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December 27, 2006

The Honorable Gordon H. Smith  
Chairman  
Special Committee on Aging  
United States Senate  
Washington, D.C. 20510

The Honorable Herb Kohl  
Ranking Member  
Special Committee on Aging  
United States Senate  
Washington, D.C. 20510

Dear Senators Smith and Kohl:

In response to your December 6, 2006 request, enclosed is a paper prepared by the American Bar Association proposing actions to strengthen the country's guardianship system and prepare it to effectively meet the needs of a growing elderly population.

Thank you for giving us this opportunity to submit the views of the Association to you.

Sincerely,



Robert D. Evans



# AMERICAN BAR ASSOCIATION

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## **STATEMENT OF**

**CHARLES P. SABATINO, DIRECTOR  
AND  
ERICA F. WOOD, ASSISTANT DIRECTOR**

**of the**

**COMMISSION ON LAW AND AGING**

**on behalf of the**

**AMERICAN BAR ASSOCIATION**

**submitted to the**

**SPECIAL COMMITTEE ON AGING**

**of the**

**U.S. SENATE**

**on the subject of**

**“IMPROVING GUARDIANSHIP FOR THE ELDERLY”**

**December 28, 2006**

**Mr. Chairman and Members of the Committee:**

The American Bar Association is pleased to present a statement on guardianship reform on behalf of the American Bar Association. We are Charles Sabatino and Erica Wood, Director and Assistant Director of the ABA Commission on Law and Aging. The Association is the world's largest voluntary professional organization with more than 400,000 members. The Association's Commission on Law and Aging has played a leadership role in adult guardianship reform for over 20 years, including convening or co-convening three national conferences, as well as working with the AARP Public Policy Institute on guardianship monitoring, with the University of Kentucky on public guardianship, and with the National Center on Elder Abuse on guardianship data. The ABA Section of Real Property, Probate and Trust Law is also a leader in the area. Both the Commission on Law and Aging and the Section of Real Property, Probate and Trust Law participate in the National Guardianship Network, which includes national organizations with a primary interest in good guardianship law and practice.

The Association has extensive policy on adult guardianship reform. (The ABA policy, dated August 1987, February 1989, August 1991 and August 2002, is available on the Commission's Web site at <http://www.abanet.org/aging/commissionprojects/home.shtml> ). The policy emphasizes the need for strong procedural due process in the appointment of a guardian, a functional determination of capacity, use of the least restrictive alternative in determining whether a guardian is required and in shaping the guardianship order, effective court oversight and monitoring, minimum standards of practice for guardians, and adequate staffing and funding for public guardianship programs.

Guardianship traditionally has been a creature of state law and the ABA adopted policy in August 1991 to the effect that federal guardianship legislation is unnecessary. However, because federal pensions and other funds may be managed by guardians/conservators, and because many aspects of guardianship suffer because of the Balkanization of laws, data, and procedures across state lines, there is a growing need for a federal role in offering resources and incentives for quality improvement and reform efforts. In 1992, the Senate Special Committee on Aging held a *Roundtable Discussion on Guardianship* to examine the need for a federal role. It has been almost 15 years since the 1992 Roundtable. As indicated in the 2004 report by the U.S. Government Accountability Office, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, some courts have developed innovative "promising practices." A federal

role in offering support, visibility and the opportunity for replication could jump-start local efforts and foster systems change. The ABA supports the following approaches for federal action.

**1. Support Monitoring Capacity of State Courts.** The American Bar Association policy on guardianship monitoring urges 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).

Despite recent press stories of abuse by guardians and oversight failures (*The Los Angeles Times*, November 2005; *The Seattle Times*, December 2006), 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 the 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.

In 2005 the AARP Public Policy Institute and the ABA Commission on Law and Aging presented the findings of a national survey of court monitoring practices, drawing on the expertise and experience of judges, attorneys, court managers, guardians and disability advocates. The report (*Guardianship Monitoring: A National Survey of Court Practices*) shows that monitoring practices vary widely; and that while they have advanced over the past 15 years, there is a critical need for additional verification of guardian reports and accounts, visits to individuals under guardianship, use of technology in bolstering monitoring, guardian training, court-community collaboration and 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. Federal leadership and funding to encourage replication of effective monitoring techniques and pioneer new uses of technology – for instance through the State Justice Institute or the National Institute of Justice, or through provisions in a reintroduced Elder Justice Act – could enhance guardian accountability.

**2. Improve Coordination of SSA Representative Payment Program with State Court Guardianship Programs.** Closely related to state court guardianship systems is the much larger Social Security Representative Payment Program and other similar federal payee programs including the Department of Veterans Affairs fiduciary program. The 2004 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.” 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 concerning: (1) determining whether a guardian is necessary; (2) limiting the guardianship order; (3) determining the suitability of the proposed guardian; (4) monitoring, including providing the court with copies of the SSA payee report; and (5) exchanging appropriate information and conducting joint or cross training. The ABA Commission has produced a model judicial education curriculum unit on the representative payment system. In 2006, the ABA Commission assisted the AARP Public Policy Institute in planning for and conducting an AARP National Policy Council Consumer and Housing Committee *Roundtable on Representative Payees and Guardianship*, which generated preliminary specific

suggestions for coordination among state courts, SSA and the Department of Veterans Affairs on fiduciary issues.

The American Bar Association has adopted policy related directly to fiduciary performance under the Social Security Representative Payment Program (February 2002). To advance coordination and exchange of information between the two fiduciary systems, ABA 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].”

**3. Recognize Efforts to Address Guardianship Jurisdiction 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. Guardianship jurisdiction 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; and (3) 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). The Association is participating on a Guardianship Jurisdiction Committee of the National Conference of Commissioners on Uniform State Laws to draft a *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*. The model act will address initial jurisdiction, transfer of jurisdiction and recognition of guardianship/conservatorship orders across state lines. Clearly, the Act will be most effective if adopted by all states. Senate Special Committee on Aging and other federal recognition of the importance of the Act will enhance the awareness of policymakers and the public, and this visibility could be helpful as state legislators consider the new model.

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. 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.

**4. Encourage Development of Uniform 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 an obstacle. There is no uniform method for data collection, or uniform data fields.

The 2004 GAO report highlighted a grave lack of hard data on guardianship of vulnerable adults. The report found that only one-third or fewer of the responding courts surveyed tracked the number of active guardianships for incapacitated adults, and concluded that the dearth of statistical data limits oversight and efforts to improve the guardianship system. The report maintained that “sufficient data are not available to determine the incidence of abuse of incapacitated people by guardians . . . nor the extent to which guardians . . . are protecting incapacitated people from abuse.”

The GAO findings and conclusions reinforce earlier statements by the National “Wingspan” Guardianship Conference (*Stetson*, 2002; National Academy et al., 2004), the National Center for State Courts (Hannaford & Hafemeister, 1994), and other writings recognizing a troubling absence of statistics to evaluate the adult guardianship process and the reforms that have occurred, as described below. Nationally, we are looking at guardianship “through a glass, darkly,” unable to make informed policy and practice choices without an adequate knowledge base of what exists and what trends are evident.

In 2006, the ABA Commission completed a report for the National Center on Elder Abuse, *State-Level Adult Guardianship Data: An Exploratory Survey*. The report presented the results of a survey of state and territorial court administrators. The report found that about one-third of responding state court administrative offices receive from trial courts reports on filings and dispositions of adult guardianship of the person and/or property but close to two-thirds do not. Additionally, data reported to state court administrative offices is limited to filings and dispositions – and thus does not indicate the size of the caseload or include a range of elements that would be critical for research and reform efforts – for example, age and condition of incapacitated individuals, categories of petitioners and guardians, reasons the case was initiated, number of limited guardianships, number of cases of elder abuse – and frequently number of reports and accounts not timely filed. The report concluded that major investment in technology, training and standardized definitions is necessary.

ABA policy supports systematic data collection on guardianship by courts (February 1989); and development and funding of a uniform system of data collection within all areas of the guardianship process (August 2002). Federal funding (such as through the National Institute of Justice, HHS agencies or the State Justice Institute – or

through specific provisions in reintroduction of the Elder Justice Act) of selected state-based projects to determine the number of adult guardianship cases for which the courts have oversight and to design an effective data collection system could help to transform our knowledge of the system and identify areas needing attention.

It is noteworthy that Congress just enacted legislation as part of the tax extension legislation (H.R. 6111) that calls for a study by DHHS on establishing a uniform national data base on elder abuse. Since some elder abuse cases may become guardianship cases and the same kind of data barriers afflict both elder abuse and guardianship, this study should include abuse within the guardianship system, and moreover Congress should consider the merit of an expanded or parallel effort to examine options for a uniform national data base on guardianship.

**5. Support Research to Evaluate Guardianship Practices and Programs.** 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 see Annual Legislative Updates and State Legislative Charts at <http://www.abanet.org/aging/legislativeupdates/home.shtml>), but light could be shed on the implementation of these laws.

For example, a unique tri-state study lead by a psychologist of the Geriatric Mental Health Clinic, VA Boston (Moye et al, *Clinical Evidence in Guardianship of Older Adults is Inadequate*, article submitted for review) found that statutes with provisions that promote functional assessment are associated with increased quality of clinical testimony and use of limited guardianship orders. This small study should pave the way for larger investigations of the implementation of recent guardianship legislative changes, the effect of such changes and of the institution of guardianship on the care and lives of incapacitated individuals. For instance, a landmark report, *Wards of the State: A National Study of Public Guardianship*, by the University of Kentucky in collaboration with the ABA Commission, recommended in 2005 that “the effect of public guardianship services on wards over time merits study.” The rationale was that guardianship is a drastic government intervention in the lives of vulnerable individuals, and states must

demonstrate benefits in providing for needs, improving or maintaining functioning and protecting assets of those unable to care for themselves.

ABA policy supports “undertaking research to measure successful practices and programs to examine how guardianship is enhancing the well-being of persons with diminished capacity” (August 2002). Federal research entities such as the National Institute on Aging, the Agency for Healthcare Research and Quality and the HHS Assistant Secretary for Planning and Evaluation could fund research designed to measure the effectiveness and outcome of guardianship services under various legal and programmatic scenarios.

**6. Support Enactment of the Elder Justice Act.** S. 2010, the bipartisan “Elder Justice Act,” died at the end of the 109<sup>th</sup> Congress when Congress adjourned *sine die*. The Act would have created an infrastructure and provided resources for a nationally coordinated strategy in collaboration with the states to address issues of elder abuse. ABA policy “supports efforts to improve the response of the federal, state, territorial and local governments and of the criminal and civil justice systems to elder abuse, neglect and exploitation.” The Act includes critical clearinghouse, technical assistance, training and data collection activities that bear on abuse within the guardianship system. Indeed, prior versions of the Act included provisions relating directly to fiduciary training, research, technical assistance and data collection, and these should be restored.

Thank you for the opportunity to offer this statement to the Special Committee. The ABA looks forward to continuing to assist the Committee on guardianship and other issues affecting the older population – and is especially a voice for those who are vulnerable, incapacitated, poor, isolated and often alone.



## American Bar Association

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