

# Court-Appointed Attorneys in Courts of Probate

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Prepared by:

Integrity of the Practice / Pro Bono Subcommittee of the  
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## APPENDIX I

### PERFORMANCE STANDARDS GOVERNING REPRESENTATION OF CLIENTS IN CONSERVATORSHIP PROCEEDINGS

#### Prepared by the Office of the Probate Court Administrator

These standards describe the steps which should be taken by an attorney who has been assigned to represent the respondent in a conservatorship proceeding or a proceeding in which the petitioner is requesting the authority to administer psychiatric medication pursuant to Conn. Gen. Stat. §§ 17a-543(e) or 17a-543a.

1. A conservatorship application may be adversarial. The role of counsel in these cases is to be an advocate for the respondent and to insure that the respondent is afforded all of his/her due process and other rights. Whether independently retained or appointed by the Court, it is crucial that the attorney serve the client's expressed or implied wishes. Respondents in such proceedings often express the view that nobody is on their side; it is essential therefore that the attorney be an advocate for the respondent. It is the court's and not the attorney's responsibility to decide what is in the best interest of the respondent or person under conservatorship. *Gross v. Rell*, 304 Conn. 234, 261-266 (2012).

The attorney is to represent the client zealously within the bounds of the law. A lawyer should abide by his or her client's decisions concerning the objectives of the representation.<sup>1</sup> Zealous advocacy means:

- a. Advising the client of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of those options.
- b. Giving that advice in the language, mode of communication, and terminology that the client is most likely to understand.
- c. Vigorously supporting that course of action chosen by the client.

The attorney must advocate the client's wishes at all hearings even if the attorney personally disagrees with those wishes. The attorney also has the responsibility to help the client understand the possible costs and consequences of the various options and to try to

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<sup>1</sup> Conn. Rules of Professional Conduct, Rule 1.2.

minimize those costs. In sum, the role of counsel for a client with a psychiatric disability is the same as in any other case.<sup>2</sup>

2. Immediately upon receipt of the assignment of the case the attorney shall:
  - a. Communicate with the client to inform the client of the assignment.
  - b. Arrange to meet with the client (if the attorney's schedule does not permit him/her to meet with the client and promptly begin work on the case, the attorney shall decline the appointment).<sup>3</sup>
3. The attorney shall meet with the client as soon as possible, but at least 72 hours prior to the hearing. The purpose of this initial interview is to begin to develop a lawyer-client relationship based on mutual understanding and trust, and to explain to the client the nature of the conservatorship application and the consequences of a judicial finding of incapacity. The attorney shall explain the role of the attorney, the relevant law, determine the client's version of the facts, including the client's family and living situation, discuss possible alternatives, and ascertain the client's wishes.<sup>4</sup> Ordinarily, if a client is opposed to the application, the attorney must be also.<sup>5</sup>
4. The attorney shall thoroughly investigate the facts.<sup>6</sup> This investigation shall include review of any physician's evaluation or other reports filed with the petition or in the court's file; review of hospital records and records by outpatient clinicians, treatment history, and comments regarding the competence of the client, as well as interviews with mental health clinical staff, case workers from hospital or other community mental health

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<sup>2</sup> See, Rules of Professional Conduct 1.14: "When a client's capacity to make or communicate adequately considered decisions in connection with a representation is impaired, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

<sup>3</sup> Conn. Rules of Professional Conduct, Rule 1.3 and 1.4.

<sup>4</sup> Conn. Rules of Professional Conduct, Rule 1.3 and 1.4.

<sup>5</sup> Conn. Rules of Professional Conduct, Rule 1.14 (a): "When a client's capacity to make or communicate adequately considered decisions is impaired [due to mental disability]... the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." See Conn. Gen. Stat. § 45a-132, which prohibits judges and magistrates from appointing a *guardian ad litem* prior to a determination by a court of probate that the respondent is incapable of caring for himself or herself or incapable of managing his or her affairs.

<sup>6</sup> Conn. Rules of Professional Conduct, Rule 1.3.

programs and other persons familiar with the client, and friends and family of the client.<sup>7</sup> To ensure unimpeded access to client records, Form PC-182A, Appointment of Attorney for Interested Party, includes an order that the attorney for the respondent shall have access to all medical and psychological records concerning the respondent. See also C.G.S. § 45a-98b.

5. The attorney shall read and become thoroughly familiar with the statutory law, including Conn. Gen. Stat. §§ 45a-644 *et seq.*, and if applicable, Conn. Gen. Stat. § 17a-495 *et seq.* (commitment provisions), Conn. Gen. Stat. §§ 17a-543, 17a-543 (e) and (f), and 17a-543a (consent to psychiatric treatment).
6. After reviewing the petition and the medical record the attorney shall determine if any procedural defenses can be raised, and file appropriate motions with supporting memoranda. Procedural defenses should be raised, e.g., where a timely physician's evaluation is lacking [Conn. Gen. Stat. § 45a-650(a)], where the requirements for proper notice and service are not met [Conn. Gen. Stat. § 45a-649], or where the petitioner has failed to set forth facts in support of the petition.
7. The attorney shall confer with the petitioner personally, or through counsel, whichever is appropriate, to determine the petitioner's reason for the application. The attorney should confer with potential witnesses, including treating psychiatrists or psychologists, nursing and any other relevant staff, the prospective conservator, if any, and other possible witnesses suggested by the client.
8. The attorney shall determine whether or not the client has executed a durable or springing power of attorney, an advance directive for health care, or a living will. Conn. Gen. Stat. § 45a-650(g). The attorney shall also ascertain whether the client has designated a conservator in advance, pursuant to Conn. Gen. Stat. § 45a-645, or otherwise has indicated a preference for a specific person to serve as conservator.
9. After developing a thorough knowledge of the law and the facts of the case, the attorney should discuss with the client the upcoming hearing, the likelihood of defeating the petition, and the possibility of alternatives to involuntary conservatorship (*e.g.*, appointment of a Representative Payee for Social Security benefits; a negotiated agreement with the petitioner or family or treaters, relating to the client's care, domicile,

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<sup>7</sup> Psychiatry is an inexact field at best, and psychiatric diagnoses and opinions as to capacity are not determinative.

or finances; or voluntary representation pursuant to Conn. Gen. Stat. § 45a-646); Probate Court Rules of Procedure, sec. 33.2.<sup>8</sup>

10. The attorney shall inform the client of the progress of case preparation, including the witnesses expected to be called and any other evidence the attorney intends to present. The attorney should also 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.
11. If the attorney believes an additional physician's evaluation will aid the client, and the client agrees to such an evaluation, the attorney should take steps with the client's assistance and approval, to arrange for such an evaluation (preferably by a clinician of the client's choosing). Pursuant to Conn. Gen. Stat. § 45a-132a, the court may also order an evaluation and may assess the physician's fees against the petitioner and/or respondent. If insurance does not cover the cost of examination and all parties are indigent, the Probate Administration Fund will then pay the fees. The attorney should advise the physician that the purpose of the examination is to evaluate the client's mental status and assess his or her psychiatric disability, if any, and the extent of its incapacitating effect on the client's ability to care for himself or herself or manage his or her affairs.
12. Where necessary, witnesses should be subpoenaed.<sup>9</sup> The attorney should meet with the witnesses in advance of the hearing in order to prepare them for direct and cross-examination. Any medical records should be reviewed to identify those parts that should be excluded or challenged. The attorney should identify the petitioner's witnesses and make an effort, if tactically indicated, to interview them and prepare cross-examination. Prior to the hearing the attorney shall prepare consistent direct and cross-examination questions and prepare arguments to the judge.
13. The attorney should not file a report, but may file a statement of the client's position. Form PC-170A.
14. During the hearing the attorney should act as a zealous advocate for the client, vigorously supporting that course of action chosen by the client, insuring that proper procedures are followed and that the client's interests are well represented. It is crucial that the client feel that his or her point of view has been heard.

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<sup>8</sup> Clients are often unfamiliar with the effects of a conservatorship and its alternatives. It is therefore incumbent on the attorney to educate the client on the implications of contesting the petition or of seeking various alternatives, and to assist the client in selecting the option likely to maximize the client's freedom and choices.

<sup>9</sup> The cost of subpoenaing witnesses for indigent clients cannot be reimbursed by the Probate Administration Fund. However, subpoenas can be served by any indifferent person, so costs should be minimal.

15. After the hearing the attorney shall meet with the client to explain the court's decision. If the application is granted by the court, the attorney shall explain the client's right to appeal and/or to seek habeas relief. Should the client wish to appeal the Probate Court's decision or to seek habeas relief, the attorney shall assist the client in filing an appeal to the Superior Court or an application for habeas relief to the Probate Court or the Superior Court.<sup>10</sup>
16. The attorney continues representation of a respondent following the Court's issuance of a decree appointing a conservator. The attorney continues to represent the person under conservatorship in all matters that may require Probate Court review, approval, or action, including compliance by the conservator in his or her duties. In addition, the attorney shall continue to represent the client for purposes of periodic reviews of the conservatorship, application for restoration when requested by the client, and application to the Probate Court for habeas relief when requested by the client.

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<sup>10</sup> See Conn. Gen. Stat. § 45a-186 and § 45a-705a (“An individual subject to [conservatorship] may apply for and is entitled to the benefit of the writ of habeas corpus without having previously exhausted other available remedies.... application for a writ of habeas corpus under this section shall be brought to either the Superior Court or the Court of Probate.”)

## APPENDIX II

### PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CLIENTS IN CIVIL COMMITMENT PROCEEDINGS

#### Prepared by the Office of the Probate Court Administrator

These standards generally describe the steps that should be taken by attorneys assigned to represent persons in civil commitment cases.

1. The role of the attorney for the respondent in a commitment case is to act as a zealous advocate for the client<sup>1</sup> and to ensure that the respondent is afforded all of his or her due process and other rights. It is not proper for the attorney to act as a guardian ad litem in the best interest of his or her client. *See*, Rules of Professional Conduct 1.2(a)<sup>2</sup> and 1.14(a)<sup>3</sup> *Gross v. Rell, 304 Conn. 234, 261-266 (2012)*.
  
2. Immediately upon receipt of the assignment of the case the attorney shall:
  - a. Communicate with the client to inform the client of the assignment;
  
  - b. Arrange to meet with the client (if the attorney's schedule does not permit him or her to meet with the client and promptly begin to work on the case, the attorney shall decline the assignment);

Rules of Professional Conduct 1.3 and 1.4.
  
3. The attorney shall not agree to a continuance of the case unless he or she has first consulted with the client and obtained the client's consent.
  
4. The attorney shall meet with the client as soon as possible, but in no event later than 72 hours prior to the hearing. The purpose of this initial interview is to begin to develop a lawyer-client relationship based on mutual understanding and trust, to explain the commitment law and procedures to the client, to discuss the alternatives to continued

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<sup>1</sup> Almost invariably, this means opposing the petition.

<sup>2</sup> "A lawyer should abide by a client's decisions concerning the objectives of representation."

<sup>3</sup> "When a client's capacity to make or communicate adequately considered decisions in connection with a representation is impaired, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

hospitalization available to the client, to determine the client's version of the facts that led to the filing of the petition, and to determine the client's wishes regarding the case. Rules of Professional Conduct 1.3 and 1.4.

5. The attorney shall thoroughly investigate the facts. This investigation shall include reviewing the medical records and interviewing the hospital staff (including doctors, nurses, social workers, and others), and reading the probate file. The attorney should also speak to patients on the ward, friends, and family members of the client, and staff of any other programs who are familiar with the client. Rules of Professional Conduct 1.3.
6. The attorney shall read and become thoroughly familiar with the statutory law, including Conn. Gen. Stat. §§ 17a-495 *et seq.* (The civil commitment provisions) and Conn. Gen. Stat. § 17a-540 *et seq.* (The Patients' Bill of Rights, which governs, *inter alia*, informed consent and the right to refuse medication for the treatment of mental illness and the right to specialized treatment and discharge plans.) The attorney should also become familiar with rules 44 and 45 of the Probate Court Rules of Procedure.
7. After reviewing the medical record and the commitment petition, the attorney shall determine if any procedural defenses can be raised, and file appropriate motions with supporting memoranda.

Procedural defenses may include:

- Lack of jurisdiction, Conn. Gen. Stat. § 17a-497(a);
  - The hospital failed to file the petition at the appropriate time;
  - The hearing has not been commenced within the 10-day time period set forth in Conn Gen. Stat. § 17a-498(a);
  - The petition fails to set forth facts in support of the petition;
  - Insufficient notice was provided to permit the respondent to exercise the right pursuant to Conn. Gen. Stat. § 17a-497(b) to have the case heard by a three-judge court; or
  - Insufficient notice was provided to permit the respondent to exercise his or her right pursuant to Conn. Gen. Stat. § 17a-498(c) to have the court-appointed examining physicians appear at the hearing.
8. After developing a thorough knowledge of the law and the facts of the case, the attorney shall discuss with the client any available alternatives to commitment. These may include participation in an out-patient psychotherapy and counseling program, a community support program, day treatment services, or placement in a less restrictive environment such as supportive housing, an apartment program, or a group residence. The client



should be apprised of his or her right to elect voluntary status in the hospital. The attorney should make it clear to the client that the ultimate decision regarding the proposal of alternatives to commitment must be made by the client. The attorney should reassure the client that the attorney will stand behind the client's decision and forcefully advocate for the client's position. Rules of Professional Conduct 2.1.<sup>4</sup>

9. After this client meeting, and if appropriate, the attorney shall enter into negotiations with relevant persons concerning the case (*e.g.*, discussions with the treating physician(s) regarding alternatives to hospitalization or conversion to voluntary status; discussions with social workers, Department of Mental Health and Addiction Services officials, or other providers regarding the availability of alternative placements).
10. If the attorney and the hospital can agree to a negotiated settlement, the attorney shall meet with his or her client to explain the terms of the proposed agreement and obtain the client's consent to the settlement. Should the client decline the settlement offer, the attorney shall be prepared to try the civil commitment case.
11. Prior to the hearing, the attorney shall identify potential witnesses who may testify in support of the client. Where necessary, witnesses should be subpoenaed.<sup>5</sup> The attorney should meet or speak with the witnesses prior to the trial in order to prepare them for direct and cross-examination. The attorney shall review the medical record and identify those parts of the record that should not be admitted into evidence. The attorney should determine the identity of the hospital's witnesses and of the physicians appointed by the court pursuant to Conn. Gen. Stat. § 17a-498(c) in advance of the hearing, review the reports of the latter physicians, and make an effort, if tactically indicated, to interview them and prepare appropriate cross-examination.<sup>6</sup> The attorney shall 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.

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<sup>4</sup> If there is no meaningful participation by the client, the attorney should proceed with the trial using the best information obtainable. As set forth above in paragraph 1 and the accompanying footnote, the attorney should oppose the petition and assure that the client is afforded all of his or her other rights.

<sup>5</sup> The cost of subpoenaing witnesses for indigent clients cannot be reimbursed by the Probate Administration fund. However, subpoenas can be served by any indifferent person, so costs should be minimal.

<sup>6</sup> The statute requires attendance of the court-appointed physicians only if requested by the respondent or respondent's counsel. It is usually advisable to have these physicians available at the hearing. Thus, a request should be made promptly (see, Conn Gen. Stat. § 17a-498(c): the court is to be given three days notice). Requests to have the physicians available may be withdrawn later. Attorneys may review the physician's reports in advance of the hearing.

12. During the hearing the attorney should act as a zealous advocate for the client, vigorously supporting that course of action chosen by the client, ensuring that proper procedures are followed, and that the client's objectives are well-represented.
13. After the hearing, the attorney shall meet with the client to explain the court's decision. If the client is committed, the attorney shall explain the client's right to appeal. The attorney shall review the evidence that was presented at the hearing in order to advise the client about any steps the client can take during the commitment period in order to be discharged from the hospital.<sup>7</sup> Should the client wish to appeal the Probate Court's decision, the attorney shall file an appeal in a timely manner. See Conn. Gen. Stat. § 45a-186.

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<sup>7</sup> Note that a writ of *habeas corpus*, rather than an appeal, may be the better vehicle to deal with procedural defects in a commitment proceeding, as habeas petitions are addressed promptly by the Superior Court. The hospital must notify the patient annually of the right, upon request, to a hearing to review the commitment. Conn. Gen. Stat. § 17a-498 (g). The court must conduct an annual review of the commitment, with a mandatory hearing every two years even in the absence of a request for hearing. *Id.* In addition, a client may file an application for release pursuant to Conn. Gen. Stat. § 17a-510. For a discussion about the need for periodic reviews see *Fasulo v. Arafteh*, 173 Conn. 473 (1977).