WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202501

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RPCs: 1.0A, 1.1, 1.2, 1.6, 1.7, 1.10

Subject: Representing a Licensed Long-Term Care Facility and Sharing Information about a Resident with a Potential but not yet Appointed Certified Professional Guardian or Conservator; Subsequent Simultaneous Representation of Both a Long-Term Care Facility and a Certified Potential Guardian or Conservator

ISSUES

1. May a lawyer who represents a licensed long-term care facility [n.1] regarding a petition for appointment of a Certified Professional Guardian ("CPG") [n.2] or conservator [n.3] for a resident of the facility disclose information about the resident to the potential CPG or conservator prior to their appointment?

2. After a CPG or conservator is appointed, may the lawyer simultaneously represent both the facility and the CPG or conservator?

SHORT ANSWERS

1. A lawyer representing the facility may disclose information about a resident with a prospective CPG or conservator only if the disclosure is: (a) permitted by applicable substantive law; and (b) consistent with the lawyer's duty of competent representation of the facility under RPC 1.1, including but not limited to the duty to protect confidential information about the resident.
2. After a CPG or conservator is appointed, the lawyer may only represent both the facility and the CPG or conservator only if: (a) no conflict of interest would result under RPC 1.7; or (b) the resulting conflict is one that is capable of written informed consent and such consent is obtained.

   Representing both a long-term care facility and a CPG or conservator for a resident of the facility will often lead to conflicts of interest, and many of

those conflicts will not be subject to waiver or consent. This is especially so when the lawyer is considering representation of a CPG in addition to the facility. Even though the lawyer's second client will be the CPG and not the resident or ward, the extremely wide scope of the duties owed by CPGs to residents/wards and to the many ways in which the interests of a facility and its residents can be adverse, the simultaneous representation of both a facility and a CPG for a resident of the facility is likely to result in conflicting obligations that cannot be waived.

The conflicts risks are lower when the lawyer's second client is a conservator rather than a CPG because the duties of conservators to residents are far more limited than those owed by CPGs. Nonetheless, a case-by-case analysis of the prospects for conflicts and for conflicts waivers will still be required.

ANALYSIS

Question 1.

As with any other matter, a lawyer representing a facility regarding the potential appointment of a CPG or conservator owes the facility a duty of competent representation under RPC 1.1 [n.4] In the present context, this includes but is not limited to advising the facility against disclosures of information about a resident that would violate substantive federal or state law regarding the resident's right to confidentiality. The lawyer's duty of competent representation to the facility also includes advising the facility to take reasonable steps to assure that any potential CPG or conservator with whom information may be shared can reasonably be relied upon to protect resident confidentiality.

Since these substantive federal and state law requirements are outside the range of issues that may be addressed in Advisory Opinions, we cannot address them.[n.5] We do note, however, that any substantive federal or state obligations regarding resident confidentiality are in addition to the lawyer's duty to protect information relating to the representation of the facility under RPC 1.6.

Question 2.

A. Representing Facilities and CPGs

Washington law imposes very strong and very broad fiduciary and other legal obligations on CPGs. As noted in *Raven v. Department of Social and Health Services,* 177 Wash.2d 804, 823 (2013), "A guardianship is a trust relation of the most sacred character." (internal citation and quotation omitted). *See also In re Disciplinary Proceedings Against Petersen*, 189 Wash.2d 768, 778 (2014) states that "the paramount duty of a guardian [is] to actively seek information and input from the ward and others

close to the ward to ensure appropriate care and residential placement decisions." And as noted in *Guardianship of Lamb*, 173 Wash.2d. 173, 185 (2011) the CPG Standards under which CPGs must operate:

> [D]irect guardians to provide timely and accurate reports to the court, act within the scope of the appointed guardianship, consult with the incapacitated person and defer to that person's autonomous decision-making capacity when possible, cooperate with professional caregivers and relatives of the incapacitated person, and seek independent professional evaluations and opinions when necessary to identify the incapacitated person's best interests.

The high and extensive set of obligations that Washington law imposes on CPGs necessarily affects the lawyer's duty of competent representation in representing a CPG. A lawyer representing a CPG must take reasonable care under RPC 1.1 to keep the CPG in compliance with the CPG's substantive obligations—including but not limited to the obligation to weigh heavily the actual or potential preferences or interests of the resident. It also follows that when representing a CPG in addition to a facility, a lawyer must consider any limitations on the lawyer's conduct that may be imposed by RPC 1.7, the general concurrent client conflict of interest rule. Moreover, cases including *In re Guardianship of Karan,* 110 Wash.App. 76 (2002) hold that a lawyer who represents a CPG will at times owe direct duties to the resident as a third-party beneficiary even though the resident is not a client of the lawyer. A lawyer who represents a CPG may at times have direct civil liability to a resident even though the resident is not the lawyer's client--an additional potential source of conflicts under RPC 1.7. [n.6]

RPC 1.7(a) provides that:

> 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:
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> (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.

There are many instances in which the interests of residents—which, as noted, the CPG and the CPG's lawyer must strive to protect—will be inconsistent with the interests of the facility. This will be true, for example, when issues arise with respect to resident care or to policies or practices of the facility that may adversely affect the resident in some way. If a lawyer (or law firm [n.7]) represents both a CPG and a facility when one or more such issues between them are present, a conflict of interest will be present even if the lawyer only seeks to represent one "side" of that issue. Furthermore, present disagreements or disputes between a facility and a CPG are not the only source of conflicts that the lawyer must consider. Under RPC 1.7, the lawyer is charged not only with what the lawyer

actually knows about the interests of the facility and the CPG but also with whatever else the lawyer should reasonably know with respect to those interests. This includes the extent to which future conflicts are reasonably foreseeable and the likely effect of harm to clients if such conflicts arise. In other words, the lawyer will have to consider and address with each client "the likelihood that a difference in interest [between the clients] will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the other client." RPC 1.7, Comment [8]. This would include consideration of added costs to a client in the event of a subsequent need to change counsel due to a conflict.

Whenever the lawyer's duties to the facility-client touch upon or concern resident rights or interests or the lawyer's duties to the CPG-client touch upon or concern resident rights or interests which could adversely affect the facility, it is difficult if not impossible to imagine that no conflict of interest under RPC 1.7(a) will exist. If, by contrast, the lawyer's representation of the facility has nothing to do with resident care issues but is limited to protecting the facility's trademarks, and if it happened that no disputes foreseeably and reasonably appeared on the horizon regarding the care of the resident by the facility, then no conflict of interest at all might be present. When, however, there is factual or legal overlap between the work that the lawyer performs or is expected to perform for the facility and the CPG, a conflict under RPC 1.7(a) will be present.

When a conflict under RPC 1.7(a) is present, the lawyer may begin or continue representation of the facility and the CPG only if permitted by RPC 1.7(b), which requires that four conditions be met:

1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client,

2) the representation is not prohibited by law,

3) the representation does not involve the assertion of a claim by one client against the other in the same litigation or other proceeding before a tribunal, and

4) each affected client gives informed consent in writing (following authorization from the other client to make any required disclosures).

We are not aware of any applicable statutes, regulations or case law holding that the kinds of simultaneous representation under consideration here are unambiguously "prohibited by law" within the meaning of RPC 1.7(b)(2). Nonetheless, we note that the "reasonable belief" standard contained in RPC 1.7(b)(1) is an objective, rather than a purely subjective, standard. In other words, the lawyer must not only personally believe that the lawyer will be able to provide competent and diligent representation to each client, but that belief must be objectively reasonable from a neutral lawyer's or observer's point of view. In addition, and under RPC 1.7(b)(3), the lawyer could not represent both the facility and the CPG in litigation or other proceedings before a tribunal in which the facility and the CPG would be on the opposite side of any issues. And under RPC 1.7(b)(4) and RPC 1.0A(e), "Informed

consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client."

We agree that a CPG, as a lawfully appointed guardian, would have the right to waive or consent to a conflict that can be waived or consented to. Nonetheless, we find it difficult to conceive of situations in which informed consent from the CPG (and the facility) would be sufficient to allow a lawyer simultaneously to represent both a facility and a CPG for a resident of the facility with respect to any issues pertaining to the resident's rights or interests at, or with respect to, the facility.

B. Representing Facilities and Conservators

RPC 1.7 is also potentially applicable to the concurrent representation of a facility and a conservator. Nonetheless, the duties of a conservator are limited to protection of the resident's financial affairs and thus are much narrower in scope than the duties of a CPG with respect to the resident's overall welfare. It follows that the risk that a conflict will exist under Rule 1.7 and the risk that any resulting conflict will not be subject to waiver will be less in the facility-conservatorship context than in the facility-CPG context. If, however, a financial dispute was to arise between the facility and the conservator, it would certainly not be possible for the lawyer to represent both sides of the dispute and it is questionable whether there are many circumstances in which written consent from both clients would allow the lawyer to proceed on behalf of either one against the other.

Endnotes

1. With respect to the licensing of facilities, see RCW 70.129.010(4) and sources cited therein. Residents of such facilities are protected under Washington's "long-term care resident rights" laws. See RCW 70.129.005 et seq.
2. Pursuant to RCW 11.130.010(11), "'Guardian' means a person appointed by the court to make decisions with respect to the personal affairs of an individual." With respect to the certification of professional guardians, *see* RCW 11.130.010 *et seq.*; GR 23.
3. Pursuant to RCW 11.130.010(5), "'Conservator' means a person appointed by a court to make decisions with respect to the property or financial affairs of an individual subject to conservatorship." With respect to the appointment of conservators, see RCW 11.130.360 *et seq.*; GR 23.
4. As with any other matter, the lawyer must be satisfied that the goals and objectives that the facility wishes to pursue and how they are to be pursued are legally appropriate. *See*, *e.g.*, RPC 1.2(a), (d). We therefore assume that the facility's (and the lawyer's) support for the appointment of a particular CPG or conservator is made in good faith and is not the result of an unlawful *quid pro quo* or side deal between the facility and the CPG or conservator.
5. Potential sources of law on these issues include but are not necessarily limited to RCW 70.129; RCW 74.34; RCW 11.130; 45 CFR Parts 160 and 164; and 42 CFR Part 482.
6. Conflicts of interest could also result from a lawyer's decision to exercise the right make disclosures adverse to client interests under sections including RPC 1.6(b)(8).
7. Under RPC 1.10(a), the conflicts of interest addressed in this opinion would apply to all lawyers working for any of these clients at a single firm.