Memorandum

Date: June 23, 2015

From: Mark A. Larsen, Director
Committee for Public Counsel Services, Mental Health Litigation Division

To: Mental Health Litigation Division Panel Attorneys

RE: Limitations on Panel Membership

As has been explained in several regional meetings, effective July 1, 2015, membership on the Mental Health Litigation Division Panel will be limited to those who certify that they do not represent institutional petitioners in civil commitment, guardianship or substituted judgment proceedings. This requirement was instituted with the certification class of 2014 and will continue with the next class in 2016.

The reasons for this decision are multiple. First, the Committee for Public Counsel Services is charged with providing a limited scope of legal services to those who cannot afford to hire a lawyer. These services are limited to criminal defense, youthful offender, child and family law matters and mental health cases. Other than mental health cases, the opposing party is the Commonwealth. Only in mental health are the petitioners private entities such as nursing homes, psychiatric hospitals or mental health agencies.

CPCS has responsibility for establishing standards and guidelines for the training, qualification and removal of counsel who accept its appointments. CPCS must also provide training for counsel who accept assignments. G.L. ch. 211D, § 4. In discharging this duty, the Mental Health Litigation Division has determined that attorneys who represent institutional petitioners should not be members of its panel.

There are two practical reasons for this decision. First, some attorneys have, over the years, participated in the certification training to become counsel for hospitals and nursing homes. This is one of the reasons we brought all of our training in-house. Others have taken the training and then taken on assigned cases while developing practices on behalf of petitioners. The second reason is the desire and need for an email group that can discuss freely and frankly issues that are important to our clients. Having petitioners counsel in the email group stifles free discussion and impairs the quality of representation. No other division of CPCS would train petitioners' counsel or allow petitioners' counsel access to email groups meant for discussion of issues relating to the essential work of that division.

In addition to these practical reasons, the Rules of Professional Conduct, especially in light of changes to those rules that are effective July 1, 2015, have informed our decision. Although representation of institutional petitioners and individual respondents may not, on a case by case basis, be a clear violation of the Rules, we believe that the risk of a conflict is sufficient to warrant exclusion of those who represent institutional petitioners from the panel. There are at least three Rules that are relevant to this

analysis: Rule 1.0(f) Informed Consent; Rule 1.3, Diligence; Rule 1.7 Conflict of Interest: Current Clients; Rule 1.8 Conflict of Interest: Former Clients and Rule 1.14 Clients with Diminished Capacity.

A primary duty of an attorney is to "represent a client zealously within the bounds of the law." Rule of Professional Conduct (RPC) 1.3. The first comment to this rule provides that "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer. . ." Many of the other rules spring from and are guided by the duty of zealous representation.

The rules regarding conflicts of interest are meant to insure that attorneys put their current client's interest first without regard to their personal interests or fortunes and without regard as to how they may affect other potential clients. This is of particular importance to the clients of the Mental Health Litigation Division. As a group, those who suffer from mental illness or other disabilities are marginalized by society. They are in particular need of zealous advocacy. The personal and professional commitment of their counsel is essential. This commitment may be compromised if the attorney also represents institutions who regularly take positions against the division's clients.

These cases are complicated by the fact that the CPCS client is a respondent in both the District Courts and Probate Courts. It is confusing to the clients when they see their counsel arguing their side of the case in court and then see the very same attorney representing a petitioner. The most difficult question arises when counsel is making arguments on behalf of respondents, which if successful, may limit the arguments of current or future institutional clients.

As an example, the Massachusetts Uniform Probate Code (MUPC) vests discretion in judges to appoint counsel in guardianship cases. The decision to appoint counsel can be influenced by petitioner's counsel since the court is likely to look to the petition anto petitioner's counsel to determine whether the interests of the respondent are such that they need counsel. This raises a potential conflict. Assignment of counsel for the respondent may increase the costs to the petitioner and limit their chances of success on the merits. Petitioners have little reason to ask the court to assign counsel. Another issue that can arise is the scope of the guardianship. While the MUPC favors "limited guardianships in order to maximize the liberty and autonomy of persons subject to guardianship"[1], many of the guardianships of which the Division is aware, lack significant limitations. Respondent's counsel may be reluctant to argue that a guardianship should be limited, if in the very next case the scope of the guardianship is in issue and they represent an institutional petitioner. Similar concerns arise with regard to treatment and medication issues.

The amended Rule of Professional Conduct implicated by these scenarios is 1.7(a) (2) which reads:

[1] Guardianship of B.V.G., 87 Mass. App. Ct. 250, 256 (2015).

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. (Emphasis added.)

In 1993 the American Bar Association, Standing Committee on Ethics and Professional Responsibility, was asked to "address the question of whether a lawyer can represent a client with respect to a substantive legal issue when the lawyer knows that the client's position on that issue is directly contrary to the position being urged by the lawyer (or the lawyer's firm) on behalf of another client in a different, and unrelated, pending matter." ABA Formal Opinion 91-377, "Positional Conflicts." The conclusion of the ABA committee was such positional conflicts are, in absence of consent from both parties, disqualifying and should be avoided.

The Mental Health Litigation Division decision is also guided an ethics opinion from the District of Columbia Bar. Ethics Opinion 265, "Positional Conflicts of Interest in Simultaneous Representation of Clients Whose Positions on Matters of Law Conflict With Other Clients' Positions on Those Issues in Unrelated Matters" (1996). In the DC case, an attorney, who regularly represented children and foster parents in the DC courts, asked if she could represent an organization of foster parents. The conclusion of the DC Bar was that such representation was not allowed without the informed consent of all clients.

> When a lawyer is asked to represent an entity that takes positions on matters of law in a subject area in which the lawyer practices regularly on behalf of other clients, the lawyer may not, without the informed consent of all affected parties, accept simultaneous representation of both clients where such representation creates a substantial risk that representation of one client will adversely affect the representation of the other.

Id. Although the DC Rule on conflicts is different from the ABA Rules and thus the amended Massachusetts Rule, the conclusion of the DC committee was that they would reach the same conclusion under the ABA and amended Massachusetts Rule.

In reaching its conclusion, the DC Bar Committee posed several questions that help focus the issue and the inquiry.

> Central to deciding whether adverse effect, and therefore a conflict, exists will be issues such as: (1) the relationship between the two

> forums in which the two representations will occur; (2) the centrality in each matter of the legal issue as to which the lawyer will be asked to advocate; (3) the directness of the adversity between the positions on the legal issue of the two clients; (4) the extent to which the clients may be in a race to obtain the first ruling on a question of law that is not well settled; and (5) whether a reasonable observer would conclude that the lawyer would be likely to hesitate in either of her representations or to be less aggressive on one client's behalf because of the other representation. (Citation omitted.) In sum, we believe that the 6 focus of the analysis ought not to be on formalities but should be on the actual harm that may befall one or both clients. (Citation omitted.)

In our cases there are only two forums involved: the District Court and the Probate and Family Court. The legal issues that need to be litigated in case after case are the same. The likely adversity between petitioners and respondents are often direct, especially with regard to Rogers hearings involving the use of antipsychotic medications. Since the MUPC is so new, it is important for the courts to resolve many issues. In addition, it is essential that attorneys zealously argue their client's case, but judges in several counties have expressed concern that lawyers are not contesting cases.

Assuming, as we do, that a conflict exists, it is possible that the conflict can be waived. This requires a review of the second part of Rule 1.7.

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
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> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
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> (4) each affected client gives informed consent, confirmed in writing.

(Emphasis added.) Some panel members who have expressed opposition to this change believe that they can provide competent and diligent representation regardless of the potential conflict; that their representation is not prohibited by law and that they will not be asserting claims against clients in the same litigation.

However, that is not the end of the analysis. Even if the first three contingencies of Rule 1.7(b) apply, there is still the requirement that both clients give informed consent, confirmed in writing. It is unclear if any panel members have sought the consent of their clients, but the amended rule requires more than simple consent. It must be both informed and in writing. Both concepts are new to the Massachusetts Rules.

(f) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(c) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (f) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

This implicates one of the crucial issues in all mental health proceedings: the competence of the client. How does an attorney secure informed consent in writing from a developmentally disabled individual who may never have been competent or cannot read, from a floridly psychotic client or from one suffering from a serious paranoid disorder? What is the impact of a lawyer’s conclusion that a client is competent when a court concludes that the client is not competent? The problems that result from efforts to secure the informed consent of mental health clients are such that they should be avoided. It is not inconceivable that successor counsel will raise ineffective assistance of counsel claims and challenge the entire proceeding. If the client refuses to provide the requisite consent, the lawyer will need to decline the representation requiring the appointment of substitute counsel thus delaying a hearing and possibly further impairing the client’s rights. These potential conflicts and problems will be avoided with a policy prohibiting the representation of both institutional petitioners and individual respondents.