

Summary of Standards

Standards should be established for the performance of attorneys representing respondents in guardianship cases. Qualification and training standards are also needed. Standards should regulate the operations of the system used for the recruitment, appointment, and discipline of such attorneys. Monitoring standards should be developed to provide quality assurance oversight for representation in individual cases as well as making sure that the standards for all aspects of the legal services system are being properly implemented.

The following is a summary of the “due process *plus*” standards being recommended to ensure that clients with developmental disabilities have access to justice in guardianship cases.

A. Performance Standards (White Paper, p. 50-58)

A-1. Investigation

A-1-A. Records. The attorney has a duty to obtain all records that may be relevant to the investigation and evaluation of, and advocacy for, all issues that may arise during the course of a guardianship proceeding. Requests for such records should be made immediately after the attorney is appointed to a case.

A-1-B. Witnesses. The attorney should identify all potential witnesses, whether personal or professional, on whom the petition relies for evidence and obtain contact information for such witnesses. The attorney should identify and obtain contact information for all potential witnesses who may be helpful to advocating or defending positions that advance the wishes or interests of the client. Potential expert witnesses should be identified. All potential witnesses for the petitioner or for the respondent should be interviewed.

A-1-C. Client and Guardian. The client should be interviewed in private and in an appropriate setting, on as many occasions as necessary. The proposed guardian or guardians should also be interviewed by the attorney.

A-1-D. Background Checks. Background checks should be made to determine whether the proposed guardian is qualified and is the best person to serve as guardian. Background checks should also be conducted on members of the household in which the respondent will live if the petition is granted.

A-2. ADA Access Plan (White Paper, p. 51)

Prior to interviewing the client, the attorney should gather records and conduct interviews of relevant informants for the purpose of preparing an ADA access and communications plan for the client. This plan will assist the attorney in making sure that attorney-client interactions are as meaningful as possible and that the client is able to understand the legal proceedings and participate in them to the best of his or her abilities.

A-3. Advocacy and Defense (White Paper, p. 56-58)

A-3-A. Evaluation of Evidence. After all documents have been obtained and all potential witnesses and sources of information have been interviewed, this documentary and testimonial evidence should be evaluated by the attorney. The attorney should decide whether this information provides clear and convincing evidence in support of the petition and all allegations and requests made in it. The attorney should determine if the existing evidence raises doubts about any of the allegations of incapacity, doubts that less restrictive alternatives are feasible, or doubts that the person nominated to be guardian is qualified and is the most suitable candidate for this position of trust.

A-3-B. Appointment of Experts. The attorney should determine whether to ask the court to appoint experts to assist the attorney with the evaluation of evidence or to provide professional opinions on any issues in the case. If the attorney believes that expert evaluations or evidence is necessary to effective advocacy, a request for such appointments should be made. If experts are appointed, the attorney should work closely with the experts to maximize the value of their participation in the case.

A-3-C. Negotiation and Settlement. Once the attorney has gathered the documents, interviewed potential witnesses, reviewed the documentary and testimonial evidence, and obtained expert evaluations and recommendations (or waived that step), the attorney should make strategic decisions about how to proceed with the case. The client should participate in this process, to the extent that the client is able to do so (with any supportive services that are part of the ADA access and communication plan).

The attorney should not advocate for the denial of the petition if there is clear and convincing evidence that a guardianship is necessary to protect the client from harm and that less restrictive options are not feasible, even with supported decision making. The attorney has a duty not to make frivolous arguments or objections. The attorney also has a duty to advocate for the interests and rights of the client. The client has a right to be free from abuse or neglect and to be safe – rights that are advanced by the granting of a guardianship petition. Therefore, even if the client does not have the capacity to waive the right to a trial or to authorize the attorney to stipulate to an order granting a guardianship, the attorney should take appropriate steps to fulfill his or her ethical and constitutional duties to the client on each of these issues.

The attorney need not demand an evidentiary hearing if the facts are uncontested. Under such circumstances, the attorney should consider inviting the petitioner to stipulate that the court may make its decision based on the documents and reports in the court file. Prior to submitting the case pursuant to such a stipulation, the attorney should consider asking the petitioner to amend the petition to conform to whatever negotiated terms of guardianship seem reasonable to the parties.

A-3-D. Evidentiary Hearing. If there are facts in dispute, or arguably meritorious issues that need testimony to prove, the attorney should demand a trial on those issues. Unless there are strong reasons to the contrary, the client should be present at the trial (consistent with the ADA access and communication plan). Stipulations to undisputed evidence can be made. Testimony of lay

witnesses, experts, and documentary proof should be submitted at trial. Motions and objections should be made if they are arguably meritorious. A record should be created for any potential appeal.

A-4. Appeal (White Paper, p. 58)

Whether or not the attorney is authorized to represent the client on appeal, the attorney should assist the client to preserve the right to appeal if there are any arguably meritorious grounds for doing so. If plausible grounds exist, the attorney should file a notice of appeal, even if only as an ADA accommodation for the client.

If the client is capable of understanding the right to an appeal and the purposes of an appeal, the attorney should explain these issues to the client. This should be done consistent with the ADA access and communication plan.

B. Qualification and Training Standards (White Paper, p. 59)

B-1. Qualification Standards. The attorney should have received thorough training on issues related to guardianship and should have some general trial experience in order to be considered qualified for appointments to represent guardianship respondents.

B-2. Training Standards. The content of training programs should be informed by ADA-compliant performance standards. In order to perform properly, guardianship attorneys need to receive training on topics that coincide with performance.

Training programs should provide the necessary information to assist attorneys in understanding their clients and how their disabilities affect the attorney-client relationship, as well as how such disabilities interface with material issues involved in a guardianship proceeding.

The program should include a course in “Disabilities 101.” In this training segment, attorneys need to acquire an understanding of the types of physical, cognitive, emotional, and communication disabilities their clients may have and how they affect communication and decision making abilities.

Speakers on guardianship advocacy and defense should include seasoned guardianship attorneys who have tried contested cases. Presenters should also include disability rights advocates (including self advocates), forensic psychiatrists or psychologists, abuse and trauma therapists, disability services providers, and supported decision making specialists.

A training component should include information about the constitutional and statutory rights that guardianship respondents possess when a guardianship petition is filed. These are the rights at stake in the proceedings – the rights the attorneys should be defending from unnecessary infringement.

A necessary component of a training program is the issue of capacity to make decisions. This forensic issue is a hybrid product of law and psychology. Attorneys should hear from forensic psychologists with experience in evaluating people with developmental disabilities. They should

also learn from seasoned guardianship attorneys on how to challenge assessments, either because the evaluator is not qualified, or because the assessment failed to take various factors into consideration.

The issue of disability and abuse should be included in the training program. A significant percent of guardianship respondents have been victims of abuse as a child, or as an adult, or both. Attorneys should learn the high rate of abuse of this population, who the most likely perpetrators are, how to reduce the risk of abuse, and how to investigate suspected abuse.

C. Appointment Process Standards (White Paper, p. 59)

The manner in which attorneys are appointed from the panel of attorneys eligible to represent guardianship respondents should safeguard the autonomy of attorneys in representing their clients. To accomplish this, an independent third party, such as the local bar association or a legal services organization, should be responsible for maintaining the panel. The court should appoint attorneys from that panel serially, unless an attorney's absence or other compelling reasons require otherwise.

D. Monitoring Standards (White Paper, p. 60-66)

Procedures should be established to monitor the effectiveness of ADA-compliant “access to justice” advocacy and training standards for court-appointed attorneys who represent guardianship respondents. The procedures should have two dimensions. One is the monitoring of the performance of attorneys in *individual cases* as well as monitoring samples of cases to determine if there is a pattern of noncompliance. The other is to put into place methods to monitor the *system* for appointment, training, and oversight of the panel of attorneys.

D-1. Administrative Complaint Procedures

Procedures should exist whereby the official or agency in charge of operating a legal services panel of attorneys receives and processes complaints about the performance of members of that panel. If the investigation of such a complaint shows a violation of ethics or a violation of performance standards, the agency or official should take appropriate corrective action, such as placing the attorney on probation or removing the attorney from the panel. In order to be fair to the attorney, the investigatory and remedial process should not be conducted on an ad hoc basis but should be guided by established procedures that are applied in a uniform manner. Another remedial action is to remove the attorney from a specific case and to appoint a new attorney to represent the client.

D-2. Marsden (IAC) Hearings

In order to implement the right to effective assistance of counsel in individual cases, a procedure should be established in which a litigant can complain to the judge about the allegedly deficient performance of his or her attorney and request the appointment of a new attorney. The procedure should be similar to what occurs in California when a litigant requests that a new attorney be appointed due to ineffective performance (a “Marsden” procedure). The procedures used in such a proceeding should have the safeguards inherent in the Marsden model.

D-3. Modified Rules of Standing to Appeal

Rules of appellate standing should be modified to ensure access to the appellate process for guardianship respondents who have developmental or communication disabilities. An individual or advocacy agency should be allowed to proceed with an appeal on behalf of the respondent, especially if the appeal seeks to vindicate the litigant's civil or constitutional rights. That individual or agency should be allowed to proceed with the appeal in the capacity of next friend of the litigant.

D-4. Periodic Auditing of Cases and Systems

To make sure that individual attorneys are complying with performance standards, there should be a periodic and random audit of attorneys who are on the panel. If an attorney is randomly selected for an audit, a few of his or her cases should be reviewed. Court records and pleadings should be examined. The attorney's case file should be reviewed as well. Because this process may be time consuming, the annual review of just a few cases of just a few attorneys would be sufficient.

Systems involved in the process of managing court-appointed attorneys should also have a monitoring process. The process of appointing attorneys (recruitment and placement on the panel) should be audited. A few of the new applications for admission to the panel should be viewed to determine if the facts and assertions made in the application are true. Training programs should also be audited. The system of assigning attorneys to individual cases should be audited to determine if attorneys are assigned on a rotational basis or if there is any unfairness in the assignment process.

The "standing to appeal" process should be audited to make sure that a modified rule on standing for litigants with developmental disabilities has been adopted, that it is being made known to the panel of guardianship attorneys, and is being explained on the website of the Court of Appeal.

The "Marsden" IAC process should also be audited. The auditing agency should determine whether a court rule been adopted to allow for a Marsden process and that attorneys have been informed of the process. The auditor should check to verify that information about the Marsden process is on the court's website or in instruction booklets, and that the information advises petitioners and objectors about their ability to complain about the deficient performance of an attorney representing a guardianship respondent. Local disability rights organizations should also be informed.

D-5. ADA Noncompliance Complaint Procedures

Agencies involved in appointing, training, and supervising guardianship attorneys should adopt an informal complaint procedure in which people can file a complaint because a policy or practice of that agency is not in compliance with the ADA. This grievance procedure should be separate and distinct from a complaint procedure for failure of the agency to properly respond to a specific request for an ADA accommodation.