

## ROLE OF THE ATTORNEY FOR THE ALLEGED INCAPACITATED PERSON

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There has been considerable debate about the role of the appointed attorney for the alleged incapacitated person in a guardianship case. On one side are those who believe that the attorney should be an advocate for the alleged incapacitated person, argue zealously against the guardianship, and try to limit the extent of the powers of the guardian. According to the ABA Model Rules of Professional Conduct, the attorney must treat the subject of the guardianship as any other client.<sup>1</sup> The attorney must follow the dictates of the client, regardless of whether there is evidence enough to support those ideas, or whether the attorney agrees with what the client wants.

On the opposing side of this argument are those who believe the attorney should substitute his or her judgment for that of the incapacitated person and act as a guardian ad litem. In this role, the attorney determines what is in the best interest of the person who is the subject of the guardianship. The attorney uses his or her own judgment to decide whether the person is competent, investigates the situation, and typically files a report with the court advocating what the attorney decides is in the best interest of the client.

A New Jersey court defined the difference between an advocate and a guardian ad litem. Unlike a court-appointed

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1. ABA Model R. Prof. Conduct 1.14(a) (2000). On February 5, 2002, the ABA House of Delegates, at its Midyear Meeting in Philadelphia, Pennsylvania, completed its review of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (the ABA Ethics 2000 Commission), revising and amending the Model Rules. For a complete summary of the revisions, see *Report 401 as Passed by the House of Delegates February 5, 2002* <[http://www.abanet.org/cpr/e2K-report\\_home.html](http://www.abanet.org/cpr/e2K-report_home.html)> (Feb. 2002). Revised Model Rules 1.6 and 1.14 are reprinted at 31 Stetson L. Rev. 791, 856-866 (2002).

attorney, who is an advocate for the client, a guardian ad litem acts as the “‘eyes of the court’ to further the ‘best interests’ of the alleged incompetent.”<sup>2</sup> A court-appointed attorney is an independent legal advocate who takes part in hearings and proceedings, while a guardian ad litem is an “independent fact finder and an investigator for the court.”<sup>3</sup> Therefore, court-appointed attorneys “subjectively represent[ ] the client’s intentions, while . . . [guardians ad litem] objectively evaluate[ ] the best interests of the alleged incompetent.”<sup>4</sup>

The role the attorney is to play may be dictated by state law, or it may be so unclear that the attorney may choose whichever role he or she prefers. Often, state laws are modified by local custom and practice, which leaves the attorney with enough leeway to choose either role. In this Author’s opinion, the attorney should protect the due-process rights of the alleged incapacitated individual and advocate strenuously for the client’s wishes. If the attorney does not do this, the alleged incapacitated person has no voice in the proceedings. This is the ethical obligation of the attorney as an officer of the court, which also protects the proceedings from attack based on the due-process protections of the Fourteenth Amendment and local statutory law.

Section I of this Article discusses the history of guardianship law and how the King of England was seen as the protector of those who were established as lunatics or idiots. Section I also discusses the types of guardianship, the consequences for one under guardianship, and the role of the attorney in several states.

Section II discusses the due-process protections of the Fourteenth Amendment, the *parens patriae* authority, and the process due to the alleged incapacitated person. Section II continues with state and federal appellate cases, the right to notice, the standards of the guardian, and the standard for finding incapacity.

Section III deals with the ABA’s Model Rules of Professional Conduct. It addresses the situation of a client under a disability, and the scope of representation, diligence, communication, confidentiality, and conflicts of interests.

Section IV presents other opinions of the role of the attorney in a guardianship case, including the American Bar Association’s

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2. *In re Mason*, 701 A.2d 979, 983 (N.J. Super. Ch. Div. 1997).

3. *Id.*

4. *Id.*

position, the Uniform Guardianship and Protective Proceedings Act, the National Symposium on Guardianship systems, and the reforms that other countries have made in their guardianship laws.

Section V addresses how an attorney may play the role of an advocate for the alleged incapacitated person, from the initial interview to negotiating for less restrictive measures as an alternative to a guardianship. It also addresses how an attorney can reflect the client's wishes in court when the client is unable to communicate.

The Conclusion calls for a reform of the guardianship system based on the advances that have occurred in other countries.

## SECTION I

### A. History of Guardianship

Over the years, society has struggled with what to do with the person and property of adults who are incapacitated. Modern guardianship laws have their basis in the *parens patriae* authority of the feudal kings of England.<sup>5</sup> Under the *parens patriae* doctrine, the King was literally the “parent of the country” and had a fiduciary duty to protect the property of those who were *non compos mentis*.<sup>6</sup> In 1324, during the reign of Edward II, the statute *De Praerogativa Regis* stated as follows:

[T]he King shall provide, when any, that beforetime hath had his wit and memory happen to fail of his wit, as there are many [per lucida intervalla,] that their lands and tenements shall be safely kept without waste and destruction, and that they and their household shall live and be maintained competently with the profits of the same, and the residue besides their sustenance shall be kept to their use, to be delivered unto them when they come to right mind, so that such lands and tenements shall in no wise be alienated; and the King shall take nothing to his own use. . . .<sup>7</sup>

The law differentiated between idiots, those who were

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5. Sallyanne Payton, *The Concept of the Person in the Parens Patriae Jurisdiction over Previously Competent Persons*, 17 J. Med. & Phil. 605, 618 (1992).

6. Symposium, *Developments in the Law — Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1207–1208 (1974).

7. Payton, *supra* n. 5, at 618–619.

incompetent from birth,<sup>8</sup> and lunatics, those who had lost the use of reason.<sup>9</sup> A lunatic was defined as “one who ha[s] had under[s]tanding, but by di[s]ea[s]e, grief, or accident, ha[s] lo[s]t the u[s]e of his rea[s]on.”<sup>10</sup> A lunatic might have lucid intervals and be expected to recover his reason.<sup>11</sup>

The King had custody of an idiot, and the profits of the idiot's lands were paid to the King during the idiot's lifetime.<sup>12</sup> At his death, the King returned the land to the heirs of the idiot.<sup>13</sup> In contrast, the King was merely a trustee for the lands of the lunatic.<sup>14</sup> The King's duty was to protect and safeguard the land until the person regained his faculties.<sup>15</sup> The profits not used for care of the lunatic and his family were safeguarded and were returned to the lunatic when he recovered.<sup>16</sup> The King had to account to the lunatic, or to his heirs after he died, for his management of the property during the period of the lunatic's period of incapacity.<sup>17</sup>

The King's *parens patriae* authority became effective only after a man was found to be *non compos mentis* in a proceeding by the Lord Chancellor.<sup>18</sup> The Lord Chancellor issued a *writ de lunatico inquirendo* or a *writ de idiota inquirendo*.<sup>19</sup> A jury of twelve men would inquire into the matter; and if they found that the man was a lunatic or an idiot, he would be committed into the care of a relative or friend, called his committee.<sup>20</sup> Although it fell to the King to protect the property of the lunatic, the care of the *non compos mentis* person was committed to his family or friends.<sup>21</sup> To prevent “sinister practices,” the next heir who had an interest in the lunatic's property after his death was seldom

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8. William Blackstone, *Commentaries on the Laws of England* vol. 1, ch. f, 271, 292 (1st ed., Clarendon Press 1976).

9. *Id.* at 294.

10. *Id.*

11. *Id.*

12. *Id.* at 292.

13. *Id.* at 293.

14. *Id.* at 294.

15. *Id.*

16. *Id.*

17. *Id.*; see *Hamilton v. Traber*, 27 A. 229, 230 (Md. 1893) (stating that “the King should provide that . . . lands and tenements . . . [of lunatics] . . . be kept without waste”).

18. Blackstone, *supra* n. 8, at 293.

19. *Id.* at 294.

20. *Id.* at 294–295.

21. *Id.*

permitted to be the committee of his person.<sup>22</sup>

Formal proceedings were initiated only for those who owned land and were wealthy enough to pay for the proceedings, since the point of the inquiry was to protect the property of the subject.<sup>23</sup> Those who were poor were left to the care of their families.<sup>24</sup>

After the American Revolution, state legislatures assumed the *parens patriae* authority of the King.<sup>25</sup> Although courts did not want American democracy to retain the traditional powers of the King, *parens patriae* authority was seen as benevolent and consistent with the duty of the state to protect those who could not protect themselves.<sup>26</sup> A Maryland court in *Bliss v. Bliss*<sup>27</sup> quoted with approval *14 Ruling Case Law 544*, Section 4:

In this country after the Revolution, the care and custody of persons of unsound mind, and the possession and control of their estates, which in England belonged to the King as a part of his prerogative, were deemed to be vested in the people, and the courts of equity of the various states have, either by inheritance from the English Courts of Chancery, or by express constitutional or statutory provisions, full and complete jurisdiction authority over the persons and property of idiots and lunatics.<sup>28</sup>

The court went on to hold as follows, again quoting *14 Ruling Case Law 556*, Section 7:

In this country as has been seen, jurisdiction over the persons and property of the insane is exercised by the courts of equity of the various states as the representatives of the people of the state, and from this general jurisdiction in the absence of statute authorizing any particular court or officer to issue a commission of inquiry, the right to ascertain judicially whether or not a person is of unsound mind is deemed to be impaired.<sup>29</sup>

The Supreme Court, in the case *The Late Corporation of the*

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22. *Id.* at 295.

23. John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship and Alternatives*, 13 Wm. & Mary L. Rev. 569, 571 (1972).

24. *Id.*

25. Symposium, *supra* n. 6, at 208.

26. *Id.*

27. 104 A. 467 (Md. 1918).

28. *Id.* at 471.

29. *Id.*

*Church of Jesus Christ of the Latter-Day Saints v. United States*,<sup>30</sup> defined the *parens patriae* doctrine as follows:

If it should be conceded that a case like the present transcends the ordinary jurisdiction of the court of chancery, and requires for its determination the interposition of the *parens patriae* of the State, it may then be contended that, in this country, there is no royal person to act as *parens patriae*, and to give direction for the application of charities which cannot be administered by the court. It is true we have no such chief magistrate. But, here, the legislature is the *parens patriae*, and, unless restrained by constitutional limitations, possesses all the powers in this regard which the sovereign possesses in England. Chief Justice Marshall, in the Dartmouth College Case, said: "By the revolution, the duties, as powers, of government devolved on the people. . . . It is admitted that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department." 4 Wheat. 651 [at 662].<sup>31</sup>

The duties of the King were thus devolved onto the state legislatures, who have the power to exercise the *parens patriae* authority. These powers are seen in the authority of the state to remove children from the custody of their parents for abuse or neglect, remove a vulnerable adult from an abusive caregiver, and appoint a guardian of the person or of the property after one has been found to be mentally or physically incapacitated.<sup>32</sup>

### B. Types of Guardianship

Guardianship may come in distinct packages.<sup>33</sup> Often, a petitioner sues for guardianship of the person and of the property.<sup>34</sup> This gives the guardian total control over the alleged incapacitated person and his or her property.<sup>35</sup> The guardian may have to file an annual fiduciary account with the court.<sup>36</sup> If the

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30. 136 U.S. 1, 56–57 (1889).

31. *Id.*

32. Symposium, *supra* n. 6, at 1208–1209.

33. See e.g. Bruce S. Ross, *Conservatorship Litigation and Lawyer Liability: A Guide through the Maze*, 31 Stetson L. Rev. 757, 758–759 (2002) (describing four different types of guardianship available in California).

34. *Id.* at 759.

35. Regan, *supra* n. 23, at 608.

36. Blackstone, *supra* n. 8, at 451.

guardian does not do this, the guardian may be removed and the court will appoint someone who will file the fiduciary reports.<sup>37</sup>

If only health care is needed, a petitioner may sue only for guardianship of the person.<sup>38</sup> If only financial management is needed, one may sue for guardianship of the property.<sup>39</sup> In some states, guardianship of the property is called conservatorship.<sup>40</sup> Most often, however, petitioners sue for control of both person and property so that the guardian has maximum authority over the person.

### C. Consequences for the Person Placed under Guardianship

The effects of a judicial appointment of a guardian on the individual rights of the alleged incapacitated person are substantial. A previously competent adult may no longer have the right to decide where and how to live, how or whether to spend his or her funds, with whom to associate, or whether to accept or reject health care.

The person found to be incapacitated loses the right to vote in thirty-five states and the District of Columbia.<sup>41</sup> Of the fifteen states that do not have these statutes, some have guardianship laws that require a court to decide whether to remove the right to vote.<sup>42</sup> The New Hampshire law, for example, states that anyone a court finds to be incapacitated cannot be deprived of any legal rights without a specific finding of the court.<sup>43</sup> The court shall enumerate which legal rights the proposed ward is incapable of exercising.<sup>44</sup>

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37. *Id.*

38. Paula L. Hannaford & Thomas L. Hafemeister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 Elder L.J. 147, 148 (1994).

39. *Id.*

40. Regan, *supra* n. 23, at 607.

41. Kay Schriener, Lisa A. Ochs & Todd G. Shields, *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 Berkeley J. Empl. & Lab. L. 437, 455–456 (2000). The states are Alabama, Arkansas, Arizona, California, Delaware, Florida, Georgia, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

*Id.*

42. *Id.*

43. N.H. Rev. Stat. Ann. § 464-A:9 (Supp. 2001).

44. *Id.* The statute reads as follows:

In other states, the statutes are silent on the matters of individual rights. However, in some jurisdictions, the ward is prohibited from marrying and loses the right to make contracts.<sup>45</sup>

In 1987, the Associated Press published a series of articles on guardianship abuses that caused Congress to form a committee to look into abusive guardianship practices.<sup>46</sup> The congressional committee concluded that the “[t]ypical[ ] ward[ ] ha[s] fewer rights than the typical [convicted felon].”<sup>47</sup> The committee found that, not only could the alleged incapacitated person “no longer receive money or pay [his or her] bills,” but courts give guardians “the power to choose where [the alleged incapacitated person] will live, what medical treatment they will receive and, in rare cases, when they will die.”<sup>48</sup> In sum, the congressional committee saw guardianship as “the most severe form of civil deprivation which can be imposed on a citizen of the United States.”<sup>49</sup>

#### D. Role of the Attorney for the Alleged Incapacitated Person

The series of Associated Press articles caused many states to look at their guardianship proceedings and reform their guardianship laws.<sup>50</sup> Unfortunately, not every state gave the alleged incapacitated person the right to counsel. In many states, a guardian ad litem or visitor is appointed to investigate the situation and, based on his or her recommendation, the court may appoint an attorney for the alleged incapacitated person. For example, the New York Code states as follows:

(a) At the time of the issuance of the order to show cause, the court shall appointment a court evaluator.

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IV. No person determined to be incapacitated thus requiring the appointment of a guardian of the person and estate, or the person, or the estate, shall be deprived of any legal rights, including the right to marry, to obtain a motor vehicle operator's license, to testify in any judicial or administrative proceedings, to make a will, to convey or hold property, or to contract, except upon specific findings of the court. The court shall enumerate in its findings which legal rights the proposed ward is incapable of exercising.

*Id.*

45. H.R. Rpt. 100-639, at 21 (Sept. 25, 1987).

46. *Id.* at 13.

47. *Id.* at 4.

48. *Id.*

49. *Id.* at 1.

50. Sally Balch Hurme, *Steps to Enhance Guardianship Monitoring* 7-9 (ABA 1991).



(c) The duties of the court evaluator shall include the following:

1. meeting, interviewing and consulting with the person alleged to be incapacitated regarding the proceeding.
2. explaining to the person alleged to be incapacitated, in a manner which the person reasonably be expected to understand, the nature and possible consequences of the proceeding, the general powers and duties of a guardian, available resources, and the rights to which the person is entitled, including the right to counsel.
3. determining whether the person alleged to be incapacitated wishes legal counsel to be appointed and otherwise evaluating whether legal counsel should be appointed in accordance with section 81.10 of this article.<sup>51</sup>

Article 81.10 of the New York Code states, in part, as follows:

(a) Any person for whom relief under this article is sought shall have the right to be represented by legal counsel of the person's choice.

(b) If the person alleged to be incapacitated is not represented by counsel at the time of the issuance of the order to show cause, the court evaluator shall assist the court . . . in determining whether counsel shall be appointed.

(c) The court shall appoint counsel in any of the following circumstances:

1. the person alleged to be incapacitated requests counsel;
2. the person alleged to be incapacitated wishes to contest the petition;
3. the person alleged to be incapacitated does not consent to the authority requested in the petition to move the person alleged to be incapacitated from where that person presently resides to a nursing home or other residential facility as those terms are defined . . .;
4. if the petition alleges that the person is in need of major medical or dental treatment and the person alleged to be incapacitated does not consent;
5. the petition requests temporary powers pursuant to [provisions for a temporary guardian];
6. the court determines that a possible conflict may exist between the court evaluator's role and the advocacy needs of the person alleged to be incapacitated;

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51. N.Y. Mental Hygiene Laws § 81.09 (McKinney 1996).

7. if at any time the court determines that appointment of counsel would be helpful to the resolution of the matter.<sup>52</sup>

Other codes are more explicit in the role the attorney is to play. For example, in North Dakota the code states as follows:

Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for a hearing. If, at any time in the proceeding, the court determines that the interests of the person to be protected are or may be inadequately represented, it may appoint an attorney to represent the person to be protected. An attorney appointed by the court to represent a protected person has the powers of a guardian ad litem . . . . The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer, employee, or special appointee of the court.<sup>53</sup>

In North Carolina,

[t]he respondent is entitled to be represented by counsel of his own choice or by an appointed guardian ad litem. Upon filing of the petition, an attorney shall be appointed as guardian ad litem to represent the respondent unless the respondent retains his own counsel, in which event the guardian ad litem may be discharged.<sup>54</sup>

In thirty-five states and the District of Columbia, the respondent has the right to an attorney to represent him or her.<sup>55</sup>

In the state of Washington, the code describes the actual role the attorney must play as follows:

(1)(a) Alleged incapacitated individuals shall have the right to be represented by willing counsel of their choosing at any stage in guardianship proceedings. The court shall provide counsel to represent any alleged incapacitated person at public

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52. *Id.* § 81.10.

53. N.D. Cent. Code, § 30.1-29-07 (1996).

54. N.C. Gen. Stat. § 35A-1107 (2000).

55. H.R. Rpt. 100-639, at 8-9. The states are Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Kentucky, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

expense when either: (i) The individual is unable to afford counsel, or (ii) the expense of counsel would result in substantial hardship to the individual, or (iii) the individual does not have practical access to funds with which to pay counsel. . . .

(b) Counsel for an alleged incapacitated individual shall act as an advocate for the client and shall not substitute counsel's own judgment for that of the client on the subject of what may be in the client's best interests. Counsel's role shall be distinct from that of a guardian ad litem, who is expected to promote the best interest of the alleged incapacitated individual, rather than the alleged incapacitated individual's expressed preferences.

(c) If an alleged incapacitated person is represented by counsel and does not communicate with counsel, counsel may ask the court for leave to withdraw for that reason. If satisfied, after affording the alleged incapacitated person an opportunity to a hearing, that the request is justified, the court may grant the request and allow the case to proceed with the alleged incapacitated person unrepresented.<sup>56</sup>

The presence of an attorney acting as an advocate for the alleged incapacitated person is always open to question. In some states, the alleged incapacitated person has no attorney and no one to speak for him or her in court.<sup>57</sup> In other states, despite the words of the statutes that require the attorney to advocate for the client, the attorney acts as a guardian ad litem.<sup>58</sup> In some jurisdictions, the courts require the attorney to file a report recommending whether the guardianship should go forward.<sup>59</sup>

It has been recommended that the alleged incapacitated individual have an attorney appointed in every case as a way to safeguard the individual's rights.<sup>60</sup> However, in a ten-state study of guardianship practices conducted in 1994 by the Center for

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56. Wash. Rev. Code Ann. § 11.88.045 (West 2001).

57. H.R. Rpt. 100-639, at 3.

58. See Lauren Barritt Lisi, Anne Burns & Kathleen Lussenden, *National Study of Guardianship Systems: Findings and Recommendations* 58-59 (The Ctr. for Soc. Gerontology 1994) (discussing how some court-appointed attorneys in guardianship cases "do not view their role as that of advocate for respondent's wishes").

59. *Contra* Vicki Gottlich, *The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective*, 7 Md. J. Contemp. L. Issues 191, 212 (1995) (explaining that the "representing attorney" should be an advocate, unlike a guardian ad litem who files reports of recommendation).

60. Lisi, Burns & Lussenden, *supra* n. 58, at 54.

Social Gerontology, the study found that the alleged incapacitated individual often was unrepresented by counsel in guardianship hearings.<sup>61</sup> Respondents were present at the hearings in thirty-six percent of the cases if they lived at home, in twenty-four percent of the cases if they lived in a nursing home, and in nineteen percent of the cases if they lived in other places. The presence of fourteen percent was not ascertained.<sup>62</sup>

Attorneys for the alleged incapacitated person were court appointed in twenty percent of cases, a private attorney appeared in nine percent of the cases, there was no evidence in the file in sixty-seven percent of cases, appointment was unknown in three percent of cases, and there was missing data in two percent of cases.<sup>63</sup> Attorneys for the alleged incapacitated person were present at the hearing in twenty-four percent of cases, were not present in thirty-five percent of cases, and in forty-one percent of cases the researcher did not know.<sup>64</sup> The attorney spoke at the hearing in eighty-seven percent of cases.<sup>65</sup>

## II. DUE PROCESS PROTECTIONS

### A. The Fourteenth Amendment

The Fourteenth Amendment to the U.S. Constitution requires that due-process protections be afforded to anyone who is threatened with loss of liberty or property.<sup>66</sup> This is the case in guardianship proceedings, in which a person who has some incompetencies may lose all of his or her rights and property.<sup>67</sup> A respondent in a guardianship case can lose his or her right to vote, marry, contract, determine where he or she will live, choose the kind of health care he or she will receive, and decide how to manage his or her assets.<sup>68</sup> Once a guardian is appointed, the guardian rarely consults with the ward before making a decision.<sup>69</sup> Especially for those with mental retardation or mental

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61. *Id.*

62. *Id.* at 49.

63. *Id.* at 56.

64. *Id.*

65. *Id.* at 57.

66. U.S. Const. amend. XIV, § 1.

67. H.R. Rpt. 100-639, at 4.

68. *Id.* at 1.

69. See Michael D. Casasanto, Mitchell Simon & Judith Roman, *A Model Code of Ethics for Guardians*, 11 Whittier L. Rev. 543, 553 (1989) (making a case for a National

illness, the imposition of a guardianship may rob a person of his or her autonomy and his or her ability to manage affairs independently.<sup>70</sup>

In some cases, the imposition of a guardianship makes no difference to the ward because he or she is too incapacitated to understand the consequences of the appointment.<sup>71</sup> This may be true with regard to downward-spiraling diseases like chronic heart disease and Alzheimer's Disease.<sup>72</sup> However, the imposition of a guardianship in many cases does deprive the ward of the ability to make certain choices, or to express his or her opinion.<sup>73</sup> The imposition of a guardianship deprives the person of the right to liberty and to manage property.<sup>74</sup>

The U.S. Constitution, Fourteenth Amendment, Section I protects citizens of the United States from any state laws that "abridge the privileges or immunities of citizens of the United States[,] deprive any person of life, liberty or property without due process of law[,] [or] deny to any person within its jurisdiction the equal protection of the law."<sup>75</sup> The Supreme Court acknowledged that due process cannot be precisely defined, in *Lassiter v. Department of Social Services of Durham County*.<sup>76</sup> The concept of due process requires a determination of the "fundamental fairness" appropriate to the situation.<sup>77</sup> Fundamental fairness is discerned by considering relevant precedents and

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Model Code to be implemented that would require the guardian to consult with the ward to determine the ward's desires and preferences); Natl. Guardianship Assn., *Ethics for Guardians* <<http://www.guardianship.org>> (accessed July 24, 2001) (providing a discussion of guardianship ethics).

70. Windsor C. Schmidt, Jr., *Guardianship: The Court of Last Resort for the Elderly and Disabled*, 92 (Carolina Academic Press 1995).

71. See Casasanto, *supra* n. 69, at 545 (providing a description of a forty-nine-year-old with minimal mental ability). A guardian must make the best choice for the ward "as defined by objective socially shared criteria." *Id.* at 547.

72. *Id.* at 546. In this type of situation, guardians should look to past decisions of the ward when making current decisions. *Id.* at 549.

73. *Supra* n. 47 (stating that "[b]y appointing a guardian, the court entrusts to someone else the power to choose").

74. *Supra* n. 68. "An individual under guardianship typically is stripped of his or her basic personal rights such as the right to vote, the right to marry, the right to handle money, and so forth." *Id.*

75. U.S. Const. amend. XIV, § 1.

76. 452 U.S. 18, 24 (1981). *Lassiter* involved the termination of parental rights of a mother sentenced to prison for twenty-five to forty years after a conviction for second-degree murder. *Id.* at 25.

77. *Id.*

the various interests involved.<sup>78</sup> The Court concluded that an “indigent” has a right to appointed counsel when “the litigant may lose his physical liberty if he loses the litigation.”<sup>79</sup>

This dictate applies in guardianship matters. Consider the person who does not want to leave her home to live in a nursing home; she is certain to lose her physical liberty if she loses the case.<sup>80</sup> The right to have an attorney appointed for her, to advocate for her, and to explain to the court how she manages her care at home is essential to the concept of “fundamental fairness.”<sup>81</sup> This concept of fundamental fairness would take into account the fact that the potential ward had managed her care at home, was willing to take the risks involved in living at home, and refused to leave her home for a safer environment.<sup>82</sup> These interests would be balanced against the state’s right to protect those who cannot protect themselves, which is the principle behind the *parens patriae* doctrine.<sup>83</sup> If the risk of living at home was too great, a guardian would be appointed to move the alleged incapacitated person from her home to a nursing home.<sup>84</sup> Alternatively, the court might order the guardian to arrange additional supportive services so the ward could remain at home.<sup>85</sup>

In another case, *Vitek v. Jones*,<sup>86</sup> the Supreme Court found that moving a prisoner from a jail to a mental hospital without notice, the right to a hearing, or appointed counsel deprived the prisoner of liberty in violation of the Due Process Clause of the Fourteenth Amendment.<sup>87</sup> The Supreme Court affirmed the decision of the district court, saying that incarceration did not include transfer to a mental institution without notice and right to counsel, because involuntary treatment in a mental hospital is

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78. *Id.* at 24–25.

79. *Id.*

80. See H.R. Rpt. 100-639, at 1 (relating the story of an eighty-one-year-old woman whose guardian had unnecessarily placed her in a nursing home; it took weeks for the ward to get herself released).

81. Commn. on Mentally Disabled & Commn. on Leg. Problems of Elderly, *Guardianship: An Agenda for Reform — Recommendations of the National Guardianship Symposium 10* (ABA 1989) [hereinafter *Wingspread Recommendations*].

82. Casasanto, *supra* n. 69, at 553.

83. Payton, *supra* n. 5, at 606.

84. Casasanto, *supra* n. 69, at 554.

85. *Id.* at 560.

86. 445 U.S. 480 (1979).

87. *Vitek v. Jones*, 445 U.S. 480, 494 (1979).

not contemplated by those who serve time in jail.<sup>88</sup> The state's reliance on physicians and psychologists neither removes the prisoner's interest from due-process protection nor answers the question of what process is due under the Constitution.<sup>89</sup>

The Supreme Court cited the United States District Court for the District of Nebraska and its list of minimum procedures required to transfer a prisoner to a mental hospital.<sup>90</sup> The list of seven steps first requires that written notice be given to the prisoner about the possible transfer.<sup>91</sup> After the notice, the list of procedures calls for a hearing with enough advance notice for the prisoner to prepare.<sup>92</sup> At the proceeding, the prisoner is informed of the evidence used to support the transfer and is given the opportunity to speak and present evidence on his or her own behalf.<sup>93</sup> The third step demands that the prisoner be allowed to present testimony and to confront witnesses called by the state unless there is "good cause for not permitting such presentation, confrontation, or cross-examination."<sup>94</sup> Fourth, the procedures insist that an independent decision-maker be present.<sup>95</sup> Also, the fact-finder must make a written statement about the evidence and the reasons for the transfer.<sup>96</sup> Sixth, the state must appoint legal counsel if the prisoner is unable to afford his or her own.<sup>97</sup> Finally, the procedures require that a prisoner be provided "effective and timely notice of all the foregoing rights."<sup>98</sup>

Similarly, often the only evidence of the potential ward's incapacity in guardianship cases is two certificates from physicians or psychologists.<sup>99</sup> The court may weigh these certificates heavily as evidence of the person's incapacity, beyond what the alleged incapacitated person wishes to say to the

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88. *Id.* at 493.

89. *Id.* at 495.

90. *Id.* at 494–495.

91. *Id.* at 494.

92. *Id.*

93. *Id.*

94. *Id.* at 494–495.

95. *Id.* at 495.

96. *Id.*

97. *Id.*

98. *Id.*

99. *E.g. Poteat v. Guardianship of Poteat*, 771 S.2d 569, 571 (Fla. Dist. App. 4th 2000) (affirming the trial court's finding that testimony from a neurologist and a psychiatrist "constituted substantial competent evidence to support . . . that a guardianship was necessary").

court.<sup>100</sup> Being found incapacitated places the same stigma on a person as being forced to reside in a mental hospital.<sup>101</sup> One no longer has the autonomy afforded to adults to contract, to determine what is done with his or her funds and property, or to make decisions about what is done with his or her person.<sup>102</sup> His or her autonomy is overruled and the authority to decide what is done with his or her life is given to another person.<sup>103</sup>

In some states, the list enumerated by the Supreme Court in the *Vitek* case is codified in statutes and court rules pertaining to guardianship.<sup>104</sup> Nevertheless, when a state-furnished attorney is appointed as the eyes and ears of the court, the enumerated procedures are not met and, therefore, fundamental principles of liberty and justice are violated.

If the attorney acts for the court in investigating the case, and if the attorney makes a recommendation that ignores the wishes of his or her client, it is an ethical breach of the ABA Model Rules of Professional Conduct, which all attorneys must follow.<sup>105</sup> If the attorney ignores what the client is saying, then the court does not hear from the client, since no one speaks for him or her other than his or her attorney, who offers evidence to the court based on the “best interest standard.”<sup>106</sup> The attorney, rather than the judge, therefore becomes the decision-maker in such a case. When the attorney acts as a guardian ad litem, the due-process protections promised to the alleged incapacitated person are ignored. The client has no representation in court, and no one communicates his or her interests to the judge.

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100. *Id.*

101. See generally *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 651 (2d Cir. 1999) (stating that “[a] litigant possesses liberty interests in avoiding the stigma of being found incompetent.”).

102. *Supra* n. 68 and accompanying text.

103. *Supra* n. 70 and accompanying text.

104. *E.g.* Md. Est. & Trusts Code Ann. § 13-705 (2001) (exemplifying a statute that reflects the *Vitek* holding); Md. R. Code Ann. R. 10-201 to 10-205 (2001) (exemplifying a state’s court rules that reflect the *Vitek* holding).

105. ABA Model R. Prof. Conduct preamble ¶ 17.

106. See Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State’s Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 Issues L. & Med. 283, 283–284 (1991) (describing the “best interests standard” in the context of medical treatment for children and the incompetent).



### B. *Parens Patriae* Authority

From its inception, *parens patriae* authority has been seen as benevolent in nature, rather than adversarial, because the state is acting to protect those who cannot protect themselves.<sup>107</sup> The doctrine is focused on doing good for those who cannot protect themselves.<sup>108</sup> However, not every petitioner for guardianship is focused on doing good. At times the petitioner is seeking to protect property and funds that he or she will inherit when a relative or friend dies. At other times, relatives are warring amongst themselves, seeking control of an elder's person or property.

These are the cases in which having an advocate as legal counsel is most important. The *parens patriae* theory is enforced by public authority, sanctioned by age and custom, in furtherance of the general public good.<sup>109</sup> For it to be valid, the principles of liberty and justice must be applied, and due process for the alleged incapacitated person must be pursued. In the case of *In re Gault*,<sup>110</sup> one of the first cases in which due process was applied to juvenile court, the Supreme Court noted as follows:

[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase "due process." Under our Constitution, the condition of being a boy does not justify a kangaroo court.<sup>111</sup>

Similarly, the condition of being elderly, mentally retarded, mentally ill, or drug or alcohol dependent does not justify a kangaroo court. For the *parens patriae* doctrine to apply to all equally, the attorney must advocate for the alleged incapacitated person. Only when the attorney serves as the advocate for the alleged incapacitated person is the due process guaranteed by the Constitution accorded to the alleged incapacitated person.

In a federal case from Wisconsin, the court relied heavily on the *Gault* case in finding that the plaintiff and the class of people she represented were not accorded due process of law before they

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107. *Id.* at 287–288.

108. Payton, *supra* n. 5, at 641. "The state acquired its power as part of a medieval bargain made in the ethical structure of feudalism, under which the King became the servant, not the master, of persons he brought under his protection." *Id.*

109. Griffith, *supra* n. 106, at 288–289.

110. 387 U.S. 1 (1967).

111. *In re Gault*, 387 U.S. 1, 27–28 (1967).

were involuntarily committed to a mental institution.<sup>112</sup> The court in *Lessard v. Schmidt*<sup>113</sup> found that the Wisconsin civil-commitment standard had violated the Constitution because, among other things, it did not include the right to counsel.<sup>114</sup> Although the statute called for the appointment of a guardian ad litem, the guardian ad litem did not assume the role of an advocate.<sup>115</sup> The court found that, undoubtedly, “a person detained on grounds of mental illness has a right to counsel, and to appointed counsel if the individual is indigent.”<sup>116</sup> Quoting *Gault*, the *Lessard* court explained that counsel is needed “to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”<sup>117</sup>

Commitment to a mental institution and being found incompetent apply a similar stigma.<sup>118</sup> Both situations result in the same restraint of civil liberties, the imposition on autonomy, and the restraint on liberty and the right to protect their property. The search for less restrictive alternatives in an attempt to settle the case is always the duty of the advocate counsel. The holding of the United States District Court for the Eastern District of Wisconsin applies the rights of civil liberties to those who are alleged to be incapacitated as well.<sup>119</sup>

### C. Process Due to Alleged Incapacitated Persons

#### 1. Appellate Court Proceedings

Both state and federal courts have found that due process of law entitles an alleged incapacitated person to counsel who advocates for him or her.<sup>120</sup> Three recent cases illustrate the courts' reasoning.<sup>121</sup>

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112. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1103 (E.D. Wis. 1972).

113. 349 F. Supp. 1078 (E.D. Wis. 1972).

114. *Id.* at 1103.

115. *Id.* at 1099.

116. *Id.* at 1097.

117. *Id.* at 1098 (quoting *In re Gault*, 387 U.S. at 36).

118. *Supra* n. 101.

119. *Lessard*, 349 F. Supp. at 1103.

120. *Gault*, 387 U.S. 1 (1967); *Conservatorship of Gilbuena v. Moore*, 209 Cal. Rptr. 556 (Cal. App. 5th Dist. 1985); *Est. of Thompson*, 542 N.E.2d 949 (Ill. App. 1st Dist. 1989).

121. *In re Guardianship of Deere*, 708 P.2d 1123 (Okla. 1985); *In re Fey*, 624 S.2d 770 (Fla. Dist. App. 4th 1993); *In re Lee*, 754 A.2d 426 (Md. Spec. App. 2000).

In the case of *In re Fey*,<sup>122</sup> Florida's Fourth District Court of Appeal decided that the trial court should have appointed independent counsel to represent the ward prior to the hearing and trial preparation.<sup>123</sup> The court held that the trial court's failure to appoint independent counsel to represent the ward constituted error of constitutional proportion because such failure deprived the ward of her right to due process and equal protection of the laws.<sup>124</sup> This act also violated a Florida statute that provides for a court-appointed "attorney for each person alleged to be incapacitated in all cases involving a petition for adjudication of incapacity."<sup>125</sup> However, "[t]he alleged incapacitated person may substitute his own attorney for the attorney appointed by the court."<sup>126</sup> Additionally, the statute prohibits the attorney of an alleged incapacitated person from serving as that person's guardian or as the attorney for the guardian or the petitioner.<sup>127</sup> The court held "that compliance with section 744.331 . . . is mandatory and that the trial court's failure to adhere to these requirements at bar constituted error of fundamental proportions."<sup>128</sup>

In *In re Guardianship of Deere*,<sup>129</sup> the Supreme Court of Oklahoma held that the refusal to grant a continuance to the ward so that he could confer with his attorney, whom he had retained the day before the trial, constituted an abuse of discretion and a denial of due process.<sup>130</sup> The court said due process protects "the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security" and is a "historic libert[y]."<sup>131</sup> Court-appointed guardians "result[ ] in a massive curtailment of liberty, and it may also engender adverse social consequences."<sup>132</sup> The court observed that, once a guardian is in place, he or she "becomes the custodian of the person, estate and

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122. 624 S.2d 770 (Fla. Dist. App. 4th 1993).

123. *In re Fey*, 624 S.2d at 771. The ward had died, but the appellate court heard the case because it was a matter of great public interest, the issue was likely to recur, and the issue had not been previously addressed. *Id.*

124. *Id.*

125. *Id.* (quoting Fla. Stat. § 744.331(2)(a) (1990)).

126. *Id.* (quoting Fla. Stat. § 744.331(2)(a)).

127. *Id.* (citing Fla. Stat. § 744.331(2)(b)).

128. *Id.* at 772.

129. 708 P.2d 1123 (Okla. 1985).

130. *Id.* at 1124.

131. *Id.* at 1126.

132. *Id.*

business affairs of the ward.”<sup>133</sup> As a result, the ward can no longer choose his or her residence and loses his or her freedom to travel.<sup>134</sup> Furthermore, the ward’s legal relationship with other persons is limited and he or she suffers numerous statutory disabilities.<sup>135</sup> The right to “remain licensed to practice a profession[,] marry[,] refuse medical treatment[,] possess a driver’s license[,] own or possess firearms[,] and remain registered to vote” are also taken away.<sup>136</sup>

Further, the Supreme Court of Oklahoma noted that, when the state takes away “a person’s right to personal freedom, minimal due process requires proper written notice and a hearing at which the alleged incompetent may appear to present evidence in his/her own behalf.”<sup>137</sup> Other factors such as

[t]he opportunity to confront and cross-examine adverse witnesses before a neutral decision-maker, representation by counsel, findings by a preponderance of the evidence, and a record sufficient to permit meaningful appellate review are concomitant rights in this context

that are also required and “cannot be abridged without compliance with due process of law.”<sup>138</sup> The court used these principles to support its “finding that guardianship proceedings must comport with constitutional notions of substantial justice and fair play.”<sup>139</sup>

Finally, in the case of *In re Lee*,<sup>140</sup> the Maryland Court of Special Appeals held that the representation that was afforded a ward did not meet the requirements of the Maryland Rules and the Rules of Professional Conduct.<sup>141</sup> The court remanded the case to the trial court for a hearing on the issue of competency.<sup>142</sup> The court’s decision contains a detailed analysis of why an attorney acting as an advocate is required.<sup>143</sup>

The attorney in *In re Lee*, who was appointed to represent the

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133. *Id.*

134. *Id.* at 1125–1126.

135. *Id.* at 1126.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. 754 A.2d 426 (Md. Spec. App. 2000).

141. *Id.* at 441.

142. *Id.*

143. *Id.* at 438–441.

proposed ward, acted as a guardian ad litem and waived the ward's right to be present at trial despite the ward's statutory right and desire to be there.<sup>144</sup> Then the attorney filed a report that directly contradicted the ward's desire that a non-family member serve as guardian, sought to prevent a hearing on the issue of his incapacity, and objected when any evidence of his disability was raised in the hearing.<sup>145</sup> The court said the attorney was "acting throughout this proceeding as an investigator for the court, or perhaps as a guardian ad litem, but not as his attorney."<sup>146</sup>

The court explained that the obligations of an attorney and those of a guardian ad litem sometimes "directly conflict."<sup>147</sup> An attorney is obligated "to explain the proceedings to his client and advise him of his rights, keep his confidences, advocate his position, and protect his interests."<sup>148</sup> This requirement of "due process" is especially important "when the alleged disabled person faces significant and usually permanent loss of his basic rights and liberties."<sup>149</sup> Guardianship proceedings, the court stated, when the alleged incapacitated person has an effective attorney,

ensures that the proper procedures are followed by the court, that the guardianship is imposed only if the petitioner proves by 'clear and convincing evidence' that such a measure is necessary and there is no reasonable alternative, that the guardianship remains no more restrictive than is warranted, . . . that no collusion exists between the court appointed investigator and petitioner, and that the client's right to appeal is exercised, if appropriate.<sup>150</sup>

Quite different from the duties of an attorney, the court explained, a guardian ad litem must investigate the case from a neutral standpoint to determine whether a guardian is needed.<sup>151</sup> The guardian ad litem "may divulge the confidences of the alleged disabled person and make recommendations that may conflict

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144. *Id.* at 438.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 438-439.

149. *Id.* at 439.

150. *Id.*

151. *Id.*

with his or her wishes.”<sup>152</sup> Furthermore, “the guardian ad litem may serve as the principal witness against the alleged disabled person.”<sup>153</sup>

The *In re Lee* court quoted the Rules of Professional Conduct for the State of Maryland, enumerating Rules 1.2(a), 1.3, 1.4(b), 1.6(a), and 1.14.<sup>154</sup> The court stated that the role of the attorney in Maryland had traditionally been “shrouded in ambiguity,” but with a change in court rules, the rule was clarified to provide that the attorney should be an advocate for his or her client.<sup>155</sup> The court rules further provided that a court may “appoint an . . . investigator to discover the facts of the case.”<sup>156</sup> The court reasoned that “a normal client-lawyer relationship’ precludes an attorney from acting solely as an arm of the court.”<sup>157</sup> An attorney cannot substitute his or her “assessment of the ‘best interests’ of the client to justify waiving the client’s rights without consultation, divulging the client’s confidences, disregarding the client’s wishes, and even presenting evidence against him or her.”<sup>158</sup>

The court noted that the ward’s attorney filed “recommend[ations] that he be found disabled, in need of a guardian, and that, contrary to [the ward’s] wishes, [his daughter] be appointed his guardian.”<sup>159</sup> These actions, the court concluded, made the attorney “virtually the principal witness against [the ward’s] stated position.”<sup>160</sup>

The court found the waiver of the ward’s appearance by his counsel “a particularly troubling aspect of [the] proceedings.”<sup>161</sup> The attorney stated that “it would be exceedingly harmful to [the ward’s] current physical and mental health to be compelled to testify at this proceeding, due to the fact that he is, without doubt, an individual under a disability.”<sup>162</sup> The Court of Special

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152. *Id.*

153. *Id.*

154. *Id.* at 438–439.

155. *Id.* at 439.

156. *Id.* at 440.

157. *Id.* (quoting Md. R. Prof. Conduct 1.14(a)).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

Appeals noted three problems with this statement.<sup>163</sup> First, the attorney's conclusion about his client's health "did not address his apparent waiver of his 'right to be present' at trial but only the desirability of his being compelled to testify."<sup>164</sup> Second, the attorney seemingly took for granted that the ward's "status as 'an individual under a disability' [was] conclusive evidence that his presence at such a proceeding would be a threat to his physical and mental health."<sup>165</sup> Third, the court accepted the waiver that the attorney filed without evaluating "the basis of factual information supplied to the court by his counsel or a representative appointed by the court."<sup>166</sup> The ward did appear in court following his request, and this issue "bears reciting because it illustrates the extent to which [the ward] was without representation in even basic matters, such as the right to attend a proceeding where his fundamental rights and liberties were at stake."<sup>167</sup>

Next, the court discussed the fact that, when the ward took the stand, he received little help from counsel.<sup>168</sup> For example, counsel gave scant attention to the ward's proposal that the court appoint a guardian who was not a member of his own family.<sup>169</sup>

Finally, the court said that the behavior of the ward's counsel during trial was not only similar to that of an adverse witness, but at times resembled that of opposing counsel.<sup>170</sup> For example, the attorney made "repeated objections to the introduction of any testimony on the question of the nature and extent of [the ward's] disability, on the ground that this issue had already been decided."<sup>171</sup> Additionally, once the court decided to recommend a guardian, the ward had "no one to provide him with disinterested advice as to whether to appeal."<sup>172</sup> As a result, "from the inception of these proceedings to their conclusion," the ward was without "the legal representation contemplated by Maryland law or the

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163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 441.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

Rules of Professional Conduct.”<sup>173</sup>

Many state courts have long held that the role of the attorney for the alleged incapacitated person should be one of an advocate at the trial level. This is essential to due-process protections when the alleged incapacitated person stands to lose essentially all of his or her fundamental rights and liberty interests.

States also acknowledge that due process requires that an alleged incapacitated person have the right to adversary counsel so that his or her voice may be heard in court. For those states that do not appoint adversary counsel, the alleged incapacitated person’s contentions about how and where to live his or her life may never be heard in the court. As shown by *In re Lee*, the guardian ad litem may not heed the proposed ward’s concerns and may substitute his or her own judgment for that of the alleged incapacitated person.<sup>174</sup>

## 2. Right to Notice

Notice of the guardianship proceeding provides the alleged incapacitated person with the ability to prepare for the hearing and confer with counsel.<sup>175</sup> The element of notice is essential to the alleged incapacitated person so that he or she can find counsel who will play the role of an advocate and defend him or her against the stigma of being found incompetent by a court.<sup>176</sup> Absent any notice of the hearing, the decision of the lower court may be void.<sup>177</sup>

### III. OTHER OPINIONS ON THE ROLE OF THE ATTORNEY FOR THE ALLEGED INCAPACITATED PERSON

#### A. ABA Model Rules of Professional Conduct

The Preamble and Scope of the ABA Model Rules of Professional Conduct describe a lawyer’s responsibilities.<sup>178</sup> The

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173. *Id.*

174. *Id.* at 439.

175. *In re Guardianship of Deere*, 708 P.2d at 1125–1126.

176. *Id.*

177. See *Bliss v. Bliss*, 104 A. 467, 473 (Md. 1918) (holding that a person must have notice and an opportunity to contest an adjudication of insanity); *In re Guardianship of Deere*, 708 P.2d at 1125–1126 (finding that “minimal due process requires proper written notice and a hearing.” Failure to comply with statutory requirements may invalidate an appointment.).

178. ABA Model R. Prof. Conduct preamble ¶¶ 1-21.



Preamble says that “a lawyer is a representative of clients.”<sup>179</sup> As a representative, the lawyer is to explain to the client the client’s legal rights and obligations.<sup>180</sup> He or she is to represent the client zealously and assert the client’s position under the rules of the adversary system.<sup>181</sup> A lawyer acting as a negotiator should seek a result advantageous to the client but consistent with fairness to others.<sup>182</sup> “In all professional functions a lawyer should be competent, prompt[,] and diligent.”<sup>183</sup> The lawyer should maintain open communication with the client concerning the representation.<sup>184</sup> Additionally, the lawyer should maintain the confidences of the client.<sup>185</sup> The Model Rules, his or her own conscience, and the approval of peers guide the lawyer.<sup>186</sup>

The Scope section of the Model Rules states that the rules are rules of reason.<sup>187</sup> The section goes on to say that the attorney-client privilege belongs to the client and not to the lawyer.<sup>188</sup> The client has the expectation that disclosures made to the lawyer will not be revealed unless the client agrees.<sup>189</sup> Judicially-ordered disclosures will be made only in accordance with recognized exceptions to the attorney-client and work-product privileges.<sup>190</sup>

### *1. Client under a Disability*

The Model Rules address the question of how an attorney is to act when a client is under a disability.<sup>191</sup> Model Rule 1.14 says that, when a client’s decision-making ability is impaired due to “minority, mental disability[,] or some other reason,” an attorney must, “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”<sup>192</sup> In addition, an attorney “may seek the appointment of a guardian or take other protective

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179. *Id.* ¶ 1.

180. *Id.* ¶ 2.

181. *Id.*

182. *Id.*

183. *Id.* ¶ 3.

184. *Id.*

185. *Id.*

186. *Id.* ¶ 6.

187. *Id.* ¶ 13.

188. *Id.* ¶ 19.

189. *Id.*

190. *Id.*

191. ABA Model R. Prof. Conduct 1.14.

192. *Id.* R. 1.14(a).

action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."<sup>193</sup>

The comment to Model Rule 1.14 says that the normal client-lawyer relationship is based on the fact that, when the client is advised about his or her rights and obligations, the client can make a decision about the course of the representation.<sup>194</sup> When the client suffers from a mental or physical disability, maintaining the ordinary client-attorney relationship may become difficult.<sup>195</sup> A client lacking legal competence, however, may be able "to understand, deliberate upon, and reach conclusions about" the client's own well-being.<sup>196</sup>

In a guardianship case, because a petitioner already has filed for guardianship, the attorney need not "take other protective action."<sup>197</sup> The role of the attorney is to maintain, to the greatest extent possible, the normal client-attorney relationship, keep the client's confidences, keep the client's behavior and utterances confidential, and treat the client with attention and respect.<sup>198</sup> Even if the client has a legal representative, the attorney should "accord the represented person the status of [a] client, particularly in maintaining communication."<sup>199</sup>

Furthermore, the comment to Model Rule 1.14 notes that disclosure of a client's condition "can adversely affect the client's interests."<sup>200</sup> For example, raising the client's disability may lead to an action to involuntarily commit the client to a mental institution.<sup>201</sup> The lawyer's role in this case is, unavoidably, a difficult one and the lawyer may seek help "from an appropriate diagnostician."<sup>202</sup>

The lawyer is permitted to take emergency action when the client is not capable of acting.<sup>203</sup> Such action should seek to maintain the status quo, and the attorney should not seek

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193. *Id.* R. 1.14(b).

194. *Id.* R. 1.14 cmt. 1.

195. *Id.*

196. *Id.*

197. *Id.* R. 1.14(b).

198. *Id.* R. 1.14 cmt. 1-2.

199. *Id.* cmt. 2.

200. *Id.* cmt. 5.

201. *Id.*

202. *Id.*

203. *Id.* cmt. 6.

payment for taking such action.<sup>204</sup>

Thus, the primary role of the attorney for the alleged incapacitated person in a guardianship action is to treat the client as any other client, to try to maintain a normal client-attorney relationship, and to keep the client's confidences that would injure the client if disclosed.<sup>205</sup>

## 2. Rule 1.2: Scope of Representation

Both the client and the attorney "have authority and responsibility in the objectives and means of representation."<sup>206</sup> "The client has [the] ultimate authority to determine the purposes to be served by legal representation."<sup>207</sup> This concept is supported in Model Rule 1.2, which says that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . , and shall consult with the client as to the means by which they are to be pursued."<sup>208</sup> However, the "lawyer may limit the objectives of the representation,"<sup>209</sup> may not assist a client in criminal or fraudulent behavior,<sup>210</sup> and when the lawyer knows the client expects behavior not permitted by the ethical rules, the lawyer shall consult with the client.<sup>211</sup> Furthermore, the "lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."<sup>212</sup>

Representation, "including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."<sup>213</sup> The comment to Model Rule 1.2 emphasizes that a lawyer's representation of a client does not signify that the lawyer agrees with what the client is saying.<sup>214</sup> Especially in guardianship cases, when the client alleges that he or she is able to handle business and his or her personal life, the lawyer who represents the client does not need

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204. *Id.* cmt. 6-7.

205. *Id.* R. 1.14.

206. *Id.* R. 1.2 cmt. 1.

207. *Id.*

208. *Id.* R. 1.2(a).

209. *Id.* R. 1.2(c).

210. *Id.* R. 1.2(d).

211. *Id.* R. 1.2(e).

212. *Id.* R. 1.2(a).

213. *Id.* R. 1.2(b).

214. *Id.* R. 1.2 cmt. 3.

to agree with the client's position.<sup>215</sup> For the attorney to represent the client, the attorney must make the best case for the client, even if the only evidence of the client's ability is the client's own opinion.

When a client appears to be suffering from mental disability, the attorney's "duty to abide by the client's decision is to be guided by reference to Model Rule 1.14."<sup>216</sup> On the other hand, an agreement on representation must be in accord with the Model Rules of Professional Conduct and other laws.<sup>217</sup> "[T]he client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [Competence],"<sup>218</sup> or to settle a matter that the lawyer may wish to continue.<sup>219</sup>

### 3. Rule 1.3: Diligence

The rule regarding diligence in representation requires that an attorney "shall act with reasonable diligence and promptness in representing a client."<sup>220</sup> The comment to Model Rule 1.3 says that "perhaps no professional shortcoming" is so widely resented as procrastination.<sup>221</sup> A client's interests can be adversely affected by a lawyer's delay in handling a case.<sup>222</sup> This is especially true in guardianship cases, when medical needs may be on the horizon, a move to a more secure location may be contemplated, or family assets need to be sold so that the alleged incapacitated person can remain in a nursing home. Unreasonable delay can undermine the client's confidence in the attorney or cause the client needless anxiety.<sup>223</sup>

### 4. Rule 1.4: Communication

Communication with an alleged incapacitated person is

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215. *Id.*

216. *Id.* cmt. 2.

217. *Id.* cmt. 1.

218. Model Rule 1.1 states that "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ABA Model R. Prof. Conduct 1.1.

219. ABA Model R. Prof. Conduct 1.2 cmt. 5.

220. *Id.* R. 1.3.

221. *Id.* cmt. 2.

222. *Id.*

223. *Id.*

essential in representing the client.<sup>224</sup> Communication may have to be in the simplest of terms and at a time of day when the client is most cogent. Model Rule 1.4 requires that the attorney “keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”<sup>225</sup> Moreover, attorneys should “explain a matter to the extent reasonably necessary to permit the client to make informed choices regarding the representation.”<sup>226</sup>

The comment to Model Rule 1.4 says that the information given to the client must be appropriate for the client to understand.<sup>227</sup> Fully informing the client may be difficult when the client has a mental disability.<sup>228</sup> The attorney should speak to those who care for the person and find the time of day when the person is most cogent. For example, a person with Alzheimer’s Disease may experience a syndrome called sundowner syndrome.<sup>229</sup> When dusk falls, the person may become more confused than at other times of the day.<sup>230</sup> Therefore, the best time of day to speak to a person with Alzheimer’s Disease may be early in the morning or after a meal.<sup>231</sup>

When the attorney explains the guardianship, this should be done in the simplest of terms to clearly communicate the possibility that another person could make decisions about the client’s own life and property.<sup>232</sup> The client should have enough information so that he or she can participate fully in the representation.<sup>233</sup> When a lawyer receives an offer of settlement in a guardianship case, the lawyer should immediately communicate the offer to the client.<sup>234</sup> Even in cases in which the person has some mental incapacity, the lawyer should know how the client feels about the representation, whether he or she wants

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224. Also, Model Rule 1.14 indicates that the lawyer should, as best as possible, maintain communication with the client. ABA Model R. Prof. Conduct 1.14.

225. ABA Model R. Prof. Conduct 1.4(a).

226. *Id.* R. 1.4(b).

227. *Id.* R. 1.4 cmt. 3.

228. *Id.*

229. *The Merck Manual of Geriatrics* 372 (Mark H. Beers & Robert Berklow eds., 3d ed., Merck Research Laboratories 2000).

230. *Id.*

231. *Id.*

232. See ABA Model R. Prof. Conduct 1.4 cmt. 2 (indicating that the communication should be “consistent with the duty to act in the client’s best interest[ ]”).

233. *Id.* cmt. 1.

234. *Id.*

to be in court for the hearing, and whether the client wants a jury trial.<sup>235</sup> Above all, the client should know about the hearing and should decide whether to appear and speak to the judge. Speaking to the judge gives the client his or her day in court, and allows the judge, rather than the lawyer, to assess the need for a guardianship.

### 5. Rule 1.6: Confidentiality of Information

The rule on confidentiality of information often can trouble the attorney for the alleged incapacitated person.<sup>236</sup> In some instances, even disclosing the client's attitude and manner of dress can convey an impression to the decision-maker that may be detrimental to the client.<sup>237</sup> Pursuant to Model Rule 1.6, "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation," or are reasonably necessary to prevent a criminal act that "is likely to result in imminent death or substantial bodily harm."<sup>238</sup>

The ethical obligation of the attorney to keep the confidences of the client encourages clients to seek the services of a lawyer early in a case.<sup>239</sup> This enables the client to disclose everything to an attorney, which aids in the development of the case.<sup>240</sup> In guardianship cases, in which the attorney may be court appointed, the attorney should tell the client that the attorney is on his or her side and will defend the client against the guardianship if that is what the client wishes.<sup>241</sup> The attorney must make it clear that the client's confidences will be kept secret unless the client wishes to reveal them.<sup>242</sup> This encourages the client to reveal even embarrassing information about himself or herself, which can facilitate proper representation.<sup>243</sup>

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235. See *id.* R. 1.14 cmt. 1 (indicating that a client with decreased mental capacity may still possess the ability to make decisions affecting their own well-being).

236. *Id.* cmt. 5.

237. *Id.*

238. *Id.* R. 1.16(a)-(b)(1).

239. *Id.* R. 1.6 cmt. 2.

240. *Id.* cmt. 4.

241. See *id.* R. 1.14(a) (stating that, to the extent possible, the lawyer and the client should "maintain a normal client-lawyer relationship" when the client has a disability).

242. *Id.* R. 1.6 cmt. 3, 4.

243. *Id.* cmt. 2.

When the attorney serves as a guardian ad litem, the client has no protection against the disclosure of confidential information, for the attorney must file a report and recommendation with the court.<sup>244</sup> As in the case of *In re Lee*, the appellate court stated that the attorney became the opposing attorney during the hearing because she revealed the client's confidences, opposed the client's position on the merits of the case, and admitted that the client was disabled.<sup>245</sup>

The obligation to keep the client's confidences is essential to the client-attorney relationship.<sup>246</sup> To reveal those confidences is to betray the client when the client may have assumed that the attorney was acting as all other attorneys do.<sup>247</sup> To act as a guardian ad litem in a guardianship case is to deceive the client because the client may assume that the attorney is acting for the client, rather than as the ears and "eyes of the court."<sup>248</sup> To betray the client by revealing eccentric ways of behavior and dressing is to betray the client's confidences, and this may result in serious negative consequences to the client.<sup>249</sup>

#### 6. Rule 1.7: Conflict of Interest: General Rule

Model Rule 1.7 addresses conflicts of interest and requires that an attorney profess loyalty to his or her client.<sup>250</sup> This conflict-of-interest rule prohibits the attorney from representing an alleged incapacitated person who has a conflicting interest with another client.<sup>251</sup> This means that the attorney should not represent both the petitioner and the alleged incapacitated person. Additionally, if an attorney has represented the family of the alleged incapacitated person in the past, he or she should not represent the alleged incapacitated person in a guardianship proceeding. According to the language of Model Rule 1.7, an attorney must "not represent a client if the representation of that

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244. *In re Lee*, 754 A.2d at 439.

245. *Id.* at 440-441.

246. ABA Model R. Prof. Conduct 1.6 cmt. 4.

247. *See id.* R. 1.14 cmt. 2 (indicating that a client's disability "does not diminish the lawyer's obligation[s]" to the client).

248. *See In re Mason*, 701 S.2d 979, 983 (N.J. Super. Ch. Div. 1997) (stating that while an attorney is an advocate for the client, a guardian ad litem "is an independent factfinder and an investigator for the court").

249. ABA Model R. Prof. Conduct 1.14 cmt. 5.

250. *Id.* R. 1.7.

251. *Id.* R. 1.7(a).

client will be directly adverse to another client.”<sup>252</sup> However, an exception can be made when “the lawyer reasonably believes the representation will not adversely affect the relationship with the other client” as long as the lawyer obtains “each client[’s] consent[ ] after consultation.”<sup>253</sup>

Loyalty to a client is essential to the lawyer’s representation of a client.<sup>254</sup> If an attorney has an impermissible conflict before he or she undertakes the representation, the attorney should refuse to represent the prospective client.<sup>255</sup> If a conflict arises after the representation is undertaken, the lawyer should resign from the case.<sup>256</sup> “Loyalty to a client prohibits” taking a case “directly adverse to” a client without the client’s consent.<sup>257</sup> Loyalty to a client prohibits the attorney from taking a case that would limit the alternatives to the client “because of the lawyer’s other responsibilities or interests.”<sup>258</sup>

Loyalty to a client is a requisite element of due process. An attorney who takes a case with conflicting loyalties is doing an injustice to his or her client. All of the elements of the previous rules are encompassed in this duty of loyalty, which includes duties to abide by the client’s decisions, keep the confidences of the client, act promptly and without delay, and treat a client under a disability the same as any other client.

The Model Rules of Professional Conduct are necessary to the practice of law. They are reasonable rules that guide the practitioner in his or her conduct in client-attorney relationships.<sup>259</sup> They are requisite to due process of law. For an attorney to act as a guardian ad litem is to violate several of these rules. Disclosing the confidences of the client, reporting to the court on the client’s behavior and speech, and treating the client as an object to be surveyed, not a person to represent and for whom to advocate, are all violations of the Model Rules.

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252. *Id.*

253. *Id.* R. 1.7.

254. *Id.* cmt. 1.

255. *Id.*

256. *Id.* cmt. 2.

257. *Id.* cmt. 3.

258. *Id.* cmt. 4.

259. *Id.* preamble ¶¶ 13, 14, 18.



### B. The American Bar Association and the Uniform Guardianship and Protective Proceedings Act

The American Bar Association has stated that the role of counsel for the alleged incapacitated person should be to act as an advocate.<sup>260</sup> A Report to the House of Delegates from the ABA's Commission on Legal Problems of the Elderly reflected this position, which the House of Delegates approved at the ABA's 1988 Annual Meeting.<sup>261</sup> Likewise, the National Conference of Commissions on Uniform State Laws, which published the Uniform Guardianship and Protective Proceedings Act (UGPPA) in 1982, already supports this right to an attorney who acts as an advocate.<sup>262</sup>

### C. The National Guardianship Symposium

In 1988, a National Guardianship Symposium, known as Wingspread,<sup>263</sup> was convened by the Commission on the Mentally Disabled and the Commission on the Legal Problems of the Elderly of the American Bar Association. The conference attendees recommended a "simplified but specific petition form," which describes the physical and mental state of the proposed ward, the specific reasons for the guardianship request, the steps taken prior to the petition to find less restrictive alternatives, and the qualifications of the proposed guardian.<sup>264</sup> The recommended minimum due-process safeguards to place upon every state were the following: 1) the right to notice; 2) mandatory counsel; and 3) hearing rights.<sup>265</sup>

Conference attendees recommended that a court officer, dressed in plain clothes and trained to communicate with disabled and elderly persons, should serve the respondent with the papers and explain to the respondent the consequences of guardianship.<sup>266</sup> The written notice should be in plain English

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260. *Wingspread Recommendations*, *supra* n. 81, at 10.

261. *Id.* at 11. Part C-1 states that a "[c]ounsel as advocate should be appointed in every case, to be supplanted by respondent's private counsel if the respondent prefers." *Id.*

262. *Id.* at 10.

263. The Johnson Foundation's Wingspread Conference Center in Wisconsin hosted the National Guardianship Symposium, which was sponsored by the ABA Commissions on Legal Problems of the Elderly and on Mental Disability.

264. *Wingspread Recommendations*, *supra* n. 81, at 9.

265. *Id.* at 9-10.

266. *Id.* at 9.

and large type.<sup>267</sup> It should indicate the time and place of the hearing, and a copy of the petition should be attached.<sup>268</sup> Additionally, the conference attendees recommended that the respondent should receive a hearing before an impartial decision-maker in which the respondent may be present, compel the attendance of witnesses, present evidence and confront and cross-examine witnesses, be entitled to a clear and convincing standard of proof, and appeal adverse orders or judgments.<sup>269</sup>

The majority of symposium attendees believed that mandatory appointment of an attorney for the alleged incapacitated person was essential.<sup>270</sup> However, a minority felt that a mandatory right went too far and might not be in the best interests of the alleged incapacitated person.<sup>271</sup> The minority believed that mandatory appointment of counsel would add a layer of cost that the estate of the alleged incapacitated person might not be able to pay and would make what otherwise would have been a family decision about the best interests of the person into an adversarial proceeding.<sup>272</sup> This minority position was defeated at the plenary session on the grounds that a need to describe the minority positions regarding interim proceedings, or leave out the reference when capacity is not in question, would deny the alleged incapacitated person too much due process.<sup>273</sup>

Thus, the Wingspread Recommendations, consistent with the ABA policy, requires counsel to advocate for the alleged incapacitated person in a full hearing in all guardianship cases.<sup>274</sup> The conferees recommended that counsel be appointed in every case, regardless of the alleged incapacitated person's ability to pay.<sup>275</sup> The conferees recognized that, in most cases, counsel would be needed to prepare the case and to look out for the proposed ward's interests during the pre-hearing stage.<sup>276</sup>

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267. *Id.*

268. *Id.* at 9–10.

269. *Id.* at 10.

270. *Id.* at 11.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

## D. Other Countries

Other countries have done away with guardianship altogether and instituted new services that promote autonomy of alleged incapacitated persons and promote their independent decision-making.<sup>277</sup>

In Sweden, for example, the state has all but eliminated guardianship of adults and begun a project of mentoring.<sup>278</sup> The system in Sweden is highly decentralized.<sup>279</sup> Using a *God Man*, or mentor, is the predominant method of support service in Sweden.<sup>280</sup> The lack of voting rights for a person subject to guardianship, along with other stigmatizing, legally imposed requirements that heightened the alleged incapacitated person's sense of inferiority caused the change from guardianship to mentorship.<sup>281</sup> Swedes also have *forvaltares*, or administrators, for those for whom "other forms of assistance are insufficient."<sup>282</sup> The *forvaltares* also regulate less restrictive alternatives under the topic of parent-child laws.<sup>283</sup>

Statistics have shown that, "in 1992 some 28,000 Swedes had mentors and 4,000 had administrators."<sup>284</sup> Seven years later, the number of Swedes having mentors had grown to 40,000, and the number of *forvaltares* had dwindled to 3,500.<sup>285</sup> "The law requires that mentors be appointed instead of [*forvaltares*] whenever possible."<sup>286</sup> The mentor is paid by the state and has the same duties that an agent has under a power of attorney.<sup>287</sup> Many times, the state appoints and pays family members.<sup>288</sup> The usual fee is less than \$1,000 per year.<sup>289</sup> The district court makes the

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277. Stanley S. Herr, *Self-Determination, Autonomy and Alternatives to Guardianship 2* (Nat'l. Program Off. for Self-Determ., Inst. on Disability, Univ. of N.H. 2001). Section III.D. of this Article summarizes portions of Herr, *supra*. The summary is included with the express permission of the University of New Hampshire's National Program Office for Self-Determination, Institute on Disability, which holds the copyright on Herr, *supra*.

278. *Id.* at 6.

279. *Id.* at 7.

280. *Id.* at 6, 8.

281. *Id.* at 8.

282. *Id.* at 6, 12.

283. *Id.* at 7.

284. *Id.* at 8.

285. *Id.*

286. *Id.*

287. *Id.* at 10.

288. *Id.*

289. *Id.*

appointments in Sweden, and the appointments may be flexible according to the needs of the individual.<sup>290</sup> “The law emphasizes acting in accordance with the person’s volition.”<sup>291</sup> Mentors are most useful for those with mental retardation, mental illness, or failing health, which creates a need for assistance with financial, legal, or personal interests.<sup>292</sup> “For persons with disabilities, most mentors are appointed by consent.”<sup>293</sup> The court may appoint a *God Man* if the person lacks the capacity to consent and a medical certificate states that the person lacks the capacity to consent.<sup>294</sup>

The procedures for appointing a mentor are informal and cost nothing for the applicant.<sup>295</sup> In routine cases, the person does not have to appear for a hearing, and the court reviews the documents in the file and writes the order in about ten minutes.<sup>296</sup>

*Forvaltares* are appointed only when the person objects to the appointment of a mentor or when property or personal issues would make the appointment of a mentor problematic.<sup>297</sup> The *forvaltare* may substitute his or her judgment for that of the person with disabilities.<sup>298</sup>

Sweden has taken a step that deserves worldwide attention. It has removed the stigma of guardianship from most of its disabled citizens and has replaced the system with a more humane, personal system in which the disabled person’s wishes are often respected.<sup>299</sup> Sweden’s new law has taken a giant “step forward in the field of disability rights and policies.”<sup>300</sup>

Germany has also reformed its guardianship system. The new law, passed in 1992, utilizes a more flexible measure than guardianship.<sup>301</sup> Instead, the guardian is called the *betreuer*.<sup>302</sup> With the German method, the law has added several procedural

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290. *Id.* at 9.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 12.

298. *Id.*

299. *See id.* at 14–17 (discussing Sweden’s use of personal assistants that a person with a disability hires and fires similar to an employer).

300. *Id.* at 17.

301. *Id.* at 23.

302. *Id.*

safeguards to protect the individual's liberties and interests.<sup>303</sup> First, the judge of the guardianship court conducts a personal interview, often at the incapacitated person's permanent residence.<sup>304</sup> A second safe-guard in place in Germany is the power of the person to appeal a guardianship proceeding and "participate fully in the proceedings, regardless of legal capacity."<sup>305</sup> Next, Germany requires a "certificate of an expert that describes the person's medical, social and psychological condition as well as makes recommendations regarding the tasks and duration of the [guardian's] role."<sup>306</sup> Fourth, German procedures require the appointment of "a supporting curator" to aid the person in the determination process.<sup>307</sup> Also, there is a final conversation between the judge and the person to explain the results of the investigation, the expert's findings, the guardian's identity, and the guardian's scope of authority.<sup>308</sup> A final safeguard in place is a "durational limit of no more than five years for the [guardian's] appointment."<sup>309</sup>

The German law seeks to limit the guardian's authority by preserving zones for the autonomy of the person with disabilities.<sup>310</sup> The appointment may restrict the guardian simply to impose his or her wishes on financial matters, rather than to impose plenary guardianship over all the affairs of the supported person.<sup>311</sup> In effect, "the appointment of a *betreuer* does not affect the legal capacity of the person to make decisions of a personal nature."<sup>312</sup> The German law allows the person with disabilities to retain many rights.<sup>313</sup> For example, the person may still reserve the right to consent to medical treatment unless the guardian has the right to substitute his or her judgment.<sup>314</sup> Only medical treatment that has a high risk of death or severe impairment

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303. *Id.* at 24–25.

304. *Id.* at 24.

305. *Id.*

306. *Id.* at 25.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

requires approval from a guardianship court.<sup>315</sup> Likewise, sterilization “requires the [c]ourt’s additional declaration of consent, the appointment of a special *betreuer*, and compliance with strict criteria.”<sup>316</sup> Additional safeguards against coercive measures, such as putting the person in a mental institution or subjecting him or her to mechanical measures or medication that will limit the individual’s liberty or freedom, are also afforded to the disabled individual.<sup>317</sup>

Germany has taken steps to limit the power of the guardian and to increase the autonomy of the alleged incapacitated person.<sup>318</sup> Other industrialized nations have also taken steps to limit the authority of the guardian and to increase the self-determination of the alleged incapacitated person.<sup>319</sup>

In 1984, Austria took steps to introduce limited guardianships.<sup>320</sup> “Austrian law . . . has . . . been credited with influencing the new [laws] in Germany.”<sup>321</sup> And the Netherlands, after a long deliberation, may be “on the verge of adopting a mentorship law.”<sup>322</sup> For many years, activists criticized the laws regarding guardianship of property as being too formal, too impervious to the needs of the disabled person, and too expensive.<sup>323</sup> Spain, in 1983, revised its guardianship laws, and now the range of supports include temporary guardianships, “a guardianship limited to the representation in a specific legal proceeding . . . ‘prolonged minority’ . . . , guardianship of property . . . , and total or plenary guardianship.”<sup>324</sup> New Zealand’s guardianship law on this subject is also noteworthy for its least restrictive intrusion into the life of the person with disabilities and its comprehensiveness.<sup>325</sup>

As this discussion reveals, the United States may be behind the times in its view of guardianship laws.<sup>326</sup> For the United

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315. *Id.*

316. *Id.*

317. *Id.* at 26.

318. *Id.* at 28.

319. *Id.*

320. *Id.* at 30.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 31.

325. *Id.*

326. *Id.* at 32.

States still to cling to the idea that those with disabilities need a *parens patriae*, a “parent of the country,” denies the autonomy and liberty interests of those with disabilities.<sup>327</sup> Many of those with disabilities have competencies, but need assistance with some activities of daily living.<sup>328</sup>

In many other countries with different religions and political values, the citizens have realized the importance of according those with disabilities the full measure of potential participation in life. Autonomy in the United States is a recognized value.<sup>329</sup> We are a nation of many different races, religions, and cultures. For the most part, people are allowed to express themselves in many different ways. To impose on those with disabilities the stigma of guardianship is to deny them basic liberties or “fundamental fairness.”<sup>330</sup> Surely there is a more humane way of assisting those who cannot help themselves to achieve all that they can for as long as they can.

#### IV. REPRESENTING THE ALLEGED INCAPACITATED PERSON

Representing a questionably competent client is always an enormous challenge because determining the client's wishes is often difficult. The client may be confused about some things, but not about others. He or she may make bad decisions and insist that the lawyer advocate for him or her, or may demand that the lawyer defend a seemingly indefensible position.

It is important to remember that the attorney is playing one of a number of roles in this case. The attorney for the petitioner should explain the consequences of guardianship to his or her client and seek to achieve the desired result by the least-restrictive alternative.<sup>331</sup> If there is no alternative, the petitioner will file a guardianship suit. The judge is the ultimate decision-maker.<sup>332</sup>

Defending an alleged incapacitated person does not mean that all of an attorney's usual resources are not in play. The

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327. *Id.*

328. *Id.*

329. *Id.* at 33.

330. *Supra* nn. 77–78 and accompanying text (defining due process as requiring “fundamental fairness”).

331. *See supra* n. 264 and accompanying text (describing the Wingspread Conference Recommendations).

332. H.R. Rpt. 100-639, at 2.

attorney may use any of the tools in his or her arsenal to achieve a favorable settlement for the client or to limit the guardianship to the least-restrictive alternative.

When the attorney has no doctor's reports, favorable testimony, or any other evidence to support the client's position, one of the best things to do is bring the client to the hearing so that the client may speak to the judge. Some clients want this opportunity to make his or her case, believing that if the judge heard the client, the judge would rule in his or her favor.

Although the attorney for the alleged incapacitated person may be inclined to judge the client's competency, the court must determine competency based on clear and convincing testimony.<sup>333</sup> The attorney's way becomes clearer if he or she treats this client and case as any other.<sup>334</sup> The attorney, even with little or no guidance from the client, can ensure that:

- (1) there is no less restrictive alternative to guardianship;
- (2) proper due-process procedure is followed;
- (3) the petitioner proves the allegations in the petition by clear and convincing evidence, if that is the standard in the jurisdiction;
- (4) the proposed guardian is a suitable person to serve; and
- (5) if a guardian is appointed, the order leaves the client with as much autonomy as possible.

When the attorney assumes this role, the client receives the due-process protection promised him or her by the Constitution.<sup>335</sup> He or she has a zealous advocate who can speak knowledgeably for the client, put the client on the stand if the client is willing, cross-examine expert witnesses, ensure that the evidence proves incompetency by clear and convincing evidence, ensure that the guardian is fit to handle the tasks of being a guardian, and encourage the court to impose the least-restrictive guardianship possible, so that the autonomy of the person alleged to be incapacitated is left with all the powers he or she has previously managed.<sup>336</sup>

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333. See *supra* n. 264 and accompanying text (describing the Wingspread Conference Recommendations).

334. See *supra* nn. 178–192 and accompanying text (explaining the scope of an attorney's representation under the Model Rules).

335. *Supra* pt. II (discussing issues of due process in guardianships).

336. See Gottlich, *supra* n. 59, at 199 (stressing the importance of treating clients who



## A. The Initial Interview

The initial client interview with an alleged incapacitated person may be one of an attorney's most challenging. The client may be in a nursing home, in a mental institution, or at home in difficult conditions. However, as with any client, the lawyer should try to communicate with the alleged incapacitated person as fully as possible.<sup>337</sup>

This means that the attorney must try to explain the consequences of guardianship to the fullest extent possible, putting the explanation in simple terms so that the client can understand.<sup>338</sup> The attorney can explain the ways to defend against a guardianship and can explain the resources the client can use to counter the allegations. For example, a psychiatrist's testimony that the client was able to handle her financial affairs won the case in *In re Estate of Wood*.<sup>339</sup> Additional testimony from friends or other family members may persuade the court that the petitioner is not the best guardian. In the *In re Lee* case, the ward's son called his father to the stand, who testified that a family member was not the best person to be his guardian because of animosity in the family.<sup>340</sup>

If the person is confused, consider whether the confusion may be due to drugs that he or she is taking. Check medical records and speak to a doctor to evaluate this possibility. Consider also that confusion may be compounded by depression, a frequent and easily overlooked complication in the elderly.<sup>341</sup> Ask the physician if the client has been given the Geriatric Depression Scale.<sup>342</sup> Diet may also cause confusion, as when the client is not absorbing enough vitamin B-12.<sup>343</sup> Shots of this vitamin may clear up the confusion. Ask those caring for the person when the confusion started: is it of long standing, or did it occur rather recently? At

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are defendants in guardianship cases in the same manner as the Model Rules proscribe for a client under disability).

337. *Id.* at 201.

338. *Id.* at 206.

339. 533 A.2d 772 (Pa. Super. 1987).

340. *In re Lee*, 754 A.2d at 433.

341. *The Merck Manual of Geriatrics*, *supra* n. 229, at 362. "Depression affects up to 40% of patients with dementia . . ." *Id.*

342. *See id.* (explaining that the Geriatric Depression scale is a standardized instrument used to evaluate an elderly person's mood).

343. Holistic-online.com, *Depression — Nutrition and Diet* <[http://holisticonline.com/Remedies/Depression/dep\\_nutrition1.htm](http://holisticonline.com/Remedies/Depression/dep_nutrition1.htm)> (last updated Jan. 28, 2002).

times, when a person who is elderly has an extreme illness, delusions may set in after the illness has been treated. Waiting a week or so for the confusion to clear may be the best remedy against a guardianship.

Additional ways to counter the guardianship may be to inquire into home health services. One way to find out about these services is to call the local health department or local Area Agency on Aging to find out what services are offered. A client who can stay at home, with services in place, will be eternally grateful.

### B. Timing of the Initial Interview

Ask about the best time to interview the client.<sup>344</sup> Many elderly clients are most clear minded in the morning. Others have “good days and bad days.” Talk to whomever is in close contact with the client before the visit to find the best time to visit. You may even ask the person to call you on a “good” day and arrange for the interview when the client is feeling well.

### C. Confidentiality

Create a confidential setting for the interview, away from roommates, nurses, and family members.<sup>345</sup> In a nursing home, there is usually a secluded room in which you and the client can talk privately, even if it is the social worker’s office. A confidential setting is as necessary as with any other client, so the client is free to speak freely to you.<sup>346</sup> You may want to take the client out to lunch or for coffee to achieve a confidential setting. Turn off the television.

Allow enough time to explain matters fully to the person. Explain who you are and emphasize that you are on the client’s side. Slowly discuss the nature and consequences of the guardianship.<sup>347</sup> Paraphrase each paragraph of the petition and try to elicit the client’s position so that you can file your answer.<sup>348</sup> Explain the person’s rights under the law.<sup>349</sup> Ask whether your

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344. See generally Gottlich, *supra* n. 59, at 217–218 (listing techniques for improving communication with clients who are defendants in guardianship proceedings).

345. *Id.*

346. *Id.*

347. *Id.* at 216–217.

348. *Id.*

349. *Id.*

client wants a guardian. Ask his or her opinion of the proposed guardian and whether there is anyone else the client trusts more than that person. Make sure the client has no relatives other than those listed as interested persons. Ask the client if he or she wants to attend the hearing or talk to the judge.<sup>350</sup> Question the client about whether there are witnesses he or she wants to call.<sup>351</sup> Find out whether he or she wants a jury trial.<sup>352</sup>

#### D. Less Restrictive Alternatives

##### 1. Personal Care

Discuss with the client possible alternatives to guardianship. Consider whether your client has the capacity to grant a power of attorney for health care to a trusted relative or friend, thus alleviating the need for a guardian.<sup>353</sup> If your client does have capacity to grant a power of attorney, you should have a doctor certify that the person is competent to assent to such a document.<sup>354</sup> Be sure that the letter or document the doctor writes states that the client is capable of informed consent.<sup>355</sup> Because there may be two physicians' certificates filed with the court, it is especially important that you document the client's capacity.<sup>356</sup> You also may want to video tape or audio tape the interview when the client names the agent to document the fact that you asked the client non-leading questions.

Ask if your client would agree voluntarily to proposed medical treatment, to move voluntarily to a nursing home, or to other services that are proposed in the petition. When faced with guardianship, the client that has resisted a move in the past may prefer the move instead of losing his or her autonomy and right to make his or her own decisions.

If the person is unable to make medical decisions for himself or herself, research the surrogacy laws of your state. The person

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350. Under the Americans with Disabilities Act, if the client cannot come to court because of physical difficulties, the court may hold the trial at a location to which the client has access. 42 U.S.C. § 12132 (1994).

351. Gottlich, *supra* n. 59, at 217.

352. *Id.*

353. *Id.* at 219.

354. Scott K. Summers, *Guardianship & Conservatorship: A Handbook for Lawyers* 3, 25, 47 (ABA 1996).

355. *Id.* at 3.

356. *Id.* at 25, 47.

may not need a guardian of the person if the state statutes allow a relative or friend to make medical decisions for the person. It is important to mention to relatives or friends that, just because they are consenting to medical treatment for their loved one, they are not responsible for paying for the treatment.

For a person who has assets and who lives alone, there are geriatric-care managers who may oversee the services to which the person is entitled.<sup>357</sup> You can call National Association of Professional Geriatric Care Managers, 1604 N. Country Club Road, Tucson, AZ 85716-3102, at 520-881-8008, or contact them on the Internet at [www.caremanager.org](http://www.caremanager.org).<sup>358</sup> You may also inquire into which home health services may be covered under Medicare or Medicaid.

If your client needs attention during the day when relatives or friends are working, call your local Area Agency on Aging to ask about adult day care. These centers provide transportation, a caring environment, and some nursing needs while caretakers work.<sup>359</sup> There are also respite-care programs that will pay a trained person to stay with someone who needs attention while the caretaker leaves for a few hours.<sup>360</sup> Some nursing homes also will keep people for a short time while caretakers are away on vacation. Also, ask about the availability of meals on wheels, transportation to medical appointments, food and prescription deliveries, and telephone reassurance programs.

If the client needs supervision, you may inquire into assisted-living facilities, nursing homes, and continuing-care retirement communities. You should be aware that assisted-living facilities are not regulated by government agencies unlike nursing homes.<sup>361</sup> You should research the law in your state to determine

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357. See Natl. Assn. of Prof. Geriatric Care Managers, *The Professional Care Managers* <<http://www.caremanager.org/gcm/ProfCareManagers1.htm>> (accessed Jan. 13, 2002) (listing the types of services available to older people and their families).

358. *Id.*

359. See Natl. Assn. of Area Agencies on Aging, *n4a-Advocacy. Action. Answers on Aging* <<http://www.n4a.org/>> (accessed Feb. 12, 2002) (providing an Eldercare Locator and links to local chapters of Area Agencies on Aging).

360. See Administration on Aging, *Caregiver Resources on the AOA Web Site* <<http://www.aoa.gov/caregivers/default.htm>> (accessed Feb. 12, 2002) (giving resources for questions and contacts regarding elderly care).

361. Michelle Stowell, *Review of Selected 2000 California Legislation: Health and Welfare Chapter 434: Protecting Those with Alzheimer's Disease and Dementia by Increasing Educational Requirements for RCFE Staff*, 32 *McGeorge L. Rev.* 733, 734 (2001).

to what regulations assisted-living facilities must adhere.

## 2. Money Matters

It may be that your client has let financial matters slip. This may be an indication of lack of interest in financial affairs, depression, drugs that may affect the person's mind, or diet. In any event, you should address with your client why this has happened and what can be done to remedy the situation.

If your client has been sued for guardianship of the property or conservatorship, investigate whether your client is capable of writing a power of attorney for financial reasons.<sup>362</sup> Again, you should have a physician examine your client and insert a letter or document in the patient's chart stating that the client is capable of informed consent.<sup>363</sup> This is especially important because there may be two physicians' certificates in the court file alleging that your client is incapacitated.<sup>364</sup> You may also want to video tape or audio tape the conversation when your client names the agent he or she wants to appoint.

If the person is confused about money management, consider appointing a representative payee for his or her Social Security or other government benefit checks.<sup>365</sup> A representative payee is an alternative to guardianship.<sup>366</sup> The client gets notice that his or her check will be going to someone else who will pay his or her bills and give him or her spending money.<sup>367</sup> Many government-benefits and retirement systems also have representative payees.<sup>368</sup> Be sure that the person selected to be the representative payee is trustworthy and has the best interests of your client at heart.

Some utility companies will notify a third person if the utility bills of a person are not paid. This contingency will prevent the person's utilities from being turned off.

Many banks accept Social Security and other benefit checks as direct deposits. Some banks will pay bills that occur on a regular basis such as rent, nursing home bills, utility bills, and

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362. Summers, *supra* n. 354, at 2, 7.

363. *Id.* at 3, 47.

364. *Id.* at 25, 47.

365. *Id.* at 6-7.

366. George H. Zimny & George T. Grossberg, *Guardianship of the Elderly — Psychiatric and Judicial Aspects* 7-8 (Springer Publ. Co. 1998).

367. *Id.*

368. *Id.*

mortgages. Your client would thus be relieved of remembering to write checks to each payee on a monthly basis.

Joint accounts may be a way to handle money matters.<sup>369</sup> The choice of a person to put on a joint account must be made very carefully, for this other person will have access to the whole account.<sup>370</sup> A joint account must be created when both parties are mentally competent.<sup>371</sup>

Setting up a trust may be a way to avoid guardianship.<sup>372</sup> The parents of an adult child with mental retardation may set up a trust so that, when they both die, the funds from their estates will go into the trust for the son or daughter. In this way, a financial institution will manage the money for the son or daughter and pay whatever needed expenses he or she has above and beyond what his or her government benefits might be.<sup>373</sup>

#### E. Your Client's Wishes

It may be impossible to interview your client. The client may be comatose or totally uncomprehending. In this case, look for other evidence of what the client may have wanted when he or she was competent.

- Did the client ever execute an advance directive for health care?
- Ask medical providers whether an advance directive is in the client's file.
- Did the client ever speak to anyone about his or her wishes regarding health care?
- Interview the interested persons listed in the petition to find out how the client felt about the proposed guardian.
- If your client is in a nursing home, ask who visits and who is involved with his or her care. Discovering an interested person willing to take responsibility for your client may eliminate the need for a guardian altogether.

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369. Summers, *supra* n. 354, at 7.

370. *Id.*

371. See *Heldenbrand v. Stevenson*, 249 F.2d 424, 428 (10th Cir. 1957) (indicating competency as a factor in determining the validity of joint checking accounts); *Josephson v. Kuhner*, 139 S.2d 440, 444 (Fla. Dist. App. 1st 1962) (applying principles of law for inter vivos gifts to determine the validity of joint bank accounts).

372. Summers, *supra* n. 354, at 10.

373. *Id.*

### CONCLUSION

The need for reform of our country's guardianship laws cries out. The assumption that those with disabilities need the protection of the state, of the *parens patriae* doctrine, when they are able to work in the real world, manage public transportation, be reliable citizens, have political opinions, enjoy themselves, participate in sexual relations, vote, participate in activities, and participate in our democracy, demonstrates this need to reform the system.

In far too many instances, the role the attorney for the alleged incapacitated person plays is that of a guardian ad litem. This means that the attorney violates the Model Rules of Professional Conduct, turns on his or her client, and files a report in which the client's voice is not heard at all. The court does not hear the voice of the person with disabilities because the attorney is ignoring it.

The movement in other countries displays how our country's system should be reformed. Other countries have uncoupled the formalistic, court-ordered guardianship system and put in place a reform movement that accords to those with disabilities the right to enjoy their freedom while being assisted with their needs.<sup>374</sup> Sweden's system does not impose on the alleged incapacitated person a system of court-ordered, plenary guardianship.<sup>375</sup> Instead it assists the alleged incapacitated person with what they need the most.<sup>376</sup>

In the United States, one who has been found by a court to be incompetent cannot vote.<sup>377</sup> This is a basic disenfranchisement for one who may have the capacity to understand how, when, and where to vote. The coupling of incapacity to voting, the right to contract, marriage, creation of a will, and management of one's own property is a notion rooted in the past. With medication, many people who have in the past been *non compos mentis* are now able to function in the world.

Leading organizations have turned their backs on guardianship and encourage their members to protect the alleged

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374. *Supra* pt. III(D) (discussing other countries' approaches to guardianship).

375. *Supra* nn. 278–300.

376. *Id.*

377. *Supra* nn. 41, 68.

incapacitated person's liberty and due-process rights with vigor.<sup>378</sup> A movement for self-determination for those with disabilities has reached worldwide proportions.<sup>379</sup> The American Association on Mental Retardation has taken on the position that all of its members are entitled to self-determination.<sup>380</sup> The 1999 position paper defined this right as "the right to act as the primary causal agent in one's life, to pursue self-defined goals and to participate fully in society."<sup>381</sup>

The time has come to reform the American guardianship system, not just in the area of the role of the attorney for the alleged incapacitated person, but a reform of the entire system. This can be done only on a national level, for all those with disabilities should be treated the same. This is the challenge of the new millennium, when the baby boomers will attain old age and those who are struggling with guardianship law will be looking for more efficient, more flexible systems than that of inviting the court into the life of the disabled person and his or her family. The movement to uncouple abuses of liberty interests and due-process protections must become a more flexible and efficient system for all those who suffer from disabilities.

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378. *Supra* pt. III(B).

379. E.g. Council of Europe Comm. of Ministers, *Recommendation No. R(99)4 on Principles Concerning the Legal Protection of Incapable Adults* <<http://www.coe.fr/cm/ta/rec/1999/99r4.htm>> (accessed Feb. 2, 2002); Inter-American Commn. on Human Rights, *Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities* <<http://222.cidh.oas.org/BÃ;sicos/disability.htm>> (accessed Jan. 24, 2002).

380. Herr, *supra* n. 277, at 33.

381. *Id.*