CHILD WELFARE LAW SYMPOSIUM

ETHICS MODULE

Clients with Impaired Capacity

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Session I:
Clients with Impaired Capacity

- *NOTE: Unless otherwise indicated, all emphasis supplied.*

First Principle:

- Rule 1.14. Client with Impaired Capacity

"When a client's capacity to make or communicate adequately considered decisions in connection with the representation is impaired . . . **the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client**."

RPC 1.14(a).

First Task: Assessment

- In determining the nature and extent of a client's diminished capacity, "[a] **lawyer may seek guidance from an appropriate diagnostician**." Commentary, Rule 1.14.

- **Limited disclosure of client information to aid assessment is impliedly authorized** as necessary to carry out the representation. ABA Formal Opinion 96-404 (August 2, 1996).

- Consult first with client to request consent to speak with client's doctor. If client refuses, discuss concerns with doctor **only where the lawyer "reasonably believe[s] . . . client's ability to act in his own interest is impaired**." Connecticut Informal Opinion 98-17 (July 29, 1998).

  See also, RPC 2.1 and Commentary.

Some Relevant Assessment Considerations

Commentary, RPC 1.14

- Client's ability to articulate reasoning behind decision
- Client's ability to appreciate consequences of decision
- Substantive fairness of decision
- Variability of client's state of mind
- Consistency of decision with known client commitments and values

If a lawyer "reasonably believes" that a client . . .

- "is unable to make or communicate adequately considered decisions,
- "is likely to suffer substantial physical, financial or other harm unless action is taken *and*
- "cannot adequately act in the client's own interest . . ."

the lawyer **may** take "**reasonably necessary** protective action," including . . .

- Consulting with those who can act to protect the client, and
- "[I]n appropriate cases, seeking the appointment of a personal representative."

RPC 1.14(b).

RPC 1.6(a): Implied Authorization for Disclosure of Confidential Information

- Rule 1.6 applies to protect information related to the representation of client with impaired capacity. RPC 1.14(c).
- "When taking protective action pursuant to [RPC 1.14(b)], the lawyer is impliedly authorized . . . to reveal information about the client, **but only to the extent necessary to protect the client's interests**." *Id.*.

Considerations/Goals in Taking Protective Action

- Giving effect to wishes and values of client, to extent known
- Protecting/advancing client's best interests
- Limiting intrusion on client's decision-making autonomy
- Respecting client's family and social connections

Commentary, RPC 1.14.

De Facto Guardianship/ Involuntary Conservatorship?

"[A]n attorney may act as the client's de facto guardian or advocate for an involuntary conservatorship against the client's express wishes **only if it is unmistakably clear that the client is incapable of making reasonable and informed decisions and the attorney is of the firm belief that a conservatorship is the only way to protect important interests of the client**."

Gross v. Rell, 304 Conn. 234, 272, n. 27.

Gross v. Rell, 304 Conn. 234 (2012)

- Responding to three questions of law certified by the US Court of Appeals for the Second Circuit in litigation arising from involuntary conservatorship.

- Holding, in pertinent part for RPC purposes, **NO QUALIFIED IMMUNITY** for attorney for respondent in conservatorship proceedings or attorney for conserved person because
  - **attorney's primary function is advocating for client's expressed wishes**, not assisting court in a best-interests determination;
  - Primary purpose of statutory provision for appointed counsel is **to ensure that respondent/conservatee is fully informed about the nature of the proceedings** and **that a trained attorney zealously advocates his/her express wishes**, both during the proceedings and during the conservatorship.

Gross v. Rell, cont'd

- General rule: **attorneys for respondents/conservatees are not ethically permitted to make decisions based on their personal judgment re: their clients' best interests.** *Gross*, at 264.
- "Although an attorney might be required in an exceptional case to act as client's de facto guardian, that is not the attorney's primary role." *Gross,* at 263.
- "[I]mpaired adults are presumed to be competent under rule 1.14 until incompetence has been established." *Gross*, at 267.
- Even then, "attorney can make decisions on the basis of the client's reasonable and informed decisions." *Id..*

Gross v. Rell, cont'd

- **Ordinarily, attorney for conserved person should look to client's appointed legal representative for guidance**, *e.g.*, where conservator has determined that conservatee's expressed preference is unreasonable and attorney agrees with that determination. *Gross*, at 263.

- However, where conservator and conserved person disagree and **attorney "believes . . . the conservatee's expressed wishes are not unreasonable . . . the attorney may advocate for those wishes and is not bound by the conservator's decision."** *Id.*.

- If attorney knows that conservator is acting adversely to conserved person's interests, **"attorney may have an obligation to rectify the misconduct."** *Gross*, at 263-64.

Gross v. Rell, cont'd

- Citing *Carrubba v. Moskowitz*, distinguishes between attorney for respondent/conservator and attorney appointed (per Conn. Gen. Stat. § 46b-54a) to represent minor child in dissolution proceeding :

> "Because the *primary* role of the attorney in this context is to assist the court in determining and serving the best interests of the child[,] the attorney is entitled to quasi-judicial immunity."

Gross, at 267 (*emphasis original; citation & internal quotation marks omitted*).

Withdrawal?

- Not contemplated by Rule 1.14, which authorizes only "protective action" (RPC 1.14(b));
- Permissible per Rule 1.16(b), if possible "without material adverse effect on the interests of the client" (RPC 1.16(b)(1));
- Conn. Informal Op. 97-19: withdrawal, while permissible, *"is not the preferred course of action"* to avoid filing for protective action; rather, it "probably occurs when the client needs representation the most."

Emergency Legal Assistance

- Permissible on behalf of non-client **where "health, safety or financial interest of a person with impaired capacity is threatened with imminent and irreparable harm,"** and **only where lawyer "reasonably believes that the person has no other representative available.**"

- Goals: preserve status quo; avoid imminent harm; protect confidences; regularize relationship ASAP.

Commentary, RPC 1.14.

QUESTIONS?