

PRACTICE TIPS FOR INTERVIEWING THE ALLEGED INCAPACITATED PERSON

First Case. My first Title 11 Guardian ad Litem investigation involved an older gentleman who I will call Phillip Jones. The Petition for Guardianship had been filed by Eastern State Hospital for Mr. Jones who was said to be an older gentleman in their care, diagnosed with dementia, a “hitter,” unable to live on his own due to his dementia or with family help. He was described by the hospital social worker as non-verbal. He was in the closed ward of their geriatric section.

I reviewed the information provided with the Petition for Guardianship, called the social worker for more personal information and made an appointment to visit Mr. Jones. After escorting me through several locked doors, the social worker pointed out Mr. Jones who was seated in a chair against a wall outside his room. She told me “he doesn’t speak,” and introduced me to Mr. Jones. I said hello and introduced myself and asked Mr. Jones if we could talk, calling him by the name Mr. Jones. The social worker stated again “he doesn’t speak” just as he raised his head to look at me and Mr. Jones corrected me by saying “Phillip.” The social worker again reiterated “he doesn’t speak” and Mr. Jones again said “Phillip.”

Mr. Jones and I spent some time together as I reviewed the rights in the Notice of Guardianship and as staff provided care to him. He did not verbally respond to my questions related to the specific rights, but appeared to focus his gaze on me. His care giver cued him to follow her into his room to change some soiled adult incontinence briefs. She said “he’s a hitter but it doesn’t hurt” as he swatted at her. Staff commented that the “hitting” or “swatting” was likely reflexive and part of his dementia-related behaviors.

Mr. Jones was one of a number of Alleged Incapacitated Persons (AIPs) I have met as a Guardian ad Litem who was described as “not speaking.” I have come to appreciate that “interviewing” is more than verbal or written speech, but a highly personalized means of communicating with my AIP which I adapt for that individual’s capacity to hear, understand and respond.

Chapter III of your manual describes valuable considerations for this critical first step of our investigations. The issues we need to discuss with our AIPs and the sensitive nature of the information we seek can be difficult for our AIPs to manage on first meeting. I have found my more successful interviews occur when I prepare well for interviews, approach my AIPs with a lighter tone of voice, slow my pattern of speech to allow for my AIP to think about how they may want to respond, adjust my presentation of information to the ability of my AIP to understand, ask open-ended questions to solicit input, and LISTEN to their responses and concerns. If they have questions or requests of me, I reiterate them as I leave and let my AIP know I will return with answers as soon as I am able. Doing multiple interviews with my AIP generally will result in more useful information over time if they have had time to think about the question(s) posed, time to recover from the effects of a traumatic (and possibly transitory medical) event like a stroke or surgery, have had medication changes, or have decided they can trust you to respect their needs and perspective.

Please note: The new Uniform Guardianship Act has new definitions for Court visitors and guardians ad litem, as well as the former title of Alleged Incapacitated Persons. AIP is used herein for convenience.

Tips for preparing for your first AIP interview.

- Contact the Petitioner and review written materials related to the perceived need for guardianship. Obtain copies of their documentation to corroborate information you receive as much as possible.
- If the AIP resides at home or a congregate care setting, call and ask if (1) the AIP and those around the AIP have been tested for Covid19 with negative results and (2) when an interview might be scheduled. If the AIP and those around the AIP have not been tested with negative results and you do not feel safe, OR if no in-person visits are permitted, find out whether a “window” visit could be arranged OR a FaceTime or phone call arranged until pandemic conditions improve. Wear a mask and comply with facility visitor rules. Take a copy of your Covid vaccination record, just in case.
- If the AIP is in hospital, the social worker and care staff are likely to be able to provide information on the degree of receptive speech, expressive speech, or non-verbal signs the AIP demonstrates as a means to communicate. Ask if there are triggers (verbal or behavioral) that you need to avoid. Is the AIP likely to be able to tolerate a visit from a stranger?
- If the AIP is a non-English speaking person and you are, how will you communicate with the AIP? Find out if there is someone (not the petitioner) who can translate for you during your interview. Spokane has a remarkably diverse population of individuals who speak many more languages than I do. Seek out a reliable, non-conflicted interpreter if needed.
- If your AIP is truly a non-verbal person, or in a coma, ask those closest to the AIP how they communicate with the AIP and whether there is a non-verbal response, for example: one blink for yes, two blinks for no, nodding of the head, tapping fingertips. If the AIP is able to use limited means to communicate, establish yes or no signals, ask yes or no questions, tell the AIP you want to be sure you understand them correctly so you may re-ask questions to be sure you know what they mean.
- Be aware of, or seek information about, your AIP’s primary language, culture, values, or trauma history. Their experiences can affect what they feel they can share with you. A follow up interview may be a good idea if they need time to think about what the guardianship could do to assist them.
- Be aware of your own biases (we all have them), stereotypes you may have about what you have read or been told about the AIP and the AIP’s capacities from initial review of information. Bring to bear your own experiences, prior work with clients, your cultural competency, mindfulness of the generational reference points of importance to your AIP and their life experiences as you think about your evolving understanding of the AIP’s needs in relation to guardianship.
- Consider taking an extra copy of the Notice of Guardianship with you as a reminder of information you need to discuss and obtain from the AIP. I also use a tickler in my file for handy reference. See AIP Information Sheet.

Special considerations when interviewing a minor AIP.

- If the AIP is a child, adjust your approach to meet their developmental needs as you go over their rights and the process. Use language the minor AIP can understand.
- Meet privately with your minor AIP and periodically do brief follow up contacts outside the presence of the Petitioner/family. School counselors are very helpful in arranging minimally intrusive check ins via phone at school.
- Children generally live within the context of family, friends and school. Ask the child to describe these areas of interest, what they like best, what they do not, who are the safe people in their world? Who would they ask for help if they are hurt or feel unsafe?
- If you sense the minor AIP is feeling uncomfortable with an adult, or that person is listening in on conversations, establish a secret word they can say to let you know they are not comfortable and switch to yes and no questions. Follow up with why they may feel uncomfortable.
- Maintain good boundaries and a positive, helpful and forward-looking approach. Ask open ended questions to solicit input from your minor AIP and LISTEN.
- Reassure the minor AIP that they have done nothing wrong and that the Court is involved to make sure they will be okay. Explain your role in terms the child may understand. Invite questions from the minor AIP and seek their input. One of my favorite questions is to ask children “If you had a magic wand that could grant you a wish, what would that be?” I repeat this question during my tenure on the case. The answers are sometimes surprisingly relevant to the case.
- If the AIP is a child, give the child permission to say “I don’t know” or “Can you explain that?” It can be intimidating for a child to have an adult in a position of authority ask them questions, especially a new person who is a virtual stranger. An intimidated person is not likely to give full disclosure.
- If the AIP is a child, and you believe s/he is able to answer, ask the child if s/he is Indian. If the answer is yes, ask what tribe. Follow up this line of questioning with reliable adults who have a close relationship with the child. If the child is considered an Indian child under the Federal Indian Child Welfare Act, 25 USC §1911, notice to the child’s tribe is required. See also requirements under the Washington state Indian Child Welfare Act, RCW 13.38.
- If the AIP is a child who may need a guardian due to sexual or physical abuse by a parent, guardian or legal custodian **AND** there is an on-going investigation being done by law enforcement OR Child Protective Services, **DO NOT ASK QUESTIONS ABOUT THE ABUSE.** Reassure the minor AIP that they have done nothing wrong and that the Court is involved to make sure they will be okay. There are child sexual abuse investigation protocols in place in Washington to safeguard the child’s potential testimony if criminal Court action is pursued. Failure to adhere to the protocols may mean the abuser can argue the child’s statements have been tainted and they will not be held accountable as a result. Contact the assigned investigators from law enforcement or Child Protective Services to advise them of your role and to request information, if needed for your investigation. Many, but not all child sexual abuse cases, are handled by Child Protective Services in Juvenile Court. [In cases involving alleged sexual abuse of a minor AIP, an alternate source of collateral

information would be the law enforcement or Child Protective Services investigators or the hospital's Sexual Assault Nurse Examination (SANE), report. If the child was seen following disclosure.]

- Visit where the child may be living and meet the household members. If you feel something is not quite right, trust your initial impression and follow up. Why are YOU uncomfortable? Do not ignore the warning signals that pop up. Some information you find may make you really uncomfortable. Talk to a mentor but do not ignore what you experience. It could be the difference of safety for your minor AIP and an appropriate or inappropriate appointment. When in doubt of what is "fair," err on the side of fair and safe for a vulnerable minor or adult.

Subsequent interviews with your AIP.

I try to meet with my AIPs at least once or twice more before the hearing. If the AIP has posed a question for me to pursue or has concerns, I will do a follow up contact to answer their questions or concerns as soon as I am able.

The questions related to appointment of counsel, the right to a jury trial or whether they want to participate in the guardianship hearing are sometimes deferred by the AIPs until I have completed my investigation. This usually occurs when they are unsure if they feel they need a guardian or want to know more about the proposed guardian and what they can expect from their guardian. I will revisit those issues with the AIP when I know what my recommendation(s) will be after all the investigation information is reviewed. Arrangements for their appearance can be made if they choose to participate. During the Covid19 pandemic, participation by calling in to the courtroom or by Zoom may occur, contingent upon their ability to access/use telephones or computers. Some AIPs have declined to participate for a variety of reasons but will ask me to let them know later how things went.

I will ask the proposed guardian, especially Certified Professional Guardians (CPGs), to meet with my AIP and I then check in with the AIP after their meeting to gain their perspective on whether they think they can work with the CPG.

If the proposed guardian is a lay guardian, I will ask the AIP privately whether they feel comfortable with the proposed lay guardian being appointed to help them. If the answer is no, we must inquire. (FYI ~ On some occasions, the person seeking appointment is the person who is abusing, neglecting or financially exploiting the AIP. Remember to be aware of bias: our own.) I ask proposed lay guardians to review the CPG standards of practice as they will have the same fiduciary duties as professional guardians.

What to do if your AIP is truly unable to communicate and respond to your questions.

On very rare occasions, my AIP has been unable to communicate even by blinking eyes, nodding their head, raising a finger, tapping their hand. As a matter of due diligence, I have observed their interactions with caregivers to see if there are subtle behaviors which appear responsive to their environment or questions. Include your attempts to communicate and their responses in your Report to the Court. Previous Title 11 trainers who were medical professionals

told us that hearing is the last sense to go. Consequently, I always address the AIP and advise them of what I have found, my recommendations, and the hope that this action will help meet their needs whether or not there is a verbal response.

I will reach out to individuals in my AIP's close circle of family, friends, church or social groups to seek AIP's wishes if they were previously able to express themselves. It helps to investigate their previous significant religious beliefs which are likely to guide their decision-making processes or define quality of life for the AIP. Many AIPs had a life long before we met them and will hopefully be able to continue with many aspects of their life that are healthy, safe and enjoyable for them after we are discharged.

Almost final thoughts.

The fifteen hours we have to develop an understanding of the needs of our AIP is fifteen hours the incoming guardian will not have. Upon appointment, they are the representatives of our AIP and assume responsibility for our AIPs. Guardians will receive from me copies of the confidential documents on file for the person in need of protection and a copy of the contact face sheet I use during my investigation with the names, relationship to the AIP, addresses, telephone numbers and email addresses for each person contacted during my investigation. If there are urgent matters requiring their attention, the guardian will receive from me copies of bills needing immediate payment, bank statements, upcoming medical appointments and medication allergies. It also helps guardians to know something of the AIP's history, values, interests and preferences in supporting the AIP's quality of life as the AIP would define it. The completeness of our work not only provides information to the Court. Our Report to the Court can assist the guardian in taking timely and appropriate action on behalf of the AIP as quickly as possible, especially if the guardian is not a person previously familiar with the AIP.

What to do if you need help.

Feel free to reach out to your colleagues on the Registry. We have all been newly-minted Guardians ad Litem. We are fortunate to have a collegial and supportive group of GALs who don't mind sharing. Remember to pay this forward. Thank you for your interest in joining us.