AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 * (202) 662-1760

STATEMENT OF

NANCY M. COLEMAN, DIRECTOR

of the

COMMISSION ON LAW AND AGING

on behalf of the

AMERICAN BAR ASSOCIATION

for a

FORUM DISCUSSING GUARDIANSHIP

of the

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

JULY 22, 2004

Mr. Chairman:

My name is Nancy Coleman and I appreciate the opportunity to participate in this forum on guardianship on behalf of the American Bar Association, the world's largest voluntary professional organization with more than 400,000 members. I am the Director of the Association's Commission on Law and Aging, which has played a leadership role in adult guardianship reform for over 20 years. I am pleased to comment on the GAO study on guardianship released today, and will address my remarks to three related aspects of guardianship: (1) guardian accountability and monitoring; (2) coordination between state courts and federal representative payment programs; and (3) inter-jurisdictional guardianship issues.

A. Guardian Accountability and Monitoring

The American Bar Association has extensive policy on guardianship monitoring, urging the regular filing and court review of guardian accounts and reports, effective sanctions for failure to comply, training and minimum standards for guardians, and maintenance of adequate court data systems on guardianship (August 1987, February 1989, August 1991, August 2002).

The impetus for court monitoring is not an assumption that guardians are doing a poor job or abusing their appointments. On the contrary, although data is lacking, it appears that most individual and agency guardians meet the needs of at-risk, incapacitated persons, sometimes against great odds. However, oversight of guardians is an essential function of the court and a critical safeguard, given that guardianship can remove fundamental rights and liberties. Moreover, monitoring can be helpful to guardians as they fulfill one of society's most demanding roles. It also can be preventive, letting guardians know they are under they eye of the court and must meet the court's trust in appointing them. Finally, monitoring can allow the court to track guardianship practices, identify trends and make any necessary changes in procedure. All of these rationales for monitoring are underscored as our population ages, chronic illnesses including dementia become more prevalent, medical choices expand with new technologies, and the number of guardian agencies increases.

During the past 15 years, all states have revised their adult guardianship law and close to half have adopted comprehensive new codes, including stronger provisions for

guardian accountability and monitoring. (See the legislative chart (updated to 2003) on guardianship monitoring produced by the ABA Commission on Law and Aging with Sally Hurme at the Commission's website at www.abanet.org/aging/guardian5.pdf). The GAO study has found that generally state law requires reports on the personal status of incapacitated persons and an accounting of the individual's finances, but that the frequency of reports, review requirements and enforcement procedures vary. A number of news articles within the past few years show instances in which monitoring procedures remain lax and vulnerable persons -- frequently elderly -- are subject to risk. In truth, there is very little data to refute or substantiate this. Statistics and research are scant. However, the press stories are an indication that monitoring practices may be lagging behind statutory standards – that there is a gap between the paper and the reality.

At the same time, courts across the country have begun to initiate model practices and procedures to ensure effective monitoring, as described by the GAO report. An examination of key elements of guardianship accountability and monitoring reveals the following. (These points are summarized from the Statement of Erica F. Wood, Associate Staff Director of the ABA Commission submitted to the Senate Special Committee on Aging at its February 2002 hearing on guardianship.)

- Guardian Training. Some states have developed guardian training handbooks and videos guiding guardian activity and answering basic questions. A few states such as Florida and New York have statutorily-required guardian training. Yet many guardians have no training at all. The cost of training is a substantial barrier, especially as states are facing budgetary shortfalls.

- Standards and Certification. An essential component of guardianship monitoring is the standard by which guardian performance is judged. The National Guardianship Association (NGA) has a *Code of Ethics* and *Standards of Practice.* In addition, through its National Guardianship Foundation, NGA has a nationwide process to certify guardians. A few states (Arizona, Washington, Florida) have developed guardian certification requirements. Certification helps to ensure courts and community that professional guardians have a basic understanding of their fiduciary duties, but it is still in its infancy and needs greater support and visibility.

- Reports and Accounts to Court. As noted by the GAO study, almost all states require guardians/conservators to submit to court periodic accountings and personal status

reports on the welfare of the incapacitated person. Despite this, an ABA study of guardianship monitoring in 1991 found that in many instances the reporting requirements were not rigorously enforced – and this has been echoed in a number of troubling press accounts. There is little data on enforcement of guardian reporting requirements.

- Judicial Review. Aside from a sentinel effect, reports and accountings serve little purpose if no one looks at them. The 1991 ABA study of guardianship monitoring identified several components of an effective review process – tracking or tickler systems, designated judges responsible for review, designated financial auditors and examiners of personal status reports, and established review criteria. Yet in reality, once reports are filed, what happens to them is as varied as the number of states, courts and judges. A Florida Supreme Court Commission on Fairness survey of Circuit Courts in 2000 found very little in the way of court review. Public hearings by the Illinois Guardianship Reform Project in 1999-2000 uncovered "frustration with the inconsistency in carrying out statutory monitoring requirements [including] a laxity in closely scrutinizing annual reports."

  Beyond this, if initial paper review reveals problems, to what extent do courts send investigatory personnel out to be the "eyes and ears of the judge" and check up on the incapacitated person? Sadly, the answer appears to be "rarely." While most states authorize judges to use investigators when a "red flag" comes to the court's attention, resources are scarce. Only California has a comprehensive statewide system of regular probate court investigators. Some courts are beginning to use inventive, low-cost approaches toward review – sending a copy of the guardian report to interested third parties, asking the state public guardianship program to aid in review of private guardianships, or using volunteers and students regularly to visit incapacitated persons and guardians. Money remains a key stumbling block.

- Sanctions and Enforcement. When guardians violate their fiduciary duty, courts have a panoply of sanctions, including suspension, contempt, removal and appointment of a successor. The court also can withhold the guardian's fees, surcharge the bond or hold guardians accountable for mismanagement of property. There is little data indicating the frequency with which these remedies are used, or how effective they are in preventing abuse or exploitation.

- Guardianship Plans. The concept of a "guardianship plan" is that the guardian should be required to submit not only an after-the-fact status report, but a forward-looking document describing to the court the proposed care of the incapacitated person. This provides the judge with a tool to measure the guardian's future performance; encourages the guardian to sit down early in the game and chart a course of action; and might be useful information for individuals listed in the notice. Little data exists to determine whether such plans are actually in use, are practical and are beneficial.

- Court Data. Courts and the public have very little accurate, reliable data about guardianship -- and without this, policymakers and practitioners are working in the dark in assessing what exists and how to improve the system. We don't know the number of persons actually under adult guardianship in the country. The GAO study noted that a third or fewer of the courts in California, Florida and New York track the number of guardianships and few track the number of incapacitated individuals under guardianship. Moreover, even when courts keep guardianship data, it may get lost in the wide variety of other case files, be mixed with data on guardianship for minors, or be lumped in with more general probate or decedents' estates data. State differences in terminology also present a real obstacle. There is no uniform method for data collection, or uniform data fields.

- Funding. Good monitoring requires sufficient resources. Courts must have funds available for staff, investigations, volunteer management, computers, software, training and materials. Financing for guardianship monitoring, however, must compete with other court needs, as well as other county and state needs, in increasingly overstrained budgets. Jurisdictions may seek multiple funding sources to finance monitoring – including state appropriations, local monies, the estate of the incapacitated person, filing fees, and grants for special projects.

Guardianship traditionally has been a creature of state law. However, because federal pensions and other funds may be managed by guardians/conservators, and because some aspects of guardianship – including monitoring -- could benefit from federal financial assistance, there may be a role for the federal government in offering funds to assist states in their efforts. In 1992, the Senate Special Committee on Aging held a *Roundtable Discussion on Guardianship* to examine the need for federal legislation and the possible federal "hooks" for regulation. It has been twelve years since the 1992 Roundtable. As indicated in the GAO report, some courts have developed

innovative "promising practices." These practices require support, visibility, and the opportunity for replication. Many different suggestions on federal funding assistance and support have been advanced by guardianship experts and interested organizations over the years. Some of these are summarized below. The ABA does not have policy on these funding approaches.

- Provide funding to support the monitoring capacity of state courts and to encourage the replication of promising practices. For example, the State Justice Institute in past years made available grants to state courts to improve court management, which could include a focus on guardian accountability.

- Encourage the development of a uniform data collection system on guardianship nation-wide, so that data collection by state courts is consistent and comparable.

- Support research on guardianship practices. During the past decade, only a handful of small projects have documented guardianship practices. Much of the criticism of guardianship proceedings stems from a few highly publicized, notorious examples of guardian abuse and neglect of wards. Whether these examples constitute the exceptions or the rule on how guardianships actually function is not known. The ABA Commission has tracked exactly what state laws have been passed, but light could be shed light on the implementation of these laws.

- Encourage state and area agencies on aging, and the long-term care ombudsman programs funded under the Older Americans Act to coordinate with state courts with guardianship supervision. Some believe that knowledge of the aging network and aging service providers could be helpful to judges in assessing guardianship plans and reviewing guardian reports. Agencies on aging could aid courts in judicial education on aging and in identifying potential community volunteers to serve as visitors or court monitors. Long-term care ombudsman could alert the court when long-term care complaints involve guardians and their wards. (The ABA Commission on Law and Aging has produced and distributed a brochure for courts on "Good Guardianship: Promising Practice Ideas on Community Links" and a mirror image brochure for the aging and disability network on "Good Guardianship: Promising Practice Ideas on Court Links for Agencies on Aging, Adult Protective Services and Long-Term Care Ombudsman.")

- Support the technical assistance, clearinghouse, and data collection activities in the proposed Elder Justice Act that include guardianship. This recognizes that guardianship is a double-edged sword – it can aid in preventing elder abuse, yet sadly guardians sometimes can commit elder abuse.

B. Coordination Between State Courts and Federal Representative Payment Programs.

Closely related to state court guardianship systems is the much larger Social Security Representative Payment Program and other similar federal payee programs. The American Bar Association has adopted policy related directly to fiduciary performance under the Social Security Representative Payment Program (February 2002). The President signed Public Law No. 108-203 in March 2004, which included a number of provisions addressing the Social Security Representative Payment Program similar to those advocated by the Association.

The GAO study notes that state courts and federal representative payment programs serve overlapping populations but coordinate little in oversight efforts, and that information collected by state courts is generally not systematically shared with federal agencies and vice versa. Very little data is available on cases involving both guardians and representative payees.

A 2001 ABA study on *State Guardianship and Representative Payment* funded by the State Justice Institute recommended "a better exchange of information, liaison, and continuing education opportunities between the state guardianship and SSA representative payment systems." With the assistance of a broad-based advisory committee, the study identified specific practices that might aid both fiduciary systems to ensure better accountability and safeguard the rights and the funds of incapacitated persons and/or federal beneficiaries. These practices address five related aspects of the guardianship system:

1. Determining whether a guardianship is needed. When a guardianship petition is filed, if the respondent's only source of income is from the Social Security Administration or other government program and if the respondent has a representative payee, courts should recognize that a conservator need not be appointed, unless there are

other compelling circumstances. Moreover, a representative payee may be able to provide valuable information on the individual's finances, functional capacity and living circumstances. Thus, the court routinely might seek to ascertain the Social Security benefit and representative payment status of respondents, and might interview the payee for critical information.

2. Limiting the guardianship order. Judges might consider representative payment in framing limited orders, and should have available model representative payment clauses for guidance. A limited order could exclude management of Social Security benefits but ensure that function is integrated with the broader financial and personal decision-making to be handled by the guardian.

3. Determining the suitability of the proposed guardian. If the proposed guardian has been a representative payee, his or her record (obtained with a Consent for Release of Information) could assist the court in evaluating the person's actions in a fiduciary role.

4. Monitoring the guardianship. In instances where it would be helpful, courts could require guardians who are also representative payees to supplement annual guardianship accounts and reports with copies of the reports they have submitted to SSA. In addition, courts could examine SSA records, if accessible through appropriate Consents for Release of Information, to identify instances of cases involving guardians also serving as representative payees in which there has been evidence of substandard performance or breach of fiduciary duty.

5. Exchanging information between the two systems. Regular exchange of information and educational opportunities between state courts with guardianship jurisdiction and the SSA representative payment program can offer significant benefits for each in strengthened monitoring and accountability. Moreover, coordination between state courts and SSA field offices could foster joint efforts to recruit volunteers and provide public information. To promote better understanding, state court administrative offices could develop and present course units on the representative payment system for judges and court staff; and SSA filed offices could receive information or training sessions on the state guardianship process. (The ABA Commission has produced a model judicial education curriculum unit on the representative payment system.) To advance coordination and exchange of information between the two fiduciary systems,

American Bar Association policy makes two specific recommendations for federal action (February 2002).

- First, the ABA urges the Social Security Administration to "recognize state and territorial courts with guardianship, juvenile, or family law jurisdiction as judicial entities entitled to access federal agency records relating to representative payees (with or without such fiduciaries' prior consent) within the statutory exception to the federal Privacy Act which permits disclosure of such information 'pursuant to the order of a court of competent jurisdiction' [5 U.S.C. §552a(b)(11)]."

- Second, the ABA supports a requirement that organizations that make application to serve as representative payee for an individual SSA beneficiary should "provide advance notice of their intention to family members (parents, siblings, children, and grandparents) of beneficiaries and to other legal representatives and, in so doing, advise such parties of SSA's general preference for appointment of individual payees with a demonstrated interest in the beneficiary over organizational payees [20 C.F.R. §§ 404.2021 & 416.635, 640 & 645]."

C. Inter-jurisdictional Guardianship Issues

The GAO study highlights complications that can arise when guardianship of an adult involves more than one state, and notes that this can affect a court's capacity to provide effective oversight. Indeed, as society becomes increasingly mobile, respondents frequently have ties to several states. Respondents, incapacitated individuals, family members, caregivers, and property may be located in several different jurisdictions. Sometimes family conflicts can trigger abrupt movement of an incapacitated person across state lines, making enforcement of guardianship orders difficult.

Therefore, interstate guardianship questions may arise as to: (1) the most appropriate state in which to file a petition; (2) the most effective process for transferring a guardianship from one state to another; (3) instances in which petitions have been filed in more than one state; and (4) the need for recognition of guardianship across state borders. American Bar Association policy urges the adoption of "standard procedures to resolve interstate jurisdiction controversies and to facilitate transfers of guardianship cases among jurisdictions" (August 2002).

To address these critical issues the National College of Probate Judges convened an Advisory Committee to study the incidence of interstate guardianships and explore ways to foster cooperation among courts with guardianship jurisdiction. I served as a member of this Advisory Committee. The Committee developed five standards on interstate guardianship, which are now included in the *National Probate Court Standards.* These standards aim toward a concept of guardianship "portability" in which a guardianship established in one state could be transferred to another efficiently and without an unnecessary re-litigation of the question of capacity – absent a showing of abuse or other compelling circumstances. The standards also encourage judges and court staff to communicate about specific guardianship cases that cross state lines. Federal government assistance in further study of interstate issues and in bringing visibility to the National Probate Court Standards would help to improve court oversight.

However, in today's global society, jurisdictional issues extend beyond interstate issues. Individuals with questionable or diminished capacity and their families may travel or live in several countries and may confront complicated problems involving recognition of a guardianship, recognition of a durable power of attorney, choice of law, and need for cooperation among countries of the world.

Thus, a Hague Convention on the International Protection of Adults was adopted by the Hague Convention in October 1999. The Convention aims to provide an international solution to conflicting assertions of state authority over disputes involving incapacitated adults. I served as a representative of the United States to the drafting committee for this Convention. ABA policy ((February 2000) urges that: (1) the U.S. Senate give its advice and consent to the ratification of the Hague Convention; and (2) the U.S. Congress enact legislation implementing the Convention's provisions.

Thank you for the opportunity to offer comments at the Senate Special Committee on Aging forum on adult guardianship.