



Greater Hartford Legal Aid

October 16, 2009

Attorney Carl E. Testo
Director of Legal Services
State of Connecticut Judicial Branch
100 Washington Street
Hartford, Connecticut 06106

RE: Opposition to Proposed Amendment to Rule 7.4A(d)

Dear Attorney Testo:

I am a founding member and former executive committee member of the elder law section of the Connecticut Bar Association. I have practiced elder law for over 20 years. I represent individuals over sixty years of age under a grant funded by the Older American's Act.

I am writing to oppose the amendment to Rule 7.4A(d) of the Rules of Professional Conduct seeking to include elder law among the fields of practice for which Connecticut attorneys may be certified as specialists.

While the proposal raises nominal goals that would benefit both the profession and the public, there are sound reasons to give pause before recognizing this particular certification.

I respectfully submit that elder law is not so much a field of law as it is the demographic description of the population targeted for marketing a variety of legal services. Although the proponents of the modification quoted Attorney Kate McEvoy's description of elder law practice that included "representation of younger individuals with disabilities," the definition approved by the proposed certifying agency is "the legal practice of counseling and representing older persons and their representatives..."¹ See May 19, 2009 letter from Attorney Franklin A. Drazen. Providing services to the elderly is a very profitable industry. Even if the practice of elder law is not limited to representing "older" persons, it is an amorphous description of an area of law.

¹ The definition itself includes providing legal services to persons other than the elderly individual in regard to issues that affect the elderly individual's rights.

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The proposed certifying agency is not competent to certify Connecticut attorneys as having special competency in the areas they have identified as their practice. Rule 7.4A(a) requires that the proposed board or entity certifying specialists be required to "provide a reasonable basis for the representation that lawyers so certified possess special competence." According to the National Elder Law Foundation, the practice of elder law encompasses providing legal services in 12 different areas of practice including healthcare directives, trust, estates and probate, title XIX planning and healthcare financing, hospital and nursing home law, real estate planning and financing, ERISA, civil rights, and trial and administrative litigation. See What is Cela? by Andrew H. Hook and Sandra L. Smith at 3. With few exceptions, the practice of law in these areas is governed by state law. The NELF is a national organization. It cannot administer a test that would reflect specialized knowledge in multiple areas of state law and practice. The bar exam is the measure of a homogenous test administered nationwide. It does not measure specialized expertise but elemental competence.

The practice governed by the proposed certification is too broad. It is not reasonable to expect that one individual could have superior proficiency in all of these areas and a firm is not eligible for certification. Publication of such a certification would necessarily mislead the public as to an attorney's true area of expertise.

The proposed amendment is largely redundant. Rule 7.4A(d) already provides for certification for most of the areas identified as elder law practice, *i.e.*, administrative law, civil trial and appellate practice, civil rights and discrimination, commercial transactions, consumer claims protection, estate planning and probate, residential real estate, taxation and workers compensation. The redundancy raises questions again about what area of legal practice the amendment seeks to certify. The rules of professional conduct do not certify special expertise based upon race, ethnicity, sex, age or other characteristics of clients.

According to the proponents, the practice of elder law also includes a practice area not recognized by Connecticut law, *i.e.*, "advising how capacity is determined and the level of capacity required for various legal activities." Hook at 3. In Connecticut, capacity is presumed until a probate judge has clear and convincing evidence of a limitation the individual cannot overcome with reasonable assistance. *General Statutes* § 45a-650.

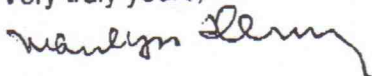
Significantly, the proposal was not submitted by the elder law section of the Connecticut Bar Association. The proposed amendment was submitted by Attorney "Franklin A. Drazen, CELA", on behalf of the Board of Directors of the Connecticut Chapter of the National Academy of Elder Law Attorneys (NAELA). The chapter does not and cannot claim to represent the interests of the majority of lawyers who practice in this field. According to the proponents, 458 Connecticut attorneys have paid dues to join the elder law section of the CBA. Of the 128 Connecticut attorneys who are members of

the National Association of Elder Law Attorneys, only 90 have joined the local chapter. Of those, only 13 have earned the NELF certification. See Drazen letter at 2. Four of the members of the board of directors of the local chapter advertised their certification in this letter. The local chapter's letterhead identifies three of the members as CELA's. Attorneys Czepiga, Dillman, Drazen and Levine all advertise their certification on their websites. Both the proponents' and the letter from Lori Barbee, NELF's executive director, are silent as to how many of the 458 members of the elder law section of the Connecticut Bar Association have found it necessary or beneficial to pursue certification.

I urge you to reject the proposed amendment as it has not been vetted before the interested practice areas of the largest legal professional organization of our own state. By the proponents' own declaration, the genesis of the amendment is the NELF's interest in being recognized as the certifying agency in Connecticut and presumably expanding its market among Connecticut attorneys. The proposed amendment will have an impact on the members of the trusts and estate section of the CBA as well as the 458 members of the elder law section identified in the proponents report. Any proposal to amend rule 7.4A should have the benefit of the consideration of the practice sections and board of governors of the Connecticut Bar Association.

For all of the above reasons, I respectfully request that you reject the proposed amendment to rule 7.4A of the Rules of Professional Conduct.

Very truly yours,



Marilyn Denny