

## **QUESTION POSED**

During the June 2009 Executive Council meeting, a motion was made to change the name of the Elder Law Section to the Elder and Disability Law Section of the Florida Bar.

During subsequent discussions, while not made as part of the motion before the Executive Council to change the name, it was revealed that proponents of the name change would like to change the Section name to the Elder and Disability Law Section and bifurcate the Section into two divisions: The Elder Law Division and the Disability Law Division.

Each of these issues will be addressed separately below.

## **BACKGROUND**

There are approximately 2,807,598 older individuals in Florida (2000 census) or 17.6% of the total state population and that number is expected to grow by 20% over the next decade. This is five times the population of persons with disabilities in Florida.

The Elder Law Section began in 1991. Since that time, the section has experienced a steady increase in members. As of December 28, 2009, the section has 1578 members. When the Medicaid rules were changing in 2006 and 2007 there was a spike in membership. The membership numbers are now in line with the pre-DRA membership numbers and between mid-November 2009 and mid-December 2009, the membership increased by 18. Membership in the Elder Law Section of the Florida Bar is open to all members of the Florida Bar in good standing who apply. *Bylaws of the Elder Law Section of the Florida Bar, Article II, Section 1(a)*. The Elder Law Section is expanding what it has to offer members of the Florida Bar who wish to join. In addition to its traditional agenda and offerings (list of committees included at the end of this paper), over the past two years it has expanded its substantive offerings within the Florida Bar's Elder Law definition: the Special Needs Trust Committee has grown to include several subcommittees; the Medicaid and Government Benefits Committee has grown to include a subcommittee dedicated to VA Benefits; the Section has added a Residents' Rights Committee, a Probate Committee, a Tax Committee, a Litigation Committee and a Disability Law Committee; the Section has recruited articles from government agencies with which Elder Law attorneys and their clients must interact; the Section has added VA Benefits and Litigation CLEs; and the Section is working with the Young Lawyers Division to educate new lawyers on Elder Law issues. The number of Florida Bar Board Certified Elder Law Attorneys is also growing each year and is currently approximately 80.

According to the National Academy of Elder Law Attorneys, Elder Law was developed in the past 20 years as "a separate specialty area because of the unique and complex issues faced by older persons and persons with disabilities." *National Academy of Elder Law Attorneys Aspirational Standards for the Practice of Elder Law*.

**Elder law is defined by The Florida Bar for the purposes of "expertise" as follows:**

"Elder law" means legal issues involving health and personal care planning, including: advance directives; lifetime planning; family issues; fiduciary representation; capacity; guardianship; power of attorney; financial planning; public benefits and insurance; resident rights in long-term care facilities; housing opportunities and financing; employment and retirement matters; income, estate, and gift tax matters; estate planning; probate; nursing home claims; age or disability discrimination and grandparents' rights. The specialization encompasses all aspects of planning for aging, illness, and incapacity. Elder law clients are predominantly seniors, and the specialization requires a practitioner to be particularly sensitive to the legal issues impacting these clients. *Rule 6-20.2 of the Rules Regulating the Florida Bar.*

**The Elder Law Section's mission is as follows:**

The Elder Law Section exists to cultivate and promote professionalism, expertise and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs, and advocates on behalf of its members. *Bylaws of the Elder Law Section of the Florida Bar, Article I, Section 2.*

**KEEPING THE ELDER LAW SECTION'S NAME THE SAME**

**Name Recognition & Respect**

The Elder Law Section has spent the past 20 years creating name recognition with the public, the bar, the legislature and the judiciary. Elder Law attorneys are seen as champions of the elderly with a unique understanding and expertise. We are respected for representing one of the most vulnerable segments of the population. Despite gains in recognition and respect from the judiciary, government agencies (e.g. Department of Children & Families and Department of Elder Affairs) and the legislature, we still have more progress to make.

The Elder Law Section has hired (individually or in conjunction with the Academy of Florida Elder Law Attorneys) a legislative consultant, a lobbyist, a public relations consultant and a legislative liaison. Section members are recruited to introduce themselves to local legislative delegations to introduce legislators to Elder Law and what Elder Law Attorneys do. All these efforts are to increase the visibility of the Elder Law Section and the Elder Law Attorney. The Elder Law Section brand would be diluted if it were to change its name now.

**The Change Requires a Fundamental Change to the Elder Law Section Identity**

While some still believe Elder Law is primarily the representation of individuals in obtaining Medicaid to cover the costs of long term care, the reality is Elder Law Attorneys represent Florida's 2.8 million older individuals in many legal issues besides Medicaid. While some work, such as Special Needs Planning, guardianship, Medicaid and incapacity planning, can involve younger, disabled individuals and individuals receiving Social Security Disability, Elder Law attorneys are associated with championing the causes of the elderly. In addition, many of the Elder Law Attorney's clients are not or do not believe they are disabled and would be

uncomfortable being associated with that term. By changing the Section's name to the Elder and Disability Law Section, the Section would have to change its focus and identity. Even the State of Florida treats the elderly and persons with disability differently—See: Department of Elder Affairs and Agency for Persons with Disability.

The proposal to change the name is said to be for the purposes of bringing into membership some 1500 Social Security Disability attorneys in Florida. Social Security Disability practice is a federal practice focused on individuals under the age of 65 who are/become disabled and are seeking a finding by the Social Security Administration of disability based on a physical or mental disability—a practice focused more on medical issues than incapacity planning, protection against abuse and exploitation or the preservation of income or assets for care. The Section would no longer be focused on a specific population, but all individuals from birth through death.

However, Social Security Disability law is not the only area of practice under Disability Law. Disability Law, after a survey of both Florida Bar Sections and other state bars, includes all of the following:

- Attorneys whose practice focuses on the Americans with Disabilities Act
- Attorneys who represent individuals with mental health and substance abuse issues in involuntary placement proceedings
- Criminal law attorneys who represent individuals with mental illness who commit crimes, including crimes against elders
- Attorneys who represent disabled children in educational settings
- Attorneys who advocate for the homeless mentally ill
- Attorneys who represent all disabled persons in institutional settings

While it has been stated that not all of these attorneys are to be included the Section (or would even join) it is important to understand that the Section cannot exclude these attorneys without serious and likely negative scrutiny from the Florida Bar. Adding Disability Law to the Section requires the Section to fundamentally redefine itself and its focus. This cannot be done without more planning and participation from the disability law bar (which is not currently part of the Section), which according to proponents of changing the name of the Section will not come until the Section makes the hasty, unplanned decision to change its name.

### **Disability Lawyer says The Section Has “Nothing to Offer” Disability Attorneys**

According to those proposing the change the Section's name, there are only two members in the Section that do medical disability claims (Social Security Disability law). The Section currently has at least the same number of members who practice in one of the other areas of disability law described above and at least one of them is very active in the Section.

The proposed name change is to attract approximately 1500 more Social Security Disability law attorneys. However, it has been repeatedly stated by the name change proponents that the Section has nothing to offer Disability Attorneys without a hasty name change. While a name change may attract a few new members, those members could be recruited into the Section by a

personal invitation. If the Section is going to change its name to attract more members to the Section, then the Section would likely get more members if it changed its name to something more inclusive such as Elder and Special Needs Law Section of The Florida Bar.

A name change alone is not going to get members from a different practice area to join if a section has “nothing to offer.” To attract more members, the Section must have something to offer. If, as has been stated, the Section has nothing to offer now, it would have nothing to offer after a hasty, unplanned name change. After the name change, significant planning and effort would have to be made by volunteers to develop those offerings to attract new members and if such efforts fail, the Section has changed its focus and identity with no gain.

### **Requires Fundamental Changes to the Structure of the Section (Even if not Bifurcated)**

While a name change seems simple, accommodation must be made for the influx (assuming there would be one) of new members who practice outside Elder Law. Accommodations would include but not be limited to the following:

- Changes to the bylaws including the name, mission, additional permanent committees, which must be approved by the Florida Bar.
- Additional CLE offerings. While additional CLE offerings may help, there are additional financial obligations associated with more CLE offerings and if those offerings are not utilized by members and nonmembers, then the Section may lose money. Additionally, new CLE offerings will require finding individuals with expertise to present the programming. It has been stated by proponents of the name change that our section currently lacks the expertise to present CLE offerings that would attract the attorneys sought by the name change.
- Policy changes. With changes in membership make up, come changes in focus. As the Section changes its focus to accommodate disability from birth through age 65, the Section will have to add new policies and change existing ones. These changes can/may cause conflict in the Section and, due to the change in focus cause a loss in membership.
- Legislative Position Changes. With a change in focus will come a need to review the Section’s legislative positions and add or change them. The legislative resources available to the Section (including both paid staff and volunteers) are already spread thin. Adding new legislative focus, more positions and more members to accommodate will make legislative advocacy more difficult and likely lead to a reduction in our advocacy efforts. It may also lead to increased conflict in membership due to the demand on limited resources.
- Budgetary changes. Right now the Section spends a large portion of its budget advocating for and educating the bar and public on Elder Law issues. It supports the Public Policy Task Force, the current focus of which is to engage in collaborative rule making with regard to Medicaid coverage for long term care, to engage in rule challenges regarding Medicaid long term care issues and to monitor and provide support and technical assistance for legislative changes related to issues affecting the elderly. The section presents at least four Elder Law related CLEs a year. There has been no consideration given to the possible budgetary affects a name change would have once members began to join. It would likely require additional legislative budget

as well as additional funds to provide CLE appropriate for the disability lawyers of the section.

- **Committee Changes.** Additional committees will need to be added and populated based on the focus and identity of the Section. With additional substantive committees, the substantive chair will have far more responsibility in fulfilling his/her responsibility to keep abreast of “all substantive law issues of concern to the section, including review of legislation, the proposal of legislation, the study of issues, the preparation of substantive writings, the creation of specific committees and the identification of issues the division identifies as a priority.” *Bylaws of the Elder Law Section of the Florida Bar, Article III, Section 4(f)*. A similar additional burden will be placed on the Administrative Chair who will be responsible for “administration of the activities of the section, including publications, CLE, public relations, budget, membership and coordination with other sections of the Bar.” *Bylaws of the Elder Law Section of the Florida Bar, Article III, Section 4(e)*. Such additional burdens will likely require a change in the functions of the leadership positions to spread the new burdens more evenly amongst the Executive Committee.
- **Resource burdens.** Our section administrator currently administers three sections. The work needed to change the name of the section (without regard to the bifurcation of the Section), may be more than our section administrator can do and may lead to other functions of the Section suffering. Additionally, given the apparent make up of the Section/Division assignments, each administrator handles up to 8000 members or three sections. Even with an additional 1000 members, it does not appear likely the Section will receive a dedicated section administrator. Additional volunteers from the Section will also be needed to populate new committees, present CLEs and work with other sections and the Bar through the name change issues (and possibly bifurcation of the Section).

### **Requires Fundamental Changes to the Section’s Public Policy Efforts and Agenda and Will Lead to Perpetual Conflict**

When the Section changes its name and identity, its public policy efforts and agenda will also change. The changes in identity to accommodate a yet undefined and non-existent membership base will create conflict in the current membership. What will happen to the Public Policy Task Force Funding and Focus? Where will the Section focus its legislative efforts? Which projects or issues will take priority?

Additional changes needed in the Section’s public policy efforts (summarized above) and agenda will lead to additional and possibly perpetual conflict as the Section membership with a bifurcated focus wrangles over Sections resources and budget allocation.

### **Changing the Name Requires Planning and a Detailed Proposal for Approval to the Bar That Has Not Been Done**

While changing the Section’s name sounds simple, there is little that is more complicated. Changing the name of a Florida Bar Section, according to the Florida Bar, is a major change and

requires a number of things to be evaluated by the Bar. Just a few of the items that will be reviewed are set out below.

First, the Bar will want to know which Sections may be affected by or have an interest in the Section's proposed name change. After only a summary review of the Florida Bar Sections, the following sections may have an interest in or would be affected by a change to the Elder Law Section's name to the Elder and Disability Law Section:

- the Equal Opportunity Law Section
- the General Practice, Solo and Small Firm Section
- the Labor and Employment Law Section
- Public Interest Law
- Trial Lawyers
- Workers' Compensation
- Young Lawyers Division

The Bar is likely to expect that the Section has at least notified those Sections. Due to the time constraints on the Ad Hoc Name Change Committee and its direction to come up with the pros and cons of a Name Change, a discussion of the sections affected was never had and no sections were notified of this proposed change.

Second, the Bar will expect the Section to have a definition of the area of law it will be adding to the Section with its name change, including what lawyers/law practices will be included and which will not. Due to the time constraints on the Ad Hoc Name Change Committee and its direction to come up with the pros and cons of a Name Change, there is currently no definition of Disability Law other than Social Security Disability Law and that definition was not adopted by the Ad Hoc Name Change Committee.

Finally, the Section will have to review its bylaws and determine what changes need to be made to the bylaws to accommodate the change in name and new area of law being added to the Section. These bylaw changes will have to be submitted to the Florida Bar for approval. Due to the time constraints on the Ad Hoc Name Change Committee and its direction to come up with the pros and cons of a Name Change, a discussion of potential bylaws changes was not had.

Ultimately, the Board of Governors will vote on the proposal to change the Section's name. From the Section's current position, it appears the Section may be placing the cart before the horse—change the name in hopes of attracting a yet undefined group of attorneys in a yet undefined new practice area without the planning to accommodate either the practice area or the influx of potential members. Without significantly more work, planning and investigation, the proposal to change the name, as it currently stands will not pass muster, according to the requirements provided by the Florida Bar.

### **An Orderly Assimilation of Disability Attorneys Can Be Had with Less Conflict and More Planning**

The Elder Law Section continues to adapt to the changes in representing Florida's elderly and individuals with special needs. The Section recently created a 'Disability Law Committee,'

which is chaired by an attorney who works with persons with disabilities. The Committee is active in the evaluation of legislation of interest to the Section, coordinating with other Florida Bar Sections that serve individuals with disabilities and working to include advocacy in the Elder Law Section's CLEs. This does not require notification to the other Florida Bar Sections that may object. It does not require the approval of the Florida Bar. This does not require a change in the name, focus and identity of the Elder Law Section. As disability lawyers become involved with that committee or help create new committees, an orderly assimilation of this distinct specialty could be accomplished. If the committee(s) becomes large enough and active enough to support the needs and burdens associated with changing the focus and identity of the Section (and possible bifurcation), then such a change may be warranted.

The "Public Interest Section" and the "Workers Comp. Section" already have Disability committees that function in a similar way, including an active disability blog. Those sections did not change their names and they have Social Security Disability Lawyers as their members, including the Section's resident Social Security Disability law expert, David Lillesand.

## **Conclusion**

According to the proponents of the name change, New Jersey is one state that changed the name of the "Elder Law Section" to the "Elder and Disability Law Section". No other state has done so and New Jersey did it to describe their "Special Needs Planning". While Social Security Disability Attorneys may need a place of their own, it may be more advantageous for them to create their own specialty Section. This is not to say Social Security Disability Attorneys are not welcome in the Elder Law Section. However, it seems like a significant leap to make accommodations for a population of members that currently will not join due to the Section's current name and for which the Section has nothing to offer.

The current proposal to change the name is not appropriate for the Section at this time. It requires a significant effort by the Section and its members with no assured gain or benefit. While the Section is promised new members if the name is changed, the proponents of the change state the Section has nothing to offer the members attracted by the change, placing the Section at risk. This is a risk the Section is ill-equipped to take at this time. In addition, based on the discussions of the Ad Hoc Name Change Committee, the change and the work necessary to develop the issues for the approval of the Florida Bar without having a membership base to serve and to assist in that burden will create significant conflict that may impede the other work of the Section.

If the Section were to change its name, it may want to consider names that are more inclusive. Since "Special Needs Planning" is a part of every Elder Law Section in every state, if a name change and all the work required for it were necessary, it would be more advantageous for the Section to change its name to the Elder and Special Needs Law Section. This appears to be easier to create an inclusive definition of the Section's practice area, is more comprehensive and may be easier to present to the Florida Bar and fulfill its requirements.

## **BIFURCATION OF THE SECTION**

As the discussions regarding the pros and cons of changing the Section's name to the Elder and Disability Law Section developed, it became apparent that proponents of the name change also proposed to bifurcate the Section into two distinct divisions that operate separately in many instances, similar to the Florida Bar Real Property Probate and Trust Section (membership at approximately 10,000). The Elder Law Division would operate to accommodate the Elder Law Attorneys in the Section. The Disability Law Division would operate to accommodate Disability Law Attorneys (specifically Social Security Disability Law Attorneys).

For a name change alone, the Florida Bar requires significant planning, a proposal, investigation by the Board of Governors and a vote from the BOG. Bifurcation of the Elder Law Section will require significant work and planning from the Executive Council over the next two to three years, diverting resources from the activities already in motion. Over the next two to three years, the Section will have to do all the things required for the name change as well as rewrite its bylaws, restructure how it is governed, develop a budget impact statement, develop a budget, develop two program agendas, etc. With this comes potential for more conflict and a host of other, yet to be discovered difficulties, again with no current membership base to support the burden.

### **WHAT THE SECTION NEEDS**

As the Ad Hoc Name Change Committee developed the pros and cons of a possible name change and bifurcation of the section, the issues discussed in the Committee demonstrate the Section's need for a strategic planning committee that meets regularly to move the Section forward in whatever direction it must move and develop the deliberative plans necessary to advance the Section.

<b>FL BAR SECTION</b>	<b>ADMINISTRATOR</b>	<b>MEMBERS</b>
Administrative Law	Jackie Werndli(850) 561-5623	1243
Appellate Practice	Valerie Yarbrough(850) 561-5630	1446
Business Law	Valerie Yarbrough(850) 561-5630	4714
City, County and Local Government Law	Ricky Libbert(850) 561-5631	1676
Criminal Law	Paige Graham(850) 561-5628	2584
Elder Law	Arlee Colman(850) 561-5625	1578
Entertainment, Arts and Sports Law	Angela Froelich(850) 561-5633	916
Environmental and Land Use Law	Jackie Werndli(850) 561-5623	1887
Equal Opportunities Law Section	Summer Hall(850) 561-5650	222
Family Law	Summer Hall(850) 561-5650	3660
General Practice, Solo and Small Firm	Ricky Libbert(850) 561-5631	2331
Government Lawyer	Summer Hall(850) 561-5650	1031
Health Law	Ashlea Wiley(850) 561-5624	1382
International Law	Angela Froelich(850) 561-5633	1006
Labor and Employment Law	Angela Froelich(850) 561-5633	1969
Out-of-State Division	Arlee Coleman(850) 561-5625	1156
Public Interest Law	Valerie Yarbrough(850) 561-5630	435
Real Property, Probate and Trust Law	Liz Smith(850) 561-5619	9474
Tax	Ashlea Wiley(850) 561-5624	2048
Trial Lawyers	Paige Graham(850) 561-5628	6372
Workers' Compensation	Arlee Colman(850) 561-5625	1390
Young Lawyers Division	Tom Miller(850) 561-5621	22,075

# **ELDER LAW SECTION'S SUBSTANTIVE COMMITTEES/SPECIAL SUBSTANTIVE COMMITTEES**

## **Medicaid/Government Benefits**

Co-Chairs: John Clardy  
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Long Term Care Insurance (Partnership)  
Veterans' Benefits

## **Special Needs Trusts**

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Pooled Trust  
Trust Protector  
Florida Asset Protection Trusts  
Federal Taxation and SNT's  
Federal Legislative

## **Death Care Industry**

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## **Estate Planning**

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