

## AFFIDAVIT OF COUNSEL

NOW COMES Carol F. Barton, of Worcester, Massachusetts and hereby depose and

states that:

1. I am an attorney in good standing, licensed to practice in the Commonwealth of Massachusetts, with a principal place of business at 71 Elm Street, Suite 100, Worcester, Massachusetts and obtained a Master of Laws in Estate Planning and Elder Law from Western New England College School of Law.
2. A large portion of my law practice involves assisting elders with MassHealth long term care applications. Over the last several years I have prepared numerous MassHealth applications. I have attended numerous MassHealth administrative fair hearings during the past twenty years while practicing elder law.
3. It has been my experience that when a notice of denial is issued for excess countable assets, the notice will simply state that the application was denied, refer in general terms to a MassHealth regulation and state the amount of the applicant's assets that exceeds the standard allowance of \$2,000.00. The notice of denial will also include information regarding the applicant's right to appeal the denial. The notice of denial does not contain an explanation disclosing how the excess asset amount was calculated, how the applicant violated the referenced regulation or how MassHealth arrived at its determination. The MassHealth denial notice does not provide a clear statement of the specific reason(s) for the denial of benefits.
4. I often must file an appeal despite not knowing the specific reason(s) for the issuance of a denial.
5. Despite submitting multiple requests to the MassHealth case-worker for clarity on the issuance of the denial, it has been my experience not to receive clarification before the hearing. This lack of clarification adversely impacts my ability to prepare for and participate in the hearing and increases legal fees.
6. It appears to be MassHealth's common pattern and practice to refuse to provide a written explanation for the denial, which forces the applicant to participate in an appeal. It has been my experience that the applicant learns of the reason for the issuance of the denial at the hearing.
7. It is very uncommon to receive a legal memorandum before the hearing. It has been my experience that the MassHealth representative delivers a legal memorandum, usually written by the MassHealth's legal department, to the applicant at the fair hearing. The memorandum is usually lengthy and contains numerous arguments supporting the notice of denial. I have to read the memorandum at the hearing to determine MassHealth's reasoning for issuing the denial. As a result, the applicant has no ability to prepare and present his/her challenges to the denial to the hearing officer at the hearing.

8. Although the hearing officer will often leave the record open for the applicant to file a response brief, this pattern and practice causes additional delays and gives MassHealth an unfair advantage during the presentation before the hearing officer.

9. This situation is even more egregious for individuals who proceed without counsel as they are unlikely to be aware of their right to request the hearing officer to leave the record open to provide the applicant with an opportunity to respond to MassHealth's memorandum.

10. This pattern and practice is particularly problematic when dealing with complicated applications that contain irrevocable trusts. Often the applicant is forced to participate in a hearing with no understanding of which trust provisions MassHealth deemed to violate Medicaid law or which regulations rendered the trust assets to be deemed countable. I have a current trust appeal, where the fair hearing is scheduled to occur in nine business days and I have no idea why MassHealth determined that the irrevocable trust constitutes a countable asset. I have requested clarification from the caseworker regarding the denial but no reason or clarification for the denial has been provided.

11. My clients are often in extremely vulnerable positions, they are elderly, in need of long term care benefits and have limited resources. They are concerned about delays and increased costs. This pattern and practice of failing to provide a clear statement of the specific reason(s) for the denial, of withholding information and forcing the participation in a hearing not only violates the applicant's due process rights but it also increases stress at a time when applicants are very vulnerable.

12. In my experience, I have represented individuals whose applications were denied on a legal theory that had been discredited and/or overruled in prior MassHealth hearing decisions and/or court decisions, and in all of such cases MassHealth's memorandum failed to disclose the existence of the contrary authorities.

13. Many other attorneys have told me that they have had similar experiences as I described above. I have also been told by other elder law attorneys that their subpoena requests to the hearing officers are routinely denied; that MassHealth case files routinely do not contain the reasons for the denial; that MassHealth workers often cite attorney-client privilege as their reason for not providing an explanation for the denial of benefits before the fair hearing and that MassHealth denials are automatically generated by a computer.

14. A recent example of a defective denial I received occurred on January 9, 2018. I filed an application for long term care benefits for a married applicant. The denial was issued based on program limits for a single individual. I called the MassHealth caseworker and was told, "the figures are all wrong, they don't make sense, because the denial is for a single person, just ignore the numbers, it was issued by the computer." I was required to file an appeal and participate in a hearing to resolve the issue and obtain benefits. Three notices of denial were issued on the application which caused a substantial delay in the approval of benefits.

SIGNED under the pains and penalties of perjury on this 14th day of May, 2018.

Carol F. Barton  
Carol F. Barton, Esquire