

**ELDER LAW AND DISABILITY RIGHTS SECTION COUNCIL MEETING
APRIL 2, 2011**

Offices of Caroline Dellenbusch
2944 Fuller Ave. NE Ste. 100
Grand Rapids, MI 49505
10 a.m. to noon

Present: Paul Sturgul, J. David Kerr, Caroline Dellenbusch, Jill Goodell, Sara Schimke, Dan Blau, Dolores Coulter, Brad Vauter, Michele Fuller, Chris Barrett, James Bauer, Angela Swanberg, Jackie Rygiel-Sprague, Will Lucias, Don Rosenberg, Bob Anderson, Sandy Mall, Art Malisow, Christine Caswell, John Payne, ___ Fornberg?
Guest: Todd Tennis

Paul Sturgul opened the meeting with introductions.

Minutes: The minutes from the March meeting were approved by unanimous consent, after spelling was corrected for a few names of those in attendance.

Treasury Report: The unaudited financial reports for February had been emailed earlier, by the section Treasurer. The largest expense categories this fiscal year, to date, surrounded conference and seminar expenses (including speaking fees, etc.) and legislative consultant fees. The largest revenue items were dues and seminar and conference income. The ending fund balance as of February is \$85,914.27. The reports were accepted as presented.

Old Business:

-Spring Conference. The conference went well and Paul Sturgul thanked Harley Manela for his work.

-Nursing Home Model Contract. No report.

-Section Newsletter. John Payne reported efforts on this are shaping up well. At present there likely will be articles or information about legislative highlights, an article on the spring conference, a calendar of various events and a current events column, and also a possible article on uncapping of property taxes, POLST, etc. Payne reported that Christine Caswell (who has previous publication experience) will provide editorial/publishing experience, and that others who have been working on the project include members who are writing specific articles, perhaps on a one time basis, and those helping with regular features like the organization event listings, current events column, etc. John Arenz and Christopher Smith are serving on the project too. The goal is to get a draft of the newsletter to the Council for review by April 30th or so, and then, at the May meeting, get approval for

publishing/distribution. Those with possible articles or contributions are encouraged to contact Payne.

The idea of providing a stipend for the newsletter editor, of \$500 per issue, was also raised. This has been done elsewhere, and the section does pay a modest stipend to those who help coordinate the spring and fall conferences. Jill Goodell moved, with support from Caroline Dellenbush, that a stipend of \$500 per issue be paid to John Payne. Some discussion ensued, and Payne said perhaps the money should really be paid over to Christine Caswell, if approved. Paul Sturgul suggested that if it was paid, it could be paid to Payne as the official editor and he'd be free to do what he wanted thereafter. Other discussion ensued, and a motion was made to table this issue. Two abstained on the motion to table but all others voted in support, so the issue will be brought up at the meeting May 7th. The actual mechanism of publication/distribution is still being refined too—a blast fax type distribution or notice was suggested by David Kerr, others suggested trying to distribute it a bit like NAELA.

-BEM 401/Pooled Trusts. The changes in DHS policy that went into effect at the beginning of April were discussed in some detail. The section's response to the more restrictive language will take a three-pronged approach: administrative, legislative and litigation. The pooled trust funds can be helpful to those over 65 on Medicaid, improving the quality of life for those involved. When bed hold issues crop up, or glasses or dentures are needed, for example, tapping into a pooled trust makes a real difference.

Meetings and discussion with legislators have already taken place. A letter from a few state representatives will be sent to DHS administrator Corrigan, with the hopes that that will encourage a change in the policy. Representative Cotter, from the Mt. Pleasant area, and a member of the section, has agreed to such a letter, but as of the April meeting date, hadn't sent it out.

In the meantime, it was suggested that we might want to find sponsors for legislation that would ease the way for such pooled trusts to be able to be used by those over 65, and to see what other states have in this regard. Since state budget issues loom large now, it may be difficult to get the legislature or the governor to focus on other bills—however, any bills introduced that could be framed as a smart thing to do fiscally, might some traction.

Dan Blau wondered whether litigation could help, or hurt, our section's administrative and legislative approaches. That is, might the litigation, or threat of same, help convince the head of DHS to rewrite the BEM or encourage legislators to pass a bill to short cut the litigation? Or, could litigation sour those involved, and they'd simply delay action pending any court order? Legislative consultant Todd Tennis suggested the section shouldn't worry overmuch about proceeding along all these fronts, if need be. He thinks it is a bit tricky to predict anyway, and if done thoughtfully, litigation need not stop all progress on other fronts.

Litigation on the issue of the revised BEM 401 and the pooled trust issue is the third front. Michele Fuller has identified possible plaintiffs. Fuller and others argue that this is a significant change from past policies, and Sanford Mall suggested this new policy would simply preclude members from being able to make an argument before an ALJ and convince the ALJ to allow a trust for any of their clients. Mall also said he may have a case he could bring, if things fall into place, for a client of the firm. Mall added that the research he's done so far suggests even the pooled trusts themselves might have standing or be allowed to be a party in a declaratory action. Dolores Coulter thinks there are arguments the state would use too however, and notes that courts tend to give weight to administrative actions and decisions by agencies, and has read some who believe the pooled trusts are divestment. It was noted by Paul Sturgul that because of the CMS position or letter, in the past, and the arguments folks like David Lillesand have made (suggesting pooled trusts for those over 65 are prohibited under Medicaid legislation) that bringing a case could be tricky. In Minnesota, guidance is being sought from CMS. Other discussion ensued about any suit in regards to this issue—at least with financial support of the section, and ancillary issues like the timing of a suit, etc.

A motion was made by David Kerr, and seconded by John Payne, that the section provide \$5000 in support of litigation to challenge the restrictions on the pooled trusts, and that the section officers monitor the spending. More discussion ensued, and Brad Vauter and others asked whether this litigation is more important to the section and the people we serve, than any other issue that might also need challenging such as standard of promptness issues, qualified spouse IRA's, and nursing home dual certification issues., which he thought might affect a good deal more of the population we serve. Even if we agree it is a good thing to litigate and use section funds to help in such litigation, how much money do we spend, since there are no guarantees we'll get attorney fees reimbursed? Others asked what the litigation costs would be—at this stage they seem to be unknown. Fuller and Anderson noted that Mall and the firm, have already done a lot of research on the issue, and seemed ready to go, and Fuller added that, even though there are other issues the section might address, this issue is here now AND, if these barriers to the use of pooled trusts were broken down, many more people might be able to use such trusts. The vote was called and the motion was approved to provide section support up to \$5,000 for litigation on the pooled trust/BEM 401 issue.

-BEM 400. Paul Sturgul has been trying to reach Bridget Hefron for clarification on the recent position by DHS on jointly held real properties and how they are treated. Once again it seems a barrier to Medicaid qualification is being thrown in the path of applicants. The state's position seems to be out of order given SSI rules and the state's Medicaid plan. Don Rosenberg noted that this move by the state seems even more ludicrous than the state position on pooled trusts. Rosenberg also noted that David Shaltz has been working on the issues, and has some ideas about how this could be fixed. Others noted that finding plaintiffs, if need be on this issue, would be

easy. It was suggested that, on this issue too, the section might want to ask legislators to weigh in with a letter to DHS director Corrigan.

-Council Vacancy. No action. Sturgul said at previous meetings we'd let those interested in serving on the council attend meetings first, and that if anyone has a good candidate in mind or wants to be a candidate; they should send an email to Sturgul.

-POLST. Bob Anderson reported that he attended a nationwide meeting on the POLST concept and noted that the La Crosse Wisc. area has reported great success, and that community involvement and involvement by a wide group of stakeholders is a key to the success. POLST efforts on this are also taking root in Grand Rapids Michigan. If Michigan is to make more progress, Anderson notes, the Michigan Medical Association must also become involved. As the forms have developed with rewrites and amendments along the way, Anderson notes there has been a push to cover as many of the problems and issues as possible including authority issues involved when guardians or patient surrogates might be involved. As part of the work on the POLST efforts, Anderson also noted differences in hospital "cultures" and lawyer "cultures." Suggestions at past meetings to allow for electronic "forms" are also being incorporated.

-Litigation Committee. Sandy Mall updated the council on the PEME litigation and is tracking down PEME requests that have been really approved. Don Rosenberg says a few of his clients are among those who got successful outcomes as a result of the PEME litigation, and Dolores Coulter-who has a named plaintiff client--says she still has to make her claim. Both noted that the settlement and order provides more relief for named plaintiffs (even post death) than the rest of the class. The litigation was viewed as a success and Mall said the \$35,000 in attorney fees that the state will be forced to pay; will be reimbursed to the section.

Some of the other possible litigation efforts and concerns were covered earlier in the meeting. However, Mall and others noted that possible litigation might also be warranted in issues such as IRA's of the community spouse, dual certification issues in nursing homes, and standard of promptness. Because so many different cases and issue abound, and because it is hard to prioritize cases at this juncture, David Keer suggested a litigation plan might be worth developing. Because there are no guarantees every lawsuit would fall in our favor or require reimbursement of attorney fees, some noted, it seems smart to focus efforts. Individual attorneys, of course, can take any action they think warranted, but when the section helps support litigation, the impact issues and budget issues loom larger. Rather than authorize any more spending at this time, it was moved by Caroline Dellenbush, with a second by John Payne, that the council set priorities in litigation and securing plaintiffs. The litigation committee can then report back to the council with further recommendations. The motion carried.

-Health Care Reform Committee. Dolores Coulter said there is no committee report, but she did note pressure to scrap the CLASS act, or parts of it, by the new Congress.

-Legislative Committee. No report.

-Unauthorized Practice of Law. Bob Anderson reports that the State Bar of Michigan might consider taking more aggressive stances against trust mills and other such operations where attorney involvement in the process is minimal, if that. A trust mill case against United Investments has been approved, and a grievance against an ESI attorney may be filed. As in the past, the definition or lack thereof, of “the practice of law” in Michigan, handicaps those who would like to cut down on UPL activity. Anderson also noted that the complaint process is a grueling one. Many seniors, especially, back down on (or don’t even start) UPL complaints due to the grueling nature of the process. Brad Vauter moved, with a second by David Kerr, that the section write State Bar President Jenkins, to make sure vulnerable seniors aren’t needlessly intimidated by the complaint process. The motion carried.

-New business. Paul Sturgul advised that the August meeting of the section would be held in Marquette this year, rather than in Ann Arbor. He also announced that the fall conference will again take place at Crystal Mountain, near Cadillac, MI, and that Caroline Dellenbusch will work with Brad Geller in shaping the conference and communicating about the conference to the council. Others working on conference ideas had been encouraging us to bring in Michael Gilfix, as a speaker for some workshops or sessions, and it seems he can do so. A motion was made by Don Rosenberg, seconded by Brad Vauter, that the section authorize a payment of \$1500 to Gilfix as a speaker at our fall conference, and that the section also cover reasonable expenses to bring him in to the conference (such as his flight, etc.) The motion carried.

The legislative update report was given by the legislative consultants, and supplemented the written report.

Caroline Dellenbush moved to adjourn the meeting with support by Jill Goodell, and the motion carried.

Submitted by Brad Vauter, secretary.