

Minutes
Elder Law and Disability Rights Section State Bar of Michigan
August 6, 2011
Marquette, MI

Attendance in person and by telephone: Brad Vauter, Rosemary Buhl, Will Lucius, Angela Swanberg, John Harrison, Judge Thomas Solka, Paul Sturgul, Susan Wideman, Bob Anderson, James Steward, and by telephone: Christine Caswell, Christopher Smith, David Kerr, Sara Schimke, Jackie Sprague Rygell, David Sprague, Nolen Bush, Beth Swagman, Dolores Coulter, John Payne, Harley Manella, Chris Berry, Michelle Fuller, Caroline Dellenbusch, Judy McFalda

1. Introductions - Honorable Thomas L. Solka, Marquette County Circuit Court Judge, welcomed everyone to Marquette and gave a brief presentation about the Circuit Court Building in Marquette—and invited those who wished to tour the court after the meeting. He noted the court was dedicated in 1904. He also noted his daughter works for an elder law firm in Wisconsin.

2. Approval of Minutes - Brad Vauter presented the May minutes and they were approved by the Council.

3. Treasurers Report - Rosemary Buhl reported that the balance in the section's account was \$97,086.33 and noted that attorney Bill Goodman still owed the section the reimbursement for attorney fees.

4. Legislative Update: Capitol Services provided an update and also asked if we were in support of SB 348—which we were, in concept—though we might not get too active in the issue right now.

5. Old Business:

Spring Conference - Harley Manela is contacting the Inns of St. John about spring conference details, a possible mid March date and also a possible refund or check on the expenses of the room for the council meeting last spring.

Section Newsletter - John Payne mentioned that the newsletter draft had been sent out to the officers and council again for review before distribution to the entire section. The newsletter will be quarterly and the next submissions will be due in Oct for the November edition. The officers gave the go ahead for distribution of the draft sent earlier.

BEM 401 Pooled Trusts - Court Case re: Transfers into Pooled Trusts—Michelle Fuller briefly discussed the decision recently on pooled trusts. The good news is that the court indicated they didn't think deposits to a pooled trust were "transfer for less than fair market value." The bad news is the decision had no real analysis or discussion as to whether or not these transfers were consistent with federal law, and the state's policy wasn't really completely slapped down by the

decision either. If Michigan litigation ensues, Paul Sturgul reminded those present that the section already has allocated \$5,000 to support litigation when the right case goes forward.

BEM 400 Jointly Owned Real Property—Caroline Dellenbusch reported that, at least for one client, she has attached an appraisal saying the property value interest, under the conditions, was a value of zero—and the client's Medicaid has continued.

Estate Recovery Efforts by the contractor hired by the state to effectuate estate recovery under the current law and regulations are underway. A spate of approx. 7000 letters according to one report, have been sent to heirs, and personal representatives and even those who may have helped the deceased apply for Medicaid in the first place. The letter is a sort of fishing expedition, and various individuals including Bob Anderson, James Steward, David Kerr, John Payne, and others offered their quick thoughts on the matter. Many respond with a short note saying no probate estate open or contemplated, a few respond not at all, and others, if they think they need to make a hardship and there is a house in the estate, complete the form and claim the hardship exemption, to protect themselves. Given due process issues, it is important to look at the dates of the notices, the dates the client's received Medicaid services, etc. Likely a strong argument can be made that only those receiving Medicaid services after July 2010, would properly have been on notice to estate recovery, and even that date may be argued.

As to the proposed new estate recovery bills (SB 404,405,406) Rosemary Buhl reported a meeting on the issue with sponsor Senator Kahn, went fairly well. Kahn had only sponsored them at the request of the administration, hadn't fully read them, and didn't know that about the time these were being introduced the feds finally approved the estate recovery bill from 2007. While Kahn might still harbor the illusion that quite rich folks can game the system and get Medicaid, a constituent from his own district told him that really wasn't the case, and Kahn seemed open to reviewing the bill further, said the bill wasn't on a particularly fast track, and seemed receptive to the idea that costs of recovery, and possible detrimental impacts on communities (more neglected or empty houses in Michigan, etc.) from new estate recovery efforts could be considered. Others noted that even in states with draconian estate recovery laws, the reality is that they are not always enforced, and all were urged to study the matter further and work with other sections and organizations so they know how this might affect them as well. As such, anyone with contacts to the real property section, or bankers or others, should alert them about the proposed bills.

Report on meeting with Director Maura Corrigan of Department of Human Services regarding APS staffing - Todd Tennis, Harley Manella, Brad Vauter and others met with DHS Director Maura Corrigan for about an hour and she noted that some modest increased staffing levels have been budgeted for but that any real additions to APS staffing would likely be a year or more away, given the budget process. She welcomed support for more staffing from the section, but also seemed to hope that cross training efforts with law enforcement and others, such as probate judges and so on, would be a big help. The study out of Utah,

regarding the cost to that much smaller state, due to adult abuse and financial exploitation, was discussed and reports about the study were shared with her. There could actually be a cost benefit reason to increase APS workers, we pointed out, so besides the human dimension, there is a dollar and sense aspect to increased staffing. And the state's new budget director hails from Utah, so we also were given the go-ahead by her to set up a meeting with him too. As a spin off to this discussion, she also noted the need to tap more federal dollars, and mentioned the relative low levels in which older people from Michigan are using Veteran's benefits of various kinds. Manella and she discussed meeting with Hardiman later, to see if these services could be better utilized by Michigan residents. Finally, and again as a sort of spin off from the APS staffing level meeting, we discussed very briefly the pooled trust issue and others where the department might be deviating from federal regulation or policy and invited ourselves to arrange future meetings to discuss that in more detail.

6. Committee Reports

A. POLST Committee - Bob Anderson reported that a spirited meeting the day prior to the meeting was interesting in part because only about 3 attorneys were on the 40 person conference call. The group is shaping up with even better drafts of forms and some new structuring of committees and subcommittees to help reach the point where all can be in agreement about POLST in the context of Michigan's DNR and other related laws. A motion was made by Kerr and supported by Dellenbusch, to allow the POLST committee to cover telephone conference call expenses via our existing conference call system or the like, so that the POLST group can continue to meet via phone. The motion carried.

B. Litigation Committee – It was noted that reimbursement has not come in from Goodman yet, and some were recruited to call him or inquire about the money which could go back into our treasury. As to possible future litigation, John Harrison urged the group to tackle the state's backward treatment on IRA's and 401 K's of the community spouse. Since defined benefit plans are becoming less common, and IRA and defined contributions becoming more common, we will see more and more of our client families with these assets, and it makes no sense the state should not follow federal regulation on these assets. Paul Sturgul said he'd like to see this at the top of the list of items to possibly litigate in the coming months, even though some use the probate courts and secure an order as a sort of run around the department—this shouldn't be necessary though. The litigation committee was asked to report back with issues worth litigating.

C. Health Care Reform Committee - Dolores Coulter said that per the June 23rd meeting of the group, a paid claims tax by the entire health insurance industry might actually be a good way to help shore up Medicaid and so was gathering support. Independent exchanges are being explored by the state as part of the federal health care reform, but it likely won't shape up much until this fall.

D. Legislative Committee - Brad Vauter said the legislative report was attached

and noted too that SB 92 might be up for a vote soon, even though some hope it could still be tweaked more.

E. Unauthorized Practice of Law Committee - Bob Anderson said the committee of the bar is trying to find the right case and facts and all in regards to UPL and some of the trust and veteran's mills. In addition, we are being urged to work with the state bar UPL folks when possible in outreach to the general public, as well as perhaps, increased reporting on UPL activity. In some areas UPL committees are trying to do more active investigations or have investigators or the like at presentations and pitches of trust or veterans mills or the like.

7. New Business

A. Fall Conference - Crystal Mountain 9/21/11 - 9/23/11

B. Nominating Committee—if you have suggestions for new council members, email Paul and Caroline.

C. ICLE—Stephanie Sternberg is the new ICLE seminar planning attorney and would like to work with us in light of the spring and fall sessions we already hold, to see if they can help, or create other seminars that would be useful and not duplicate the section's efforts. She'd appreciate any ideas for speakers or courses, and wondered if we thought an ICLE "elder law" certification program might be warranted down the road.

Future Meetings -

September 23, 2011 - Crystal Mountain

Submitted:

Brad Vauter