

New Ethics Opinion: Court Appointed Attorney's Role in Guardianship

A person who is thought to be unable to manage their own affairs may become the subject of a guardianship proceeding which can result in the loss of the right to make personal or financial decisions.

In recognition of the civil liberties at stake, a court must find by clear and convincing evidence that the person is at risk and does not understand the danger before appointing a guardian.

That is a higher standard than the preponderance of the evidence standard used in most civil cases, but lower than the beyond a reasonable doubt standard required in criminal cases. The law further recognizes the gravity of guardianship proceedings by providing for the appointment of counsel.

Statutory Authority for Appointment of Counsel

If the person who is the subject of the guardianship proceeding (called the "alleged incapacitated person" or "AIP") is not already represented, the appointment of counsel is mandatory in the following circumstances pursuant to Mental Hygiene Law §81.10:

- (1) the AIP requests counsel;
- (2) the AIP wishes to contest the petition;
- (3) the petition seeks to move the AIP to a nursing home and the AIP does not consent;
- (4) the petition alleges that the AIP needs major medical or dental treatment and the AIP does not consent;
- (5) the petition requests temporary powers;
- (6) a potential conflict exists between the court evaluator's role and the advocacy needs of the AIP; or
- (7) the court determines that appointing counsel would help resolve the matter.

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The commentary of the Law Revision Commission to Mental Hygiene Law Article 81.10 provides additional guidance:

"The role of counsel, as governed by this section, is to represent the person alleged to be incapacitated and ensure that the point of view of the person alleged to be incapacitated is presented to the court. At a minimum that representation

The Committee on Professional Ethics based its analysis on the New York Rules of Professional Conduct. Rule 1.14 (b) permits an attorney to initiate a guardianship against their own client only when the client faces a risk of substantial harm and cannot adequately act in their own interest.

should include conducting personal interviews with the person; explaining to the person his rights and counselling the person regarding the nature and consequences of the proceeding; securing and presenting evidence and testimony; providing vigorous cross examination; and offering arguments to protect the rights of the allegedly incapacitated person."

Once appointed, however, counsel may face a difficult ethical dilemma when the AIP opposes the guardianship, but counsel believes that a guardian may be in the client's best interest. May counsel advocate for a position contrary to the AIP's expressed wishes, or

must counsel zealously advocate the client's stated objective of opposing the guardianship?

One attorney in this situation submitted an inquiry to the New York State Bar Association Committee on Professional Ethics, which issued Opinion 1296, dated July 8, 2026, in response. Although ethics opinions are advisory and not legally binding, they are frequently consulted by judges for guidance.

Factual Summary of The Opinion

A woman with Alzheimer's disease was recently married and made significant changes to her estate plan. A new will, power of attorney, and health care proxy were executed.

The new documents removed her sibling and appointed her recent spouse and another individual instead. The AIP's sibling initiated a guardianship proceeding. The AIP's spouse introduced her to private counsel who declined representation out of reservations about her capacity to retain counsel.

The court appointed a court evaluator who serves as the "eyes and ears" of the court and reports to the judge. The court also appointed counsel to represent the AIP.

The court-appointed counsel concluded that the AIP had diminished capacity and it would be in her best interest to have a guardian of the person and property appointed. The AIP could not recall whether she was married. She could not provide basic information regarding her assets.

She was unaware of transfers of real estate into and out of her trust. She was unable to identify her financial advisors. However, she clearly expressed that she did not want a guardian appointed and requested that her court-appointed attorney retain a medical expert to support her position that a guardianship was unnecessary.

The Opinion

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“When the lawyer reasonably believes that the client has

in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.”

The opinion reasoned that the AIP was not at risk of substantial harm because the guardianship proceeding itself provided protections, including the appointment of a court evaluator and counsel for the AIP.

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diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and,

required to advocate for the AIP’s expressed wishes rather than in favor of a guardianship. The opinion makes it clear that all adults in New York are presumed to have capacity unless there has been a judicial finding of the need for a guardian.

The duty of the attorney is not to determine the capacity of the client (that is the very subject of

the proceeding), but to advocate for the wishes of the client. Counsel must set aside their own personal opinions and leave the determination of whether a guardianship is necessary to the court.

Conclusion

The effect of a finding of a need for the appointment of a guardian is profound. The AIP becomes an Incapacitated Person (IP) and may suffer a significant deprivation of civil liberties.

Regardless of whether an attorney personally agrees that their client needs a guardian, the NYSBA ethics opinion makes clear that counsel’s duty is to advocate for the AIP’s expressed wishes, so long as the AIP is not at risk of substantial harm absent protective action.

Further, representing an AIP in this manner preserves the core principles that individuals with diminished capacity are entitled to meaningful representation and to having their voice heard before the state restricts their fundamental rights.