SUPPLEMENT
TO
RPPTL EXECUTIVE COUNCIL AGENDA
Saturday, December 9, 2017
(Numbering Follows Published Agenda)

X. General Standing Division Report – *Debra L. Boje, General Standing Division Director and Chair-Elect*

Information Items:

3. Legislation – *Cary Wright and Sarah Butters, Co-Chairs*

1. Ad Hoc Remote Notary Task Force - *E. Burt Bruton, Chair*

Report from Task Force on remote notarization issues and relationship to currently submitted legislation. **pp. 2 - 44**

6. Professionalism and Ethics – *Gwynne Young, Chair*

Update on committee's study of the role of an inventory attorney in dealing with will vaults of deceased and disabled attorneys.
NEW DOCUMENTATION ATTACHED. pp. 45 - 60

A bill to be entitled

An act relating to notaries public; amending s. 28.222(3), F.S.; providing for the recording of certified copies of electronic documents; amending s. 92.50, F.S.; providing for taking or administering oaths, affidavits or acknowledgments in accordance with online notarization laws; amending s. 95.231(1); providing limitations period for certain recorded instruments; designating ss. 117.01 through 117.108, F.S., as Part I of chapter 117; amending s. 117.01(1), F.S.; providing for notaries public to exercise their offices while in this state; amending s. 117.021, F.S.; providing for the use of tamper-evident technology in electronic notarizations; amending s. 117.05, F.S.; providing for limitations on notary fees; providing for inclusion of certain information in a jurat or notarial certificate; providing for compliance with online notarization requirements; providing for notarial certification of a printed electronic record; revising statutory forms for jurats and notarial certifications; amending s. 117.107, F.S.; providing for electronic signatures by notaries public and notarization of documents in accordance with online notarization laws; creating ss. 117.201 through 117.320, F.S., as Part II of chapter 117, F.S.; providing standards for appointment, training and regulation of online notaries and providing for online notarization of signatures and documents; amending s. 689.01, F.S.; providing for witnessing of documents in connection with online notarial acts;

amending s. 694.08, F.S.; providing for validation of certain recorded documents; amending s. 695.03, F.S.; providing for making acknowledgments, proofs and other documents in accordance with online notarization laws; amending s. 695.25, F.S.; revising statutory short forms of acknowledgment; amending 695.28, F.S.; providing for validity of recorded documents; providing an effective date.

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

Section 1. Subsection 28.222(3), Florida Statutes, is amended to read:

28.222 Clerk to be county recorder.—

(3) The clerk of the circuit court shall record the following kinds of instruments presented to him or her for recording, upon payment of the service charges prescribed by law:

(a) Deeds, leases, bills of sale, agreements, mortgages, notices or claims of lien, notices of levy, tax warrants, tax executions, and other instruments relating to the ownership, transfer, or encumbrance of or claims against real or personal property or any interest in it; extensions, assignments, releases, cancellations, or satisfactions of mortgages and liens; and powers of attorney relating to any of the instruments.

(b) Notices of lis pendens, including notices of an action pending in a United States court having jurisdiction in this

state.

(c) Judgments, including certified copies of judgments, entered by any court of this state or by a United States court having jurisdiction in this state and assignments, releases, and satisfactions of the judgments.

(d) That portion of a certificate of discharge, separation, or service which indicates the character of discharge, separation, or service of any citizen of this state with respect to the military, air, or naval forces of the United States. Each certificate shall be recorded without cost to the veteran, but the clerk shall receive from the board of county commissioners or other governing body of the county the service charge prescribed by law for the recording.

(e) Notices of liens for taxes payable to the United States and other liens in favor of the United States, and certificates discharging, partially discharging, or releasing the liens, in accordance with the laws of the United States.

(f) Certified copies of petitions, with schedules omitted, commencing proceedings under the1Bankruptcy Act of the United States, decrees of adjudication in the proceedings, and orders approving the bonds of trustees appointed in the proceedings.

(g) Certified copies of death certificates authorized for issuance by the Department of Health which exclude the information that is confidential under s. 382.008, and certified copies of death certificates issued by another state whether or not they exclude the information described as confidential in s. 382.008.

(h) Copies of any of the foregoing instruments originally

created and executed using an electronic signature, as defined in s. 695.27, and certified to be a true and correct copy by a notary public in accordance with s 117.05(12) if the county recorder is not then prepared to accept electronic documents for recording.

~~(h)~~ (i) Any other instruments required or authorized by law to be recorded.

Section 2. Section 92.50, Florida Statutes, is amended to read:

92.50 Oaths, affidavits, and acknowledgments; who may take or administer; requirements.—

(1) IN THIS STATE.—- Oaths, affidavits, and acknowledgments required or authorized under the laws of this state (except oaths to jurors and witnesses in court and such other oaths, affidavits and acknowledgments as are required by law to be taken or administered by or before particular officers) may be taken or administered by or before any judge, clerk, or deputy clerk of any court of record within this state, including federal courts, or before any United States commissioner or any notary public within this state. The jurat, or certificate of proof or acknowledgment, shall be authenticated by the signature and official seal of such officer or person taking or administering the same; however, when taken or administered before any judge, clerk, or deputy clerk of a court of record, the seal of such court may be affixed as the seal of such officer or person. Such oaths, affidavits and acknowledgements may be made outside of the physical presence of the party whose signature or act is being notarized if taken or

administered by a Florida notary in accordance with the online notarization provisions of chapter 117.

(2) IN OTHER STATES, TERRITORIES, AND DISTRICTS OF THE UNITED STATES.—Oaths, affidavits, and acknowledgments required or authorized under the laws of this state, may be taken or administered in any other state, territory, or district of the United States, before any judge, clerk or deputy clerk of any court of record, within such state, territory, or district, having a seal, or before any notary public or justice of the peace, having a seal, in such state, territory, or district; provided, however, such officer or person is authorized under the laws of such state, territory, or district to take or administer oaths, affidavits and acknowledgments. The jurat, or certificate of proof or acknowledgment, shall be authenticated by the signature and official seal of such officer or person taking or administering the same; provided, however, when taken or administered by or before any judge, clerk, or deputy clerk of a court of record, the seal of such court may be affixed as the seal of such officer or person. Such oaths, affidavits and acknowledgements may be made outside of the physical presence of the party whose signature or act is being notarized if taken or administered by a Florida notary in accordance with the online notarization provisions of chapter 117, or by a notary in another state pursuant to similar laws of the appointing state regarding the remote notarization of instruments. A statement in the jurat, or certificate of proof or acknowledgment that the laws of the appointing state were complied with conclusively establishes such compliance for purposes of this section.

(3) IN FOREIGN COUNTRIES.—Oaths, affidavits, and acknowledgments, required or authorized by the laws of this state, may be taken or administered in any foreign country, by or before any judge or justice of a court of last resort, any notary public of such foreign country, any minister, consul general, charge d'affaires, or consul of the United States resident in such country. The jurat, or certificate of proof or acknowledgment, shall be authenticated by the signature and official seal of the officer or person taking or administering the same; provided, however, when taken or administered by or before any judge or justice of a court of last resort, the seal of such court may be affixed as the seal of such judge or justice.

Section 3. Subsection 95.231(1), Florida Statutes, is amended to read:

95.231 Limitations where deed or will on record.—-

(1) Five years after the recording of an instrument required to be executed in accordance with s. 689.01; 5 years after the recording of a power of attorney accompanying and used for an instrument required to be executed in accordance with s. 689.01; or 5 years after the probate of a will purporting to convey real property, from which it appears that the person owning the property attempted to convey, affect, or devise it, the instrument, power of attorney, or will shall be held to have its purported effect to convey, affect, or devise, the title to the real property of the person signing the instrument, as if there had been no lack of seal or seals, witness or witnesses, defect in, failure of, or absence of acknowledgment or

relinquishment of dower, in the absence of fraud, adverse possession, or pending litigation. The instrument is admissible in evidence. A power of attorney validated under this subsection shall be valid only for the purpose of effectuating the instrument with which it was recorded.

Section 4. Sections 117.01 through 117.108, inclusive, of Chapter 117, Florida Statutes, are designated as “Part I” and captioned “NOTARIES PUBLIC GENERALLY.”

Section 5. Subsection 117.01(1), Florida Statutes, is amended to read:

117.01 Appointment, application, suspension, revocation, application fee, bond, and oath.—-

(1) The Governor may appoint as many notaries public as he or she deems necessary, each of whom shall be at least 18 years of age and a legal resident of the state. A permanent resident alien may apply and be appointed and shall file with his or her application a recorded Declaration of Domicile. The residence required for appointment must be maintained throughout the term of appointment. Notaries public shall be appointed for 4 years and shall use and exercise the office of notary public only while the notary public is within the boundaries of this state. An applicant must be able to read, write, and understand the English language.

Section 6. Section 117.021, Florida Statutes, is amended to read:

117.021 Electronic notarization.—

(1) Any document requiring notarization may be notarized electronically. The provisions of ss. 117.01, 117.03, 117.04,

117.05(1)-(11), (13), and (14), 117.105, and 117.107 apply to all notarizations under this section.

(2) In performing an electronic notarial act, a notary public shall use an electronic signature that is:

(a) Unique to the notary public;

(b) Capable of independent verification;

(c) Retained under the notary public's sole control; and

(d) Attached to or logically associated with the electronic document in a manner that any subsequent alteration to the electronic document displays evidence of the alteration.

(3) When a signature is required to be accompanied by a notary public seal, the requirement is satisfied when the electronic signature of the notary public contains all of the following seal information:

(a) The full name of the notary public exactly as provided on the notary public's application for commission;

(b) The words "Notary Public State of Florida";

(c) The date of expiration of the commission of the notary public; and

(d) The notary public's commission number.

(4) For electronic notarizations performed after [the effective date of this act], a notary public must use one or more tamper-evident technologies approved by the Department of State or s. 117.310 which will indicate any alteration or change to an electronic record after completion of the electronic notarial act. A person may not require a notary public to perform a notarial act with respect to an electronic record with a technology that the notary public has not selected.

(5)~~(4)~~ Failure of a notary public to comply with any of the requirements of this section may constitute grounds for suspension of the notary public's commission by the Executive Office of the Governor.

(6)~~(5)~~ The Department of State may adopt rules to ensure the security, reliability, and uniformity of signatures and seals authorized in this section.

Section 7. Subsections 117.05(2), (4), (5), (12), (13) and (14), Florida Statutes, are amended to read:

117.05 Use of notary commission; unlawful use; notary fee; seal; duties; employer liability; name change; advertising; photocopies; penalties.——

(2)(a) The fee of a notary public may not exceed $10 for any one notarial act, except as provided in s. 117.045 and s. 117.290.

(b) A notary public may not charge a fee for witnessing a vote-by-mail ballot in an election, and must witness such a ballot upon the request of an elector, provided the notarial act is in accordance with the provisions of this chapter.

(4) When notarizing a signature, a notary public shall complete a jurat or notarial certificate in substantially the same form as those found in subsection (13). The jurat or certificate of acknowledgment shall contain the following elements:

(a) The venue stating the location of the notary public at the time of the notarization in the format, "State of Florida, County of ."

(b) The type of notarial act performed, an oath or an

acknowledgment, evidenced by the words “sworn” or “acknowledged.”

(c) That the signer ~~personally~~ appeared before the notary public at the time of the notarization either in the notary public’s physical presence or by two-way video and audio conference technology pursuant to Part II.

(d) The exact date of the notarial act.

(e) The name of the person whose signature is being notarized. It is presumed, absent such specific notation by the notary public, that notarization is to all signatures.

(f) The specific type of identification the notary public is relying upon in identifying the signer, either based on personal knowledge or satisfactory evidence specified in subsection (5).

(g) The notary public’s official signature.

(h) The notary public’s name, typed, printed, or stamped below the signature.

(i) The notary public’s official seal affixed below or to either side of the notary’s signature.

(5) A notary public may not notarize a signature on a document unless he or she personally knows, or has satisfactory evidence, that the person whose signature is to be notarized is the individual who is described in and who is executing the instrument. A notary public shall certify in the certificate of acknowledgment or jurat the type of identification, either based on personal knowledge or other form of identification, upon which the notary public is relying. In the case of an online notarization, the online notary public shall comply with the

procedures set forth in Part II.

(a) For purposes of this subsection, "personally knows" means having an acquaintance, derived from association with the individual, which establishes the individual's identity with at least a reasonable certainty.

(b) For the purposes of this subsection, "satisfactory evidence" means the absence of any information, evidence, or other circumstances which would lead a reasonable person to believe that the person whose signature is to be notarized is not the person he or she claims to be and any one of the following:

1. The sworn written statement of one credible witness personally known to the notary public or the sworn written statement of two credible witnesses whose identities are proven to the notary public upon the presentation of satisfactory evidence that each of the following is true:

a. That the person whose signature is to be notarized is the person named in the document;

b. That the person whose signature is to be notarized is personally known to the witnesses;

c. That it is the reasonable belief of the witnesses that the circumstances of the person whose signature is to be notarized are such that it would be very difficult or impossible for that person to obtain another acceptable form of identification;

d. That it is the reasonable belief of the witnesses that the person whose signature is to be notarized does not possess any of the identification documents specified in subparagraph

2.; and

e. That the witnesses do not have a financial interest in nor are parties to the underlying transaction; or

2. Reasonable reliance on the presentation to the notary public of any one of the following forms of identification, if the document is current or has been issued within the past 5 years and bears a serial or other identifying number:

a. A Florida identification card or driver license issued by the public agency authorized to issue driver licenses;

b. A passport issued by the Department of State of the United States;

c. A passport issued by a foreign government if the document is stamped by the United States Bureau of Citizenship and Immigration Services;

d. A driver license or an identification card issued by a public agency authorized to issue driver licenses in a state other than Florida, a territory of the United States, or Canada or Mexico;

e. An identification card issued by any branch of the armed forces of the United States;

f. An inmate identification card issued on or after January 1, 1991, by the Florida Department of Corrections for an inmate who is in the custody of the department;

g. An inmate identification card issued by the United States Department of Justice, Bureau of Prisons, for an inmate who is in the custody of the department;

h. A sworn, written statement from a sworn law enforcement officer that the forms of identification for an inmate in an

institution of confinement were confiscated upon confinement and that the person named in the document is the person whose signature is to be notarized; or

i. An identification card issued by the United States Bureau of Citizenship and Immigration Services.

(12)(a) A notary public may supervise the making of a photocopy of an original document or printing of an electronic record and attest to the trueness of the copy, provided the document is neither a vital record in this state, another state, a territory of the United States, or another country, nor a public record, if a copy can be made by the custodian of the public record. With respect to certifying a printed copy of an electronic record, the notary public must access the tamper-evident technology used with regard to that electronic record and must verify that it has not been altered.

(b) A notary public must use a certificate in substantially the following form in notarizing an attested copy:

STATE OF FLORIDA

COUNTY OF _____

On this ___ day of _____, __(year)__, I attest that the preceding or attached document is a true, exact, complete, and unaltered photocopy made by me of __(description of document)__ presented to me by the document's custodian, _____, and, to the best of my knowledge, that the photocopied document is neither a vital record nor a public record, certified copies of which are available from an official source other than a notary public.

__(Official Notary Signature and Notary Seal)__

__(Name of Notary Typed, Printed or Stamped)__

(c) A notary public must use a certificate in substantially the following form in notarizing an attested copy of an electronic document:

STATE OF FLORIDA
COUNTY OF _____

On this ___ day of _____, (year) , I attest that the preceding or attached document is a true, exact, complete, and unaltered copy printed by me from an electronic record presented to me by the document's custodian. At the time of printing, no security features (if any) present on the electronic record indicated that the record had been altered since execution.

__(Official Notary Signature and Notary Seal)__

__(Name of Notary Typed, Printed or Stamped)__

(13) The following notarial certificates are sufficient for the purposes indicated, if completed with the information required by this chapter. The specification of forms under this subsection does not preclude the use of other forms.

(a) For an oath or affirmation:

STATE OF FLORIDA
COUNTY OF _____

Sworn to (or affirmed) and subscribed before me [_] by

personal appearance or [_] by online notarization in compliance with the laws of this state, this ___ day of _____, __(year)__, by __(name of person making statement)__.

__(Signature of Notary Public - State of Florida)__

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

Personally Known ____ OR Produced Identification _____

Type of Identification Produced _____

(b) For an acknowledgment in an individual capacity:

STATE OF FLORIDA

COUNTY OF _____

The foregoing instrument was acknowledged before me [_] by personal appearance or [_] by online notarization in compliance with the laws of this state, this ___ day of _____, __(year)__, by __(name of person acknowledging)__.

__(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 _____

(c) For an acknowledgment in a representative capacity:

STATE OF FLORIDA

COUNTY OF _____

The foregoing instrument was acknowledged before me [_] by

personal appearance or [_] by online notarization in compliance with the laws of this state, this ___ day of _____, __(year)__, by __(name of person)__ 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 _____

(14) A notary public must make reasonable accommodations to provide notarial services to persons with disabilities.

(a) A notary public may notarize the signature of a person who is blind after the notary public has read the entire instrument to that person.

(b) A notary public may notarize the signature of a person who signs with a mark if:

1. The document signing is witnessed by two disinterested persons;

2. The notary public prints the person's first name at the beginning of the designated signature line and the person's last name at the end of the designated signature line; and

3. The notary public prints the words "his (or her) mark" below the person's signature mark.

(c) The following notarial certificates are sufficient for the purpose of notarizing for a person who signs with a mark:

1. For an oath or affirmation:

__(First Name)_____(Last Name)___

__His (or Her) Mark___

STATE OF FLORIDA

COUNTY OF _____

Sworn to (or affirmed) and subscribed before me [_] by personal appearance or [_] by online notarization in compliance with the laws of this state, this ___ day of _____, __(year)__, by __(name of person making statement)__, who signed with a mark in the presence of these witnesses:

__(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 _____

2. For an acknowledgment in an individual capacity:

__(First Name)_____(Last Name)___

__His (or Her) Mark___

STATE OF FLORIDA

COUNTY OF _____

The foregoing instrument was acknowledged before me [_] by personal appearance or [_] by online notarization in compliance with the laws of this state, this ___ day of _____, __(year)__, by __(name of person acknowledging)__, who signed with a mark in the presence of these witnesses:

__(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 _____

(d) A notary public may sign the name of a person whose signature is to be notarized when that person is physically unable to sign or make a signature mark on a document if:

1. The person with a disability directs the notary to sign in his or her presence;

2. The document signing is witnessed by two disinterested persons;

3. The notary public writes below the signature the following statement: "Signature affixed by notary, pursuant to s. 117.05(14), Florida Statutes," and states the circumstances of the signing in the notarial certificate.

(e) The following notarial certificates are sufficient for the purpose of notarizing for a person with a disability who directs the notary public to sign his or her name:

1. For an oath or affirmation:

STATE OF FLORIDA

COUNTY OF _____

Sworn to (or affirmed) before me [_] by personal appearance or [_] by online notarization in compliance with the laws of this state, this ___ day of _____, __(year)__, by __(name of person making statement)__, and subscribed by __(name of notary)__ at the direction of and in the presence of __(name of

person making statement)__, and in the presence of these witnesses:

__(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 _____

2. For an acknowledgment in an individual capacity:

STATE OF FLORIDA

COUNTY OF _____

The foregoing instrument was acknowledged before me [_] by personal appearance or [_] by online notarization in compliance with the laws of this state, this ___ day of _____, __(year)__, by __(name of person acknowledging)__ and subscribed by __(name of notary)__ at the direction of and in the presence of __(name of person acknowledging)__, and in the presence of these witnesses:

__(Signature of Notary Public - State of Florida)__

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

Personally Known ____ OR Produced Identification _____

Type of Identification Produced _____

Section 8. Subsections 117.107(2) and (9), Florida Statutes, are amended to read:

117.107 Prohibited acts.—-

(2) A notary public may not sign notarial certificates using a facsimile signature stamp unless the notary public has a physical disability that limits or prohibits his or her ability to make a written signature and unless the notary public has first submitted written notice to the Department of State with an exemplar of the facsimile signature stamp. This subsection does not apply to or prohibit the use of an electronic signature by a notary public performing notarial acts in accordance with s. 117.021.

(9) A notary public may not notarize a signature on a document if the person whose signature is being notarized is not in the physical presence of the notary public or connected to an online notary public through two-way video and audio communication technology, in accordance with Part II, ~~the notary public~~ at the time the signature is notarized. Any notary public who violates this subsection or provides online notary services for a person not personally known to the online notary without complying with the provisions of part II regarding identity proofing, credential analysis and knowledge based authentication is guilty of a civil infraction, punishable by penalty not exceeding $5,000, and such violation constitutes malfeasance and misfeasance in the conduct of official duties. It is no defense to the civil infraction specified in this subsection that the notary public acted without intent to defraud. A notary public who violates this subsection with the intent to defraud is guilty of violating s. 117.105.

Section 9. Part II of Chapter 117, Florida Statutes, is created to read:

Part II – ONLINE NOTARIZATION

117.201 Definitions.--

(1) Any term defined in the Uniform Electronic Transaction Act, s. 668.50 shall have the same meaning when used in this chapter.

(2) "Appointing state" when used in reference to a notary public or certifying official of another state of the United States, means the state which commissioned or appointed the notary public or official.

(3) "Credential analysis" means a process or service operating according to criteria approved by the Department of State or in this part through which a third person provides confidence as to the validity of a government-issued identification credential through review of public and proprietary data sources.

(4) "Cyber insurance" refers to insurance which covers an online notary public's potential liability for failure to prevent or hinder unauthorized access to or use of its computer network or equipment, loss of information stored thereon, or a data breach in which unauthorized persons might gain access to non-public personal information stored thereon.

(5) "Government-Issued Identification Credential" refers to any of the approved credentials for verifying identity set forth in s. 117.05(5)(b)2.

(6) "Identity proofing" means a process or service operating according to criteria approved by the Department of State or this part through which a third person provides confidence as to the identity of an individual through use of

public and proprietary data sources and employing means such as knowledge based authentication, or biometric verification such as a fingerprint recognition, facial recognition or eye scans.

(7) "Knowledge-based authentication " means an identity assessment that is based on a set of questions formulated from public or proprietary data sources for which the principal has not provided a prior answer during the course of the identity proofing;

(8) "Online notarization" means the performance of an electronic notarization by means of two-way video and audio conference technology that meets the standards adopted under s. 117.310.

(9) “Online notary public" means a notary public who has been authorized by the Office of the Governor to perform online notarizations under this part or a civil-law notary appointed under chapter 118.

(10) “Principal Signer” means an individual:

(a) whose electronic signature is notarized in an electronic notarization; or

(b) taking an oath or making an affirmation or acknowledgment.

(11) “Remote presentation” means transmission to the online notary public through communication technology of an image of a government-issued identification credential, which image is of sufficient quality to enable the online notary public to identify the individual seeking the notary public’s services and to perform credential analysis.

(12) “Revocable Trust” means a trust as described in s.

733.707(3).

(13) "Two-way video and audio conference technology" shall refer to technology approved by the Department of State or this part which enables participants to be able to see, hear and communicate with another individual in real time using electronic means that allows the individuals communicating to simultaneously see and speak to one another.

117.210 Authority to perform online notarizations -- An online notary public has the authority to perform any of the functions authorized under chapter 117 as an online notarization, other than solemnize the rites of matrimony, or a notarial act in connection with the creation and execution of wills, codicils, revocable trusts, powers of attorney, advance directives under chapter 765, or contracts, agreements or waivers subject to s. 732.701-.702.

117.220 Relation to other laws.-- Other than those laws governing the creation and execution of wills, codicils, revocable trusts, powers of attorney, advance directives under chapter 765, or contracts, agreements or waivers subject to s. 732.701-.702:

(1) If a provision of law requires a signature, statement or instrument to be acknowledged, sworn, affirmed, made under oath, or subject to penalty of perjury, the acknowledgement or proof may be made by any of the officials and in the manner described in s. 695.03.

(2) If a provision of law requires a signature, statement or instrument to be acknowledged, sworn, affirmed, made under oath, or subject to penalty of perjury, an online notarization

satisfies that requirement if made in accordance with the online notarization provisions of Part II, or laws of the appointing state regarding the online notarization of instruments.

(3) If a provision of law requires a signature, statement or instrument to be acknowledged, sworn, affirmed, made under oath, proved, legalized, authenticated or otherwise made by a principal signer before or in the presence of a notary public or civil-law notary, the principal signer shall be deemed to have done so before or in the presence of the notary public or civil-law notary if done by two-way video and audio conference technology in accordance with the online notarization provisions of this Part II, or in accordance with the laws of the appointing state regarding the remote notarization of instruments.

117.230 Application; qualifications.--

(1) A notary public or an applicant for appointment as a notary public under Part I may apply to the Office of the Governor to be appointed and commissioned as an online notary public by:

(a) satisfying the qualification requirements for appointment as a notary public under Part I;

(b) completing an additional live or online course, not to exceed [_____] classroom hours in length, covering the duties, obligations and technology requirements for serving as an online notary public.

(c) passing a test covering the duties, obligations and technology requirements for serving as an online notary public.

(d) paying an online notary public application fee in the

amount of $25.00; and

(e) submitting to the Office of the Governor an application for appointment as an online notary public, signed and sworn to by the applicant.

(f) identifying the knowledge based authentication, credential analysis, remote presentation, tamper-evident and two-way video and audio conference technologies the online notary public intends to use in performing online notarizations. If the Department of State has then established standards for approval of technology pursuant to this Part II, each of the technologies selected must conform to those standards. If a technology conforms to the standards, the Department of State shall approve the use of the technology. If the Department of State has not yet established such standards, the online notary public shall select technologies satisfying the provisions of s. 117.310.

(g) having an online notary public bond in an amount determined by the Department of State which shall also satisfy the bond required by s. 117.01(7).

(h) Maintain a cyber insurance policy on such terms and in such amounts as may be determined by the Department of State.

117.240 Performance of notarial acts.—An online notary public:

(1) is a notary public for purposes of Part I and is subject to that part to the same extent as a notary public appointed and commissioned only under that part, including, without limitation, the provisions of s. 117.021 relating to electronic notarizations;

(2) may perform notarial acts as provided in s. 117.210 in addition to performing online notarizations; and

(3) may perform an online notarization as authorized and pursuant to the provisions of this part.

117.260 Electronic journal of online notarizations.—

(1) An online notary public shall keep a secure electronic journal of electronic records notarized by the online notary public. The electronic journal must contain for each online notarization:

(a) the date and time of the notarization;

(b) the type of notarial act;

(c) the type, the title, or a description of the electronic record or proceeding;

(d) the printed name and address of each principal signer involved in the transaction or proceeding;

(e) evidence of identity of each principal signer involved in the transaction or proceeding in the form of:

1. a statement that the person is personally known to the online notary public; or

2. a notation of the type of identification document provided to the online notary public; and

3. a copy of the government-issued identity credential provided; and

4. a copy of any other identity credential or information provided.

(f) indication that the principal signer satisfactorily passed the identity proofing.

(g) indication that the government-issued identification

credential satisfied the credential analysis.

(h) a recording of any video and audio conference used in connection with the notarial act that took place during the online notarization; and

(i) the fee, if any, charged for the notarization.

(2) The online notary public shall take reasonable steps to:

(a) ensure the integrity, security, and authenticity of online notarizations;

(b) maintain a backup copy of the electronic journal required by subsection (1); and

(c) protect from unauthorized use the electronic journal, the backup copy and any other records received by the online notary public in connection with the online notarial act.

(3) The electronic journal required by subsection (1) shall be maintained for at least seven years after the date of the transaction or proceeding.

(4) An omitted or incomplete entry in the electronic journal shall not impair the validity of the notarial act or the electronic record which was notarized, but may be introduced as evidence to establish violations of this chapter or as an indication of possible fraud, forgery, or impersonation or for other evidentiary purposes.

117.270 Use of electronic journal, signature and seal.—

(1) An online notary public shall take reasonable steps to ensure that any registered device used to create an electronic signature is current and has not been revoked or terminated by the device's issuing or registering authority.

(2) An online notary public shall keep his or her electronic journal, electronic signature, and electronic seal secure and under the exclusive control of the online notary public. The online notary public may not allow another person to use the electronic journal, electronic signature, or electronic seal of the online notary public.

(3) An online notary public may use his or her electronic signature only for performing online notarization.

(4) An online notary public shall attach or logically associate his or her electronic signature and seal to the electronic notarial certificate of an electronic record in a manner that is capable of independent verification using tamper-evident technology which renders any subsequent change or modification to the electronic record evident.

(5) An online notary public shall immediately notify an appropriate law enforcement agency and the Department of State or the Governor of theft or vandalism of the electronic journal, electronic signature, or electronic seal of the online notary public. An online notary public shall immediately notify the Department of State or the Governor of the loss or use by another person of the electronic journal, electronic signature, or electronic seal of the online notary public.

(6) An online notary public shall upon request make copies of the pertinent portions of the electronic journal and the related audio and video recordings available to any of the parties to the electronic records notarized, the attorney-agent, title agent, settlement agent, or title insurer or other agent or person which engaged the online notary public with regard to

the transaction or proceeding. The online notary public may charge a fee not in excess of $_____ for copies of all journal entries to a given series of related electronic records.

117.280 Online notarization procedures.--

(1) An online notary public, while located in the state, may perform an online notarization that meets the requirements of this Part II regardless of whether the principal signer are physically located in this state at the time of the online notarization. An online notarial act performed in accordance with this chapter shall be deemed to have been performed within the state and is governed by Florida law.

(2) In performing an online notarization, an online notary public shall verify the identity of a person creating an electronic signature at the time that the signature is taken by using technology and processes that meet the requirements of this part, and shall record the entire two-way video and audio conference session between the notary public, and the principal signer.

(3) In performing an online notarization of a principal signer not located within the state, the online notary public shall confirm that the principal signer desires for the notarial act to be performed by a Florida notary public and under Florida law.

(4) The online notary public shall verify the identity of the principal signer by:

(a) the online notary public's personal knowledge of each such individual; or

(b) each of the following, as the same may be refined or

supplemented in rules adopted pursuant to s. 117.310:

1. remote presentation by each such individual of a government-issued identification credential;

2. credential analysis of each government-issued identification credential; and

3. identity proofing of each individual.

If the online notary public is unable to satisfy each of the foregoing, or if the databases consulted for knowledge-based authentication do not contain sufficient information relative to the individual to permit proper authentication, the online notary public is not authorized to perform the online notarization.

(5) The online notary public shall take reasonable steps to ensure that the two-way video and audio conference technology used in an online notarization is secure from unauthorized interception.

(6) The electronic notarial certificate for an online notarization shall include a notation that the notarization is an online notarization and that the online notarization was conducted in accordance with the laws of the State of Florida.

(7) Except as expressly modified in this part, the provisions of Part I of this chapter shall also apply to an online notarization and an online notary public.

(8) Any failure to comply with the online notarization procedures of this section shall not impair the validity of the notarial act or the electronic record which was notarized, but may be introduced as evidence to establish violations of this chapter or as an indication of possible fraud, forgery, or

impersonation or for other evidentiary purposes. This subsection in no way alters the duty of the online notary public to comply with this chapter and the rules adopted hereunder.

117.290 Fees for online notarization.--An online notary public or his or her employer may charge a fee in an amount not to exceed $_____ for performing an online notarization in addition to any other fees authorized under Part I. Fees for services other than provision of notarial acts are not governed by this chapter.

117.310 Standards for electronic and online notarization; rulemaking authority.--

(1) The Legislature intends for the standards applicable to electronic notarization under s. 117.021 and for online notarization under this part to evolve to reflect improvements in technology and methods of assuring the identity of principal signers and the security of an electronic record. To further that intent, the Department of State may adopt rules necessary to implement the requirements of this chapter and such other rules as may be required to facilitate the integrity, security and reliability of online notarizations, including, without limitation, the amount of an online notary public bond, details regarding cyber insurance, standards regarding identity proofing, credential analysis, unauthorized interception, remote presentation, tamper-evident technology and two-way video and audio conference technology, and the Department of State may publish lists of technologies satisfying the standards and approved for use in online notarizations.

(2) Until such time as the Department of State adopts

rules addressing the amount of an online notary public bond, details regarding cyber insurance, identity proofing, credential analysis, unauthorized interception, remote presentation, tamper-evident technology and two-way video and audio conference technology, the following standards shall apply to any unaddressed technologies and matters:

(a) The amount of the online notary public bond shall be no less than $35,000.

(b) Cyber insurance shall be maintained with respect to the online notary public in an amount of no less than $100,000.

(c) Identity proofing shall have these or greater security characteristics:

1. the principal signer shall be presented with five (5) or more questions with a minimum of five (5) possible answer choices per question;

2. each question shall be drawn from a third party provider of public and proprietary data sources, which questions are identifiable to the principal signer's social security number or other identification information, or identifiable to the principal signer's identity and historical events records;

3. responses to all questions shall be made within a two (2) minute time constraint;

4. the principal signer shall have answered a minimum of eighty percent (80%) of the questions correctly;

5. the principal signer may be offered one (1) additional re-take in the event of a failed attempt; and

6. during the re-take, none of the prior questions shall be repeated.

(d) Credential analysis shall include comparison of the presented government-issued identification credential against public or proprietary data sources to confirm that one or more data elements thereon conforms to the asserted identity or that one or more readable format features conform to those specified by the issuing state or country, attempting to read of any bar codes contained on the credential, and comparing them to the identity of the principal signer, and attempting to verify any micro-printing contained on the credential.

(e) Tamper-evident technology requirements will be deemed satisfied by software that (i) creates a digest (or hash) value based upon the contents of the document using a mathematical function, (ii) encrypts the digest value with the private key of the signer's certificate; and (iii) inserts the completed signature (signed digest, certificate(s), and other information) into the document to enable it's later validation. PDF signature technology shall be deemed to meet the tamper-evident technology standards.

(f) Two-way video and audio conference technology requirements will be satisfied by a technology enabling the participants to see, hear and communicate with one another in real time using electronic means, and enabling the online notary public to record the video and audio.

(g) Reasonable steps to prevent unauthorized interception shall be satisfied by the online notary public using a secured home or office network. The online notary public is not responsible for the security of the systems used by the principal signer or others to participate in the session.

117.320 Relation to E-SIGN Act.-- This law modifies, limits and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Section 10.

INSERT 668.50 AMENDMENTS HERE

Section 11. Section 694.08, Florida Statutes, is amended to read:

694.08 Certain instruments validated, notwithstanding lack of seals or witnesses, or defect in acknowledgment, etc.—

(1) Whenever any power of attorney has been executed and delivered, or any conveyance has been executed and delivered to any grantee by the person owning the land therein described, or conveying the same in an official or representative capacity, and has, for a period of 7 years or more been spread upon the records of the county wherein the land therein described has been or was at the time situated, and one or more subsequent conveyances of said land or parts thereof have been made, executed, delivered and recorded by parties claiming under such instrument or instruments, and such power of attorney or conveyance, or the public record thereof, shows upon its face a clear purpose and intent of the person executing the same to authorize the conveyance of said land or to convey the said land, the same shall be taken and held by all the courts of this

state, in the absence of any showing of fraud, adverse possession, or pending litigation, to have authorized the conveyance of, or to have conveyed, the fee simple title, or any interest therein, of the person signing such instruments, or the person in behalf of whom the same was conveyed by a person in an official or representative capacity, to the land therein described as effectively as if there had been no defect in, failure of, or absence of the acknowledgment or the certificate of acknowledgment, if acknowledged, or the relinquishment of dower, and as if there had been no lack of the word "as" preceding the title of the person conveying in an official or representative capacity, of any seal or seals, or of any witness or witnesses, and shall likewise be taken and held by all the courts of this state to have been duly recorded so as to be admissible in evidence;

(2) Provided, however, that this section shall not apply to any conveyance the validity of which shall be contested or have been contested by suit commenced heretofore or within 1 year of the effective date of this law.

Section 12. Section 695.03, Florida Statutes, is amended to read:

695.03 Acknowledgment and proof; validation of certain acknowledgments; legalization or authentication before foreign officials.—To entitle any instrument concerning real property to be recorded, the execution must be acknowledged by the party executing it, proved by a subscribing witness to it, or legalized or authenticated by a civil-law notary or notary public who affixes her or his official seal, by before the

officers and in the form and manner following:

(1) WITHIN THIS STATE.—An acknowledgment or proof may be legalized or authenticated within this state by ~~may be made before~~ a judge, clerk, or deputy clerk of any court; a United States commissioner or magistrate; or a notary public or civil-law notary of this state, and the certificate of acknowledgment or proof must be under the seal of the court or officer, as the case may be. An acknowledgement or proof, including an acknowledgment or proof of a person who is not physically located within this state, may be made outside of the physical presence of a notary public or civil-law notary of this state in accordance with the provisions of part II, ch. 117 regarding the online notarization of instruments. A statement in the acknowledgement or proof that the laws of the appointing state were complied with conclusively establishes such compliance for purposes of this section. All affidavits and acknowledgments heretofore made or taken in this manner are hereby validated.

(2) WITHOUT THIS STATE BUT WITHIN THE UNITED STATES.—An acknowledgment or proof may be legalized or authenticated ~~made~~ out of this state but within the United States by ~~may be made before~~ a civil-law notary of this state or a commissioner of deeds appointed by the Governor of this state; a judge or clerk of any court of the United States or of any state, territory, or district; a United States commissioner or magistrate; or a notary public, justice of the peace, master in chancery, or registrar or recorder of deeds of any state, territory, or district having a seal, and the certificate of acknowledgment or proof must be under the seal of the court or officer, as the

case may be. If the acknowledgment or proof is legalized or authenticated by ~~made before~~ a notary public who does not affix a seal, it is sufficient for the notary public to type, print, or write by hand on the instrument, "I am a Notary Public of the State of __(state)__, and my commission expires on __(date)__." An acknowledgement or proof may be made outside of the physical presence of such officer in accordance with the laws of the appointing state regarding the remote notarization of instruments. A statement in the acknowledgement or proof that the laws of the appointing state were complied with conclusively establishes such compliance for purposes of this section.

(3) WITHIN FOREIGN COUNTRIES.—

(a) If the acknowledgment, legalization, authentication, or proof of a person who is physically located in a foreign country is made in a foreign country, it may be made before a commissioner of deeds appointed by the Governor of this state to act in such country; before a notary public of such foreign country or a civil-law notary of this state or of such foreign country who has an official seal; before an ambassador, envoy extraordinary, minister plenipotentiary, minister, commissioner, charge d'affaires, consul general, consul, vice consul, consular agent, or other diplomatic or consular officer of the United States appointed to reside in such country; or before a military ~~or naval~~ officer or other person authorized by 10 U.S.C. 1044a ~~the Laws or Articles of War of the United States~~ to perform the duties of notary public, and the certificate of acknowledgment, legalization, authentication, or proof must be under the seal of the officer. A certificate legalizing or authenticating the

signature of a person executing an instrument concerning real property and to which a civil-law notary or notary public of that country has affixed her or his official seal is sufficient as an acknowledgment. For the purposes of this section, the term "civil-law notary" means a civil-law notary as defined in chapter 118 or an official of a foreign country who has an official seal and who is authorized to make legal or lawful the execution of any document in that jurisdiction, in which jurisdiction the affixing of her or his official seal is deemed proof of the execution of the document or deed in full compliance with the laws of that jurisdiction.

(b) An acknowledgment, legalization, authentication, or proof of a person who is physically located in a foreign country may also be made outside of the physical presence of a notary public or civil-law notary of this state in accordance with the provisions of part II, ch. 117 regarding the online notarization of instruments, or outside the presence of a notary public or civil-law notary of another state if completed in accordance with the laws of the appointing state regarding the remote notarization of instruments. A statement in the acknowledgement, legalization, authentication or proof that the laws of the appointing state were complied with conclusively establishes such compliance for purposes of this section.

(4) All affidavits, legalizations, authentications, proofs and acknowledgments heretofore made or taken in any of the manners ~~manner~~ set forth in subsections (1), (2) or (3) above are hereby validated and upon recording shall not be denied to have provided constructive notice based on any alleged failure

to have complied strictly with this section, as currently or previously in effect, or any alleged failure to have complied strictly with the laws governing online or standard notarization of instruments in chapter 117 or the laws of the appointing state governing remote or standard notarization.

Section 13. Section 695.25, Florida Statutes, is amended to read:

695.25 Short form of acknowledgment.--The forms of acknowledgment set forth in this section may be used, and are sufficient for their respective purposes, under any law of this state. The forms shall be known as "Statutory Short Forms of Acknowledgment" and may be referred to by that name. The authorization of the forms in this section does not preclude the use of other forms.

(1) For an individual acting in his or her own right:

STATE OF _____

COUNTY OF _____

The foregoing instrument was acknowledged before me [_] by personal appearance or [_] by online notarization in compliance with the laws of this state, this __(date)__, by __(name of person acknowledging)__, who is personally known to me or who has produced __(type of identification)__ as identification.

__(Signature of person taking acknowledgment)__

__(Name typed printed or stamped)__

__(Title or rank)__

__(Serial number, if any)__

(2) For a corporation:

STATE OF _____

COUNTY OF _____

The foregoing instrument was acknowledged before me [_] by personal appearance or [_] by online notarization in compliance with the laws of this state, this __(date)__, by __(name of officer or agent, title of officer or agent)__ of __(name of corporation acknowledging)__, a __(state or place of incorporation)__ corporation, on behalf of the corporation. He/she is personally known to me or has produced __(type of identification)__ as identification.

__(Signature of person taking acknowledgment)__

__(Name typed printed or stamped)__

__(Title or rank)__

__(Serial number, if any)__

(3) For a partnership:

STATE OF _____

COUNTY OF _____

The foregoing instrument was acknowledged before me [_] by personal appearance or [_] by online notarization in compliance with the laws of this state, this __(date)__, by __(name of acknowledging partner or agent)__, partner (or agent) on behalf of __(name of partnership)__, a partnership. He/she is

personally known to me or has produced __(type of identification)__ as identification.

__(Signature of person taking acknowledgment)__

__(Name typed printed or stamped)__

__(Title or rank)__

__(Serial number, if any)__

(4) For an individual acting as principal by an attorney in fact:

STATE OF _____

COUNTY OF _____

The foregoing instrument was acknowledged before me [_] by personal appearance or [_] by online notarization in compliance with the laws of this state, this __(date)__, by __(name of attorney in fact)__, as attorney in fact, who is personally known to me or who has produced __(type of identification)__ as identification.

__(Signature of person taking acknowledgment)__

__(Name typed printed or stamped)__

__(Title or rank)__

__(Serial number, if any)__

(5) By any public officer, trustee, or personal representative:

STATE OF _____

COUNTY OF _____

The foregoing instrument was acknowledged before me [_] by personal appearance or [_] by online notarization in compliance with the laws of this state, this __(date)__, by __(name and title of position)__, who is personally known to me or who has produced __(type of identification)__ as identification.

__(Signature of person taking acknowledgment)__

__(Name typed printed or stamped)__

__(Title or rank)__

__(Serial number, if any)__

Section 14. Section 695.28, Florida Statutes, is amended to read:

695.28 Validity of recorded documents.—

(1) A document that is otherwise entitled to be recorded and that was or is submitted to the clerk of the court or county recorder by electronic or other means and accepted for recordation is deemed validly recorded and provides notice to all persons notwithstanding:

(a) That the document was received and accepted for recordation before the Department of State adopted standards implementing s. 695.27; ~~or~~

(b) Any defects in, deviations from, or the inability to demonstrate strict compliance with any statute, rule, or procedure relating to electronic signatures, electronic witnesses, electronic notarization, online notarization or for

submitting or recording ~~to submit or record~~ an electronic document which were in effect at the time the electronic document was executed or was submitted for recording;

(c) That the document was signed, witnessed or notarized electronically or that witnessing or notarization of the document may have been done outside the physical presence of the notary public or principal signer in accordance with the provisions of chapter 117 or the laws of another state regarding the online notarization of documents; or

(d) That the document recorded was a certified printout of a document to which one or more electronic signatures have been affixed.

(2) This section does not alter the duty of the clerk or recorder to comply with s. 28.222 or s. 695.27 or rules adopted pursuant to those sections ~~that section~~.

(3) Nothing herein shall preclude a challenge to the validity or enforceability of an instrument or electronic record based upon fraud, forgery, impersonation, duress, undue influence, minority, illegality, unconscionability or any other basis not in the nature of those matters described in subsection (1).

Section 15. This act shall take effect January 1, 2019.

CHAIR
Andrew M. O'Malley
Carey, O'Malley, Whitaker, et al.
712 S. Oregon Avenue
Tampa, FL 33606-2543
(813) 250-0577
aomalley@careyomalley.com

CHAIR-ELECT
Debra L. Boje
Gunster Yoakley & Stewart, P.A.
401 E. Jackson St., Ste. 2500
Tampa, FL 33602-5226
(813) 222-6614
dboje@gunster.com

REAL PROPERTY DIVISION DIRECTOR
Robert S. Freedman
Carlton Fields Jorden Burt, P.A.
4221 W. Boy Scout Blvd., Ste. 1000
Tampa, FL 33607
(813) 229-4149
rfreedman@carltonfields.com

PROBATE DIVISION DIRECTOR
William Thomas Hennessey, III
Gunster Yoakley & Stewart, P.A.
777 S. Flagler Dr., Ste. 500E
West Palm Beach, FL 33401-6121
(561) 650-0663
whennessey@gunster.com

SECRETARY
Lawrence Jay Miller
Gutter Chaves Josepher, et al.
2101 N.W. Corporate Blvd., Ste. 107
Boca Raton, FL 33431-7343
(561) 998-7847
lmiller@floridatax.com

TREASURER
Robert Swaine
Swaine & Harris, P.A.
425 S. Commerce Ave.
Sebring, FL 33870-3702
(863) 385-1549
bob@heartlandlaw.com

LEGISLATION CO-CHAIRS
Sarah Butters
Ausley McMullen
123 S. Calhoun Street
Tallahassee, FL 32301-1517
(850) 425-5447
sbutters@ausley.com

Wm. Cary Wright
Carlton Fields
P.O. Box 3239
Tampa, FL 33601-3239
(813) 229-4135
cwright@carltonfields.com

DIRECTOR, AT-LARGE MEMBERS
S. Katherine Frazier
Hill Ward Henderson
101 E. Kennedy Blvd., Ste. 3700
Tampa, FL 33602-5195
(813) 221-3900
skfrazier@hwhlaw.com

IMMEDIATE PAST CHAIR
Deborah Packer Goodall
Goldman Felcoski & Stone P.A.
327 Plaza Real, Suite 230
Boca Raton, FL 33432-3944
(561) 395-0400
dgoodall@gfsestatelaw.com

PROGRAM ADMINISTRATOR
Mary Ann Obos
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5626
mobos@flabar.org

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

November 30, 2017

Bruce W. Robinson, Chair
Disciplinary Procedure Committee
The Florida Bar Board of Governors
651 East Jefferson Street
Tallahassee, FL 32399-2300

Re: Request for information regarding file retention for probate lawyers and request for advice regarding payment of inventory attorneys in probate proceedings

Dear Mr. Robinson:

This letter responds to your letter sent on behalf of the Disciplinary Procedures Committee (DPC) of the Florida Bar to me dated June 27, 2017 seeking advice from the Real Property Probate and Trust Law (RPPTL) Section on (1) best practice standards for estate planning and probate practitioners regarding keeping original client documents such as an original will (2) how long the section recommends that practitioners should keep files including original documents (3) if a file contains an original will or trust is that considered an active file and (4) input regarding preference for payment of inventory attorneys as creditors of a decedent's estate.

The RPPTL Section has no written best practice standards for estate planning and probate practitioners regarding keeping original client documents such as an original will nor does it have any recommendations regarding length of time that a practitioner should retain files including those with original documents.

The American College of Trusts and Estates Counsel (ACTEC) publishes commentaries on the Model Rules of Professional Conduct. There are two of these commentaries that address your questions. First the ACTEC Commentary on MRPC 1.15 *Retention of Original Documents, a copy of which is attached to this letter*, discusses standards for the Retention of Original documents. The commentary provides that original client documents "should be properly identified and appropriately safeguarded". It notes that other states, such as California, require any attorney to use ordinary care for the preservation

of the document and to fold the document in a safe, vault, safe deposit box, or other secure place where it is safe from loss or destruction. The last paragraph of this commentary state that "the retention of the client's original estate planning documents does not itself make the client an "active" client or impose any obligation on the lawyer to take steps to remain informed regarding the client's management of property and family status."

The Florida Bar itself has very few Rules that address records retention. The Professional Ethics Committee has indicated that "the attorney must place primary emphasis on the desires of the client" Florida Ethics Opinion 81-8. That committee has further indicated that lawyers should make diligent attempts to contact clients or determine their wishes regarding file retention before the lawyer destroys any closed files. Florida Ethics Opinions 63-3 71-62, and 81-8. Original documents such as wills are the property of the client. Destruction of a will, trust, living will, designation of health care surrogate or durable power of attorney could adversely affect the client's interests, therefore, it seems to us that original documents must be maintained by the lawyer in perpetuity or returned to the client. This presents a dilemma for lawyers when they have lost contact with clients and for the clients in instances when their lawyer becomes deceased or incapacitated.

The Florida Bar on the PRI section of its website contains suggested file retention policies to be approved by law firms and provided to clients at the outset of any representation.

In preparing this letter, Gwynne Young, Chair of our Professionalism and Ethics committee, interviewed a number of section members regarding their practices with respect to maintaining original documents. Many practitioners are moving away from retaining original documents. Those who do indicate that a lawyer firm should maintain an inventory of all original documents in his, her or its possession. Those original documents should be maintained in a secure fireproof location. This could be in a fireproof safe in the lawyer's or law firm's office or in a safe deposit box in a bank vault.

You asked if a file containing original documents was an active file. That is an open question. I understand that whether it is an active file has significance in how the file is handled by the inventory attorney. Technically the work on the file has been concluded but the original documents would still need to be maintained or returned. This is specifically discussed in the *ACTEC* Commentary on *MRPC 1.4 Dormant Representation* (which is also attached to this letter) concerning when the effective representation of an estate planning lawyer ends and other matters related to the retention of original client documents.

In 2016, the Section drafted proposed will deposit legislation, that provided that a testator could deposit his will the Clerk of the Circuit Court for safe keeping before his or her death. It also allowed for the lawyer to deposit an original will with the Clerk under certain circumstances when they could not locate the client. This legislation dovetails nicely and could perhaps address many of the concerns of the DPC. The legislation was not pursued last year but remains under consideration. It will need the support of the Clerks of the Court. It could potentially be modified to take into account other situations faced by inventory attorneys such as incapacity, suspension or disbarment. I have enclosed a copy of the draft legislation and some background materials. I have asked Gwynne Young Chair of our Professionalism and Ethics Committee to

look into revising this legislation and moving it forward. If DPC is interested in this please contact Gwynne directly at gyoung@carltonfields.com or 813-229-4333.

Finally, you raised a question about compensation for inventory attorneys of deceased lawyers. If the lawyer's firm has assets including receivables, it would seem that these costs would be a cost of winding down the business and could be paid out of those funds. If there are no such funds and the lawyer's estate has assets, the personal representative would still need to close out the practice and to the extent the personal representative retains counsel to assist in that process, those would likely be viewed as an expense of administration. We are aware of no case law addressing this issue specifically.

Sincerely,

Andrew M. O'Malley

Pennsylvania:

Op. 89-90 (1989). A lawyer for a competent client who decided to refuse medical treatment for progressively disabling disease may serve both as her lawyer and as her guardian ad litem.

Virginia:

Op. 1769 (2003). A lawyer may not represent the daughter in gaining guardianship of incompetent mother, who is currently a client of the lawyer in another matter.

MRPC 1.15 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

ACTEC COMMENTARY ON MRPC 1.15

Retention of Original Documents. A lawyer who has drawn a will or other estate planning documents for a client may offer to retain the executed originals of the documents subject to the client's instructions. The documents so held should be considered client property and held by the lawyer in a manner consistent with the requirements of MRPC 1.15. Some states specifically include estate planning and similar documents in the definition of "property" for the purposes of this rule. For example, the Washington comments to its RPC 1.15 states: "Property covered by this Rule includes original documents affecting legal rights such as wills or deeds."

The documents should be properly identified and appropriately safeguarded. Some states may have more particular requirements for safekeeping of estate planning documents. For example, Cal. Probate Code 710 states: "If a document is deposited with an attorney, the attorney, and a successor attorney that accepts transfer of the document, shall use ordinary care for preservation of the document on and after July 1, 1994, whether or not consideration is given, and shall hold the document in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction."

MRPC 1.15 also required that records be kept of property for a certain specified number of years after termination of the representation or release of the property. This period of years varies from state to state. Most states have adopted the five-year period recommended in the model rule, but a number of states have longer periods, ranging from six to ten years. Therefore, lawyers should retain records of all original client documents for the specified number of years after such documents have been delivered to the client or the client's representative.

Storage of client documents is also subject to the notice and accounting provisions of MRPC 1.15. Notification to the client should be done in writing. The writing should disclose that the documents are being held at the client's direction and should contain the other provisions recommended in ACTEC Commentary on MRPC 1.8, addressing the potential conflict of interest issues when retaining client documents. Lawyers should also confirm that they are in compliance with any other requirements for notification, accounting or other responsibilities relating to client property under specific state versions of MRPC 1.15.

The retention of the client's original estate planning documents does not itself make the client an "active" client or impose any obligation on the lawyer to take steps to remain informed regarding the client's management of property and family status. See ACTEC Commentary on MRPC 1.8 (Conflict of Interest: Current Clients: Specific Rules), and ACTEC Commentary on MRPC 1.4 (Communication) for a discussion of the concept of dormant representation.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Cases

Delaware:

In re Wilson, 900 A.2d 102 (Del. 2006). Lawyer "admitted failure to act with reasonable diligence and promptness in the probate of over twenty estates; failure promptly to deliver to a third party funds that that party was entitled to receive from an estate; failure to place fiduciary funds in an interest-bearing account; and engaging in conduct prejudicial to the administration of justice by failing to probate over twenty estates." He was suspended for 18 months.

District of Columbia:

In re Ifill, 878 A.2d 465 (D.C. 2005). Lawyer was hired to probate an estate and withdrew $21,000 from the estate account, without approval from the executor, for his personal benefit. He later returned the money. On this matter, which occurred in Maryland, lawyer was disbarred in Maryland and (reciprocally) in D.C.

In re Miller, 896 A.2d 920 (D.C. 2006). This was reciprocal discipline for misconduct that occurred and was disciplined for in Florida. Lawyer was "a co-trustee of an estate, had engaged in misconduct including the failure to deposit certain insurance proceeds into a segregated escrow account, and failure to insure that his co-trustee properly and prudently used trust monies for the benefit of the children of the settlor, who later died." This violated Rule 1.15, and the lawyer was suspended for 6 months (in Florida and in D.C.).

In re Bach, 966 A.2d 350 (D.C. 2009). Lawyer who was serving as a conservator for a 95 year old woman wrote himself a check for $2,500 for his services even though he had not yet received court approval for this disbursement, which he knew he needed under the law. He was disbarred for taking a fee prohibited by law (Rule 1.5) and misappropriating entrusted funds (Rule 1.15). The result, the court held, was required by *In re Addams*, 579 A.2d 190 (D.C. 1990), which imposes disbarment in such cases except in "the most stringent of extenuating circumstances" which were not present here.

Illinois:

In Re Karavidas, 999 N.E.2d 296 (Ill. 2013). An attorney with no experience in trusts and estates was appointed as executor and trustee under his father's Will. In that role, he failed to fund trusts as directed, borrowed funds from the estate for his personal use (and later reimbursed the estate), and made unauthorized distributions to his mother, his sister and himself, all in violation of his fiduciary duties. The court held that his breach of fiduciary duties could not be the basis for professional discipline. His misuse of funds could not be considered conversion in violation of RPC 1.15, because he was not in possession of another's funds in the role of attorney. The court acknowledged that acts involving breach of fiduciary duty could violate RPC 8.4, if such acts were criminal (Ill. RPC 8.4(a)(3)), such acts involved dishonesty, fraud, deceit or misrepresentation (Ill. RPC 8.4(a)(4)), or such acts were prejudicial to the administration of justice (Ill. RPC 8.4(a)(5)). This attorney was charged with violating Ill. RPC 8.4(a)(4), but the hearing officer found no intent to deceive or defraud, and Ill. RPC 8.4(a)(5), but the court held that in breaching his fiduciary duty, he was not acting as attorney and he was not involved in the judicial process. The charges against the attorney were dismissed. A dissenting judge disagreed with the majority's reading of Ill. Supreme Court Rule 770, which states, "Conduct of attorneys which violates the [RPCs] or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute shall be grounds for discipline by the court." (emphasis added). The majority held that a violation of the RPCs was necessary to discipline a lawyer, but the dissent's position was that Rule 770 presented an independent ground for discipline. Note that at the time, Illinois' enumeration of the relevant subsections of Rule 8.4 differed from those found in the Model Rules.

Maryland:

Attorney Grievance Com'n of Maryland v. Goff, 399 Md. 1, 922 A.2d 554 (Md. 2007). Attorney was suspended indefinitely, but in no event for less than two months, for trust account violations, delay and incompetence in the handling of two probate estates. "[T]he combination of Respondent's lackadaisical handling of trust funds, his unreliable recordkeeping system, his failure to routinely back up his computer, and his lack of urgency in correcting the errors once discovered rise to the level of incompetent representation."

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

ACTEC COMMENTARY ON MRPC 1.4

Encouraging Communication; Discretion Regarding Content. Communication between the lawyer and client is one of the most important ingredients of an effective lawyer-client relationship. In addition to providing information and counsel to the client, the lawyer should encourage communications by the client. More complete disclosures by a client may be encouraged if the lawyer informs the client regarding the confidentiality of client information, although a lawyer need not, and sometimes should not, assure a client of confidentiality beyond what the rule and its exceptions require. See MRPC 1.6 (Confidentiality of Information). The nature and extent of the content of communications by the lawyer to the client will be affected by numerous factors, including the age, competence and experience of the client, the amount involved, the complexity of the matter, cost factors and other relevant considerations. The lawyer may exercise informed discretion in communicating with the client. It is generally neither necessary nor appropriate for the lawyer to provide the client with every bit of information regarding the representation.

In order to obtain sufficient information and direction from a client, and to explain a matter to a client sufficiently for the client to make informed decisions, a lawyer should meet personally with the client at the outset of a representation. A lawyer should not agree to do estate planning for one person when the lawyer's only communication has been with another who purports to be acting as an intermediary for the client. If circumstances prevent a lawyer from meeting personally with the client, the lawyer should communicate as directly as possible with the client. In either case the elements of the engagement should be confirmed in an engagement letter.

Effective personal communication is necessary in order to ensure that any estate planning documents that are prepared by a lawyer are consistent with the client's intentions. Because of the necessity that estate planning documents reflect the intentions of the person who executes them, a lawyer should not provide estate planning documents to persons who may execute them without receiving legal advice. Accordingly, a lawyer should be hesitant to provide samples of estate planning documents that might be executed by lay persons without legal advice. A lawyer may, of course, prepare or assist in the preparation of sample estate planning documents that are intended to be used by lawyers or by lay persons with personal legal advice.

It is equally important that the client understand the documents that the lawyer has prepared and their effects going forward. Explanations by the lawyer could include a clear statement as to whether the plan (in whole or in part) is irrevocable, and a summary of the most important features of the plan. Where the plan will require management by the client, the lawyer should provide appropriate instructions. Rather than relying on oral communications only, the lawyer should consider furnishing these explanations in writing.

Communications During Active Phase of Representation. The need for communication between the lawyer and client is reflected in Rules respecting the lawyer's duties of competence and diligence. See ACTEC Commentaries on MRPCs 1.1 (Competence) and 1.3 (Diligence). The lawyer's duty to communicate with a client during the active period of the representation includes the duty to inform the client reasonably regarding the law, developments that affect the client, any changes in the basis or rate of the lawyer's compensation [See ACTEC Commentary on MRPC 1.5 (Fees)], and the progress of the representation. The lawyer for an estate planning client should attempt to inform the client to the extent reasonably necessary to enable the client to make informed judgments regarding major issues involved in the representation. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). In addition, the lawyer should inform the client of any recommendations that the lawyer might have with respect to changes in the scope and nature of the representation. The client should also be informed promptly of any substantial delays that will affect the representation. For example, the client should be informed if the submission of draft documents to the client will be delayed for a substantial period regardless of the reason for the delay. If the lawyer determines that the client has some degree of diminished capacity, the lawyer should proceed carefully to assess the ability of the client to communicate his or her intentions and to understand the advice being given and the documents being drafted by the lawyer. The lawyer should also be alert to the possibility that after the commencement of a representation, the client might lose sufficient capacity for the lawyer to continue. See MRPC 1.14.

Communications Needed for Informed Consent. Some of the rules require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of action. The nature of the communication that is generally required in connection with informed consent is described in MRPC 1.0(e) (Terminology).

Advising Fiduciary Regarding Administration. Unless limited by agreement concerning the scope of the representation, the lawyer who represents a fiduciary generally with respect to a fiduciary estate should assist the fiduciary in making decisions regarding matters affecting the representation, such as the timing and composition of distributions and the making of available tax elections. The lawyer should make reasonable efforts to see that the beneficiaries of the fiduciary estate are informed of decisions regarding the fiduciary estate that may have a substantial effect on them. See ACTEC Commentaries on MRPCs 1.3 (Diligence), 4.1 (Truthfulness in Statements to Others) and 4.3 (Dealing with Unrepresented Person).

Dormant Representation. 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. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). 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 communication or a form email, letter, or similar mass communication 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.

Termination of Representation. A client whose representation by the lawyer is dormant becomes a former client if the lawyer or the client terminates the representation. See MRPC 1.16 (Declining or Terminating Representation) and MRPC 1.9 (Duties to Former Clients) and the ACTEC Commentaries thereon. 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.

In general, a lawyer may communicate with a former client regarding the subject of the former representation and matters of potential interest to the former client. See MRPCs 7.3 (Direct Contact with Prospective Clients) and 7.4 (Communication of Fields of Practice).

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 (Conflict of Interest: Current Client) and 1.9 (Duties to Former Clients).

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*.

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Enabling Estate Planning Client to Make Informed Decisions

Cases

California:

In re Respondent G., 1992 WL 204655 (Cal. Bar Ct. 1992). In this proceeding a lawyer was privately reprimanded for repeated failure to advise a client of the state inheritance tax owed by her with respect to an estate administration handled by the lawyer.

Minnesota:

In re Holker, 730 N.W.2d 768 (Minn. 2007). Lawyer was suspended for a minimum of six months based on misconduct in probating an estate. He delayed work on the estate for more than two years after being retained, without good cause, and without adequate communication with the client; when he was fired by the client and replaced, he failed to turn over the complete file. Then, when called upon to supply the rest of the file, he fabricated correspondence he claimed to have had with the client.

Washington:

In re Shepard, 169 Wn.2d 697, 239 P.3d 1066 (2010). Lawyer was suspended for 2 years for his participation in the sale of "living trusts." Among other violations, he failed to adequately explain to clients the effect of the documents they were signing, the availability of alternatives to the package he was selling, and the risks and benefits of living trusts compared to other estate-planning options for their specific situation.

Ethics Opinions

ABA:

Op. 08-450 (2008)). This opinion concentrates on the insurance defense scenario, but has helpful things to say for estate planners representing multiple clients on the same or related matters, particularly with regard to the interplay between the duty of confidentiality and the duty to inform. It is quoted in the annotation to Rule 1.6.

Extent of Continuing Duty to Client

Cases

California:

Brandlin v. Belcher, 134 Cal. Rptr. 1 (Cal. App. 1977). A client for whom the lawyer had previously drawn a will and trust discussed with a trust officer changing the trust to add other children as beneficiaries. The trust officer discussed the possibility with the lawyer, who said that he would have to hear from the client directly. The client died without having amended her trust. The Lawyer was granted a summary judgment in an action brought against him by the decedent's children for negligence. "[Lawyer] fully discharged whatever duty his prior representation imposed by his request through the intermediary that the client communicate with him personally. [Lawyer's] conduct satisfied rather than violated his duty as a lawyer. It was designed to assure that the personal nature of the attorney-client relationship was protected." 134 Cal. Rptr. at 3.

New York:

Lama Holding Co. v. Shearman & Sterling, 758 F. Supp. 159 (S.D.N.Y. 1991). This case involves a U.S. holding company and its foreign parents who brought an action against a law firm and trust company alleging various causes of action arising from the defendants' alleged failure to inform the plaintiffs of changes in U.S. tax laws affecting the plaintiffs' investments. Applying New York law, the federal district court held that the complaint properly stated a cause of action against the lawfirm for legal malpractice (among other claims). According to the allegations of the complaint a partner at the law firm, in response to a specific inquiry as to the possible effect on plaintiffs' interests of tax legislation then pending in Congress, replied there were no significant tax changes enacted as of that

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By John C. Moran, Chair, Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date _____, 2016)

Address Gunster, Yoakley & Stewart, P.A., 777 S. Flagler Drive, Suite 500 East, West Palm Beach, FL 33401
Telephone: (561) 650-0515; Email: jmoran@gunster.com

Position Type Probate Law and Procedure Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

John C. Moran, Gunster, Yoakley & Stewart, P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL 33401-6194, Telephone: (561) 650-0515, Email: jmoran@gunster.com
Sarah Butters, Holland & Knight LLP, 315 South Calhoun Street, Suite 600, Tallahassee, FL 32301, Telephone: (850) 425-5648, Email: sarah.butters@hklaw.com
Peter M. Dunbar, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100, Email: pdunbar@deanmead.com
Martha J. Edenfield, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100, Email: medenfield@deanmead.com

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

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

PROPOSED ADVOCACY

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

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

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

Proposed Wording of Position for Official Publication:

"Supports proposed legislation allowing a testator to deposit their original will with the clerk's office for safekeeping during their lifetime, and for other custodians to deposit original wills with the clerk for safekeeping when the testator cannot be located."

Reasons For Proposed Advocacy:

Currently there is no mechanism for a testator to deposit their original will for safekeeping with the clerk of court. Similarly, there is no system for the custodian of an original will to deposit a will for safekeeping when the testator cannot be located. The proposed legislation is aimed at avoiding improprieties such as fraud and undue influence as it relates to wills. The benefits of depositing a will are that it will be kept safe, away from public viewing during the testator's lifetime, and protected from loss and inadvertent destruction.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position [NONE?]

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

Others
(May attach list if more than one)

[NONE?]

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

[List here other Bar sections, committees or attorney organizations]

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

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

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

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

WPB_ACTIVE 7199335.1

A bill to be entitled

An act relating to the deposit of original wills with the clerk of court for safekeeping.

Be it enacted by the Legislature of the State of Florida:

Section 1. Section 732.902, F.S. is created as follows:

732.902 Deposit of wills.

(1) This Section applies with respect to a testator whose will is to be deposited if:

(a) the testator is alive; or

(b) it is unknown if the testator is alive.

(2) As used in this Section:

(a) the term "depositor" shall mean any person who deposits a will with the clerk under this Section; and

(b) the term "will" includes a separate writing as described in s. 732.515.

(3) A will may be deposited by a testator who is alive with the clerk of the court of the county in which the testator resides at the time of the deposit of the will. A will may be deposited by any other depositor with the clerk of court of the county where the depositor knows, reasonably believes or can reasonably conclude or infer from the face of the will:

(a) the testator resided at the time of the deposit of the will;

(b) the testator resided when the testator executed the will; or

(c) the testator executed the will.

(4) An attorney in possession of a will may not deposit a will pursuant to this Section unless the attorney:

(a) has either never had contact with the testator or has not had contact with the testator for at least seven (7) years prior to depositing the will;

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

(b) has made a good faith attempt to locate the testator; and

(c) has been unable to locate the testator despite a good faith effort to do so.

(5) An attorney in possession of a will shall, at the time of the deposit of the will with the clerk, submit an affidavit, together with the will, in substantially the following form:

STATE OF FLORIDA

COUNTY OF _____

Before me, the undersigned authority, personally appeared (name of Affiant), who swore or affirmed that:

I am an attorney licensed to practice law in the state of _____. I am submitting this affidavit in connection with a will that I am depositing in accordance with the provisions of s. 732.902. I have either never had contact with the testator or I have not had contact with the testator for at least seven (7) years. I have made a good faith attempt to locate the testator and have been unable to do so.

(signature of Affiant)

Sworn to (or affirmed) and subscribed before me this ___ day of (month), (year), by (name of Affiant)

(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)

(6) Upon receipt of a will deposited under this Section, the clerk shall transform and store the will on film, microfilm, magnetic, electronic, optical, or other substitute media or record the will onto an electronic recordkeeping system in accordance with the standards adopted by the Supreme Court of Florida. The clerk shall also retain and preserve the original will in its original form for at least twenty (20) years.

Transforming and storing a will on film, microfilm, magnetic, electronic, optical, or other substitute media or recording a will onto an electronic recordkeeping system, whether or not in accordance with the standards adopted by the Supreme Court of Florida, or permanently recording a will does not eliminate the requirement to preserve the original will. If the original will deposited under this Section either cannot be located or is destroyed, an electronic copy of the deposited will that was stored by the clerk shall be deemed to be an original will for purposes of offering the will for probate. Notwithstanding the foregoing, any will deemed to be an original under this paragraph is not a lost or destroyed will under the provisions of s. 733.207.

(7) Except as otherwise provided in paragraph (9) of this Section, a will deposited under this Section shall not be deemed a public record as that term is defined in s. 119.011(12) and is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(8) While the testator is alive, the only individuals to whom the clerk may deliver the will are:

(a) the testator; or

(b) a person authorized to receive the will by an order of a court.

(9) If the clerk, who is in possession of a will deposited under this Section, receives a certified copy of the death certificate of the testator, then the clerk shall retain and preserve the will in accordance with the provisions of s. 732.901(4). Provided, however, if venue over the probate administration of the testator's estate is in a state or county outside of the clerk's county, then any interested person may seek an order of the circuit court directing the clerk as to where, or as to whom, to deliver the will. For purposes of

determining when the 20-year period for retention of the will begins under s. 732.901(4), the will shall be deemed deposited under s. 732.901(4) as of the date of the clerk's receipt of a certified copy of the death certificate of the testator, or the date that the will is deposited with the clerk of court with venue over the probate administration of the testator's estate, whichever is later.

(10) The clerk shall have no liability in connection with any will deposited, retained, destroyed, or delivered in accordance with the provisions of this Section.

Section 2. This act shall take effect July 1, 2017.

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