

# Representing a Client in a Defense of Guardianship Case

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## American Bar Association Commission on Law and Aging

The mission of the American Bar Association Commission on Law and Aging (ABA Commission) is to serve as the collaborative, interdisciplinary leader of the Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons, particularly low-income and vulnerable elders. Since 1979, the ABA Commission has carried out this mission through research, policy development, technical assistance, advocacy, education, and training.

### Key Lessons

1. The first step is to always protect the due process rights of the client—even if there is no defense, it is essential to hold all parties responsible.
2. The best defense is built on presenting evidence of what the client can do with help, and to minimize the unmet needs of the client.
3. The testimony of the client can make or break your case—consider this before committing to go to trial.
4. Guardianship laws and due process vary from state to state—understand what works in your state before moving forward.

### Introduction

There are four primary reasons why a lawyer is needed to defend a person in a guardianship action:

1. To protect the person's due process rights.
2. When a Guardian/Conservator is not needed.
3. When the filing asks for more protection than is needed.
4. When a guardianship order is no longer needed, or a less restrictive order will work fine.

This Chapter Summary is limited to the four situations listed above. The focus will be on a lawyer representing the respondent or defendant in an adult guardianship case. For simplicity, we will use the term "guardian." Traditionally, a guardian had been appointed for the person, and a conservator had been appointed for the person's money. Under modern statutory law, some states use the term "guardian" for both the person and their money. California uses "conservator" for both. Some states follow the traditional rule of guardian for the person and conservator for money. Always check the law in the state the court is in to ensure you are using the correct term. The legal standard for the need for a guardian, the kinds of experts who can provide evidence or testimony, and the legal process vary based on state law. There are a variety of other roles for attorneys in guardianship cases, however for reasons of time and space, these materials are limited to the four situations above.

## Due Process Defenses

In every case, an attorney needs to defend the due process rights of their client. The basics of notice, the opportunity to be heard and to confront witnesses, and the rules of evidence need to be followed. A lawyer should defend their client's due process rights in every case, even if there is no disagreement about the need for protection.

### PRACTICE TIPS

- Review the pleadings considering state law and rules of procedure to ensure that notice requirements are met and that the pleadings meet the standards in the law.
- Meet with your client, explain what is happening, present options, and ask for their input.
- Review all reports from expert witnesses.
- If you disagree with the experts, retain other experts and be prepared to cross examine experts.
- Review qualifying expert witnesses based on state law.
- Object as needed to evidence or due process issues.

### CASE EXAMPLE

Freddy had a serious mentally illness and dementia. He had been charged with crimes and the Court found him unable to stand trial on the criminal charges. Subsequently, an adult guardianship was filed. The pleadings in the guardianship case contained details of the criminal accusations. It was clear that the petitioner intended to enter into evidence the unproven accusations. Freddy's court appointed attorney objected, and filed a "motion in limine" to exclude this evidence. The motion argued that the unproven accusations were inadmissible and unduly prejudicial. The defense in this case was not that a guardian was not needed, but that some of the evidence used by the petitioner should be inadmissible. The attorney protected the rights of a client who was unable to defend himself.

## Substantive Defenses

The substantive defenses for the need for a guardian or that a limited guardianship is sufficient, are based on state law. The evidence is generally the opinion of experts, lay testimony, and testimony of the client.

The Uniform Guardianship Conservatorship and Other Protective Proceedings Act (UGOPAA) uses the following standards to establish the need for a guardian:

*The person; lacks ability to meet essential requirement for physical health, safety, or self-care even with appropriate supportive services, technological assistance, or supported decision-making; (an) adult (is) unable to manage property or financial affairs; unable to receive and evaluate information or make or communicate decisions; identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative; or; appointment (is) necessary to avoid harm or significant dissipation of property.<sup>1</sup>*

Carefully review the law in your state to understand the elements needed to establish the need for a guardian. Review reports from expert witnesses and be prepared to cross examine them. Hold the petitioner to the burden of meeting the standard for disability in state law.

<sup>1</sup> UGCOPPA 301(a)(10(A), 401 (b)(1), 401(b)(1)(A), 301 (a)(1)(B), 401 (b)(3), and 401 (b)(2).

## Proceed as Though You Have the Burden of Proof

Though the burden may be on the petitioner to prove the need for a guardian, the best defense is built on presenting evidence to show that the standard of proof cannot be met. The two best types of witnesses are qualified experts and the client.

Many state laws define who is qualified as an expert. The most common experts are doctors, psychologists, and social workers. In selecting an expert, look for someone who has experience in assessing functional capacity, cognitive ability, and the necessity for protective actions. As long as no guardian has been appointed, the client should consent to the examination and report by the expert. Look for two things from an expert: a written report describing the examination of the person, including the evaluation of their abilities and unmet needs, and testimony in Court. State law and rules of practice will define notice on expert witnesses and your obligation to share copies of the reports and testimony in court. If there are expert witnesses for the petitioner, review their reports in advance and be prepared to cross examine the experts. Develop questions on how the assessment was done, differences of opinion on capacity or ability, and the expert's consideration of the impact of any accommodations in place to minimize unmet needs. For guidance on assessing capacity see:

- [Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers](#)
- [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#)

Testimony from the client can be critical. The client can best explain what they can do, what they need help with, the accommodations they have in place, additional accommodations they would be comfortable with, and their understanding of the choices they are making. The client's ability to be a credible witness should be considered when undertaking a defense, modification, or termination of guardianship case.

### CASE EXAMPLE

Melinda's son became concerned that Melinda was being financially exploited by her housekeeper and filed for guardianship. Records showed that Melinda was paying her housekeeper nearly \$50 an hour and allowing the housekeeper to use her credit card for personal expenses. At a hearing, when asked about the housekeeper, Melinda said, "I am very difficult to get along with, and when I pay housekeepers less, they quit. Without them I can't live alone. I know I am paying more than others, but it is worth it to have someone to put up with me and help me. Without her I wouldn't have clean clothes and a clean house. I wouldn't eat properly or remember to take my pills. I will pay whatever it costs—I can't take the money with me." The experts agreed, and the case was dismissed.

### PRACTICE TIPS FOR EXPERT WITNESSES

- The focus should be on the person's functional ability, the accommodations in place, and any unmet needs.
- If the client has a limited ability to pay, ask public health programs for physicians (or other health care professionals if allowed by state law), community mental health organizations for psychologists and psychiatrists, and government or non-profit groups for social workers as witnesses.
- Disability rights advocates may be able to help you find expert witnesses.
- Faculty and graduate students at colleges and universities can be good experts.
- Schedule and facilitate expert evaluations.

- Evaluations and reports should be done far enough in advance to allow you to review the reports and prepare the witnesses for trial.

Lay witnesses can speak to accommodations in place to meet the needs of the client. These witnesses need to have firsthand knowledge. Strong lay witnesses include the agent in a power of attorney, a person authorized to manage finances, health care agents, and in-home care providers that are assuring the persons needs are met.

## Evidence of Less Restrictive Alternatives

The UGCOPPA and many state laws ask the Court to consider the effectiveness of advance planning documents, as well as services and supports to meet the needs of the person. Evidence of Powers of Attorney, financial management assistance, banking arrangements, such as direct deposit and automatic payment, trusts with successor trustees, health care surrogates, advance health care directives, and supported decision-making agreements may be introduced to demonstrate the person's needs are met with less restrictive alternatives, or that a limited guardianship will protect the person as needed. Evidence of arrangements such as assisted living, housekeeping, nutrition assistance, home or community-based health care, lawn care, and transportation services should be presented to demonstrate that the person's health and safety needs are being met with less restrictive alternatives.

## Modifying or Terminating a Guardianship

An attorney may be asked to seek to modify or terminate a guardianship that is overly broad or not necessary. Most guardianships are plenary, meaning that they cover all of the authority that can be delegated to the guardian under law. This can be modified or terminated by proving to the Court that a limited guardianship is sufficient, or that the guardian is not needed (either was never needed, or conditions have changed and is no longer needed).

A starting point for modification or termination is the attorney being properly retained. The appointment of a guardian limits the person's ability to enter into an agreement for legal services. The guardian can consent to engage an attorney to represent the person. Or the attorney and client can ask the court to approve the representation. Courts will generally ask for a showing of proof that there is a reason to reexamine the need for a guardian prior to approving the appointment. If you proceed with representation without being hired by the guardian or without approval by the Court, the Court may question your representation and generally will deny payment of fees.

In a modification or termination case, evaluations by experts should be done with consent of the guardian or with a court order. The evidence for modification or termination is the same as the defense for not needing a guardian or for a limited guardian, explained above.

## Other Areas of Guardianship Litigation

Additional situations in which attorneys represent clients in guardianship cases include:

- Representing persons seeking the appointment of a guardian.
- Representing either the protected person or another interested party in seeking to have a guardian replaced or held accountable.
- Representing a potential guardian, where there is more than one person asking to be appointed as guardian.
- Representing guardians who have been accused of wrong-doing.
- Representing interested parties seeking damages for bad acts by guardians.

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## Additional Resources

- State by state statutory charts from the ABA Commission on Law and Aging:
  - » Modifications and terminations: [Statutory Appeals Provisions in Adult Guardianship \(2019\)](#)
  - » [Capacity Definition & Initiation of Guardianship Proceedings \(2018\)](#)
  - » Right to counsel, role of counsel, ad litem, visitors, and medical evidence: [Representation and Investigation in Guardianship Proceedings \(2018\)](#)
  - » Due process provisions: [Notice in Guardianship Proceedings \(2018\)](#)
  - » Required proof and standard of proof: [Conduct and Findings of Guardianship Proceedings \(2018\)](#)
  - » [Limited Guardianship of the Person and Property \(2017\)](#)
- [National Guardianship Association, Standards of Practice and Ethical Standards](#)
- [NCLER trainings and issue briefs on Guardianship](#)
- [Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers](#)
- [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#)

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**Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).**

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