

# Alternatives to Guardianship in Common Legal Aid Cases

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# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About ABA COLA

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the American Bar Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

# Participants Will Gain:

1. Knowledge to identify 3-5 less restrictive alternatives to guardianship.
2. Valuable “how to” skills and information on how to assist clients in accessing less restrictive alternatives to guardianship.
3. Increased competency on tools for effective communication with their client(s).

# Effective Communication

"I pledge allegiance to the Flag  
of the United States of America,  
and to the Republic  
for which it stands,  
one Nation under God, indivisible,  
with liberty and  
justice for *all*."

# Effective Communication: Title II of the ADA

- Title II of the ADA requires state and local governments, including courts, provide people with disabilities an equal opportunity to access and benefit from all of their programs, services, and activities.
- “Effective communication” means that “whatever is written or spoken must be as clear and understandable to people with disabilities as it is for people who do not have disabilities.”
- “The effective communication requirement applies to ALL members of the public with disabilities, including job applicants, program participants, and even people who simply contact state or local government agencies seeking information about programs, services, or activities.”
  - U.S. Department of Justice, Civil Rights Division, [ADA Best Practices Tool Kit for State and Local Governments](#), Chapter 3, General Effective Communication Requirements Under Title II of the ADA, March 9, 2017, retrieved on June 30, 2021

# 4th National Guardianship Summit (2021)

## 22 Recommendations

- Enhancing Rights of Persons Subject to Guardianship
- Bill of Rights
- Meaningful Due Process
- Supported Decision-Making
- Guardianship Court Improvement Programs

*Fourth National Guardianship Summit: Maximizing  
Autonomy and Ensuring Accountability May 2021*



# Communications Accommodations

- Title II regulations provide several examples of “auxiliary aids and services” to accommodate individuals with disabilities. These include, but are not limited to:
  - qualified sign-language and foreign-language court interpreters
  - assistive technology
  - notetakers
  - closed-caption decoders
  - qualified readers
  - “other similar services and actions.”
    - U.S. Department of Justice, [Civil Rights Division, ADA Best Practices Tool Kit for State and Local Governments](#), Chapter 3, General Effective Communication Requirements Under Title II of the ADA, March 9, 2017, retrieved on June 30, 2021

# Tablet Computers





















# Letter Boards



# Chat Boards

← QUICK CHAT VB

 yes	 no	 I can do it alone	 I want support	 Mom Decides	 Talk to Advisors
 Schools & Colleges	 Write Check	 Donating Organs	 Withdraw Money	 Buying & Selling	 Taxes
 Hiring & Firing	 Driving	 Choosing My Home	 Cooking	 Education	 Brush My Teeth

# Case Study #1: Eli

Eli, a 62 year old woman, reaches out to you via email for assistance with moving out of a nursing facility and into her own apartment. She writes in complete, thoughtful sentences explaining that she used to have a cell phone, a driver's license, a part-time job, and live in her own, government subsidized apartment...but "no one will help" her get out of the lockdown unit at the nursing facility she's now in.

She's unsure why she's been placed in the facility and denies having any mental health diagnosis or concerns...at least none that she'll voluntarily share with you. Eli provides her phone number and invites you to come visit her at the facility. On the phone, she's barely audible and speaks in broken, almost incoherent sentences, leaving you wondering how she previously wrote such a complete and thoughtful email. You decide to visit her.

# Case Study #1: Eli (cont.)

Before visiting her, you email her to ask if she has guardian or someone else who is helping her. She, again, writes back a very articulate and thoughtful response stating that she “thinks” someone “filed something like” but she has some paperwork that she could share with you.

Upon arrival, Eli seems agitated and uncomfortable with your presence in her space, won't look you in the eye, or audibly answer any of your questions.

- What do you do?

# Assessing Capacity

- First consider the client's mental capacity and their ability to make informed choices.
- If the client can make informed choices regarding their care and/or finances, a guardianship is not necessary.
- Make sure you spend an appropriate amount of time listening to the client and using effective communication tools to ensure that language or cultural differences are not being misinterpreted as a lack of ability to make informed choices.
- For more information on strategies to assess the client's capacity, see ["Assessing Legal Capacity: Strategies for an Elder Rights-Centered Approach."](#)

# NCLER's Practice Tips:

## Accommodate Cognitive Impairments (1 of 2)

- Begin the interview with simple questions requiring brief responses
- Conduct business at a slower pace.
- Allow extra time for responses to questions, as “word-finding” can decline with age.
- Break information into smaller, manageable segments.
- Discuss one issue at a time.
- Repeat, paraphrase, summarize, and check periodically for accuracy and comprehension.



# NCLER's Practice Tips:

## Accommodate Cognitive Impairments (2 of 2)

- If needed, provide corrected feedback and check again for comprehension.
- Provide summary notes and information sheets to facilitate later recall.
- Schedule appointments for times of the day when the client is at peak performance.
- Provide time for rest and bathroom breaks.
- Schedule multiple, shorter appointments rather than one lengthy appointment.
- Whenever possible, conduct business in the client's residence.

# Case Study #2: Olive

Olive comes to you with an eviction notice. Olive is 65 year old and appears a bit disheveled and indicates that she has no living family who can help her.

Initial conversations lead you believe Olive is having difficulty following the discussion and understanding the information you're giving her. She repeatedly talks over you and doesn't provide answers to the questions you ask.

She seems particularly irritated and insists that her friend, who has since passed away, set her rent payments up on autopay through her bank and she doesn't understand why the landlord now wants to "just kick me out."

- You suspect capacity issues. Where do you start?

# Power of Attorney

- Appoints an agent to make decisions or act on behalf of a person.
- Copies of these documents may be kept by the client's friends or family members, or by businesses frequented by the client.
- Banks or financial institutions may also keep copies of power of attorney documents on file and, in some places, these documents are recorded in the public records or filed with a county clerk.
- The authority granted in a power of attorney varies with state law and with the language of the document.
- Most powers of attorney are very broad and sweeping in authority.
- Any existing power of attorney could be brought as evidence of the client's planning and of the lack of a need for a guardian.
- Determine if the client is able to:
  1. Select a person they trust,
  2. Understand that the person they name could bind them to decisions and choices, and
  3. Generally understand the basic kinds of authority they are granting to the agent.

# Health Care Representatives or Agents (1 of 2)

- Understand the applicable state laws and know how a health care surrogate could be appointed in their state.
- Appointing a health care surrogate in writing is ideal, but some states allow for oral appointments to be recorded in medical records.
- Default or statutory consent options available in specific state.
- Inquire with clients into any existing advance directive documents that name a health care decision-maker.

# Health Care Representatives or Agents (2 of 2)

- When disputes between family members on health care decisions arise, the family may try mediation or group counseling to resolve the dispute.
  - If that fails, the court could provide a limited protective order clarifying who could consent to health care.
  - This is a very limited protective arrangement as anticipated under Article 5 of the Uniform Guardianship, Conservatorship, and other Protective Arrangements Act.
  - Seek a limited protective order, instead of guardianship, if there are no identifiable family members or friends to make health care decisions on behalf of the client.

# Medical Care and Monitoring

- Supporters can help facilitate medical care
- Virtual consultations
- Telemedicine
- Wearable health monitoring
  - Falls detectors
  - Emergency alert systems
- All should be done with understanding and consent
- Honor wishes regarding in-person meetings
  - Communications and social contact can be important

# Financial Representatives or Agents (1 of 2)

- Direct deposit and automatic billing paying services.
- Banks and other financial institutions could set up “read only” access.
- A determination needs to be made as to whether the client could agree to these arrangements (if the arrangements are not already in place).
- If these arrangements are not in place, and approval or consent is needed, the attorney could file a motion asking the court for a *limited* protective arrangement or order, authorizing someone to set up direct deposit and automatic payment.

# Financial Representatives or Agents (2 of 2)

- Social Security retirement, disability, and Supplemental Security Income (SSI) use a system of representative payees to receive, manage, and account for the income of beneficiaries that need help managing their benefits.
  - (NOTE: A court appointed guardian is NOT required to manage a person's Social Security benefits and a representative payee can be appointed by Social Security if the beneficiary is unable to manage their benefits (even if payee was not pre-appointed).
- Joint accounts offer the greatest degree of access into bank and financial accounts, but can also expose individuals to risks of abuse and exploitation.
- Direct payment



# Money Alternatives

- Direct Deposit
- Automatic Payment
- Support setup
- If agreed, provide oversight
- “Read-only” access to online financial accounts
- Shared email on notices
- Designate notice on late payments
- Pre-designate Rep Payee
- Spending Cash
- Debit or Credit cards with agreed limits on:
  - Transaction
  - Daily
  - Weekly
  - Monthly
  - Limited merchant codes
  - Agreed limits on where the card can be used
  - Specialized providers may be needed

# Case Study #3: Sam and Joy

Sam comes to you because his 80-year old mom, Joy, slipped and fell and was placed in a nursing home. Joy has some level of diminished capacity but is able to communicate her will and preferences for who she wants to help her with her daily living needs.

The facility has contacted Sam because Joy is refusing a necessary change in her medical treatment plan and is also \$30K behind on monthly payments and facing involuntary discharge, but refuses to discuss any of it with facility representative. Sam does not believe Joy can live on her own without 24-hour care and supervision and knows that she likely doesn't have the \$30K that the facility is demanding but he doesn't have access to her accounts.

# Case Study #3: Sam & Joy (cont.)

The facility has recommended that Sam file for guardianship/conservatorship over Joy so to access her finances and bank statements and get her caught-up on overdue bills. Sam asks you to help him file the Petition.

- What do you do?

# Who is the Client?

- Talk to Joy separately from Sam
  - What does she want to do?
- “Understanding the Four C’s of Elder Law Ethics”

# Trusts

- Typically established to control and manage assets while the person is alive and provide for distribution after death.
- An existing trust is clear evidence of the intention of the wishes of the grantor, or the person creating the trust.
- A trustee is someone appointed by the grantor to assist in managing the trust funds or assets, thereby negating the need for a court appointed guardian.
- Have provisions for successor trustees, and courts that regularly oversee the administration of trusts are an appropriate forum for raising questions on changing trustees.
- Presenting evidence of a trust is especially important in states that allow guardians or conservators to modify, revoke, or create trusts, as the guardian may be able to undo the planning that the grantor worked to put in place.

# Decision-Making Supports (1 of 2)

- Decision-making supports or supported decision making is the process by which an adult selects trusted supporters to help them as needed, to:
  - understand issues, options, risks, and consequences
  - empower the person to make choices
  - assist as asked and needed to carry out those decisions
- Decision-making supports are focused on the process of helping the person understand and empowering them to make choices

# Decision-Making Supports (2 of 2)

- Decision-making supports may be informal or formal
- Some people negotiate and sign written agreements or contracts
- Some want support without legal formalities
- Legal empowerment of supporters is a bigger issue if the person appears unable to make choices or has a progressive illness
- It is only supported decision-making if the person selects the supporters and makes the choices

# What are Decision Supports?

- Decision supports facilitate or accommodate understanding and decision making and support autonomy.
- Supported Decision Making
- Communication accommodations
- Physical accommodations
- Services such as transportation or delivery
- Technological supports
- Financial Automation
- Legal supports

\* We will talk about some of these in more detail later



# GPS Monitoring

- Persons who have difficulty with direction finding
- Persons who are at high risk of health crisis
- Built into smart phones, smart watches, a wide array of wearables
  - Amazingly accurate
- Seek understanding and consent
- The goal needs to be balancing autonomy with monitoring
- If the person wants to be able to turn off, or not carry, they should be able to

# Delivery Services

- Shopping and delivery services empower autonomy and independence
- Expanded service
  - Fresh foods in rural areas are not as common
- Nearly everything can be ordered
- Automatic replenishment
- Need understanding and consent
- To the extent possible, honor desires to get out of the house and shop

# Transportation

- One of the biggest challenges
- Most transportation assistance is provided by family and friends
- Don't assume the person can't drive
  - Occupational Therapists and other experts can assess accommodations and risks
- Ride share and taxi apps eliminate the need for in-person payment

# Building a Support Network

- The person must select and trust the supporters
- The supporters must be able to work together and collaborate
- The supporters must honor the choices of the person

# Generate a List

- Family
- Friends
- Neighbors
- Trusted service providers
- Trusted professionals
- Others the person frequently interacts with
- Think inside and outside the box

# When There Seems to Be No One

- Look again
- Look beyond the normal concept of family and friends
- Is there anyone the person has:
  - Regular contact with
  - The person trusts
  - The person would turn to
- Distant family
  - Ask why
  - Negative history—honor wish to not have contact

# Professionals as Supporters

- When a client hires a lawyer, the client is hiring a supporter
- Social workers, nurse care managers, and professional money managers can all be successful supporters, if selected and trusted by the person
- If the person can not pay, look to community or government services
- The person must select and trust
- Everyone must be committed to person-centered and person-driven decision making

# Case Study #4: Maria & Jose

Maria is the daughter of Jose, a 75 year old who has been diagnosed with mild dementia. He has a strong group of family supports, friends, and community supports. Although he sometimes doesn't understand complex language and needs help with understanding how money works, he is able to clearly express his will and preferences.

Maria is seeking your assistance to help Jose obtain Medicaid home and community based services. The Medicaid office has denied his application for services and Maria does not have a Power of Attorney or any authorization to work with an attorney on his behalf.

- What do you do?



# Conclusions (1 of 2)

- Ensuring effective communication supports is essential to ensuring that all aspects of judicial proceedings uphold every individual's right to access and engage in meaningful due process.
- Most states require alternatives to be considered first before initiating a guardianship action or require proof that a guardianship is necessary before continuing an existing guardianship.
- Alternatives to guardianship include a power of attorney, health care representative or agent, financial representative or agent, trust, and/or supported decision-making agreement.

# Conclusions (2 of 2)

- It is important to first assess the client's mental capacity and their ability to make informed choices. If the client could make informed choices regarding their care and/or finances, a guardianship is NOT necessary.
- Guardianships should only be sought when alternatives fail to protect an individual. If the alternatives are working, even a person who is comatose should not need a guardian.

# Ensure liberty and justice for *all*.

## Consider the following (1 of 2):

- Educate yourself on effective communication supports and requirements in your judicial system
- Make it a priority to develop, provide, and assist individuals with disabilities, older adults, and their caregivers, by offering the kinds of advising, tools, and services that provide for effective communication and information needed to facilitate, maintain, and promote their wellness, to continue to support their independence, their freedom of choice, their autonomy, and dignity.
- CLE programs through your state or local bar for judges and attorney colleagues.

# Ensure liberty and justice for *all*.

## Consider the following (2 of 2):

- Presentations and/or webinars at guardianship stakeholder events to include, but not limited to, doctors, nurses, bankers, teachers, social workers, and other stakeholders who may not believe that the person with a disability has “capacity” to make their own choice and be supported in effective communication.
- Community presentations at your local library, town hall, or other places the public gathers to educate and advocate on available resources for effective communication supports in your court system and how to access them.
- Informal, one-on-one discussions with professional colleagues to help evolve traditional practices and educate others about best practices involving supported decision-making and effective communication in judicial proceedings.
- Updates to your webpage to include tools, resources, and real-life examples of how supports for effective communication are being used in your court system.

# Additional Resources:

- [Something to Talk About: Supported Decision Making and Access to Justice for All](#)
- [4th National Guardianship Summit | Recommendations](#)  
See also ([video](#))
- [NCLER: Using Alternatives to Guardianship to Defend Against or Terminate Guardianship](#)
- [ABA Journal Article: ABA pushes for a federal guardianship court improvement program](#)
- [ABA State-Specific Advance Planning Forms](#)
- [NCLER: Advance Planning Documents: Planning and Prevention](#)
- [NCLER: Overview of Guardianship and Alternatives to Guardianship](#)

# ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITIES

2<sup>nd</sup> Edition



Commission on  
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HANDBOOK FOR LAWYERS

## Assessment of Older Adults with Diminished Capacities Handbook

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# Case Consultations

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).