AFFIDAVIT OF COUNSEL

NOW COMES Margot G. Birke, of Elder Law Solutions, Newburyport, Massachusetts, and hereby deposes 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 1 Harris Street, Newburyport, Massachusetts, 01950.

2. I have been licensed to practice law in Massachusetts since 1997. I am also licensed to practice law in the 1st Department of the State of New York since 1995. I have been a member of the National Academy of Elder Law Attorneys (NAELA) and its Massachusetts Chapter (MassNAELA) since January 2000. I also served as President of the Chapter in 2016.

3. A large part of my law practice involves assisting elders with MassHealth long term care applications. Over the years I have processed and advised clients on several hundred MassHealth applications. In addition I have represented many of these clients at administrative fair hearings challenging wrongful denials of their applications.

4. The most frustrating aspect of this process is the receipt of a notice of denial that is generic in nature and does not provide any substantiation of the reason/s for the denial.

Once a MassHealth long term care application is filed, typically the applicant waits to receive his/her notice of approval or denial. If the notice of denial for excess countable assets, for example, the notice will simply state that the application was denied, will reference in general terms a regulation which MassHealth deems applicable and then will state the amount of the applicant's assets which exceed the standard allowance of $2,000.00, and information regarding the right to appeal the decision.

There is no other information provided as to the basis of the calculation, how the applicant violated the referenced regulation, or how MassHealth came to its determination. In other words the applicant is left to speculate on the possible underlying reasons for the denial.

5. As a result it becomes necessary to file an appeal on behalf of the applicant in order to preserve his or her potential eligibility, while attempting on my own to determine the specific reasons for the MassHealth denial.

6. The need make multiple attempts to obtain clarification for the denial from the case worker who issued it, or sometimes receiving an incorrect reason, adversely impacts my ability to prepare for the hearing.

7. The common pattern and practice of MassHealth is to decline or refuse to disclose additional information, which forces appellants to go to an appeal hearing to learn for the first

time why the application was denied and how the amount of disqualifying excess assets was calculated. It is difficult for clients to understand why I do not know what the issue is.

8 At the hearing, when the case includes an issue such as a trust or promissory note or care agreement, it is common practice and procedure for the MassHealth representative to deliver a legal memorandum, usually written by the Legal Department of MassHealth, to the appellant who then sees it for the first time. The memo is usually delivered to the worker prior to the date of the hearing but the worker is instructed not to put the memorandum in the appellant's file or not to make it available to the appellant or appellant's counsel prior to the start of the appeal hearing. As a result, the applicant has absolutely no ability to prepare and present his/her challenge to the denial of the application before the hearing officer.

9. Although the hearing officer will often leave the record open for the appellant to file a responsive brief, this pattern and practice leads to additional delays and gives MassHealth an unfair advantage during the presentation before the hearing officer at the time scheduled for the fair hearing.

10. This situation is even more egregious for individuals who proceed without counsel as they are unlikely to know enough regarding MassHealth procedures to request that the hearing Officer leave the record open in order to have the opportunity to respond to the memorandum on the record after reviewing its contents.

11. This pattern and practice is particularly problematic when dealing with more complicated matters such as trusts. Often the appellant is forced to go to the hearing with absolutely no understanding of what trust provision MassHealth has deemed to violate Medicaid law or regulations and rendered the trust assets to be deemed countable.

12. My clients are often in extremely vulnerable positions. They are concerned about not being able to stay in the nursing home. They are concerned about the delays, as their time is often limited. This pattern and practice of failing to give a clear statement of the specific reasons for the denial in the notice, of engaging in information withholding, of forcing a hearing to proceed for which the appellant cannot adequately prepare, not only violates their due process rights but also adds additional stress at a time when appellants are most vulnerable.

13. Many times appellants applications were denied on a legal theory that had been discredited in prior hearing decisions, or even court decisions. In each case, the memorandum failed to disclose the existence of such contrary authorities.

14. Many of my colleagues have told me that they had similar experiences as I have described above. I have also heard that their subpoena requests to the hearing officer are routinely denied; that MassHealth applicants' case files routinely do not contain the reasons for the denial, especially on cases involving trusts and other complicated countable assets; that MassHealth workers often cite attorney-client privilege as their reason for not providing the reasons for the denial before the scheduled fair hearing; and that MassHealth denials are automatically computer-generated if the MassHealth worker does not timely complete work on the case file.

15. Automatically generated denials have increased over the past year and result in additional time, resources, and stress to all involved. A denial notice cannot be ignored, even when both the applicant and the case worker know it is just a place marker and that the case worker will deal with the case shortly.

SIGNED under the pains and penalties of perjury on this 12th day of April, 2018.

Margot G. Birke
BBO #636045