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Standing Committee on Professional Ethics

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INFORMAL OPINION 15-07

DUTY TO FOLLOW INSTRUCTIONS OF CLIENT WITH DIMINISHED CAPACITY IN APPEALING PROBATE COURT ORDER

You have asked whether a Court-appointed attorney for a Conservatee is required to "assist" the client in filing an appeal of a Probate Court Order when the attorney believes the appeal is "frivolous" and may be financially "detrimental" to the client (not only as a result of the fees and expenses incurred in the appeal itself but, especially, if the appeal were to cause a delay in liquidating assets needed for the individual's care). You also have asked whether the Court-appointed attorney risks grievance proceedings for filing the appeal or for refusing to "assist" the client. Finally, you ask whether the Conservator, if an attorney, is obligated to report the attorney's behavior to the Grievance Committee.

The short answers to the three questions you ask are as follows:

1. No. The Court-appointed attorney has no duty to assist the client/conservatee in filing a frivolous or financially detrimental appeal.

2. Yes. All attorneys risk being the subject of a grievance proceeding.

3. No. The Conservator is not required to report the attorney's behavior to the Grievance Committee if he or she acts as we suggest.

The principal question you pose has been the subject of prior Informal Opinions, *see, e.g.,* Informal Opinion 05-20, as well as various commentaries. *See, e.g.,* ACTEC *Commentaries*, MRPC 1.14, "Client With Diminished Capacity." However, in Connecticut, the nature and extent of the Court-appointed attorney's duties are now controlled by the decision of the Connecticut Supreme Court in *Gross v. Rell*, 304 Conn. 234 (2012). The Court spoke to this precise issue as follows:

> With respect to attorneys for conservatees, "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client." Rules of Professional Conduct (2005) 1.14, commentary. Thus, if a conservatee has expressed a

preference for a course of action, the conservator has determined that the conservatee's expressed preference is unreasonable, and the attorney agrees with that determination, the attorney should be guided by the conservator's decisions and is not required to advocate for the expressed wishes of the conservatee regarding matters within the conservator's authority. If the attorney believes that the conservatee's expressed wishes are not unreasonable, however, the attorney may advocate for those wishes and is not bound by the conservator's decision. Rules of Professional Conduct (2005) 1.14, commentary ("[e]ven if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication"); *Schult v. Schult,* 241 Conn. 767, 783, 699 A.2d 134 (1997) ("[T]he rules ... recognize that there will be situations in which the positions of the child's attorney and the guardian may differ.... Although we agree that *ordinarily* the attorney should look to the guardian, we do not agree that the rules require such action in every case." [Citation omitted; emphasis in original.]). In addition, if an attorney knows that the conservator is acting adversely to the client's interest, the attorney may have an obligation to rectify the misconduct. See Rules of Professional Conduct (2005) 1.14, commentary.[19]

> Fn. 19 The commentary provides: "If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct." Rules of Professional Conduct (2005) 1.14, commentary. A fortiori, if the attorney represents the ward, and not the guardian, he or she has such an obligation.

We conclude, therefore, that attorneys for conservatees ordinarily are required to act on the basis of the conservator's decisions. If the conservator's decision is contrary to the conservatee's express wishes, however, and the attorney believes that the conservatee's expressed wishes are not unreasonable, the attorney may advocate for them.

Thus, as a general rule, attorneys for respondents and attorneys for conservatees are not ethically permitted, much less required, to make decisions on the basis of their personal judgment regarding a respondent's or a conservatee's best interests, although they may be required to do so in an exceptional case. These ethical principles clearly would apply to an attorney personally retained by a respondent or conservatee to represent him or her in conservatorship proceedings at his or her own expense; see General Statutes (Rev. to 2005) § 45a-649 (b) (2) ("the respondent has a right to be present at the hearing and has a right to be represented by an attorney at his or her own expense"); and nothing in the language of § 45a-649 (b) suggests that an attorney appointed by the Probate Court pursuant to the statute would have a different role. Accordingly, we conclude that the primary purpose of the statutory provision of § 45a-649 requiring the Probate Court to appoint an attorney if the respondent is unable to obtain one is to ensure that respondents and conservatees are fully informed of the nature of the proceedings and that their articulated preferences are zealously

advocated by a trained attorney both during the proceedings and during the conservatorship.

Gross v. Rell, *supra*, at 259-265.

As to reporting duties arising in such circumstances, we have repeatedly recognized the subjective nature of that obligation. Recent Informal Opinions provide guidance on this issue. *See, e.g.,* Informal Opinions 2013-05, 2011-06, 2005-11, 2004-13 and 1994-33. As to the risk of grievance proceedings being initiated by a client in such circumstances, this can never be foreclosed. Indeed the Supreme Court's decision in *Gross* implicitly acknowledges that possibility.

THE COMMITTEE ON PROFESSIONAL ETHICS

BY _____
Marcy Tench Stovall, Chair