

TO: Mental Health Counsel

FROM: Stan Goldman

RE: Clarification of CPCS Policy re Private Retention of Counsel in Guardianship Matters

Date: January 4, 2010

Please note the following clarification of CPCS's policy concerning assigned counsels' representation of clients found not-indigent in guardianship proceedings (revisions highlighted, emphases in original):

ASSIGNED COUNSEL MANUAL, CHAPTER V

3. Prohibition Against Being Privately Retained On The Previously Assigned Case

The attorney may **not** be privately retained in a case in which s/he was previously assigned. The purpose of this rule is to prevent the appearance of impropriety, conflict of interest, solicitation, or fraud upon the court.

A. Exceptions to this general rule are outlined below:

...

2. Originally Indigent Client – Intervening Determination of Non-Indigency

If the client was originally found indigent and the attorney was assigned by the court, but during the course of the representation, the court makes a **subsequent** determination that the client is **not** indigent, then the attorney may be privately retained by the client at that time, at the request of the client; **provided, however, in proceedings pursuant to G.L. c. 111, §§ 94C and 94G; c. 123; c. 123A; and c. 190B** where a subsequent determination that the client is not indigent is made **prior to the commencement of a hearing**, the attorney may be privately retained by the client at the client's request, unless the court directs the attorney to continue to represent the client at public expense **or, in proceedings under G.L. c. 190B, from the assets of the client or another party at a rate set by the court**; and provided further, that where a subsequent determination that the client is not indigent is made **after the commencement of a hearing**, the attorney shall continue to represent the client at public expense **or, in proceedings under G.L. c. 190B, from the assets of the client or another party at a rate set by the court**. See also SJC Rule 3:10, § 5.

In such cases, the attorney shall fully explain to the client that representation of the client on such matters may create the appearance of impropriety, solicitation, or overreaching by the attorney. If the client continues to request to retain the attorney privately on the case, the attorney shall obtain a written informed consent signed by the client, stating the client's understanding of his/her right to seek other counsel for the private case.

As always, if you have any questions or concerns regarding this or any other matter, please don't hesitate to contact me.