediators result in additional expense and delays?

Mr. Gelfand explained that under his proposal the court would appoint Board Certified attorney only if parties want to limit the pool section position in opposition and substitute Board Certification.

Alexandra Rieman moved to amend the motion to oppose the proposal and provide comment to say that the Section is opposed as the proposal is too limiting. Instead, we should allow the court to appoint a mediator with particular expertise in the area of law at issue. Ms. Rieman felt that limiting candidates to Board Certification was too limiting. Mr. Gelfand accepted the proposed amendment. After further discussion, the motion to oppose the proposed rule change as drafted passed unanimously. The matter was referred to the Executive Committee to review any final comments before submission.

b. **Report on new Fellows for the 2019-2020 Bar year – Ben Diamond**

General Standing - Fellows – Mr. Hennessey recognized Representative Benjamin ("Ben") Diamond. Mr. Diamond introduced new Fellows and thanked Christopher A. Sajdera and all involved in Fellows program – almost 60 applicants this year.

Mr. Diamond thanked Mr. Diamond thanked Tae Bronner, Robert Freedman, Josh Rosenberg, Larry Miller, Sarah Butters, Chris Sajdera, Angela Santos, Brenda Ezell and Mary Ann Obos. Mr. Diamond introduced Probate and Trust Law Division: Fellows Joe Percopo and Antonio Romano; Real Property Division: Michelle Hinden and Kristen Jaiven.

Recognized returning second year Fellows: Samah Abukhodeir, Chris Barr, Denise Cazobon, Gabrielle Jackson.
The Fellows met on Thursday – new Fellows appreciate support of Executive Council members.
The Fellows each introduced themselves.

2. **General Standing** – Mr. Hennessey recognized Laird A. Lile - Liaison with Clerks of the Court.
Mr. Lile reported that they continue to liaise – especially as to clerks of court becoming custodians for electronic wills and that the Clerks would be looking for input from

Executive Committee.

3. **RP - Information Item**:

Mr. Freedman recognized Robert Swaine, Real Property Division Director
Mr. Swaine thanked all of the Real Property committee sponsors:
First American Title, The Fund, Attorney's Real Estate Councils of Florida, AmTrust Financial Services, and Hopping Green & Sams, P.A.

Real Property Problems Study - Lee A. Weintraub, Chair

Mr. Swaine recognized Lee Weintraub, Brenda Ezell and Burt Bruton.
Discussion of a third-party proposal to eliminate the need for subscribing witnesses on leases of real property. Mr. Weintraub explained that this is not a legislative matter of RPPTL Section – From National Association for Industrial and Office Parks (NAIOP) a commercial trade association – RPPTL Problem Study Committee approved after adjustment, since Clearwater meeting.

Brenda Ezell of Leasing Committee – Currently Section 689.01, Florida Statutes requires two witnesses for certain conveyances in excess of one year, which includes leases in excess of one year.

Burt Bruton – a proposal was made by NAIOP during the past legislative session, but it was withdrawn to allow for talks. It is now before Executive Council in its technical advice capacity.

39 other states do not require witnesses of leases of any kind. Florida's is in a minority position requiring two witnesses.

Ms. Ezell added that Chapter 679, Florida Statutes regarding execution of leases by corporations does not require witnesses for corporate leases.
After comments from the floor, Mr. Swaine closed the discussion and thanked the participants.

4. **PT - Action Item**:

Mr. Freedman recognized Sarah Butters, Probate & Trust Division Director.

Ms. Butters thanked the sponsors for the Probate & Trust Division.

Probate Sponsors:

BNY Mellon Wealth Management, Management Planning, Inc., Business Valuation Analysts, LLC, Kravit Estate Appraisal, Coral Gables Trust, Grove Bank and Trust, Northern Trust Company, and Pluris Valuation Advisors, LLC
Ms. Butters recognized Alfred J. Stashis, Jr., Co-Chair.

IRA, Insurance, and Employee Benefits Mr. Stashis introduced the issue and explained that it was necessary to clarify that an IRA transferred incidental to divorce should remain exempt in the hands of the transferee in the same manner as a 401(K).

The Committee's proposed motion is as follows:

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. Passed unanimously – Ms. Butters thanked everyone.

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

a. **Discussion on Draft of 2019 Strategic Plan**

Mr. Freedman recognized Michael Gelfand.

Mr. Gelfand stated that the strategic plan has been published twice and received extensive comments.

Jon Scuderi and Katherine Frazier had advised Mr. Gelfand that on the chart on pages 119-120, "tracking" should refer to "tracking memo" in multiple instances. Mr. Gelfand thanked all who participated in the strategic planning groups – one critical difference is an effort to insure implementation. Committee to reinforce recommendation.
Most of the discussion/comments focused on the size of the Executive Council, particularly the number of ALMS.

Mr. Gelfand indicated that in order to increase membership there was a stated objective of seeking out under-represented constituencies and to remove under-performing persons and encourage more involvement.
Committee Motion to approve.

Mr. Freedman suggested the motion should be tabled and that there be a conference call with the Strategy Planning Committee regarding size of the Executive Council and the other comments received and come back to the Executive Council in Miami with a final recommendation.

6. **General Standing - Membership and Inclusion** - *Annabella Barboza and Brenda Ezell*, Co-Chairs

Mr. Hennessey recognized Brenda Ezell.

a. **Report on committee activities** – Ms. Ezell reported that in the coming year will work more closely with fellows and outreach to applicants to the Fellows program who were not selected. Annabella Barboza introduced Dresden Brunner who reported that most of the discussion/comments focused three events in need of ambassadors – Tampa, Miami and Tampa. Seek out under-represented constituencies – minority bar, young lawyers, sponsor, and attendees increasing membership. Last year spent $4,000 supporting its objectives and updated mission statement on committee page.

7. **General Standing** - **Professionalism and Ethics** – *Gwynne A. Young,* Chair

Mr. Freedman reported that the RPPTL Players have agreed to pass their presentation to the Section meeting in Miami. Mr. Freedman recognized Andrew Sasso. Mr. Sasso reported regarding a proposed rule change which is in the Supplemental Agenda. This proposed change was first presented as an information item at our Clearwater meeting. However, because it was not in the original agenda, it requires a waiver of the rules in order to be considered. Mr. Mezer moved to waive the rules. The motion was seconded and approved with only Nick Curley opposed. Professionalism and Ethics Committee motion to seek adopt of ABA model Rule, modifies Florida Bar Rule 4-1.14 regarding Clients With Diminished Capacity – The Florida Bar rule and the ABA model rule were compared. Most states have adopted this model Rule.

Florida Rule currently requires being a "de facto guardian" but that term is not defined. Mr. Sasso offered a Committee motion to support the proposed change of the Florida Bar rule from Committee motion and to support changes. Discussion and comments from the floor was had. Mr. Kelly indicated that it is not an emergency and suggested that it be referred back to Guardianship Committee and other sub-committees for comment. Nick Curley agreed with Rohan Kelly and asked for additional time to return it to the Guardianship Committee.

Fletch Belcher moved to table the Committee's motion and refer to the Guardianship Committee, and the motion was seconded by Mr. Mezer. The motion passed by a majority vote after a count of hands (84- to 54) to defer (table).
Recessed for 10 minutes for lunch.

8. **General Standing** - **Information and Technology** – *Neil Barry Shoter,* Chair

a. Update on website modifications and changes.

Mr. Freedman recognized Neil Shoter, Chair of the Information and Technology Committee.

Mr. Shoter reported: If there are problems with Committee Listserv, please let Mr. Shoter know, updated pages, including news events, social media and Twitter use has increased exponentially. He reminded everyone about the Cyber Security CLE at lunch on Friday at the Miami meeting of the Executive Council, and indicated that this topic may be presented thereafter on a regular basis.

Mr. Shoter encouraged Section Committees to update webpages, particularly as to contact information.

Mr. Freedman gave details regarding dinner and the Dave Matthews Band concert that night, and a request for used lunch boxes to be given to Mr. Gelfand to donate to students to use as camera bags.

9. **PT - Information Item**: Mr. Freedman recognized Ms. Butters.

Trust Law Committee - *Matthew Triggs*, Chair.

Ms. Butters recognized Matthew Triggs, Chair of the Trust Law Committee.

Mr. Triggs initiated a discussion on a potential Section legislative position to support adoption of the "Florida Directed Trust Act", which is a modified version of the Uniform Directed Trust Act. The proposed Act would clarify and change various aspects of the Florida Statutes relating to directed trusts.

The Committee received a number of comments since its last publication as an Information Item, so they are taking the time to incorporate those changes. The Committee expects the current draft to be available as an Action Item at the next meeting.

10. **RP - Action Item**:

Mr. Swaine recognized Richard McIver, Real Property Finance and Lending Committee.

Mr. McIver presented a committee motion after providing history and context: the existing statute was pre-emption by Federal Act:

The Committee's motion to: (A) adopt as a Section legislative position support to repeal § 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; (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.

The motion was approved by a unanimous vote.

11. **PT - Action Item**:

Probate and Trust Litigation Committee -

Ms. Butters recognized J. Richard (Rich) Caskey, Chair of the Probate and Trust Litigation Committee.

Mr. Caskey explained that the current Notice of Administration does not adequately put parties on notice of the need to bring certain objections or actions in a timely manner. This can be a trap for the unknown. The Committee has prepared legislation to clarify a party's rights and obligations. Mr. Caskey presented the Committee's motion.

Committee 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.

The motion was unanimously approved.

12. **General Standing** - **Law School Mentoring & Programing** – *Lynwood F. Arnold, Jr.*, Chair

Mr. Freedman recognized Lynwood F. Arnold, Jr., Law School Mentoring & Programing

Mr. Arnold reported on their various activities occurring at law schools throughout the state. Mr. Arnold also reported that they had nine (9) law students registered to attend The Breakers and various meetings.

13. **RP - Information Item**:

Condominium and Planned Development Committee.

Mr. Swaine recognized William P. Sklar, Co-Chair of Condominium and Planned Development Committee.

Mr. Sklar presented an information item that the Condominium and Planned Development Committee had a discussion of legislation that would clarify existing law that a condominium association has the right to represent its unit owner members as a class, pursuant to F.R.C.P. 1.221 and Florida Statutes Section 718.111(3**).**

Mr. Sklar indicated class action rule has been in place 42 years and used as vehicle for construction defects class litigation, as an example. However, the Miami-Dade County Property Appraiser argued that a condominium association lacked standing. The Committee met and did not agree with the position of the Date County Property Appraiser and moved to amended 718.111(3) and petition The Florida Bar's Civil Rules Committee to amend FL.R. CivP.1.221.

14. **General Standing** - **Model and Uniform Acts** - *Bruce M. Stone and Richard W. Taylor*, Co-Chairs

a. Written report of the Committee

Patrick Duffy, vice-chair of the Committee, advised that the Committee is studying the Uniform Partition of Heirs Property Act.

XI. **Adjourn**: Motion to Adjourn.

Mr. Freedman moved to adjourn. Multiple seconds as to that motion and motion was unanimously approved at 12:48 P.M.

Respectfully submitted,

Steven Mezer, Secretary

ACTIVE: 12859368_1

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**	Johnathan Butler	johnathan.l.butler@wellsfargo.com
Friday Reception	**Westcor Land Title Insurance Company**	Sabine Seidel	sseidel@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	laura.licastro@stewart.com
Friday Night Dinner	**Rago Auctions and Phillips**	Sebastian Clark; Jennifer Jones	jjones@phillips.com; Sebastian@ragoarts.com
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Cumberland Trust	Eleanor Claiborne	eclaiborne@cumberlandtrust.com
Fiduciary Trust International of the South	Vaughn Yeager	vaughn.yeager@ftci.com
Heritage Investment	Joe Gitto	jgitto@heritageinvestment.com
North American Title Insurance Company	Jessica Hew	jhew@natic.com
Practice 42	Aubrey J. Ehrhardt	audrey@practice42.com
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BNY Mellon Wealth Management	Joan Crain	joan.crain@bnymellon.com	IRA, Insurance and Employee Benefits
Business Valuation Analysts, LLC	Tim Bronza	tbronza@bvanalysts.com	Trust Law
Coral Gables Trust	John Harris	jharris@cgtrust.com	Probate and Trust Litigation
Coral Gables Trust	John Harris	jharris@cgtrust.com	Probate Law Committee
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First American Title	Wayne Sobian	wsobien@firstam.com	Real Estate Structures and Taxation
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Hopping Green & Sams	Vinette D. Godelia	vinetteg@hgslaw.com	Development and Land Use
Kravit Estate Appraisal	Bianca Morabito	bianca@kravitestate.com	Estate and Trust Tax Planning
Management Planning Inc.	Roy Meyers	rmeyers@mpival.com	Estate and Trust Tax Planning
Northern Trust	Tami Conetta	tfc1@ntrs.com	Trust Law
Pluris Valuation Advisors	Monique Jeffries	mjeffries@pluris.com	Asset Protection Committee
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REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COMMITTEE'S SUMMARY OF INTERIM ACTION
July 27, 2019 – October 16, 2019

WHEREAS, Article IV, Section 3 of the Bylaws of the Real Property, Probate & Trust Law Section of The Florida Bar provides in pertinent part "[T]hat the Executive Committee also has the power and authorize to exercise the function of the Executive Council when and to the extent authorized by the Executive Council with respect to a specific matter, and on any matter which the Executive Committee reasonably determines requires action between meetings of the Executive Council. All action taken by the Executive Committee on behalf of the Executive Council must be reported to the Executive Council at its next meeting." The Executive Committee hereby reports the following actions taken between meetings of the Executive Council, as follows:

On July 27, 2019 - Telephonic - Attendees: Wm. Cary Wright, Lawrence Jay Miller, Jon Scuderi, Debra L. Boje, Robert S. Freedman, Steven H. Mezer, S. Katherine Frazier, Robert S. Swaine, William T. Hennessey, John C. Moran, Wilhelmina F. Kightlinger and Sarah S. Butters. Approval of the Section position to oppose proposed amendments to Rules 5.181, 5.182, 5.183, 5.184 and 5.185, Florida Probate Rules, pertaining to mediation/arbitration provisions. Motion made by Sarah Butters, seconded by John Moran, and the motion, after discussion, was passed unanimously.

On August 2, 2019 – via E-mail – Attendees: Wm. Cary Wright, Lawrence Jay Miller, Jon Scuderi, Debra L. Boje, Robert S. Freedman, Steven H. Mezer, S. Katherine Frazier, Robert S. Swaine, William T. Hennessey, John C. Moran, Wilhelmina F. Kightlinger and Sarah S. Butters. Authorization given to Ad Hoc E-Wills Committee to appoint ambassadors to consult with the Florida Court Clerks and Comptrollers on matters pertaining to electronic wills. Committee motion made to authorize the Ad Hoc E-Wills Committee to appoint ambassadors to consult with the FCCC based upon the foregoing. Motion passed unanimously.

On August 23, 2019 – Telephonic – Attendees: Wm. Cary Wright, Lawrence Jay Miller, Jon Scuderi, Debra L. Boje, Robert S. Freedman, Steven H. Mezer, S. Katherine Frazier, Robert S. Swaine, William T. Hennessey, John C. Moran, and Wilhelmina F. Kightlinger. (1) Approval of the Section position to oppose the Florida Commission on Access to Civil Justice's proposal to expand the Florida Registered Paralegal Program (Chapter 20, Rules Regulating The Florida Bar) through amendments. Motion made by Ms. Boje and seconded by Mr. Swain to approve the draft of the task force's findings and to authorize Mr. Freedman to send it to The Florida Bar on behalf of the Real Property Probate & Trust Law Section of The Florida Bar. Motion passed. 11-0 (Ms. Butters absent). (2) Approval of the contract Dean Mead to serve as the Section's Legislative Consultant for the period September 1, 2020 – August 31, 2022. The Legislative Committee submitted a proposed new Legislative Consultant Contract with Dean Mead. A copy of that agreement is available to any Member of the Executive Council upon request to Steven Mezer. After discussion, a motion was made by Katherine Frazier to approve the new Legislative Consultant Contract. The motion was seconded by Robert Swaine. Motion passed 11-0 (Ms. Butters absent).

On September 6, 2019 – via E-Mail - Attendees: Robert S. Freedman, Wm. Cary Wright, Jon Scuderi, Debra L. Boje, Steven H. Mezer, S. Katherine Frazier, Robert S. Swaine, William T. Hennessey, John C. Moran, Wilhelmina F. Kightlinger and Sarah S. Butters. Approval of the Section position to approve proposed changes to Rules 6-30.2, 60-30.3 and 6-30.4, Rules Regulating The Florida Bar, pertaining to composition of the membership of the Condominium and Planned Development Law Certification Committee and standards for peer review for certification and recertification of candidates. Committee motion to approve the proposed amendments to Rules 6-30.2, 6-30.3 and 6-30.4 of the rules governing the Condominium and Planned Development Law Certification Committee as attached was considered and Mr. Freedman be authorized and directed to send a position statement to The Florida Bar. Motion passed - 11-0 (Mr. Miller was not available).

On September 9, 2019 – via E-Mail – Attendees: Wm. Cary Wright, Lawrence Jay Miller, Jon Scuderi, Debra L. Boje, Robert S. Freedman, Steven H. Mezer, S. Katherine Frazier, Robert S. Swaine, William T. Hennessey, John C. Moran, Wilhelmina F. Kightlinger and Sarah S. Butters. Appointment of Erin Christy to serve as the Real Property Probate & Trust Law Section's representative to the Diversity & Inclusion Committee of The Florida Bar. Motion passed unanimously.

On October 16, 2019 – via Email – Attendees: Wm. Cary Wright, Lawrence Jay Miller, Jon Scuderi, Debra L. Boje, Robert S. Freedman, Steven H. Mezer, S. Katherine Frazier, Robert S. Swaine, William T. Hennessey, John C. Moran, Wilhelmina F. Kightlinger and Sarah S. Butters. Approval of resolution to honor Past Chair Lewis Kanner on his passing. Motion passed unanimously.

On October 16, 2019 – via E-Mail – Attendees: Wm. Cary Wright, Lawrence Jay Miller, Jon Scuderi, Debra L. Boje, Robert S. Freedman, Steven H. Mezer, S. Katherine Frazier, Robert S. Swaine, William T. Hennessey, John C. Moran, Wilhelmina F. Kightlinger and Sarah S. Butters. Authorization of the Section Chair to vote at the upcoming Council of Sections video conference meeting to increase the Section's annual dues from $300.00 to $500.00. Motion passed unanimously.

By: Steven H. Mezer
Steven H. Mezer, Secretary

ACTIVE: 12909947_1

Resolution

The Executive Council of the Real Property, Probate & Trust Law Section
Of The Florida Bar
Recognizing the Service and Contributions of

Lewis Mitchell Kanner

Whereas, Lewis Mitchell Kanner was born July 13, 1934, a fourth generation Florida native, who graduated from Miami High School, The University of Florida in 1955 and the University of Florida College of Law in 1958; and

Whereas, Lewis Kanner was husband to his wife of 59 years, Marcia Kanner, and father to Ellen Kanner; and

Whereas, Lewis Kanner was admitted to The Florida Bar on November 6, 1958; and

Whereas, Lewis Kanner was a partner of the law firm of Solomon, Kanner, Damian and Rodriguez, practicing both real estate and probate law and was known as a fierce advocate for his clients; and

Whereas, Lewis Kanner was an author of publications on Title Standards, Real Estate and Surveying; and

Whereas, Lewis Kanner served as Chairman of The Florida Board of Bar Examiners and served as Chair of the Real Property, Probate and Trust Law Section of The Florida Bar in 1977-1978, and he established many enduring friendships through his service to the Bar; and

Whereas, Lewis Kanner was a proud Floridian who loved birds and traveling throughout Florida and was fond of Florida history, but hated traffic; and

Whereas, Lewis Kanner passed away on August 17, 2018, at the age of 84 years; and

Whereas, the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar recognizes the extraordinary dedication and service that Lewis Kanner provided during his lifetime to his community, his family and friends, and The Florida Bar, particularly the Real Property, Probate and Trust Law Section, and acknowledges that he will be missed and fondly remembered.

Now Therefore, be it resolved by the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar that the rich life of Lewis Kanner is celebrated, that his passing is mourned, and that his distinguished service and many contributions to the practice of law, particularly to the practice of Real Estate, Probate and Trust Law, are respected, appreciated, acknowledged and will be remembered forever.

Unanimously Adopted by the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar in Miami, Florida, this 9th day of November, 2019.

Steven H. Mezer, Secretary
Real Property, Probate & Trust Law
Section of The Florida Bar

Robert S. Freedman, Chair
Real Property, Probate & Trust Law
Section of The Florida Bar

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REAL PROPERTY, PROBATE & TRUST LAW SECTION
THE FLORIDA BAR

www.RPPTL.org

September 10, 2019

Jasmine Rodriguez
Certification Specialist, Legal Specialization and Education Department
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399

Re: Proposed Amendments to Rules 6-30.2, 6-30.3 and 6-30.4, Rules Regulating The Florida Bar

Dear Ms. Rodriguez:

This letter is sent in response to your letter dated August 29, 2019, to request response from the Real Property, Probate and Trust Law Section ("RPPTL Section") of The Florida Bar to the above-referenced proposed amendments.

The RPPTL Section's Executive Committee has unanimously approved the proposed amendments, a copy of which is attached to this letter.

The proposal amendment to Rule 6-30.2 specifically will serve to ensure that the composition of the Condominium and Planned Development Law Certification Committee ("Committee") will appropriately contain a sufficient number of attorneys who represent (1) developers and (2) community associations controlled by unit and parcel owners other than the developer, assuming that there are eligible attorneys in such practice areas who are willing to serve on the Committee. This is very important, as the nature of representation of developers and turned-over community associations is far different and both types of practice need sufficient representation on the Committee for purposes of preparation of the certification examination and the vetting of certification applicants.

The RPPTL Section had no specific comments to the proposed amendments to Rules 6-30.3 and 6-30.4, and approves same.

Sincerely,

Robert S. Freedman
Chair, Real Property, Probate and Trust Law Section

RULE 6-30.2 DEFINITIONS AND COMMITTEE

Commented [A1]: Added to indicate that the committee make-up is also included.

(a) Community Association and Planned Development. A "community association" is a corporation for profit or not-for-profit that is engaged in the management and operation of common interest real property, which typically includes:

(1) associations for condominiums, homeowners, property owners, and mobile homes;

(2) associations governing communities or properties which may be related to residential, commercial, other non-residential communities or properties;

(3) cooperatives;

(4) recreational organizations such as golf or tennis clubs; and

(5) voluntary organizations that are incorporated or not incorporated.

A "planned development" is real property in Florida that consists of or will consist of separately owned areas, lots, parcels, units, or interests together with common or shared elements or interests in real property, or where the separately owned areas, lots, parcels, units, or interests are subject to common restrictive covenants or are governed by a community association.

(b) Condominium and Planned Development Law. "Condominium and planned development law" is the practice of law that involves:

(1) serving as counsel to community associations, property owners, community association members, sellers, purchasers, developers, lenders, governmental agencies, and investors in matters related to community associations and planned developments;

(2) drafting governing documents or their amendments, and preparing filings with governmental agencies that regulate community associations or planned developments;

(3) serving in or for governmental agencies which regulate community associations or planned developments;

(4) representing parties in construction lien and defect claims, collection of assessment actions, governing document and community association statutory enforcement and dispute actions, and other litigation, arbitration, and mediation in matters relating to community associations or planned developments; and

(5) planning, development, construction, and financing of condominium or planned development communities.

(c) Condominium and Planned Development Law Certification Committee. The condominium and planned development law certification committee shall be composed of the following:

Not less than one-third of the members shall be attorneys whose practice focuses on the representation of community associations controlled by unit or parcel owners other than the developer thereof or of community association members; and

Not less than one-third of the members shall be attorneys whose practice focuses on the representation of developers or others structuring and creating condominium and planned developments.

Notwithstanding the foregoing requirements for representation on the committee, in the event there is no eligible attorney with the required focus practice area willing to serve on the committee, the vacancy shall be filled by appointment of any eligible attorney.

~~(c)~~ (d) Practice of Law. The "practice of law" for this area is set out in rule 6-3.5(c)(1).

Commented [A2]: This section was added to have near equal representation of attorneys with community association and developer experience. This will help with the development of examination questions.

New subchapter added August 27, 2019.

RULE 6-30.3 MINIMUM STANDARDS

(a) Minimum Period of Practice. The applicant must have been engaged in the practice of condominium and planned development law for at least 5 years immediately preceding the date of application.

(b) Substantial Involvement. The applicant must demonstrate continuous and substantial involvement in the practice of law, of which at least 40 percent has been spent in active participation in condominium and planned development law during at least 3 of the 5 years immediately preceding the date of application.

(c) Practical Experience. The applicant must demonstrate substantial practical experience in condominium and planned development law by providing examples of at least 20 substantive tasks or services performed on behalf of, or in connection with, community associations and planned developments, such as:

(1) drafting, reviewing, interpreting, or revising development and governing documents, title instruments and reports, title insurance policies, contracts for sale and purchase, and statutory and administrative laws, rules, and provisions;

(2) drafting financing instruments for developers, lenders, investors, or community associations;

(3) planning and drafting project legal structures and entities;

(4) dealing with development funds and associated development documents;

(5) drafting other project related documents;

(6) serving as an arbitrator or counsel for a party in an arbitration;

(7) serving as a mediator or counsel for a party in a mediation;

(8) drafting opinion letters;

(9) serving as legal counsel at a trial, on appeal, or in administrative hearings;

(10) representing owners, purchasers, developers, lenders, investors, community associations, governmental agencies, or political subdivisions in matters relating to condominium and planned development law; or

(11) any other activity deemed appropriate by the condominium and planned development law certification committee.

The applicant must also describe, through examples or narrative, the applicant's law practice of representing community associations, developers, lenders, investors, or owners in matters involving condominium and planned development law during the 5-year period preceding the date of application. The examples or narrative must include the approximate number and type of clients the applicant has represented during the 5-year period. Consideration will be given to applicants who have served as in-house counsel or who have been employed by governmental agencies.

(d) Peer Review. The applicant must submit the names and addresses of 5 individuals~~, who are neither relatives nor current associates or partners,~~ as references to attest to the applicant's substantial involvement, practical experience, and competence in condominium and planned development law, as well as the applicant's character, ethics, and reputation for professionalism in the practice of law. The names of lawyers who are relatives or currently practice in the applicant's law firm or in the applicant's educational institution or government entity employer may not be submitted as references. At least 4 of the 5 references must be lawyers or judges and at least 3 of the lawyer references must be members of The Florida Bar. The condominium and planned development law certification committee may, at its option, send reference forms to other lawyers and judges.

Commented [A3]: Peer review exclusion language consistency among all committee areas.

(e) Education. The applicant must demonstrate completion of 50 credit hours of approved continuing legal education in condominium and planned development law during the 3-year period immediately preceding the date of application. Accreditation of educational hours is subject to policies established by the condominium and planned development law certification committee or the board of legal specialization and education.

(f) Examination. The applicant must pass an examination administered uniformly to all applicants to demonstrate sufficient knowledge, skills, proficiency, and experience in condominium and planned development law to justify the representation of special competence to the legal profession and the public.

(g) Exemption. An applicant who has been substantially involved in condominium and planned development law for a minimum of 20 years, and who otherwise fulfills the standards under rule 6-30.3(c)–(e), will be exempt from the examination. This exemption is only applicable to those applicants who apply within the first 2 application filing periods from the effective date of these standards.

New subchapter added August 27, 2019.

RULE 6-30.4 RECERTIFICATION

During the 5-year period immediately preceding the date of application, the applicant must satisfy the following requirements for recertification:

(a) Substantial Involvement. The applicant must demonstrate continuous and substantial involvement in condominium and planned development law throughout the period since the last date of certification or recertification. The demonstration of substantial involvement must show that condominium and planned development law comprises at least 40 percent of the applicant's practice.

(b) Practical Experience. The applicant must demonstrate continued compliance with the requirements of rule 6-30.3(c).

(c) Education. The applicant must demonstrate completion of at least 75 credit hours of approved continuing legal education in condominium and planned development law, in accordance with the standards set forth in rule 6-30.3(e).

(d) Peer Review. The applicant must submit the names and addresses of at least 3 individuals~~, who are neither relatives nor current associates or partners,~~ as references to attest to the applicant's substantial involvement, practical experience, and competence in condominium and planned development law, as well as the applicant's character, ethics, and reputation for professionalism in the practice of law. The names of lawyers who are relatives or currently practice in the applicant's law firm or in the applicant's educational institution or government entity employer may not be submitted as references. At least 2 of the 3 references must be lawyers or judges, and at least 1 must be a member of The Florida Bar. The condominium and planned development law certification committee may, at its option, send reference forms to other lawyers and judges.

Commented [A4]: Peer review exclusion language consistency among all committee areas.

New subchapter added August 27, 2019.

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REAL PROPERTY, PROBATE & TRUST LAW SECTION
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September 30, 2019

VIA EMAIL ONLY TO: drcmail@flcourts.org

Florida Dispute Resolution Center
Supreme Court Building
500 S. Duval Street
Tallahassee, FL 32399

Re: Proposed Amendments to Florida Probate Rules 5.181-5.185

To Whom It May Concern:

On behalf of the Real Property, Probate and Trust Law Section of The Florida Bar ("RPPTL Section"), this letter responds to the request for comments to the proposed additions to Florida Probate Rules 5.181-–5.185 (collectively, the "Proposed Probate Rules").

The Committee on Alternative Dispute Resolution Rules and Policy ("Committee") should be commended for its efforts to seek a process allowing parties who cannot agree on a specific mediator to narrow the blind pool of potential mediators. Being involved in court and executive branch rulemaking, the RPPTL Section is mindful of the hard work, depth of study, serious approach and good faith expended in the rule making process. To the extent that the current rules significantly inhibit parties from suggesting to a court criteria rationally related to the parties' dispute, then rulemaking may be appropriate. The RPPTL Section looks forward to the opportunity to further engage with the Committee regarding the proposed amendments.

The RPPTL Section.

As an introduction, the RPPTL Section historically has been, and continues to be, the largest substantive law section of The Florida Bar. The RPPTL Section assists, represents, and involves well over 10,000+ members practicing in the areas of real estate, construction, probate, trust and estate law. RPPTL Section members' dedication to serving the public in these fields of practice is reflected in just a few of their continuing efforts, including producing educational materials and seminars for attorneys and the public, assisting the public pro bono, drafting proposed legislation, rules of procedure and regulation, and, upon request, providing advice to the judicial, legislative and executive branches on issues related to our fields of practice.

The proposed changes to the Proposed Probate Rules are of interest to the RPPTL Section because such changes will potentially apply to proceedings concerning estate, trust, and guardianship law, as well as real estate law, all of which will impact the RPPTL Section's membership. Evaluating the proposed amendments, the RPPTL Section gathered an ad hoc group of attorneys who have extensive use of the mediation process, as well as practices that would include many facets of legal issues affecting the elderly, including guardianships, wills, trusts and housing for older persons. The RPPTL Section also asked for comments from those members of the RPPTL Section who practice in the area of probate, guardianship and trusts. The Proposed Probate Rules were also presented to the RPPTL Section's Executive Committee last week.

The RPPTL Section's Position.

The Committee previously published a notice of the Proposed Amendments to Fla. R. Civ. P. Rule 1.720 and Fla. R. Fam. R. Rule 12.741 (collectively, the "Civil Procedure and Family Law Proposed Rules"). After careful consideration of those proposed rules, the RPPTL Section's Executive Council unanimously approved a RPPTL Section Position on July 27, 2019, in opposition to the Civil Procedure and Family Law Proposed Rules. The RPPTL Section provided comments to your Committee via letter dated July 31, 2019. Shortly thereafter, the Committee published the Proposed Probate Rules, which unfortunately did not address any of the concerns raised in the RPPTL Section's July 27, 2019, letter and raised some additional concerns.

For this reason, the RPPTL Section's Executive Committee, taking interim action in accordance with the RPPTL'S Section Bylaws because consideration of the Proposed Probate Rules by the overall RPPTL Section Executive Council was not possible under the time frame required for a response, unanimously approved a RPPTL Section Position on September 27, 2019, in opposition to the Proposed Probate Rules. We provide the following comments for your Committee's consideration, some of which mimic the concerns raised regarding the Civil Procedure and Family Law Proposed Rules. We also strongly recommend that these proposed rules be referred to the Probate Rules Committee for further consideration of the appropriateness and scope of mediation for guardianship matters.

Rationale for the Position.

The RPPTL Section's concerns initially focus upon the undefined threshold for applying the proposed amendments. The term "elder law issues," is not defined. In Florida, there is a perception, if not a reality, that there are many "elders" involved in disputes. The lack of a key definition as to what is an "elder law" dispute, creates not only uncertainty, but also will in turn create more disputes over application. For example, are estate, trust, and guardianship disputes always "elder law" disputes? Would a landlord-tenant or homeowners' association dispute where one of the parties is over age 65 be considered an "elder law issue?" Would the provisions apply to premises liability claims in hospitals, medical malpractice in nursing homes, or covenants restricting age and uses? The term "elder law" needs to be defined, or its application may have a much broader reach than intended. This would have the unintended effect of inappropriately circumscribing the available pool of mediators and undermining the blind selection process generally required by the Proposed Probate Rules.

Further, concerning qualifications, attending a training course does not correlate to professionalism, ethics or skills. At this time, the Florida State Courts Dispute Resolution Center website does not identify any mediators who have completed certified elder mediation training or what their qualifications would be. The RPPTL Section does not believe that courts should be limited to selecting persons who have taken approved "certified elder mediation training." It cannot be forgotten that parties are able to agree upon a specific mediator, the

selection being based upon training, scheduling or whatever criteria they desire. Perhaps, if the Proposed Probate Rules are going to be amended at all, the change should allow one or more of the parties to request the court to appoint someone with specialized training and knowledge in the substantive areas of law involved or such other limiting criteria as the parties may agree upon, including, for example, a mediator who is Board Certified by The Florida Bar in the substantive areas of law involved. Board certification with its rigorous entry criteria, exam, background reports, and recommendations provides an alternative process that recognizes "special knowledge, skills and proficiency in various areas of law and professionalism and ethics in practice."

Finally, many believe that the inclusion of any mediation rules within the Florida Probate Rules would create unintended complications. Those concerns include:

(1) The addition of a mediation rule within the Florida Probate Rules would, at a minimum, be duplicative and unnecessary because adversarial probate and guardianship matters are already governed by the Rule of Civil Procedure. See, Florida Probate Rule 5.025(d)(2). Thus, where appropriate, the Court could simply order the parties in non-adversarial probate and guardianship proceedings to conduct mediation in accordance with the mediation rules under the Florida Rules of Civil Procedure.

(2) Having a separate mediation or arbitration rule in the Florida Probate Rules could create inconsistencies in the event that there are future changes to either the Probate Rules or the Civil Rules that are not uniform to both.

(3) There are some adversarial guardianship matters that the Court should not be referring to mediation. For example, disputes regarding an individual's incapacity and the extent to which his/her civil rights should be restricted are matters that may not be mediated or settled via compromise. The Probate Rules Committee is better positioned to analyze these civil rights issues and better draft the scope of mediation given their specific expertise in guardianship matters.

(4) There is concern that creating a specialty group of mediators could result in favoritism towards certain groups of mediators, a dearth of certified elder law mediators, and increased cost of mediation due to specialized mediators charging a premium for their services or being required to travel to areas where qualified mediators do not exist.

Conclusion.

The RPPTL Section requests that the Proposed Probate Rule amendments not be submitted to the Supreme Court. It is suggested that the Committee may desire to: First, determine if there is a need to promote mediators with specialized knowledge and proficiency, including whether the current rules already permit the parties to request a mediator with specialized knowledge outside the blind selection process; and, if so, then second, utilize a selection process that tests and screens for specialized knowledge and professionalism if it is requested by one or more the parties. Finally, even if this Committee determines that a mediation rule is appropriate, the Committee should refer the Proposed Probate Rules amendments to the Probate Rules Committee for further consideration of the scope and appropriateness of mediating guardianship matters.

If there are hearings for consideration of the Proposed Probate Rule amendments, then please advise me of the date, time and location, and if there are any submission procedures. Of course, if the RPPTL Section can be of assistance in this process, then please inform me of the manner in which the RPPTL Section can be helpful.

Thank you in advance for your courtesies.

Respectfully submitted,

Robert S. Freedman
Chair, Real Property, Probate & Trust
Law Section

cc: Jeff Goethe, Chair, Probate Rules Committee

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REAL PROPERTY, PROBATE & TRUST LAW SECTION
THE FLORIDA BAR
www.RPPTL.org

September 30, 2019

Lori S. Holcomb
Division Director, Ethics and Consumer Protection
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Re: Proposal to Expand the Florida Registered Paralegal Program (Chapter 20, Rules Regulating The Florida Bar)

Dear Ms. Holcomb:

The Florida Commission on Access to Civil Justice ("FCACJ") has requested input from The Florida Bar's Board of Governors regarding its proposal to expand the Florida Registered Paralegal Program (Chapter 20, Rules Regulating The Florida Bar), by amending the rules (the "Proposal"). The Board of Governors has in turn requested input from the Real Property, Probate and Trust Law Section of The Florida Bar ("RPPTL Section"), and this correspondence is sent in response to your email soliciting such input.

The RPPTL Section.

As an introduction, the RPPTL Section historically has been, and continues to be, the largest substantive law section of The Florida Bar. The RPPTL Section assists, represents, and involves well over 10,000+ members practicing in the areas of real estate, construction, probate, trust and estate law. RPPTL Section members' dedication to serving the public in these fields of practice is reflected in just a few of their continuing efforts, including producing educational materials and seminars for attorneys and the public, assisting the public pro bono, drafting proposed legislation, rules of procedure and regulation, and, upon request, providing advice to the judicial, legislative and executive branches on issues related to our fields of practice.

Current Situation.

Currently, there are rules that create and regulate registered paralegals in Chapter 20, Rules Regulating The Florida Bar. The proposed amendments would allow a paralegal, registered as an Advanced Florida Registered Paralegal ("AFRP"), to provide limited legal services to limited representation clients in matters involving family law, landlord tenant law, guardianship law, wills, advance directives or

debt collection defense. In assisting these clients, the AFRP may help the limited representation client fill out forms, provide general information, and assist the clients in navigating the court system. The Proposal appears to allow AFRPs to provide legal services/advice without lawyer supervision of the work product, which is a major change from the current situation. See Rule 4-5.3(c) of the Rules Regulating The Florida Bar. While many lawyers currently employ paralegals, they have a duty to supervise the work of the paralegals. Under the current Proposal, the "work product" of a Florida Registered Paralegal ("FRP") would continue to be supervised by a lawyer (see Rule 20-2.1(l)(1) of the Proposal), but not for AFRPs.

In addition, many lawyers currently use paralegals to perform client intake without the lawyer's presence. This is permissible when (1) the paralegal identifies that he/she is not a lawyer, (2) it is limited to fact gathering, and (3) no legal advice is given. See Ethics Opinion 88-6. The attorney then makes the decision to either accept or reject a case, provides the opinion as to what documents are required, and provides the required legal services. The Proposal, as currently drafted, appears to allow the AFRP to listen to a potential client's legal issue, recommend a form, and prepare the form, all without lawyer review of the work product. The Proposal would also allow the ARFP to prepare "other documents" in addition to the form in question. See Rule 20-6.3(a)(a) of the Proposal. This may result in the execution of forms which do not properly address an individual's legal needs, resulting in additional time and legal costs to correct the errors.

Opposition to Proposal; Discussion and Analysis.

The RPPTL Section commends the laudable efforts of the FCACJ to provide the poor and underserved persons greater access to quality legal services. It is well known that the cost of legal services can be prohibitive, and the interests of justice and the citizens of Florida are better served by more people having access to quality legal services that they can afford.

However, the RPPTL Section's Executive Committee, taking interim action in accordance with the RPPTL'S Section Bylaws because consideration of the Proposed Probate Rules by the overall RPPTL Section Executive Council was not possible under the time frame required for a response, unanimously approved a RPPTL Section Position on September 27, 2019, **in opposition** to the Proposal. We provide the following comments and discussion for the FCACJ's consideration.

These concerns, and the basis for the RPPTL Section's opposition to the current Proposal, are that the Proposal (a) conflicts with existing unlicensed practice of law ("UPL") and ethics decisions (and the solid public policy reasoning for such decisions), (ii) fails to provide quality control for the legal services being provided, (iii) fails to detail the requisite specificity for a successful program, and (iv) is subject to abuse, fraud, and other potential unforeseen consequences. For the foregoing reasons, the Proposal, as drafted, does not accomplish the goal of access to justice nor does it fix the current problems facing the public. In fact, the Proposal, as currently drafted, potentially creates a host of new problems (which are addressed below).

a. Conflict with Existing Law - Unlicensed Practice of Law.

The Proposal appears to be contrary to Florida Supreme Court decisions, Florida Bar ethics opinions, the Rules Regulating The Florida Bar, and the well-reasoned arguments supporting those decisions and rules. In *The Florida Bar v. Sperry*, 140 So.2d 587, 595 (Fla. 1962), and *The Florida Bar v. Town*, 174 So.2d 385 (Fla. 1965), the Florida Supreme Court announced that if important legal rights of a person are affected by the giving of advice or by the performance of services, including the preparation of legal instruments by which legal rights are

obtained, secured, or given away, then such act constitutes the practice of law. Clearly, providing assistance in the completion of forms, even the most basic of forms, affects the legal rights of persons and could constitute UPL.

Rule 10-2.1(a) of the Rules Regulating The Florida Bar provides that, "[i]n assisting in the completion of the form, oral communication by nonlawyers is restricted to those communications reasonably necessary to elicit factual information to complete the blanks on the form and inform the self-represented person how to file the form. The nonlawyer may not give legal advice or give advice on remedies or courses of action." Aside from the ministerial act of taking written instructions (from the client or a Florida attorney) and filling in blanks, any further action taken by a person on behalf of another would constitute UPL.

In *The Florida Bar v. Keehley*, 190 So.2d 173 (Fla. 1966), which dealt with matters relating to the preparation of corporate charters and other related documents, the Florida Supreme Court approved and adopted the conclusions of the circuit court judge acting as a referee which held that neither the absence of compensation, the close personal relationship between the party preparing the documents and those for whom they were prepared, nor the interest of the respondent in the transaction, either present or prospective, served to legalize his actions in formation of the corporations. See also, Advisory Legal Opinion – AGO 75-129, May 5, 1975. The Florida Supreme Court stated in *Keehley*:

> "It is equally inimical, dangerous and contrary to the welfare of the public to permit untrained and unqualified persons, who have not been admitted to The Florida Bar, to perform such services for individuals who desire to incorporate and to operate as corporations under the Florida law, whether a fee is charged, whether the parties are closely related, or whether the untrained persons is one of the interested parties." *Keehley*, 190 So.2d at 175.

The Proposal appears to separate AFRPs from FRPs by allowing AFRPs to provide legal services or prepare documents which are not reviewed by an attorney. Cf. Rule 20-2.1(l)(1) of the Proposal relating to FRPs. If this is the case, this would be in conflict with Rule 4-5.3(c), which states, "the lawyer **must review** and be responsible for the work product of the paralegals or legal assistants." (Emphasis added.)

b. Harm to the Public.[1]

The limited training required under the Proposal does not fully address the concerns regarding protection of the public. Perhaps a significant amount of training and licensing requirement may provide for better protection of the public than what is in the current Proposal (something akin to being licensed members of the Bar but less stringent). The Florida Supreme Court has stated:

> ". . . the unauthorized practice of law by those not qualified and admitted actually creates work for the legal profession because of the errors and mistakes of those who for others illegally perform legal work they are not competent to perform. In this, the members of the legal profession gain, but the unfortunate

[1] "[T]he single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation." *The Florida Bar v. Moses*, 380 So.2d 412, 417 (Fla. 1980).

> members of the public who were ill-advised lose, in some instances, quite badly." *Sperry*, 140 So.2d at 595.

Any lawyer who has been hired as successor counsel after prior counsel has made mistakes understands the difficulty and expense of redressing any prior mistakes. Additionally, while some mistakes can be fixed at a minimum cost, others can be very costly to remedy. Even worse, some mistakes simply cannot be repaired and a client who may have a winning case is left losing their case and paying attorney's fees (and possibly the other side's attorney's fees).

The Proposal appears to allow an AFRP to provide services if they are supervised **or** employed by a lawyer. The RPPTL Section believes that any AFRP allowed to provide services must be employed **and** supervised by a lawyer. The failure to require employment with a lawyer and supervision by that lawyer would appear to allow loosely associated individuals to thwart the intent of the Proposal and to otherwise harm the public. Moreover, it provides the "stamp of approval" of The Florida Bar over individuals practicing under the auspices of the AFRP program, when in fact such individuals may be practicing with little or no oversight from The Florida Bar and a licensed attorney. What if an attorney is licensed in Florida but actually practices in another jurisdiction, does not have an office in Florida, but associates with local paralegals? Is this a scenario that is acceptable? The RPPTL Section believes there should be added safeguards, and perhaps requiring the lawyer to be located in Florida (or at least for a percentage of the time) if she/he uses AFRPs may address this concern.

In addition, the Proposal allows the AFRP to prepare "other documents" related to the forms as well without truly defining "other documents." (See Rule 20-6.3(a)(1) of the Proposal.) If a guardianship owes taxes, should the AFRP be allowed to provide tax advice since it relates to the guardianship? There should be limitations on what "other documents" includes.

It is not on account of protectionism for the practice of law, but protection for the general public, that the Proposal, as currently drafted, should be rejected. As stated by the Florida Supreme Court, "[i]t is the effort to reduce this loss by members of the public that primarily justifies the control of admissions to the practice of law, discipline of those who are admitted, and the prohibition of the practice to those who have not proved their qualifications and been admitted." *Sperry*, 140 So.2d at 595. Under the Proposal, AFRPs are not subject to the same ethical rules and standards of care as a member of The Florida Bar. These Rules and standards of care of our profession exist for the protection of the public, and any person providing legal services must adhere to the same. The inability to control the quality of the legal services provided by an AFRP harms the public and fails to provide the requisite protection incumbent to move forward with the Proposal.

c. Practice Areas.

The breadth of the practice areas encompassed by the Proposal, together with the lack of definitions or specificity of what services may be provided within such practice areas, is problematic. While the Proposal may work for some, limited practice areas in limited scope assignments, the Proposal does not contain the requisite specificity to guide the AFRP program. For example, what is meant by "wills"?[2] Does it include a 100 page "form" will that has been developed by a practitioner over years of experience? Does this include estate planning and probate administration? If it is contemplated that drafting of "simple wills" be allowed, one gets into the slippery slope of what is a "simple" will. Also, it is doubtful that an AFRP has the legal

[2] The Florida Supreme Court has held that a nonlawyer cannot draft a will for a third party. *The Florida Bar v. Larkin*, 298 So.2d 371 (Fla. 1974).

ability to advise a client regarding proper alternatives to a "simple will," including using other estate planning tools and techniques, such as lady bird deeds, trust agreements, jointly held assets, and the legal implications of choosing those alternatives, including tax consequences and asset protection.

In probate and guardianship administrations, lawyers are generally required to be involved pursuant to Fla. Prob. R. 5.030(a). This is because probate and guardianships are extremely detailed-oriented practice areas fraught with deadlines and other nuances which present traps for the unwary. Guardianship cases are by their very nature adversarial because the petitioner is seeking to declare someone incapacitated and to remove their civil rights (which is why counsel is appointed for the alleged incapacitated person when a case is initiated pursuant to § 744.331(2), Fla. Stat.) Accordingly, an AFRP should not be allowed to provide legal advice in guardianships and probate cases.

Ethics opinions, such as Ethics Opinion 89-5, demonstrate the specificity necessary for a nonlawyer to engage in a quasi-legal practice. Ethics Opinion 89-5 details five requirements for a nonlawyer in a law firm to conduct a real estate closing, including the requirement that the client understands the closing documents in advance of the closing, the lawyer be available for consultation during closing, and the nonlawyer will not give legal advice at the closing or make impromptu decisions that should be made by the supervising lawyer. Whether a real estate closing, contract, or "simple" will, a nonlawyer will not be able to comply with similar requirements without attorney involvement.

Landlord-tenant law and debt collection often involve litigation. Moreover, without the requisite specificity, each suffer from the same deficiencies enumerated above. The FAR/BAR residential form lease may be one thing (although such lease still has numerous instances of negotiated issues that impact legal rights), but a twenty-five page lease developed by a lawyer, which contains numerous legal waivers and requirements, could be something completely different. Debt collection involves extensive knowledge of Federal and State debt collections law, Florida exemptions, and tenancy by the entirety laws, and traverses bankruptcy protections and the numerous exceptions across each area of the law. Debt collection is not "form" driven.

Notwithstanding the above, with the proper protections, an AFRP may be able to aid clients with filling out certain forms which have been approved by the Florida Supreme Court or by statute, such as forms commonly used in family law or advanced directives, provided that specificity and protections, such as was set forth in Ethics Opinion 89-5, are put in place. Other areas of practice which are not enumerated in the Proposal, but which may also lend themselves to an ARFP's involvement, may include Baker Act and Marchman Act proceedings. Even so, when a limited representation client asks, "what's the difference between Option A and Option B?", a licensed attorney should be available to explain such important legal rights.

Whether a "simple" form or a more complex guardianship or debt collection proceeding, it is clear that lawyer oversight is necessary. Such oversight will necessarily bear a cost, negating or substantially reducing any cost savings intended by the Proposal and reveals the Proposal to not be materially different than what is presently available to lawyers, paralegals, and the public through the Florida Registered Paralegal Program.

d. Concerns Regarding Fraud.

The Proposal opens the door, and may perhaps legitimize, certain unscrupulous activities. One potential unintended consequence of the Proposal would be to allow paralegal mills, conceivably employing scores of AFRPs, headed by one lawyer, with very little, if any, supervision. What if a financial planner obtains the necessary requirements to be an AFRP

under the Proposal and loosely teams up with a non-estate planning lawyer to then provide an estate planning mill closely tied to the financial planner's investment advice business? There are also concerns regarding UPL with disbarred lawyers or out-of-state lawyers practicing law in Florida through an AFRP loophole.

e. Other Issues Identified.

The unintended consequences of the Proposal should be studied. In addition to the aforementioned issues, the RPPTL Section also identified several other issues and potential unintended consequences of the Proposal as currently drafted. While the target audience of the Proposal is the "underserved" and indigent persons in Florida, AFRPs could be utilized to target other groups, such as the elderly, wealthy, or the public as a whole, through broad marketing campaigns aimed at getting large quantities of clients in the door to provide "one size fits all" legal products, or worse, a "bait and switch" tactic of drastically increasing the cost of services provided after the initial meeting or detracting from presently available sources for quality low or no cost competent legal representation. Without any restriction on services to be provided by the AFRP or fees to be charged, the Proposal could be subject to abuse of citizens outside its target, potentially resulting in an AFRP being tasked with providing legal advice or drafting estate plans for extremely wealthy individuals with major tax consequences. Legal aid organizations have income limits to ensure that the target audience receives their services. The Proposal lacks such limit or any other mechanism to ensure the target audience is served which could result in the target audience, again, being ignored and priced out of the services to be provided.

Cottage industries within practice areas could spring forth from the Proposal. For instance, in corporate legal practice, the Proposal could be utilized for the completion of corporate documents, charters, or articles of incorporation. Such would violate existing law. *The Florida Bar v. Fuentes*, 190 So.2d 748 (Fla. 1966); *Keehley*, 190 So. 2d at 173.

The public may not truly appreciate that the services are being provided by a person who is not authorized to practice law in the state of Florida. Detailed written disclosures and informed consent could alleviate some of these concerns but are absent from the Proposal.

f. State of Washington Limited License Legal Technician (LLLT).

There has been some discussion that the Proposal is based on Washington State's concept of a Limited License Legal Technician ("LLLT").[3] However, the requirements for LLLTs appear to be much more in-depth than what is required of AFRPs and the Washington program only has a handful of participants. Some of the requirements of an LLLT include:

1. Education

- Associate Degree or higher in any subject
- LLLT Core Curriculum: 45 credits of legal studies courses that must be taken at a school with an ABA-approved or LLLT Board-approved paralegal program or at an ABA-approved law school and that must include the following subjects
- Civil Procedure, minimum 8 credits

[3] The Washington Lawyer (publication of the District of Columbia Bar), suggests that the program may work in Washington State based on the specific needs of that jurisdiction, but are not appropriate everywhere, including in their own jurisdiction. John Murph, *The Justice Gap & the Rise of Nonlawyer Legal Providers*, Wash. Law., Sept. 2019, at 18-23. A copy of the Article is enclosed with this submission.

- Contracts, minimum 3 credits
- Interviewing and Investigation Techniques, minimum 3 credits
- Introduction to Law and Legal Process, minimum 3 credits
- Law Office Procedures and Technology, minimum 3 credits
- Legal Research, Writing, and Analysis, minimum 8 credits
- Professional Responsibility, minimum 3 credits
- 5 credit hours in basic domestic relations subjects
- 10 credit hours in advanced and Washington-specific domestic relations subjects.

2. Examinations Requirement: 3 examinations

- Paralegal Core Competency Exam (PCCE)
- LLLT Practice Area Examination: Tests knowledge of a specific practice area. Currently, the approved practice area is family law.
- LLLT Professional Responsibility Examination: Tests knowledge of LLLT ethics.

3. Experience Requirement

- 3,000 hours of substantive law-related work experience as a paralegal or legal assistant supervised by a lawyer prior to licensing.
- Experience must be acquired no more than three years prior to, or 40 months after, passing the LLLT practice area exam.

The Proposal only requires 3 hours of course credit to sit for national examination. Under the Proposal, an AFRP could take a 3-hour course in contracts and then seek to provide services in family law. How does this benefit the public if the AFRP does not know family law and its nuances? The Proposal only requires a national examination. If an attorney is required to take the Bar Exam which includes Florida-specific law, why should an AFRP not also be subject to an examination on Florida specific law?

Conclusion.

The RPPTL Section supports the push to increase access of the public to justice, but opposes the Proposal in its current form. However, any efforts to increase access should have as its priority Florida's unwavering public policy of protecting its citizens from the unlicensed practice of law, incompetent legal services, and fraud. Regarding the Proposal, the RPPTL Section recommends:

- Eliminating wills, guardianships, landlord tenant and debt collection from the practice areas;

- Studying allowing AFRP to participate in Baker Act and Marchman Act proceedings and/or the completion of Florida Supreme Court-approved forms;

- Strictly defining exactly what services and forms (and limiting each) which can be utilized by the AFRP within any areas of practice allowed (such as family law);

- Providing a better definition (with proper limits) on what "other documents" mean in Rule 20-6.3(a)(1);

- Increasing the educational/licensing requirement to be an AFRP;

- Requiring an AFRP to be both employed by **and** supervised by a lawyer and perhaps require the lawyer to work or have an office in Florida;

- Adding additional safeguards to prevent fraud, such as paralegal mills with lack of supervision;

- Expanding legal aid or re-routing resources into the existing Florida Bar's Lawyer Referral Source program, or other available no/low cost legal alternatives should be considered in the alternative to the Proposal. There are presently programs and service providers which provide access to justice for underserved and indigent persons, *under the supervision or directly by a licensed attorney*. Increasing funding to such organizations or providing a mechanism for underserved persons to pay a portion of the cost of legal services commensurate to their income level could serve *and* protect the target audience; and

- Providing better public access to legal references, such as legal educational materials, forms, and other tools – even posting such tools online in a centralized location. Computer access at each public library or Clerk of Court could be provided (with no other internet service) to allow persons to research public records, Florida Supreme Court-approved forms, and potential tutorials produced by The Florida Bar on how to complete of the forms.

If revisions to the Proposal are made in this regard, the RPPTL Section would be able to consider providing its support.

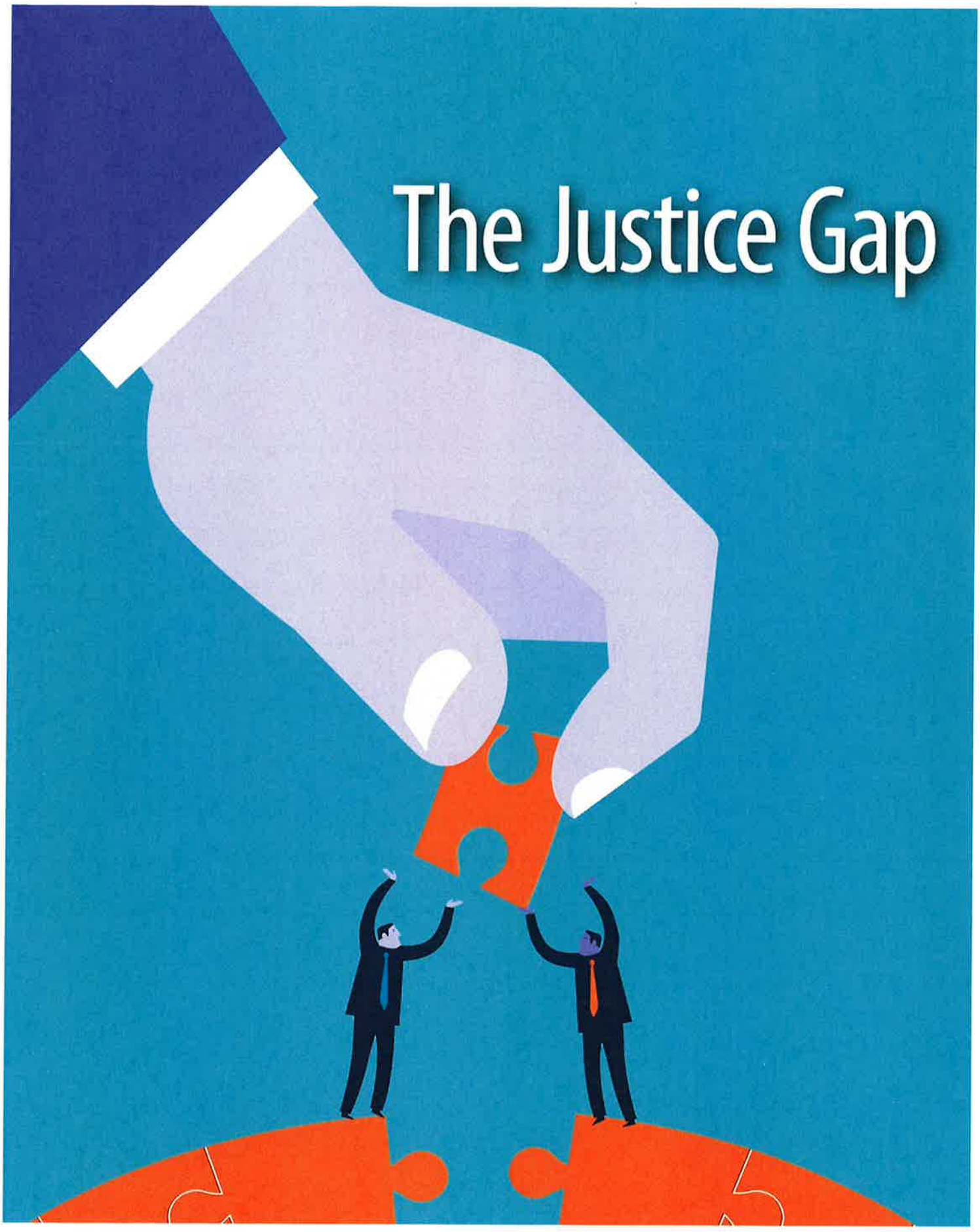
Thank you in advance for your courtesies.

Respectfully submitted,

Robert S. Freedman
Chair, Real Property, Probate & Trust
Law Section

Enclosure

The Justice Gap



& the Rise of Nonlawyer Legal Providers

By John Murph

Kelly Peterson-Lalka, a mother of four living in Montesano, Washington, began a lengthy child custody battle with her ex-husband in 2008. Unable to afford a lawyer, she had no choice but to represent herself in court, while her ex-husband, according to Peterson-Lalka, spent close to $60,000 in attorney's fees. "I would get killed every time I entered the court because of the forms and service requirements, plus the legal processes were so confusing," Peterson-Lalka says.

In 2019, months before one of her daughters graduated from high school, Peterson-Lalka prepared for another court battle with her ex-husband, this time for post-secondary child support so he could help pay for the teenager's college education. "My daughter received a [partial] scholarship, but my ex-husband was unwilling to pay any amount toward her education," Peterson-Lalka says.

Under Washington State law, a court can order a divorced parent to pay some or all of a child's education expenses at a college, trade school, or vocational school, and sometimes graduate school. To receive post-secondary child support, the guardian parent must file a petition before the child turns 18 or graduates from high school.

Peterson-Lalka, who earns a moderate income, still could not afford a lawyer. But through some of her attorney friends from her home state of Montana, she learned about Washington's limited license legal technicians (LLLTs) — professionals who help clients fill out legal paperwork, provide information, and help clients navigate court proceedings without the supervision of a lawyer. LLLTs cost substantially less than lawyers.

Through a Google search, Peterson-Lalka found Kellie W. Dightman, an LLLT based in Olympia, Washington, who guided her through the petition filing process. After reviewing the ex-husband's income, Dightman discovered that he should have been paying more than double the amount he'd been ordered to pay in child support based on his monthly income. The ex-husband, however, refused to release his income information to the court, so Dightman helped Peterson-Lalka file for an extension on the post-secondary child support petition.

Peterson-Lalka appeared in court six times. Although Dightman was not authorized to appear in court with Peterson-Lalka, her legal assistance led to a favorable outcome. "My daughter is now going to get post-secondary child support from him in the amount of $18,000 a year, which will allow her to graduate from college with zero debt," Peterson-Lalka says.

The charge for Dightman's services, which continued over a period of five months, was just $395.

ELEVATING THE ROLE OF NONLAWYERS

Peterson-Lalka's case illustrates the crisis many people face nationwide regarding access to justice. According to a 2017 Legal Services Corporation study, low-income Americans received inadequate or no legal help for 86 percent of civil legal problems reported the previous year.

In 2013 Washington sought to mitigate the crisis by becoming the first state to offer an affordable option for individuals priced out of the services of lawyers: a new category of nonlawyer professionals called LLLTs. Licensed by the Washington Supreme Court, LLLTs advise and assist clients in certain family matters, including divorce and child custody, without lawyer supervision — but cannot represent them in court.

To become an LLLT, an applicant must have a minimum of an associate degree in any subject; earn at least 45 credits in legal studies courses from an American Bar Association (ABA)–approved or a Washington State Bar Association LLLT Board–approved paralegal program, or from an ABA-accredited law school; and pass three examinations focused on core competencies, practice area, and professional responsibility. The state has approximately 30 practicing LLLTs to date.

Other states have explored similar approaches to increasing access to justice. In 2013 the Colorado Judicial Branch authorized the use of self-represented litigant coordinators called Sherlocks, who staff self-help centers in courthouses throughout the state and provide free one-on-one procedural assistance, offer referrals, and give out court forms and written information to civil litigants. Sherlocks assisted 175,162 self-represented litigants in 2017.

In November 2018, Utah's Supreme Court amended Rule 14-802 of the Rules Governing the Utah State Bar to permit licensed paralegal practitioners (LPPs) to assist clients in specific matters. The minimum educational requirement for an LPP is an associate degree in paralegal studies from an accredited school. An applicant must also pass a professional ethics exam and an LPP exam for each practice area in which he or she seeks to be licensed, and obtain certification by the National Association of Legal Assistants, the National Association of Legal

> The challenge for LLLTs to work in the District might be finding opportunities where they can earn a high enough income to pay whatever student debt [they have] and afford the expense of living in D.C.
>
> **PATRICK McGLONE**
> *Ullico Inc.*

> If we are going to add 'limited' nonlawyer services in D.C. to address the reality of the needs here, we have to develop a program that provides opportunities and incentives for qualified nonlawyers to provide services at a much lower cost.
>
> **SHELDON KRANTZ**
> *DC Affordable Law Firm*

Professionals, or the National Federation of Paralegal Associations. Modeled after Washington State's LLLT program, LPPs help self-represented litigants in family law, landlord–tenant, and consumer debt matters, but cannot provide in-court representation.

Oregon also is considering allowing nonlawyer paraprofessionals to provide limited legal services. In June 2017, the Oregon State Bar Futures Task Force recommended the creation of a licensure program for paraprofessionals "who would be authorized to provide limited legal services, without attorney supervision, to self-represented litigants in (1) family law and (2) landlord–tenant proceedings."

"The most compelling argument for licensing paraprofessionals is that the Bar's other efforts to close the access-to-justice gap have continued to fall short. We must broaden the options available for persons seeking to obtain legal services, while continuing to strive for full funding of legal aid and championing pro bono representation by lawyers," the task force said in its report.

In June 2019, the State Bar of California's Task Force on Access Through Innovation of Legal Services proposed allowing nonlawyers to (1) provide specified legal advice and services with appropriate regulation and (2) hold a financial interest in law firms. The proposals have been submitted for public comment.

Other states have launched or are developing nonlawyer navigator programs to assist self-represented litigants with civil legal matters. A June 2019 report by the Justice Lab at Georgetown University Law Center in Washington, D.C., identified 23 such programs currently in existence.

The report, "Nonlawyer Navigators in State Courts: An Emerging Consensus," noted that those who championed the programs, including the judiciary, state access-to-justice commissions, and bar foundations, "brought a range of diverse resources and strategies to help meet the [self-represented litigant] demand and have created programs without major regulatory reform or rule changes."

New York City, for instance, allows volunteer court navigators to help self-represented litigants navigate its landlord–tenant court; some volunteers can even accompany clients in the Bronx Civil Court and in the Kings County and Queens County housing courts.

In the United Kingdom and Australia, "there is a greater variety of individuals and organizations that can provide legal services," says Kathleen Clark, vice chair of the D.C. Bar Global Legal Practice Committee. For example, organizations not owned by lawyers, including for-profit companies, are able to offer legal services to clients, a practice not allowed in the United States.

For people who are not eligible for pro bono legal assistance because their incomes exceed the federal poverty guidelines, LLLTs, LPPs, and other nonlawyer legal services providers are a lifeline. When Peterson-Lalka sought counsel from lawyers for her child custody matter, she recalls being told that the retainer alone could cost approximately $1,500.

"That's not something I could come up with at the drop of a hat," she says. "Most Americans live from paycheck to paycheck. So, to come up with something between $1,500 and $2,000 just to start a case is almost unattainable, even for someone with a moderate income."

VIABILITY IN THE DISTRICT

But how viable would the LLLT model be for the rest of the country? The District of Columbia has more than 30 legal services provider organizations serving its low-income population, yet more than 80 percent of D.C. residents still represent themselves in Superior Court despite the city's high concentration of lawyers.

"It's untenable that so many represent themselves in situations where they are in danger of losing custody of their children or being evicted," says Sheldon Krantz, executive director of the DC Affordable Law Firm (DCALF), a nonprofit charitable organization that provides legal services to clients at reduced rates. "We need to be looking at alternative ways of providing needed services to people who confront a complicated legal system on their own."

At its first meeting in December 2018, the newly formed D.C. Bar Global Legal Practice Committee began studying the different models for providing legal services, including the LLLT program. "We are at an early stage of our inquiry. So, I'm not in any position to go into a lot of detail," says Clark. "But one question that arises is whether the model in Washington State is a step in the right direction. Is it sufficient? And how does it compare to what is occurring outside the United States?"

> The [D.C. Access to Justice] Commission recommends that the District explore the use of nonlawyers and other allied professionals in addressing legal and other needs, including navigator-type programs.
>
> **NANCY DRANE**
> *D.C. Access to Justice Commission*

Krantz applauds Washington for devising an alternative method for providing legal services, but he questions whether the LLLT model would meet the needs of the District. "The model imposes very rigid and expensive qualifying requirements. While some of the requirements are needed to protect the public, others, in my view, go well beyond what is necessary," Krantz argues.

In addition to the educational and examination requirements, LLLT applicants must accumulate 3,000 hours of substantial law-related experience as a paralegal or legal assistant under lawyer supervision. Those hours must be acquired no more than three years prior to or 40 months after passing the practice area exam. In Utah, LPPs must log 1,500 hours of substantial law-related experience within three years prior to the application.

While these exacting requirements cost less than a law degree, many LLLTs and LPPs find that they need to charge rates sufficient to offset the debt they took on to obtain their license.

"While less than the normal fees lawyers charge, LLLT fees still average about $100 an hour and often exceed that amount," Krantz says.

Priscilla Selden of Wenatchee, Washington, the second person to become an LLLT in the state, started her practice in 2015. Previously, she was a paralegal for 25 years. A member of Washington's Practice of Law Board between 2009 and 2012, Selden was on the committee that wrote the rules for LLLTs. Although her fees are not fixed in writing, she says her services cost about a third of what lawyers charge.

"I do flat fees as opposed to hourly because I think it's more understandable for clients and a bit kinder to them," Selden says. "The clients know what it's going to cost, which takes away some of the anxiety of wondering if they are going to run up a huge bill. We have a very consumer-focused ethos."

Selden gets clients through her contacts with a local nonprofit volunteer lawyer program, her work as a courthouse facilitator, and through referrals from other attorneys. "It's been a progression," she says. "But now, I'm pretty busy. I have maybe four or five clients in my solo practice at any given time."

It's important to mention that the cost of living in Wenatchee is significantly lower than that in Washington, D.C. "The challenge for LLLTs to work in the District might be finding opportunities where they can earn a high enough income to pay whatever student debt [they have] and afford the expense of living in D.C.," says Patrick McGlone, former D.C. Bar president and senior vice president, general counsel, and chief compliance officer at Ulllico Inc.

In a September 2018 article in the online *ABA Journal*, McGlone cited a March 2017 study by the National Center for State Courts and the American Bar Foundation that found general client satisfaction with LLLTs. But the study also found that "the experience of . . . LLLTS to date has not been especially encouraging in terms of viable business models when operating as a pure full-time LLLT practice."

"Washington State, Utah, and other jurisdictions are to be commended for experimenting with new models of delivering at least limited legal services by nonlawyers, subject to certain educational requirements and disciplinary oversight. After a period of refinement and growth, the licensed legal technician model may mature into a potent solution to the access-to-justice gap," McGlone wrote. "In some jurisdictions, the model may grow to the point of sustainability. . . . In other states, the model may not be an effective solution, but given the persistence of the access-to-justice challenge, we must remain open-minded about this innovative approach."

McGlone says one reason LLLTs and LPPs work in Washington State and Utah is that they serve more rural areas where the ratio of lawyers is significantly less than the general population.

Steve Crossland, a lawyer based in Cashmere, Washington, concurs. One of the main architects of the LLLT program, he argues that Washington State's access-to-justice crisis stems largely from fewer people entering and graduating from law schools there. "About half of the Washington State Bar Association consists of baby boomers like me," Crossland says. "And many of us are retiring. That shrinking number of practicing lawyers has caused a crisis."

Krantz notes that because of the District's high cost of living, many DCALF clients struggle to pay its already reduced fees. "There are over 100,000 people in the District who fall within the 200 percent to 400 percent federal poverty level. As an example, the annual income level for an individual at 200 percent of the federal poverty level is $24,280, and $48,500 at 400 percent. DCALF charges $75 an hour for its legal services," Krantz explains. "We learned very quickly that most of our clients cannot afford to pay even that rate. If we are going to add 'limited' nonlawyer services in D.C. to address the reality of the needs here, we have to develop a program that provides opportunities and incentives for qualified nonlawyers to provide services at a much lower cost."

James Sandman, president of the Legal Services Corporation, says District residents may be leery of LLLTs because of the very nature of their practice. "Let's start with the title they gave the position — limited licensed legal technician.

I can't think of a title less likely to inspire confidence on the part of the consumer," Sandman says.

Other hurdles that Sandman sees in getting the LLLT model off the ground in the District include getting buy-ins from local law schools to invest in an LLLT program and amending Rule 49 of the D.C. Court of Appeals Rules governing unauthorized practice of law.

ALTERNATIVES TO THE LLLT MODEL

Despite Washington, D.C.'s large network of legal services provider organizations and the availability of lawyers who offer lower rates by unbundling some of their services, the access-to-justice crisis persists.

"In a forthcoming report on the District's civil justice system, the D.C. Access to Justice Commission offers a variety of recommendations in bridging the justice gap, including the expansion of support for traditional models of legal representation and non-traditional approaches," says Nancy Drane, executive director of the commission. "Among other strategies, the commission recommends that the District explore the use of nonlawyers and other allied professionals in addressing legal and other needs, including navigator-type programs."

Drane notes that the D.C. Courts recently launched two navigator programs. The Veterans Navigator Office connects court-involved veterans to agencies and programs that provide a wide variety of services, including mental health and substance abuse treatment, civil legal assistance, social adjustment counseling, job training, and processing of VA benefits and claims. Court-involved veterans are defined as those having a criminal, civil, probate, domestic violence, small claims, landlord–tenant, or family matter in D.C. Superior Court.

The Court Navigator Program, on the other hand, helps self-represented litigants physically navigate the court, complete their business with the court, and access pertinent information on other legal services. This program currently serves clients in small claims and landlord–tenant disputes. These navigator programs supplement the services offered by legal services providers onsite at D.C. Superior Court, including attorneys of the day and the Landlord Tenant Resource Center.

Among the seven recommendations outlined in Georgetown Law's Justice Lab report are to "[secure] good data to measure and determine the results of navigator programs" and to conduct independent research to make the best use of navigator efforts. The latter includes "evaluations of individual programs to demonstrate program outcomes, impact, and cost savings; studies to help determine when best to use nonlawyers to provide assistance; and surveys of best practices in community-based programs using nonlawyers to help unrepresented people."

Krantz agrees that finding innovative solutions to bridge the justice gap is key. "We need to start thinking creatively of ways that involve our many universities," Krantz says. "The District has a number of law schools and schools of social work; we can engage their students. There are also massive numbers of baby boomers who are retiring from professional careers and are looking for ways to give back to their communities. We should involve them."

"But we should go way beyond Washington State's LLLT program and create our own way of using qualified nonlawyers to meet the crisis confronting us," Krantz adds. "I'm convinced that we are up to that challenge."

Illustration, iStock; Patrick McGlone, courtesy of Patrick McGlone; Sheldon Krantz, courtesy of Sheldon Krantz; Nancy Drane, courtesy of D.C. Access to Justice Commission

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 2020-2021

Executive Council Meeting Schedule

Bill Hennessey'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 23 – July 26, 2020	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Room Rate (Deluxe Room – King): $239 Premium Room Rate: $290
September 30 – October 4, 2020	**Out of State Executive Council Meeting** Four Seasons Resort Jackson Hole, WY Standard Guest Room Rate: $395 (single/double)
December 3 – December 6, 2020	**Executive Council & Committee Meetings** Disney's Yacht Club Orlando, FL Standard Guest Room Rate: $289 ($25 pp for each person over 18 years old)
February 2 – February 6, 2021	**Executive Council & Committee Meetings** Hammock Beach Resort Palm Coast, FL Standard Guest Room Rate: $289 (single/double)
May 28 – May 31, 2021	**Executive Council Meeting & Convention** JW Marriott Marco Island, FL Standard Guest Room Rate: $245 (single/double)

RPPTL Financial Summary from Separate Budgets

2019-2020 [July 1 - August 31] YEAR

TO DATE REPORT

General Budget	YTD
Revenue	$ 1,021,472
Expenses	$ 565,517
Net:	$ 455,955

Attorney Loan Officer	YTD
Revenue	$ 4,500
Expenses	$ 52
Net:	$ 4,448

CLI	YTD
Revenue	$ 5,635
Expenses	$ 180
Net:	$ 5,455

Trust Officer Conference*	
Revenue	$ 210,250
Expenses	$ 36,140
Net:	$ 174,110

Legislative Update*	
Revenue	$ 25,178
Expenses	$ 87,331
Net:	$ (62,153)

Convention	
Revenue	$ 660
Expenses	$ -
Net:	$ 660

Roll-up Summary (Total)	
Revenue:	$ 1,267,695
Expenses	$ 689,220
Net Operations	$ 578,475

Beginning Fund Balance:	$ 2,136,908
Current Fund Balance (YTD):	$ 2,715,383
Projected June 2019 Fund Balance	$ 2,052,489

1 This report is based on the tentative unaudited detail statement of operations dated 08/31/19 (prepared 10/18/19)

**expenses and revenue have not been finalized*

Course Date	Course #	Course Title	Location/Venue	Program Chair
11/1/2019	3681	*Joint CLE w/ Georgia*	Jacksonville/Webcast	Hardy Roberts/Peter Crofton (Georgia Bar)
11/15/2019	3589	*Probate Law Seminar*	Fort Lauderdale	Travis Hayes / John
11/20/2019	3396	RPPTL Audio Webcast: Sharing Physical Space in a Digital World	Audio Webcast	Chris Sadjera / Willie Kightlinger
12/10/2019	3399	*RPPTL Audio Webcast: Mediation in Estate, Trust, and Guardianship*	Audio Webcast	Amy Beller
12/17/19	3400	*RPPTL Audio Webcast: Correct Notorization*	Audio Webcast	George Karibjanian
12/18/19	3397	*RPPTL Audio Webcast: Title Insurance: What Will the Insurere Really Do and What is the Exposure, Part 1*	Audio Webcast	Chris Smart/ Willie Kightlinger
1/7/2020	3401	*RPPTL Audio Webcast: Professionalism & Ethics Series- Part 1*	Audio Webcast	TBD
1/14/2020	3398	*RPPTL Audio Webcast: Title Insurance: What Will the Insurer Really Do and What is the Exposure, Part I*	Audio Webcast	Chris Smart/ Willie Kightlinger
1/16/2020	3402	*RPPTL Audio Webcast: Homestead Series - 1*	Audio Webcast	TBD
2/7/2020	3586	*Trust & Estate Symposium*	Tampa	Rich Caskey/Matt Triggs
2/21/2020	3500	*Condominium Law Certification Review*	Nova, Ft. Lauderdale	Sandra Krumbein
2/28/2020	3274	*Attorney Bankers Conference*	Stetson Law School, Tampa	Rob Stern
3/4-7/2020	3502	*14th Annual Construction Law Institute*	JW Marriott, Orlando	Jason Quintero
3/4-7/2020	3501	*Construction Law Certification Review*	JW Marriott, Orlando	Melinda S. Gentile and Elizabeth B. Ferguson
3/18/2020	3403	*RPPTL Audio Webcast: Professionalism & Ethics Series - 2*	Audio Webcast	TBD
4/17-18/2020	3721	*Real Property Cert Review*	Hyatt Orlando Airport	Manuel Farach
3/27-28/20	3588	*Wills Trusts and Estates Certification Review*	Hyatt Orlando Airport	Jeff Goethe
4/24/2020	3585	*Guardianship CLE*	CAMLS, Tampa	Caitlin Powell
5/20/2020	3722	*RPPTL Audio Webcast: Professionalism & Ethics Series - 3*	Audio Webcast	TBD
5/30/2020	3587	*RPPTL Convention Seminar*	Loews Sapphire Falls, Orlando	Stacy Kalmanson, Silvia Rojas
6/17/2020	3723	*RPPTL Audio Webcast: Homestead Series – 3*	Audio Webcast	TBD
6/24/2020		*RPPTL Audio Webcast: Homestead Series - 4*	Audio Webcast	TBD

Proposed Budget 20- 21
Real Property Probate Trust Law Section

Account	15-16 Actual	16-17 Actuals	17-18 Actuals	18-19 Actuals	19-20 Budget	20-21 Proposed Budget
SUMMARY						
Beginning Fund Balance	$ 1,066,946	$ 1,477,972	$1,684,323	$ 1,823,263	$ 2,136,908	$ 2,052,489
Net Operations *	141,554	277,789	(4,779)	203,254	(94,249)	(249,600)
Legislative Update	28,094	(34,438)	(23,622)	(42,185)	(29,395)	(29,395)
Convention	(70,543)	(161,847)	(81,136)	(35,940)	(119,400)	(121,900)
Attorney Trust Officer	249,512	(2,328)	135,203	110,402	68,500	83,500
CLI**	62,409	121,880	125,911	110,992	107,525	114,525
Attorney Loan Officer		5,291	(11,935)	(28,400)	(17,400)	(2,950)
Ending Fund Balance #	$ 1,477,972	$ 1,684,323	$1,823,965	2,141,386	$ 2,052,489	$ 1,846,669

** Net Operations other than Legis. Update, Convention, Attorney Trust Officer Conf. and CLI beginning in 16-17.*

*** CLI was previously incuded in CLE roll up reflected in Net Operations from the General Tab until 2015-2016.*

**** Special projects was previously in Net Oper. from the Gen. Tab until 2016-2017. In 16-17 Budget for Spec. Proj. was returned to*

 # Includes small adjustments for rounding differences

'@ The original budget adopted by the section was revised to accommodate the new process developed for TFB overhead.

Roll Up

General	Budget
Revenue	$ 1,352,000
Expenses	$ (1,601,600)
Net	$ (249,600)

ALO	Budget
Revenue	$ 24,000
Expenses	$ (26,950)
Net	$ (2,950)

CLI	Budget
Revenue	$ 298,300
Expenses	$ (183,775)
Net	$ 114,525

Legislative Update	Budget
Revenue	$ 63,500
Expenses	$ (92,895)
Net	$ (29,395)

ATO	Budget
Revenue	$ 296,000
Expenses	$ (212,500)
Net	$ 83,500

Convention	Budget
Revenue	$ 70,000
Expenses	$ (191,900)
Net	$ (121,900)

Charitable Orgs Conference	Budget
Revenue	$ -
Expenses	$ -
Net	$ -

Rollup Summary	Budget
Revenue	$ 2,103,800
Expenses	$ (2,309,620)
Net Operations	$ (205,820)
Beginning Fund Balance (Based on Budget)	$ 2,137,497
Budgeted 2020-21 Fund Balance	$ 2,052,489
Estimated Ending Fund Balance for 2020-21 based on Current Budget	$ 1,846,669

THE FLORIDA BAR
Real Property, Probate and Trust Law General
Budget 2020-2021

	2016-17 Actual	2017-18 Actual	2018-19 Actual	2019-20 Budget	2020-21 Budget
3001-Annual Fees	$608,400	$616,160	$626,460	600,000	600,000
3002-Affiliate Fees	4,980	7,440	8,680	5,000	5,000
Total Fee Revenue	**613,380**	**623,600**	**635,140**	**605,000**	**605,000**
3301-Registration-Live	134,539	169,726	180,582	220,000	220,000
3331-Registration-Ticket	(245)				
Total Registration Revenue	**134,294**	**169,726**	**180,582**	**220,000**	**220,000**
3351-Sponsorships	186,363	211,750	237,476	180,000	180,000
3391 Section Profit Split	321,485	226,705	276,501	260,000	260,000
3392-Section Differential	23,040	27,480	25,440	25,000	25,000
Other Event Revenue	**530,888**	**465,935**	**539,417**	**465,000**	**465,000**
3561-Advertising	7,998	16,560	18,117	12,000	12,000
Advertising & Subscription Revenue	**7,998**	**16,560**	**18,117**	**12,000**	**12,000**
3899-Investment Allocation	150,494	112,048	100,919	98,445	50,000
Non-Operating Income	**150,494**	**112,048**	**100,919**	**98,445**	**50,000**
Total Revenue	**1,437,054**	**1,387,869**	**1,474,175**	**1,400,445**	**1,352,000**
4131-Telephone Expense	1,847	535	1,321	2,000	2,000
4134-Web Services	42,377	35,811	45,372	75,000	75,000
4301-Photocopying			65	300	300
4311-Office Supplies	521	1,684	2,021	1000	5000
Total Staff & Office Expense	**44,745**	**38,030**	**48,779**	**78,300**	**82,300**
5051-Credit Card Fees	3,159	12,274	11,178	12,000	12,000
5101-Consultants	109,538	120,000	120,000	120,000	120,000
5581-Legislative Consultant Travel**	NEW	NEW	NEW	15,000	15,000
5121-Printing-Outside	42,072	49,796	103,658	120,000	120,000
5199-Other Contract Services		46,279	15,125	10,000	45,000
Total Contract Services	**154,769**	**228,349**	**249,961**	**277,000**	**312,000**
5501-Employee Travel	11,851	13,799	18,438	16,000	20,000
5531-Board/Off/Memb Travel	28,291	22,977	32,741	20,000	20,000
Total Travel	**40,142**	**36,776**	**51,179**	**36,000**	**40,000**
6001-Post 1st Class/Bulk	1,330	26,671	1,046	2,000	2,000
6101-Products Purch for Sale	30,000			0	0
6311-Mtgs General Meeting	490,751	649,814	559,586	600,000	650,000
6321- Mtgs Meals			250		
6325-Mtgs Hospitality	29,821	49,654	20,938	35,000	35,000
6361-Mtgs Entertainment	7,007				
6399-Mtgs Other		6,543	10,306	15,000	15,000
6401-Speaker Expense	2,168		328	7,500	7,500
6451-Committee Expense	86,756	93,897	67,348	110,000	110,000
6531-Brd/Off Special Project		4,994	491	50,000	50,000
6599-Brd/Off Other	3,490	5,772	6,632	11,000	15,000
7001-Grant/Award/Donation	11,903	16,414	18,099	8,000	8,000
5521-Law School Programming*	NEW	NEW	NEW	5,500	5,500
5522-Professional Outreach*	NEW	NEW	NEW	3,000	3,000
5520-Diversity Initiatives*	NEW	NEW	NEW	12,000	12,000
7011-Scholarship/Fellowship	18,591	22,669	14,091	27,000	27,000
7999-Other Operating Exp	2,000	(1,000)	1,475	5,000	5,000
8901-Eliminated IntFund Exp	3,000	3,250		0	0
Total Other Expense	**686,817**	**878,678**	**700,590**	**891,000**	**945,000**
8021-Section Admin Fee	207,623	209,770	217,024	210,094	220,000
8101-Printing In-House	24,869	1,687	86	2,000	2,000
8111-Meetings Services		50	3,000	0	0
Total Admin & Internal Expense	**232,492**	**211,507**	**220,110**	**212,094**	**222,000**
9692-Transfer Out-Council of Sections	300	300	300	300	300
Total InterFund Transfers Out	**300**	**300**	**300**	**300**	**300**
Total Expense	**1,159,265**	**1,393,640**	**1,270,919**	**1,494,694**	**1,601,600**
Net Income	**277,789**	**(5,771)**	**203,256**	**(94,249)**	**(249,600)**

*The Grant/Award-Donation Line item has been split out to three new line items including Law School Programming, Professional Outreach, and Divesity Initiatives.
** The Legislative Consultant Travel Line Item has been added in 2019-20

THE FLORIDA BAR
RPPTL Attorney Bankers Conference
Budget 2020 -2021

	2016-17 Actual	2017-18 Actual	2018-19 Actual	2019-20 Budget	2020-21 Budget
3301-Registration-Live	$250	$8,075	$5,875	15,000	12,500
Total Registration Revenue	**250**	**8,075**	**5,875**	**15,000**	**12,500**
3341-Exhibit Fees	2,875	(1,375)	750	5,000	1,500
3351-Sponsorships	3,000	7,500	8,500	5,000	8,000
Other Event Revenue	**5,875**	**6,125**	**9,250**	**10,000**	**9,500**
3401-Sales-CD/DVD			0	2,000	2,000
Total Revenue	**6,125**	**14,200**	**15,125**	**27,000**	**24,000**
5051-Credit Card Fees	105	377	223	500	500
Total Contract Services	**105**	**377**	**223**	**500**	**500**
5501-Employee Travel		1,203	0	1,500	1,250
5571-Speaker Travel		712	4,990	1,000	4,000
Total Travel		**1,915**	**4,990**	**2,500**	**5,250**
6321-Mtgs Meals		5,380	30,443	12,500	5,000
6325-Mtgs Hospitality		8,087	0	7,000	5,000
6341-Mtgs Equip Rental		4,826	1,563	5,000	3,000
6401-Speaker Expense		535	5	3,000	0
7999-Other Operating Exp	154			2,000	300
Total Other Expense	**154**	**18,828**	**32,011**	**29,500**	**13,300**
8011-Administration CLE		5,000	5,722	10,000	6,000
8101-Printing In-House		15	5	200	200
8131-A/V Services			0	550	550
8141-Journal/News Service	425		425	1,000	1,000
8171-Course Approval Fee	150		150	150	150
Total Admin & Internal Expense	**575**	**5,015**	**6,302**	**11,900**	**7,900**
Total Expense	**834**	**26,135**	**43,526**	**44,400**	**26,950**
Net Income	**5,291**	**(11,935)**	**(28,401)**	**(17,400)**	**(2,950)**

THE FLORIDA BAR
Real Property Construction Law Institute
2020-2021 Budget

	2016-17 Actual	2017-18 Actual	2018-19 Actual	2019-20 Budget	2020-21 Budget
3301-Registration-Live	$87,820	$96,185	$93,580	90,000	90,000
3331-Registration-Ticket	2,657	2,730	1,097	2,000	2,000
Total Registration Revenue	**90,477**	**98,915**	**94,677**	**92,000**	**92,000**
3351-Sponsorships	173,665	183,575	208,276	190,000	190,000
3392-Section Differential	(1,020)		0	0	0
Other Event Revenue	**172,645**	**183,575**	**208,276**	**190,000**	**190,000**
3401-Sales-CD/DVD	24,835	16,243	13,160	15,000	15,000
3411-Sales-Published Materials	540	1,260	900	500	500
Sales, Rents & Royalties Revenue	**25,375**	**17,503**	**14,060**	**15,500**	**15,500**
3699-Other Operating Revenue				800	800
Other Revenue Sources				**800**	**800**
Total Revenue	**288,497**	**299,993**	**317,013**	**298,300**	**298,300**
5051-Credit Card Fees	3,515	2,147	6,719	4,000	4,000
5181-Speaker Honorarium		1,500	0	5,000	5,000
Total Contract Services	**3,515**	**3,647**	**6,719**	**9,000**	**9,000**
5501-Employee Travel	1,163	2,034	1,923	2,000	2,000
5571-Speaker Travel	3,017	2,083	7,199	4,000	9,000
Total Travel	**4,180**	**4,117**	**9,122**	**6,000**	**11,000**
6001-Post 1st Class/Bulk	6	5	6	25	25
6021-Post Express Mail	152	161	172	200	200
6319-Mtgs Other Functions		19,020	20,017	15,000	15,000
6321-Mtgs Meals	49,083	50,596	62,278	50,000	50,000
6325-Mtgs Hospitality	35,955	37,496	45,508	40,000	40,000
6341-Mtgs Equip Rental	25,802	21,666	25,833	25,000	25,000
6399-Mtgs Other	17,277		163	0	0
6401-Speaker Expense	8,646	6,004	5,141	12,000	0
7999-Other Operating Exp	412	1,556	2,484	1,500	1,500
Total Other Expense	**137,333**	**136,504**	**161,602**	**143,725**	**131,725**
8011-Administration CLE	14,300	25,000	25,000	25,000	25,000
8101-Printing In-House	1,832	1,292	264	2,000	2,000
8131-A/V Services	2,836	2,947	2,738	3,250	3,250
8141-Journal/News Service	2,471	425	425	1,650	1,650
8171-Course Approval Fee	150	150	150	150	150
Total Admin & Internal Expense	**21,589**	**29,814**	**28,577**	**32,050**	**32,050**
Total Expense	**166,617**	**174,082**	**206,020**	**190,775**	**183,775**
Net Income	**121,880**	**125,911**	**110,993**	**107,525**	**114,525**

THE FLORIDA BAR
RPPTL Legislative Update
Budget 2020 -2021

	2016-17 Actual	2017-18 Actual	2018-19 Actual	2019-20 Budget	2020-21 Budget
3321-Registration-Webcast	$16,385	$7,007	$8,509	15,000	15,000
Total Registration Revenue	**16,385**	**7,007**	**8,509**	**15,000**	**15,000**
3341-Exhibit Fees	6,100	15,000	18,250	14,000	14,000
3351-Sponsorships		700	0	0	0
Other Event Revenue	**6,100**	**15,700**	**18,250**	**14,000**	**14,000**
3401-Sales-CD/DVD	36,000	34,526	24,535	34,000	34,000
3411-Sales-Published Materials	1,400	950	630	500	500
Sales, Rents & Royalties Revenue	**37,400**	**35,476**	**25,165**	**34,500**	**34,500**
Total Revenue	**59,885**	**58,183**	**51,924**	**63,500**	**63,500**
4111-Rent Equipment	10,013	10,653			
4301-Photocopying			127	100	100
4311-Office Supplies			71	150	150
Total Staff & Office Expense	**10,013**	**10,653**	**198**	**250**	**250**
5031-A/V Services	1,495		1,495	1,495	1,495
5051-Credit Card Fees	647	1,288	1,043	2,000	2,000
5121-Printing-Outside	13,831	3,341	2,846	5,000	5,000
5199-Other Contract Services	4,661	2,318	0	0	0
Total Contract Services	**20,634**	**6,947**	**5,384**	**8,495**	**8,495**
5501-Employee Travel	1,962	1,204	450	3,000	3,000
5571-Speaker Travel	1,216	342	227	1,500	6,500
Total Travel	**3,178**	**1,546**	**677**	**4,500**	**9,500**
6001-Post 1st Class/Bulk	9	31	49	50	50
6021-Post Express Mail	464	364	283	500	500
6311 - Mtgs General Meeting			81		
6321-Mtgs Meals	40,410		48,321	45,000	45,000
6325-Mtgs Hospitality	8,405	819	707	1,500	1,500
6341-Mtgs Equip Rental		52,556	30,162	15,000	15,000
6401-Speaker Expense	5,222	2,651	1,258	5,000	0
7001-Grant/Award/Donation		220		5,000	5,000
7999-Other Operating Exp	470	55	84	500	500
Total Other Expense	**54,980**	**56,696**	**80,945**	**72,550**	**67,550**
8011-Administration CLE	500	2,000	3,200	1,000	1,000
8101-Printing In-House	2	7	0	350	350
8131-A/V Services	4,043	3,806	3,703	4,000	4,000
8141-Journal/News Service	824		0	1,600	1,600
8171-Course Approval Fee	150	150	0	150	150
Total Admin & Internal Expense	**5,519**	**5,963**	**6,903**	**7,100**	**7,100**
Total Expense	**94,324**	**81,805**	**94,107**	**92,895**	**92,895**
Net Income	**(34,439)**	**(23,622)**	**(42,183)**	**(29,395)**	**(29,395)**

* Please note: The 2017-18 Legislative Update Meals expense line item was incorrectly added to the 6341 Equipment Rental Line item.

THE FLORIDA BAR
RPPTL Attorney Trust Officer Liaison Conference
2020 -2021 Budget

	2016-17 Actual	2017-18 Actual	2018-19 Actual	2019-20 Budget	2020-21 Budget
3301-Registration-Live	($65)	$163,336	$160,924	160,000	160,000
3331-Registration-Ticket	1,079	3,154	12,085	10,000	10,000
Total Registration Revenue	**1,014**	**166,490**	**173,009**	**170,000**	**170,000**
3341-Exhibit Fees	400	77,300	20,700	60,000	40,000
3351-Sponsorships	(2,550)	69,000	81,900	60,000	80,000
Other Event Revenue	**(2,150)**	**146,300**	**102,600**	**120,000**	**120,000**
3401-Sales-CD/DVD	7,040	8,140	11,290	5,000	5,000
3411-Sales-Published Materials	3,300	480	1,740	1,000	1,000
Sales, Rents & Royalties Revenue	**10,340**	**8,620**	**13,030**	**6,000**	**6,000**
Total Revenue	**9,204**	**321,410**	**288,639**	**296,000**	**296,000**
4111-Rent Equipment	1,750	33,115	0	0	0
Total Staff & Office Expense	**1,750**	**33,115**		**0**	**0**
5051-Credit Card Fees	796	7,115	3,340	8,000	8,000
5121-Printing-Outside	870	5	1,154	2,500	2,500
Total Contract Services	**1,666**	**7,120**	**4,494**	**10,500**	**10,500**
5501-Employee Travel		2,108	2,652	2,000	2,000
5571-Speaker Travel	1,235	1,248	1,056	4,000	8,100
Total Travel	**1,235**	**3,356**	**3,708**	**6,000**	**10,100**
6001-Post 1st Class/Bulk	3	9	173	1,000	1,000
6021-Post Express Mail	99	81	166	150	150
6319-Mtgs Other Functions		9,881	7,844	10,000	10,000
6321-Mtgs Meals		43,182	43,044	57,000	57,000
6325-Mtgs Hospitality		64,445	62,353	85,000	70,000
6341-Mtgs Equip Rental	(1,750)	(12,626)	18,391	17,000	17,000
6399-Mtgs Other			750		
6401-Speaker Expense	2,904	2,862	3,799	4,100	0
7999-Other Operating Exp	1	1,475	300	1,000	1,000
Total Other Expense	**1,257**	**109,309**	**136,820**	**175,250**	**156,150**
8011-Administration CLE		25,000	25,000	25,000	25,000
8101-Printing In-House		1,386	2,563	2,000	2,000
8131-A/V Services	5,475	5,621	5,503	7,000	7,000
8141-Journal/News Service		850	0	1,600	1,600
8171-Course Approval Fee	150	450	150	150	150
Total Admin & Internal Expense	**5,625**	**33,307**	**33,216**	**35,750**	**35,750**
Total Expense	**11,533**	**186,207**	**178,238**	**227,500**	**212,500**
Net Income	**(2,329)**	**135,203**	**110,401**	**68,500**	**83,500**

THE FLORIDA BAR
RPPTL Convention
2020-2021 Budget

	2016-17 Actual	2017-18 Actual	2018-19 Actual	2019-20 Budget	2019-20 Budget
3301-Registration-Live	$58,157	$57,838	$66,035	50,000	50,000
Total Registration Revenue	**58,157**	**57,838**	**66,035**	**50,000**	**50,000**
3341-Exhibit Fees	6,250	8,000	20,582	10,000	10,000
3351-Sponsorships	(175)		25,000	10,000	10,000
Other Event Revenue	**6,075**	**8,000**	**45,582**	**20,000**	**20,000**
Total Revenue	**64,232**	**65,838**	**111,617**	**70,000**	**70,000**
4111-Rent Equipment	15,027	20,523	3,874	0	0
4311-Office Supplies		11	19		
Total Staff & Office Expense	**15,027**	**20,534**	**3,893**	**0**	**0**
5051-Credit Card Fees	1,073	1,757	1,375	3,000	3,000
Total Contract Services	**1,073**	**1,757**	**1,375**	**3,000**	**3,000**
5501-Employee Travel	1,597	2,786	3,994	2,500	5,000
Total Travel	**1,597**	**2,786**	**3,994**	**2,500**	**5,000**
6001-Post 1st Class/Bulk	305	200	9	500	500
6021- Post Express Mail			4		
6321-Mtgs Meals	200,746	111,107	121,486	150,000	150,000
6341-Mtgs Equip Rental	NEW	NEW	8,530	20,000	20,000
6361-Mtgs Entertainment	7,331	10,605	8,256	13,000	13,000
7001 - Grant Donation			10		
Total Other Expense	**208,382**	**121,912**	**138,285**	**183,500**	**183,500**
8101-Printing In-House				400	400
Total Admin & Internal Expense				**400**	**400**
Total Expense	**226,079**	**146,989**	**147,547**	**189,400**	**191,900**
Net Income	**(161,847)**	**(81,151)**	**(35,930)**	**(119,400)**	**(121,900)**

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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. <u>Educating Committees and Their Leadership as to both the Process and Role of the Section</u> –

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. <u>The Role of and Relationship with Legislative Consultants</u> –

A. Tracking Charts and Tracking Memos. Tracking Memos 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 Memo, noting that Committee agenda notices become abbreviated late in the session. More emphasis on the review of weekly listed bills following the Tracking Memos 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 Memo.

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 that the Executive Committee consider whether it would be worthwhile to engage a second legislative consulting firm for conflict purposes, whom 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 that 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 that 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's 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's Finance and Accounting Division. A balance sheet should be provided with The Florida Bar's 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 continued 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 as 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 be distributed annually to each chair and vice chair 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 a chair and a vice-chair 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 before 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 whom 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 whom 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 being 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 be consulted more often, 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, currently at 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. If the Executive Council continues to grow, and is not decreased, anticipated adverse consequences include: optimal and alternative venues will be increasingly difficult to locate; expenses and related subsidies will be unsustainable; and, a deterioration of forums for healthy discourse. To help ensure the goals of the Section can efficiently be met the subcommittee recommends the following:

Members should be reminded that not being on Executive Council is not a bar to active membership. Section members who are not on the Executive Council obtain significant benefits by attending committee and other meetings, including obtaining substantive knowledge as well as professional and social interaction with peers outside of the Saturday meeting.

While the number of ALMs is not limited, each ALM should be required to be actively engaged and actively contributing to the Section and the Section's mission. Reappointment as an ALM should not be automatic just because a person has been on the Executive Council for a number of years. ALMs should be required to (i) actively serve on Section committees and participate in ALM projects; (ii) promote throughout the year the Section in their local communities by helping plan and participating in local Section events, and attending local bar events to encourage Section participation by local attorneys and raise Section awareness, with a particular emphasis on diversity events; and (iii) regularly keeping local Section members informed of Section programs, activities and projects. The Director of ALMs should clearly communicate ALMs' roles and responsibilities to the ALMs.

To help ensure that ALMs are actively engaged each ALM applying or reapplying to be ALM should complete an application that includes: the ALM's plan to to fulfill his or her duties as an ALM for the upcoming year; and for an ALMs reapplying, a summary of how the ALM fulfilled their duties for the current year, or the last year as an ALM. The Director of ALMs should consciously review and evaluate the

applications and recommend for appointment only individuals who meet their roles and responsibilities.

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 be limited to two vice-chairs, increasing only when appropriate such as large committees where the chair delegates many responsibilities. A decrease in vice-chairs for a committee may be appropriate for committees responsible for a significant event (i.e. ATO or Legislative Update), emphasizing that participating on those committees does not require vice-chair label, rather regular members may have those 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.

Similar to the status of ALMs, the Executive Committee should review liaison positions annually, confirm their ongoing active viability, review the number of members named as a liaison, and confirm that the members serving in that role should continue as a liaison.

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 anticipated additional benefit of opening additional positions for up and

[1] The Subcommittee on Committees references this position as an Emeritus member.

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.

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 require 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 his or her 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 profiting from a cancellation and reselling 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 needs 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. 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 element that makes a meeting a convention rather than 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! The issues are how many committee members attend by telephone; and for that that attend by telephone, what percentage of the meeting discussion do they actually hear?
3. Microphones. Important for large committees – some members’ 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 members' 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 that a Sunday Brunch is unnecessary and not well attended. The Section typically does not offer a Brunch, and a Brunch 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 members' 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 committee 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 to obtain 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 committee 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 compensating 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 a 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.

PROFESSIONALISM & ETHICS COMMITTEE

Real Property, Probate and Trust Law Section – The Florida Bar

Rule 4-1.14 (*sc.* Client Under A Disability) of the Rules Regulating The Florida Bar

On Friday, May 31, 2019 the Professional & Ethics Committee voted to seek amendments to Rule 4-1.14 (*sc.* Client Under A Disability) of the Rules Regulating The Florida Bar (Florida Rule 4-1.14) as modified by Rule 1.14 (*sc.* Client With Diminished Capacity) of the American Bar Association's Model Rules of Professional Conduct (ABA Rule 1.14) with clarification and style edits. The Guardianship, Power of Attorney & Advance Directives Committee also made edits.

The Florida Bar's Ethics 2000 Review Panel (The Florida Bar Panel) recommended adoption of ABA Rule 1.14; but, reportedly due to comments from the Standing Committee on Legal Needs of Children, the Public Interest Law Section, University of Miami School of Law's Center for Ethics and Public Service, Florida's Children First!, Circuit Court Judge Raymond T. McNeal, and Sixth Circuit Public Defender Bob Dillinger the ABA Rule 1.14 was not adopted in Florida. However, the American Bar Association reports most states have adopted ABA Rule 1.14.

The Florida Bar Panel studied the recommendations of the American Bar Association Ethics Commission 2000. The Florida Bar Panel's charge was "to analyze the ABA recommendations and compare them with existing Rules Regulating The Florida Bar" with a "primary concern in analyzing the ABA Ethics Commission 2000 recommendations should be protecting the public and maintaining the core values of the legal profession." The Florida Bar Panel agreed with most of the changes proposed by the ABA "Ethics 2000" Commission. Specifically, regarding ABA Rule 1.14 The Florida Bar Panel reported:

> ***SUMMARY of Substantive Changes Adopted by the ABA House of Delegates***
>
> Changes terminology from clients with a "disability" to clients with "diminished capacity,"which is explained as a change in terminology only. New rule also focuses on degrees of a client's capacity with provisions for emergency legal assistance for clients with seriously diminished capacity and sets forth protective measures a lawyer may take short of requesting a guardian if a lawyer reasonably believes that there is risk of substantial harm unless action is taken. Commentary provides guidance to attorneys dealing with clients with diminished capacity. Old commentary regarding an attorney acting as "de facto" guardian for the client was deleted.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida Rule 4-1.14 uses the term "disability," but otherwise is substantially the same as the new ABA model rule. The ABA commentary eliminates the provision in the Florida comment that if a client suffering a disability has no guardian or legal representative, "the lawyer often must act as *de facto* guardian," adds a provision regarding consultation with family members, eliminates the provision imposing an obligation on lawyers to seek the appointment of a legal guardian and adds detailed guidance for lawyers regarding the taking of protective action.

RECOMMENDATION of Yes or No and REASONS

YES. The committee recommends adoption of the new ABA Model Rule as providing superior guidance to lawyers than the existing rule. The committee specifically discussed whether deletion of the commentary "the lawyer often must act as *de facto* guardian" is desirable. The committee concluded that if the ABA Model Rule is adopted, there is no need for this provision. The new ABA Rule 1.14(b) provides that "when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective actions, including consulting with individuals or entities that have the ability to take action to protect the client . . . ." Paragraph 5 of the commentary to the Rule sets out in detail the various types of protective action a lawyer may take if he reasonably believes that a client is at risk of substantial physical, financial or other harm. These detailed provisions are much more helpful than the vague statement that a lawyer must often act as a de facto guardian.

10.14.19

RULE 4-1.14 CLIENT WITH DIMINISHED CAPACITY

(a) Maintenance of Normal Relationship. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental disability, or for some other reason, the lawyer must maintain a normal client-lawyer relationship with the client as much as reasonably possible.

(b) Protective Action. A lawyer is not required to seek a determination of incapacity or the appointment of a guardian or take other protective action with respect to a client. However, when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, such as, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian. A lawyer must make reasonable efforts to exhaust all other available remedies to protect the client before seeking removal of any of the client's rights or the appointment of a guardian.

(c) Confidentiality. Information relating to the representation of a client with diminished capacity is protected by the rule on confidentiality of information. When taking protective action pursuant to this rule, the lawyer is impliedly authorized under the rule on confidentiality of information to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. Some persons of advanced age can be capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the person the status of client, particularly in maintaining communication.

The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of these persons is in furtherance of the rendition of legal services to the client and does not waive the attorney-client privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under subdivision (b), must look to the client, and not family members, to make decisions on the client's behalf. A lawyer should be mindful of protecting the privilege when taking protective action.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See rule 4-1.2(d); Saadeh v. Connors, 166 So.3d 959 (Fla.4th DCA 2015); Fla. AGO 96–94, 1996 WL 680981.

Taking Protective Action

If a lawyer reasonably believes that a client is at risk of substantial physical, financial, or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in subdivision (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then subdivision (b) permits the lawyer to take protective measures deemed necessary. These measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections. Which factors the lawyer chooses to be guided by will depend on the nature of the protective action to be taken, some issues being governed by the client's substituted judgment and others by the client's best interests.

Whether the client's capacity has diminished may be shown by such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances require. Evaluation of circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of client's condition

Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by rule 4-1.6. Therefore, unless authorized to do so, the lawyer may not disclose confidential information. When taking protective action pursuant to subdivision (b), the lawyer is impliedly authorized to make the necessary disclosures. Nevertheless, given the risks of disclosure, subdivision (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in these cases is an unavoidably difficult one.

Emergency Legal Assistance

A lawyer may, but is not required to, take legal action to protect a person with diminished capacity who is threatened with imminent and irreparable harm to the person's health, safety, or financial interests even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other alternative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in an exigent situation has the same duties under these rules as the lawyer would with respect to a client.

A lawyer who acts on behalf of a person with diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer may disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person while maintaining the person's confidential information.

AMENDMENTS PROCESS

SECTION BYLAWS

WHAT GOVERNS THE PROCESS

- Florida Bar Board of Governors Standing Board Policy 5.52

3 REVIEWS & THEIR COMMITTEES

- Substantive
- Strategic

} PROGRAM EVALUATION COMMITTEE (PEC)

- Fiscal – BUDGET COMMITTEE

REVIEW PROCESS

- SUBSTANTIVE (Program Evaluation Committee)
  - Content is reviewed for substance. Is the change good policy?

- STRATEGIC (Program Evaluation Committee)
  - Review for adherence to The Florida Bar's strategic plan, which may occur before, simultaneously with, or after substantive review.

REVIEW PROCESS CONTINUED

- FISCAL (Chief Financial Officer and Budget Committee)
  - This may occur anytime after substantive review, but must occur before final Board of Governors action. Amendments are reviewed for any fiscal impact to The Florida Bar. Fiscal review is complete by the bar's Chief Financial Officer if there is de minimus fiscal impact to The Florida Bar. Moderate or significant fiscal impact requires review by Budget Committee.

BOARD OF GOVERNORS APPROVAL

- Amendments go to the Board of Governors for final action after all reviews are completed.

FORMAT REQUIREMENTS

- Program Evaluation Committee requires that amendments be presented in a word document in legislative format (the existing bylaws with additions shown as stricken through and additions underlined).
- Justification for substantive amendments must appear in comment bubbles in the word document.
- The Section must prepare a justification for each substantive amendment (why is the change being made) and a summary of each substantive change

HELPFUL TIP:

- **Record minutes** of meeting when **substantive changes** are made. Consider detailing in the minutes or a separate memo a summary of the changes and the reasons for the changes.
  - *WHY?*
  - **If language is unclear** and **edits need to be made**, revision will be easier.
  - **If the justification isn't present** in the document, then revising and adding reasoning for the change is easier.

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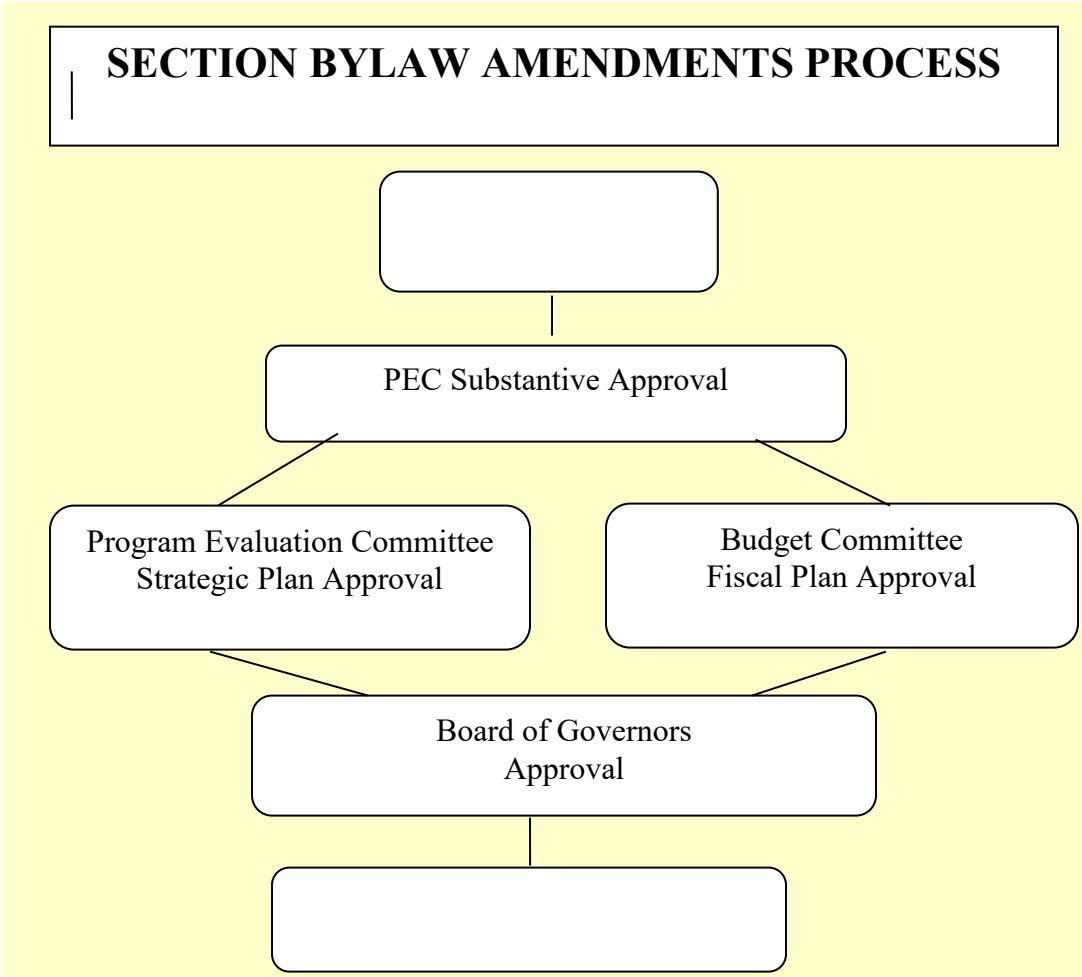

Note: Strategic, fiscal, and substantive review may be occurring concurrently

AMENDMENTS TO BYLAWS OF FLORIDA BAR SECTIONS

Standing Board Policy 5.52 (operational policies of The Florida Bar's Board of Governors) governs the amendments process for section bylaws. Amendments to section bylaws must be approved by The Florida Bar Board of Governors to become effective. The board process requires substantive, strategic, and fiscal review before final action by the Board of Governors. Final action of the Board of Governors is on second reading. A copy of Standing Board Policy 5.52 appears below.

The Program Evaluation Committee is the substantive reviewer of all section bylaws and also handles strategic review. Those may happen simultaneously or successively. The bar's Chief Financial Officer and Budget Committee perform fiscal review.

Bar staff may have questions or comments prior to presentation to the Program Evaluation Committee and Board of Governors.

The Program Evaluation Committee requires that the bylaws be presented in a particular format: a word document in legislative format (the full text of the bylaws with deletions shown stricken through and additions shown underlined with comments briefly indicating the reasons for the changes in bubbles using word's "Review" function). The section administrator will assist the section in creating the document, but section members will need to provide the summary and the reasons for the changes.

The section administrator also will work with the section to provide the information required by the Board of Governors in this process. The section must provide the Program Evaluation Committee and Board of Governors with a summary of and justification for proposed substantive changes as well as the date of the section's approval and numeric vote, if available. The summary is the "what" is being changed, specifically noting the article, section, and number of the bylaw with a brief description of the change for each substantive change. Additionally, the Board requires a justification for each substantive change – the "why" the change is being made. An example of each is below:

> News Notice Summary: Within Article II, Section 2.2(b), permits certain full-time professors to serve on the Executive Council (which would be limited to 1 at a time in amendments to Article V, Section 5.1(a)).
>
> Justification for Amendment: Within Article II, Section 2.2(b) full-time academics may have potentially significant contributions to the section but may have retired or resigned from the bar or have come to Florida based on their expertise but not become Florida bar members. Emphasizing this as an exception, a complementary edit in Section 5.1(a) provides no more than 1 could be on the Executive Council at a time. Should the Board of Governors find the proposal of an affiliate member as a voting member of the Executive Council is prohibited by standing board policy 5.51, this alternative (b) excises that language.

The Rules Program staff is available to work with you and your section administrator on amendments at any point in the process, including before submission to the section for approval.

Standing Board Policy 5.52 Board Action on Proposed Section Bylaw Amendments

(a) Purpose. This policy provides for necessary substantive, fiscal, and strategic planning review and adequate notice to section members of amendments to section bylaws.

(b) Procedure for Requesting Board Action.

(1) *Review by Section.* Any proposed amendment to a section's bylaws must first be approved by that section in accordance with its bylaws and with sufficient notice to its membership as specified in its bylaws.

(2) *Form of Request.* The section must provide the proposed amendments to the bar's Rules Program staff in legislative format using the current bylaws with deletions stricken through and additions underlined; a brief statement of the reasons for each substantive change; and the date, numeric vote, and name of the section or section entity that approved the amendments.

(c) Review. All section amendments must undergo substantive, fiscal, and strategic review. Reviews may be simultaneous and must be complete before the program evaluation committee presents an amendment to the board for final action.

(1) *Substantive Review.* Any proposed amendment must be reviewed on a substantive basis by the program evaluation committee, which may refer the proposed amendment back to the section for clarification or further amendment. The program evaluation committee is responsible for presenting any proposed amendment and committee recommendation to the board.

(2) *Fiscal Review.* The bar's chief financial officer will review each proposed amendment and determine if there is a potential budget impact as a result of the implementation of the recommendation. If the bar's chief financial officer finds a moderate or significant impact, the budget committee will review the proposed amendment and develop a recommendation to the board.

(3) *Strategic Plan Review.* The program evaluation committee will review the proposed amendment to evaluate its effect, if any, on the bar's strategic plan.

(d) Board Action.

(1) *Conceptual Action.* The board may approve a concept before compliance with the terms of this policy.

(2) *Final Action.* The board may take final action on an amendment after compliance with this policy.

(e) Final Action. Amendments to section bylaws are final only on board approval.

AMENDMENTS PROCESS

SECTION BYLAWS

WHAT GOVERNS THE PROCESS

- Florida Bar Board of Governors Standing Board Policy 1.60
  - 4 levels of review by The Florida Bar Board of Governors Committees
  - 2 readings by the Board of Governors at consecutive meetings
  - Publication in the Florida Bar News before Board of Governors first reading and final action

4 REVIEWS & THEIR COMMITTEES

- Substantive
- Strategic

} PROGRAM EVALUATION COMMITTEE (PEC)

- Procedural – RULES COMMITTEE
- Fiscal – BUDGET COMMITTEE

ORDER OF REVIEW

- 1st – SUBSTANTIVE (Program Evaluation Committee)
  - Content is reviewed for substance. Is the change good policy?
- 1st and/or 2nd – STRATEGIC (Program Evaluation Committee)
  - Review for adherence to The Florida Bar's strategic plan, which may occur before, simultaneously with, or after substantive review.

ORDER OF REVIEW CONTINUED

- 3rd – PROCEDURAL (Rules Committee)
  - This may occur any time after substantive review, but must occur before final Board of Governors action. The Rules Committee reviews for adherence to the Supreme Court of Florida Guidelines for Rules Submissions. Any grammatical issues or other style issues are noted and reviewed here.
- 4th – FISCAL (Chief Financial Officer and Budget Committee)
  - This may occur anytime after substantive review, but must occur before final Board of Governors action. Amendments are reviewed for any fiscal impact to The Florida Bar. Fiscal review is complete by CFO if de minimus impact. Moderate or significant fiscal impact requires review by Budget Committee.

OFFICIAL NOTICE – BAR *NEWS*

- Official notice must be published in the Bar *News* before the first reading and before final action is taken by the Board of Governors.
- Publication allows bar members to express concerns regarding changes proposed to rules.

WHAT HAPPENS AFTER THE 4 LEVELS OF REVIEW?

- Amendments go to the Board of Governors for first and second reading. This occurs at **two separate meetings**.

FORMAT REQUIREMENTS

- Program Evaluation Committee requires that amendments be presented in a word document in legislative format (the existing bylaws with additions shown as stricken through and additions underlined).
- Justification for substantive amendments must appear in comment bubbles in the word document.
- The Section must prepare a justification for each substantive amendment (why is the change being made) and a summary of the change for the official notice in the Florida Bar *News* (what is being changed)

HELPFUL TIP #1:

- **Designate one or two people in the section** to make approval for non-substantive edits.
  - *WHY?*
  - You will not have to go back to the full section to make decisions (faster and easier).

HELPFUL TIP #2:

- **Record minutes** of meeting, especially when **substantive changes** are made. Consider asking the section to write a memo detailing the changes and the reasons for the changes.
  - *WHY?*
  - **If language is unclear** and **edits need to be made**, revision will be easier.
  - **If the justification isn't present** in the document, then revising and adding reasoning for the change is easier.

HELPFUL TIP #3: Committee Staff Review

- Provide amendments to Rules Committee staff for review before presentation to Program Evaluation Committee
  - Rules Committee staff can suggest edits to conform to the Supreme Court style guide prior to submission to the Program Evaluation Committee for substantive review
- Be prepared to make changes after staff review before you go to Program Evaluation Committee

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WHITE PAPER

PROPOSED AMENDMENTS TO §§ 736.0103, 736.0201, FLA. STAT., AND PROPOSED CREATION OF TWO ADDITIONAL STATUTES IN CHAPTER 736 FLA. STAT.

I. SUMMARY

While Florida probate law provides reasonable certainty regarding the rights of creditors, beneficiaries, and the personal representative when a decedent devises his or her homestead real property by will, that is not the case when homestead real property is devised by a settlor' s revocable living trust, even though both wills and trusts may make similar testamentary dispositions. Currently Florida law does not adequately address two key issues when homestead real property passes pursuant to a revocable trust at the time of the settlor's death.

The first issue is whether the exemption from forced sale under Article X, Section 4 of the Florida Constitution inures to homestead heirs who receive the homestead property outright as a beneficiary under the decedent's revocable trust or who receive an interest as the beneficiary of an ongoing or continuing trust created under the decedent's revocable trust.

The second issue is the timing and method of the passage of title to the homestead property, and, as between a trustee or the beneficiaries, who has the right to sell the homestead property and who is responsible for paying the payment of expenses associated with the homestead property during the initial trust administration. This issue remains unclear under current law.

This legislation addresses (1) the effect of a direction to sell the home and the effect of a residuary gift of homestead through a trust on the inurement of a decedent's exemption from forced sale for the protection of homestead heirs and (2) the ability to obtain an order determining homestead status within a probate proceeding when the homestead property is titled

in the name of a trustee of the decedent's revocable trust at the time of death. There are proposed changes to Section 736.0201, Florida Statutes, which will require changes to Fla. R. Prob. P. 5.405, to provide the process for the determination of the homestead status of real property. The proposed legislation removes some of the potential pitfalls for the residents of the State of Florida who choose to own their homesteads in their revocable trusts and pass their homestead properties through revocable trusts upon their deaths.

The bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

The general framework regarding homestead property for purposes of probate and trust administration is contained in Article X, Section 4 of the Florida Constitution, and to a lesser extent in Chapter 732 and Chapter 733 of the Florida Statutes. There are also provisions relating to restrictions on the devise of homestead property and protections from claims in Chapter 736. Article X, Section 4(a) of the Florida Constitution allows an exemption from forced sale for real property homestead owned by a natural person. Subsection 4(b) provides that the exemption shall inure to the decedent's heirs and Subsection (c) imposes restrictions on the devise of that property. Presently, there is no statutory guidance and inconsistency in the existing case law regarding several issues with respect to homestead property that is titled in the trustee of a revocable trust upon the death of the settlor of the trust.

There are three main issues that must be addressed when a homestead owner dies with the homestead property in a revocable trust:

1. Devise Restrictions - The first issue is whether the devise restrictions and forced descent of homestead property pursuant to the Florida Constitution and the Florida Statutes will apply.

2. Inurement of Exemption - The second issue is whether the exemption from forced sale pursuant to Article X, Section 4 of the Florida Constitution inures to homestead heirs who are either outright beneficiaries of homestead property pursuant to the testamentary provisions of a revocable trust or are beneficiaries of ongoing trusts into which the homestead property passes upon the death of the settlor of a revocable trust.

3. Passage of Title and Ownership Expenses - The final issue is which party or parties (trustee vs. beneficiaries) have the responsibilities for paying the expenses related with the property during the initial trust administration.

Devise Restrictions

Regarding the first issue, Florida statutes and case law are currently in agreement that the constitutional restrictions on the devise of homestead property apply to property held in a revocable trust. The relevant statutes indicate that property held in a revocable trust is subject to the constitutional devise restrictions just as if the property held in the revocable trust was titled in the name of the settlor individually upon death. Currently, section 732.4015(2), Florida Statutes, clarifies that the definitions of "owner" and "devise" found in section (2) of the statute include revocable trusts. Application of this definition makes a revocable trust transparent for the constitutional limitations imposed upon the devise of homestead real property. It is consistent with the longstanding public policy of protecting surviving spouses and minor children as recognized in *City Nat'l Bank v. Tescher*, 578 So. 2d 701, 703 (Fla. 1991).

Inurement of Exemption

The second issue listed above which has not been adequately addressed by the Florida Statutes is whether a decedent's homestead exemption from forced sale inures under Art.

X, Section 4(b) of the Florida Constitution to homestead heirs who receive an outright gift of homestead property under a revocable trust and beneficiaries who inherit an interest in homestead property through an ongoing trusts upon the death of the settlor of a revocable trust. While there are several cases that address the issue, there is a troubling split in the District Courts of Appeal that leads to uncertainty.

In *Elmowitz v. Estate of Zimmerman,* 647 So. 2d 1064 (Fla. 3d DCA 1994), the Third District Court of Appeal held that the devise of homestead to the decedent's revocable trust through a pour over will caused the homestead creditor exemption to be lost. Accordingly, the exemption from forced sale did not inure to the beneficiaries of a revocable trust upon the death of the settlor. The homestead was devised through the residuary clause of the revocable trust. The court found that this resulted in the loss of the homestead exemption from forced sale. The *Elmowitz* court noted in footnote one that the property was not specifically devised to the beneficiary of the trust. The beneficiary was entitled only to an amount equivalent in value to 50% of the trust assets and was not entitled to an undivided or equitable interest in the protected homestead property. There is an implication in footnote one that if the property had been specifically devised under the revocable trust, the exemption may have inured to the beneficiary.

> It is noted that the Zimmerman's property was not specifically devised to Plotkin, thus she could not claim protection under Article X, Section 4(b) of Florida's Constitution . . . and was only entitled to an equivalent in value from the assets of the trust.
> *Id.* at n. 1.[1]

For homestead devised through a will, however, the courts have held that a specific gift of the homestead is not required. A gift under the residuary clause of a will is a sufficient indicator of the testator's intent" to have the same effect as a specific gift, invoking the homestead protection for

[1] While *Elmowitz* is the only case with this type of holding, it was cited by the Supreme Court of Florida as authority in *McKean* v. *Warburton,* 919 So. 2d 341 (Fla. 2005), albeit, for a different proposition.

the heirs. *Clifton v. Clifton*, 553 So. 2d 192 (Fla. Dist. Ct. App. 1989).

The First District Court of Appeal reached a result contrary to the decision in *Elmowits.* In opposite result in *HCA Gulf Coast Hospital Estate of Downing,* 594 So. 2d 774 (Fla. 1st DCA 1992). In *Estate of Downing,* the appellate court focused on the substance rather than the form of the devise in holding that the property retained its exempt character. Mrs. Downing's will devised her homestead to her former husband, as trustee of a testamentary spendthrift trust, for the benefit of her adult daughter. Affirming the trial court, and relying on *In re: Donovan,* 550 So. 2d 37 (Fla. 2d DCA 1989), the First District Court of Appeal held that for purposes of Article X, Section 4 of the Florida Constitution, the benefit of the homestead exemption from forced sale inures to a spendthrift beneficiary, such as Mrs. Downing's daughter, who would be otherwise entitled to claim homestead protection had title passed directly to her by devise or intestacy. *Id.* at 776. Unfortunately, however, the *Downing* case's precedential value is questionable as the court's ruling was very fact specific and the court found that the trust in *Downing* was more in the nature of a nominee relationship and less in the nature of a truly discretionary trust. The court held that "the result we reach here relies on the fact that the trustee, Mr. Downing, although possessed of legal title in the subject property, exercised nothing more than a supervisory interest in the homestead. Were the facts otherwise, this result may have been different."

Similarly, the Fourth District Court of Appeal in *Engelke v. Engelke* , 921 So. 2d 693 (Fla. 4th DCA 2006), held that a settlor's interest in a principal residence owned by his revocable trust was constitutionally protected homestead which could not be used to pay the estate's claims and expenses. In *Engelke,* the decedent's interest in his residence was transferred to his revocable trust prior to his death. The decedent retained the right to live on the property and the right to revoke the trust at any time. On his death, the decedent's wife continued to have the right to live

on the property during her lifetime and, upon her death or removal from the home, the decedent's children would receive the home through the residuary provisions of the trust. *Id.* at 694. The appellate court held that the decedent's interest in the property was protected during his lifetime under Article X, Section 4(a) of the Florida Constitution and the exemption inured to his heirs under Subsection 4(b) of the constitution, upon his death. *Id.* at 696. In support of its holding, the Court relied upon its own precedent in *Hubert v. Hubert,* 622 So. 2d 1049 (Fla. 4th DCA 1993), in which the Court held the decedent's exemption inured to his sons where the decedent devised his property to a "good friend" for her life with a remainder to his sons. In the *Hubert* case, the value of the life estate could be reached by the decedent's creditors, but the value of the remainder interest remained protected. *Id.* at 1051.

Accordingly, there are presently inconsistencies between the District Courts of Appeal as to whether the homestead exemption inures to the recipients of the homestead property upon the death of the settlor of a revocable trust. This lack of guidance and the inconsistent results within the courts have led to uncertainty in the legal community and for the citizens of Florida regarding an extremely important constitutional protection.

Passage of Title

The third issue listed above that has not been adequately addressed by the Florida Statutes or the case law is the timing and passage of title to homestead property titled in a revocable trust. The practical implications of this issue are as follows:

a. As between a trustee or the beneficiaries, who has the right to possess the homestead property?

b. Who has the right to sell the homestead property and who is responsible for paying the expenses associated with the homestead property during the initial trust

administration such as mortgage payments, condo maintenance and assessments, upkeep, utilities, taxes?

c. Who is responsible for damage to the property during initial administration such as hurricane damage or vandalism or theft?

d. Who is responsible for insuring the property?

e. Can the trustee and the attorney for the trustee base their fees on the value of the homestead property (i.e. - is the homestead real property an asset of the trust or does title pass at the moment of death as in the probate context)?

f. When and how can a trustee of a revocable trust take possession of protected homestead, take responsibility for the expenses of a protected homestead property, and then charge the expenses against other assets of the trust or homestead property?

Article X, Section 4 of the Florida Constitution does not say when title passes upon the death of the owner of the homestead. Instead, with respect to homesteads owned by decedents in their individual names, the answer is found in the Probate Code. Generally, title to the decedent's real property vests in the beneficiaries at the moment of the decedent's death, subject to the administration of the estate. *See* sections 732.101 and 732.514, Florida Statutes. Section 733.607(1), Florida Statutes, provides that "[e]xcept as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, *except the protected homestead,* ...". Section 733.608(1)(a), Florida Statutes, provides, that "[a]ll real and personal property of the decedent, *except the protected homestead,* ... shall be assets in the hands of the personal representative . . . ". It is clear that both of those statutes apply only to a personal representative and not in a trust context. Section 733.607, Florida Statutes, even refers specifically to "a decedent's will" and both refer to "the personal representative."

There are no statutes in Chapter 736 of the Florida Statutes addressing this issue. In a trust context, assuming the trustee holds title prior to the death of the settlor of a revocable trust, the Florida Trust Code does not address what happens upon the settlor's death and when legal title to homestead property in the revocable trust vests in the beneficiaries when the devise is permitted under the Florida Constitution.

However, case law supports treating homesteads in revocable trusts in the same manner as individually owned homesteads. *See, e.g., Engelke v. Estate of Engelke,* 921 So. 2d 693 (Fla. 4th DCA 2006); *see also Aronson v. Aronson,* 81 So. 3d 515 (Fla. 3d DCA 2012) (Aronson II). In the *Engelke* case, the Fourth District Court of Appeal held that the homestead property in the decedent's revocable trust was not an asset available to the trustee to sell or to use to satisfy expenses of administration or creditor claims. In the *Aronson II* case, the Third District Court of Appeal ruled that where a husband invalidly devised his homestead property in his revocable trust (the property was titled in his revocable trust at the time of his death and the improper devise was in the trust) that the homestead property passed outside of probate and "in a twinkle of an eye, as it were" title vested as provided in Section 732.401, Florida Statutes. Further, from that moment forward (i.e. from the date of husband's death on), "the trustees had no power or authority with respect to the homestead" and the widow - as life tenant - became responsible and liable for all of the expenses of maintaining the homestead. *Id.* at 519.

Given the lack of statutory clarity and authority, trustees and their attorneys are at risk of being criticized by trust beneficiaries no matter how they choose to handle homestead property. Because real estate practitioners and the title insurance industry relies upon title being vested in the trustee and the protections for such reliance, the Real Property, Probate and Trust Law has received objections to a proposal that would vest title to protected homestead in the trust

beneficiaries. Probate and trust lawyers, however, continue to be concerned that title can, and in some cases should, vest in the trust beneficiaries based upon the terms of the trust and the history of case law that says title vests in the heirs because the protected homestead can't he sold to pay the creditor claims of the deceased owner's creditors.

Finally, the proposed legislation offers a process for the determination of the homestead status of real property owned by a trust by permitting a determination to be made in a probate proceeding for the trust settlor's estate. To accomplish this result, the proposed legislation offers a new subsection (7) to Section 736.0201, Florida Statutes. A modification to Fla. Prob. R. 5.405 would be required.

III. EFFECT OF PROPOSED CHANGES

As set forth in more detail below, the proposed legislation will simplify the administration of homestead properties held in revocable trusts and will provide consistent results for homestead properties that pass through decedents' revocable trusts or pursuant to decedents' wills. The vesting of title to protected homestead, however remains clear for homestead devised through a will, but the legislation does not extend the same certainty to homestead devised through a revocable trust.

IV. SECTION-BY-SECTION ANALYSIS

A. Inurement of Exemption

The proposed legislation addresses at least one of the issues relating to a devise of protected homestead through a trust, making the rules more consistent with existing case law for a devise pursuant to a last will and testament. The proposal recognizes that a general power of sale or general direction to pay debts, expenses and claims within the trust instrument are not considered the equivalent of a power of sale and will not affect the inurement of the decedent's

exemption from forced sale. *Engelke v. Estate of Engelke*, 921 So. 2d 693 (Fla. Dist. Ct. App. 2006).

B. Court Proceedings

The proposed legislation also resolves the difficulty in obtaining homestead determinations when homestead property is held in a revocable trust upon the death of the settlor. Currently there is no authority for having a homestead determination made in an ongoing probate proceeding because the property at issue is not passing pursuant to a will and was not titled in the decedent's name upon his or her death. In general, trust proceedings and probate proceedings are both within the jurisdiction of the circuit courts, but different rules of procedure apply. The proposed revision to Section 736.020, Florida Statutes, is designed to create the authority for filing such a petition by a trustee or trust beneficiary. The Section has prepared a proposed amendment to Fla. Prob. R. 5.405, to be submitted to the Probate Rules Committee, which would supplement the information that is required in a petition to determine the homestead status of property. These proposed changes will apply to all petitions to determine homestead in a probate proceeding because the current rule lacks sufficient information to allow the trier of fact and the parties to make a complete determination regarding the homestead status.

C. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments. By confirming and strengthening the constitutional protections for the families of Florida residents, the proposal is consistent with the policy behind the homestead protections. By protecting the family home, the family of a deceased Florida resident is less likely to require public assistance from the government.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposed legislation will benefit the private sector by providing certainty and predictability to the residents of the State of Florida who choose to devise their homestead property through a revocable trust upon their death. Similarly, the proposed legislation is anticipated to create savings by eliminating unnecessary court proceedings arising from the current uncertainty.

VII. CONSTITUTIONAL ISSUES

None. The proposed changes do not conflict with any constitutional provisions and are consistent with the public policy underlying the constitutional restrictions on the devise of homestead and the exemption from the claims of a Florida resident's creditors when homestead is devised to the owner's family.

VIII. OTHER INTERESTED PARTIES

The title insurance industries' concerns have been taken into account, resulting in the withdrawal of provisions affecting the vesting of title when protected homestead is devised through a trust. The Elder Law Section of the Florida Bar may have an interest as it relates to creditor issues for residences held in revocable trusts. The Florida Bankers Association may also be interested.

A bill to be entitled

An act relating to trust procedures; ~~s. 736.0103 to add a definition of homestead heir; creating a new s. 736._____;~~ to provide that when a devise of homestead violates the Florida constitutional limitations on devise, the title to the homestead shall pass as provided in s. 732.401, F.S., at settlor's death; ~~to provide that when a homestead is validly devised by trust and requiring outright distribution to one or more homestead heirs, legal and beneficial title shall vest in the homestead heirs at the moment of settlor's death free of the claims of decedent's creditors; to vest title to validly devised homestead property in the trustee when the trust directs the sale of otherwise protected homestead property;~~ to provide that when the trust directs the sale of homestead real property, title to the homestead property remains vested in the trustee subject to the provisions of the trust; ~~to confirm the exemption from creditor claims inuring to homestead heirs who receive a beneficial interest in the homestead real property under a testamentary or continuing trust;~~ to provide that this section shall apply to the administration of trusts and estates of settlors and decedents who die on or after July 1, 2019; to state that this section applies only to trusts described in s. 733.707(3) and to testamentary trusts; amending s. 736.0201 to provide for a proceeding to determine the homestead status of real property

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owned by a trust~~; creating new 2. 736._____ to authorize (but not require) a trustee to take possession of protected homestead real property and to expend trust funds for the limited purpose of preserving the property; to provide for written notice to interested persons that the trustee has taken possession of the property; to secure expenditures incurred by a lien; to provide for attachment, perfection and priority of the lien; to prescribe the contents of the notice of lien and methods of enforcement of the lien~~.

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

Section 1. ~~Section 736.013 is amended to add a new subsection (11) and renumbering existing (11) through (23), to read:~~

~~736.0103. Definitions. Unless the context otherwise requires, in this code: . . .~~ ~~(11) "Homestead heir" means the homestead owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution.~~

~~[the remaining paragraphs will be renumbered (12) – (24)]~~

~~Section 2.~~ Section 736._____ is created to read:

736._____. Testamentary and revocable trusts; homestead protections.

(1) If a devise of homestead under a trust violates the limitations on the devise of homestead in s. 4(c), Art. X of the

State Constitution, title shall pass as provided in s. 732.401 at the moment of death.

(2) ~~If, upon the death of the settlor of a trust, the terms of the trust do not violate the limitations on the devise of homestead in s. 4(c), Art. X of the State Constitution, and require the outright distribution of an interest in protected homestead, whether by specific or residuary devise, to one or more homestead heirs, legal and beneficial title shall vest in the homestead heirs at the moment of the settlor's or testator's death.~~ A power of sale or general direction to pay debts, expenses and claims within the trust instrument shall not subject ~~the~~ an interest in the protected homestead to the claims of decedent's creditors, expenses of administration, and obligations of the decedent's estate as provided in s. 736.05053.

(3) If a trust directs the sale of property that would otherwise qualify as protected homestead, and the property is not subject to the constitutional limitations on the devise of homestead under the Florida Constitution, title shall remain vested in the trustee and subject to the provisions of the trust.

(4) ~~If a trust devises what would otherwise constitute protected homestead of a decedent to a testamentary or continuing trust in which a homestead heir of the deceased~~

~~testator or settlor has a beneficial interest, the protection from the decedent's creditors, expenses of administration and obligations of the decedent's estate shall inure to the interests of the homestead heirs. Legal title shall remain vested in the trustee, subject to the terms of the trust. The beneficial interests passing to persons who are not homestead heirs shall not be protected from the claims of the decedent's creditors, expenses of administration, and obligations of the decedent's estate as provided in s. 736.05053.~~

~~(5)~~ This section is intended to clarify existing law and shall apply to the administration of trusts and estates of decedents who die before, on, or after the date of enactment of this section.

(~~6~~5) This section applies only to trusts described in s. 733.707(3) and to testamentary trusts.

Section ~~3~~2. Section 736.0201 Role of court in trust proceedings, is amended add a new subsection (7) to read:

(7) A proceeding to determine the homestead status of real property owned by a trust may be filed in the probate proceeding for the settlor's estate if the settlor was treated as the owner of the interest held in the trust pursuant to the provisions of s. 732.4015. The proceeding shall be governed by the Florida Probate Rules.

~~Section 4. Section 736._____ is created to read:~~

~~736._____. Possession of Homestead; Trustee Powers.~~

~~(1) If the trustee holds record title to property that reasonably appears to the trustee to be protected homestead that is to be distributed outright and free of trust or passes by operation of law to one or more homestead heirs as a result of the death of the settlor, and if the property is not occupied by a person who appears to have an interest in the property, the trustee is authorized, but shall have no duty, to take possession of the property and to expend trust funds for the limited purpose of preserving, maintaining, insuring, and protecting it for the person having an interest in the property. If the trustee takes possession of the property, any rents and revenues may be collected by the trustee for the account of the homestead heirs, but the trustee does not have a duty to rent or otherwise make the property productive.~~

~~(a) The trustee shall deliver written notice to interested persons, including any person in actual possession of the property that contains:~~

~~1. A legal description of the property;~~

~~2. The name and address of the trustee and the trustee's attorney, if any;~~

~~3. A statement that the trustee has taken possession of the property for the limited purpose for preserving, maintaining,~~

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~~insuring or protecting the property for the persons having an interest in the property;~~

~~4. The date the trustee took possession of the property;~~ ~~and~~

~~5. The trustee's right to recover amounts expended and obligations incurred for these purposes, including reasonable attorney's and trustee's fees and costs.~~

~~(b) If the trustee expends trust funds or incurs obligations to preserve, maintain, insure, or protect property that the trustee reasonably believes to be protected homestead, the expenditures and obligations incurred for these purposes, including reasonable attorney's and trustee's fees and costs, shall constitute a debt owed to the trustee. The debt may be charged against the protected homestead, and secured by a lien, as provided in this section.~~

~~(c) The trustee's lien shall attach to the property and take priority as of the date and time a claim of lien is recorded in the official records of the county where that property is located, and the lien may secure the debt incurred before or after recording the claim of lien. The claim of lien may be recorded before adjudicating the amount of the debt. The claim of lien may be filed in the proceeding to determine the homestead status of the property, but failure to do so does not affect the validity of the lien. A copy of the claim of lien~~

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~~shall be served on each person appearing to have an interest in the property.~~

~~(d) The notice of lien must state:~~

~~1. The legal description of the property;~~

~~2. The name and address of the trustee and the trustee's attorney, if any;~~

~~3. To the extent known to the trustee, the name and address of each person appearing to have an interest in the property;~~ and

~~4. That the trustee has expended or will expend funds to preserve, maintain, insure, and protect the property and that the lien stands as security for recovery of those expenditures and obligations incurred, including reasonable attorney's and trustee's fees and costs. The claim of lien is valid if it substantially complies with the requirements of this section.~~

~~(e) The trustee may seek a judicial determination of the homestead status of any real property under s. 736.0201. The court having jurisdiction of the determination of the homestead status of the property may also adjudicate the amount of the debt secured by the claim of lien after notice to the persons appearing to have an interest in the property.~~

~~(f) The trustee may enforce payment of the debt through any of the following methods:~~

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~~1. By foreclosure of the lien in the manner of foreclosing a mortgage under the provisions of chapter 702;~~

~~2. By offset of the debt against any other trust property in the trustee's possession that would otherwise be distributable to or for the benefit of any person having an interest in the protected homestead, including assets held in further trust; or~~

~~3. By offsetting the debt against the revenues from the protected homestead received by the trustee, if any.~~

~~(g) Unless the trust instrument provides otherwise, the amount of the debt payable by each person having an interest in the property shall be apportioned pursuant to s. 738.801. Further apportionment of the debt among two or more persons in the same class as tenants or remaindermen shall be pro rata according to each person's interest in the property. The persons having an interest in the property shall 167 have no personal liability for the repayment of the debt unless the trust instrument or a beneficiary agreement provides otherwise.~~

~~(h) Parties dealing with the trustee are not required to inquire into the terms of the unrecorded trust agreement or any lien. The doctrine of merger does not extinguish the debt, regardless of the trustee's position as both oblige and hold of legal title to the property.~~

~~(i) The lien shall terminate upon the earliest of:~~

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~~1. Recording a release of lien signed by the trustee in the official records of the county where the property is located;~~

~~2. Five years from the recording of the lien in the official records unless a proceeding to determine the debt or enforce the lien has been filed prior to the expiration of the five years; or~~

~~3. The entry of an order releasing the lien; or~~

~~4. The entry of an order determining the property to not be protected homestead property.~~

~~(j) Any interested person may request an estoppels letter from the trustee in writing to the trustee's address designated in the claim of lien. The trustee shall deliver the estoppels letter within 14 days to the requesting person at the address designated in the written request setting forth the unpaid balance of the debt secured by the claim of lien. The trustee shall record a release of lien in the official records of the county where the property is located within 30 days after receipt of payment in full, or as agreed. If a judicial proceeding is necessary to compel compliance with the provisions of this subsection, the prevailing party shall be entitled to an award of attorney's fees and costs.~~

~~(k) To facilitate a sale or encumbrance of protected homestead property subject to the trustee's claim of lien~~

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~~pending a final determination and payment of the amount properly reimbursable to the trustee under this section:~~

~~1. Any interested person may petition the court for a transfer of the lien provided for in this section from the property to the proceeds of the sale or encumbrance by requiring the deposit of the proceeds into a restricted account subject to the lien, to be held there subject to the continuing jurisdiction of the court for disposition; or~~

~~2. The Trustee and the homestead heirs may agree to retain in escrow the amount demanded as reimbursement by the trustee, to be held there under the continuing jurisdiction of the court pending a final agreement of disposition or judicial determination and payment of the amount properly reimbursable to the trustee under this section; or~~

~~3. The homestead heirs may transfer the lien from the property to other security by depositing with the clerk of court of the county where the property is located a sum of money in an amount equal to the amount demanded as reimbursement by the trustee plus interest thereon at the legal rate for 3 years plus the greater of $5,000 or 50% of the amount demanded as reimbursement by the trustee to apply to any court attorneys' fees and costs which may be taxed in any proceeding to enforce the lien. Upon such deposit being made, the clerk shall make and record a certificate showing the transfer of the lien from the~~

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~~real property to the security and mail a copy thereof by registered or certified mail to the trustee at the address designated in the claim of lien. Upon the filing of the certificate of transfer, the real property shall be released from the lien claimed, and such lien shall be transferred to the security. The clerk shall be entitled to a service charge of up to $15 for making and serving the certificate. Any excess of the security over the amount of the liens or judgment rendered, plus costs actually taxed, shall be repaid to the party filing the security or his or her successor in interest. Any deposit of money shall be considered as paid into the court and shall be subject to the provisions of law relative to payments of money into court and the disposition of these payments. Any party having an interest in such security or the property from which the lien was transferred may at any time, and any number of times, file a complaint in chancery in the circuit court of the county where such security is deposited in order:~~

~~a. To require additional security;~~

~~b. To require reduction of security;~~

~~c. To require payment or discharge thereof; or~~

~~d. Relating to any other matter affecting said security.~~

~~(1) In any action for enforcement of the debt described in this section, the court shall award attorneys' fees and costs as~~

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~~in chancery actions, including reasonable attorney's fees and costs.~~

~~(m) A trustee entitled to recover a debt for expenditures and obligations incurred, including attorney's fees and costs, under this section may be relieved of the duty to enforce collection by an order of the court finding:~~

~~1. That the estimated court costs and attorney's fees in collecting the debt will approximate or exceed the amount of the recovery; or~~

~~2. That it is impracticable to enforce collection in view of the improbability of collection.~~

~~(n) A trustee shall not be liable for failure to attempt to enforce collection of the debt if the trustee reasonably believes it would have been economically impracticable.~~

~~(o) The trustee shall not be liable for failure to take possession of the property reasonably believed to be protected homestead or to expend funds on its behalf.~~

~~(p) In the event that the property is determined by the court not to be protected homestead, subsections (a)-(m) shall not apply and any liens previously filed shall be deemed released upon recording of the order in the official records of the county where the property is located.~~

~~(2) If the trustee holds title to property that reasonably appears to the trustee to be protected homestead subject to a~~

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~~continuing trust, unless the trust instrument expressly provides otherwise the trustee shall have full authority to expend trust funds to preserve, maintain, insure, and protect the property without notice to or reimbursement from the beneficiaries~~.

Section ~~5~~3. This act shall take effect July 1, 2020.

Section 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

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Ethics Vignette
July 2019

When Does A Current Client Become a Former Client?

Whether a client is a current client or former client can be a difficult question for estate and trust lawyers. Each stage affects the attorney´s ability to represent other clients and imposes different duties and obligations. When a current client becomes a former client is not always clear, especially when interaction with the client may be dormant for long periods of time. Attorneys should seek to avoid the confusion whenever possible.

The status of a client can make a substantial difference in analyzing conflicts of interests. To oversimplify, under the rules governing conflicts of interest for current clients, pursuant to 4-1.7 of the Florida Rules of Professional Conduct, an attorney may not represent another client adverse to a current client even in a wholly unrelated matter. However, under 4-1.9 of the Florida Rules of Professional Conduct relating to former clients, an attorney may represent a client adverse to a former client, unless the two matters are the same or substantially related in which that person´s interest are materially adverse to the interest of the former client. Although the conflicts can be cured through informed consent in some circumstances, the difference in the rules will determine whether the attorney may or may not accept new clients.

In addition, the distinction of the client status also impacts the statute of limitations. The "continuing representation doctrine" may toll the statute of limitations for professional malpractice until the representation terminates. See e.g., Wilder v. Meyer, 779 F. Supp. 164 (S.D. Fla. 1991). Finally, an attorney may have a number of continuing duties and associated liabilities to current and dormant clients, even though the client's estate planning documents have long been resting in the attorney's will vault.

There are many reasons why an attorney may wish to terminate the attorney/client relationship once the task at hand is complete and the attorney completes the legal representation. An unambiguous letter terminating the legal relationship is sufficient. On the other hand, an attorney may value the client and wish to continue the representation. Some attorneys do not want to offend a client with an "I don't represent you" letter. Many estate planning attorneys hope the client will consider them when the client has future business or that the attorney will have some role in administering the client's estate.

Where there is no letter terminating the attorney-client relationship, the answer to whether the client is a former client or a current client must be that "ït depends." Although this topic is very fact specific, there are a few common themes worth noting. First, the relationship between an attorney and a client is consensual and, under most circumstances, it can be

terminated at any time by any party. That same concept applies to corporate fiduciaries and their customers. There are certain exceptions to this rule as to attorneys in the litigation context where court approval may be required before the attorney and client may sever their relationship. However, in most circumstances, a clear writing should accomplish the task of severing the attorney-client relationship, even if it is not the in the form of a formal termination letter.

Under some circumstances, the passage of time has been held to terminate the lawyer-client relationship. See e.g., Yang Enterprises, Inc. v. Georgalis, 2008 Fla. App. LEXIS 11865 (Fla. App. August 7, 2008) and several other cases on point cited in Freivogel on Conflicts (www.freivogelonconflicts.com) and the ACTEC Commentaries on the Model Rules of Professional Conduct relating to Model Rules 1.8 and 1.4. In Yang Enterprises, Inc. v. Georgalis, although the decision was based largely in part on the passage of time in determining whether a client was a current or former client, the court stated that ministerial tasks done by a paralegal to update completed estate planning documents did not represent a continuing legal representation.

Finally, a client's disability may terminate the attorney/client relationship. See Restatement (Third) of the Law Governing Lawyers § 24 (2000) and comments thereto.

In the estate planning area, it is fairly common to see what has been described as a "dormant" relationship. In a "dormant" relationship, the active representation, such as the task of preparing estate planning documents, has been completed but the relationship has not been formally terminated. Concepts of dormant representation can make it difficult to determine whether an estate planning client is "current" or "former" client for purposes of conflict of interest analysis. The ACTEC Commentaries on the Model Rules of Professional Conduct comment to Model Rule 1.4 are very instructional on this issue. The Commentaries state as follows:

"The execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents an estate planning client. At that time, unless the representation is terminated by the lawyer or client, the representation becomes dormant, awaiting activation by the client. At the client's request the lawyer may retain the original documents executed by the client . . . Although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by the completion of the active phase of the representation. As a service the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents. Similarly, the lawyer may send the client an individual letter or a form letter, pamphlet, or brochure regarding changes in the law that might affect the client. In the absence of an agreement to

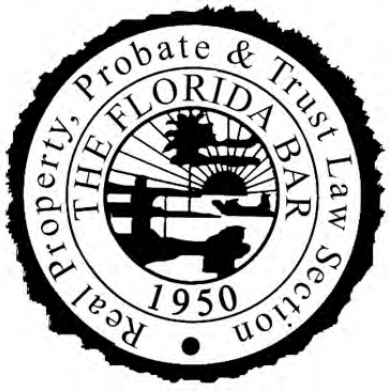
the contrary, a lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs."

The ACTEC Commentaries suggests that a client whose representation by the attorney is dormant only becomes a former client if the lawyer or the client terminates the representation. "The lawyer may terminate the relationship in most circumstances, although the disability of a client may limit the lawyer's ability to do so. Thus, the lawyer may terminate the representation of a competent client by a letter, sometimes called an "exit" letter, that informs the client that the relationship is terminated. The representation is also terminated if the client informs the lawyer that another lawyer has undertaken to represent the client in trusts and estates matters. Finally, the representation may be terminated by the passage of an extended period of time during which the lawyer is not consulted." ACTEC Commentary on MRPC 1.4.

There are two good examples included in the ACTEC Commentaries explaining the concept of dormant representation in typical estate planning scenarios.

Example 1.4-1. Lawyer (L) prepared and completed an estate plan for Client (c). At C's request L retained the original documents executed by C. L performed no other legal work for C in the following two years but has no reason to believe that C has engaged other estate planning counsel. L's representation of C is dormant. L may, but is not obligated to, communicate with C regarding changes in the law. If L communicates with C about changes in the law, but is not asked by C to perform any legal services, L's representation remains dormant. C is properly characterized as a client and not a former client for purposes of MRPCs 1.7 and 1.9.

Example 1.4-2. Assume the same facts as in Example 1.4-1 except that L's partner (P) in the two years following the preparation of the estate plan renders legal services to C in matters completely unrelated to estate planning, such as a criminal representation. L's representation of C with respect to estate planning matters remains dormant, subject to activation by C.



RPPTL LAW SCHOOL LIAISON

2019/2020

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A bill to be entitled

An act relating to the Uniform Partition of Heirs Property Act; providing a directive to the Division of Law Revision; creating s. 64.201, F.S.; providing a short title; creating s. 64.202, F.S.; providing definitions creating s. 64.203, F.S.; providing applicability; specifying the relation of the act to other law; creating s. 64.204, F.S.; providing for service and notice; creating s. 64.205, F.S.; providing for appointment and qualifications of commissioners; creating s. 64.206, F.S.; providing for the determination of property value; creating s. 64.207, F.S.; providing for buyout of cotenants; creating s. 64.208, F.S.; providing for alternatives to partition; creating s. 64.209, F.S.; providing factors to be considered in determining whether partition in kind may be ordered; creating s. 64.210, F.S.; providing for sale of property through open-market sale, sealed bids, or auction; creating s. 64.211, F.S.; providing requirements for reporting of an open-market sale of property; creating s. 64.212, F.S.; providing for uniformity of application and construction; creating s. 64.213, F.S.; specifying the relation of the act to the Electronic Signatures in Global and National Commerce Act; providing an

effective date.

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

Section 1. The Division of Law Revision is directed to designate ss. 64.011-64.091, Florida Statutes, as part I of chapter 64, Florida Statutes, entitled "General Provisions," and ss. 64.201-64.215, Florida Statutes, as part II of that chapter, entitled "Uniform Partition of Heirs Property Act."

Section 2. Section 64.201, Florida Statutes, is created to read:

64.201 Short title.—This part may be cited as the "Uniform Partition of Heirs Property Act".

64.202 Definitions.—As used in this part, the term:

(1) "Ascendant" means an individual who precedes another individual in lineage, in the direct line of ascent from the other individual.

(2) "Collateral" means an individual who is related to another individual under the law of intestate succession of this state but who is not the other individual's ascendant or descendant.

(3) "Descendant" means an individual who follows another individual in lineage, in the direct line of descent from the other individual.

(4) "Determination of value" means a court order

determining the fair market value of heirs property under s. 64.206 or s. 64.210 or adopting the valuation of the property agreed to by all cotenants.

(5) "Heirs property" means real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action:

(a) There is no agreement in a record binding all the cotenants which governs the partition of the property;

(b) One or more of the cotenants acquired title from a relative, whether living or deceased; and

(c) Any of the following applies:

1. Twenty percent or more of the interests are held by cotenants who are relatives;

2. Twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or

3. Twenty percent or more of the cotenants are relatives.

(6) "Partition by sale" means a court-ordered sale of the entire heirs property, whether by open-market sale conducted under s. 64.210, sealed bids, or auction.

(7) "Partition in kind" means the division of heirs property into physically distinct and separately titled parcels.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) "Relative" means an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage, adoption, or law of this state other than this part.

64.203 Applicability; relation to other law.—

(1) This part applies to partition actions filed on or after July 1, 2020.

(2) In an action to partition real property under part I of this chapter the court shall determine whether the property is heirs property. If the court determines that the property is heirs property, the property must be partitioned under this part unless all of the cotenants otherwise agree in a record.

(3) This part supplements part I of this chapter and, if an action is governed by this part, replaces provisions of part I of this chapter that are inconsistent with this part.

64.204 Service; notice by posting.—

(1) This part does not limit or affect the method by which service of a complaint in a partition action may be made.

(2) If the plaintiff in a partition action seeks notice by publication and the court determines that the property may be heirs property, the plaintiff, not later than 10 days after the court's determination, shall post and maintain while the action is pending a conspicuous sign on the property that is the subject of the action. The sign must state that the action has commenced and identify the name and address of the court and the

common designation by which the property is known. The court may require the plaintiff to publish on the sign the name of the plaintiff and the known defendants.

64.205 Commissioners.—If the court appoints commissioners pursuant to s. 64.061, each commissioner, in addition to the requirements and disqualifications applicable to commissioners in part I of this chapter, must be disinterested and impartial and not a party to or a participant in the action.

64.206 Determination of value.—

(1) Except as otherwise provided in subsections (2) and (3), if the court determines that the property that is the subject of a partition action is heirs property, the court shall determine the fair market value of the property by ordering an appraisal pursuant to subsection (4).

(2) If all cotenants have agreed to the value of the property or to another method of valuation, the court shall adopt that value or the value produced by the agreed method of valuation.

(3) If the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, the court, after an evidentiary hearing, shall determine the fair market value of the property and send notice to the parties of the value.

(4) If the court orders an appraisal, the court shall appoint a disinterested real estate appraiser licensed in this

state to determine the fair market value of the property assuming sole ownership of the fee simple estate. On completion of the appraisal, the appraiser shall file a sworn or verified appraisal with the court.

(5) If an appraisal is conducted pursuant to subsection (4), not later than 10 days after the appraisal is filed, the court shall send notice to each party with a known address, stating:

(a) The appraised fair market value of the property.

(b) That the appraisal is available at the clerk's office.

(c) That a party may file with the court an objection to the appraisal not later than 30 days after the notice is sent, stating the grounds for the objection.

(6) If an appraisal is filed with the court pursuant to subsection (4), the court shall conduct a hearing to determine the fair market value of the property not sooner than 31 days after a copy of the notice of the appraisal is sent to each party under subsection (5), whether or not an objection to the appraisal is filed under paragraph (5)(c). In addition to the court-ordered appraisal, the court may consider any other evidence of value offered by a party.

(7) After a hearing under subsection (6), but before considering the merits of the partition action, the court shall determine the fair market value of the property and send notice to the parties of the value.

64.207 Cotenant buyout.—

(1) If any cotenant requested partition by sale, after the determination of value under s. 64.206, the court shall send notice to the parties that any cotenant except a cotenant that requested partition by sale may buy all the interests of the cotenants that requested partition by sale.

(2) Not later than 45 days after the notice is sent under subsection (1), any cotenant, except a cotenant that requested partition by sale, may give notice to the court that it elects to buy all the interests of the cotenants that requested partition by sale.

(3) The purchase price for each of the interests of a cotenant that requested partition by sale is the value of the entire parcel determined under s. 64.206 multiplied by the cotenant's fractional ownership of the entire parcel.

(4) After expiration of the period in subsection (2), the following rules apply:

(a) If only one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall notify all the parties of that fact.

(b) If more than one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall allocate the right to buy those interests among the electing cotenants based on each electing cotenant's existing fractional ownership of the entire parcel divided by the total

existing fractional ownership of all cotenants electing to buy and send notice to all the parties of that fact and of the price to be paid by each electing cotenant.

(c) If no cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall send notice to all the parties of that fact and resolve the partition action under s. 64.208(1) and (2).

(5) If the court sends notice to the parties under paragraph (4)(a) or paragraph (4)(b), the court shall set a date, not sooner than 60 days after the date the notice was sent, by which electing cotenants must pay their apportioned price into the court. After this date, the following rules apply:

(a) If all electing cotenants timely pay their apportioned price into court, the court shall issue an order reallocating all the interests of the cotenants and disburse the amounts held by the court to the persons entitled to them.

(b) If no electing cotenant timely pays its apportioned price, the court shall resolve the partition action under s. 64.208(1) and (2) as if the interests of the cotenants that requested partition by sale were not purchased.

(c) If one or more but not all of the electing cotenants fail to pay their apportioned price on time, the court shall give notice to the electing cotenants that paid their apportioned price of the interest remaining and the price for

all that interest.

(6) Not later than 20 days after the court gives notice pursuant to paragraph (5)(c), any cotenant that paid may elect to purchase all of the remaining interest by paying the entire price into the court. After the 20-day period, the following rules apply:

(a) If only one cotenant pays the entire price for the remaining interest, the court shall issue an order reallocating the remaining interest to that cotenant. The court shall issue promptly an order reallocating the interests of all of the cotenants and disburse the amounts held by it to the persons entitled to them.

(b) If no cotenant pays the entire price for the remaining interest, the court shall resolve the partition action under s. 64.208(1) and (2) as if the interests of the cotenants that requested partition by sale were not purchased.

(c) If more than one cotenant pays the entire price for the remaining interest, the court shall reapportion the remaining interest among those paying cotenants, based on each paying cotenant's original fractional ownership of the entire parcel divided by the total original fractional ownership of all cotenants that paid the entire price for the remaining interest. The court shall issue promptly an order reallocating all of the cotenants' interests, disburse the amounts held by it to the persons entitled to them, and promptly refund any excess payment

held by the court.

(7) Not later than 45 days after the court sends notice to the parties pursuant to subsection (1), any cotenant entitled to buy an interest under this section may request the court to authorize the sale as part of the pending action of the interests of cotenants named as defendants and served with the complaint but that did not appear in the action.

(8) If the court receives a timely request under subsection (7), the court, after hearing, may deny the request or authorize the requested additional sale on such terms as the court determines are fair and reasonable, subject to the following limitations:

(a) A sale authorized under this subsection may occur only after the purchase prices for all interests subject to sale under subsections (1) through (6) have been paid into court and those interests have been reallocated among the cotenants as provided in those subsections.

(b) The purchase price for the interest of a nonappearing cotenant is based on the court's determination of value under s. 64.206.

64.208 Partition alternatives.—

(1) If all the interests of all cotenants that requested partition by sale are not purchased by other cotenants pursuant to s. 64.207, or if after conclusion of the buyout under s. 64.207, a cotenant remains that has requested partition in kind,

the court shall order partition in kind unless the court, after consideration of the factors listed in s. 64.209, finds that partition in kind will result in manifest prejudice to the cotenants as a group. In considering whether to order partition in kind, the court shall approve a request by two or more parties to have their individual interests aggregated.

(2) If the court does not order partition in kind under subsection (1), the court shall order partition by sale pursuant to s. 64.210 or, if no cotenant requested partition by sale, the court shall dismiss the action.

(3) If the court orders partition in kind pursuant to subsection (1), the court may require that one or more cotenants pay one or more other cotenants amounts so that the payments, taken together with the value of the in-kind distributions to the cotenants, will make the partition in kind just and proportionate in value to the fractional interests held.

(4) If the court orders partition in kind, the court shall allocate to the cotenants that are unknown, unlocatable, or the subject of a default judgment, if their interests were not bought out pursuant to s. 64.207, a part of the property representing the combined interests of these cotenants as determined by the court and this part of the property shall remain undivided.

64.209 Considerations for partition in kind.—

(1) In determining under s. 64.208(1) whether partition in

kind would result in manifest prejudice to the cotenants as a group, the court shall consider the following:

(a) Whether the heirs property practicably can be divided among the cotenants.

(b) Whether partition in kind would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which a court-ordered sale likely would occur.

(c) Evidence of the collective duration of ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other.

(d) A cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant.

(e) The lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property.

(f) The degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or

upkeep of the property.

(g) Any other relevant factor.

(2) The court may not consider any one factor in subsection (1) to be dispositive without weighing the totality of all relevant factors and circumstances.

64.210 Open-market sale, sealed bids, or auction.—

(1) If the court orders a sale of heirs property, the sale must be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group.

(2) If the court orders an open-market sale and the parties, not later than 10 days after the entry of the order, agree on a real estate broker licensed in this state to offer the property for sale, the court shall appoint the broker and establish a reasonable commission. If the parties do not agree on a broker, the court shall appoint a disinterested real estate broker licensed in this state to offer the property for sale and shall establish a reasonable commission. The broker shall offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.

(3) If the broker appointed under subsection (2) obtains within a reasonable time an offer to purchase the property for at least the determination of value:

(a) The broker shall comply with the reporting requirements in s. 64.211; and

(b) The sale may be completed in accordance with state law other than this part.

(4) If the broker appointed under subsection (2) does not obtain within a reasonable time an offer to purchase the property for at least the determination of value, the court, after hearing, may:

(a) Approve the highest outstanding offer, if any;

(b) Redetermine the value of the property and order that the property continue to be offered for an additional time; or

(c) Order that the property be sold by sealed bids or at an auction.

(5) If the court orders a sale by sealed bids or an auction, the court shall set terms and conditions of the sale. If the court orders an auction, the auction must be conducted under part I of this chapter.

(6) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled to a credit against the price in an amount equal to the purchaser's share of the proceeds.

64.211 Report of open-market sale.—

(1) Unless required to do so within a shorter time by part I of this chapter, a broker appointed under s. 64.210(2) to offer heirs property for open-market sale shall file a report

with the court not later than 7 days after receiving an offer to purchase the property for at least the value determined under s. 64.206 or s. 64.210.

(2) The report required by subsection (1) must contain the following information:

(a) A description of the property to be sold to each buyer.

(b) The name of each buyer.

(c) The proposed purchase price.

(d) The terms and conditions of the proposed sale, including the terms of any owner financing.

(e) The amounts to be paid to lienholders.

(f) A statement of contractual or other arrangements or conditions of the broker's commission.

(g) Other material facts relevant to the sale.

64.212 Uniformity of application and construction.—In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

64.213 Relation to Electronic Signatures in Global and National Commerce Act.—This part modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. ss. 7001 et seq., but does not modify, limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c), or authorize electronic delivery of any of the notices described

in s. 103(b) of that act, 15 U.S.C. s. 7003(b).

Section 3. This act shall take effect July 1, 2020.

Hennessey, William

From: Farach, Manny <mfarach@mcglinchey.com>
Sent: Tuesday, October 8, 2019 12:17 PM
To: Hennessey, William
Cc: Sarah S. Butters; Gwynne Alice Young (gyoung@carltonfields.com); Freedman, Robert S.; Swaine, Robert
Subject: RE: [RPPTL General Standing 2019-20] General Standing Chairs and Liaisons

Bill,
I'll let Gwynne jump in here as she may have more information but other than a continued fundamental policy difference on UVTA, I don't see any pending issues between RPPTL and Business Law Section:

Legislative
BLS's big initiative this year is UCRERA (Uniform Commercial Real Estate Receivership Act) and the BLS Task Force met with RP Lit and Finance and Lending at the Breakers and there have been continued discussions since then; the differences appear to be down to one relatively minor issue. At least from the RP side, I am not aware of anything on the RPPTL side that would create big issues for BLS.

Policy
I am not aware of any fundamental policy differences between RPPTL and BLS which need to be discussed. I have not noticed any issues between the two sections arising from the contested race for President-Elect of the Bar.

Bar Governance
I'm not aware of any fundamental bar governance issues that separate RPPTL and BLS, and only point out for discussion purposes that RPPTL and BLS, as the two biggest (and presumably the richest) sections in The Florida Bar, should probably start talking with each other and planning on how to deal with the *Janus* issue. In my informal conversations with John

Stewart over the years, he believes the eventual outcome will be a shrinking of the Bar and the sections. I suspect that if the Bar shrinks, there will be demands on the two biggest (and presumably richest) sections of the Bar to give back more money to the Bar.

Again, I'll defer to Gwynne if she has hear something or knows something I missed.

Manuel Farach

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fax: (954) 756-8064
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Alabama California Florida Louisiana Massachusetts Mississippi New York Ohio Tennessee Texas Washington, DC

From: rpptl_general_standing_2019-20-bounces@lists.flabarrpptl.org <rpptl_general_standing_2019-20-bounces@lists.flabarrpptl.org> **On Behalf Of** Hennessey, William
Sent: Tuesday, October 08, 2019 11:21 AM
To: 'rpptl_general_standing_2019-20@lists.flabarrpptl.org' <rpptl_general_standing_2019-20@lists.flabarrpptl.org>
Cc: Sarah S. Butters <SButters@ausley.com>
Subject: [RPPTL General Standing 2019-20] General Standing Chairs and Liaisons

Good morning General Standing Committee Chairs and Liaisons.

Your Executive Committee is hard at work making final plans for the November meeting in Miami. Please let me know by later today if you plan to have an information or action item and send me your proposed legislation/rule change along with a white paper and position request form by Friday. Also, if any of you have any written reports which you would like included in the agenda package please get them to me by Friday.

Lastly, a number of Executive Council members have requested that we be provided with written reports from the Elder Law and Business Law Liaisons identifying any projects which will be of interest to this Section. This report can be a couple of paragraphs, or even attach proposed legislation, if it is in a form that would be helpful to review. We have had a number of instances where we have butted heads with other Sections in the legislature. Our goal is to try to do a better job communicating our problems and issues during the Section process and before the BoG so that we can try to work out differences. Gwynne, Manny, Marjorie, and Travis, can you please look into whether there is anything percolating which we need to address, send me any materials which the Executive Council should review, and brief a brief written update for inclusion in the agenda package.

Many thanks.

Bill

GUNSTER
PRIVATE WEALTH SERVICES

William T. Hennessey | Shareholder
Fellow, American College of Trust and Estate Counsel
777 South Flagler Drive, Suite 500 East
West Palm Beach, FL 33401
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Email me: whennessey@gunster.com

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By William P. Sklar, Co-Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date:_____, 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

(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 clarify that a condominium association has the right to represent its unit owner members in a class action defense, including when an association challenges ad valorem assessments on behalf of its unit owner members to the value adjustment board, and the property appraiser subsequently appeals the VAB's decision to increase owners' taxes. In such instance, the association may represent its unit owner members as a group pursuant to F.R.C.P. 1.221 and Florida Statutes §718.111(3).

Reasons For Proposed Advocacy:

The ability of a condominium association ("Association") to bring class actions on behalf of its unit owner members for matters of common interest has been recognized for more than 40 years as a result of the *Avila v. Kappa*, 347 So. 2d 599 (Fla. 1977) resulting in the creation of F.R.C.P. 1.220(b), now 1.221, and in Florida's Condominium Act in §718.111(3) recognizing and authorizing an Association to sue and be sued "on behalf of all unit owners concerning matters of common interest." Likewise, Associations are permitted class action standing to file ad valorem real property tax challenges on behalf of its unit owner members, providing the

efficiency and benefit of working together to reduce all member ad valorem real property taxes.

Most recently, in the case of *Central Carillon Beach Condominium Association, Inc. v. Garcia*, 245 So.3d 869 (Fla. 3d DCA 2018), the Third District Court of Appeal held that, while recognizing class action standing for an Association and the aforesaid rule F.R.C.P. 1.221 and §718.111(3), the Association's ability to defend lawsuits as a class action representative was limited to defense of actions in eminent domain and was inapplicable when a property appraiser appeals an ad valorem decision by a Value Adjustment Board ("VAB"). The decision has placed condominium unit owners and Associations in an extremely difficult position to effectively and cost-efficiently defend actions when the county property appraiser ("PA") appeals VAB decisions, because it forces individual unit owners to individually defend appeals from a VAB decision obtained by an Association on all applicable unit owners' behalf. {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

(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.

118653053.1

WHITE PAPER

BILL TO AMEND THE AD VALOREM TAX PROCEDURE STATUTES AND CONDOMINIUM CLASS ACTION STANDING STATUTE TO ESTABLISH A CONDOMINIUM ASSOCIATION'S CLASS ACTION STANDING TO DEFEND AD VALOREM TAX LITIGATION ON BEHALF OF THE CONDOMINIUM UNIT OWNER MEMBERS OF THE ASSOCIATION CONSISTENT WITH EXISTING F.R.C.P. 1.221 AND FLORIDA STATUTES §718.111(3) – PROPOSED REVISIONS TO §718.113(3)

I. SUMMARY:

Issue: Condo Association Right to Defend Lawsuit

The ability of a condominium association ("Association") to bring class actions on behalf of its unit owner members for matters of common interest has been recognized for more than 40 years as a result of the *Avila v. Kappa* case, 347 So. 2d 599 (Fla. 1977) resulting in the creation of F.R.C.P. 1.220(b), now 1.221, and in Florida's Condominium Act in §718.111(3) recognizing and authorizing an Association to sue and be sued "on behalf of all unit owners concerning matters of common interest." Likewise, Associations are permitted class action standing to file ad valorem real property tax challenges on behalf of its unit owner members, providing the efficiency and benefit of working together to reduce all member ad valorem real property taxes.

Most recently, in the case of *Central Carillon Beach Condominium Association, Inc. v. Garcia,* 245 So.3d 869 (Fla. 3d DCA2018), the Third District Court of Appeal held that, while recognizing class action standing for an Association and the aforesaid rule F.R.C.P. 1.221 and §718.111(3), the Association's ability to defend lawsuits as a class action representative was limited to defense of actions in eminent domain and was inapplicable when a property appraiser appeals an ad valorem decision by a Value Adjustment Board ("VAB"). For the reasons indicated below, this has placed condominium unit owners and Associations in an extremely difficult position to effectively and cost-efficiently defend actions when the county property appraiser ("PA") appeals or files a new action contesting a decision of a VAB.

II. CURRENT SITUATION:

Associations can challenge, on behalf of its condominium unit owner members, ad valorem property tax assessments by filing a single challenge to the VAB. Current law for both VAB appeals and class action matters require the Association to provide an "opt-out" to its members, giving Association members an opportunity to withdraw from the Association's proposed challenge of ad valorem assessments. If members do not "opt-out" they are part of the class represented by the Association in the challenge to the ad valorem assessment.

PAs have taken the position that although an Association may file a VAB challenge or an appeal directly to circuit court on behalf of its members to challenge ad valorem assessments, the same Association is *not authorized to defend* a PA appeal of a VAB decision obtained by the Association on behalf of its members.

Under the current statutes, the PA has argued that even if an Association properly files a single joint petition to the VAB on behalf of its unit owners, and the VAB rules that a reduction in the

assessed value of the units is warranted, the Association is not authorized to defend the PA's appeal of the VAB decision to circuit court. Instead, the PA has argued that each unit owner must individually defend when the PA appeals to increase their taxes. The Third District recently upheld this argument for the first time in the *Central Carillon* case cited above. Because of *Central Carillon*, individual Association members are tasked with defending a PA appeal of a VAB decision obtained by the Association on behalf of its members, instead of the Association defending the appeal.

Furthermore, despite the PA's position that the Association is not authorized to represent its members in the defense of a PA appeal, the PA is statutorily permitted to – and does - serve notice of its appeal on the Association as a class representative. *The PA does not serve notice on each unit owner despite the recent decision that the Association cannot represent its members in a PA appeal of a VAB decision.*

III. EFFECT OF SUGGESTED CHANGE:

If an Association challenges ad valorem assessments on behalf of its members to the VAB, and the PA appeals the VAB's decision in circuit court to increase the owners' taxes, the Association can continue to represent its members as a group throughout the PA's appeal of the VAB decision.

IV. ANALYSIS:

In order to effectuate the suggested change, Section 718.111(3) is amended to clarify that the Association is permitted to institute, file, protest, maintain, and defend administrative or legal challenges or appeals of ad valorem taxes on individual units or values of common facilities or common elements, either in its own name or on behalf of its members, as taxpayers.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS:

The proposal will recognize savings for both state and local government by increasing judicial efficiency and streamlining local government attorney matters. The proposal will result in a single appeal concerning common arguments, surrounding a single set of facts, and resulting in a single, unified, consistent decision for condominium unit owners. The current state of the law requires multiple individual appeals, before separate judges, with possible conflicting decisions despite the fact that the appeals originated from the single underlying decision obtained by the Association on behalf of its members in a single action.

VI. DIRECT IMPACT ON PRIVATE SECTOR:

Costs will be substantially reduced by allowing the Association, which has already successfully represented the unit owners in the VAB challenge and understands the legal arguments and appraisal theory behind the challenge, to represent its members in the appeal. The Association will only need a single law firm for its representation, the costs of which are shared by all members that are part of the challenge and appeal. Individual owners will not need to obtain their own attorney, who would not be familiar with the arguments raised or the appraisal theory used in the VAB challenge. Additionally, associational representation allows pooled resources and a unified defense to assist all Association members in maximizing their ad valorem tax savings, especially when ad valorem reductions could be minimal to individual owners, which would not allow them to cost-effectively defend individually against the government.

VII. CONSTITUTIONAL ISSUES:

A potential constitutional issue concerning due process is fixed by this proposal. Currently, if an Association successfully challenges ad valorem assessments on behalf of its members before the VAB, and the PA appeals the assessments, the PA is only required to serve notice of its appeals to the Association, despite the Association being unable to defend the appeal on behalf of its members. This means that the PA is not required to give notice to individual unit owners, who are now individual defendants tasked with their own individual defense, when the PA seeks to raise the owner's ad valorem taxes by appealing the VAB's decision of the Association's challenge.

The proposal remedies this possible due process issue by allowing the Association to defend the appeal of a decision it obtained on behalf of its members in the first instance. Individual notices and appeals for each and every owner would not be at issue.

A bill to be entitled

An act relating to _____; providing an effective date.

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

Section 1. Section 718.111(3) is amended to read as follows:

(3) POWER TO MANAGE CONDOMINIUM PROPERTY AND TO CONTRACT, SUE, AND BE SUED; CONFLICT OF INTEREST.—

(a) The association may contract, sue, or be sued with respect to the exercise or nonexercise of its powers. For these purposes, the powers of the association include, but are not limited to, the maintenance, management, and operation of the condominium property.

(b) After control of the association is obtained by unit owners other than the developer, the association may institute, maintain, defend, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest to most or all affected unit owners, including, but not limited to, the common elements; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving an improvement or a building; representations of the developer pertaining to any existing or proposed commonly used facilities; ~~and protesting~~ ad valorem taxes on commonly used facilities ~~and on~~

~~units; and may defend actions~~ or on units including, as the taxpayer, the association being a party defendant in any appeal resulting from the association's protest of ad valorem taxes in eminent domain or ~~bring~~ inverse condemnation actions.

(c) If the association has the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation, administrative proceedings, and disputes involving the matters for which the association could bring a class action.

(d) Nothing herein limits any statutory or common-law right of any individual unit owner or class of unit owners to bring any action without participation by the association which may otherwise be available.

(e) An association may not hire an attorney who represents the management company of the association.

(f) The amendments made by this act to s. 718.111, Florida Statutes, are intended to clarify existing law and apply to any pending action.

Section 2. This act shall take effect July 1, 2020

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Reese Henderson, Chair, Construction Law Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date_____, 20___)

Address 50 N. Laura Street, Suite 1100, Jacksonville, FL 32202
Telephone: (904) 598-9929

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 (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:

"Support for legislative changes to construction lien law in the state of Florida, including changes to Fla. Stat. Ch. 255 and 713."

Reasons For Proposed Advocacy:

The proposed legislation will provide needed changes to Ch. 255 and 713, Fla. Stat., including, but not limited to, (1) expanding the definition of contractor under Section 713.01, FS to include construction managers; (2) correct ambiguity in improper payments made by an Owner prior to abandonment of a project by contractor; (3) requiring a tenant's information on a Notice of Commencement where a tenant is contracting for leasehold improvements; (4) statutorily bringing attorney fees under Chapter 713 back to the net judgment rule as opposed to the prevailing party standard set forth in *Trytek v. Gale Industries*; (5) clearing up ambiguity in Section 337.18, FS as it relates to waiver and release of payment bond claims in public transportation

projects; (6) repealing Section 255.05(7), FS which allows for cash to serve as an alternative form of security on public projects as opposed to payment bonds; and (7) repealing Section 713.245, FS which created conditional payment bonds. The items that the Construction Law Committee is seeking to address in the proposed legislation would assist in fixing current ambiguities in the law. Further, the repeal of Section 255.05(7) would ensure that lienors working on public projects always have the protection of a payment bond. Section 713.245, FS which provides for conditional payment bonds is unworkable at best, and a trap for unwary lienors and owners at worst. When passed originally, Section 713.245, FS was scheduled to sunset within one year due to many technical issues created by the statute that made perfecting a lien or bond claim very difficult and confusing. The intent was to pass a glitch bill to address those issues. Instead, the Florida legislature removed the sunset provision during the next legislative session without addressing the many technical issues the statute raised, and the Florida construction industry and legal professionals have been struggling with how the statute is to be applied ever since.

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

No formal responses received as of the date of this submission

(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 Legislative Bill for 2020 Legislative Session Addressing Changes in Florida's Construction Lien and Bond Laws

I. SUMMARY

The Construction Law Committee requests the approval of the RPPTL Executive Council of the Committee's Proposed Lien and Bond Law as having the Section's support and access to the Section's lobbyist to advance the bill during the 2020 Legislative Session. The proposed legislation to the RPPTL addresses some ambiguities and gaps in the current law and to restore the ability of construction lien claimants to recover their attorney's fees when they succeed in enforcing their lien claims.

II. CURRENT SITUATION AND EFFECTS OF PROPOSED LEGISLATION

Section 255.05, *Florida* Statutes:

Currently, Section 255.05 requires any person entering into a formal contract with the state or applicable local governmental agency to obtain a payment bond for the repair or construction of public buildings. The payment bond provides security for subcontractors and suppliers on government projects who do not have the protection of the lien law because construction liens do not attach to public property. Section 255.05, however, does not address the situation where a tenant who is a privately held entity contracts for construction or repair of a leasehold improvement on government-owned property. Under current law, subcontractors and suppliers are not protected on these tenant improvement projects by a payment bond, even though no lien will attach to the government property if the lienor is not paid. To remedy this, the proposed bill would amend Section 255.05 to require a tenant contracting for leasehold improvements on government property to obtain a payment bond from its contractor in accordance with the requirements of Section 255.05.

Section 713.01, *Florida* Statutes:

Currently, Section 713.01 provides an expansive definition of "contractor" for purposes of the construction lien law. That section, however, fails to address lien rights of licensed building and general contractors that are performing construction management services. The proposed bill corrects this by expanding the definition of "contractor" to include those licensed contractors performing construction management services.

Section 713.06(3)(h), *Florida* Statutes:

Currently, Section 713.06(3)(h) addresses proper payments by an Owner on a construction project. That section, however, fails to address monies improperly paid by an Owner prior to abandonment of the contractor on the project. Under current law, it is unclear whether, payments made by the Owner *after* recommencement reduce or eliminate the Owner's liability for improper payments made prior to abandonment of the project by the original contractor. The proposed bill adds language clarifying that payments made after abandonment

and recommencement do not reduce the Owner's liability for improper payments made prior to abandonment.

Section 713.09, Single Claim of Lien, *Florida* Statutes:

Currently, Section 713.09 requires a single claim of lien when there are several improvements on the same parcel of property, provided they are all performed pursuant to the same direct contract. This section, however, does not address the situation where the same Owner contracts for multiple improvements on the same property through multiple direct contracts with the same contractor. The proposed bill would allow a lienor to file a single claim of lien for all improvements performed for the same owner under multiple direct contracts.

Section 713.13(1), Notice of Commencement, *Florida* Statutes:

Currently, Section 713.13(1) addresses the requirements of a Notice of Commencement for improvements to real property. However, the Notice of Commencement requirements in a situation where a tenant is contracting for the improvements on a leasehold interest are not clearly stated. If the fee simple property is exempt from liens under 713.10, Fla. Stat., then the lienor's interest will only attach to the leasehold improvements. As such, the proposed bill streamlines and improves the Notice of Commencement requirements in order to clearly identify a tenant's information so as to ensure that proper notice is provided to lienors when the construction consists of tenant improvements.

Section 713.29, Attorney Fees, *Florida* Statutes:

Currently, Section 713.29 provides that a court "must" award attorney fees to the prevailing party on a lien or bond claim. The current version of the statute does not specifically provide for attorney fees for prevailing on a transfer lien bond claim under Section 713.24, Florida Statutes. While the language "or to enforce a claim against a bond under this part…" may very well encompass a lien transfer bond under Section 713.24, the proposed bill amends Section 713.29 to specifically state that a prevailing party on a lien transfer bond under Section 713.24 is entitled to attorney fees.

Further, following the Florida Supreme Court's decision in *Trytek v. Gale Indus., Inc.*, 3So. 3d 1194 (Fla. 2009), the prevailing party in a construction lien foreclosure action is deemed to be the party that prevailed on the significant issues in the case (as opposed to obtaining a net judgment). Further, despite Section 713.29's mandatory language, Court in *Trytek* held that a court may find that neither party was a prevailing party because each party prevailed on some portion of their respective cases. For example, a lienor prevails on the lien foreclosure claim; however, the opposing party prevailed on its counter-claim that significantly reduced the amount of the construction lien. In this exemplar scenario, *Trytek* held that each party prevailed on significant issues and neither party was deemed to be a prevailing party. There are two problems with *Trytek's* holding. First, it does not comport with the "must be taxed" language of Section 713.29, which evidences the Legislature's intent that a finding of a prevailing party and the award of attorney's fees is mandatory on the court, not discretionary. Second, the *Trytek* rule has also created significant problems for lawyers trying to counsel clients on expectations in lien

cases, because under the *Trytek* rule the ability to recover one's attorney's fees upon prevailing is completely uncertain and unpredictable. The proposed bill would restore the requirement that the court determine a prevailing party.

The proposed bill also adds a definition of "prevailing party" that takes into account the ultimate result in the litigation as compared with pre-suit offers. In the proposed bill, the "prevailing party" would be defined as the party who:

> (1) successfully enforces his or her lien or claim against a bond, even if not to the extent of his or her original contention. However, a party who does not recover an amount that exceeds any pre-suit good faith unconditional tender that was not accepted shall not be a prevailing party under this section.
>
> (2) except as otherwise provided in s. 713.16(5)(b), defends the action where the lienor has no recovery or the lienor does not recover an amount that exceeds any pre-suit good faith unconditional tender that was not accepted.

The proposed language would allow a lienor the opportunity to recover prevailing party attorney fees despite the fact that the original lien value is not obtained through the litigation, so long as the lienor obtained a judgment that exceeded any pre-suit good faith unconditional tender from the owner. Conversely, the Owner would be the prevailing party is the lien is held invalid or if the lienor's recovery does not exceed the amount of a pre-suit good faith unconditional tender. The proposed standard for determining the prevailing party in lien actions is somewhat analogous to the proposal for settlement/offer of judgment rule found in Rule 1.442, *Fla. R. Civ. P.* and Section 768.79, Florida Statutes. This "prevailing party" threshold would provide an incentive for lienors and owners to enter into good faith settlement negotiations without the necessity of litigation.

Section 337.18, Surety Bonds on Public Transportation Projects, *Florida Statutes*:

Currently, Section 337.18 provides that any Notices required to perfect a bond claim on a public transportation project may be served in the manner set forth in Section 713.18. However, Section 337.18 is silent on the rules relating to providing a waiver and release of payment bond claims. As such, to rectify the ambiguity, the CLC suggests adding language to Section 337.18(1)(c) which provides that the provisions for the waiver and release of claims against a payment bond contained in Section 255.05 apply to all contracts under Section 337.18.

Section 9 of the Proposed Legislation – Repealing Section 255.05(7)

Section 255.05(7) currently allows a contractor contracting with a state or local public entity to post, in lieu of a statutory payment bond, an "alternative form of security" who could be cash, a money order, a certified check, a cashier's check and other types of instruments. This subsection is extremely problematic for several reasons. First, this subsection provides no clear rules for where this "alternative form of security" is to be deposited or who is responsible for administering claims against such a deposit. The subsection leaves it completely in the discretion of the state or local public entity to determine the value of the alternative form of security. There is no requirement, in other words, that the alternative form of security be in the

full amount of the contract price, as is required for most statutory payment bonds under Section 255.05(1)(g).

The rules governing the provision of payment bonds under Section 255.05 as security for payment on public projects are well-defined and are written to provide protection to lienors furnishing labor, services and materials on public projects. A cash deposit simply is not an acceptable substitute for a surety company's financial wherewithal and institutional experience administering payment bond claims. Only a payment bond backed by a surety company can provide the security necessary to protect unpaid claimants on public projects. For that reason, the proposed bill repeals Section 255.05(7) to eliminate the option of an "alternative form of security" which does not have the safeguards of a payment bond.

Section 10 of the Proposed Legislation – Repealing Section 713.245, *Florida Statutes*

Currently, Section 713.245 provides a confusing statutory scheme for making claims on a Conditional Payment Bond. Section 713.245 was originally enacted to address the Florida Supreme Court's ruling in *OBS Co. v. Pace Construction Corp.*, 558 So. 2d 404 (Fla. 1990). In *OBS*, a subcontractor made a claim on a payment bond for money due for work performed when the general contractor was not paid by the owner. In the subcontract, the general contractor and subcontractor agreed to a risk-shifting provision whereby the subcontractor agreed that payment would not be due unless and until the general contractor was paid by the owner. However, the owner and general contractor required that the general contractor submit an affidavit stating that all subcontractors had been paid in full in order to receive final payment. The general contract and subcontract created an ambiguity, which based upon the decision, was to be construed against the general contractor. As a result, the Florida Supreme Court found that the "pay when paid" clause in the subcontract simply required payment within a reasonable amount of time as opposed to completely eliminating the necessity of payment until the owner paid the general contractor. Accordingly, the subcontractor's claim against the payment bond was proper and the "pay when paid" clause did not prohibit the payment bond claim by the subcontractor.

After *OBS*, Section 713.245 was passed to address the decision. In the original version of Section 713.245, there was a sunset provision that provided that the statute would sunset in one year. That sunset provision was thought to be critical at the time in order to use the intervening year to rework the statute and try to steer it away from the "ping pong" effect of liens attaching, then liens not attaching, depending upon what affidavits were placed in the record. Unfortunately, after the first year, the only change to the statute was to delete the sunset provision. Since the passing of Section 713.245, the application of Section 713.245 has often become a trap for the unwary or unsophisticated owner, and an overly complicated process for lienors/bond claimants on private construction projects. The necessity of filing a lien only for that lien to be transferred to a bond to the extent of payment by the owner to the general contractor creates a significant amount of contract administration problems and costs.

Due to the foregoing, the proposed bill would repeal Section 713.245, Florida Statutes, in its entirety.

III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None that the CLC is aware of at this time.

IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

There may be a greater financial impact to parties involved in lien foreclosure actions as a result of the changes to Section 713.29, Fla. Stat. due to the risk-shifting definition of "prevailing party" in the proposed legislation.

V. CONSTITUTIONAL ISSUES

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

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

Section 1. Subsection (1) of section 255.05 is amended to read:

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

(1) A person entering into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority or private entity, for the construction of a public building, for the prosecution and completion of a public work, ~~or~~ for repairs upon a public building or public work, or for construction or repair of leasehold improvements on government owned property, shall be required, before commencing the work or before recommencing the work after a default or abandonment, to execute and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized to do business in this state as surety. A public entity may not require a contractor to secure a surety bond under this section from a specific agent or bonding company.

Section 2. Subsection (8) of section 713.01 is amended to read:

713.01 Definitions.—As used in this part, the term:

(8) "Contractor" means a person other than a materialman or laborer who enters into a contract with the owner of real property for improving it, or who takes over from a contractor as so defined the entire remaining work under such contract. The term "contractor" includes an architect, landscape architect, or engineer who improves real property pursuant to a design-build contract authorized by s. 489.103(16), and a licensed building and general contractor as defined in paragraphs 489.105(3)(a)

and (b) who provides construction management services.

Section 3. Paragraph(3)(h) of section 713.06 is amended to read:

713.06 Liens of persons not in privity; proper payments.—

(3) The owner may make proper payments on the direct contract as to lienors under this section, in the following manner:

(h) When the owner has properly retained all sums required in this section to be retained but has otherwise made improper payments, the owner's real property shall be liable to all laborers, subcontractors, sub-subcontractors, and materialmen complying with this chapter only to the extent of the retentions and the improper payments, notwithstanding the other provisions of this subsection. Any money paid by the owner on a direct contract, the payment of which is proved to have caused no detriment to any certain lienor, shall be held properly paid as to the lienor, and if any of the money shall be held not properly paid as to any other lienors, the entire benefit of its being held not properly paid as to them shall go to the lienors. Any monies paid by the owner for completion of the work after abandonment of the direct contract and recommencement shall not reduce or otherwise affect the amount of pre-abandonment improper payments for purposes of determining the extent of owner's liability to, and the funds available for, paying pre-abandonment lienors who have not received payment in full.

Section 4. Section 713.09 is amended to read:

713.09 Single claim of lien.—A lienor may ~~is required to~~ record only one claim of lien covering his or her entire demand against the real property when the amount demanded is for labor or services or material furnished for more than one improvement

under the same direct contract or multiple direct contracts. The single claim of lien is sufficient even though the improvement is for one or more improvements located on separate lots, parcels, or tracts of land. If materials to be used on one or more improvements on separate lots, parcels, or tracts of land ~~under one direct contract~~ are delivered by a lienor to a place designated by the person with whom the materialman contracted, other than the site of the improvement, the delivery to the place designated is prima facie evidence of delivery to the site of the improvement and incorporation in the improvement. The single claim of lien may be limited to a part of multiple lots, parcels, or tracts of land and their improvements or may cover all of the lots, parcels, or tracts of land and improvements. If a ~~In each~~ claim of lien under this section is for multiple direct contracts, the owner under the direct contracts must be the same person for all lots, parcels, or tracts of land against which a single claim of lien is recorded.

Section 5. Subsection (1) of section 713.13, Florida Statutes is amended to read:

713.13 Notice of commencement.—

(1)

(a) Except for an improvement that is exempt pursuant to s. 713.02(5), an owner or the owner's authorized agent before actually commencing to improve any real property, or recommencing completion of any improvement after default or abandonment, whether or not a project has a payment bond complying with s. 713.23, shall record a notice of commencement in the clerk's office and forthwith post either a certified copy thereof or a notarized statement that the notice of commencement has been filed for recording along with a copy thereof. The notice of commencement shall contain the following information:

1. A description sufficient for identification of the real property to be improved. The description should include the legal description of the property and also should include the street address and tax folio number of the property if available or, if there is no street address available, such additional information as will describe the physical location of the real property to be improved.

2. A general description of the improvement.

3. The name and address of the owner of record ~~, the owner's interest in the site of the improvement, and the name and address of the fee simple titleholder, if other than such owner.~~ 4. The name and address of the tenant (lessee), if the tenant ~~A lessee who~~ contracts for the improvements as ~~is~~ an owner as defined under s. 713.01(23) ~~and must be listed as the owner together with a statement that the ownership interest is a leasehold interest~~.

5. ~~4.~~ The name and address of the contractor.

6. ~~5.~~ The name and address of the surety on the payment bond under s. 713.23, if any, and the amount of such bond.

7. ~~6.~~ The name and address of any person making a loan for the construction of the improvements.

8. ~~7.~~ The name and address within the state of a person other than himself or herself who may be designated by the owner as the person upon whom notices or other documents may be served under this part; and service upon the person so designated constitutes service upon the owner.

(b) The owner, at his or her option, may designate a person in addition to himself or herself to receive a copy of the lienor's notice as provided in s. 713.06(2)(b), and if he or she does so, the name and address of such person must be included in the notice of commencement.

(c) If the contract between the owner and a contractor

named in the notice of commencement expresses a period of time for completion for the construction of the improvement greater than 1 year, the notice of commencement must state that it is effective for a period of 1 year plus any additional period of time. Any payments made by the owner after the expiration of the notice of commencement are considered improper payments.

(d) A notice of commencement must be in substantially the following form:

Permit No. Tax Folio No.

NOTICE OF COMMENCEMENT

State of

County of

The undersigned hereby gives notice that improvement will be made to certain real property, and in accordance with Chapter 713, Florida Statutes, the following information is provided in this Notice of Commencement.

1. Description of property: (legal description of the property, and street address if available) .

2. General description of improvement: .

3. a. Owner of record: (name and address).

b. Owner's phone number: .

4. a. Tenant (Lessee) if tenant contracted for the improvements: (name and address) .

b. Tenant's phone number.

~~information or if the Lessee contracted for the improvement~~:

~~a. Name and address: .~~

~~b. Interest in property: .~~

~~c. Name and address of fee simple titleholder (if different from Owner listed above): .~~

5. ~~4~~.a. Contractor: (name and address) .

b. Contractor's phone number: .

6. ~~5.~~ Surety (if applicable, a copy of the payment bond is attached):

a. Name and address: _____.

b. Phone number: _____.

c. Amount of bond: $ _____.

7. ~~6.~~a. Lender: (name and address) .

b. Lender's phone number: _____.

8. ~~7.~~ Persons within the State of Florida designated by Owner upon whom notices or other documents may be served as provided by Section 713.13(1)(a)7., Florida Statutes:

a. Name and address: _____.

b. Phone numbers of designated persons: _____.

9. ~~8.~~a. In addition to himself or herself, Owner designates _____ of _____ to receive a copy of the Lienor's Notice as provided in Section 713.13(1)(b), Florida Statutes.

b. Phone number of person or entity designated by owner: _____.

10. ~~9.~~ Expiration date of notice of commencement (the expiration date will be 1 year from the date of recording unless a different date is specified) .

WARNING TO OWNER: ANY PAYMENTS MADE BY THE OWNER AFTER THE EXPIRATION OF THE NOTICE OF COMMENCEMENT ARE CONSIDERED IMPROPER PAYMENTS UNDER CHAPTER 713, PART I, SECTION 713.13, FLORIDA STATUTES, AND CAN RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION. IF YOU INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN ATTORNEY BEFORE COMMENCING WORK OR RECORDING YOUR NOTICE OF COMMENCEMENT.

(Signature of Owner or Tenant/Lessee, or Owner's or Tenant/Lessee's Authorized Officer/Director/Partner/Manager)

(Signatory's Title/Office)

The foregoing instrument was acknowledged before me this day of , (year) , by _____ (name of person) as an individual or as _____ (type of authority, . . . e.g. officer, trustee~~, attorney in fact~~) for _____ (name of party on behalf of whom instrument was executed) .

(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

(e) A copy of any payment bond must be attached at the time of recordation of the notice of commencement. The failure to attach a copy of the bond to the notice of commencement when the notice is recorded negates the exemption provided in s. 713.02(6). However, if a payment bond under s. 713.23 exists but was not attached at the time of recordation of the notice of commencement, the bond may be used to transfer any recorded lien of a lienor except that of the contractor by the recordation and service of a notice of bond pursuant to s. 713.23(2). The notice requirements of s. 713.23 apply to any claim against the bond; however, the time limits for serving any required notices shall, at the option of the lienor, be calculated from the dates specified in s.713.23 or the date the notice of bond is served on the lienor.

(f) The giving of a notice of commencement is effective upon the filing of the notice in the clerk's office.

(g) The owner must sign the notice of commencement and no one else may be permitted to sign in his or her stead.

Section 6. Paragraph (a) of subsection (3) of section

713.18, Florida Statutes is amended to read:

713.18 Manner of serving notices and other instruments.—

(3)

(a) Service of an instrument pursuant to this section is effective on the date of mailing or shipping the instrument if it:

1. Is sent to the last address shown in the notice of commencement or any amendment thereto or, in the absence of a notice of commencement, to the last address shown in the building permit application, or to the last known address of the person to be served; and

2. Is returned as being "refused," "moved, not forwardable," or "unclaimed," or is otherwise not delivered or deliverable through no fault of the person serving the item.

(b) If the address shown in the notice of commencement or any amendment to the notice of commencement, or, in the absence of a notice of commencement, in the building permit application, is incomplete for purposes of mailing or delivery, the person serving the item may complete the address and properly format it according to United States Postal Service addressing standards using information obtained from the property appraiser or another public record without affecting the validity of service under this section.

Section 7. Section 713.29, Florida Statutes, is amended to read:

713.29 Attorney's fees.—

In any action brought to enforce a lien, including a lien that has been transferred to security, or to enforce a claim against a bond under this part, the court or arbitrator shall determine a ~~the~~ prevailing party who shall be ~~is~~ entitled to recover a reasonable fee for the services of her or his 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 prevailing party is a party who:

(1) successfully enforces his or her lien or claim against a bond, even if not to the extent of his or her original contention. However, a party who does not recover an amount that exceeds any pre-suit good faith unconditional tender that was not accepted shall not be a prevailing party under this section.

(2) except as otherwise provided in s. 713.16(5)(b), defends the action where the lienor has no recovery or the lienor does not recover an amount that exceeds any pre-suit good faith unconditional tender that was not accepted.

Section 8. Paragraph (1)(c) of section 337.18 is amended to read:

337.18 Surety bonds for construction or maintenance contracts; requirement with respect to contract award; bond requirements; defaults; damage assessments.—

(1)

(c) A claimant, except a laborer, who is not in privity with the contractor shall, before commencing or not later than 90 days after commencing to furnish labor, materials, or supplies for the prosecution of the work, furnish the contractor with a 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 his or her labor, materials, or supplies shall deliver to the contractor and 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 may be served at any time during the

progress of the work or thereafter but not before 45 days after the first furnishing of labor, services, or materials, and not 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. An action by a claimant, except a laborer, who is not in privity with the contractor for the labor, materials, or supplies may not be instituted against the contractor or the surety unless both notices have been given. Notices required or permitted under this section may be served in any manner provided in s. 713.18, and provisions for the waiver and release of claims against the payment bond contained in s. 255.05(2) shall apply to all contracts under this section.

Section 9. Section 255.05(7) is hereby repealed.

Section 10. Section 713.245 is hereby repealed.

Section 11. This act shall take effect July 1, 2020.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Matthew Triggs, Chair, Trust Law Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date_____, 20___)

Address
Matthew Triggs
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Position Type Trust Law 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, Florida 34103, Telephone: (239) 436-1988, Email: jscuderi@gfsestatelaw.com
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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 creating the "Florida Uniform Directed Trust Act" (a modified version of the Uniform Directed Trust Act), which clarifies and changes various aspects of the Florida Statutes relating to directed trusts.

Reasons For Proposed Advocacy:

Numerous legal issues arise regarding directed trusts (trusts whose terms grant a person other than a trustee a power over some aspect of the trust's administration). Principal among them are (a) applicable fiduciary duties that apply to the non-trustee holding power (the "trust director") and the trustee that is being directed (the "directed trustee"), (b) what trust director powers should be exercised without duty (that is, should not be covered by the Act), (c) the liability of a trust director, including limitations and defenses, (d) how the location of a trust director impacts the principal place of administration of the trust, (e) what powers a trust director has that are not expressed in the trust agreement, (f) required duties of a trust director and a directed trustee to

provide information to each other, and to provide information to beneficiaries, (g) duties of the trust director and a directed trustee to monitor, inform or advise the other, (h) how to apply these issues to circumstances when one trustee is directing another trustee (since "directed trusts" are limited to trusts where the directing person is not a trustee), (i) personal jurisdiction over a trust director, and (j) a determination of what other provisions of the Florida Trust Code should apply to trust directors. Since numerous trust instruments governed by Florida law include directed trust provision, and directed trust provisions are useful planning mechanisms, a resolution to these issues would be of significant benefit. The proposal adopts legislative solutions to these issues. By adopting these provisions as part a Uniform Act, Florida also gains the benefits of having provisions substantially similar to laws adopted in other states. The White Paper to this legislation provides substantially more detail regarding the proposed legislation.

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

Tax Section of The Florida Bar	no opposition at this time
(Name of Group or Organization)	(Support, Oppose or No Position)
The Florida Bankers	no opposition at this time
(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

Florida Uniform Directed Trust Act

I. SUMMARY

This legislation adopts the Uniform Directed Trust Act ("UDTA") into Chapter 736, with modifications. The Act provides statutory provisions relating to directed trusts (trusts whose terms grant a person other than a trustee a power over some aspect of the trust's administration). The UDTA has extensive comments regarding its provisions, which provide further information on the background and operation of its provisions beyond the provisions of this White Paper.

II. CURRENT SITUATION & GENERAL NEED FOR ACT

Numerous legal issues arise regarding directed trusts. Principal among them are (a) applicable fiduciary duties that apply to the non-trustee holding power (the "trust director") and the trustee that is being directed (the "directed trustee"), (b) what trust director powers should be exercised without duty (that is, should not be covered by the Act), (c) the liability of a trust director, including limitations and defenses, (d) how the location of a trust director impacts the principal place of administration of the trust, (e) what powers a trust director has that are not expressed in the trust agreement, (f) required duties of a trust director and a directed trustee to provide information to each other, and to provide information to beneficiaries, (g) duties of the trust director and a directed trustee to monitor, inform or advise the other, (h) how to apply these issues to circumstances when one trustee is directing another trustee (since "directed trusts" are limited to trusts where the directing person is not a trustee, (i) personal jurisdiction over a trust director, and (j) a determination of what other provisions of the Trust Code should apply to trust directors.

Numerous trusts are established under Florida law that include one or more powers granted to non-trustees. Fla. Stat. §736.0808 presently addresses some of the above-described issues, but its coverage is narrow and limited. There is little in the way of case law in Florida on most of these issues, leaving trust directors, trustees, and beneficiaries without direction on these issues and requiring litigation to establish law on a case-by-case basis. Recognizing the importance of having statutory law on these subjects, many other states and common law countries have enacted legislation of varying scope dealing with many of these subjects. The UDTA was promulgated to provide a comprehensive statutory arrangement to address all of these issues and would be of welcome benefit to all parties involved with directed trusts.

III. MISC. ASPECTS

The statutory provisions are in two segments. The first is changes to existing Florida Trust Code provisions. These are changes needed to coordinate with the separate Act Part, and to include provisions of the Act that are better placed elsewhere in the Trust Code than in a separate Act

part, such as definitions relating to Act provisions. The second segment is a new Part XIV of the Trust Code entitled "Directed Trusts."

It was determined that a separate Part was superior to scattered inclusion of the UDTA provisions throughout the Trust Code. This preserves the UDTA structure to obtain the benefits of close coordination with a uniform act, and the Directed Trust Act provisions are discrete enough to warrant a separate part. This also assists in avoiding undue complexity by excluding provisions throughout the Trust Code that may not be of relevance to trusts without directed trust features.

Like most Trust Code provisions, the provisions of the Act are a set of default rules that can be overridden in the trust instrument (except as otherwise noted).

IV. SECTION-BY-SECTION ANALYSIS

A. Section 736.0103 – Definitions (Modification to Existing Statute)

Current Situation: This provision provides definitions applicable throughout the Trust Code.

Effect of Proposed Changes: Adds new definitions applicable to the directed trusts, principally including:

1. "Directed trust" – a trust which includes a power of direction;
2. "Directed trustee" – a trustee subject to direction by a trust director;
3. "Power of direction" – a power over a trust granted to a person by the trust terms that is exercisable by the person when not serving as a trustee;
4. "Terms of a trust" – expands the current definition to include trust terms established by or amended by a trustee, a trust director, a court order, or a nonjudicial settlement agreement; and
5. "Trust director" – a person who has a power of direction under the trust terms to the extent exercisable while that person is not a trustee.

B. Section 736.0105(2)(b) – Default and Mandatory Rules (Modification to Existing Statute)

Current Situation: This provision provides that the terms of a trust may not modify the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

Effect of Proposed Changes: This provision would now be subject to the authority regarding such issues as they related to directed trusts otherwise provided in new Sections 736.1409, 736.1411, and 736.1412.

C. *Section 736.0603(3)- Settlor Powers (Modification to Existing Statute)*

Current Situation: While a trust is revocable, the duties of the trustee are owed exclusively to the settlor.

Effect of Proposed Changes: A new provision is added to provide that a trustee may follow a direction of the settlor that is contrary to the trust provisions while a trust is revocable.

D. *Section 736.0703(9) – Cotrustees (Modification to Existing Statute)*

Current Situation: This provision relates to the duties and obligations of trustees when the trust provisions provide a power to direct or prevent action by one trustee vis-à-vis another trustee.

Effect of Proposed Changes: This provision is removed since these provisions are now addressed in the new Part.

E. *Section 736.0808 – Powers to Direct (Modification to Existing Statute)*

Current Situation: This provision is currently the operative provision for duties, powers, and obligations relating to powers of direction granted to non-trustees.

Effect of Proposed Changes: This provision is removed since its subject matter is now entirely addressed in the new Part in numerous provisions thereof.

F. *Section 736.1008 – Limitations on Proceedings Against Trustees (Modification to Existing Statute)*

Current Situation: This provision relates to limitations on proceedings against trustees regarding items disclosed in a trust disclosure document.

Effect of Proposed Changes: Trust directors will now have the same protections as trustees for items disclosed in a trust disclosure document (whether issued by a trustee or a trust director). The definition of a "trust disclosure document" is expanded to include an accounting or other written report prepared by a trust director. A "limitation notice" may now be issued by a trust director, and the notice language regarding an action by a beneficiary for breach of trust is no longer limited to an action against the trustee (so as to have the effect of including an action against either/or a trustee or trust director).

G. *Section 736.1017 – Certification of trust*

Current Situation: This provision allows the delivery of a certification to interested persons regarding relevant terms of a trust, in lieu of delivery of the trust instrument itself. This allows for the preservation of confidentiality as to trust terms that are not relevant to the purpose of delivering relevant trust terms (e.g., title review and title insurance issuance in real estate transactions).

Effect of Proposed Changes: The existence, scope and exercise of powers of direction, and the identity of current trust directors, is added to the items included in the certification, since such items will often be relevant to the purposes of the certification.

H. Part XIV – Directed Trusts

Effect of Proposed Changes: Establishes a new Part under the Trust Code, which will encompass Sections 736.1401 through 736.1418. The last two digits of each section number are in accord with the corresponding or source sections of the UDTA.

I. Section 736.1403 – Application; Principal Place of Administration (new)

736.1403(1) - Effect of Proposed Changes: Provides that this Part will apply to a trust, wherever created, if it has its principal place of administration in Florida. It further provides the Part will apply only to decisions or actions occurring after the effective date of enactment of the Part. If the principal place of administration is moved to Florida, the Part applies only decisions or actions occurring after such a move.

736.1403(2) - Effect of Proposed Changes: Expands the statutory rules on "principal place of administration" to include Florida if the trust terms so provide and a trust director's principal place of business is located in or a trust director is a resident of Florida. Thus the location of a trust director in Florida is sufficient in itself to allow Florida to be the principal place of administration.

J. Section 736.1405 - Exclusions (New)

Effect of Proposed Changes: Under the Act, a non-trustee holding a power over a trust by its terms is subject to the Act. Nonetheless, certain powers are excluded from the Act. Principal among the effects of such exclusion is that the power holder is not subject to any fiduciary duty unless otherwise imposed by the trust terms. These excluded powers are:

A Power of Appointment. Under current law, a non-trustee holder of a power of appointment holds a mere personal power and does not have any fiduciary duties regarding the exercise of the power (absent contrary trust terms). This exclusion is continued by excepting powers of appointment from the Act provisions. The Act provides that a power to terminate a trust is a power of appointment for this purpose.

A trust may grant a power to create, modify or terminate a power of appointment. The provision does not characterize such a power as a power of appointment for these purposes and subjects such a power to the Act and its concomitant fiduciary duties. That is, a direct power of appointment over property is materially different than a power that does not directly impact property but instead is a power to create, modify, or terminate a power of appointment, and it was determined that the broad authority under the latter warranted the imposition of fiduciary duties on the power holder. Nonetheless, the last clause of 736.1405(3)(b) is intended to clarify that if a holder of a traditional power of appointment with power thereunder to create a new trust or other property interest has with the power the ability to create a new power of appointment (*e.g.*, under the new trust arrangement), such power in the original power holder to create a new power of appointment should nonetheless still be a power of appointment for these purposes. This is because in that instance the power to create, modify or terminate is only an adjunct to the power of appointment and cannot be exercised separate and apart from an appointment otherwise occurring under the power.

A Power to Appoint or Remove a Trustee or Trust Director.

A Power of a Settlor over a Trust While it is Revocable by that Settlor.

A Power of a Beneficiary to the Extent the Exercise or Nonexercise of the Power Affects the Beneficial Interest of the Beneficiary or Another Beneficiary Represented by That Power.

A Power If the Trust Provides it is a Nonfiduciary Power, and it Must be Held in a Nonfiduciary Capacity to Achieve the Settlor's Tax Objectives. This provision is to allow for the availability of grantor trust treatment for federal income tax purposes to a settlor via certain common planning techniques (which do not function if the power holder has a fiduciary duty regarding that power).

A Power If the Trust Provides it is a Nonfiduciary Power and Allows Reimbursement to Settlor of Income Tax Liabilities Attributable to the Income of the Trust. This allows a trust director to pay the income tax liabilities of a settlor attributable to the grantor trust status free of a conflicting duty to trust beneficiaries.

A Power to Add or Release a Power If Such Power Can Affect the Grantor Trust Status of the Trust. Again relating to grantor trusts, this permits the trust director to toggle such status on or off (to the extent allowed under federal income tax law) free of a duty to trust beneficiaries.

K. SECTION 736.1406 – Powers of Trust Director (New)

Effect of Proposed Changes: This provision limits the powers of a trust director to the powers granted in the trust instrument, except it will also establish further powers not expressly granted that are appropriate to the exercise or nonexercise of the power that is granted. It also provides that trust directors with joint powers must act by majority decision.

The draftspersons discussed at length whether the further power language under s. 736.1406(3)(a) included the power in the trust director to hire attorneys and others to assist the trust director in performing its powers of direction. The draftspersons concluded that such a power to hire and direct payment of fees and costs for those engaged was implicit in the statutory language, as noted in the Comments to the UDTA. Thus, explicit statutory language to this effect was not needed nor desirable. The draftspersons also concluded that such powers extended to the hiring of attorneys in defense of a breach of trust action. The draftspersons also noted that the statutory language does not require that such hiring and payment powers will exist in all situations and to the same extent in all situations, but arises and applies only to the extent such powers are "appropriate to the exercise or nonexercise of a granted power of direction" per the statutory language.On a related matter, the draftspersons added to the UDTA in s. 736.1416(q) a provision that subjects the payment of attorney fees and costs of a trust director to the provisions, procedures, and limitations of. 736.0802(10), since the draftspersons could determine no significant policy reason why s. 736.0802(10) should apply to such payments when incurred by a trustee and not when incurred by a trust director.

L. SECTION 736.1407 – Limitations on Trust Director (New)

Effect of Proposed Changes: A trust director with powers relating to Medicaid payback or a charitable interest is subject to the same rules as a trustee would be under regarding those items.

M. SECTION 736.1408 – Duty and Liability of Trust Director (New)

Effect of Proposed Changes: A trust director is subject to the same fiduciary duty and liability as a trustee would have if it had such a power. However, such duty and liability can be reduced under the trust instrument in the same manner as a trust instrument can reduce the duty and liability of a trustee. Thus, for example, since the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries cannot be eliminated by the trust instrument under Section 736.0105(2)(b) for a trustee, the same minimum duty applies to the duty of a trust protector. The terms of the trust may also impose a duty or liability on a trust protector that would not otherwise apply to a similarly acting trustee.

A trust director that is a health care provider that is licensed, certified, or otherwise authorized or permitted by law will not be under any duty or liability under the Act when acting in such capacity.

N. SECTION 736.1409 – Duty and Liability of Directed Trustee (New)

Current Law: Under Section 736.0808(2), a directed trustee is obligated to act to follow a trust director's power of direction. However, it shall not act if such action would be "manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust."

Effect of Proposed Changes. A directed trustee again is obligated to act on the direction received, with the modification that the direction to act is to take *reasonable* action to comply.

Under this provision, a directed trust is not permitted to act regarding a power of direction if by so doing the trustee would be engaging in "willful misconduct." The standard is a departure from the standard described above under current law.

Aside from the language of the UDTA itself, the "willful misconduct" limitation on acting is appropriate since it is the same standard applicable under current law when one trustee has power to direct a co-trustee to act. Since that standard is acceptable under current law when one fiduciary is directing another, and since a trust director is now imbued under the Act with the same fiduciary duties as a trustee under Section 736.1408, it is appropriate that the willful misconduct standard is similarly applied to a directed trustee under the Act. That is, no compelling policy reasons could be discerned why a trustee that is being directed should have a different limitation dependent on whether the directing person is a cotrustee with fiduciary duties or a trust director with fiduciary duties.

Neither the UDTA nor the Act has a definition of "willful misconduct." Nor does the Trust Code. Some states do provide for a definition in their statutory trust provisions, such as Delaware. The draftspersons determined that such a definition was outside of the scope and purpose of implementing this Act, and may have a collateral impact in other areas of Florida statutory law that employ the term "willful misconduct" without statutory definition, even if the definition was statutorily limited to the Trust Code or the Act provisions.

The Comments to the UDTA provide:

> Subsection [(1)] requires a trustee to act reasonably as it carries out the acts necessary to comply with a trust director's exercise or nonexercise of the director's powers. If a trust director with a power to direct investments directs the trustee to purchase a particular security, for example, the trustee must take care to ensure that the security is purchased within a reasonable time and at reasonable cost and must refrain from self-dealing and conflicts of interest in doing so. The duty to take reasonable action under subsection [(1)] does not, however, impose a duty to ensure that the substance of the direction is reasonable. To the contrary, subject to subsection [(2)], a trustee that takes reasonable action to comply with a power of direction is not liable for so acting even if the substance of the direction is unreasonable. In other words, subject to the willful misconduct rule of subsection [(2)], a trustee is liable only for its own breach of trust in executing a direction, and not for the director's breach of trust in giving the direction. Returning to the example of a direction to purchase a security, the trustee is not required to assess whether the purchase of the security would be prudent in relation to the trust's investment portfolio; the trustee is only required to execute the purchase reasonably. *[references to statute modified to correspond with Florida numbering]*

Such commentary makes clear that the directed trustee is liable only for its own breach of conduct in following a direction, subject to the willful misconduct provisions of subsection (2). However, the UDTA comments also provide:

> A trustee's duty to take reasonable action is limited by the scope of the trust director's power of direction. A directed trustee should not comply with a direction that is outside of the director's power of direction and beyond the director's further powers under Section 6(b)(1). To do so would violate the trustee's duty under subsection (a) and the trustee's background duty to act in accordance with the terms of the trust. See, e.g., Uniform Trust Code § 105(b)(2) (amended 2005) (making mandatory "the duty of a trustee to act … in accordance with the terms … of the trust"); Restatement (Third) of Trusts § 76 (2007) ("The trustee has a duty to administer the trust … in accordance with the terms of the trust.").

A concern exists that this commentary on the trustee's duty to act in accordance with the trust terms may be interpreted to support a claim that a director's breach of trust in giving a direction is *per se* a direction that is outside of the scope of the granted power of direction or further powers, and thus following the direction would be a breach of trust by the directed such trustee. Such an interpretation would be contradictory to the preceding quoted UDTA comment and conclusion that the directed trustee is liable only for its own breach of trust (subject to the willful misconduct provisions of subsection (2)). To clarify that such an interpretation by reason of the UDTA comments would be improper, subsection (3) was added. This provision acknowledges the directed trustee's duty to determine if a direction is within the scope of granted power of direction, but also provides that a direction which constitutes or may constitute a breach of trust (by the trust director or the directed trustee) does not by itself mean the direction is outside the scope of a granted power of direction.

The Act provides limits on the exercise of a power of direction to release a trustee or trust director from liability for breach of trust.

The provision provides that a directed trustee that has reasonable doubt about its duty under this Section can apply to the court for instructions, with attorney fees and costs to be paid from the trust as provided in the Trust Code.

Beyond the foregoing duty imposed on the directed trustee, the Act permits trust terms to impose additional duties and liabilities on a directed trustee.

O. Section 736.1410 – Information Exchange and Reliance (New)

Effect of Proposed Changes. Each of a trustee and a trust director has a duty to provide information to the other to the extent the information relates to powers or duties of both of them. They may act in reliance on such information without committing a breach of trust unless their action constitutes willful misconduct. A trust director is also required to provide information to a qualified beneficiary upon a written request to the extent the information is reasonably related to the powers or duties of the trust director.

The draftspersons intend that a trust director has no other direct duty to account or provide information to a beneficiary (although a trust director may in its discretion issue a trust disclosure document to commence the statute of limitations for breach of trust per Section 736.1413(2)). They considered adding an express provision to that effect, but for purposes of not departing from the UDTA language when possible, no such language was included.

P. Section 736.1411 – No Duty to Monitor, Inform or Advise (New)

Effect of Proposed Changes. A trustee has no duty to monitor a trust director, nor to advise a settlor, beneficiary, trustee, or trust director as to how the trustee might have acted differently than the trust director. A trust director likewise has no duty to monitor a trustee or another trust director, nor to advise a settlor, beneficiary, trustee or another trust director as to how the trust director might have acted differently than a trustee or another trust director. The provision does not bar a trustee or trust director from doing any of the foregoing, and if done the actor does not assume a duty to continue to do so in the future.

Q. SECTION 736.1412 – Application to Cotrustee (New)

Effect of Proposed Changes. When trust terms confer a power on one or more trustees to the exclusion of another trustee to direct or prevent actions of the other trustee, the trustee subject to direction has the same duties and liabilities as imposed under the Act on a directed trustee under Sections 736.1409 through 736.1411. The policy is that the trustee in both circumstances is being directed by another fiduciary and thus there is no justification for imposing different rules or standards on the trustee subject to direction based on whether the person giving direction is a trustee or a trust director. Regarding the required standard of conduct for liability, the willful misconduct standard of current Section 736.0603(9) continues to apply, and thus this aspect of trustee liability remains the same as under current law.

R. SECTION 736.1413 – Limitations on Actions Against a Trust Director (New)

Effect of Proposed Changes: The same limitations period under Section 736.1008 that applies to a breach of trust action against a trustee is applied to breach of trust actions against trust directors. Similarly, a trust director can benefit from the six months shortened limitations period under current law through the issuance of a qualified trust accounting or written report.

S. SECTION 736.1414 – Defenses in Action Against a Trust Director (New)

Effect of Proposed Changes: A trust director is provided with the same defenses in a breach of trust action as are available to a trustee.

T. SECTION 736.1415 – Court Jurisdiction Over a Trust Director (New)

Effect of Proposed Changes: A trust director is subject to the personal jurisdiction of Florida courts by accepting appointment. Other permissible methods of obtaining jurisdiction continue to apply.

U. SECTION 736.1416 – Misc. Application of Trust Code Provisions to Trust Directors (New)

Effect of Proposed Changes: The Trust Code contains numerous provisions that apply to trustees. Without further statutory modifications, these provisions would not apply to a trust director. The draftspersons determined that numerous of the provisions should apply to a trust director, while others should not. Thus, a blanket inclusion or exclusion of Trust Code trustee provisions to trust directors was deemed inappropriate. Instead, the draftspersons reviewed all applicable provisions and determined which should be extended to trust directors. Items in the Trust Code that apply to trustees and are not expressly made applicable to a trust director by this provision or elsewhere in the Act are intended not to apply to a trust director. The list is lengthy, so the reader is directed to Section 736.1414 of the proposed Act for those specific items.

This section applies the rules of Section 736.0701 for acceptance of trusteeship by a trustee to acceptance of the office of trust director by a named trust director. Because of the nature of many trust director powers, limiting acceptance to the means described in Section 736.0701

may leave interested persons (including the trust director) in doubt as to whether a trust director has accepted the office. This is because it is relatively demonstrable when a trustee undertakes its office by accepting trust property or exercising powers or performing duties, all of which constitute acceptance under Section 736.0701(2). So acceptance by a trustee can be readily ascertained by determining whether a trustee undertook any such items. However, many trust director powers do not involve accepting trust property nor immediately exercising powers or performing duties. An example would be the power to amend a trust, which may not be acted upon for many months or years. Absent compliance with a method of acceptance provided in the trust agreement, it would be difficult to know if a trust director has accepted its office. This section of the Act permits a trustee, settlor, or a qualified beneficiary to make a written demand on a trust director to accept or confirm prior acceptance of the office, and the trust director must respond within 60 days. The draftspersons believed it would be problematic to automatically disqualify the trust director for failing to respond within that 60 day period, but intend that the mandatory obligation to respond can be enforced by an action of an interested person to obtain a determination by a court of competent jurisdiction as to acceptance or non-acceptance.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal should not have any material economic costs or benefits to members of the private sector.

VII. CONSTITUTIONAL ISSUES

The proposal should not raise any constitutional issues.

VIII. OTHER INTERESTED PARTIES

Tax Section

The Florida Bankers Association

FLORIDA UNIFORM DIRECTED TRUST ACT

736.0103 Definitions.—Unless the context otherwise requires, in this code:

[add following definitions and renumber all subsequent subparagraphs in the section]

(__) "Directed trust" means a trust for which the terms of the trust grant a power of direction.

(__) "Directed trustee" means a trustee that is subject to a trust director's power of direction.

(__) "Power of direction" means a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee. The term includes a power over the investment, management, or distribution of trust property, a power to amend a trust instrument or terminate a trust, or a power over other matters of trust administration. The term excludes the powers described in s. 736.1405(2).

(~~21~~__) "Terms of a trust" means ~~the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding~~:

(A) except as otherwise provided in subparagraph (B), the manifestation of the settlor's intent regarding a trust's provisions as:

(i) expressed in the trust instrument; or

(ii) established by other evidence that would be admissible in a judicial proceeding; or

(B) the trust's provisions as established, determined, or amended by:

(i) a trustee or trust director in accordance with applicable law;

(ii) court order; or

(iii) a nonjudicial settlement agreement under s. 736.0111.

(__) "Trust director" means a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust.

736.0105 Default and mandatory rules.—

(1) Except as otherwise provided in the terms of the trust, this code governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(2) The terms of a trust prevail over any provision of this code except:

(a) The requirements for creating a trust.

(b) Subject to ss. 736.1409, 736.1411 and 736.1412, t~~T~~he duty of the trustee to act in good faith and in accordance with the terms and purposes of

the trust and the interests of the beneficiaries.…

736.0603 Settlor's powers; powers of withdrawal.—

(1) While a trust is revocable, the duties of the trustee are owed exclusively to the settlor.

(2) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

(3) Subject to ss. 736.0403(2) and 736.0602(3)(a), the trustee may follow a direction of the settlor that is contrary to the terms of the trust while a trust is revocable.

736.0703 Cotrustees.—

(1) Cotrustees who are unable to reach a unanimous decision may act by majority decision.

(2) If a vacancy occurs in a cotrusteeship, the remaining cotrustees or a majority of the remaining cotrustees may act for the trust.

(3) Subject to s. 736.1412, a~~A~~ cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other provision of law, or other

temporary incapacity or the cotrustee has properly delegated the performance of the function to another cotrustee.

(4) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(5) A cotrustee may not delegate to another cotrustee the performance of a function the settlor reasonably expected the cotrustees to perform jointly, except that a cotrustee may delegate investment functions to a cotrustee pursuant to and in compliance with s. 518.112. A cotrustee may revoke a delegation previously made.

(6) Except as otherwise provided in subsection (7), a cotrustee who does not join in an action of another cotrustee is not liable for the action.

(7) Except as otherwise provided in ~~subsection (9)~~ or s. 736.1412, each cotrustee shall exercise reasonable care to:

(a) Prevent a cotrustee from committing a breach of trust.

(b) Compel a cotrustee to redress a breach of trust.

(8) A dissenting cotrustee who joins in an action at the direction of the majority of the cotrustees and who notifies any cotrustee of the dissent at or before the time of the action is not liable for the action.

~~(9) If the terms of a trust provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. Except in cases of willful misconduct on the part of the excluded trustee, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power. An excluded trustee does not have a duty or an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the excluded trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power. The provisions of s. 736.0808(2) do not apply if the person entrusted with the power to direct the actions of the excluded trustee is also a cotrustee.~~

~~**736.0808 Powers to direct.**~~

~~(1) Subject to ss. 736.0403(2) and 736.0602(3)(a), the trustee may follow a direction of the settlor that is contrary to the terms of the trust while a trust is revocable.~~

~~(2) If the terms of a trust confer on a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.~~

~~(3) The terms of a trust may confer on a trustee or other person a power to direct the modification or termination of the trust.~~

~~(4) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.~~

736.1008 Limitations on proceedings against trustees.—

(1) Except as provided in subsection (2), all claims by a beneficiary against a trustee for breach of trust are barred as provided in chapter 95 as to:

(a) All matters adequately disclosed in a trust disclosure document issued by the trustee or a trust director, with the limitations period beginning on the date of receipt of adequate disclosure.

(b) All matters not adequately disclosed in a trust disclosure document

if the trustee has issued a final trust accounting and has given written notice to the beneficiary of the availability of the trust records for examination and that any claims with respect to matters not adequately disclosed may be barred unless an action is commenced within the applicable limitations period provided in chapter 95. The limitations period begins on the date of receipt of the final trust accounting and notice.

(2) Unless sooner barred by adjudication, consent, or limitations, a beneficiary is barred from bringing an action against a trustee for breach of trust with respect to a matter that was adequately disclosed in a trust disclosure document unless a proceeding to assert the claim is commenced within 6 months after receipt from the trustee or a trust director of the trust disclosure document or a limitation notice that applies to that disclosure document, whichever is received later.

(3) When a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document is barred as provided in chapter 95 and accrues when the beneficiary has actual knowledge of:

(a) The facts upon which the claim is based, if such actual knowledge

is established by clear and convincing evidence; or

(b) The trustee's repudiation of the trust or adverse possession of trust assets.

Paragraph (a) applies to claims based upon acts or omissions occurring on or after July 1, 2008. A beneficiary's actual knowledge that he or she has not received a trust accounting does not cause a claim to accrue against the trustee for breach of trust based upon the failure to provide a trust accounting required by s. 736.0813 or former s. 737.303 and does not commence the running of any period of limitations or laches for such a claim, and paragraph (a) and chapter 95 do not bar any such claim.

(4) As used in this section, the term:

(a) "Trust disclosure document" means a trust accounting or any other written report of the trustee or a trust director. A trust disclosure document adequately discloses a matter if the document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to that matter.

(b) "Trust accounting" means an accounting that adequately discloses the information required by and that substantially complies with the standards set forth in s. 736.08135.

(c) "Limitation notice" means a written statement of the trustee or a

trust director that an action by a beneficiary ~~against the trustee~~ for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later. A limitation notice may but is not required to be in the following form: "An action for breach of trust based on matters disclosed in a trust accounting or other written report of the trustee or a trust director may be subject to a 6-month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney." . . .

736.1017 Certification of trust.

(1) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(a) The trust exists and the date the trust instrument was executed.

(b) The identity of the settlor.

(c) The identity and address of the currently acting trustee.

(d) The powers of the trustee.

(e) Whether the trust contains any powers of direction, and if so, the identity of the current trust directors, the trustee powers subject to a power

of direction, and whether the trust directors have directed or authorized the trustee to engage in the proposed transaction for which the certification of trust was issued.

(~~e~~f) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust.

(~~f~~g) The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee.

(~~g~~h) The manner of taking title to trust property.

(2) A certification of trust may be signed or otherwise authenticated by any trustee.

(3) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(4) A certification of trust need not contain the dispositive terms of a trust.

(5) A recipient of a certification of trust may require the trustee to furnish copies of any excerpts from the original trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.

(6) A person who acts in reliance on a certification of trust without

knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying on the certification.

(7) A person who in good faith enters into a transaction in reliance on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(8) This section does not limit the right of a person to obtain a copy of the trust instrument when required to be furnished by law or in a judicial proceeding concerning the trust.

Part XIV: DIRECTED TRUSTS

736.1401 SHORT TITLE. — This part may be cited as the Florida Uniform

Directed Trust Act.

736.1403 APPLICATION; PRINCIPAL PLACE OF ADMINISTRATION.—

(1) This part applies to a trust subject to this chapter, whenever created, that has its principal place of administration in this state, subject to the following rules:

(a) If the trust was created before [the effective date of this part], this part applies only to a decision or action occurring on or after the effective date of this part.

(b) If the principal place of administration of the trust is changed to this state on or after [the effective date of this part], this part applies only to a decision or action occurring on or after the date of the change.

(2) In addition to the provisions of s. 736.0108, in a directed trust, terms of the trust which designate the principal place of administration of the trust in Florida are valid and controlling if a trust director's principal place of business is located in or a trust director is a resident of Florida.

736.1405 EXCLUSIONS. —

(1) In this section, "power of appointment" means a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership

interest in or another power of appointment over trust property.

(2) Unless the terms of a trust expressly provide otherwise by specific reference to this Part XIV or this s. 736.1405(2), this part does not apply to:

(a) a power of appointment;

(b) a power to appoint or remove a trustee or trust director;

(c) a power of a settlor over a trust while it is revocable by that settlor;

(d) a power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of:

1. the beneficiary; or

2. another beneficiary represented by the beneficiary under s. 736.0301 through s. 736.0305 with respect to the exercise or nonexercise of the power;

(e) a power over a trust if the terms of the trust provide that the power is held in a nonfiduciary capacity, and

1. the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the United States Internal Revenue Code of 1986, as amended, and regulations issued thereunder, as amended; or

2. it is a power to reimburse the settlor for all or a part of the settlor's income tax liabilities attributable to the income of the trust; or

(f) a power to add or to release a power under the trust instrument if

the power subject to addition or release causes the settlor to be treated as the owner of all or any portion of the trust for federal income tax purposes.

(3) Unless the terms of a trust provide otherwise, a power granted to a person other than a trustee:

(a) to designate a recipient of an ownership interest in trust property, including a power to terminate a trust, is a power of appointment and not a power of direction; and

(b) to create, modify or terminate a power of appointment, is a power of direction and not a power of appointment, except a power to create a power of appointment that is an element of a broader power to affect an ownership interest in trust property beyond the mere creation of a power of appointment, such as a power to appoint trust property in further trust, is a power of appointment and not a power of direction.

736.1406 POWERS OF TRUST DIRECTOR. —

(1) Subject to s. 736.1407, the terms of a trust may grant a power of direction to a trust director.

(2) A power of direction includes only those powers granted by the terms of the trust.

(3) Unless the terms of a trust provide otherwise:

(a) a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the trust director under subsection (1); and

(b) trust directors with joint powers must act by majority decision.

736.1407 LIMITATIONS ON TRUST DIRECTOR.— A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction or further power under s. 736.1406(3)(a) regarding:

(1) a payback provision in the terms of a trust necessary to comply with the reimbursement requirements of Medicaid law in Section 1917 of the Social Security Act, 42 U.S.C. Section 1396p(d)(4)(A)[, as amended][, and regulations issued thereunder, as amended]; and

(2) a charitable interest in the trust, including notice regarding the interest to the Attorney General.

736.1408 DUTY AND LIABILITY OF TRUST DIRECTOR.—

(1) Subject to subsection (2), with respect to a power of direction or further power under s. 736.1406(3)(a):

(a) a trust director has the same fiduciary duty and liability in the

exercise or nonexercise of the power:

1. if the power is held individually, as a sole trustee in a like position and under similar circumstances; or

2. if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and

(b) the terms of the trust may vary the trust director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.

(2) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this part to provide health care in the ordinary course of the trust director's business or practice of a profession, to the extent the trust director acts in that capacity the trust director has no duty or liability under this part.

(3) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

736.1409 DUTY AND LIABILITY OF DIRECTED TRUSTEE. —

(1) Subject to subsection (2), a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under s. 736.1406(3)(a) and the trustee is not liable for such

reasonable action.

(2) A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under s. 736.1406(3)(a) to the extent that by complying the trustee would engage in willful misconduct.

(3) Prior to complying with a trust director's exercise of a power of direction, the directed trustee shall determine whether or not the exercise is within the scope of the trust director's power of direction. The exercise of a power of direction is not outside the scope of a trust director's power of direction merely because the exercise constitutes or may constitute a breach of trust.

(4) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if:

(a) the breach involved the trustee's or other director's willful misconduct;

(b) the release was induced by improper conduct of the trustee or other director in procuring the release; or

(c) at the time of the release, the trust director did not know the material facts relating to the breach.

(5) A directed trustee that has reasonable doubt about its duty under this section may apply to the court for instructions, with attorney fees and costs to be

paid from assets of the trust as provided in this code.

(6) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this part.

736.1410 DUTY TO PROVIDE INFORMATION. —

(1) Subject to s. 736.1411, a trustee shall provide information to a trust director to the extent the information is reasonably related both to:

(a) the powers or duties of the trustee; and

(b) the powers or duties of the trust director.

(2) Subject to s. 736.1411, a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to:

(a) the powers or duties of the trust director; and

(b) the powers or duties of the trustee or other trust director.

(3) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in willful misconduct.

(4) A trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in willful

misconduct.

(5) A trust director shall provide information within the trust director's knowledge or control to a qualified beneficiary upon a written request of a qualified beneficiary to the extent the information is reasonably related to the powers or duties of the trust director.

736.1411 NO DUTY TO MONITOR, INFORM, OR ADVISE. —

(1) Notwithstanding s. 736.1409(1), unless the terms of a trust provide otherwise:

(a) a trustee does not have a duty to:

1. monitor a trust director; or

2. inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the trust director; and

(b) by taking an action described in paragraph (a), a trustee does not assume the duty excluded by paragraph (a).

(2) Notwithstanding s. 736.1408(1), unless the terms of a trust provide otherwise:

(a) a trust director does not have a duty to:

1. monitor a trustee or another trust director; or

2. inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the trust director might have acted differently than a trustee or another trust director; and

(b) by taking an action described in paragraph (a), a trust director does not assume the duty excluded by paragraph (a).

736.1412 APPLICATION TO COTRUSTEE.—

(1) The terms of a trust may provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees.

(2) The excluded trustees shall act in accordance with the exercise of the power in the manner, and with the same duty and liability, as a directed trustee with respect to a trust director's power of direction under s. 736.1409 through s. 736.1411.

(3) The trustee or trustees having the power to direct or prevent actions of the excluded trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power.

736.1413 LIMITATION OF ACTION AGAINST TRUST DIRECTOR. —

(1) An action against a trust director for breach of trust must be commenced within the same limitation period as under s. 736.1008 an action for breach of trust against a trustee in a like position and under similar circumstances.

(2) A trust accounting or any other written report of a trustee or a trust director has the same effect on the limitation period for an action against a trust director for breach of trust that such trust accounting or written report would have under s. 736.1008 in an action for breach of trust against a trustee in a like position and under similar circumstances.

736.1414 DEFENSES IN ACTION AGAINST TRUST DIRECTOR. — In an action against a trust director for breach of trust, the trust director may assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

736.1415 JURISDICTION OVER TRUST DIRECTOR. —

(1) By accepting appointment as a trust director of a trust subject to this part, the trust director submits to the personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the trust director.

(2) This section does not preclude other methods of obtaining jurisdiction

over a trust director.

736.1416 OFFICE OF TRUST DIRECTOR.—

(1) Unless the terms of a trust provide otherwise, a trust director shall be considered a trustee for purposes of applying the following provisions:

(a) role of court under s.736.0201;

(b) proceedings for review of employment of agents and review of compensation of trustee and employees of a trust under s. 736.0206;

(c) representation by holder of power of appointment under s. 736.0302(4);

(d) designated representative under s. 736.0306(2);

(e) requirements for creation of a trust under s. 736.0402(3);

(f) as to allowing application by the trust director for judicial modification, termination, combination or division under ss. 736.04113, 736.04114, 736.04115, or 736.0414(2) if the trust director is so authorized by the terms of the trust;

(g) discretionary trusts and the effect of a standard under s. 736.0504;

(h) creditors' claims against settlor under s. 736.0505(1)(c);

(i) trustee's duty to pay expenses and obligations of settlor's estate under s. 736.05053(4);

(j) acceptance under s. 736.0701;

(k) giving of bond to secure performance under s. 736.0702;

(l) vacancy and appointment of successor under s. 736.0704;

(m) resignation under s. 736.0705;

(n) removal under s. 736.0706, but not to give the trust director the power to request removal of a trustee under that provision;

(o) reasonable compensation under s. 736.0708;

(p) reimbursement of expenses under s. 736.0709;

(q) payment of costs or attorney fees under s. 736.0802(10), if the trust director has a power of direction, or a further power to direct, the payment of such costs or attorney fees pursuant to s. 736.1406(2) or (3)(a);

(r) discretionary power and tax savings provisions under s. 736.0814;

(s) administration pending outcome of contest or other proceeding under s. 736.08165;

(t) applicability of chapter 518 under s. 736.0901;

(u) nonapplication of prudent investor rule under s. 736.0902;

(v) remedies for breach of trust under s. 736.1001;

(w) damages for breach of trust under s. 736.1002;

(x) damages in absence of breach under s. 736.1003;

(y) attorney's fees and costs under s. 736.1004;

(z) trustee's attorney fees under ss. 736.1007(5) through 736.1007(7);

(aa) reliance on trust instrument under s. 736.1009;

(bb) events affecting administration under s. 736.1010;

(cc) exculpation under s. 736.1011;

(dd) beneficiary's consent, release, or ratification under s. 736.1012; and

(ee) limitations on actions against certain trusts under s. 736.1014.

(2) If a person has not accepted a trust directorship under the terms of the trust or under s. 736.0701 or a trustee, settlor, or a qualified beneficiary of the trust is uncertain whether such acceptance has occurred, a trustee, settlor, or a qualified beneficiary of the trust may make a written demand on a person designated to serve as a trust director, with a written copy to the trustees, to accept or confirm prior acceptance of the trust directorship in writing. A written acceptance, written acknowledgment of prior acceptance, or written declination of the trust directorship, shall be delivered by the designated trust director within 60 days of receipt of such demand to all trustees, qualified beneficiaries, and the settlor if living.

EFFECTIVE DATE. The provisions of this Act take effect July 1, 2020.

2019 WL 3214117
District Court of Appeal of Florida,
Second District.

Shane R. HAYSLIP and Laura M. Hayslip, Appellants,
v.
U.S. HOME CORPORATION, Appellee.

Case No. 2D17-4372
|
Opinion filed July 10, 2019

Synopsis

Background: Subsequent purchasers filed lawsuit against home builder, alleging that builder had inadequately and improperly installed stucco system on the home in violation of the Florida Building Codes Act. Builder moved to stay the court proceedings and compel arbitration pursuant to the language of the original special warranty deed conveying the home to original purchasers. The Circuit Court, Lee County, Alane C. Laboda, J., stayed lawsuit pending mediation and/or arbitration, and subsequent purchasers appealed.

Holdings: The District Court of Appeal, Black, J., held that:

[1] language in original special warranty deed from home builder to original purchasers created valid arbitration agreement, and

[2] as matter of first impression, arbitration provision in original special warranty deed, mandating mediation and/or arbitration, was covenant running with the land, and thus, it was binding upon subsequent purchasers.

Affirmed; question certified.

West Headnotes (16)

[1] **Alternative Dispute Resolution**
Validity
Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement
Alternative Dispute Resolution
Waiver or Estoppel

To determine whether claim is subject to arbitration, courts must determine: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.

Cases that cite this headnote

[2] **Alternative Dispute Resolution**
Scope and standards of review

Existence of a valid agreement to arbitrate is a question of law, and appellate courts review the trial

court's determination de novo.

Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Writing, signature, and acknowledgment

Absent valid written agreement to arbitrate, no party may be forced to arbitrate claim.

Cases that cite this headnote

[4] **Alternative Dispute Resolution**
Writing, signature, and acknowledgment

Neither the Federal Arbitration Act nor the Florida Arbitration Code requires an arbitration agreement to be signed to be enforceable. 9 U.S.C.A. § 1 et seq.; Fla. Stat. Ann. § 682.02.

Cases that cite this headnote

[5] **Alternative Dispute Resolution**
Persons affected or bound

Party's conduct can demonstrate intent to be bound by arbitration agreement.

Cases that cite this headnote

[6] **Deeds**
Signature or subscription

Florida law does not require that the home buyer sign the warranty deed in order to be bound by it.

Cases that cite this headnote

[7] **Deeds**
Signature or subscription
Deeds
Attestation

Deed for real property must only be signed by the seller in the presence of two witnesses. Fla. Stat. Ann. § 689.01.

Cases that cite this headnote

[8] **Alternative Dispute Resolution**
In general; formation of agreement

Language in original special

warranty deed from home builder to original purchasers created valid arbitration agreement; special warranty deed was executed by builder's representative in the presence of two witnesses, purchasers were on notice of the original special warranty deed's covenants and restrictions, and by taking title to and possession of home, they acquiesced to the arbitration provision. Fla. Stat. Ann. § 689.01.

Cases that cite this headnote

[9] **Alternative Dispute Resolution**
Persons affected or bound
Covenants
Covenant of warranty

Arbitration provision in original special warranty deed, mandating mediation and/or arbitration, was a covenant running with the land, and thus, it was binding upon subsequent purchasers, who alleged that home builder had inadequately and improperly installed stucco system on home; intent that covenant run with land was evident in language of original special warranty deed, stating that all covenants, conditions and restrictions contained in deed were equitable servitudes, perpetual, and ran with land including, without limitation, arbitration provision, and performance of covenant affected occupation and enjoyment of the home, as it dictated means by which subsequent purchasers had to seek to rectify building defects related to home.

Cases that cite this headnote

[10] **Covenants**
Nature and essentials in general

Covenants are loosely defined as promises in conveyances or other instruments pertaining to real estate and are divided into two categories, real and personal.

Cases that cite this headnote

[11] **Covenants**
General rules of construction
Covenants
Covenants which may run with land in general

"Real covenant," or "covenant running with the land," differs from a merely "personal covenant," in that the former concerns the property conveyed and the occupation and enjoyment thereof, whereas the latter covenant is collateral or is not immediately concerned with the property granted.

Cases that cite this headnote

[12] **Covenants**
Persons liable on personal covenants
Covenants
Persons liable on real covenants

Real covenant binds the heirs and assigns of the original covenantor, while a personal covenant does not.

Cases that cite this headnote

[13] **Covenants**
General rules of construction
Covenants
Covenants which may run with land in general

Primary test whether the covenant runs with the land or is merely personal is whether it concerns the thing granted and the occupation or enjoyment thereof or is a collateral or a personal covenant not immediately concerning the thing granted.

Cases that cite this headnote

[14] **Covenants**
Covenants which may run with land in general

In order that covenant may run with the land, it must have relation to the land or the interest or estate conveyed, and the thing required to be done must be something which touches such land, interest, or estate and the occupation, use, or enjoyment thereof.

Cases that cite this headnote

[15] **Covenants**
Covenants which may run with land in general

To establish a valid and enforceable covenant running with the land, plaintiff must show: (1) existence of a covenant that touches and involves the land; (2) intention that the covenant run with the land; and (3) notice of the restriction on part of the party against whom enforcement is sought.

Cases that cite this headnote

[16] **Covenants**
Covenants which may run with land in general

If performance of the covenant must touch and involve the land or some right or easement annexed and appurtenant thereto, and tends necessarily to render property more convenient and beneficial to the owner, it is a covenant running with the land.

Cases that cite this headnote

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Lee County; Alane C. Laboda, Judge.

Attorneys and Law Firms

M. Lee Reeder of Burnett Wilson Reeder, Tampa (withdrew after briefing); David M. Greene and Joshua E. Burnett of Burnett Law, P.A., Tampa (substituted as counsel of record), for Appellants.

David M. Gersten of Gordon Rees Scully Mansukhani LLP, Miami; and Lawrence J. Dougherty, C. David Harper, and Adam R. Alaee of Foley & Lardner LLP, Tampa, for Appellee.

Opinion

BLACK, Judge.

***1** Shane and Laura Hayslip appeal a nonfinal order granting U.S. Home Corporation's motion to stay the Hayslips' claim for relief under section 553.84, Florida Statutes (2016), of the Florida Building Codes Act and to compel arbitration pursuant to the original special warranty deed. The Hayslips argue that the arbitration provision contained in the original special warranty deed is invalid; alternatively, if the arbitration provision is valid, the Hayslips assert that as subsequent purchasers of the home they are not bound by it because it is not a covenant running with the land but is merely a personal covenant binding only upon the original purchasers of the home. We hold that a valid arbitration agreement exists and that as a restrictive covenant running with the land, the arbitration provision contained in the original special warranty deed is binding upon the Hayslips as subsequent purchasers of the home. Therefore, we affirm the circuit court's order compelling arbitration. As this case presents an issue of first impression in Florida, we certify a question of great public importance.

In 2007, David and Luisa Kennison entered into an agreement with U.S. Home for the purchase of a newly-built home in Lee County. U.S. Home conveyed the home to the Kennisons by special warranty deed, which was recorded in the public records of Lee County. The special warranty deed was executed by a U.S. Home representative in the presence of two witnesses but was not signed by the Kennisons. The special warranty deed contains various covenants, conditions, and restrictions, including a provision requiring arbitration of disputes arising under or related to the home. Specifically, the deed provides, in part, as follows:

> G. All covenants, conditions and restrictions contained in this Deed are equitable servitudes, perpetual and run with the land including, without limitation, Sections H, I, and J.
>
> ....
>
> I. Grantor and Grantee specifically agree that this transaction involves interstate commerce and that any Dispute ... shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act ... and not by or in a court of law or equity. "Disputes" (whether contract, warranty, tort, statutory or otherwise), shall include, but are not limited to, any and all controversies, disputes or claims (1) arising under, or related to, this Deed, the underlying purchase agreement, the Property, the community in which the Property is located or any dealings between Grantee and Grantor ...; (2) arising by virtue of any representations, promises or warranties alleged to have been made by Grantor or Grantor's representative; and (3) relating to personal injury or property damage alleged to have been sustained by Grantee, Grantee's children or other occupants of the Property, or in the community in which the Property is located. Grantee has accepted this Deed on behalf of his or her children and other occupants of the Property with the intent that all such parties be bound hereby.

***2** Section J further provides, in part, that "Grantee, by acceptance of this Deed, automatically agrees for itself, and its heirs, personal representatives, successors and assigns, to observe and to be bound by all of the terms and conditions set forth in this Deed."

In 2010, the Hayslips purchased the home from the Kennisons. The 2010 warranty deed, which was not signed by the Hayslips, did not contain any express provisions regarding arbitration but did provide that the conveyance of the home was "[s]ubject to easements, restrictions, reservations and limitations, if any." In January 2017, the Hayslips filed a lawsuit against U.S. Home, alleging that U.S. Home inadequately and improperly installed the stucco system on the home in violation of the Florida Building Codes Act. See § 553.84. U.S. Home moved to stay the court proceedings and compel arbitration pursuant to the language of the original special warranty deed conveying the home to the Kennisons. Following a hearing, the general magistrate concluded that the arbitration provision in the original special warranty deed is a covenant running with the land and therefore binding on the Hayslips, who were properly noticed of the condition. The general magistrate recommended that the Hayslips' lawsuit be stayed pending mediation and/or arbitration. The circuit court adopted the general magistrate's report and recommendation, and the Hayslips appealed.

[1]It has been repeatedly held that "courts are required to indulge every reasonable presumption in favor of arbitration, recognizing it as a favored means of dispute resolution." Am. Int'l Grp., Inc. v. Cornerstone Buss., Inc., 872 So. 2d 333, 338 (Fla. 2d DCA 2004) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460

U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)); accord Perdido Key Island Resort Dev., L.L.P. v. Regions Bank, 102 So. 3d 1, 3 (Fla. 1st DCA 2012) ("Florida law favors arbitration, often holding that any doubt regarding the arbitrability of a claim should be resolved in favor of arbitration."). With this general proposition in mind, we turn to the Hayslips' first issue regarding the validity of the arbitration provision contained in the original special warranty deed. To determine whether a claim is subject to arbitration, we "must determine (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Perdido Key Island Resort Dev., L.L.P., 102 So. 3d at 3-4 (citing Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999)). The Hayslips dispute only the existence of a valid arbitration agreement, arguing that because the original special warranty deed was not signed by the Kennisons it does not reflect their intent to be bound, rendering it invalid.

[2] [3] [4] [5] [6] [7] [8]"[T]he existence of a valid agreement to arbitrate is a question of law, [and] we review the trial court's determination de novo." Lowe v. Nissan of Brandon, Inc., 235 So. 3d 1021, 1024 (Fla. 2d DCA 2018) (alterations in original) (quoting Avatar Props., Inc. v. Greetham, 27 So. 3d 764, 766 (Fla. 2d DCA 2010)). "Absent a valid written agreement to arbitrate, no party may be forced to arbitrate a claim." Id. (citing Seifert, 750 So. 2d at 636). However, neither the Federal Arbitration Act nor the Florida Arbitration Code require an arbitration agreement to be signed to be enforceable. Santos v. Gen. Dynamics Aviation Servs. Corp., 984 So. 2d 658, 660 (Fla. 4th DCA 2008). Rather, a party's conduct can demonstrate intent to be bound by the agreement. Id. at 661. Here, it is undisputed that the Kennisons were on notice of the original special warranty deed's covenants and restrictions, and by taking title to and possession of the home, they acquiesced to the arbitration provision. See Bessemer v. Gersten, 381 So. 2d 1344, 1348 n.6 (Fla. 1980) (noting that by accepting a deed the grantee agrees to fulfill the conditions of the covenant contained therein (quoting 1 R. Boyer, Fla. Real Estate Transactions, § 24.03, at 574 (1977))); cf. Santos, 984 So. 2d at 659, 661 (concluding that Mr. Santos's continued employment with General Dynamics after receipt of the dispute resolution policy—which provided that all employment claims must be submitted to arbitration—sufficiently demonstrated his consent to the arbitration agreement); BDO Seidman, LLP v. Bee, 970 So. 2d 869, 872, 875 (Fla. 4th DCA 2007) (concluding that Mr. Bee's continued employment with BDO Seidman after the implementation of the amended partnership agreement, which mandated arbitration for all disputes under the agreement, demonstrated his consent to the arbitration agreement). Further, Florida law does not require that the home buyer sign the warranty deed in order to be bound by it. See Bessemer, 381 So. 2d at 1348 n.6 ("In Florida it is standard practice for only the grantor to sign the deed ...." (quoting Boyer, supra, at 574)); Taylor v. Fla. E. Coast Ry. Co., 54 Fla. 635, 45 So. 574, 578 (1907) ("When the grantee accepts a deed and enters into possession of the land conveyed, he is deemed by such acts to have expressly agreed to do what is stipulated in the deed he should do, even though he did not sign

the deed." (quoting Silver Springs, O. & G. R. Co. v. Van Ness, 45 Fla. 559, 34 So. 884, 887-88 (1903))). The deed must only be signed by the seller in the presence of two witnesses. See § 689.01, Fla. Stat. (2016) ("No estate or interest of freehold ... shall be created, made, granted, transferred or released in any other manner than by instrument in writing, signed in the presence of two subscribing witnesses by the party creating, making, granting, conveying, transferring or releasing such estate ...."). We therefore find no merit in the Hayslips' first issue on appeal; the language in the original special warranty deed creates a valid arbitration agreement.

***3** [9]The Hayslips next contend that if a valid arbitration agreement exists, it is a personal covenant between U.S. Home and the Kennisons and not a covenant running with land and binding upon them as subsequent purchasers. The Hayslips contend that the arbitration provision does not touch and concern the land, a necessary requirement to be characterized as a covenant running with the land or real covenant.

[10] [11] [12] [13] [14] [15]"Covenants are loosely defined as 'promises in conveyances or other instruments pertaining to real estate' ... [and] are divided into two categories, real and personal." Palm Beach County v. Cove Club Inv'rs Ltd., 734 So. 2d 379, 382 n.4 (Fla. 1999) (quoting 19 Fla. Jur. 2d Deeds § 168 (1998)). A real covenant, or covenant running with the land, "differs from a merely personal covenant in that the former concerns the property conveyed and the occupation and enjoyment thereof, whereas the latter covenant is collateral or is not immediately concerned with the property granted." Hagan v. Sabal Palms, Inc., 186 So. 2d 302, 310 (Fla. 2d DCA 1966) (citations omitted) (quoting Maule Indus., Inc. v. Sheffield Steel Prods., Inc., 105 So. 2d 798, 801 (Fla. 3d DCA 1958)); accord Caulk v. Orange County, 661 So. 2d 932, 933-34 (Fla. 5th DCA 1995). "A real covenant binds the heirs and assigns of the original covenantor, while a person[al] covenant does not." Palm Beach County, 734 So. 2d at 382 n.4 (quoting 19 Fla. Jur. 2d Deeds § 174).

> The primary test whether the covenant runs with the land or is merely personal is whether it concerns the thing granted and the occupation or enjoyment thereof or is a collateral or a personal covenant not immediately concerning the thing granted. In order that a covenant may run with the land it must have relation to the land or the interest or estate conveyed, and the thing required to be done must be something which touches such land, interest, or estate and the occupation, use, or enjoyment thereof.

Hagan, 186 So. 2d at 310 (quoting Maule Indus., Inc., 105 So. 2d at 801); accord Caulk, 661 So. 2d at 934. Therefore, "to

establish a valid and enforceable covenant running with the land ..., a plaintiff must show (1) the existence of a covenant that touches and involves the land, (2) an intention that the covenant run with the land, and (3) notice of the restriction on the part of the party against whom enforcement is sought." Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261, 265 (Fla. 4th DCA 2007). In this case, the Hayslips have challenged only the first element.[1]

***4** Although no Florida appellate court has considered whether an arbitration provision contained within a deed touches and concerns the land such that it is binding on subsequent purchasers like the Hayslips, we find the following cases to be instructive. In Winn-Dixie Stores, Inc., Winn-Dixie, a tenant in a shopping plaza, sued the landlord and Dolgencorp, Inc., another tenant in the same shopping plaza, based upon a covenant in its recorded lease granting Winn-Dixie the exclusive right to sell groceries. 964 So. 2d at 263. The Fourth District concluded that the grocery exclusive was a covenant that "touched and involved" the land because it "affects the mode of enjoyment of the premises." Id. at 265 (quoting Dunn v. Barton, 16 Fla. 765, 771 (Fla. 1878)). In Dunn, John Dunn assigned a commercial lease to Mary Barton, who agreed not to permit the leased premises to be used as a bar because Mr. Dunn owned the adjoining bar and sought to limit his competition. 16 Fla. at 770. Ms. Barton then leased the premises to Annie Hazelton, who opened a bar and restaurant. Id. Mr. Dunn sued both Ms. Barton and Ms. Hazelton to enforce his agreement with Ms. Barton. As indicated by the court in Winn-Dixie, "[t]he supreme court characterized the Dunn/Barton use restriction as a covenant which ran with the land, because it affected 'the mode of enjoyment of the premises.' " 964 So. 2d at 264 (quoting Dunn, 16 Fla. at 771). "[T]he covenant was enforceable against Hazelton, who, as sublessee, was 'subject to the covenants running with the land in the hands of her lessor.' " Id. (quoting Dunn, 16 Fla. at 772).

[16]Much like the covenants in Winn-Dixie and Dunn, the performance of the covenant here affects "the occupation and enjoyment" of the home, see Hagan, 186 So. 2d at 310, as it dictates the means by which the Hayslips must seek to rectify building defects related to the home. Not only is the covenant triggered when an apparent defect in the home is realized and the homeowners seek recourse from the builder, but the outcome of the arbitration proceeding necessarily impacts the home as well. Thus, the arbitration provision touches and concerns the property itself. Additionally, "[i]f the performance of the covenant must touch and involve the land or some right or easement annexed and appurtenant thereto, and tends necessarily to ... render[ ] [the property] more convenient and beneficial to the owner, it is a covenant running with the land." Hagan, 186 So. 2d at 310 (quoting Maule Indus., Inc., 105 So. 2d at 801). In Florida the legislature has deemed alternative dispute resolution to be a beneficial and effective mechanism by which to resolve construction defect disputes. § 558.001, Fla. Stat. (2016); accord Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 232 So. 3d 273, 278 (Fla. 2017); see also § 558.002(3) (" 'Claimant' means a property owner, including a subsequent purchaser ..., who asserts a claim

for damages against a contractor ... concerning a construction defect ...."); § 558.002(5)(b) (" 'Construction defect' means a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property resulting from ... [a] violation of the applicable codes in effect at the time of construction or remodeling which gives rise to a cause of action pursuant to s. 553.84.").[2]

The Hayslips rely on Caulk in reaching the contrary conclusion; Caulk, however, is distinguishable. In that case, the deed of conveyance reflected the grantor's reservation of the right to condemnation proceeds arising from the taking of a portion of the property conveyed. 661 So. 2d at 933. A few years after a subsequent purchaser acquired the property, Orange County filed suit seeking condemnation of a portion of the property. Id. The grantor learned of the pending condemnation proceeding and sought to intervene, claiming an interest in the proceeds based on the original deed. Id. The language of the covenant did not express an intent that it run with the land or state that it was binding on heirs and assigns. Id. at 934. Importantly, the Fifth District concluded that the covenant was "incapable of running with the land" because it had "no effect whatever on the land" and only " 'touche[d]' and 'concern[ed]' ... intangible personal property." Id. While the covenant at issue in Caulk was triggered by the taking of the land, it otherwise did not concern the land but rather the money flowing from its taking; it was merely a promise between the grantor and original grantee. See id.; see also Suniland Assocs. v. Wilbenka, Inc., 656 So. 2d 1356, 1358-59 (Fla. 3d DCA 1995) (holding "that an agreement to assign rents and profits creates no interest in the property itself" and therefore is not a covenant running with the land).[3]

***5** As U.S. Homes points out, several other state and federal courts have concluded that arbitration provisions such as the one in this case were real covenants that touch and concern the land. In J&JB Timberlands, LLC v. Woolsey Energy II, LLC, No. 14-cv-1318-SMY-RJD, 2017 WL 396174, at *1-2 (S.D. Ill. Jan. 30, 2017), the surface of the property at issue—a "pristine floodplain forest"—was conveyed by warranty deed to William E. Puckett while reserving the mineral rights to the property. The reservation in the deed provided "that the Grantor shall pay for damages caused by mineral extraction activity, and that if no agreement on the amount of damages is reached within ninety (90) days, 'the amount of damage shall be determined by arbitration.' " Id. at *1. Mr. Puckett conveyed the surface property to J & JB Timberlands, LLC (J & JB), subject to the reservation in the prior deed. Id. at *2. Global Geophysical Services conducted a seismic survey on the property at the direction of the Woolsey defendants, resulting in, according to J & JB, "extensive, measurable, long-term habitat loss and tree and plant damage ... Rutting and other damage to the forest floor which will require years to restore." Id. at *1. J & JB filed suit, and the defendants moved to stay the court proceedings pending arbitration pursuant to the arbitration provision in the deed. Id. J & JB asserted that it was not bound by the arbitration provision because it was a

personal covenant that did not run with the land. Id. at *3. Under Illinois law, "[a] covenant touches and concerns the land if it affects the use, value, and enjoyment of the property." Id. at *4 (quoting Bank of Am., N.A. v. Cannonball LLC, 382 Ill.Dec. 562, 12 N.E.3d 841, 848 (Ill. App. Ct. 2014)). The federal court concluded that "the reservations provision which includes a covenant to pay for damages to the surface of the land obviously affects the use, value and enjoyment of the land and, therefore, touches and concerns the land." Id.

Similarly, in Baker v. Conoco Pipeline Co., 280 F. Supp. 2d 1285, 1292, 1294 (N.D. Okla. 2003), a previous property owner granted an easement to Ajax Pipeline Company to lay petroleum pipelines across the property. The Bakers subsequently acquired the property, and Conoco Pipeline Company became the successor to Ajax's easement rights. Id. at 1291-92, 1295. As part of the operation of its pipeline, Conoco performed "easement clearing activities" on the land over the pipeline. Id. at 1292. As a result, the Bakers sued Conoco claiming that it damaged trees and other vegetation on the property. Id. Conoco moved to stay the court proceedings and compel arbitration based on the arbitration provision in the recorded easement on the property. Id. The arbitration provision in the easement set forth a procedure for dealing with "damage to crops, fences and timber, which may arise from laying, maintaining, operating or removing such pipe lines":

> Said damage, if not mutually agreed upon, to be ascertained and determined by three disinterested persons; one to be appointed by the [Grantor], his heirs or assigns; one by the Grantee, its successors or assigns, and the third by the two persons aforesaid, and the award of such three persons, or any two of them, shall be final and conclusive.

Id. at 1292. The Bakers argued that the arbitration agreement was a personal covenant binding only on the original parties to the agreement. Id. at 1295. The federal court ruled in favor of Conoco, determining that the arbitration provision "satisfies the requirements of a covenant running with the land" because it "affects the method for recovery of damage to crops, fences, and timber, and thus 'touches and concerns the land.' " Id. at 1296. In other words, because it provided the exclusive procedure for resolving disputes concerning damage to the property it "clearly 'touch[ed] and concern[ed]' the real property." Id. at 1298.

Finally, in Kelly v. Tri-Cities Broadcasting, Inc., 147 Cal.App.3d 666, 195 Cal. Rptr. 303, 304 (1983), Tri-Cities Broadcasting, Inc. (Tri-Cities), purchased a radio station from Far West Broadcasting Corp. (Far West). In conjunction with the purchase of the radio station, Tri-Cities was assigned the lease to the land upon which the station operated. Id. By the terms of the lease, Tri-Cities was required to provide the lessor with free radio time in lieu of rent payments, and any disputes arising out of the lease

were to be arbitrated. Id. at 305. Noting that the case law was sparse regarding the nature of a covenant to submit to arbitration and relying on Abbott v. Bob's U-Drive, 222 Or. 147, 352 P.2d 598 (1960), the California appellate court concluded that the covenant to arbitrate ran with the land:

> "In the case at bar the covenant to arbitrate is invoked to require the lessee to submit to arbitration a matter relating to rental payments under the lease. A covenant to pay rent clearly 'touches and concerns' the land. It would seem to follow that a covenant to arbitrate a question with respect to rental payments should also be required as relating to the property interests of the original covenanting parties as lessor and lessee.... '[T]here would seem to be no reason for applying the rules of touching and concerning in an overtechnical manner, which is unreal from the standpoint of the parties themselves.' "
>
> ***6** The Oregon Supreme Court concluded a covenant to arbitrate was a covenant running with the land. We agree and would treat it as similar to a covenant to pay rent upon which it rests for the conclusion that such a covenant "touches and concerns the land."

Kelly, 195 Cal. Rptr. at 310-11 (quoting Abbott, 352 P.2d at 604).

In this case, the circuit court properly characterized the arbitration provision in the original special warranty deed mandating mediation and/or arbitration as a covenant running with the land, binding upon the Hayslips as subsequent purchasers of the home. However, because this case presents an issue of first impression with potentially wide-ranging effect, we certify the following question as one of great public importance:

> DOES A MANDATORY ARBITRATION PROVISION CONTAINED WITHIN A RESIDENTIAL WARRANTY DEED CONVEYING RESIDENTIAL PROPERTY FROM HOME BUILDER TO ORIGINAL PURCHASER RUN WITH THE LAND SUCH THAT IT IS BINDING ON SUBSEQUENT PURCHASERS WHERE THE INTENDED NATURE OF THE PROVISION IS CLEAR AND THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT WAS ON NOTICE OF THE PROVISION?

Affirmed; question certified.

VILLANTI and ATKINSON, JJ., Concur.

All Citations

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Footnotes

1 Even had the Hayslips challenged the second and third elements, it is readily apparent that under the facts of this case they would not have prevailed. The intent that the covenant run with the land is evident in the language of the original special warranty deed: "All covenants, conditions and restrictions contained in this Deed are equitable servitudes, perpetual and run with the land including, without limitation, Section[ ] ... I, [the arbitration provision] ...." Cf. Caulk, 661 So. 2d at 934 ("[N]othing in the deed suggests it was intended to [run with the land]. Rather, the language suggests the opposite."). Moreover, the Hayslips were, at a minimum, on constructive notice of the arbitration provision contained in the recorded original special warranty deed. See Hagan, 186 So. 2d at 311; see also Vetzel v. Brown, 86 So. 2d 138, 140 (Fla. 1956) ("The Vetzels had notice of the restrictions on the use of their property. They had the constructive notice imputed to them by the recordation of the 1947 agreement, and they had 'implied actual notice' because of the typed in statement in their deed (which was on a printed form) that the title was 'subject to easements and restrictions of record.' ").

2 We note that the Hayslips did not advance in the initial brief any policy arguments against arbitration or claim that the arbitration provision is unconscionable. See Waterview Towers Condo. Ass'n v. City of West Palm Beach, 232 So. 3d 401, 409 (Fla. 4th DCA 2017) ("[R]estrictive covenants are enforced so long as they are not contrary to public policy, do not contravene any statutory or constitutional provisions, and so long as the intention is clear and the restraint is within reasonable bounds." (quoting Hagan, 186 So. 2d at 308-09)); cf. Anderson v. Taylor Morrison of Fla., Inc., 223 So. 3d 1088, 1089 (Fla. 2d DCA 2017).

3 We acknowledge that this court has previously recognized that arbitration provisions are generally characterized as personal covenants; importantly, however, our recognition and application of that general proposition was within a completely different context than this case. See Am. Int'l Grp., Inc., 872 So. 2d at 336 (quoting Federated Title Insurers, Inc. v. Ward, 538 So. 2d 890, 891 (Fla. 4th DCA 1989)). Unlike the personal contract at issue in American International Group, which could not bind or be enforced by a nonsignatory to the contract, the particular language of the arbitration provision within the original special warranty deed in this case establishes that it is a covenant running with the land and binding upon subsequent purchasers of the home.