



# UTAH JUDICIARY

## Attorneys in Guardianship Cases Training Series

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### Part 2: The Ethics of Working with Clients with Diminished Capacity

#### Materials



# Ethical Considerations in Representing Respondents in Guardianship Proceedings

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1

## Representation: A Requirement and a Right

- “Unless the allegedly incapacitated person has counsel of the person’s own choice, the court shall appoint an attorney to represent the person in the proceeding...” Utah Code Section 75-5-303(2)(b)
- “[A] person alleged to be incapacitated has the right to... be represented by counsel before a guardianship is imposed and have counsel represent the person during the guardianship proceeding...” Utah Code Section 75-5-301.5(1)(a)
- \*Not going to address situations where counsel not required for purposes of this presentation\*

2

## Why?

- Guardianship is a protective proceeding, but it is also a deprivation of rights
- Adversarial proceeding
  - Conflict of interest rules apply
- Historically little oversight and abuse of process
  - Nevada

3

## Attorney's Role

- The Respondent is your client
  - Duties to your client, not other parties
  - Rules of Professional Conduct apply as they would any client
  - Rule 1.14 Representing Clients with Diminished Capacity
    - Not designed specifically for this situation, but informative
    - Balance client interests with need for protection
- NOT a Guardian ad Litem
  - Best interests standard not applicable even though more familiar

4

## Incapacity

- “‘Incapacitated’ means an adult's ability to do the following is functionally impaired to the extent that the individual lacks the ability, even with appropriate technological assistance, to meet the essential requirements for financial protection or physical health, safety, or self-care: (a) receive and evaluate information, (b) make and communicate decisions, or (c) provide for necessities such as food, shelter, clothing, health care, or safety.” **Utah Code Ann. 75-1-201(25).**
- Requires a judicial determination, by clear and convincing evidence. **Utah Code Ann. 75-5-304(1).**

5

## Types of cognitive incapacity most likely in signature program cases



Dementias

Mental illness

Intellectual/developmental disability

6

## Dementia

- DSM-5 treats dementia as a catchall major neurocognitive disorder
- Features:
  - Substantial decline in one or more areas compared to prior functioning (e.g. learning, memory, executive function, language)
  - Validated objectively (e.g. by cognitive testing, clinical assessment)
  - Sufficient to interfere with independence and daily activities
  - No other explanation
- Do *not* identify with chronological age

7

## Mental Illness

- Wide variety of conditions that may interfere with occupational, social, and daily functions
- Not tied to IQ or age
- May be temporary, cyclical, or episodic
- Condition may change depending on medication, treatment adherence

8

## Intellectual/ Developmental Disability

- Present before age 22, usually from birth
- Cognitive capacity (IQ) and adaptive functioning
- Severity determined by functioning
- “Developmental” disability is the broader category which may not involve difficulties in learning or reasoning
  
- “Severe” intellectual disability undefined in Utah law; medically defined as average mental age 3-6, using single words and phrases to communicate, benefiting from daily care and support

9

## If a client doesn't self-identify you may need to assess:

- Does the client act or talk in a different manner?
- Does the client seem unusually confused or preoccupied?
- Is the client's speech hard to understand?
- Does the client's vocabulary seem limited?
- Does the client have difficulty expressing him/herself?

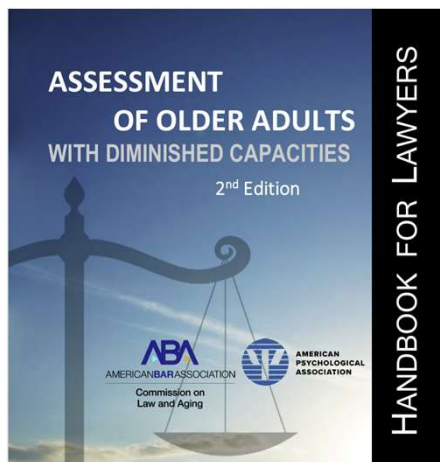
10

## History Questions

- Did you have special services (IEP, 504, accommodations) in school?
- Have you ever received Mental Health or DD services (waiver services)?
- Do you get any kind of social security check?
- Is there a guardian, rep payee, or POA who helps you with your finances or decisions?

11

## Assessing Capacity



- For purposes of representation – not ultimate judicial determination
- Undue Influence Screening Tool
- Assessment Worksheet

12

## Attorney-Client Relationship

13

### ABA Model Rule 1.14(a)

- When a client's capacity to make adequately considered decisions in connection with a representation is diminished, the lawyer *shall*, as far as reasonably possible, maintain a "normal" relationship with the client.

14

## Commentary Suggests Reasons Rule 1.14 Was Needed

Clients with disabilities may be unable to monitor the attorneys' performance.

Studies found that attorneys spend less time interviewing clients with disabilities than other clients.

There is a tendency to usurp decisions that should be left to the client.

15

## “Normal” Client Relationship

- Effective communication
- Duty of loyalty to client, not guardian, petitioners, family members
- When necessary to assist in representation, presence of third person does not affect applicability of attorney-client privilege.

16

## Decisions for Client—Rule 1.2

- Lawyer shall abide by client’s decisions concerning objectives of representation
  - Includes decisions about whether to settle
- Shall consult with client as to means
- May limit scope of representation, with client’s informed consent

17

## Rule 1.4: Lawyer Shall

Notify	Promptly notify client of decision or circumstance that requires informed consent
Consult	Reasonably consult with client about means to accomplish objectives
Inform	Keep client reasonably informed about status of matter
Respond	Respond to reasonable requests for information
Consult about	Consult about limitation of lawyer’s conduct

18

## Confidentiality of Information

Rule 1.6(a): shall not reveal information unless client gives informed consent, disclosure implicitly authorized to carry out representation, or permitted by Rule

Rule 1.14(c): when taking protective action, lawyer is implicitly authorized to reveal information in Rule 1.6(a) only to extent reasonably necessary to protect client's interests

19

## Taking Protective Action

20

## ABA Model Rule 1.14(b) Protective Action

- May take protective action if reasonably believe
  - Client has diminished capacity,
  - Client is at risk of substantial physical, financial, or other harm, unless action is taken, *and*
  - Client cannot adequately act in own interest

21

## Examples

- Consulting with family members
- Consulting with professionals and/or adult protective services
- Alternatives to guardianship
  - Supported decision-making
  - Power of Attorney, Health Care Directive
- Appointment of GAL or guardian
  - Limited guardianship, temporary guardianship, regular review of guardianship

22

## Factors to Consider

- Client's wishes and values, to the extent known
- Client's best interests
- Preserving client's decision-making autonomy to the greatest extent feasible
- Maximizing client's capabilities
- Representing the client's family and social connections

23

## Effective Communication

24

## More Rule 1.4: Lawyer Shall

- “Explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

25

## Effective Communication: General Tips

- Talk to client
- Learn about client’s disability
- Ask about needs and preferences
- Be aware of body language
- Patience, humor, and the Golden Rule

26

## Effective Communication: Client with ID

- Limit distractions, people present
- Begin by asking some basic questions to assess level of basic knowledge
- Ask questions a number of ways; ask the person to repeat or explain statements
- Avoid compound or complex sentences

27

## More Communication: Client with IDD

- Wait for a response before continuing
- Eye contact
- Concrete, not abstract
- Minimize and simplify written information

28

## Effective Communication: Client with MI

- Be aware of possible processing difficulties
- Be aware of body language
- Wait for response before continuing
- Let the person know you are prepared to believe them (you should actually be prepared)
- Do not confront untruths; work around them

29

## Resources

- [ABA/APA Assessment of Capacity in Older Adults](#)
- ABA PRACTICAL Tool
- ABA Defense Against Guardianship
- National Center on Law and Elder Rights (NCLER) and Justice in Aging
- National Academy of Elder Law Attorneys (NAELA)
- Report on Clinical Evaluation, [www.utcourts.gov](http://www.utcourts.gov)
- Court Visitor Program

30

## Related Links

<https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>

[https://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice/practical\\_tool/](https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/)

<https://www.utcourts.gov/en/self-help/case-categories/gc.html>

<https://ncler.acl.gov/home#gsc.tab=0>

<https://justiceinaging.org/>



## Attorneys in Guardianship Cases Training Series

### Allison Barger

Allison Barger is an associate attorney with Kathie Brown Roberts PC and one of three Certified Elder Law Attorneys in the State of Utah. Allison participates in the Probate Rules subcommittee of the Utah Rules of Civil Procedure, of which she is a founding member. She has presented numerous continuing education programs to the State Bar sections and authored articles in the Utah Bar Journal on topics such as special needs planning, guardianships, and related ethical issues. She is a past chair of the Elder Law section of the Utah State Bar and has participated in various volunteer legal services for seniors throughout her career.

### Brant Christiansen

Brant T. Christiansen, JD, LLM, MBA, is a partner at Lewis Hansen. Over the last decade, Brant has represented numerous individuals, families, and professional fiduciaries in the guardianship and conservatorship process and has advised families on the most appropriate and least-restrictive protections for their incapacitated or disabled loved ones. Brant serves on the Executive Committee of the Elder Law Section of the Utah State Bar, the Executive Committee of the Utah Working Interdisciplinary Network of Guardianship Stakeholders (WINGS), and as a member of the Probate Rules Subcommittee. Brant also volunteers for the Guardianship Signature Program.

### Katie Cox

Katie Cox is a staff attorney and Utah Medical-Legal Partnership Attorney Coordinator at the Disability Law Center. Katie also holds a Master of Social Work. She practices law as a healing profession, combining her law and MSW education to be a client-centered, humanistic practitioner, engaging in the work from both an individual and systemic perspective. Katie is passionate about social, economic, reproductive, and disability justice, human dignity, and whole health. Katie serves on the WINGS committee and regularly participate in subcommittees and workgroups aimed at improving access to justice for vulnerable individuals.

### Rob Denton

Rob Denton is a retired attorney, with a law degree from the S.J. Quinney College of Law at the University of Utah. Rob spent most of his career representing people with disabilities, including in guardianship cases. Rob worked for the Disability Law Center for 28 years. He is a member of the Utah WINGS committee, serving as a stakeholder from 2013-present. He has been an active participant in building and strengthening the Guardianship Signature Program since it was first developed in 2015.

## Leslie Francis

Leslie P. Francis, Ph.D., J.D., holds joint appointments as Alfred C. Emery distinguished professor of law and distinguished professor of philosophy at the University of Utah, where she also directs the Center for Law and Biomedical Sciences. Leslie is a published author, with works related to disability law and ethics, bioethics, and justice in health care. She is a member of the Disability Rights Bar Association and serves on the boards of the Utah Disability Law Center and the “And Justice for All” committee. Through the Guardianship Signature Program of the Office of State Courts, she regularly provides pro bono representation for people who are the subject of guardianship; for this work, she was a recipient of the service to the courts award in 2021.

## Langdon Owen

Langdon T. Owen, Jr. is a member of the law firm of Cohne Kinghorn, p.c. in Salt Lake City, Utah. Don is a transactional lawyer who practices in such areas as estate and tax planning, guardianship and conservatorship, business and commercial transactions, health care law, nonprofit organizations, probate, and real estate. He has practiced law since 1977, and serves on the Probate Rules subcommittee of the Utah Rules of Civil Procedure. He holds a Juris Doctor degree from the University of Utah (1977) and a Bachelor of Arts degree from the University of California, Berkeley (1973, with great distinction).

## Shonna Thomas

Shonna Thomas is the Court Program Administrator for the Guardianship Reporting and Monitoring Program (GRAMP), which includes the Guardianship Signature Program and the Court Visitor Program. Shonna serves as staff to WINGS and the Probate Rules subcommittee, and facilitates several workgroups related to guardianship. Shonna has worked for the State of Utah for 17 years, focusing her efforts on advocating for vulnerable populations, including five years as the training specialist on a federal research grant aimed at empowering teenagers with developmental disabilities. Shonna also worked as a behavior specialist and functional behavior assessment (FBA) trainer in Pennsylvania. Shonna holds MS degrees in human services and criminal justice, and a BA degree in psychology.





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## Guardianship Signature Program



# VOLUNTEER OPPORTUNITY

The Guardianship Signature Program (GSP) connects volunteer attorneys with respondents in guardianship proceedings who need an attorney but do not have one of their own choosing.

The program is a joint effort by the Administrative Office of the Courts and the Utah State Bar, with endorsements by the Board of District Court Judges and the Bar Commission.

To participate in the program, attorneys must:

- Be eligible to practice law in Utah or be enrolled in a Utah law school. \*
- Accept the fee limits (pro bono and Modest Means).
- Certify knowledge of guardianship law and procedure or complete the free online training course.

**Eligible for CLE credits**

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**Malpractice insurance covered by the Bar**

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**Choose cases to suit your schedule**

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**Active and Inactive attorneys can join**

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**Gain valuable experience while serving your community**

### **FOR MORE INFORMATION:**

**Call:** (801) 578-3925

**Email:** GRAMP@utcourts.gov

**Visit:** [utcourts.gov/gramp/gsp](http://utcourts.gov/gramp/gsp)

\* Under Rule 14-807, students and recent graduates, under the direct and immediate personal supervision and in the presence of a resident attorney, can conduct or assist with interviews and other investigations, do research, prepare pleadings and other papers, and represent the client at hearings.