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## WHAT IS A CELA?

BY

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## **What is a Certified Elder Law Attorney (“CELA”)?**

In the spring of 1994, I discussed the new elder law attorney certification program with my paralegal. To be honest, I was reluctant to apply. I had not taken a formal exam since I took the Virginia Bar exam 20 years previously. The thought of a formal exam made me apprehensive. I was not sure the benefit would outweigh the cost and effort. My paralegal, however, said “Andy, I think you should do it. Why, don’t you try?”

Over the summer, I ordered the recommended reading materials and studied every Sunday afternoon. The preparation for the exam was very helpful. Frankly, I learned a lot that I could put to use in my practice. I took the exam in November of 1994 in New Orleans and passed it. I was certified as an elder law attorney in February of 1995 after the American Bar Association granted accreditation. I have subsequently helped write certification exams and grade them. I am now a member of the Board of Directors of the National Elder Law Foundation (NELF), the organization that administers the Elder Law certification program. Five years have now passed since I was certified and I have recently taken my re-certification examination.

To be very honest, she was right in 1994. My certification as a Certified Elder Law Attorney (“CELA”) has been very beneficial. I learned a lot during the preparation for the exam. With this new information, I have been able to expand the services offered by my office. The CELA designation has helped me differentiate my practice from other lawyers and service providers. I will frequently receive referrals due to my CELA certification.

The CELA program has been good for elder law attorneys. In developing the CELA program, NELF developed a comprehensive definition of elder law. This definition and the American Bar Association’s (ABA) accreditation of the CELA program has helped elder law gain recognition and acceptance with the bar and the public as a recognized legal specialty.

The CELA program is good for the public. De facto lawyer specialization is widespread. Lawyers describe themselves to clients and the public by specialty: “I am a trial lawyer” or “I am a criminal defense attorney.” The CELA certification program helps the public identify attorneys with an enhanced level of skill in meeting an elderly person’s legal needs.

### **History**

In July of 1993, the National Academy of Elder Law Attorneys (NAELA) assisted in the formation of NELF as a nonprofit organization. NELF’s purpose was to develop and improve the professional competence of lawyers in elder law.

NELF’s board decided to identify those lawyers as CELA’s who had a sufficiently enhanced level of skill and knowledge to be able to identify all of the elderly client’s needs, and either

take care of them or refer the client to someone else who could. The next step was to define elder law. After defining elder law, the NELF developed a certification program and submitted it to the American Bar Association for accreditation. The first exam was given in November of 1994. In February of 1995, the American Bar Association's House of Delegates accredited NELF as the certifying entity for specialization in elder law.

In August of 2006, there are 338 CELAs in 39 states. Elder law is the fastest growing ABA accredited specialty.<sup>1</sup>

## **Definition of Elder Law**

NELF defines elder law as follows:<sup>2</sup>

Elder Law is the legal practice of counseling, and representing older persons and their representatives about the legal aspects of health and long-term care planning, public benefits, surrogate decision-making, older persons' legal capacity, the conservation, disposition and administration of older persons' estates and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.

In addition, attorneys certified in elder law must be capable of recognizing issues of concern that arise during counseling and representation of older persons, or their representatives, with respect to abuse, neglect, or exploitation of the older person, insurance, housing, long-term care, employment, and retirement. The certified elder law attorney must also be familiar with professional and non-legal resources and services publicly and privately available to meet the needs of the older persons, and be capable of recognizing the professional conduct and ethical issues that arise during representation.

## **Who May be Certified?**

Certification as a CELA is not limited to members of the NAELA. It is open to all attorneys who qualify. The applicant must be licensed to practice law and be an active member of the bar in at least one state, the District of Columbia, the Commonwealth of Puerto Rico, or any US Territory. The applicant must be in good standing of the bars of all jurisdictions in which he or she is licensed to practice.

The applicant must have practiced law 5 years before applying. Service as a judge or law professor may be substituted at the discretion of NELF. The applicant may not be certified for 3 years following any public discipline, final criminal conviction, final malpractice judgment, or admission of malpractice, unless the applicant establishes to NELF that such factors are not relevant to the applicant's fitness to be certified.

## **Substantial Involvement in Elder Law**

The applicant must make a satisfactory showing that in each of the preceding 3 years; he or she practiced elder law an average of 16 hours per week. During the preceding three years, the applicant must have provided legal services in 60 elder law matters in the following categories:

1. Health and Personal Care Planning, including giving advice regarding, and preparing, advance medical directives (medical powers of attorney, living wills, and health care declarations) and counseling older persons, attorneys-in-fact, and families about medical and life sustaining choices, and related personal life choices.
2. Pre-Mortem Legal Planning, including giving advice and preparing documents regarding wills, trusts, durable general or financial powers of attorney, real estate, gifting, and the financial and tax implications of any proposed action.
3. Fiduciary Representation, including seeking the appointment of, giving advice to, representing, or serving as executor, personal representative, attorney-in-fact, trustee, guardian, conservator, representative payee, or other formal or informal fiduciary.
4. Legal Capacity Counseling, including advising how capacity is determined and the level of capacity required for various legal activities, and representing those who are or may be the subject of guardianship/conservatorship proceedings or other protective arrangements.
5. Public Benefits Advice, including planning for and assisting in obtaining Medicare, Medicaid, Social Security, Supplemental Security Income, Veterans benefits, and food stamps.
6. Advice on Insurance Matters, including analyzing and explaining the types of insurance available, such as health, life, long-term care, home care, COBRA, medigap, long-term disability, dread disease, and burial/funeral policies.
7. Resident Rights Advocacy, including advising patients and residents of hospitals, nursing facilities, continuing care retirement communities, assisted living facilities, adult care facilities, and those cared for in their homes of their rights and appropriate remedies in matters such as admission, transfer and discharge policies, quality of care, and related issues.
8. Housing Counseling, including reviewing the options available and the financing of those options such as: mortgage alternatives, renovation loan programs, life care contracts, and home equity conversion.
9. Employment and Retirement Advice, including pension, retiree health benefits, unemployment benefits, and other benefits.
10. Income, Estate and Gift Tax Advice, including consequences of plans made and advice offered.
11. Counseling about tort claims against nursing homes.
12. Counseling with regard to age and/or disability discrimination in employment and housing.

13. Litigation and Administrative Advocacy in connection with any of the above matters, including will contests, contested capacity issues, elder abuse (including financial or consumer fraud), fiduciary administration, public benefits, nursing home torts, and discrimination.

14.

40 of the 60 elder law matters must be in categories 1 through 5, with at least 5 matters in each category. Ten of the elder law matters must be in categories 6 through 13, with no more than 5 in any one category. The remaining 10 matters may be in any of the 13 categories without limitation.

### **Continuing Legal Education & Peer Review**

Within the three years preceding the application for certification, the applicant must have participated in at least 45 hours of continuing legal education in elder law. The applicant must also submit as references the names of 5 attorneys who are familiar with the competence and qualifications of the applicant in elder law. Three of the attorneys must have devoted a minimum of 800 hours to the practice of elder law during each of the preceding three years. NELF may also make additional inquiries about the applicant's fitness to be certified.

### **Application Process**

The CELA certification process begins with the applicant filing a short-form application. The short form application package can be obtained by writing to NELF, at 1604 N. Country Club Rd, Tucson, AZ 85716-3102 or faxing (520) 325-7925. The package will contain an explanation of the certification program, a copy of the Rules and Regulations, and the short form application. NELF uses the short form to determine if the applicant meets the initial requirements concerning licensing and length of practice.

If NELF determines that the applicant meets the initial requirements, the applicant will be sent the long form application, including the notice to take the examination. The long form application documents substantial involvement in elder law, continuing legal education, and peer review. The notice to take the certification examination must be submitted within 30 days before taking the certification examination.

The entire application process must be completed within 2 years after filing the short form application. The exam may be taken before or after filing the long form application.

### **Certification Review Class**

Prior to taking the certification exam I strongly recommend that you take the NAELA Certification Review Course. The review course consists of home study, practice exams, and

an all day review session prior to a NAELA Symposium or Institute. The registration fee (currently \$175) includes audio tapes, a manual of written materials and the review session. I found the preparation for the exam to be a *very valuable* learning experience. I frequently purchase the audio tapes to keep up to date on developments in the law. I use the tapes and manual for internal training for my staff. You may register for the review course by writing to NAELA at 1604 N. Country Club Road, Tucson, AZ 85716-3102 or calling (520) 881-4005.

## **Examination**

The certification exam is administered 2 times a year. The exam is offered annually in June at regional locations. The 2000 Regional Certification exam was offered in 56 different cities in 21 different states. The exam is also offered on a national basis after the annual NAELA Institute.

The exam is a one day closed book exam consisting of essay, short answer and multiple choice questions. Each exam is graded by two graders. If the grades given by the two graders on any question vary significantly, the question will be graded by a third grader. The graders do not know the names of the persons whose exams they are grading. For the last four exams, an average of 55% of the attorneys taking the exam passed it.

In my experience the exam concentrates on categories 1 through 5 listed in the section on substantial involvement of this article. Frequently these categories will be the subject of essay and short answer questions. I believe the most frequent error that test takers make is failing to take time to organize their thoughts for the essay and short answer questions. A few minutes of organization and outlining can significantly improve an answer. Additionally, when you do not have in-depth knowledge of the answer, the test taker should at least identify the issues and state how he would approach solving the problem.

The following are examples of questions that have been used on prior exams but have been retired from the exam question bank:

### **Long Essay Question**

Question 1

40 Points

(Suggested time: 40 Minutes)

Richard and Kate are husband and wife. Richard is 70 years old and his health is declining steadily. He is barely ambulatory at this time. His wife, Kate, is also 70 years old but is in marvelous health. They reside in a home worth approximately \$80,000 which is free from mortgage. They have two children, Helen, who is 46 years old and is currently receiving Social Security Disability; and Robert, who is 42 years old, married and has two children. Robert is in fine health.

Kate comes to your office and indicates that together she and her husband have an estate with a total value of \$500,000. Both Richard and Helen (although in questionable health) are fully mentally competent. Richard's and Kate's income consists of: \$6,000 per year pension (Richard), \$12,000 per year SSA (Richard), \$6,000 per year SSA (Kate), and \$12,000 per year investment/dividend income (Richard & Kate, JWROS).

Kate and Richard indicate that they want to: avoid probate as much as possible; provide for Richard's care if his health continues to decline; provide for the future of their disabled daughter; and preserve as much of their joint wealth as possible from the claims of the state for any Medicaid benefits which may be extended. Suggest and justify a plan and the steps needed to implement the plan that would meet these goals.

(For purposes of this hypothetical, assume that both Richard and Kate desire to have the attorney represent both of them and do not discuss the ethical issues which may arise under that arrangement.)

### **Short Essay Question**

Question 2 - 15 Points

(Suggested time: 15 minutes)

Jane was married to John for eleven years before their divorce five years ago. John is 64, remarried, and still working full-time. Jane just turned 62 and next month is marrying a 66 year old man who is retired and on Social Security. Explain whether Jane is likely to be eligible for Social Security and on what possible bases?

### **Multiple Choice**

A gifted life insurance policy will be included in the estate of an insured donor for how long after the date of the gift:

- A. 3 years
- B. 60 months
- C. 30 months
- D. 1 year
- E. An unlimited period

After a hospital stay, Medicare may fully pay for up to how many days in a skilled nursing facility?

- A. 14 days
- B. 20 days
- C. 100 days
- D. 0 days are fully paid

## **What does CELA Certification Cost?**

The filing fees for the short form application and the long form application are \$25 and \$275 respectively. The cost of taking the exam is \$300. After you have been certified, there is an annual fee of \$100. These fees are set to pay for the cost of administering the certification program and to pay the accreditation fees to the American Bar Association and to various states. For example, the American Bar Association charges \$3,500 every 5 years to accredit the CELA certification program.

In addition to these fees you will likely incur costs for the Certification Review Course (approximately \$175) and travel expenses to take the examination. I recommend that you budget about \$1,250 for application fees, exam fees, registration for the review course, travel and lodging. These costs will not be incurred all at once but will be spread over a two year period. Additionally, you may be able to reduce the travel expenses by taking a regional examination.

## **Revocation and Suspension**

Once granted, the CELA certification can be suspended or revoked by NELF if:

1. The certification was granted contrary to NELF's Rules and Regulations.
2. The certification was granted to a person ineligible to acquire the certification or the person made a false representation or misleading statement in the application process.
3. The certificate holder has failed to abide by NELF's rules.
4. The certificate holder has failed to pay applicable fees.
5. The certificate holder no longer meets the qualifications for a CELA.
6. The certificate holder has been disciplined, disbarred or suspended from the practice of law by anybody authorized to impose professional discipline.
7. The certificate holder has admitted malpractice or a final malpractice judgment has been entered against the certificate holder.

Certificate holders have the obligation to inform NELF of any fact or circumstance that could result in the revocation or suspension of the certificate.

Prior to revocation or suspension of a CELA certification, NELF will advise the certificate holder of the proposed action, the reasons for the action, and the certificate holder's right to file a written response within 30 days of the notice. After expiration of the 30 days, the NELF Board of Standards will meet to consider the grounds for the proposed action and the certificate holder's response. The certificate holder is advised within 15 days of the Board of Standard's decision. Since the CELA certification program began in 1995 one CELA certificate has been revoked.

## **Re-certification**

Once granted, certification is effective for 5 years. At the conclusion of five years, recertification is not automatic. A CELA who desires continued certification must apply for recertification. To be re-certified the CELA must pay a re-certification fee and meet the following requirements:

1. Submit satisfactory evidence of good standing in all jurisdictions in which the CELA is licensed to practice law.
2. Pass an open book take home examination.
3. Make a satisfactory showing of continued substantial involvement in the practice of elder law.
4. Submit satisfactory evidence of 60 hours of continuing legal education in elder law during the last 5 years.
5. Submit the names and addresses of 3 current CELAs who are familiar with the competence and qualification of the applicant in elder law, together with a signed confidentiality waiver. NELF may also make additional inquiries as it deems appropriate.

If after reviewing this information, NELF believes that the applicant may not meet the standards established for CELAs, it may conduct further investigations or require additional information from the applicant.

I recently took the exam for re-certification. Frankly, it was a challenging exam. I estimate that it took me at least 10 hours to take. However, it was a valuable learning tool. Since then, I have graded re-certification exams. The vast majority of the persons taking the re-certification exam do very well. The pass rate has been 99.5%.

## **Rules concerning Communication of Specialty Certification**

In 1990, the United Supreme Court in *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*<sup>3</sup> held that an absolute ban to an attorney advertising his certification as a "Certified Civil Trial Specialist by the National Board of Trial Advocacy" was an unconstitutional violation of his first amendment rights. However, a total of five of the justices discussed the possibility that advertising could be potentially misleading and that the State could require a disclaimer to remedy this.

In 1994, the United States Supreme Court in *Ibanez v. Florida Dept. of Business and Professional Regulation*<sup>4</sup> dealt with a less restrictive issue. The Florida Bar Association had reprimanded an attorney who placed the designations CPA and CFP next to her name on her business cards and in a Yellow Pages ad. The Florida Bar argued that the use of the term "certified" to refer to an organization other than the Florida Bar (or an organization it had

approved) “inherently misleads the public into believing that state approval and recognition exists.” The Supreme Court disagreed.

The Florida Bar next argued that the statements were potentially misleading so that it could require a disclaimer. The Supreme Court ruled that for a state to restrict commercial speech that is not false, deceptive or misleading, it must substantiate the claimed harms and show that its restriction will alleviate them to a material degree. The Supreme Court found that the Florida Bar had not demonstrated with sufficient specificity that any member of the public could have been misled by the designations CPA and CFP or that any harm could have resulted from their use. The Supreme Court noted that Certified Financial Planner was a well established and protected federal trademark. The Court examined the criteria required to achieve the CFP designation including core educational requirements, passage of an exam, and continuing education. The Court stated that the designation CFP did not fall within the caveat note in Peel covering certifications issued by organizations that made no inquiry into the applicant’s fitness or issued certificates for a price. The requirements for certification as a CFP as recited in the court’s decision appear comparable to the requirements for certification as a CELA.

After the Peel decision, the American Bar Association modified its Model Rules of Professional Conduct concerning Communication of Fields of Practice and Certification<sup>5</sup> as follows:

For jurisdictions where there are a regulatory authority granting certification or approving organizations that grant certification a lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization or authority but only if:

- (1) such certification is granted by the appropriate regulatory authority or by an organization which has been approved by the appropriate regulatory authority to grant such certification; or
- (2) such certification is granted by an organization that has not yet been approved by, or has been denied the approval available from, the appropriate regulatory authority, and the absence or denial of approval is clearly stated in the communication, and in any advertising subject to Rule 7.2, such statement appears in the same sentence that communicates the certification.

For jurisdictions where there are no procedure either for certification of specialties or for approval of organizations that grant certification a lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization, provided that the communication clearly states that there is no procedure in this jurisdiction for approving certifying organizations. If, however,

the named organization has been accredited by the American Bar Association to certify lawyers as specialists in a particular field of law, the communication need not contain such a statement.

A few states have adopted this rule verbatim. However, many states have used portions of it to craft ethics rules reflecting local preferences. As of April 25, 2000, the states have adopted the following approaches:<sup>6</sup>

1. Those states that recognize ABA accreditation but ask the certifying entity to make application with the State: Alabama, California, Idaho, South Carolina and Tennessee. NELF has been accredited by Alabama, California, Idaho, and Tennessee.
2. Those states that recognize ABA accreditation and require no additional action on the part of the certifying entity: Alaska, Delaware, Florida, Hawaii, Maine, Mississippi, New Hampshire, New Jersey, North Carolina, South Dakota, Vermont, and Wisconsin.
3. Those states that allow communication of certification with a disclaimer designated by the state: Colorado, Iowa, Massachusetts, Missouri, New Mexico, New York, Virginia, Washington, and Wyoming.
4. Ohio allows communication of certification with a disclaimer if the certifying entity has not been approved by the State. Communication without a disclaimer is allowed for entities that apply and are approved by the state. The NELF Ohio application is pending.
5. Those states that allow communication by state accredited organizations: Arizona, Connecticut, Indiana, Louisiana, Minnesota, Pennsylvania, and Texas. NELF's has been accredited by Indiana, Minnesota Pennsylvania and Texas.
6. Those states that allow communication without restrictions as long as the communication is true and not misleading; or states with no regulations: Kansas, Kentucky, Michigan, Montana, North Dakota, Oregon, and Washington D.C.
7. Those states that do not allow communication of certification: Arkansas, Maryland, Nebraska, Nevada, Oklahoma, Rhode Island, Utah, and West Virginia.

Additional information can be obtained from the American Bar Association's web page.<sup>7</sup> To be honest, I believe that many of the state rules concerning disclosure of certification are more restrictive than permitted by the applicable Supreme Court decisions. I don't believe that a CELA should be required to use a disclaimer since the certification process has been accredited by the ABA requires includes an inquiry into the candidate's fitness, an examination, and continuing education.

NELF's rules provide that "Except as restricted by applicable law, an attorney holding a current certification from the Board of Certification shall use the following language to disclose the certification in written communication: "Certified as an Elder Law Attorney by the National Elder Law Foundation."<sup>9</sup>

## The Legal Malpractice Standard of Care

Specialists are held to a higher standard of care in legal malpractice cases than general practitioners. The California Court of Appeals in *Wright v. Williams* held that generally an attorney that holds himself out to the public and to the profession as a specializing in an area of law must exercise the skill, prudence and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field.<sup>9</sup> Even though Wisconsin did not have a formal specialist certification program, the Wisconsin Court of Appeals held an attorney to a higher standard because he held himself out to the public as a specialist.<sup>10</sup> Thus, application of the higher standard of care does not require certification as a specialist. The higher standard of care results from the attorney's representations, including personal representations or advertisement. An attorney with a CELA certification will be held to the higher standard of care for specialists.

However, most attorneys who are qualified to secure CELA certification probably already would be held to the higher standard of care due to representations that they have made to the public concerning their "specialization." Therefore, the CELA certification will not increase the legal malpractice exposure of most attorneys who are already substantially involved in an elder law practice.

### Conclusion

The CELA certification program has been good for the public since it is helpful in identifying attorneys with an enhanced level of skills in assisting elderly persons. It has been good for the legal profession since it has helped develop and improve the professional competence of lawyers in elder law. It has been good for the attorneys who have been certified since it has provided a valuable learning experience and has helped them differentiate their practices from other attorneys and service providers. I encourage each elder lawyer to consider obtaining CELA certification. It is well worth the time and effort.

### Endnotes

1. ABA Standing Committee on Specialization web page, [www.abanet.org/specialization/info.html](http://www.abanet.org/specialization/info.html)
2. Sections 2.1 and 2.2 of the Rules and Regulations of the NELF Board of Certification
3. 496 U.S. 91 (1990)
4. 512 U.S. 136 (1994)
5. ABA Model Rule of Professional Conduct 7.4 ©
6. NELF State Status List
7. <http://www.abanet.org/specialization/state.html#tx>
8. Section 8 of the NELF Rules and Regulations Regarding Certification of Elder Law Attorneys
9. 47 Cal. App. 3rd 802
10. Duffey Law Office, S.C. v. Tank Transport, Inc., 535 N. W. 2d 91 (Wis. Ct. App. 1995)

## About This Document

This article is a summary of the Certified Elder Law Attorney program. The programs of other states will differ. This Article is provided as a courtesy to help you. It is not intended as a substitute for legal advice. It is distributed with the understanding that if you need legal advice, you will seek the services of a competent elder law attorney. While every precaution has been taken to make this article accurate, we assume no responsibility for errors or omissions, or for damages resulting from the use of the information in this article.

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