

b. COMMITTEE FOR PUBLIC COUNSEL SERVICES

PERFORMANCE STANDARDS

GOVERNING THE REPRESENTATION OF INDIGENT ADULTS IN GUARDIANSHIP PROCEEDINGS UNDER G.L. c. 190B (INCLUDING "SUBSTITUTED JUDGMENT" MATTERS) AND IN AUTHORIZATION TO TREAT PROCEEDINGS UNDER G.L. c. 123

These standards describe the steps which must, at a minimum, be taken by an attorney who has been assigned to represent an adult client in the Probate Court Department against whom has been initiated a guardianship proceeding, pursuant to G.L. c. 190B, or a client in the District Court Department against whom a petition seeking the authority to administer antipsychotic medication or other medical treatment for mental illness has been filed, pursuant to G.L. c. 123, § 8B. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct, as well as all applicable CPCS policies and procedures.

1. The role of counsel is to diligently and zealously advocate on behalf of his or her client, within the scope of the assignment, to ensure that the client is afforded all of his or her due process and other rights. To that end, only in exceptional circumstances may counsel stipulate to the client's incapacity; provided, however, that in proceedings in which a substituted judgment determination is required, counsel must oppose the petition and present "all reasonable alternatives" to the proffered treatment for the court's consideration. *See In the Matter of Moe*, 385 Mass. 555, 567 (1982); *Superintendent of Belchertown State School. v. Saikewicz*, 373 Mass. 728, 757 (1977).

Further, under G.L. c. 190B, upon a finding of incapacity, the probate court is required to

exercise [its] authority . . . so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's limitations or other conditions warranting the procedure.

G.L. c. 190B, § 5-306(a). Thus, full or plenary guardianship is to be the exception, rather than the rule. To that end, counsel must ensure that, in those cases in which his or her client is found to be incapacitated, the guardian's authority is strictly tailored to the specific decision-making needs of the client.

2. Immediately upon receipt of the assignment, the attorney shall (a) file an appearance with the court; (b) notify petitioner's counsel of the assignment; and, (c) obtain a copy of the petition, the medical certificate or clinical team report, and any affidavit(s), documents or other pleadings that were filed with the petition.

3. Also immediately upon assignment, the attorney shall contact the client to inform him or her of the assignment and to schedule an initial meeting. The attorney shall meet with the client as soon as possible thereafter, but in no event later than one week prior to the return date set by the court; provided, however, that the attorney shall meet with the client no later than the next business day following the assignment whenever a petition for the appointment of a temporary guardian or for a substituted judgment

determination is filed, or whenever an expedited hearing or other proceeding is sought or scheduled.¹ If the attorney is unable to meet with the client in accordance with this section and to promptly begin working on the case, or if the attorney is unable to appear in court on the assigned date, he or she shall decline the appointment.

At this initial meeting the attorney shall, at a minimum, explain to the client the purpose of and procedures involved in the impending guardianship proceeding, the client's rights and options in respect to the proceeding, and ascertain the client's wishes and perspectives as to the matters that will be at issue.² The attorney shall explain his or her role and those of the other participants in the proceeding.^{3, 4} While not

¹ As a general rule, the attorney should not agree to a continuance sought by petitioner without first consulting with the client. After such consultation, and unless the attorney determines that the client's legal or clinical interests would be adversely affected, he or she may agree to the continuance.

² Rule 1.14 of the Massachusetts Rules of Professional Conduct affords attorneys guidance as to their ethical responsibilities in dealing with clients "under a disability." The rule provides that, as with other clients, attorneys generally should follow the wishes of their cognitively, emotionally, or otherwise impaired clients, and provides suggestions as to steps that might be taken when an attorney has serious doubts as to his or her client's ability to competently direct litigation or other legal matters. The rule recognizes, however, that in some circumstances, mental health proceedings specifically noted among them, such a course of action may be impermissible:

Such circumstances arise in the representation of clients who are competent to stand trial in criminal, delinquency and youthful offender, civil commitment and similar matters. Counsel should follow the client's expressed preference if it does not pose a risk of substantial harm to the client, even if the lawyer reasonably determines that the client has not made an adequately considered decision in the matter.

Mass. R. Prof. C. 1.14, cmt. 7 (taking protective action).

While the "default" position of adhering to the client's expressed (albeit inadequately considered) decisions may seem reasonable, the imposition of guardianship (i.e., the removal of a client's fundamental right to make his or her own decisions) or treatment with those modalities requiring a substituted judgment determination absent the true informed consent of the client is a substantial deprivation of liberty and, therefore, most certainly "pos[es] a risk of substantial harm to the client."

³ If the client refuses legal representation, the court must determine whether his or her waiver is "competent." SJC Rule 3:10, § 3. If he or she is not competent to waive counsel or is "otherwise unable effectively to exercise [his or her] rights at a hearing," standby counsel must be appointed. SJC Rule 3:10, § 3. If the client objects to a particular attorney despite that attorney's best efforts to establish an effective professional relationship, the attorney should move the court to permit him or her to withdraw, and move that successor counsel be assigned. In doing so, of course, counsel must be careful to avoid divulging any confidential information or other information that could be harmful to the client's interests. The court should determine whether the person's objections are reasonable. If so, the motions should be allowed and successor counsel appointed. If not, the motion to withdraw should be denied and the attorney should continue as counsel or be directed to serve as "standby counsel." SJC Rule 3:10, §§ 3, 6.

⁴ Where counsel has been assigned but prior to the commencement of a hearing the court determines that the client is not indigent, the court may dismiss assigned counsel and advise the client to retain private counsel. However,

if the interests of justice so require [], the judge shall authorize the continued services of appointed counsel at public [i.e., CPCS] expense. The interests of justice may require such appointment if, for example, the party is incompetent to obtain counsel, incapable of obtaining access to funds, or incapable of locating or contracting with a lawyer.

SJC Rule 3:10, § 5. If the client is advised to retain private counsel, the attorney who had been previously assigned may be retained, provided that he or she fully explains to the client that such representation may create "the appearance of impropriety, solicitation, or overreaching." If the client nevertheless wishes to retain the attorney, the attorney must obtain a written statement

required, the attorney should seek to obtain from the client written authorization to examine and copy the client's medical records or, where the client is unable or unwilling to provide such authorization, a court order authorizing same.

4. The attorney shall thoroughly investigate the facts. This investigation shall include at a minimum (a) a review of the medical certificate, or the clinical team report, filed with the petition, and an interview of the clinician(s) who conducted the examination(s) upon which the certificate or report is based; (b) for a client who is or has been residing in a mental health, developmental disability or nursing facility, a review of (i) facility records, including medication history, (ii) treatment review notes, including diagnoses, treatment history, and comments regarding the client's capacity, (iii) unit and nursing notes, for notations as to the client's relationship and cooperation with staff and treatment programs, and (iv) the client's Individual Service Plan or similar document;⁵ (c) an interview of the petitioner, current treatment providers, staff (including doctors, nurses, and social workers) of current residential programs, if applicable, and of former providers and program staff if reasonably accessible; and (d) other persons familiar with the client, such as friends and family. The attorney shall also determine whether the client has executed, or is capable of executing, a health care proxy, durable power of attorney, or similar instrument delegating authority to a surrogate decision-maker, that would obviate the need for the appointment of a guardian.

5. In most instances, independent psychiatric or psychological expertise will be of assistance in the preparation and defense of the proceeding, particularly in the assessment of a client's capacity.⁶ In most cases in which the authority to administer antipsychotic medication is sought by means of a substituted judgment determination, the expert assistance of a psychiatrist should be sought, and such assistance must be sought whenever such medications are proposed to be administered for the first time to a particular client. After meeting with the client and investigating the facts, as described above in ¶ 4, the attorney shall determine whether expert assistance will be of value and, if so, he or she shall move for funds therefor, pursuant to the Indigent Court Costs Act. G.L. c. 261, §§ 27A-G. *See Guardianship of a Mentally Ill Person*, Mass.App.Ct., No. 85-0018 Civ. (Dreben, J.).⁷

signed by the client stating the client's understanding of his or her right to seek other counsel for the private case. *CPCS Assigned Counsel Manual*, Part V, § 3(A)(2).

⁵ Of particular significance will be information as to treatment and services that are, or can be made, available that will assist the client in "meeting the essential requirements for physical health, safety or self-care," despite his or her alleged disabilities. See definition of "incapacity" at n. 6, below.

⁶ The appointment of a guardian, or the authority to administer or withhold "extraordinary treatment," is warranted upon a finding that a client is "incapacitated." An "incapacitated person" is defined as:

an individual who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

G.L. c. 190B, § 5-101(9).

⁷ Sample Motions, Affidavits and other material are available on the Mental Health Litigation Unit's website: http://www.publiccounsel.net/Practice_Areas/Mental_Health/practice_aids/practice_aids_motions.html. The decision as to whether to retain the services of a clinician is the attorney's. He or she must, of course, discuss the purpose, parameters and confidential nature of the clinician's examination with the client.

6. Upon allowance of the motion for funds, the attorney shall contact the independent clinician and instruct him or her as to the purpose and parameters of his or her role and responsibilities. To the extent appropriate, the attorney should share with the clinician all pertinent information obtained pursuant to ¶ 4, above. The attorney shall remind the clinician that all information gleaned and opinions formed by the clinician shall remain confidential and may be shared only with the client and the attorney, and that such information and opinions may not be divulged to the court, petitioner, or petitioner's attorney without the permission of the client's attorney.

After the clinician examines the client, reviews the records and speaks with staff and others, as appropriate, he or she and the attorney shall meet to discuss the clinician's findings and opinions. Of particular concern should the clinician opine that the client may indeed be incapacitated to some extent, will be the identification of those areas of decision-making in which the client is not incapacitated and those areas of decision-making in which the client, although perhaps having difficulty, is able to care for him- or herself with assistance, in order that the court may tailor its order to the specific decision-making needs of the client.

The attorney shall determine whether and to what extent the clinician's services shall be of further use. If the clinician will be called to testify at a hearing, the attorney shall fully prepare him or her for direct- and cross-examination.

The attorney also should inform the clinician as to the amount of funds that have been allowed and instruct him or her to refrain from performing any services or incurring any expenses in excess of such amount unless and until a supplemental motion for funds has been allowed.

7. The attorney shall use formal discovery processes if indicated and tactically advisable. The attorney shall confer with potential witnesses, including but not limited to the petitioner, personally or through counsel, treating psychiatrists and psychologists, nursing and any other staff familiar with the client's care and treatment, the prospective guardian, if one has been nominated, and other possible witnesses suggested by the client. The attorney should also confer with other involved parties, for example, family members. Where necessary, witnesses should be subpoenaed. The attorney should meet with the witnesses in advance of the trial in order to prepare them for direct- and cross-examination. The attorney shall review the medical record to identify those parts of the record that may be inadmissible and, therefore, whose admission should be objected to if proffered at trial. The attorney should identify the petitioner's witnesses and make an effort, if tactically indicated, to interview them on the record and prepare cross-examination.

8. The attorney should meet again, and as often as necessary, with the client to discuss the upcoming hearing, and should keep him or her informed of the progress of case preparation. The attorney should inform the client of the witnesses expected to be called and any other evidence he or she intends to present. The attorney also should discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney should thoroughly prepare the client for direct- and cross-examination.

9. The attorney should establish a record of: (a) the nature, type, and extent of the client's specific cognitive and functional abilities and limitations; (b) evaluations of the client's mental and physical condition and, if appropriate, his or her educational potential, adaptive behavior, and social skills; (c) the prognosis for

improvement and any available recommendations as to appropriate treatment or habilitation plans;⁸ (d) the client's experience, if any, with the specific treatment proposed, including side effects; (e) the client's history of participation in inpatient and outpatient treatment; (f) the relative success of previous treatment plans; (g) the current treatment plan, if any; (h) the client's criminal history, if any; (i) his or her employment record; (j) his or her home and familial situation, and (i) the client's religious beliefs, if they would be pertinent.

10. After reviewing the petition and the pleadings, the attorney shall determine if any procedural defenses can be raised, and file appropriate motions with supporting memoranda.

If it appears likely that the client will be found to be incapacitated, the attorney shall negotiate with petitioner's counsel as to the scope of the guardian's authority. If the parties are able to agree on a proposed guardianship order that is appropriately tailored to the specific decision-making needs of the client, the attorney may stipulate thereto at the hearing.

11. Prior to the hearing, the attorney shall (a) prepare any pretrial motions, memoranda, and requests for rulings; (b) prepare consistent direct- and cross-examination questions; and (c) prepare an opening argument. If required or requested by the court, or as otherwise deemed appropriate by the attorney, he or she shall prepare requests for findings of fact and law to be presented at the close of evidence.

12. During the hearing the attorney shall act as a zealous advocate for the client, insuring that proper procedures are followed and that the client's interests are well represented. To that end, the attorney shall: (a) file any and all appropriate motions and legal memoranda, including but not limited to motions regarding the assertion of privileges and confidential relationships, and the admission, exclusion or limitation of evidence; (b) present and cross-examine witnesses, and provide evidence in support of the client's position; (c) make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and (d) take any and all other necessary and appropriate actions to advocate for the client's interests.

13. If the court finds the client to be incapacitated, the attorney shall ensure that (i) the court tailors the guardian's authority to the specific decision-making needs of the client,⁹ (ii) the guardianship order clearly delineates such limited authority, and (iii) the guardian's obligation to periodically report to the court is noted. If a temporary guardianship order issues, the attorney shall ensure that (i) the temporary guardian's authority is limited to decision-making pertinent to the exigent circumstances that warranted the appointment and (ii) the expiration date of the appointment is specified. Where treatment pursuant to a substituted judgment determination is authorized, the attorney shall ensure that (i) periodic reviews and an expiration date are incorporated into the court's decree, (ii) a treatment plan is approved by the court, and (iii) a monitor is appointed to oversee the implementation of the treatment plan.

14. After the hearing the attorney shall meet with the client to explain the court's decision and, if a guardianship or substituted judgment order has issued, the client's appellate rights. If the client wishes to

⁸ See n. 5, above.

⁹ "The court shall exercise [its] authority . . . so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's limitations or other conditions warranting the procedure." G.L. c. 190B, § 5-306(a).

exercise such appellate rights, the attorney shall file a timely notice of appeal with the trial court. Where an appeal is filed, the attorney shall, without delay, notify CPCS's Mental Health Litigation Unit in order that appellate counsel may be assigned.

15. As directed by the Administrative Office of the Probate and Family Court, in guardianship proceedings that do not involve a substituted judgment determination, the attorney's representation shall terminate upon the issuance of the court's decree, unless otherwise ordered by the court. In proceedings in which a substituted judgment determination has been made to authorize treatment, the attorney will continue to represent the client for purposes of periodic reviews and extensions of the substituted judgment order and treatment plan.

16. Whenever counsel's representation continues beyond the issuance of the initial guardianship or substituted judgment order, as described in ¶ 15, counsel is not to assume oversight responsibility for his or her client's ongoing treatment or living arrangements (*e.g.*, the attorney is not expected to attend his or her client's treatment team meetings). That is a monitor's responsibility as to substituted judgment matters and is a guardian's responsibility as to other issues. Rather, the attorney's role is to advocate on behalf of his or her client in respect to judicial proceedings.

Such proceedings will come about in either of two ways: (i) regularly scheduled periodic reviews and/or extensions of substituted judgment orders, or (ii) petitions or motions for termination or modification of guardianship orders, both of which will require counsel to meet with his or her client, review monitor or guardian reports, review records, review pleadings, etc., as necessary, and in accordance with these standards, to prepare for the impending hearing.

June 16, 2009