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## Introduction: What Is Elder Law Anyway?

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## Introduction: What Is Elder Law Anyway?

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Many of us who now consider ourselves "Elder Law" attorneys were practicing elder law long before it had a name. We were a group of attorneys concerned with problems unique to the elderly who worked as their advocates. Through various publications by agencies such as the Center for Social Gerontology, the American Association of Retired Persons, the Center for Public Representation, and the Legal Counsel for the Elderly,<sup>1</sup> we became aware that other attorneys and agencies had similar interests and concerns. Because of the concern for the unique legal problems facing the elderly during the 1970s, the Department of Health, Education and Welfare awarded grant monies to provide direct legal services to the elderly in 1975.

The legal profession's involvement with the elderly began in 1978 when the American Bar Association formed the Commission on Legal Problems of the Elderly ("Commission"). Since 1988, the Commission has published a quarterly newsletter, BIFOCAL, and a bimonthly bulletin to various bar committees on the elderly.<sup>2</sup> Attorney participation in elder law on the national level began with the formation of the National Academy of Elder Law Attorneys ("NAELA"). The initial group of twenty-six founding members decided to form NAELA while they were attending a joint conference on Law and Aging held in Washington, D.C. The term, "Elder Law," was coined by Michael Gilfix, Esquire, one of NAELA's founding members. The NAELA headquarters were established in Tucson, Arizona in 1987. NAELA grew rapidly to 1150 members in forty-eight states and the District of Columbia by 1991.<sup>3</sup>

It is not surprising that the practice of elder law organized on a national level since much of elder law relates to federal programs that benefit the elderly in general, such as the Medicaid program. Many elder law attorneys

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1. PETER J. STRAUSS ET AL., *AGING AND THE LAW* 2 (1990).
2. *Id.*
3. Peter J. Strauss, *NAELA: A Vehicle for the Challenge of the '90s*, NAELA Q., Fall 1991, at 1.

join NAELA to meet with other attorneys throughout the United States at the various symposia and institutes offered by NAELA, to exchange information and to determine how government benefit programs are administered in different states of the union. For example, one problem that confronted the elderly was the income cap under Medicaid. In most states, persons cannot qualify for Medicaid if their income exceeds 300% of the Supplemental Security Insurance ("SSI") benefit rate (currently \$1338 per month). Many elderly persons, therefore, had too much income to qualify for Medicaid and too little income to afford the nursing care they required.

To resolve the income gap dilemma, attorneys in Colorado came up with the idea of creating a trust whereby monies in excess of the income cap were placed in trust until the Medicaid recipient died. At that time, all of the trust funds reverted to the State of Colorado. This procedure was initially challenged in the courts in *Miller v. Ibarra*.<sup>4</sup> Later, it was recognized by the Colorado legislature,<sup>5</sup> and finally sanctioned by the federal government as part of the Omnibus Budget Reconciliation Act of 1993.<sup>6</sup>

Other benefits were realized by elder law attorneys through their association with NAELA. By 1992, the express mission of NAELA was to "ensure delivery of quality legal services for the elderly and to advocate for their rights."<sup>7</sup> Its stated purpose was to "provide information, education, networking, and assistance to attorneys, Bar organizations, and other individuals or groups advising elderly clients and their families."<sup>8</sup> NAELA also seeks to promote "technical expertise and ethical awareness among attorneys, Bar organizations . . . [and t]o develop awareness of the issues surrounding legal services for the elderly."<sup>9</sup>

The prominence of NAELA has helped to establish and to define the practice of elder law. At the first NAELA annual institute, held in November 1991 in San Antonio, Texas, a survey was taken of the attorneys attending the institute to determine how those attorneys defined elder law. NAELA found the three major categories to be: 1) estate planning and administration, including tax questions; 2) disability, Medicaid, and other long-term care issues; and 3) guardianship, conservatorship, and commit-

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4. 746 F. Supp. 19 (D. Colo. 1990).

5. COLO. REV. STAT. § 26-4-526 (1994).

6. 42 U.S.C. § 1396(p)(b)(4)(B) (1988 & Supp. V 1993).

7. *Speaking About the Academy*, 4 NAELA NEWS (Nat'l Acad. of Elder Law Att'ys, Tucson, Ariz.), Oct. 1992, at 5.

8. *Id.*

9. *Id.*

ment matters, including fiduciary administration.<sup>10</sup> Other areas cited by NAELA included retirement benefits, Medicare, disability benefits, litigation in the areas of elder abuse, and elder fraud.<sup>11</sup>

NAELA membership has now grown to 2400 members with chapters in Massachusetts, the Carolinas, Arizona, and New York.<sup>12</sup> Florida formed the Academy of Florida Elder Law Attorneys in 1994, the fifth local chapter of NAELA. Russell E. Carlisle is the first Chapter President of the Florida chapter and he has reported an initial membership of sixty-five attorneys.<sup>13</sup>

In 1991, the Elder Law section of the Florida Bar was formed with Joseph W.N. Rugg as Chair, Jerome Ira Solkoff as the first Chair-elect, and an initial membership of 325 members. Rebecca C. Morgan is the 1994-1995 Chair, and current membership has grown to 1037. The bylaws of the Elder Law section allow for nonvoting affiliate membership, which is limited in number to one-third of the current membership. One of the criteria for acceptance as an affiliate is that the person provides services to elder citizens in the fields of health, welfare, or financial counseling. There are currently sixty affiliate members.

The reasons for encouraging affiliate membership are practical. One cannot practice elder law for any period of time without understanding that the needs of the clients extend beyond their legal problems. The clients may be frail or ill and require home health care or placement in an institutional facility. The clients may be well but fearful that future illness may deplete financial resources, and thus may need to consider a long-term care insurance policy. If a client is a caretaker and is overwhelmed with the demands of caring for a person who is suffering from some form of dementia, the client may need other support services offered by various religious organizations or nonprofit organizations, such as the Alzheimer's Association. Peter J. Strauss, author of many elder law publications, notes in his book, *Ageing and the Law*, that

meeting the needs of the client(s) depends on moving beyond conventional legal work to offering practical assistance. Quite often, the attorney is the right person to provide information about home care, nursing homes, special geriatric health programs, adult day care, and

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10. Janet L. Kuhn, *Who Are We? Highlights from the NAELA Institute Questionnaire*, NAELA Q., Spring 1992, at 11.

11. *Id.*

12. *NAELA Chapter News*, 5 NAELA NEWS (Nat'l Acad. of Elder Law Att'ys, Tucson, Ariz.), Sept. 1993, at 8-10.

13. *Id.* at 9.

respite care; handling even a few elder-law cases quickly leads to an accumulation of such information and contacts with the right people.<sup>14</sup>

Because so much of an elder law practice involves contact with insurance agents, geriatric care or case managers,<sup>15</sup> and social service agency personnel, these persons have been invited to join the Elder Law section of the Florida Bar as affiliate members to work with attorneys to meet the needs of the elderly.

As the field of elder law expands, the various bar associations throughout the State of Florida are forming elder law committees. There are now elder law committees in the Hillsborough County Bar Association and in the Clearwater Bar Association. The Palm Beach County Bar Association formed an Elder Law Practice committee in 1993, with C. Mark Shalloway as Chairman. This year, the South Palm Beach County Bar Association is forming an Elder Law committee with this author as Chairperson. The Elder Law committee in Palm Beach County has endeavored to establish a substantive practice experience exchange and to establish an Elder Service Provider Information Exchange for its members. Thus, an important function of these local committees is to promote education and disseminate information on issues relating to elder law.

There is no elder law certification in the State of Florida. However, the National Academy of Elder Law Foundation ("NAELF"), an organization created by the Board of Directors of NAELA, is, for the first time, offering board certification upon meeting of the requirements set by NAELF. One of these requirements is successful completion of an examination covering the following topics: 1) Health and Personal Care Planning (including advance medical directives and living wills); 2) Pre-Mortem Legal Planning (wills and trusts); 3) Fiduciary Representation (including guardianship, trustees and personal representatives); 4) Legal Capacity Counseling (advising how capacity is determined and the level of capacity required for various legal activities); 5) Individual Representation (of those who are or who may be the subject of guardianship or conservatorship procedures); 6) Public Benefits Advice (including Medicaid, Medicare, social security, and veteran's benefits); 7) Advice on Insurance (including health, life, long-term disability, and burial/funeral policies); 8) Resident Rights Advocacy (including advising patients of their rights and remedies in matters such as admission, transfer, discharge policies, and

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14. STRAUSS ET AL., *supra* note 1, at 4.

15. Care or case managers coordinate social and medical services.

quality of care); 9) Housing Counseling (reviewing options and financing of options such as mortgage alternatives, life care contracts, and home equity conversion); 10) Employment and Retirement Advice (pensions, retiree health benefits, and unemployment benefits); 11) Income, Estate, and Gift Tax Advice; 12) Counseling about Tort Claims Against Nursing Homes; 13) Age and/or Disability Discrimination Counseling (including employment and housing, and Americans with Disabilities Act); and 14) Litigation and Administrative Advocacy (including will contests, contested capacity issues, and elder abuse).<sup>16</sup>

Then what is elder law? Is it all of the fourteen areas identified above? Or is it better understood as described in NAELA's brochure, *Elder Law: A Legal Practice Coming of Age?* Rather than being defined by technical distinctions, the brochure defines elder law by the client to be served.<sup>17</sup> What is the role of an elder law attorney? As Jerome I. Solkoff stated, the role of the elder law attorney is to be concerned with and to meet the current needs of the elderly client.<sup>18</sup> This concern must take precedence over the disposition of the client's estate upon his or her demise.

Finally, who is an elder law attorney? As stated above, as of this date there is no elder law certification in the State of Florida. Rule 4-7.4(c) of the Rules Regulating the Florida Bar, however, states that an attorney "who is certified by a national group which has standards for certification substantially the same as those set out in chapter 6, may inform the public and other lawyers of his or her certified areas of legal practice."<sup>19</sup> The minimum standards for certification as stated by NAELA<sup>20</sup> are as follows:

- 1) *Licensure*: Applicants must be duly licensed to practice law in at least one state or the District of Columbia.
- 2) *Practice*: Applicants must be engaged in the practice of law for the five-year period immediately preceding the date of application.
- 3) *Integrity*: Applicants may not be certified for three years following any public discipline, final criminal conviction, or malpractice judgment.

16. *Special Report*, 6 NAELA NEWS (Nat'l Acad. of Elder Law Att'ys, Tucson, Ariz.), Mar. 1994, at 1-4.

17. M. Garey Eakes, *Keeping Up With Elder Law: A Role for NAELA*, NAELA Q., Fall 1991, at 2.

18. Interview with Jerome I. Solkoff, Attorney and former NAELA Chair, in Ft. Lauderdale, Fla. (July 1, 1994).

19. FLA. BAR RULES OF PROFESSIONAL CONDUCT Rule 4-7.4(c) (1987).

20. See *Special Report*, *supra* note 16, at 2.

4) *Substantial Involvement:*

a) *Number of Hours:* In each of the three years immediately preceding application, the applicant shall have practiced elder law an average of sixteen hours per week.

b) *Task Requirement:* During the three years immediately preceding the application, the applicant shall have provided legal services in at least sixty elder law matters, as defined above, with no more than ten matters in any one of the areas.

5) *Continuing Legal Education:* Within the three years immediately preceding application, the applicant shall have participated in at least forty-five hours of continuing legal education in elder law.

6) *Peer Review:* The applicant shall submit as references the names of five attorneys, all of whom are familiar with the competence of the applicant, and none of whom are persons related to or engaged in legal practice with the applicant. Three of the named attorneys shall have devoted a minimum of 800 hours to the practice of elder law.

7) *Examination:* The applicant shall successfully complete a written examination prepared and graded by the Examination Committee.<sup>21</sup>

These standards are similar to the standards required by Rule 6-3.5 of the Rules Regulating the Florida Bar.<sup>22</sup> This author has submitted the NAELA requirements to the Florida Bar for a written opinion as to whether NAELA standards comply with the regulation of Rule 4-7.4(c).<sup>23</sup>

Although we do not know at this writing if possession of NAELA certification will allow attorneys to hold themselves out as elder law specialists, it is proper for an attorney to say that a majority of his or her practice is in the field of elder law, that he or she belongs to any of the various elder law organizations as above identified, and that he or she has made a study of elder law by attending various Continuing Legal Education courses and NAELA symposia and institutes. In view of the foregoing, in this author's opinion, it would then be proper to consider oneself an elder law attorney.

Much progress has been made in providing the elder client with legal representation that addresses his or her unique needs. However, there still remains much to accomplish toward recognizing elder law practice as a unique specialty.

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21. *See id.* at 7-8.

22. FLA. BAR RULES DESIGNATION AND CERTIFICATION PROGRAMS Rule 6-3.5 (1987).

23. To date, no response has been received.