

**NOTICE OF MEETING FOR THE PROBATE TRIAL AND PROCEDURE
COMMITTEE OF THE TRUST AND ESTATE SECTION AND ELDER LAW SECTION
OF THE COLORADO BAR ASSOCIATION**

November 4, 2020 at 10 a.m.

<https://cba-cle.zoom.us/j/91827848116?pwd=VEFQRms3VHYyaFpXSDJmN1ROcVp0UT09>

Meeting ID: 918 2784 8116

Passcode: 620136

Call-in: 1 (312) 626 6799

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AGENDA

1. Welcome and Introductions
2. Review of Minutes from October 7, 2020/Approval
3. Chair's Report
 - a. Probate Bench Book – Kathy Seidel
4. New Business or Requests
5. Updates/Reports
 - a. CRPP Rule 40(d). Submitted to Supreme Court for approval? Marcie McMinimee
 - b. Cost Recovery and Compensation Act; C.R.S. § 15-10-604 re procedure and process. Marc Darling/Marcie McMinimee
 - c. Due process concerns re “substantiated perpetrator” list maintained by Departments of Human Services. Kathy Seidel/Norv Brasch
 - d. C.R.S. §§15-14-708(2) and 421(6)(a) Powers of Attorney when fiduciary appointed. Marcie McMinimee
 - e. Conservator's Annual Report - Tabled.
6. Adjournment

NEXT MEETING: December 2, 2020 @ 10 a.m.

REMINDER: Join the Committee through CBA Membership Department – email membership@coabar.org

Probate Trial and Procedure Committee

Minutes of the October 7, 2020 Meeting

The Probate Trial and Procedure Committee met virtually on October 7, 2020. The meeting was called to order at approximately 10:05am.

The following members were present or participated by phone:

Lindsay Andrew – Landrew@steenrodllaw.com

Norv Brasch – norv@tealaw.com

Lynne Bruzzese – lynne@lbdurangolaw.com

Gary Clexton – gclcxton@m-s-lawyers.com

Lisa Dunn - Lisa@LotusFiduciaryGroup.com

Michael Eidelson- michael@evolved-legal.com

Rich Keily – rgkiely@hollandhart.com

Amy Wegner Kho – amy@coelderlaw.net

Keith Lapuyade – keith.lapuyade@overtonlawfirm.com

Rikka M. Liska – rikke@estate-planning-help.com

Marcie McMinimee – mmcinimee@steenrodllaw.com

Suzy Nelson – suzy@suzynelsonlaw.com

Sal Quintana – s.quintana@qlegalservices.com

Sandra Sigler - sandra@siglerlawco.com

Courtney Smith Hambro – courtney@lotusfiduciarygroup.com

Rabea Taylor

Herb Tucker – htucker@wadeash.com

1 Approval of Minutes of Prior Meeting

The minutes of the September 2, 2020 meeting were approved.

2 Chair's Report

- a. Probate Bench Book – Project is moving forward. Still looking or a few more articles to be written. Several broad topic areas are complete or almost complete. Judge Leith is up to date on edits.

3 New Business or Requests

None

4 Updates/Reports

- a. CRPP Rule 40(d) – Marcie McMinimee reported that it is still under review with the Supreme Court Rules Committee and Judge Leith.
- b. DHS/APS “substantiated perpetrator” list. Kathy Seidel reported that a meeting with DHS and CBA members was held on 10/2/2020 among representatives from Colorado Bar Association (CBA) and Colorado Department of Human Services (DHS) regarding the Colorado Adult Protective Services (CAPS) system. The CBA representatives were Andrew White, Kris Zumalt, Lindsay Andrew and Kathy Seidel. The DHS representatives were Emily Hanson – Legislative Liaison; Kevin Neimond – Manager, Legislative Affairs; Avilene Rodriguez – Legislative Analyst; Kara Harvey – Division Director, Aging and Adult Services; and Peggy Rogers – Manager, Adult Mistreatment Prevention and Response Section. The purpose of the meeting was to request DHS to provide information regarding the Department’s top priorities with the CAPS system; what issues they have with the system; and what is evolving or changing, especially in light of the recent audit of APS. Peg Rogers provided most of the information from the DHS perspective in her role as manager of the Adult Mistreatment Prevention and Response Section. Ms. Rogers’ section deals mainly with background checks of public and private employees at medical and long term care facilities. In general terms she said that DHS doesn’t anticipate many changes to CAPS over the next year. She said that the counties are working as hard as they can given the many changes that have been implemented over the past six years, in addition to the regulatory changes implemented in September. In addition, COVID has hindered access to long term care facilities. Their long term objectives continue to focus on how to improve outcomes for at risk adults.

The State Auditor conducted an audit of APS in May 2020. Ms. Rogers stated that with respect to employment background checks the audit found that the CAPS checks do not report sufficient information to employers so they can make fully informed employment decisions. The audit recommended that APS improve the descriptive information reported to employers. This is resulting in big changes if an investigation can impact employment. They are trying to do it right but hard to get implemented. There is much training (quarterly and specialized) for employees. She stated that the employees are social workers first and they are looking at the client as a whole in terms of their needs. The investigation into suspected abuse is only part of what the employees do. Employers won’t hire anyone who has been documented as a substantiated perpetrator. Therefore, they are trying to address legal and privacy issues that arise when reporting to employers. Of particular concern is that in smaller communities, brief summary reports can leak into the public domain.

She stated that the auditors focused on intent, “Did the substantiated perpetrator intend to harm the at risk adult?” DHS takes the position that intent doesn’t matter. For example, if an arm is broken, it happened and it is difficult for the social worker

to determine intent. Similar analogy to the police, who arrest a suspect, but don't prosecute or judge. Kris Zumalt inquired who would make the "intent" determination and Ms. Rogers responded that the issue of intent is addressed in the appeals process and that intent is one of the factors considered in determining whether to negotiate with the alleged perpetrator. Other factors in determining whether to negotiate a settlement with a substantiated perpetrator include checking for compliance with the CAPS process and the evidence provided during the investigation.

The discussion segued into differentiation between cases involving employees versus family members and friends acting as caregivers. DHS refers to these as "community" cases versus "facility" cases. According to Ms. Rogers, seventy percent (70%) of substantiated perpetrator cases are community cases and involve family members and that this is common across all states in the United States. The appeals process is handled by a different unit, "CAMDRS" (Child and Adult Mistreatment Dispute Review). CAMDRS handles all appeals of substantiated perpetrators for child and adult cases.

Regarding due process concerns, Ms. Rogers reported a new rule recently enacted (I believe effective this past September) regarding situations where the caretaker may also be an at risk adult due to intellectual or developmental disabilities or other cognitive defects. In these situations there may be a finding of mistreatment but no culpability.

Lindsay Andrew shared her views from the perspective of a Special Administrator's office. She described working with clients who receive letters that they have been found to be substantiated perpetrators. She asked about the process leading up to these letter notifications, especially in cases of financial exploitation.

Ms. Rogers responded by referring to the investigation regulations at 30.500 (12 CCR 2518-1-30.500) that require interviews of the client, the informing party, collaborative parties, caregivers and the alleged perpetrator. The next step is to review evidence and decide if it is more likely or not that the mistreatment happened. If the case worker concludes "yes" they communicate with the alleged perpetrator and inform them that they will receive a letter from the county. It should be very detailed in its findings, include a FAQ section and explain the appeals process through CAMDRS. If an appeal is initiated, it is noted in the CAPS system, however, in Colorado, the fact that the letter was issued is still reportable to the employer. If a finding of mistreatment is overturned by CAMDRS, it is not reportable. The county can also overturn a finding of mistreatment, especially if new evidence comes to light.

It became apparent that CBA members need to meet with a representative from CAMDRS to further understand issues related to due process rights of those who are found to be substantiated perpetrators as due process rights do not enter into the process prior to the initiation of the appeals process. Andy White agreed to follow up

- with Emily Hanson to set up a meeting with a representative of CAMDRS. No further action to be taken prior to the next meeting. In summary, DHS was very open and receptive to our observations and involvement in improving the CAPS system and process.
- c. C.R.S. §15-14-708(2) and 15-14-421(6)(a) re Powers of Attorney. Marcie McMinimee reviewed the inconsistent language of the statutes. Subsection 708(2) provides that when a fiduciary is appointed, the principal is accountable to the fiduciary, the POA is not terminated and the agent's authority continues. Subsection 421(6)(a) states that upon appointment of a conservator, the agent shall take no further action without the approval of the conservator. After discussion, agreed that subsection 708 should incorporate subsection 421. Marcie to draft proposed changes and report back next month.
 - d. Cost Recovery and Compensation Act. Marcie McMinimee reported that there was no meeting this month. She reiterated that she had spoken to Judge Leith who opined that she thought the current statute is working well and that the statute should not be changed. Herb Tucker thought that a change to the procedural rule might be a solution as he has experienced ambiguity between the rule and court decisions. Marcie will again reach out to Judge Leith.
 - e. Conservator's Annual Report – Tabled.

5 Adjournment

The meeting adjourned at approximately 11:00 am.