LEGAL ISSUES FOR PEOPLE WITH ALZHEIMER'S

ATTORNEY CAROL WESSELS

APRIL, 2017

SPECIAL FOCUS ON CHALLENGING BEHAVIORS

AND HOW THEY ARE ADDRESSED IN THE LEGAL SYSTEM

TIME FOR A LEGAL HEALTH CHECKUP

- Diagnosis of Alzheimer's can be a stressful time.
- You can't change the diagnosis, but you can put yourself in the best possible legal situation.
- Start by taking stock of what you have:

OVERVIEW: WHAT HAVE YOU TAKEN CARE OF ALREADY?

- Health Care Power of Attorney
- Health Care HIPAA releases
- Financial Power of Attorney
- Long Term Care Insurance
- Short/Long Term Disability Insurance
- Agents listed on existing accounts
- Will or Trust
- House and other dispositions

HCPOA & HIPAA

- Are you comfortable with your named agents?
- Have you made decisions regarding
  - long term care admissions,
  - special issues related to Alzheimer's diagnosis, and
  - end of life issues?
- Have you discussed these with your agents?
- Have you signed HIPAA releases for your agents to get health care information before the HCPOA is "activated"?

FINANCIAL POWER OF ATTORNEY

- Are you satisfied with your current choices of agent(s) or need to change?
- Does your POA include all of the authority it needs to? **Note: If you use a state form, the answer is *probably not*.**
- Have you added your agent as "POA" to your accounts (note: *joint* accounts are different!)
- Does your agent have all of your account numbers, asset info, safe deposit and online access codes(or in an accessible place).

INSURANCE

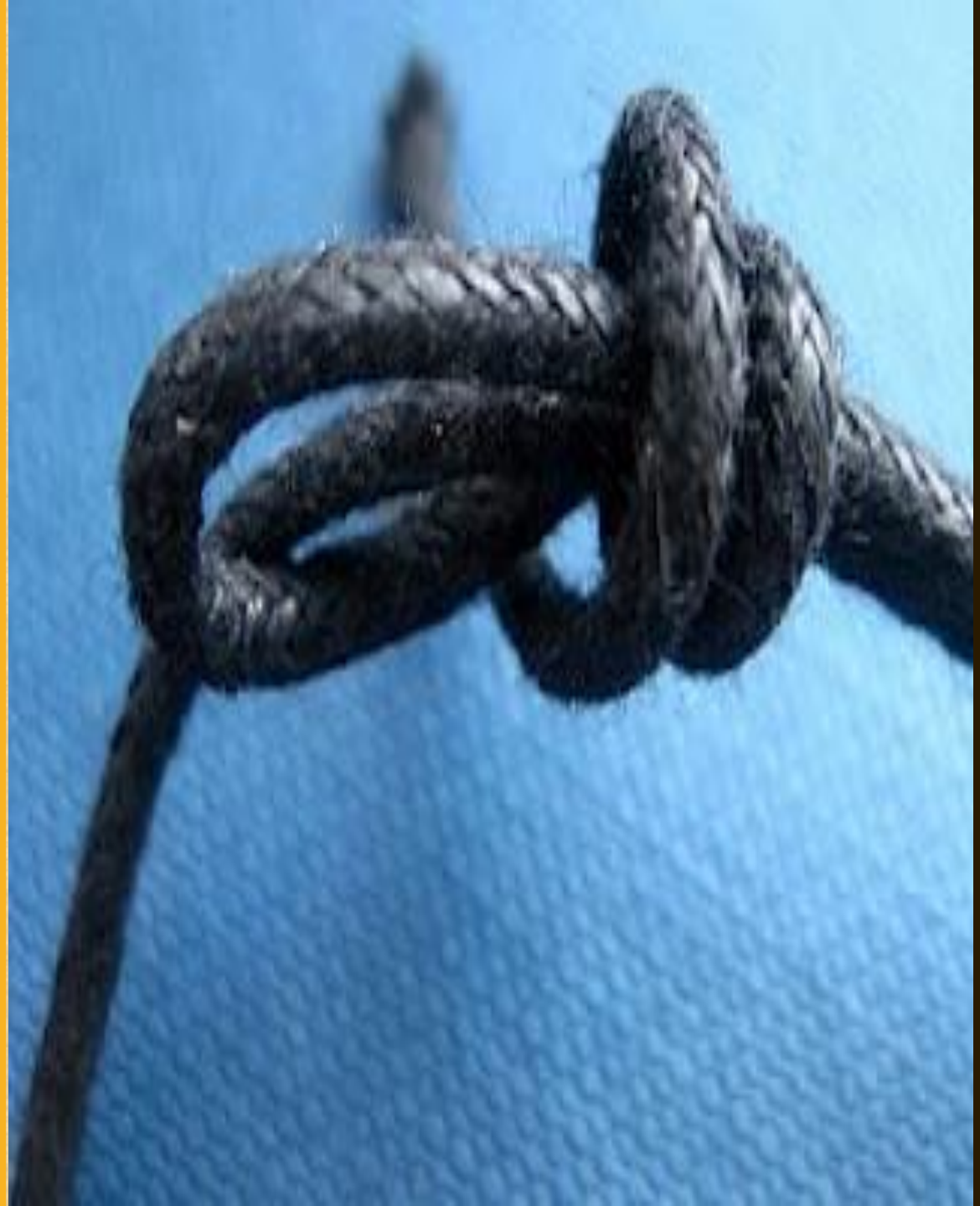
- If you have long term care, disability or life insurance, now is the time to get familiar with the requirements and benefits.
- If you are paying premiums, make sure your agent has the information to keep the policies current.

WILL OR TRUST

- If you have a will, make sure you have located the *original* and put it in a safe place. Only the original can be admitted easily to court (admitting a copy requires formal probate, a hearing, and witness testimony.)
- Are you happy with your choice of personal representative / trustee?
- Need to change any of the distributions?
- If a trust, is there an incapacity provision?
- Have your assets been transferred to trust? Do they need to be?

OTHER DISPOSITIONS

- Have you set up your assets to transfer without probate if possible?
- P.O.D. on accounts
- T.O.D. on House
- Beneficiaries on life insurance / annuities / Retirement accounts.



TYING UP YOUR LOOSE ENDS

If you have not done some or all of those things, it's time to get moving.

Start finding your papers and putting them together.

Figure out what you still need to do.

Consult with a lawyer about the needed documents.

Some can be done on your own, but I don't recommend it (I'm a lawyer.)

ADDRESSING CHALLENGING BEHAVIORS

- One of the symptoms of the disease can be challenging, and sometimes violent behavior.
- Behaviors can be coupled with a lack of awareness on the part of the individual, which makes it difficult to address the issue.
- How does this play out in a long term care setting? At home?
- What laws are involved?

FOUR LAWS

- The laws that might come into play in situations involving challenging behaviors and the need for treatment are:
  - Chapter 51, Wisconsin's Mental Health Act
  - Chapter 55, Wisconsin's Protective Placement Process
  - Chapter 155, Wisconsin's Power of Attorney for Health Care Statute
  - Chapter 50, regarding voluntary admission to certain facilities.

WHAT WAS THE HELEN E.F. CASE ABOUT?

- Whether it is legally appropriate to use Wisconsin's Chapter 51 process for an individual whose diagnosis is dementia.
- Two legal questions were presented:
  - Is Alzheimer's / Dementia a "mental illness" within the meaning of the civil commitment statutes?
  - Is an individual with Alzheimer's / Dementia a "proper subject for treatment" under Chapter 51?

HOW DID IT HAPPEN?

- Who was Helen? 85 year old, 100-pound woman, with dementia. Non-verbal. Activated power of attorney for health care.
- What did she do? Helen was hitting people in the nursing home where she resided for 6 years. Police were called by the facility, and she was detained and taken to the locked psychiatric unit of a local hospital. She underwent Chapter 51 proceedings.
- What else was going on with her? While in the hospital a UTI was discovered and treated.
- At final hearing, the treating physician testified that while the dementia was not treatable cognitively, the behavioral disturbances were treatable. Helen E.F. remained in the hospital throughout the proceedings.

LOWER COURT ARGUMENTS AND HOLDINGS

- Trial Court found that Helen's dementia and behavioral disturbances were a treatable mental illness and that Helen was a proper subject for treatment. Court ordered inpatient commitment and involuntary psychiatric medication.
- Helen appealed. The Court of Appeals found that Dementia was not a mental illness within the meaning of Chapter 51, and that Helen was not a proper subject for treatment. Court observed that Chapter 51 is for individuals who are suitable for treatment and "rehabilitation" and that individuals with dementia are not rehabilitable.
- Court of Appeals noted the Handcuffed report prepared by the Alzheimers Association of SE WI.

WISCONSIN SUPREME COURT HOLDING

- Fond du Lac County appealed to the Wisconsin Supreme Court. Supreme Court considered arguments from the parties, as well as *amicus curiae*.
- Supreme Court found that in this case, Helen E.F. was not a proper subject for treatment, because her Alzheimer's disease was not subject to rehabilitation, and because Chapter 55 protective placement was the more appropriate process by which an individual with dementia should be treated.
- Court "left for another day" the question of how to treat individuals with co-occurring mental illness and dementia.

RAMIFICATIONS AND UNANSWERED QUESTIONS

- Did the decision apply to all dementia patients or just Helen?
- Why couldn't Helen obtain necessary treatment when her power of attorney for health care was activated?
- What facilities are appropriate for emergency placement of individuals with Alzheimer's and Dementia?
- How do law enforcement respond when called by a facility?

POWER OF ATTORNEY FOR HEALTH CARE

- CAN consent to voluntary psychotropic medication
- CAN consent to hospitalization in "regular" hospital
- CAN consent to admission to nursing home for long term care if specific permission given.

- CANNOT consent to involuntary medication
- CANNOT consent to hospitalization in psychiatric hospital, even voluntarily
- CANNOT consent to admission to nursing home for long term care if principal has a diagnosis of mental illness, even if that is not primary condition requiring long term care.

Wis. Stats. § 155.20(2) (a) states:
A health care agent may not consent to admission of the principal on an inpatient basis to any of the following:
1. An institution for mental diseases, as defined in s. 49.43(6m).
2. An intermediate care facility for persons with mental retardation, as defined in s. 46.278 (1m) (am).
3. A state treatment facility, as defined in s. 51.01 (15).
4. A treatment facility, as defined in s. 51.01 (19).

And why would we want to do that anyway for an Alzheimer's patient? The solution was wrong!
But in any event, this is why Helen E.F. was in court.

CHAPTER 55 – PROTECTIVE PLACEMENT / SERVICES

- In Alzheimer's context, this is used primarily to obtain facility placement where no appropriate POAHC is in place, or where ward objects.
- Must be used if ward is to be placed in locked facility.
- For placement, must be combined with a guardianship of the person.
- Court process required.
- *Can also be used* to obtain an order for psychotropic medication.
- Resource for detailed information: http://gwaar.org/wi-guardianship-support-center.html#ProtectiveServices

SPECIFIC PROTECTIONS UNDER CHAPTER 55

- Petition for involuntary medication requires a guardian, and requires specific allegations regarding the individual's incapacity to refuse medication, likelihood of improvement.
- Guardian ad litem will be appointed.
- Guardian, not court, makes ultimate decision after petition approved
- Specific notice to certain family and agent under POAHC
- Right to counsel
- Can be initiated by family

CHAPTER 55 PROCESS

- Can be initiated by a number of different "interested persons" including family, "official" of a health care provider, friend, or Adult Protective Services.
- Must include petition for guardianship of one is not already in place.
- Requires determination of incompetency.
- In an emergency, can be accomplished quickly. (55.135)
- Individual can be immediately detained upon personal observation of, or a reliable report made by a person who identifies self to, a sheriff, police officer, fire fighter, guardian, if any, or authorized representative of county APS dept. or an agency with which it contracts.
- Hearing must be held in 60 days, or in emergency detention cases, within 72 hours for temporary hrg and 30 days for final hrg.
- Hearing is open unless indiv. requests that it be closed.

INVOLUNTARY MEDICATION UNDER CH. 55.14

- "Involuntary administration of psychotropic medication" means any of the following:
  - **1.** Placing psychotropic medication in an individual's food or drink with knowledge that the individual protests receipt of the psychotropic medication.
  - **2.** Forcibly restraining an individual to enable administration of psychotropic medication.
  - **3.** Requiring an individual to take psychotropic medication as a condition of receiving privileges or benefits.
- Prerequisites:
  - Dr prescribed psychotropic meds
  - Individual is not competent to refuse
  - Individual has refused to take meds or voluntary administration is not feasible.
  - Person's condition likely to improve with medication
  - Substantial risk of physical harm, impairment, injury, or debilitation to self or others.
- *See Also* 55.13 emergency protective services – immediate, no petition or hrg.

CHAPTER 51

- Used to obtain involuntary treatment and rehabilitation of a mental illness
- Does not require appointment of guardian.
- Does not require *guardian ad litem*.
- *Closed, confidential procedure*
- Individual will have counsel at hearing.
- Can be converted to protective placement
- Being used (mostly inappropriately) even after Helen E.F.
- Expedient, but WRONG SOLUTION and long term consequences.

CHAPTER 51 PROCESS

- Can be initiated by law enforcement, treatment director of Ch. 51 facility, or three party petition.
- Must be based upon direct observation or reliable report to law enforcement
- Must show that the individual is mentally ill. Degenerative Brain Disorder specifically excluded from that definition.
- Must show danger to self or others by recent acts, or risk of substantial harm due to incapacity (there are 5 standards that are more specific than this general listing)
- Must show capacity for rehabilitation through treatment

CHAPTER 51 PROCESS

- Very limited notice
- Right to counsel
- Closed hearing
- Temp hearing within 72 hours of individual's
- Witnesses testify from personal observations about the allegations of dangerousness, and doctor testifies about medical issues: mental illness, disability, or dependence, and treatment.
- Judge determines probable cause to detain further
- Final hearing within 14 days.

COMPARISON OF AUTHORITIES UNDER CHAPTER 51,55,AND 155

Power to consent (Ch. 55/155) or order (Ch. 51)	Chapter 51	Chapter 54/55 (Guardian consent)	POAHC Ch 155	NO Sub decision-maker (SDM)
Voluntary psych meds	Yes. Dr. Orders meds, no SDM needed.	Yes – if no objection from ward and g has authority. Guardian orders. 54.25(d)(2)(ab)	Yes. Agent decides.	Yes – Individual decides.
Involuntary psych meds	Yes after PC found under 51.61(g) & after final commitment. Dr. Orders.	Yes – with Court approval 55.14 after hearing. Guardian must agree.	No. Agent follows direction of ward if ward objects, unless otherwise specified.	n/a
Voluntary admission to Beh. Health unit	Yes 51.10.	Yes – if no objection from Ward 51.10 and 54.25(d)(2)(ab) – which could be better worded.	No	Yes - Individual
Involuntary admission to Beh. Health unit	Yes	No under 55.12(2), Only as Chapter 51 conversion.	No	No

COMPARISON OF AUTHORITIES UNDER CHAPTER 51,55, AND 155 (cont'd)

Admission to SNF/CBRF if diagnosed with mental illness	CHAPTER 51 No	CHAPTER 55 Yes	POAHC No	NO AUTHORITY Yes - Individual
Time required to obtain; duration	Prelim 72 hours, final 14 days. Expires after 6 months / 1 year.	Emergency w/in 72 hours; permanent w/in 60 days. Annual reviews.	Immediate upon signing and activation. Indefinite, but can be revoked unless written otherwise.	n/a
Other issues / limitations	In Conversion of Ch 51 to Chapter 55, cannot give involuntary meds to someone with Deg. Br. Dis. 51.20(7)(d) is subject to definition of "Serious and persis. mental illness" in 51.01(14t) which excludes DBD.	*If restraint involved with meds must have RN/LPN/physician present, may also transfer to appropriate facility for restraint if ordered by Court. 55.14 (8-9).	Prohibition on certain decision making where principal is mentally ill. Disability discrimination /ADA problem?	

CONFIDENTIALITY OF RECORDS UNDER CHAPTER 51

- 51.30 Records of treatment and court proceedings are confidential and – generally - cannot be released without informed consent. There are exceptions.
- A guardian may obtain all records
- "Informed consent": must be in writing and must contain the following: the name of the individual, agency, or organization to which the disclosure is to be made; the name of the subject individual whose treatment record is being disclosed; the purpose or need for the disclosure; the specific type of information to be disclosed; the time period during which the consent is effective; the date on which the consent is signed; and the signature of the individual or person legally authorized to give consent for the individual.

SAMPLE LANGUAGE FOR POAHC

Informed Consent pursuant to Wis. Stat. 51.30(2) : I hereby provide my informed consent pursuant to Wis. Stat. 51.30(2) to the release of any records regarding any treatment or proceedings under Chapter 51 and Chapter 55, to my named agent and alternate agent under this document, regardless of whether the power of attorney for health care has been activated.

This consent includes records in existence at the time of this signing, or that may come into existence in the future. This consent is in effect from the time of execution of this document until it is revoked. The purpose of this disclosure is to enable my agent to have full and complete information about my health treatment and needs in order to effectively act as my agent, and to allow my agent to release information as necessary to those who may treat me in the future. This includes any records which are subject to release under 51.30(2) and should be broadly interpreted to provide the greatest access possible.

I also authorize my named agents to sign an informed consent to the release of such information if my power of attorney has been activated.

COLLATERAL CONSEQUENCE

- Chapter 51 commitment has a collateral consequence: a POAHC agent may not admit an individual with mental illness to a skilled nursing facility.

  Wis. Stat. §155.20(2)(c). Under this statute:

  2. A health care agent may consent to the admission of a principal to the following facilities, under the following conditions:

  c. To a nursing home or a community based residential facility, for purposes other than those specified in subd. 2. a. and b., if the power of attorney for health care instrument specifically so authorizes ***and if the principal is not diagnosed as developmentally disabled or as having a mental illness at the time of the proposed admission.***

- Similarly, provisions allowing post-hospital admission to a facility where no power of attorney exists, exclude people with a diagnosis of mental illness, see Wis. Stats. §50.06(2)(b).
- I believe this is illegal.

PRACTICAL POINTERS

- Include appropriate releases in powers of attorney.
- Talk with health care providers and facilities during the search process to determine their approach to challenging behaviors. Ask for examples.
- Do not feel you must blindly follow the process chosen by a facility.
- Be prepared to be forceful if your loved one is taken to a commitment facility.
- There is no "on-label" use of psychotropic medications to treat the non-cognitive symptoms of Alzheimer's.
- BEWARE of "collateral" diagnoses during clients ongoing treatment for dementia – "depression" "anxiety" etc.

ATTORNEY CAROL WESSELS
BLOG: WESSELSELDERLAW.WORDPRESS.COM

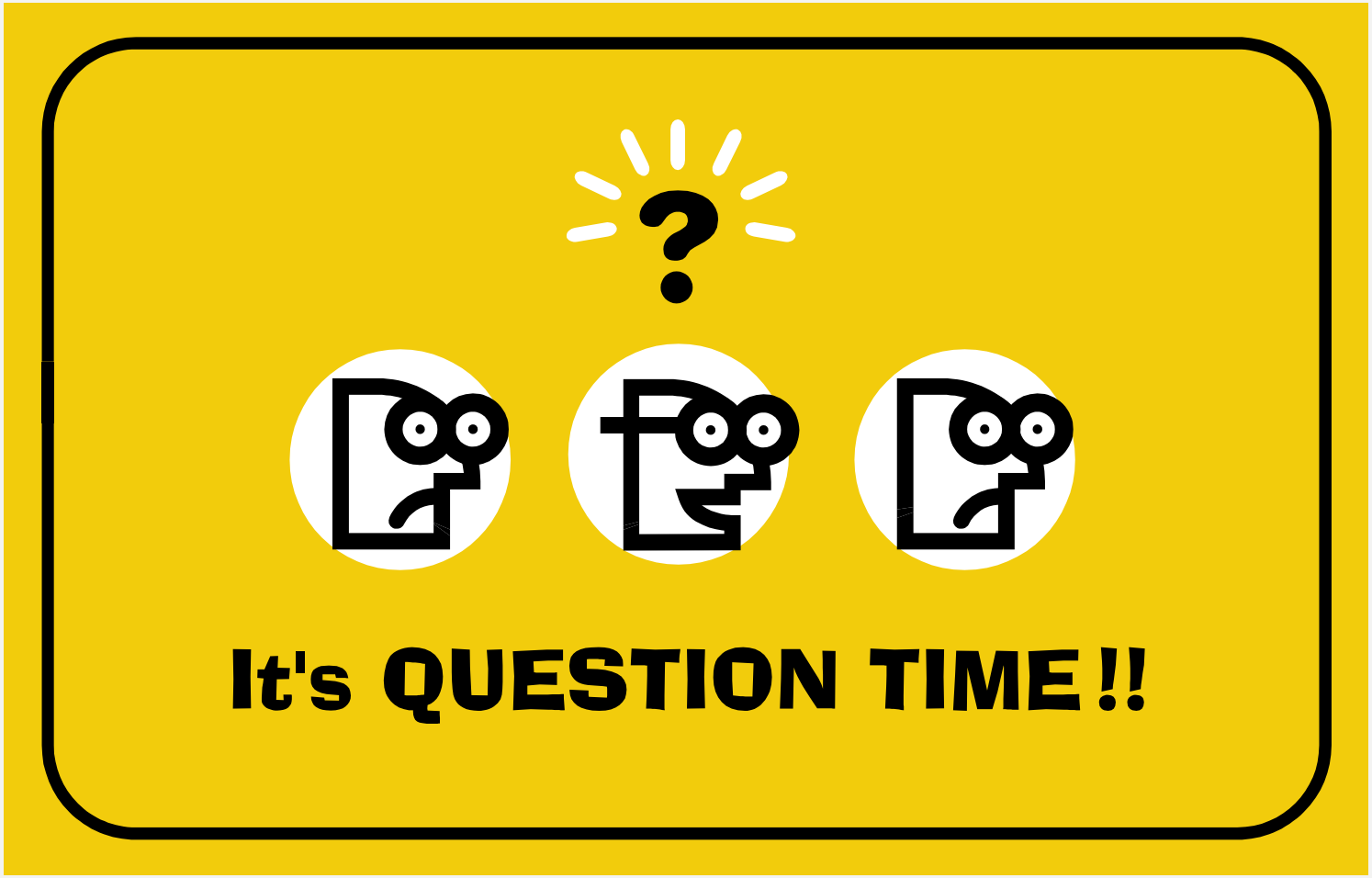
WESSELS LAW OFFICE LLC

11649 N. Port Washington Rd., Suite #210

Mequon WI 53092

262-264-7702

www.wesselslawoffice.com


It's QUESTION TIME!!