

# THE ROLE OF THE ATTORNEY FOR THE DEFENDANT IN ADULT GUARDIANSHIP CASES: AN ADVOCATE'S PERSPECTIVE

Vicki Gottlich\*

## INTRODUCTION

Among the ten major substantive recommendations made by the subcommittee for Reform of the Maryland Guardianship statute of the Task Force on Guardianship<sup>1</sup> was a clarification of the role of the attorney in the guardianship process. The Task Force suggested that the attorney for the allegedly incapacitated person<sup>2</sup> serve as a zealous advocate for the client, not as an

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\* Staff attorney with the National Senior Citizens Law Center and served on the Maryland Task Force on Guardianship. Ms. Gottlich thanks Melinda Bellus and Fred Moosally, law student interns at the National Senior Citizens Law Center, and Sherie Libber, Court of Appeals Standing Committee on Rules of Practice and Procedure, for their research assistance.

<sup>1</sup> The Task Force on Guardianship was convened by the Maryland Office on Aging in 1994 to assess current laws governing guardianship and surrogate decision-making and to develop legislation proposing comprehensive statutory reform. Its goal was to develop more explicit standards and procedures so that guardianship is not imposed unless there is a well-defined disability and need for a surrogate to act. Letter from Marjorie Richmond, Program Officer, Public Guardianship for the Elderly, Maryland Office on Aging (Feb. 1, 1994) (on file with author).

<sup>2</sup> The proposed changes to the Maryland Guardianship laws, codified in the Estates and Trusts Article of the Annotated Code of Maryland, refer to the incapacitated person as "the defendant." See MD. CODE ANN., EST. & TRUSTS § 13-705 (Proposed Draft 1994). The Subcommittee also recommended that all statutory references to guardianship petition and petitioner, be changed to complaint and plaintiff, respectively. See *id.* The proposed change emphasizes that guardianships are an adversarial civil proceeding which may result in the loss of the defendant's right to make important personal decisions. This article therefore uses the term "defendant" instead of "respondent" or "alleged disabled person."

investigator of the necessity of the guardianship for the court. This recommendation is one of the most controversial of the proposed changes to the Maryland Estates and Trusts Article.

Because of the ambiguity in current Maryland law, attorneys for the defendant in different localities across the state (and sometimes different attorneys within the same locality) assume very disparate functions in the guardianship process.<sup>3</sup> Should the Maryland General Assembly adopt the recommendation, many attorneys will need to rethink their obligations to their clients. Some critics were unclear about what the duties of an advocate entailed, and therefore objected out of a concern over this new role for attorneys.<sup>4</sup> Others objected because they view guardianship as a *parens patriae* proceeding, one that is in the best interest of the defendant, rather than as an adversarial proceeding in which basic civil rights are at stake.<sup>5</sup> Unfortunately, in some Maryland courts, as well as some of those in every other state, guardianship proceedings are *pro forma*,<sup>6</sup> and the petition is ratified with little regard for the rights of the defendant. Judges and attorneys in these jurisdictions have opposed any change to or clarification of Maryland's guardianship law in order to preserve their comfortable system for disposing of these cases.

This Article addresses the role of the attorney for the defendant from an advocate's perspective. Unlike traditional law review articles, it does not set forth different approaches and then reach a conclusion about the best approach. Instead, the Article

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<sup>3</sup> See Joan L. O'Sullivan & Diane E. Hoffmann, *The Guardianship Puzzle: Whatever Happened to Due Process?*, 7 MD. J. CONTEMP. LEGAL ISSUES 11, 25 n.81 (1995-96).

<sup>4</sup> See Frederick R. Franke, Jr., *Perfect Ambiguity: The Role of the Attorney in Maryland Guardianships*, 7 MD. J. CONTEMP. LEGAL ISSUES 223 (1995-96).

<sup>5</sup> Several commentators have noted that the benevolent purpose of the *parens patriae* power works against procedural safeguards and causes harmful results. See, e.g., Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 247 (1975); *Guardianship and Older Persons*, BEST PRACTICE NOTES ON THE DELIVERY OF LEGAL ASSISTANCE TO OLDER PERSONS (Center for Social Gerontology, Ann Arbor, Mich.), Mar. 1987, at 5.

<sup>6</sup> *Pro forma* means "as a matter of form or for the sake of form. Used to describe . . . statements or conclusions based upon assumed or anticipated facts." BLACK'S LAW DICTIONARY 1212 (6th ed. 1990). See also O'Sullivan & Hoffmann, *supra* note 3, at 39.

attempts to clarify what representation of a defendant in a guardianship proceeding entails, and why such representation is important.

### I. MARYLAND LAW: THE STATUTE VERSUS THE RULES

Questions about the role of the attorney for the defendant arise because of a perceived ambiguity in Maryland law. However, the statute is clear that the court must appoint an attorney for the defendant, and that the appointed attorney must assume the traditional attorney's role of advocate.<sup>7</sup> According to Black's Law Dictionary, "To represent a person is to stand in his place; to supply his place; to act as his substitute."<sup>8</sup> In other words, the attorney appointed to represent the defendant stands in the place of the defendant before the court and presents to the court what the defendant him or herself would have presented.<sup>9</sup> A court must appoint such an attorney in every guardianship proceeding unless the alleged incapacitated individual already has counsel. The Preamble to the Maryland Rules of Professional Conduct makes the point clearly: "As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."<sup>10</sup>

The Maryland Rules of Civil Procedure, however, seem to be in direct conflict with the statute. Rule R76 states that "[t]he court *in its discretion may appoint* an attorney who shall *investigate* the facts of the case and shall *report*, in writing, his findings to the court."<sup>11</sup> Under this Rule, appointment of an attorney is discretionary. An attorney appointed under the rules is required to serve as a guardian *ad litem*, i.e., an investigator or fact finder for the court. If such an attorney presents to the court what the defendant would have presented, it is only reported as one of the many facts uncovered during the investigation of the case.

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<sup>7</sup> See MD. CODE ANN., EST. & TRUSTS § 13-705(d) (Supp. 1995). The statute states, in relevant part, that "unless the alleged disabled person has counsel of his choice, the court shall appoint an attorney to represent him in the proceeding." *Id.* (emphasis added).

<sup>8</sup> BLACK'S LAW DICTIONARY 1301 (6th ed. 1990).

<sup>9</sup> See *infra* notes 59-86 and accompanying text.

<sup>10</sup> MARYLAND RULES OF PROFESSIONAL CONDUCT pmbl. (Repl. Vol. 1995).

<sup>11</sup> MD. R. R76 (emphasis added).

An attorney cannot serve as both the advocate mandated by the statute and as the investigator described in the Maryland Rules. The guardian *ad litem* function is contrary to traditional representation in civil and criminal proceedings.<sup>12</sup> The attorney as investigator must present all facts to the court, including those which conflict with the expressed desires or wishes of the client, and must also make a personal assessment of the need for a guardian.<sup>13</sup> Traditional counsel, on the other hand, advocates the position of the client and reveals only those facts essential to establishment of the client's case.<sup>14</sup>

If Maryland Rule R76 and section 13-705(d) of the Estates and Trusts Article are to be read consistently, they must be read as envisioning distinct roles for different attorneys. The court would appoint an attorney to represent the defendant in every case, as mandated by section 13-705(d). Then, if the court decides to exercise its discretion, it could appoint a second attorney as guardian *ad litem* to investigate the facts and report back to the court. This rarely, if ever, happens in Maryland. In most cases, the court issues an order appointing an attorney to serve as both counsel for the defendant pursuant to the Estates and Trusts Article and also as the court's investigator pursuant to the Maryland Rules. The appointed attorney has the dilemma of determining which role is required and generally chooses the easier investigative function.

Courts that create the conflict for attorneys and attorneys who act as investigators are out of compliance with Maryland law. They are denying the defendant the right to counsel, as mandated by section 13-705(d). The Maryland Rules give the court discretion to appoint an investigator,<sup>15</sup> not discretion to deny the defendant a statutory right and due process of law.

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<sup>12</sup> Lawrence Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 633-37 (1981).

<sup>13</sup> See Alison Patrucco Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, 41 EMORY L.J. 633, 703 (1993).

<sup>14</sup> See *infra* note 86 and accompanying text.

<sup>15</sup> MD. R. R76.

Without an attorney to advocate for his or her wishes, the defendant has no voice in a proceeding which dramatically affects his or her future.

Further, the guardianship provisions in the Estates and Trusts Article take precedence over the Maryland Rules.<sup>16</sup> Although the Maryland Rules have the same force and effect of law as a statute, they can be repealed or modified by passage of a subsequent statute.<sup>17</sup> The current Maryland R Rules are based on a set of rules governing conservatorship proceedings that went into effect on January 1, 1959.<sup>18</sup> They gave the court the discretion to appoint a guardian *ad litem* for the person whose property was the subject of the conservatorship proceeding.<sup>19</sup> In 1962, the R Rules provided for the discretionary appointment of a guardian *ad litem* in guardianship proceedings to investigate the facts and file an answer in which he reported his findings.<sup>20</sup> The Editors' Note to the 1962 Rule explains that the new provision was meant to protect against improper adjudication and to "provide a discretionary method of *independent investigation* for the court."<sup>21</sup> In other words, the drafters intended to protect the potentially incapacitated person by giving the court an independent arm to investigate the facts of the case before the court.

The term "guardian *ad litem*" was replaced by the term "attorney," effective February 2, 1970.<sup>22</sup> The editors cross-referenced the explanation for the change to the rules concerning appointment of a guardian or committee for a defendant under a disability.<sup>23</sup> The committee note to that Rule explained that under prior procedure the deputy clerk of court was often appointed guardian *ad litem*, and generally did nothing more than fill in blank lines on a form, providing little protection for a defendant under a disability.<sup>24</sup> The drafters of that Rule commented that

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<sup>16</sup> State v. Cardinell, 601 A.2d 1123, 1125 (Md. Ct. Spec. App. 1992).

<sup>17</sup> *Id.*

<sup>18</sup> See MD. R. 1384(b)(2) (1959).

<sup>19</sup> *Id.*

<sup>20</sup> See *id.* at R76 (1962).

<sup>21</sup> *Id.* editors' note (emphasis added).

<sup>22</sup> See *id.* at R76 (1970).

<sup>23</sup> *Id.* editors' note.

<sup>24</sup> *Id.* committee note.

the Rule was not intended to preclude appointment of an attorney "in a proper case" involving a child.<sup>25</sup>

The Maryland Court of Appeals acknowledged the different roles for attorneys appointed pursuant to section 13-705(d) and Maryland Rule R76 in its recently published proposed revisions to the guardianship and fiduciary rules.<sup>26</sup> The proposed rules require the court to appoint an attorney for a defendant as soon as the petition is filed.<sup>27</sup> They also give the court discretion to appoint an independent investigator whose function is to investigate the facts of the case and to report written findings to the court.<sup>28</sup> According to the Reporter's Note, the new rule is based on the statutory provisions mandating appointment of counsel to represent the defendant. The Note further indicates that the lawyer's role is governed by Rule 1.14 of the Maryland Rules of Professional Conduct, and that the optional investigator was added to avoid any breach of the attorney-client relationship.<sup>29</sup>

The history of the R Rules clearly reveals that they were never intended to provide an attorney to represent or advocate for the defendant.<sup>30</sup> A guardian *ad litem's* function, as defined by the Rules, is to protect the defendant and provide independent evidence for the court.<sup>31</sup> Since the statutory function for the attorney set forth in section 13-705(d)<sup>32</sup> is so different, and was enacted more recently, it takes precedence over the R Rules.<sup>33</sup> The function of the attorney in Maryland, therefore, is to represent and advocate for the defendant, and not simply to serve as an investigator for the court.<sup>34</sup>

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<sup>25</sup> *Id.* at 205(e) (1970).

<sup>26</sup> 22:24 Md. Reg. P-16 (Nov. 24, 1995) (proposed Nov. 6, 1995). Appointment of counsel is only required for defendants who are not already represented, and is discretionary for a minor defendant in a guardianship over a minor. *Id.* at P-20 (Proposed MD. R. 10-106(a)).

<sup>27</sup> *Id.* (Proposed MD. R. 10-106(a)).

<sup>28</sup> *Id.* at P-21 (Proposed MD. R. 10-106(c)).

<sup>29</sup> *Id.* (Proposed MD. R. 10-106 reporter's note).

<sup>30</sup> See *supra* notes 18-25 and accompanying text.

<sup>31</sup> MD. R. R76.

<sup>32</sup> MD. CODE ANN., EST. & TRUSTS § 13-705(d) (1977).

<sup>33</sup> The guardianship provisions in the Maryland Estates and Trusts Code were enacted in 1977, seven years after the last change to the R Rules. Compare *id.* with MD. R. R76.

<sup>34</sup> See MD. CODE ANN., EST. & TRUSTS § 13-705(d) (1977).

## II. DUE PROCESS REQUIRES THAT THE DEFENDANT BE REPRESENTED BY AN ATTORNEY WHO ADVOCATES FOR THE DEFENDANT

### A. Guardianship Limits the Rights of the Defendant

It is difficult to understand the need for an attorney advocate in guardianship proceedings without understanding the effect of guardianship on the potential ward. Guardianships are designed to assist individuals who are no longer capable of caring or making decisions for themselves. Despite the seemingly benevolent nature of the guardianship system, the consequences of guardianship are very harsh. When a court appoints a guardian, the ward loses all rights to determine anything about her life.

The typical ward has fewer rights than the typical convicted felon—they can no longer receive money or pay their bills . . . . By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen . . . .<sup>35</sup>

Even the enactment of guardianship reform legislation limiting the authority of the guardian<sup>36</sup> does not change the effect of guardianship on the ward. For example, an Oklahoma law allows a person under a guardianship or conservatorship to execute a will, provided that the will is subscribed and acknowledged in front of a district court judge.<sup>37</sup> The statute has been used to invalidate a will that was not subscribed and acknowledged by

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<sup>35</sup> HOUSE SUBCOMM. ON HEALTH AND LONG-TERM CARE OF THE HOUSE SPECIAL COMM. ON AGING, ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE, H.R. DOC. NO. 641, 100th Cong., 1st Sess. 4 (1987).

<sup>36</sup> Between 1987 and 1994, 16 states enacted some form of guardianship reform legislation. Several states, including Texas, now require that the powers of the guardian be limited so that the ward retains more control over his or her life. For a detailed discussion on these reform efforts, see Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 MD. J. CONTEMP. LEGAL ISSUES 143 (1995-96).

<sup>37</sup> OKLA. STAT. ANN. tit. 84, § 41(b) (West 1990). The purpose of the statute is to offer the kind of protection from financial abuse envisioned by Oklahoma's adult protective services laws. See *In re Estate of Goodwin*, 854 P.2d 390, 399 (Okla. Ct. App. 1993).

one judge even though the testator was only under a temporary guardianship imposed by an emergency order.<sup>38</sup> Similarly, the underlying issue in another case to remove the guardian and terminate the guardianship was the guardian's unwillingness to allow the ward to live more independently and the restrictions she placed on his visits with the woman he wants to marry.<sup>39</sup>

Thus, when a court imposes a guardianship upon an individual, Fourteenth Amendment due process considerations come into play.<sup>40</sup> Guardianship deprives the ward of *liberty*<sup>41</sup> to determine such life decisions as residence, whether to marry, what clothing and necessities to buy, and what friendships to keep.<sup>42</sup> Guardianship also deprives a ward of *property* in that the ward loses control of money and property management, and perhaps control of how to dispose of assets after death.<sup>43</sup>

### B. Fourteenth Amendment Considerations

The effect of guardianship on the civil rights and liberties of a ward dramatizes the importance of the guardianship proceeding. Several studies and reports issued in the late 1980's addressed the need for greater protection in the guardianship process and recommended ways to provide better protection for the defen-

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<sup>38</sup> See *Goodwin*, 854 P.2d at 392.

<sup>39</sup> See *Hedin v. Gonzales*, 528 N.W.2d 567, 571 (Iowa 1995).

<sup>40</sup> U.S. CONST. amend. XIV, § 1. See Anne K. Pecora, *The Constitutional Right to Court-Appointed Adversary Counsel for Defendants in Guardianship Proceedings*, 43 ARK. L.J. 345, 353 (1990).

<sup>41</sup> *In re Guardianship of Deere*, 708 P.2d 1123, 1125 (Okla. 1985) ("One of the historic liberties which is protected by the due process clauses . . . is the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security. Appointment of a guardian results in a massive curtailment of liberty . . .").

<sup>42</sup> See, e.g., *In re Guardianship of Kowalski*, 478 N.W.2d 790, 793 (Minn. Ct. App. 1991). After protracted litigation, the Minnesota Court of Appeals appointed the ward's lesbian partner as her guardian. *Id.* at 797. The lower court had appointed her father as guardian, and he precluded the partner from visiting his daughter. *Id.* at 791. The court of appeals held "that the trial court had abused its discretion in denying [the ward's lesbian partner's (appellant)] petition where there was uncontradicted expert testimony as to the appellant's suitability, and where there was insufficient evidence as to the qualifications or neutrality of the named guardian." *Id.*

<sup>43</sup> *In re Estate of Goodwin*, 854 P.2d 390, 392 (Okla. Ct. App. 1993).



dant.<sup>44</sup> First, guardianship procedures must include proper notice and the right to be present at the hearing.<sup>45</sup> Second, in considering the evidence before it, the court must make an independent assessment of the medical diagnosis of the defendant, and use trained investigative resources to assist in making the incapacity determination.<sup>46</sup> Third, the court must find that no less restrictive alternatives exist, and must tailor its order to maximize the autonomy of the ward.<sup>47</sup> Finally, the court must ensure the effectiveness of guardianship services by training guardians and providing for increased supervision of their activities.<sup>48</sup>

The recommended procedures described above fall squarely within the Fourteenth Amendment mandate for due process. Due process requires proper notice and hearing,<sup>49</sup> the opportunity to confront and cross-examine adverse witnesses,<sup>50</sup> the mandate for a standard of proof,<sup>51</sup> and the appointment of counsel.<sup>52</sup>

The right to be represented by counsel is foremost among the due process protection that must be in place to ensure that guardianship proceedings do not needlessly infringe on the rights of the defendant.<sup>53</sup> Without adequate counsel, the defendant has no one to assist him or her through the legal process, to

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<sup>44</sup> See, e.g., H.R. DOC. NO. 641, *supra* note 35; ERICA F. WOOD, ABA COMM'N ON LEGAL PROBLEMS OF THE ELDERLY & NAT'L JUDICIAL COLLEGE, STATEMENT OF RECOMMENDED JUDICIAL PRACTICES (1986) [hereinafter RECOMMENDED JUDICIAL PRACTICES]; ABA COMM'N ON THE MENTALLY DISABLED & COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, GUARDIANSHIP: AN AGENDA FOR REFORM (1989), *reprinted in* 13 MENTAL & PHYSICAL DISABILITY L. REP. 274 (1989) [hereinafter AN AGENDA FOR REFORM].

<sup>45</sup> *Accord Hedin v. Gonzales*, 528 N.W.2d 567, 573-75 (Iowa 1995).

<sup>46</sup> See RECOMMENDED JUDICIAL PRACTICES, *supra* note 44, at 4; AN AGENDA FOR REFORM, *supra* note 44, at 16.

<sup>47</sup> See RECOMMENDED JUDICIAL PRACTICES, *supra* note 44, at 4; AN AGENDA FOR REFORM, *supra* note 44, at 17, 19-20; *see also Hedin*, 528 N.W.2d at 573-75.

<sup>48</sup> See H.R. DOC. NO. 641, *supra* note 35; *see also* RECOMMENDED JUDICIAL PRACTICES, *supra* note 44, at 5; AN AGENDA FOR REFORM, *supra* note 44, at 23.

<sup>49</sup> *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>50</sup> *Goldberg*, 397 U.S. at 269.

<sup>51</sup> *Mathews*, 424 U.S. at 344.

<sup>52</sup> *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 34 (1980), *reh'g denied*, 453 U.S. 927 (1981).

<sup>53</sup> *Honor v. Yamuchi*, 820 S.W.2d 267, 270 (Ark. 1991) (citing *Heryford v. Parker*, 396 F.2d 393 (11th Cir. 1968)). See RECOMMENDED JUDICIAL PRACTICES, *supra* note 44, at 3.

explain his or her rights, or to advocate for his or her interests. Effective counsel ensures that the court follows the proper procedures, that the guardianship is imposed only if the plaintiff proves that such a drastic measure is necessary, and that the guardianship remains no more restrictive than is warranted by the particular defendant's abilities and limitations. A guardian *ad litem* who acts as the eyes and ears of the court generally will not cross-examine the plaintiff's witnesses or otherwise ensure that the plaintiff satisfy the clear and convincing evidentiary standard for establishment of a guardianship.<sup>54</sup> The guardian *ad litem* does not present an affirmative case for the defendant, and, in fact, often serves as the primary witness against the defendant.<sup>55</sup> In any other civil proceeding, an attorney who undertakes the role of a guardian *ad litem*, without another attorney advocating for the client,<sup>56</sup> would be breaching his or her duty to the client and to the court.<sup>57</sup>

### III. RULES OF PROFESSIONAL RESPONSIBILITY

Maryland's Rules of Professional Conduct, based on the Model Code of Professional Responsibility and the Model Rules of Professional Conduct, also support an advocacy role for attorneys appointed to represent the defendant in guardianship proceedings.<sup>58</sup>

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<sup>54</sup> See MD. CODE ANN., EST. & TRUSTS § 13-705(b) (Supp. 1995); see also Hedin v. Gonzales, 528 N.W.2d 567 (Iowa 1995).

<sup>55</sup> See Shamblin v. Collier, 445 S.E.2d 736, 738 (W. Va. 1994). In *Shamblin*, the lower court granted a petition for incompetency based in large part on the testimony of the guardian *ad litem*. *Id.* The guardian *ad litem* testified that the defendant knew his name, the names of his children, and of the President of the United States, but could not name his care giver or the correct date. *Id.* He further stated that the defendant had a nervous disorder or obsessive-compulsive behavior and was unable to manage his own affairs because of his advanced age, his inability to read and write, and his low weight. *Id.* The guardian's medical diagnosis was based solely on his observations. *Id.*

<sup>56</sup> MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.14(b) (1995). The Maryland Rules of Professional Conduct allow the court to appoint a guardian *ad litem* who will help advise counsel how to proceed when counsel believes the client cannot adequately act in his or her own best interest. *Id.*

<sup>57</sup> *Id.* at 1.2.

<sup>58</sup> See *infra* notes 59-71 and accompanying text.

### A. *The Attorney As Advocate*

Traditional legal practice requires an attorney to advise a client about the possible available courses of action, and to pursue the course chosen by the client after a discussion of the merits of each possibility.<sup>59</sup> The explanation of the proceedings and issues must provide the client with enough information to make an informed choice about the representation.<sup>60</sup> Even if the client chooses an option that is not the same option as the attorney would have chosen, the attorney is obligated under the Maryland Rules to advocate the client's position on his or her behalf.<sup>61</sup>

Rule 1.14 of the Maryland Lawyers' Rules of Professional Conduct addresses the role of an attorney who represents a client under a disability.<sup>62</sup> The rule provides that "when a client's ability to make adequately considered decisions in connection with the representation is impaired . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."<sup>63</sup> This includes the duty to abide by the client's decisions as to the objectives of the representation and whether to accept an offer of settlement.<sup>64</sup>

By definition, many defendants in guardianship proceedings may be considered clients under a disability.<sup>65</sup> Under Maryland Rule of Professional Conduct 1.14, the attorney for the defendant must maintain a traditional attorney-client relationship with that individual,<sup>66</sup> including explaining the proceeding and options, abiding by the client's decision, and asserting the client's position during the course of the proceeding.<sup>67</sup> Thus, even if an attorney thinks the guardianship would be in the

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<sup>59</sup> MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1995).

<sup>60</sup> *Id.* at 1.4(b).

<sup>61</sup> *Id.* at 1.2, 1.14.

<sup>62</sup> *Id.* at 1.14(a).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1.2(a).

<sup>65</sup> *Id.* at 1.14(a).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1.14 cmt.

client's best interest, the attorney whose client opposes guardianship is obligated under the Maryland Lawyers' Rules of Professional Conduct to defend against the guardianship petition. Likewise, if the defendant expresses any opinion about the proceeding, including the choice of guardian, the attorney is responsible for advocating that position before the court.<sup>68</sup> In other words, the current Maryland Lawyers' Rules of Professional Conduct require an attorney to approach the representation of the defendant in a guardianship proceeding as he or she would approach the representation of any other client.

An attorney who acts as a guardian *ad litem* and reports his or her observations to the court assumes a role which is not described under Rule 1.14. The guardian *ad litem* will often describe the nature of the guardianship proceeding and its consequences to the defendant, and will listen to the defendant's concerns about the proceeding.<sup>69</sup> The guardian *ad litem*, however, will not then follow the defendant's decision concerning the course of the guardianship proceedings.<sup>70</sup> Instead, the guardian *ad litem* will continue the investigation and formulate an independent decision about the guardianship which he or she believes is in the defendant's best interest, even if it conflicts with the defendant's expressed position.<sup>71</sup>

### B. Preservation of a Client's Confidences

The guardian *ad litem* function as described in Maryland Rule R76 runs afoul of another of the basic tenets of lawyering, i.e., that an attorney maintain the confidences of the client. Maryland Rules of Professional Conduct Rule 1.6(a) admonishes an attorney "not [to] reveal information relating to representation of a client unless the client consents after consultation."<sup>72</sup>

When an attorney reports to the court in compliance with Mary-

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<sup>68</sup> *Id.* at 1.2(a), 1.14.

<sup>69</sup> See O'Sullivan & Hoffmann, *supra* note 3, at 38-9.

<sup>70</sup> Pat M. Keith & Robbyn R. Wacker, *Implementation of Recommended Guardianship Practices and Outcomes of Hearings for Older Persons*, 33 GERONTOLOGIST 81, 83 (1993).

<sup>71</sup> Lauren Barritt Lisi & Saidy Barinaga-Burch, *National Study of Guardianship Systems: Summary of Findings and Recommendations*, 29 CLEARINGHOUSE REV. 643, 650 n.73 (1995).

<sup>72</sup> Compare MD. R. R76 with MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1995).

land Rule R76, the attorney relates elements of conversations with the defendant and others, as well as his or her own observations about the defendant's ability to manage finances or to formulate responsible decisions concerning food, clothing, and shelter.<sup>73</sup> The information is relayed to the court without the client's consent, sometimes over the client's objections, and often forms the basis for the appointment of a guardian.

Rule 1.6 of the Maryland Rules of Professional Conduct encompasses two related principles, both of which are important in the guardianship context.<sup>74</sup> The attorney-client privilege stems from the law of evidence and covers direct communications from the client.<sup>75</sup> The privilege applies in judicial proceedings and precludes an attorney from being called as a witness or from producing evidence in the proceeding.<sup>76</sup> The ethical principle of confidentiality applies to all information about a client, regardless of its source.<sup>77</sup> Thus, Rule 1.6 of the Maryland Lawyers' Rules of Professional Conduct precludes the disclosure of any confidences of the client, whether garnered through direct conversations or any other source, without the consent of the client.<sup>78</sup>

These Rules of Conduct also create exceptions to the general rule of confidentiality.<sup>79</sup> An attorney may disclose information when it is necessary to advance the client's case; when the disclosure is needed to prevent the commission of crimes likely to result in death, substantial bodily harm, or substantial injury to

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<sup>73</sup> MD. CODE ANN., EST. & TRUSTS § 13-705(b) (Supp. 1995). The grounds for appointing a guardian of the person in Maryland include a finding that the defendant "lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including provisions for health care, food, clothing, or shelter." *Id.*

<sup>74</sup> MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (Repl. Vol. 1995) ("The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics.")

<sup>75</sup> MD. CODE ANN., CTS. & JUD. PROC. § 9-108 (1995).

<sup>76</sup> *Id.*

<sup>77</sup> 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.6:103 (2d ed. 1990 & Supp. 1996).

<sup>78</sup> MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1995).

<sup>79</sup> *Id.* at 1.6(b).

property; or when disclosure aids in the defense of a lawsuit or grievance against the attorney.<sup>80</sup> Rule 1.6(b)(4) gives an attorney the discretion to reveal information relating to the representation when necessary to comply with the Rules of Professional Conduct, a court order, or other law.<sup>81</sup>

At first reading, the exception in Rule 1.6(b)(4) of the Maryland Rules of Professional Conduct seems to exonerate an attorney who complies with Maryland Rule R76 and discloses a defendant's confidences in a report to the court. However, that reading is inconsistent with the thrust of the Rules of Professional Conduct. The Rules are clear that an attorney must undertake every effort to accord the same level of representation to a client of questionable capacity as to other clients.<sup>82</sup> Such level of representation involves the preservation of client confidences except in very limited circumstances. To allow an attorney to waive the principles of confidentiality without the consent of the client when the very issue of the client's capacity is at stake is to allow the limited exception to replace the mandatory rules of conduct in every guardianship proceeding. Furthermore, the role of the attorney is really defined in section 13-705(d) of the Estates and Trusts Article.<sup>83</sup> An attorney appointed to represent a defendant must comply with the confidentiality requirement.

Scholars admonish that the Rules of Professional Conduct require the attorney to pursue a course of traditional lawyering tailored to the client's decision-making capacity.<sup>84</sup> The Rules of Professional Conduct do not allow the attorney to "assume the role of 'de facto guardian' to act against the client's expressed wishes or instructions."<sup>85</sup> The attorney is obligated to maintain, as nearly as possible, a traditional attorney-client relationship and to preserve the confidences of the client. An attorney asked to disclose confidential information about an older client or the

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1.6(b)(4).

<sup>82</sup> *Id.* at 1.14.

<sup>83</sup> See *supra* notes 7-34 and accompanying text.

<sup>84</sup> See, e.g., Linda Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. CONTEMP. L. 61 (1988).

<sup>85</sup> *Id.* at 82.

older client's situation owes that client a duty of confidentiality and may not disclose the client's confidence without the client's consent.<sup>86</sup>

#### IV. THE ATTORNEY AS ZEALOUS ADVOCATE

##### A. *Maryland Law*

What does it mean to act as an advocate for the defendant and zealously represent his or her interests? Certainly the Rules of Professional Conduct set the minimum standard. The attorney must meet with the client, impart enough information to allow the client to make choices about the representation, and abide by the client's decision.<sup>87</sup> The attorney must assert the client's position but may not disclose any information relating to the representation without the consent of the client or unless the information furthers the client's cause.<sup>88</sup>

Currently, the Maryland guardianship statute requires the attorney to represent the defendant in the guardianship proceeding without providing additional guidance.<sup>89</sup> It is possible that in 1977 the drafters of the statute did not see the need for further detail, believing that attorneys were familiar with the specifics of client representation. They may even have assumed that a change in the guardianship statute would have led to a revision of the attorney's duties in the Maryland Rules of Civil Procedure.<sup>90</sup> Members of the Subcommittee on the Reform of the Guardianship Statute were concerned that the intent of the drafters of the 1977 guardianship statute had never been fully implemented, and decided to be more specific about the duties of the attorney.<sup>91</sup> The subcommittee has proposed the following language in draft section 13-705.1 of the Estates and Trusts Article:

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<sup>86</sup> Mark Falk, *Ethical Considerations in Representing the Elderly*, 36 S.D. L. REV. 54, 64-65, 67 (1991).

<sup>87</sup> MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1995).

<sup>88</sup> *Id.* at 1.6.

<sup>89</sup> MD. CODE ANN., EST. & TRUSTS § 13-705 (1977).

<sup>90</sup> See *supra* notes 26-29 and accompanying text.

<sup>91</sup> See MD. CODE ANN., EST. & TRUSTS § 13-705.1 (Proposed).

(A) APPOINTMENT BY THE COURT - Upon the filing of a complaint for appointment of a guardianship or motion to terminate or modify the guardianship order, the court shall appoint an attorney to represent the defendant or disabled person, unless the person already has counsel.

(B) ROLE OF THE ATTORNEY - (1) The attorney for the defendant shall act as a zealous advocate for the defendant, and not as a guardian *ad litem*. The attorney shall not substitute the attorney's own judgment for that of the defendant on the subject of what may be in the defendant's best interests, or any other matter. (2) At a minimum, the attorney shall: (I) conduct personal interviews with the defendant or disabled person; (II) explain, in terms expected to be understood by the defendant or disabled person, the nature and possible consequences of the proceedings, the rights to which the defendant or disabled person is entitled, and the legal options available; (III) secure and present evidence and testimony, and offer arguments that promote the views and protect the rights of the defendant or disabled person.<sup>92</sup>

The proposed language was meant to clarify the attorney's role, rather than substantially change the requirements of the current statute. The draft incorporates the minimum standards of the Maryland Rules of Professional Conduct by requiring the attorney to meet with the defendant, explain the guardianship procedure and its effect on the defendant in language expected to be understood by the defendant, and to advocate for the defendant.<sup>93</sup> Proposed section 13-705.1 amplifies the ethical rules by requiring the attorney to meet with the defendant more than once and to secure and present evidence and offer arguments on behalf of the client.<sup>94</sup> The proposal reacts to the confusion

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*



generated by the current Maryland Rules<sup>95</sup> and requires the court-appointed attorney to act as the defendant's advocate and not as a guardian *ad litem*, thus prohibiting the attorney from substituting his or her own judgment for the defendant's. In this way, the proposal overrides Maryland Rule R76 and clarifies that no attorney appointed as a representative is to investigate a guardianship proceeding and report findings to the court.<sup>96</sup> Further, the proposal is in accord with changes to the guardianship rules recommended by the court of appeals.<sup>97</sup>

### B. State Statutes

While the majority of state guardianship statutes makes no mention of the role of the attorney, a number of states have amended their codes to give the attorney some guidance in such proceedings. Vermont, for example, follows the Model Rules of Professional Conduct and requires the appointment of counsel, who must receive copies of the petition and all relevant documents, consult with the defendant prior to the hearing, and explain the meaning of the proceedings to the defendant.<sup>98</sup> If the court determines that the defendant or ward is unable to communicate with or advise counsel, the court may, upon motion of the defendant or of defendant's counsel, appoint a guardian *ad litem* to make decisions for the client.<sup>99</sup>

Alaska law specifically requires the attorney "to represent the ward or respondent zealously" and to follow the decisions of the defendant concerning the defendant's interests.<sup>100</sup> As in Vermont, a guardian *ad litem* may be appointed only if the defendant cannot determine his or her own interest without assistance.<sup>101</sup> The District of Columbia also requires the appointment of an attorney to "represent zealously that individual's legitimate

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<sup>95</sup> See *supra* note 11 and accompanying text.

<sup>96</sup> *State v. Cardinell*, 601 A.2d 1123, 1125 (Md. Ct. Spec. App. 1992) (holding that a subsequent statute repeals or modifies a rule).

<sup>97</sup> See *supra* note 27 and accompanying text.

<sup>98</sup> VT. STAT. ANN. tit. 14, § 3065(b) (Supp. 1995).

<sup>99</sup> *Id.* § 3066.

<sup>100</sup> ALASKA STAT. § 13.26.111(a)-(b) (Michie 1992).

<sup>101</sup> *Id.* Compare VT. STAT. ANN. tit. 14, § 3066 (Supp. 1995).

interests” but provides by court rules for the appointment of a guardian *ad litem* for defendants unable to determine their own interests without assistance.<sup>102</sup> Alaska, unlike Vermont or the District of Columbia, allows the attorney representing the defendant to serve as the guardian *ad litem* if there is no other party readily available and the attorney’s interests would not conflict with the client’s.<sup>103</sup>

The distinction between the role of the attorney and the role of the guardian *ad litem* is clearest in the Washington state statute.<sup>104</sup> A defendant in Washington has the right to be represented by counsel at any stage of the guardianship proceeding.<sup>105</sup> Counsel is directed to act as an advocate for the client and not substitute counsel’s own judgment for that of the client concerning the client’s best interests.<sup>106</sup> The guardian *ad litem*, on the other hand, is directed to promote the defendant’s best interest, rather than the defendant’s expressed preferences.<sup>107</sup>

Both Alaska and West Virginia set out in their statutes activities the attorney as zealous advocate must undertake. In Alaska, the attorney must meet with and interview the defendant before the hearing and explain the nature and potential effect of the guardianship proceeding.<sup>108</sup> The attorney must also present evidence, testimony, and arguments that protect the defendant’s rights and interests.<sup>109</sup> In other words, Alaska has codified in its guardianship statute that the attorney is to assume the traditional role of a lawyer.

West Virginia, taking a cue from Alaska, delineated carefully and explicitly in its recently enacted legislation the job of the attorney for the defendant.<sup>110</sup> The statute sets forth the “major

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<sup>102</sup> D.C. CODE ANN. § 21-2033(b) (Michie 1989); D.C. SUPER. CT. PROB. DIV. R. 305(b), 306(b), (d) (Michie 1995).

<sup>103</sup> ALASKA STAT. § 13.26.112(c) (Michie 1992).

<sup>104</sup> WASH. REV. CODE ANN. § 11.88.045 (West 1992).

<sup>105</sup> *Id.* § 11.88.045(a).

<sup>106</sup> *Id.* § 11.88.045(b).

<sup>107</sup> *Id.* § 11.88.045(1)(a)-(b).

<sup>108</sup> ALASKA STAT. § 13.26.111(a)(1)-(2) (Michie 1992).

<sup>109</sup> *Id.* § 13.26.111(a)(3).

<sup>110</sup> W. VA. CODE § 44A-2-7 (1995).

areas of concern”<sup>111</sup> or issues upon which legal counsel should focus attention. These areas of concern are: whether the guardianship is necessary;<sup>112</sup> what limitations should be placed on the powers of the guardian;<sup>113</sup> whether the recommended guardian is the person with the greatest interest in the individual;<sup>114</sup> whether the bond, if necessary, is adequate;<sup>115</sup> and, if needed, the appropriateness of the placement for the individual.<sup>116</sup> The statute then sets out twenty activities which counsel may perform in pursuing the major areas of concern:<sup>117</sup>

(1) Promptly notify the individual and any caretaker of the appointment of counsel; (2) contact any caretaker, review the file and all other relevant information; (3) maintain contact with the client throughout the case and assure that the client is receiving services as are appropriate to the client’s needs; (4) contact persons who have or may have knowledge of the client; (5) interview all possible witnesses; (6) pursue discovery of evidence, formal and informal; (7) file appropriate motions; (8) obtain independent psychological examinations, medical examinations, home studies, as needed; (9) advise the client on the ramifications of the proceeding and inquire into the interests and desires of the individual; (10) subpoena witnesses to the hearing; (11) prepare testimony for cross-examination of witnesses to assure relevant material is introduced; (12) review all medical reports; (13) apprise decision maker of the individual’s desires; (14) produce evidence on all relevant issues; (15) interpose objections to inadmissible testimony and otherwise zealously represent the interests and desires of the client; (16) raise appropriate questions to all nominations for guardian and the adequacy of the bond; (17) take all steps to limit the scope of guardianship to the individual’s actual needs, and make all arguments to limit the

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<sup>111</sup> *Id.* § 44A-2-7(b).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* § 44A-2-7(c).

amount of interventions; (18) ensure that the court considers all issues as to the propriety of the individual's current or intended placement and that the limitations are set forth in the order; (19) inform the client of the right to appeal, and file an appeal to an order when appropriate; and (20) file a motion for modification of an order or petition for a writ of habeas corpus if a change of circumstances occurs which warrants a modification or termination.<sup>118</sup>

West Virginia legislators decided the only way to avoid uncertainty about the role of the attorney for the defendant was to codify both the issues that might arise in a guardianship proceeding and any function that good lawyering would require of an advocate.

### C. Case Law

In the 1980's, the few reported decisions that discussed the role of the attorney in guardianship proceedings generally did so in the context of other issues. Missouri courts were in the forefront of the discussion. In a case concerning waiver by counsel of a defendant's rights to be present at a hearing and to a jury trial, the Missouri Supreme Court stated that court-appointed counsel must act as an advocate for the individual to protect the individual from an erroneous deprivation of rights and to prevent the right to counsel from becoming a "mere formality."<sup>119</sup> If the defendant understands the right that he or she is waiving, then the attorney for the defendant must follow his or her client's wishes, even if the attorney disagrees with the defendant's decision.<sup>120</sup> If the defendant cannot direct the attorney, then counsel may make decisions that "safeguard and advance the interests of the client."<sup>121</sup> Subsequent decisions have held that (1) the attorney must at least talk with the defendant before the hearing and cannot waive the right to be present unless the court agrees that the client's best interest is being served;<sup>122</sup> (2) an attorney

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<sup>118</sup> *Id.*

<sup>119</sup> *In re Link*, 713 S.W.2d 487, 496 (Mo. 1986).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *In re Jesse*, 744 S.W.2d 514, 516 (Mo. Ct. App. 1988).

who waived the defendant's right to be silent and allowed the obviously incoherent defendant to testify was acting within the attorney's right to make decisions for the client;<sup>123</sup> and (3) an attorney could waive the defendant's rights without a trial-court inquiry after determining that the defendant was unable to communicate.<sup>124</sup>

During that time period, other courts blurred the distinctions between the attorney as advocate and as guardian *ad litem*. When the defendant in a Maine proceeding objected to the imposition of a full guardianship, the court requested the guardian *ad litem*, who had recommended that a guardianship be imposed, to assist the respondent in developing a full record for the court.<sup>125</sup> The appeals court concluded that the trial court's request created no conflict.<sup>126</sup> The court found that the guardian *ad litem* was not technically acting as an attorney for the defendant and at all times acted in that individual's best interest, regardless of the individual's personal wishes.<sup>127</sup>

More recently, however, the Court of Appeals of Washington reversed an order authorizing the parents of an incompetent minor to consent to her sterilization.<sup>128</sup> The guardian *ad litem* acted as an investigator and reported her findings to the court.<sup>129</sup> She waived her client's right to be present at the hearing and did not cross-examine adverse witnesses. The Court determined that the fundamental right at issue--sterilization--and the guardian *ad litem*'s failure to take an adversarial position, warranted the appointment of independent counsel for the incompetent minor.<sup>130</sup>

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<sup>123</sup> *In re Estate of Moehlenpah*, 763 S.W.2d 249, 253 (Mo. Ct. App. 1989).

<sup>124</sup> *Id.*

<sup>125</sup> *In re Richard H.*, 506 A.2d 221, 222 (Me. 1986).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *In re Guardianship of K.M.*, 816 P.2d 71, 75 (Wash. 1991).

<sup>129</sup> *Id.* at 74.

<sup>130</sup> *Id.*

The Supreme Court of New Jersey, in one of the most recent cases on the role of the attorney in guardianship cases,<sup>131</sup> distinguished the role of the attorney from the role of the guardian *ad litem* and set forth standards for the attorney as advocate to follow.<sup>132</sup> The court analogized to New Jersey law concerning the role of the attorney for minors and cited to the New Jersey Judicial Surrogates Liaison Committee:

The role of the representative attorney is entirely different from that of a guardian *ad litem*. The representative attorney is a zealous advocate for the wishes of the client. The guardian *ad litem* evaluates for himself or herself what is in the best interests of his or her client-ward and then represent[s] the client-ward in accordance with that judgment.<sup>133</sup>

The court noted that the representative attorney and the guardian *ad litem* may take different positions--the former advocating for the client's preferences and the latter advocating a position that is in the client's best interests.<sup>134</sup> While the former utilizes advocacy techniques traditionally used by an attorney, the latter "may merely file a report with the court."<sup>135</sup>

The New Jersey case is particularly relevant to the Maryland guardianship law. At the time of the decision the New Jersey Rules of Civil Procedure did not carefully delineate the functions of the attorney as zealous advocate. The supreme court therefore suggested practices for attorneys to follow until the rules of

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<sup>131</sup> *In re M.R.*, 638 A.2d 1274, 1286 (N.J. 1994). Other recent decisions have dealt more with the issue of the right to counsel than the role of counsel. *See, e.g.*, *Honor v. Yamuchi*, 820 S.W.2d 267 (Ark. 1991); *In re St. Luke's Roosevelt Hospital Center*, 607 N.Y.S.2d 574 (Sup. Ct. 1993). The New York Supreme Court relied in part on constitutional grounds in determining that an attorney's presence is required when important liberty interests are at stake, implying at least that an attorney should advocate to protect those interests. *Id.*

<sup>132</sup> *M.R.*, 638 A.2d at 1283.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1284.

<sup>135</sup> *Id.*

procedure were amended.<sup>136</sup> The court reminded attorneys that a declaration of incompetency did not deprive someone of the right to make decisions and that it is the primary duty of the attorney to protect the person's rights, including that individual's right to make decisions.<sup>137</sup> The attorney is obligated to advocate any decision made by the client, but may in limited circumstances inform the court of the possible need for a guardian *ad litem*.<sup>138</sup> The court concluded that it intended to respect everyone's right of self-determination, and that the court's function is to protect the best interests of those who cannot exercise their rights.<sup>139</sup>

#### *D. The Americans with Disabilities Act*

The passage of the Americans with Disabilities Act<sup>140</sup> adds further complexity to the discussion of the role of the attorney for the defendant in guardianship cases. This relatively new federal law requires that attorneys, along with other businesses open to the public,<sup>141</sup> not discriminate on the basis of a client's disability.<sup>142</sup> The ADA goes beyond requiring physical access to the attorney's office or the courthouse. The service provided by the attorney and the activities conducted by the court must also

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<sup>136</sup> *Id.* at 1285-86. *See also* NEW JERSEY SUPREME COURT JUDICIARY-SURROGATES LIAISON COMM., GUIDELINES FOR COURT-APPOINTED ATTORNEYS IN INCOMPETENCY PROCEEDINGS (1994).

<sup>137</sup> *M.R.*, 638 A.2d at 1285.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1285-86. Because the defendant in the case was a woman with developmental disabilities, the court framed some of its discussion in terms of individuals with developmental disabilities. However, the comments and reasoning should apply to all defendants in guardianship proceedings.

<sup>140</sup> 42 U.S.C. §§ 12101-12213 (1990 & Supp. V 1994). The Act is referred to herein as the "ADA."

<sup>141</sup> Title III applies to public accommodations. *See id.* § 12181. State courts are covered under Title II, which extends the nondiscrimination requirements to state and local governments, regardless of whether they receive federal funding. *See id.* § 12131.

<sup>142</sup> *Id.* § 12102(2). Defendants in adult guardianship proceedings are people with disabilities protected by the ADA. *Id.* Even if they do not actually have a physical or mental impairment that substantially limits a major life activity, they are perceived by the person who initiates the guardianship proceeding to have an impairment, thus satisfying the ADA's definition of person with a disability. *Id.*

be accessible.<sup>143</sup> The attorney must make reasonable modifications to the services offered to allow the person with disabilities to take advantage of them, as long as the modifications do not fundamentally alter the nature of an attorney's service or cause undue burden on the attorney.<sup>144</sup>

What the ADA actually requires of the attorney, then, is that the attorney comply with Rule 1.14 of the Maryland Rules of Professional Responsibility.<sup>145</sup> The attorney must undertake every effort to maintain a normal attorney-client relationship with the defendant, despite the defendant's actual or perceived disabilities.<sup>146</sup> This includes modifying general office practices, such as simplifying forms and legal descriptions and arranging appointments at times and in places that allow the defendant to participate most fully, to ensure that the defendant has the same opportunity to receive the same kinds of lawyering services that people without disabilities receive.<sup>147</sup>

By extending the prohibition against discrimination to people with disabilities, the ADA reversed a public philosophy that only required protection and isolation of those individuals with disabilities.<sup>148</sup> The ADA protects and empowers people with disabilities in all aspects of their lives: work, recreation, tasks essential for daily living, interactions with businesses open to the public, as well as interactions with state and local government.<sup>149</sup> Arguably, the ADA's purpose of empowerment runs counter to the *parens patriae* philosophy of guardianship, which is

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<sup>143</sup> *Id.* §§ 12132, 12182(b)(2)(A)(ii). Courthouse access is of particular importance in guardianship proceedings. The presence of the defendant is often waived because the defendant's attorney is unable to attend the hearing. Under the ADA, the court has the obligation to modify its practices to ensure participation by the defendant, even if it means moving the hearing to the defendant's nursing home or hospital. 28 C.F.R. § 35.130(b) (1995). New York, recognizing its obligations to the defendant, has codified the requirement that hearings may be held in the location where the defendant is present. N.Y. MENTAL HYG. LAW § 81.11(c) (McKinney Supp. 1996).

<sup>144</sup> 42 U.S.C. § 12182(b)(2)(A)(ii).

<sup>145</sup> *Compare id.* § 12182 with MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1995).

<sup>146</sup> MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1995).

<sup>147</sup> 42 U.S.C. § 12182(1)(A)(ii).

<sup>148</sup> *Id.* § 12101(a).

<sup>149</sup> *See id.* § 12101(b).



designed to protect those thought to be too incapacitated to protect themselves.<sup>150</sup> The role of the attorney as advocate is more closely aligned to the purpose of the ADA. The attorney promotes empowerment by advocating self-determination for the defendant. The guardian *ad litem* function is founded more in the notion of *parens patriae*, the right of the state to protect the welfare and best interests of its citizens, since the guardian *ad litem* decides what is in the individual's best interests. As the ADA changes the notion of how society treats people with disabilities, the ADA should also change the way the public views guardianships<sup>151</sup> and the way in which attorneys for the defendant represent their clients.

#### *E. Practical Considerations*

Opponents of the advocacy role for the defendant's attorney cite examples of unnecessary and protracted litigation that increases costs for all parties and that results in the imposition of a guardianship. Alternatively, they express fears that an advocacy role will cause a vulnerable adult to be left unprotected. While these are grave concerns, the legal system provides other mechanisms for addressing them. For example, courts have authority to impose sanctions on lawyers who abuse the legal process by filing unnecessary and frivolous lawsuits and/or motions.<sup>152</sup> If a vulnerable adult is left unprotected, the plaintiff may not have proved the need for guardianship. An advocacy role for defense counsel may lead to improved lawyering for all parties.

The New Jersey Supreme Court analogized the role of the attorney for the defendant to the role of an attorney representing any other client.<sup>153</sup> While the attorney is required to advo-

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<sup>150</sup> See Horstman, *supra* note 5.

<sup>151</sup> See Sally Balch Hurme, *Limited Guardianship: Its Implementation Is Long Overdue*, 28 CLEARINGHOUSE REV. 660, 670 (1994). For example, more states are adopting the concept of limited guardianship, in which the guardian is only granted authority to perform those functions with which the defendant needs assistance. *Id.* Limited guardianship is compatible with the ADA's concept of individualized assessment of the needs of the person with a disability. 28 C.F.R. § 35.130(b) (1995).

<sup>152</sup> MD. R. 1.341 (court may assess costs and reasonable expenses, including reasonable attorney fees, against a party, attorney, or both, if court finds the party acted in bad faith or without substantial justification in maintaining or defending a civil action).

<sup>153</sup> *In re M.R.*, 638 A.2d 1274, 1284-85 (N.J. 1994).

cate the decision of the client, the attorney is not required to advocate decisions that are patently absurd.<sup>154</sup> The court also noted that if capacity is not contested, the defendant may want to raise other issues, such as the choice of guardian or the client's place of residence.<sup>155</sup> In the context of other civil litigation, a responsible attorney will not accept a case when there is no cause of action or seek a remedy that is unavailable in a particular claim, despite the client's desire that the attorney do so. An attorney and client might concede liability in a contract or tort case, but contest zealously the amount of damages or other remedy requested. Likewise, in advocating the position of the defendant in a guardianship proceeding, the attorney must and will act within the bounds of the rules of professional responsibility.

Acting as a zealous advocate in the guardianship contest involves the normal steps that an attorney ordinarily takes in preparing for litigation. The West Virginia legislature's delineation of these steps in its new guardianship law recognizes the failure of attorneys to prepare guardianship cases in the same manner as any other civil case.<sup>156</sup> On a bleaker note, the legislature may have been concerned that without a codification of the attorney's responsibility, attorneys would continue to provide the same level of representation as they did before the law was enacted. Regardless, the attorney representing the defendant should, at a minimum, take the following steps to assure effective advocacy.<sup>157</sup>

*1. Meet with the client--*The attorney must conduct personal interviews with the defendant and explain, in a manner the client will understand, the nature of the guardianship proceedings and their consequences. This includes advising the defendant of the attorney's appointment to represent the defendant's interests, explaining what is meant by the guardianship proceed-

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 1285.

<sup>156</sup> W. VA. CODE § 44A-2-7(b), (c) (Supp. 1995).

<sup>157</sup> MD. DEP'T OF HEALTH & HUMAN RESOURCES, ATTORNEY'S GUIDE (forthcoming 1996) (manuscript at 16).

ing, and the consequences of the particular intervention sought. The attorney is obligated to discuss court procedures, including the right of the defendant to be present at the hearing and to testify, the possibility of a jury trial, an assessment of any potential witnesses, and to seek out the client's position. As part of the conversation, the attorney and defendant should consider possible modifications of court procedures that may be necessary to allow the defendant to participate more fully in the proceeding.<sup>158</sup>

At the meetings, the attorney should elicit the defendant's perception of the circumstances which led to the proceeding and determine, if possible, the client's wishes. If the defendant can communicate in any way, the attorney's obligation is to advocate the individual's wishes, regardless of whether the attorney thinks they are in the client's best interests. It is important to remember that being a zealous advocate does not mean the attorney must contest the guardianship if the defendant does not choose to do so.<sup>159</sup> The defendant may only be concerned with one of the other major issues identified by the West Virginia legislature, such as limiting the power of the guardian, having a certain friend or relative appointed guardian, or living (or more likely not living) in a particular environment.<sup>160</sup> Some defendants are anxious about smaller details. They may want to ensure that their friends will still be able to visit, that they are not placed in one special nursing facility, or that they can still have their daily candy bar or glass of beer in the nursing facility in which they will be placed.

2. *Use techniques to improve communications when interviewing the defendant.*-The attorney should meet with the defendant face-to-face and be cognizant of potential communication problems, such

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<sup>158</sup> *Id.* (manuscript at 20). Courts are required under Title II of the Americans with Disabilities Act to make reasonable modifications to their procedures to ensure that people with disabilities can participate fully. 28 C.F.R. § 35.130(b) (1995).

<sup>159</sup> The author has represented clients who did not object to having someone else make decisions for them and, in one particular case, wanted the guardianship to continue even though there was evidence to support a termination of the guardianship or a modification of the powers of the guardian.

<sup>160</sup> W.VA. CODE § 44-A-2-7(b) (Supp. 1995).

as language barriers, hearing impairments<sup>161</sup> or aphasia.<sup>162</sup> The environment of the meeting place also may cause sensory problems associated with the defendant's specific disability. Light, noise, print size of legal documents, and other distractions may affect the defendant's ability to understand and discuss the issues. If communication barriers are present, the attorney should be sure that the necessary auxiliary aides<sup>163</sup> are available during any interview with the client and during all judicial proceedings. The time of day may affect the defendant's ability to participate effectively at interviews, depositions, and hearings. The attorney should consider whether the client does better in the morning or afternoon, or before or after meals. Location of the interview is also important. Even if the attorney's office is accessible, a defendant may be homebound or simply more comfortable at home. Interviews may have to be scheduled around the facility's visiting hours, though exceptions should be made if the defendant is not alert during these times. Discussions with the defendant are private; communications with defendants in guardianship proceedings are subject to the same respect and confidentiality given to communications with clients in other types of cases.

3. *Prepare for representation*--The attorney should secure and present evidence, testimony, and other arguments to promote the defendant's position and to protect the defendant's rights. Advocacy for the defendant entails the use of traditional lawyering techniques, such as pre-trial motions, discovery, stipulations, judicial notice, and evidentiary objections. In the guardianship context, advocacy also involves investigation of the less

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<sup>161</sup> Not all hearing-impaired individuals use sign language or even the same sign language.

<sup>162</sup> Aphasia is defined as a "partial or total loss of the ability to articulate ideas in any form." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 60 (1981).

<sup>163</sup> 28 C.F.R. § 36.303 (1995). Auxiliary aids are devices or services that help promote effective communication, including qualified interpreters, qualified readers, and audio tapes. *Id.*

restrictive alternatives to guardianship,<sup>164</sup> including powers of attorney, advance directives, representative payees,<sup>165</sup> trusts, and social services. The results of the pre-hearing investigation may determine the availability of less intrusive assistance and could lead to a negotiated settlement or to dismissal of the case.

As with other civil cases, the attorney should review the file and other relevant information and interview interested persons, neighbors, friends, social workers, and others who may have contact with the defendant. Reviewing medical records may not yield sufficient information, however, and doctors' certificates should not be considered *prima facie* evidence of disability. The attorney should interview those doctors who prepared the medical certificates to determine the extent of their personal knowledge about the defendant and their overall expertise with the kinds of conditions the defendant is alleged to possess. When evaluating medical evidence, the attorney should discover what medications the defendant is taking, and explore the possibility of drug interactions which may be the actual cause of the client's mental confusion. In addition, the attorney may want to obtain independent medical reports.

At the hearing, the attorney should cross-examine all witnesses, especially the medical experts. Familiarity with diagnostic techniques and symptoms of common psychological disorders helps in questioning of medical personnel. Another potential line of questioning involves whether results of psychological tests administered to the defendant are reflective of dementia or of educational and cultural biases, and whether the defendant was provided with any necessary auxiliary aides to enable him or her

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<sup>164</sup> MD. CODE ANN., EST. & TRUSTS § 13-705(b) (Supp. 1995) (finder of fact in a guardianship proceeding must determine that no less restrictive alternative to guardianship is available).

<sup>165</sup> 42 U.S.C. §§ 405(j), 1383(a)(2) (1990 & Supp. 1994). A representative payee is designated by the Social Security Administration to receive a beneficiary's social security or supplemental security income check and to pay for all of his or her necessary expenses. *Id.* Appointment of a guardian of the estate is not necessary for an individual who only has social security income, who has no assets to administer, and who has a representative payee.

to effectively communicate responses to the tests.<sup>166</sup> Social workers or other investigators may be questioned about whether they investigated all less restrictive alternatives to guardianship. When appropriate, family members, friends, and other plaintiffs should be questioned about whether other motivations, including pecuniary gain or conflicts of interest, prompted the filing of the guardianship petition.

In many ways, the functions performed by the attorney as advocate are similar to the functions performed by the guardian *ad litem*. Both are supposed to meet with and interview the defendant before the hearing and explain the nature and effect of the guardianship proceeding. Both should also interview potential witnesses, review evidence, and otherwise investigate the facts of the case. However, the advocate treats the defendant as a client, while the guardian *ad litem* treats the defendant as another witness in the investigation. The advocate uses the information gathered to develop a strategy of the case, present evidence, testimony, and arguments that protect the defendant's rights and interests. The guardian *ad litem* uses the same information to formulate his or her own opinion about what the court should do in the case, and delivers that opinion to the court. It should not be very difficult, therefore, for an attorney who has been acting as a guardian *ad litem* to assume the responsibilities of an advocate in order to protect the rights of the defendant.

## CONCLUSION

An attorney appointed to represent the defendant in a guardianship proceeding should acknowledge that his or her obligations are the same as to any other client, slightly modified by the capabilities of the client. The fact that a defendant has or is perceived to have functional limitations does not automatically mean the defendant cannot direct the attorney or assist in prepa-

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<sup>166</sup> In one case, the author represented a defendant who was deaf and spoke a pigeon dialect of American Sign Language. A physician who signed one of the medical certificates communicated with the defendant through her hospital roommate, without verifying that her roommate was communicating the questions to her correctly or even in a language that she understood.

ration of the case. The Maryland Rules of Professional Conduct, as well as the courts of other states, recognize this point.<sup>167</sup> Congress also acknowledged a growing awareness of the capabilities of people with disabilities when it enacted the Americans with Disabilities Act.

The important due process concerns at stake for the defendant in a guardianship proceeding warrant the protection accorded by an attorney acting as an advocate. Without someone to represent his or her interests and to advocate on his or her behalf, the defendant may face unnecessary restrictions on self-autonomy and liberty. No one else in the array of individuals involved in a guardianship proceeding will promote the defendant's views. Without an attorney representing the defendant, an entire proceeding concerning the future of the defendant will be conducted with little or no input from the person most affected by the proceeding. It is the job of the other parties to the proceeding, the plaintiff, the examining doctor, the social workers, to explain why the guardianship is needed. Ultimately, after listening to the arguments from the plaintiff and the defendant, it is for the court to determine what is in the defendant's best interests.<sup>168</sup>

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<sup>167</sup> See, e.g., *In re Link*, 713 S.W.2d 487 (Mo. 1986); *In re Grady*, 426 A.2d 467, 483 (N.J. 1981).

<sup>168</sup> See *In re M.R.*, 638 A.2d 1274 (N.J. 1994), *Kicherer v. Kicherer*, 400 A.2d 1097, 1100-01 (Md. 1979).

