

WINGS ACTION TOOLS

Right to and Role of Counsel*

An important issue for WINGS is the right to and role of counsel in *guardianship* proceedings. Stakeholders could conduct research, spur education and training, or advocate for changes in statute or court rule.

Counsel can:

- ✓ make the difference between a guardianship and a less-restrictive option, between a full and limited order, between a restoration of rights and continuation in a guardianship that may be unnecessary or overbroad;
- ✓ make the voice of the individual subject to guardianship heard; and
- ✓ promote a care plan according to the individual's values and preferences.

Your WINGS could focus on specific counsel issues in guardianship proceedings, including:

- ✓ right to counsel for individuals alleged to need a *guardian*;
- ✓ role of counsel for such individuals;
- ✓ role of the *guardian ad litem*;
- ✓ role of counsel for petitioners;
- ✓ right to counsel for individuals subject to guardianship (post-appointment);
- ✓ role of counsel for individuals subject to guardianship (post-appointment).

This Action Tool includes:

- ✓ Stakeholder Action Strategies;
- ✓ Key Background;
- ✓ Resources (with links to access information quickly).

*Italicized terms are used generally and may be different in your state. Words in blue are hyperlinks to important resources.

Ten WINGS Stakeholder Action Strategies

Here are ideas for WINGS action on the right to and role of counsel. Whatever path your WINGS chooses, be sure to build in evaluation outcome measures.

- ✓ Talk About It: Where Do We Stand. Structure a panel discussion with judges, court staff, the bar association, legal services, and the protection and advocacy agency on where the state stands and what gaps exist.
- ✓ Conduct a File Study. Is there any state data or research on guardianship counsel issues? Consider a limited research project or file study to determine the need for representation in practice.
- ✓ Educate Lawyers and Judges. Promote continuing legal and judicial education programs about the role of counsel, including implementing [ABA Model Rule 1.14](#) on the ethics of representing “clients with diminished capacity.”
- ✓ Advocate for Statutory and Rule Changes on Right to Counsel. Study your state’s statutory provisions on right to counsel for an individual alleged to need a guardian, including mandatory court appointment and payment for representation of indigent clients. Is there a need to clarify or strengthen these provisions?
- ✓ Advocate for Statutory and Rule Changes on Role of Counsel. Consider revising statute or court rules to clarify the role of counsel in:
 - representing an individual alleged to need a guardian;
 - representing a petitioner;
 - serving as guardian ad litem; or
 - representing an individual already subject to guardianship.
- ✓ Strengthen Pro Bono Assistance. Support efforts to promote pro bono representation in guardianship proceedings.
- ✓ Increase Legal Services. Determine the extent of legal aid involvement in guardianship, and how it can be increased.

- ✓ Improve Disability Representation. Determine the extent of *protection and advocacy agency* (P&A) representation of individuals with disabilities in guardianship, and how it can be increased. A National Disability Rights Network [report](#) found that 84% of state P&As responding to a survey represent or could represent individuals with disabilities in guardianship issues.
- ✓ Promote Less-Restrictive Options. Use the [ABA PRACTICAL Tool for Lawyers](#) to educate lawyers throughout the state about less-restrictive options, including supported decision making. Minnesota WINGS has used the PRACTICAL Tool in training and outreach to legal audiences and other professionals, to help them assess the need for a guardian and avoid unnecessary guardianships by using other decision-making options.
- ✓ Support Representation in Restoration. Work with the bar, legal services, and the P&A or *developmental disabilities council* to train lawyers in restoration of rights. Consider adapting the [Florida Manual for Legal Professionals](#) to your state.

Key Background

Right to Counsel – State Statutes and Court Rules

Do individuals who are alleged to need a guardian have a right to be represented by a lawyer under your state statute?

- The majority of [state guardianship statutes](#) include provisions on counsel for *respondents* in guardianship proceedings – ranging from required appointment of counsel in every case, to appointment of counsel in specified instances, to court discretion on need for counsel. Some states cover the costs of court-appointed lawyers for indigent respondents.

- The [Uniform Guardianship, Conservatorship and Other Protective Arrangements Act](#) is a model law approved by the Uniform Law Commission in July 2017. The Act sets out two alternative counsel provisions for state legislatures to consider. Sec. 305(a), Sec. 406(a).
 - In Alternative A, the court must appoint a lawyer to represent the respondent *if*: (1) requested by the respondent; (2) recommended by the *court visitor*; or (3) the court determines it is needed.
 - In Alternative B, unless the respondent is already represented by a lawyer, the court must appoint one.
- The [National Probate Court Standards](#) include model court rules on guardianship proceedings. The Standards provide that “Probate courts should appoint a lawyer” if requested by the respondent, recommended by a court visitor, or the court determines counsel is needed. Standard 3.3.5(A).
- There is little data and research on the frequency or consistency in practice of court appointment of counsel for individuals alleged to need a guardian.

Role of Counsel – State Statutes and Court Rules

Even if an individual alleged to need a guardian has a right to counsel, how lawyers carry out the representation varies widely.

- Less than half the [state guardianship statutes](#) include any provisions concerning the role of counsel for the respondent. Statutory roles range from “zealously represent the individual’s expressed wishes” to “serve as guardian ad litem” advocating for the person’s best interests rather than the individual’s wishes.
- The 2017 [Uniform Guardianship, Conservatorship and Other Protective Arrangements Act](#) (Sec. 305(b); Sec. 406 (b)) provides that the lawyer is to:
 - Make reasonable efforts to ascertain the respondent’s wishes.
 - Advocate for the respondent’s wishes to the extent reasonably ascertainable.
 - If wishes are not reasonably ascertainable, advocate for the least-restrictive option consistent with the respondent’s interests.

- The [National Probate Court Standards](#) provide that “the role of counsel should be that of an advocate for the respondent.” Standards 3.3.5(B).
- For a classic article on role of counsel as a zealous advocate for the individual’s wishes, see Joan O’Sullivan, “[Role of the Attorney for the Alleged Incapacitated Person.](#)”

Ethical Rules for Lawyers in Guardianship Proceedings

The American Bar Association’s [Model Rules of Professional Conduct, Rule 1.14](#), addresses the lawyer-client relationship when the client has “diminished capacity.” State ethics rules generally have adopted or adapted the ABA Model Rules, but it is important to identify [your state’s equivalent to Model Rule 1.14](#), and any [relevant state ethics opinions](#). Here are key concepts in Rule 1.14:

- The Rule directs lawyers to “as far as reasonably possible, maintain a normal lawyer-client relationship.” That means that lawyers should assume the client is able to direct the decisions at hand. Rule 1.14(a).
- However, the Rule then provides that when the lawyer believes the client is at risk of substantial harm and cannot act for him/herself, “the lawyer may take reasonably necessary protective action” – including consulting with those who can help to protect the client, seeking the appointment of a guardian ad litem, and even seeking appointment of a guardian if there is no other option. Rule 1.14(b).
- The [Comment to Rule 1.14](#) elaborates on the lawyer’s role and the kinds of protective actions that might be taken.

Role of Guardian ad Litem

- Guardians ad litem are lawyers who play a critical part in the guardianship appointment process in many states.
- According to the Uniform Act, a guardian ad litem is “a person appointed to inform the court about, and to represent the needs and best interests of an individual.”
- The duties of a guardian ad litem [vary significantly by state](#), but generally include informing the individual alleged to need a guardian of his or her

rights; investigating the person’s abilities and limitations, and the risk of abuse; and summarizing the result in a report to court.

- The role of a guardian ad litem thus is very different from the traditional role of a lawyer who must “zealously advocate” for the wishes of the client. A guardian ad litem represents the individual’s best interests rather than the expressed wishes.
- There is little research on how guardians ad litem function in practice, and a need to clarify roles.
- Examples of state guidance for guardians ad litem in adult guardianship proceedings include the [State Bar of Wisconsin 2017 Adult Guardian ad Litem Training](#), and the [2014 Michigan Center for Law and Aging Manual for Guardians ad Litem and Appointed Counsel](#).
- The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act, the National Probate Court Standards, and several states require the court to appoint a “court visitor” instead of a guardian ad litem to investigate and inform the court. The visitor may have similar roles to a guardian ad litem and may have a clinical or social services background.

Role of Counsel for Petitioner

- Lawyers frequently represent family members or organizations in petitioning for the appointment of a guardian. There is no research on practices in such representation.
- An important role in counseling potential petitioners is to inform them of possible less-restrictive options.
- The American Bar Association created the [PRACTICAL Tool for Lawyers: Steps in Supporting Decision Making](#). It is a nine-step tool that helps lawyers identify and suggest decision-making options that are less restrictive than guardianship – which may make the petition unnecessary.

Post-Appointment Right to Counsel

- Once a guardian is appointed, an individual loses rights and therefore faces challenges in making a complaint about a guardian – or seeking a change in the court order or ending the order with restoration of rights. Access to a lawyer would help to give these individuals a voice.

- The post-appointment right to counsel varies significantly by state. A 2015 article by Jenica Cassidy, "[Restoration of Rights in Adult Guardianship](#)," found that 12 states expressly require the court to appoint counsel for an unrepresented individual who seeks restoration of rights. Several other states provide that the individual has the same rights in a restoration proceeding as in a guardian appointment proceeding.
- The [Uniform Guardianship, Conservatorship and Other Protective Arrangements Act](#) states that an individual seeking restoration of rights "is entitled to be represented by an attorney of the adult's choosing."

Post-Appointment Role of Counsel

What is the role of counsel in advocating for fundamental rights for individuals for whom a guardian has been appointed?

- The leading resource on post-appointment role of counsel is Kohn & Koss, "[Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship](#)." This 2016 article uses constitutional, contract, and agency law to argue that post-appointment representation is legally and ethically permissible, and is essential to protect fundamental rights.
- For additional insights into the post-appointment role of counsel, see Wood, Teaster & Cassidy, [Restoration of Rights in Adult Guardianship](#).

Resources

- American Bar Association Commission on Law and Aging, Commission on Disability Rights, Section on Civil Rights and Social Justice, Section on Real Property, Trust and Estate Law, *PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making* (2016).
https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html
- American Bar Association Center for Professional Responsibility, *Model Rules of Professional Conduct*, Rule 1.14, Clients with Diminished Capacity.
https://www.americanbar.org/groups/professional_responsibility/publications

[/model rules of professional conduct/rule 1 14 client with diminished capacity.html](#)

- American Bar Association, “Representation and Investigation in Guardianship Proceedings,” state-by-state statutory chart updated to 2016.
http://www.americanbar.org/content/dam/aba/administrative/law_aging/chartrepresentationandinvestigation.authcheckdam.pdf
- Florida Developmental Disabilities Council, *Developing Abilities and Restoring Rights: A Manual for Legal Professionals* (2016).
http://www.fddc.org/sites/default/files/media/2016LegalManual_cjm_0.pdf
- Hutt, D., National Disability Rights Network, *Report on Survey of the Protection and Advocacy Network on Involvement in Guardianship and Conservatorship Issues* (2017).
http://www.naela.org/NGN/Adult_Guardianship_Reform/National_Guardianship_Studies/NGN/Adult_Guardianship_Reform/National_Guardianship_Studies.aspx?hkey=550f2697-13a0-4561-a752-2504458b3103
- Kohn, N. & Koss, C., “Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship,” *Washington Law Review*, Vol. 91, No. 2, (2016). <https://www.law.uw.edu/wlr/print-edition/print-edition/vol-91/2/lawyers-for-legal-ghosts-the-legality-and-ethics-of-representing-persons-subject-to-guardianship>
- National College of Probate Judges, National Center for State Courts, *National Probate Court Standards*.
<http://ncsc.contentdm.oclc.org/cdm/ref/collection/spcts/id/240> .
- O’Sullivan, J., “Role of the Attorney for the Alleged Incapacitated Person,” *Stetson Law Review* (2002).
http://www.supporteddecisionmaking.org/sites/default/files/role_of_the_attorney.pdf

- *Uniform Law Commission, Uniform Guardianship, Conservatorship and Other Protective Arrangements Act.*

http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/2017AM_UGCOPPA_AsApproved.pdf

This action tool is supported by grant No. 90EJIG0007-01-00 from the Administration for Community Living, U.S. Department of Health and Human Services (DHHS). Grantees carrying out projects under government sponsorship are encouraged to express freely their findings and conclusions. Therefore, points of view or opinions do not necessarily represent official Administration for Community Living or DHHS policy.

Under the ACL grant, the American Bar Association (ABA) Commission on Law and Aging coordinates and provides technical assistance to establish, expand and enhance state Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS). The views expressed in this Action Tool have not been approved by the ABA House of Delegates or the Board of Governors and should not be construed as representing the policy of the American Bar Association.