

# ELDRS Update

## Spring Edition 2021, Volume XI, Issue 1

*This is a publication of the Elder Law & Disability Rights Section of the State Bar of Michigan. All opinions are those of the respective authors and do not represent official positions of the Elder Law & Disability Rights Section or the State Bar of Michigan. Comments or submissions should be directed to Christine Caswell, Editor, at [christine@caswellpllc.com](mailto:christine@caswellpllc.com).*

## ***ELDRS Legislative Week open to all Members***

### **Meet your legislators one on one**

*By Christine Caswell, ELDRS Chair  
Caswell Law PLLC, Lansing*

ELDRS is hosting a virtual Legislative Week May 10 -14. To schedule meetings with your Michigan legislators, send your name and address to [courtneyvancamp@capitol-services.org](mailto:courtneyvancamp@capitol-services.org), and meetings will be arranged through Capitol Services, Inc.

Past-chair Christopher Smith initiated Legislative Day in 2019 with members traveling from all over the state to attend. For obvious reasons, we canceled in 2020. But, not wanting to lose the tradition, we are doing virtual meetings this year, allowing members to both promote ELDRS legislative causes and to establish a relationship between practitioners and legislators.

There will be a training session at 3 pm on Monday, May 10, and a follow-up “happy hour” at 4 on Friday May 10. Links will be sent once you register. If you have any questions about the event, please contact either Courtney VanCamp or me at [christine@caswellpllc.com](mailto:christine@caswellpllc.com).

## ***They Did What??***

### **Nursing Home Camera: how hidden cameras catch employee abuse**

*By Patricia E. Kefalas Dudek, Patricia E. Kefalas Dudek & Associates, Farmington Hills*

I recently read one of the most shocking headlines in the Oakland County Section of *The Detroit News*: “Detroit area home inspector allegedly caught on video ‘pleasuring himself’

### ***Save the Dates***

- **Legislative Week** – May 10 – 14, 2021, virtual; Training 3 pm, Monday, May 10; wrap-up meeting 4 pm, Friday, May 14
- **Fall Conference**, October 4-6, 2021 at the DoubleTree by Hilton Hotel in Bay City (note, this is Monday-Wednesday)

with Elmo Doll.”<sup>1</sup> This happened to a family having a routine inspection as part of selling their home. The inspector entered the two-year-old’s bedroom, and his criminal behavior was broadcast to the homeowner in real time via the nursery camera in the room. The homeowner, who was justifiably horrified, recorded the entire thing, which thankfully led to the man being criminally charged. I agree with Oakland County Sheriff Mike Bouchard who said in a statement, “Just when I think I have seen it all, someone steps up and surprises me with a new level of disturbing actions.”<sup>2</sup> He then continued, “We cannot always presume that employers have done their job and have confidence their employees are trustworthy and are there to do the job for which they’ve been hired.”<sup>3</sup>

This much joked-about caught-on-camera situation happened in the backdrop of a pandemic of epic proportions where some of our most vulnerable citizens are isolated from their loved ones for months at a time. I shudder to think what may have been happening without oversight. Thank goodness technology assisted many in reducing their isolation.

I am frequently asked about the legality and or admissibility of both audio and visual recordings in legal proceedings. The purpose of this article is to provide some clarifications to those considering the use of cameras and or audiotaping.

Michigan is considered a one-party consent state, which means if one person on the phone and or video call consents, then a recording is allowed. So, if I were fighting with my mother, I could legally record the fight without her consent. A third party, however, is prohibited from doing so. So, if a neighbor tried to record the fight between me and my mother without consent from both of us, it would violate the privacy rights of both myself and my mother.

This law can be found at MCL 750.539(c) and reads:

Any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs, or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$2,000.00, or both.

This law protecting the legitimate First Amendment right to privacy from third parties has been in effect in Michigan since 1967. Furthermore, the statute was reviewed by the

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<sup>1</sup> Mike Martindale, “Home inspector allegedly caught on video 'pleasuring himself' with Elmo doll,” *The Detroit News*, April 7, 2021.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

Michigan Court of Appeals in the case of *Lewis v. LeGrow*, 258 Mich App 175, 178 NW2d 675, 2003. The Court of Appeals ruled that a bedroom is a “private place” within the meaning of the statute.

So, what does this mean to a person in a nursing home, or a licensed group home? Well, according to some Michigan nursing home neglect lawyers, a hidden camera and or an audio recorder can be placed in the room of the nursing home resident with their consent or that of their legally designated representative, (i.e., a guardian or their agent under a power of attorney).

There is no question that folks with disabilities and seniors that live in congregate situations are often abused and neglected. The hope for is that the presence of a camera would/could dissuade the abuse or may be used to report abusive or neglectful staff when the person residing there is unable to do so.

The recording of abuse and neglect must be balanced against the privacy issues for the other folks living in the facility. Contrary to what has recently been reported in many of Michigan’s news outlets, Michigan law allows the use of a camera or “electronic monitoring device” as defined in MCL 333.1101, Michigan’s Public Health Code. Again, if the resident, or their legal representative, is aware of the installation, pays to install it, it is installed with the privacy of others in mind, and there is messaging that explains the presence of the device, for example to the other residents of the facility, it is legal!

Recently, there was a bill proposed by Sen. Runestad allowing cameras and recordings in nursing homes. Gov. Whitmer took some heat for vetoing the bill. However, had it passed as written, it would have done the opposite of its intention; it would have forbidden the use of both cameras and audio recordings in a court of law.

Much like body camera recordings and black box recordings, concerned citizen recordings have provided a greater level of accountability. Monitoring devices in settings where long-term services are provided will do the same, and, if the owner of the facility refuses to allow it, one might question placing a loved one in their “care.”

Sadly, just as Sheriff Bouchard stated, there will always be folks who will shock us with their disgusting behavior. But surveillance is a modern and effective way to reduce it. For those who continue to abuse and neglect others with their disturbing and possibly criminal behaviors, it holds them to greater accountability, just as it did for the inspector.

If you have questions related to this issue, feel free to reach out to the Michigan Long-Term Care Ombudsman Program, Disability Rights of Michigan (formally known as Michigan

Protection & Advocacy Service), or any member of the Elder Law and Disability Rights section of the State Bar of Michigan.

*Ed. Note: While the ELDRS Council supports the use of recording devices in care settings, on Nov. 7, 2020, ELDRS opposed SB 77 as passed as Substitute 3 regarding cameras in the nursing homes. ELDRS believes SB 77 as passed as Substitute 3 does not adequately allow for the effective use of cameras in the nursing homes. ELDRS believed that Substitute 3 actually helped long-term care facilities because it did not allow for audio recordings or for any recordings to be admissible in court.*

## **Legislative Updates**

*By Todd Tennis, Capitol Services, Inc.*

### **Legislature and Governor Wrestle Over Pandemic, Budgets**

The running battle between the Whitmer administration and Republican legislative leaders in Michigan over pandemic policies has dominated Lansing politics for over a year. Democratic Gov. Whitmer's use of executive orders and the powers of the Michigan Department of Health and Human Services (MDHHS) to implement restrictions on gatherings, require the use of personal protective equipment, and shutter schools, youth sports, and businesses has sparked a backlash among GOP leaders. Over the past 12 months, the Michigan House and Senate have continuously attempted to reduce the governor's executive authority, using their power over the state's purse strings and legal challenges as their main tools.

The latest battle centers on the 2022 budget process, as well as the appropriation of federal COVID-19 relief funds. In February, the House and Senate passed supplemental budget bills to spend federal pandemic relief dollars that were approved in Washington last December. The legislature conditioned nearly half of the approximately \$2 billion targeted for schools on Gov. Whitmer signing companion legislation that would remove the ability of the MDHHS to issue pandemic-related orders. Gov. Whitmer vetoed that companion bill, which resulted in just over \$800 million in school aid funding going unappropriated. Those funds can still be spent in Michigan, and the legislature is, as of this writing, putting together another supplemental bill to appropriate it. However, once again, the funding is being tied to other legislation that would limit Gov. Whitmer's authority, making its future uncertain.

The fight over executive powers is also being carried out during budget discussions regarding the 2022 fiscal year. Gov. Whitmer released her budget proposal for the next fiscal year in February, and, in mid-April, the House and Senate began voting on their first

drafts. The Senate proposals, so far, are fairly typical of the historic budget process; they agree with the governor on some funding issues and differ on others. The House, however, is adding numerous unprecedented concepts into their budget proposals centered on the theme of legislative oversight.

The most unusual proposal contained in several of the House budgets would move the process to a quarterly procedure instead of an annual one. The House is proposing to issue state funds in three-month increments, which would require the budgeting process to be, for all practical purposes, nonstop for the next year. Proponents of the change argue that the legislature's primary role is oversight of state government, and that dividing appropriations into three-month chunks will strengthen that role.

Other changes would drastically reduce staffing funds for unclassified personnel. Every department has a small number of officials who fall outside the state civil service system and are therefore "unclassified." These positions include leadership and deputies appointed by the governor or hired directly by department heads. Again, proponents of the change justify the staffing cuts by stating that it will provide greater oversight by forcing each department to appear before the House Appropriations Committee to justify each unclassified position.

While these items in the House budget proposals are unprecedented, they are not beyond the purview of the legislative branch. The legislature has proposed and even passed unusual budget iterations in the past. During the Snyder administration, the Legislature took the opposite tack and actually passed multi-year budgets with the idea that it would provide better long-term clarity for those receiving the funds. During the Granholm administration, the legislature adopted an approach based on a book titled "The Price of Government" that attempted to reassess state funding from top to bottom. Both of those concepts were fleeting, but it is not unusual for lawmakers to experiment with new ways of budgeting, especially when it has the added benefit of putting pressure on the executive branch on items of disagreement.

That said, the odds of the state moving to quarterly budgets are slim. The reaction to the proposal has been almost universally negative, and, so far, it does not seem likely that the Senate will sign on. Still, it would not be surprising if, as the two legislative chambers and the governor try to work out a final budget, greater oversight tools are inserted into the final version. Whether that budget process is completed by July (as is hoped by all parties involved), or drags on into the summer or later, is still an open question.

## ***Back to Basics Webinar Series***

*By Amanda Murray, Bassett & Associates, Ann Arbor*

Our Back to Basics Webinar series continues as an exclusive benefit to ELDRS Section members. This benefit extends to your assistants and paralegals as well. For more information, contact Amanda Murray at [amurray@bassettlaw.com](mailto:amurray@bassettlaw.com). Stay tuned to SBM Connect on how to register.

The following webinars are:

- May 13, at 12 p.m. - “Alternatives to Long-Term Care Facilities,” with Michelle Danou, Ombudsman.
- July 15, at 12 p.m. - “Appealing CMH Denials,” with Marianne Huff, President and CEO, Mental Health Association in Michigan
- September 21, at 12 p.m. - “Disability Rights” with Nadia Vann, Buhl, Little, Lynwood & Harris, PLC; Jill Babcock; and Michael Bartnik, Law for Baby Boomers, PLLC

## ***Calendar of Events***

*By Erma S. Yarbrough-Thomas, Neighborhood Legal Services Michigan Elder Law & Advocacy Center, Redford*

**ELDRS** – [www.michbar.org/elderlaw](http://www.michbar.org/elderlaw)

All meetings will be virtual until further notice:

- June 5, 10 a.m. ELDRS Council Meeting
- August 7, 10 a.m. ELDRS Council Meeting, Steward & Sheridan PLC, 205 S Main St, Ishpeming, MI 49849
- September 11, 10 a.m. ELDRS Council Meeting
- October 4-6, ELDRS Fall Conference, DoubleTree Hotel, Bay City, (if we are safely able to host an in-person meeting); note this is Monday through Wednesday
- October 5, Annual Meeting- DoubleTree Hotel, Bay City, Time TBD

**NAELA** – [www.naela.org](http://www.naela.org)

- June 16, 1-2:30 pm (EDT) Transition Planning for Young Adults with Disabilities: What the Family Needs to do When the Yellow Bus Stops. Presenter, Adrienne Arkontaky, VP of Cutty Law Firm

**ICLE/SBM** – [www.icle.org](http://www.icle.org)

- May 11 - Pandemic Lessons Learned: New Tools to Prosper in Estate Planning, Livestream, Presenters: Terrence G. Quinn and Douglas A. Mielock

- May 20-21 - Probate & Estate Planning Institute, 61st Annual- Livestream
- June 22 - Masters in Litigation: In Trial with Judge Terrence G. Berg, Livestream
- June 29 - Microsoft Excel for Lawyers, Livestream
- June 29 - Technology to Efficiently Work Remotely and Manage Your Workforce, Livestream
- August 4 - ICLE's Partnership Training: Elder Law Lunch & Learn, Livestream
- August 18 - ICLE's Partnership Training: Guided Resource Tour, Livestream
- September 14 - Drafting an Estate Plan for an Estate Under \$5 Million, Livestream
- September 17 - Elder Law Institute, 6th Annual, Livestream
- October 21 - Administrative Hearing before the MDHHS: An Interactive Workshop, Livestream