

## AFFIDAVIT

I, the undersigned Carol Cioe Klyman, hereby depose and state as follows:

1. I am an attorney in good standing, licensed to practice law in the Commonwealth of Massachusetts, and a partner in the firm of Shatz, Schwartz and Fentin, P.C., Springfield, Massachusetts.
2. I have worked in the field of estate planning, special needs planning and elder law since I passed the Bar in 1997, and before that, was employed as a paralegal in the estate planning department at my firm where I assisted clients in applying for MassHealth benefits.
3. As an attorney, I have represented clients in several dozen appeals before the MassHealth Board of Hearings, in several Superior Court appeals of adverse administrative decisions, and was a member of the MassNAELA amicus team that filed amicus briefs in recent elder law cases before the Appeals Court and Supreme Judicial Court.
4. I also represent clients in trust and estates litigation before the Probate and Superior Courts in the Commonwealth.
5. In numerous appeals before the MassHealth Board of Hearings I have come to experience MassHealth agency practices which would be questionable at best and likely not tolerated in other tribunals, whether at the agency level or trial court level.
6. Although versions of these violations have occurred over the course of many decisions, they seemed to coalesce in one case, *Lulich v. Dougherty*, which resulted in a Superior Court decision favorable to my client (Middlesex Superior Court No. MICV2010-04007, Henry, J.). In *Lulich*, these violations by the MassHealth agency included, inter alia, (1) referencing an administrative hearing decision (BOH 0801972) that the Superior Court had overturned on appeal (*Foley v.*

*Dehner*, Hampden Superior Court No. 2008-0850, June 3, 2009, Kinder, J) for the very proposition for which the decision was cited as support; (2) failing to alert the hearing officer to the Superior Court's negative treatment, which the agency did not appeal; (3) raising new facts and legal arguments in a memorandum submitted after the hearing, so that witnesses could not be cross-examined or facts refuted by the appellant's testimony. In the hearing on the case, the hearing officer told witnesses who had direct knowledge bearing on the Agency's allegations not to speak.

7. Citing to a case that is bad law perpetrates a fraud on the tribunal, makes a mockery of the Board of Hearing "fair hearing" procedure, G.L. c. 30A and the regulations thereunder, and shows bad faith. It forces elders and disabled individuals with limited resources to file appeals in order to learn why their application was denied, and puts them at a disadvantage that violates the spirit and letter of Chapter 30A and its regulations.

8. A 2010 case, which was appealed and brought up to the Superior Court two times, points out the problems appellants face when they question MassHealth agency decisions. In 2010, a caseworker provided me an advance copy of the agency memorandum, a document detailing the factual and legal basis for denying the application. The hearing officer, Mark Tonaszuck, stated on the record that it was helpful for the hearing officer and all concerned to have documents exchanged in advance, that "[t]he Board of Hearings has tried to get that to happen, and I think there's a misunderstanding on the part of some of the workers ....where they don't believe that they're allowed to pass on that information." He stated that he "can't order MassHealth to provide anything outside of the hearing . . . ." (Transcript p. 37).

9. The remand hearing in 2013 (BOH 1021232) went differently. Prior to the hearing, a paralegal from my office went to inspect the application record at the MassHealth Enrollment

Center, which is allowed under the fair hearing rules. "This is Not a Public Document" was typed at the top of the document, which my paralegal took to mean it could not be copied. The same MassHealth caseworker involved in the 2010 hearing pulled the document from her hands, stating she was not allowed to read it. The document, minus the notation, was produced by the MassHealth caseworker at the hearing two or three days later.

10. At the remand hearing, as with the Lulich hearing, the hearing officer refused to allow cross examination of witnesses and testimony regarding issues that had arisen in the Superior Court case.

11. My experience has been that the disfunction in the fair hearing system and the agency's disregard for the due process rights of applicants began with the repeal by the Massachusetts legislature of expanded estate recovery, which had allowed MassHealth to file claims for reimbursement against a decedent's probate and non-probate assets. Prior to 2006, the hearing process was transparent and collegial, and even when decisions went against me, I found the process to be fair.

11. My observation since then is that appellants with colorable claims are afraid to pursue their rights because they believe that, even though the law may be on their side, the hearing process is rigged against them.

Signed under the pains and penalties of perjury, this 14<sup>th</sup> day of May, 2018.



Carol Cioe Klyman, BBO #632772

