Judicial Council of California

Probate and Mental Health Advisory Committee

Probate and Mental Health Education Committee
of the Center for Judicial Education and Research

Proposals to Modify the California Rules of Court

Qualifications, Continuing Education Requirements and Performance Standards for Court-Appointed Attorneys in Limited Conservatorship Cases

EXHIBITS

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Exhibits to Report

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A. State Rules and Forms for Court Appointed Attorneys in Conservatorship Cases

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2015 California Rules of Court

Rule 7.1101. Qualifications and continuing education required of counsel appointed by the court in guardianships and conservatorships

(a) Definitions

As used in this rule, the following terms have the meanings stated below:

(1) "Appointed counsel" or "counsel appointed by the court" are legal counsel appointed by the court under Probate Code sections 1470 or 1471, including counsel in private practice and deputy public defenders directly responsible for the performance of legal services under the court's appointment of a county's public defender.

(2) A "probate guardianship" or "probate conservatorship" is a guardianship or conservatorship proceeding under division 4 of the Probate Code.

(3) "LPS" and "LPS Act" refer to the Lanterman-Petris-Short Act, Welfare and Institutions Code section 5000 et seq.

(4) An "LPS conservatorship" is a conservatorship proceeding for a gravely disabled person under chapter 3 of the LPS Act, Welfare and Institutions Code sections 5350-5371.

(5) A "contested matter" in a probate or LPS conservatorship proceeding is a matter that requires a noticed hearing and in which written objections are filed by any party or made by the conservatee or proposed conservatee orally in open court.

(6) "AOC" is the Administrative Office of the Courts.

(7) "Counsel in private practice" includes attorneys employed by or performing services under contracts with nonprofit organizations.

(Subd (a) amended effective January 1, 2009.)

(b) Qualifications of appointed counsel in private practice

Except as provided in this rule, each counsel in private practice appointed by the court on or after January 1, 2008, must be an active member of the State Bar of California for at least three years immediately before the date of appointment, with no discipline imposed within the 12 months immediately preceding any date of availability for appointment after January 1, 2008; and

(1) *Appointments to represent minors in guardianships*

For an appointment to represent a minor in a guardianship:

(A) Within the five years immediately before the date of first availability for appointment after January 1, 2008, must have represented at least three wards or proposed wards in probate

guardianships, three children in juvenile court dependency or delinquency proceedings, or three children in custody proceedings under the Family Code; or

(B) At the time of appointment, must be qualified:

(i) For appointments to represent children in juvenile dependency proceedings under rule 5.660 and the court's local rules governing court-appointed juvenile court dependency counsel; or

(ii) For appointments to represent children in custody proceedings under the Family Code under rule 5.242, including the alternative experience requirements of rule 5.242(g).

(C) Except as provided in (f)(2), counsel qualified for appointments in guardianships under (B) must satisfy the continuing education requirements of this rule in addition to the education or training requirements of the rules mentioned in (B).

(2) *Appointments to represent conservatees or proposed conservatees*

For an appointment to represent a conservatee or a proposed conservatee, within the five years immediately before the date of first availability for appointment after January 1, 2008, counsel in private practice must have:

(A) Represented at least three conservatees or proposed conservatees in either probate or LPS conservatorships; or

(B) Completed any three of the following five tasks:

(i) Represented petitioners for the appointment of a conservator at commencement of three probate conservatorship proceedings, from initial contact with the petitioner through the hearing and issuance of Letters of Conservatorship;

(ii) Represented a petitioner, a conservatee or a proposed conservatee, or an interested third party in two contested probate or LPS conservatorship matters. A contested matter that qualifies under this item and also qualifies under (i) may be applied toward satisfaction of both items;

(iii) Represented a party for whom the court could appoint legal counsel in a total of three matters described in Probate Code sections 1470, 1471, 1954, 2356.5, 2357, 2620.2, 3140, or 3205;

(iv) Represented fiduciaries in three separate cases for settlement of a court-filed account and report, through filing, hearing, and settlement, in any combination of probate conservatorships or guardianships, decedent's estates, or trust proceedings under division 9 of the Probate Code; or

(v) Prepared five wills or trusts, five durable powers of attorney for health care, and five durable powers of attorney for asset management.

(3) Except as provided in (e)(2), private counsel qualified under (1) or (2) must also be covered by professional liability insurance satisfactory to the court in the amount of at least $100,000 per claim and $300,000 per year.

(Subd (b) amended effective January 1, 2011; previously amended effective January 1, 2009.)

(c) Qualifications of deputy public defenders performing legal services on court appointments of the public defender

(1) Except as provided in this rule, beginning on January 1, 2008, each county deputy public defender with direct responsibility for the performance of legal services in a particular case on the appointment of the county public defender under Probate Code sections 1470 or 1471 must be an active member of the State Bar of California for at least three years immediately before the date of appointment; and either

(A) Satisfy the experience requirements for private counsel in (b)(1) for appointments in guardianships or (b)(2) for appointments in conservatorships; or

(B) Have a minimum of three years' experience representing minors in juvenile dependency or delinquency proceedings or patients in postcertification judicial proceedings or conservatorships under the LPS Act.

(2) A deputy public defender qualified under (1) must also be covered by professional liability insurance satisfactory to the court in the amount of at least $100,000 per claim and $300,000 per year, or be covered for professional liability at an equivalent level by a self-insurance program for the professional employees of his or her county.

(3) A deputy public defender who is not qualified under this rule may periodically substitute for a qualified deputy public defender with direct responsibility for the performance of legal services in a particular case. In that event, the county public defender or his or her designee, who may be the qualified supervisor, must certify to the court that the substitute deputy is working under the direct supervision of a deputy public defender who is qualified under this rule.

(d) Transitional provisions on qualifications

(1) Counsel appointed before January 1, 2008, may continue to represent their clients through March 2008, whether or not they are qualified under (b) or (c). After March 2008, through conclusion of these matters, the court may retain or replace appointed counsel who are not qualified under (b) or (c) or may appoint qualified co-counsel to assist them.

(2) In January, February, and March 2008, the court may appoint counsel in new matters who have not filed the certification of qualifications required under (h) at the time of appointment but must replace counsel appointed under this paragraph who have not filed the certificate before April 1, 2008.

(e) Exemption for small courts

(1) Except as provided in (2) and (3), the qualifications required under (b) or (c) may be waived by a court with four or fewer authorized judges if it cannot find qualified counsel or for other grounds of hardship.

(2) A court described in (1) may, without a waiver, appoint counsel in private practice who do not satisfy the insurance requirements of (b)(3) if counsel demonstrate to the court that they are adequately self-insured.

(3) A court may not waive or disregard the self-insurance requirements of (c)(2) applicable to deputy public defenders.

(4) A court waiving the qualifications required under (b) or (c) must make express written findings showing the circumstances supporting the waiver and disclosing all alternatives considered, including appointment of qualified counsel from adjacent counties and other alternatives not selected.

(Subd (e) amended effective January 1, 2009.)

(f) Continuing education of appointed counsel

(1) Except as provided in (2), beginning on January 1, 2008, counsel appointed by the court must complete three hours of education each calendar year that qualifies for Minimum Continuing Legal Education credit for State Bar-certified specialists in estate planning, trust, and probate law.

(2) Counsel qualified to represent minors in guardianships under (b)(1)(B) and who are appointed to represent minors in guardianships of the person only may satisfy the continuing education requirements of this rule by satisfying the annual education and training required under rule 5.242(d) or the continuing education required under rule 5.660(d)(3).

(Subd (f) amended effective January 1, 2011; previously amended effective January 1, 2009.)

(g) Additional court-imposed qualifications, education, and other requirements

The qualifications in (b) and (c) and the continuing education requirement in (f) are minimums. A court may establish higher qualification or continuing education requirements, including insurance requirements; require initial education or training; and impose other requirements, including an application by private counsel.

(h) Initial certification of qualifications; annual post-qualification reports and certifications

(1) Each counsel appointed or eligible for appointment by the court before January 1, 2008, including deputy public defenders, must certify to the court in writing before April 1, 2008, that he or she satisfies the qualifications under (b) or (c) to be eligible for a new appointment on or after that date.

(2) After March 2008, each counsel must certify to the court that he or she is qualified under (b) or (c) before becoming eligible for an appointment under this rule.

(3) Each counsel appointed or eligible for appointment by the court under this rule must immediately advise the court of the imposition of any State Bar discipline.

(4) Beginning in 2009, each appointed counsel must certify to the court before the end of March of each year that:

(A) His or her history of State Bar discipline and professional liability insurance coverage or, if appointed by a court with four or fewer authorized judges under (e)(2), the adequacy of his or her self-insurance, either has or has not changed since the date of his or her qualification certification or last annual certification; and

(B) He or she has completed the continuing education required for the preceding calendar year.

(5) Annual certifications required under this subdivision showing changes in State Bar disciplinary history, professional liability insurance coverage, or adequacy of self-insurance must include descriptions of the changes.

(6) Certifications required under this subdivision must be submitted to the court but are not to be filed or lodged in a case file.

(Subd (h) amended effective January 1, 2009.)

(i) Reporting

The AOC may require courts to report appointed counsel's qualifications and completion of continuing education required by this rule to ensure compliance with Probate Code section 1456.

Rule 7.1101 amended effective January 1, 2011; adopted effective January 1, 2008; previously amended effective January 1, 2009.

CONFIDENTIAL—FOR COURT USE ONLY

GC-010

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE:	*(Do not file or lodge in case file)*
CERTIFYING ATTORNEY *(Name):* State Bar No.:	

CERTIFICATION OF ATTORNEY CONCERNING QUALIFICATIONS FOR COURT APPOINTMENT IN
☐ **CONSERVATORSHIPS** ☐ **GUARDIANSHIPS**

NOTICE TO ATTORNEYS:

1. If you were appointed by the court in a conservatorship or guardianship matter that is pending on April 1, 2008, or if you are a deputy public defender with direct responsibility for the performance of legal services on the appointment of a county's public defender in such a matter, you must certify on or before that date that you are qualified for the appointment under rule 7.1101(b) or 7.1101(c) of the California Rules of Court.
2. On or after April 1, 2008, you must certify to the court that you are qualified under rule 7.1101(b) or 7.1101(c) before you may be appointed by the court, or may be placed in direct responsibility for the performance of legal services on appointment of a county's public defender, in a conservatorship or guardianship matter.
3. Under certain circumstances, courts with four or fewer authorized judges may waive the qualifications for appointed counsel under rule 7.1101. Such courts may also, without an express waiver, appoint private counsel who are not insured if counsel demonstrate that they are adequately self-insured. (See rule 7.1101(e).)

I certify as follows *(check all boxes that apply):*

1. I was admitted to the State Bar of California on *(date):* . I am currently an active member.
2. My contact information is as follows:
   a. Firm or employer name:
   b. Address:
   c. Telephone number: d. Fax number:
   e. E-mail address:
3. ☐ I am an attorney in private practice.
   a. As of the date of this certification, I have had no discipline imposed by the State Bar of California within the 12-month period immediately preceding that date. *(Initial here):* _____
   b. ☐ I am qualified to accept appointments by the court to represent minors in probate guardianships under Probate Code section 1470 under rule 7.1101(b)(1) of the California Rules of Court, in that:
      (1) ☐ Within the five years immediately before the date of this certificate, I have represented at least three wards or proposed wards in probate guardianships, three children in juvenile court dependency or delinquency proceedings, or three children in child custody proceedings under the Family Code; or
      (2) ☐ I am qualified for appointment to represent children in juvenile dependency proceedings under local court rules required by rule 5.660 of the California Rules of Court; or
      (3) ☐ I am qualified for appointment to represent children in custody proceedings under the Family Code under rule 5.242 of the California Rules of Court.

CERTIFICATION OF ATTORNEY *(Name):*

CONCERNING QUALIFICATIONS FOR APPOINTMENT IN ☐ **CONSERVATORSHIPS** ☐ **GUARDIANSHIPS**

3. *(cont.)* c. ☐ I am qualified to accept appointments by the court to represent conservatees or proposed conservatees under Probate Code sections 1470 or 1471 under rule 7.1101(b)(2) of the California Rules of Court, in that, within the five years immediately before the date of this certificate:

(1) ☐ I have represented at least three conservatees or proposed conservatees in probate or Lanterman-Petris-Short Act conservatorship proceedings; or

(2) ☐ I have completed at least three of the following five tasks:

(A) ☐ Represented probate conservatorship petitioners at commencement of three probate conservatorship proceedings, from initial contact with the petitioner through the appointment hearing and issuance of Letters of Conservatorship;

(B) ☐ Represented a petitioner, a conservatee or a proposed conservatee, or an interested third party, in two contested probate or Lanterman-Petris-Short Act conservatorship matters *(a contested matter that qualifies under items (A) and (B) may be applied to both items);*

(C) ☐ Represented a party for whom a court could appoint counsel in a total of three matters under Probate Code sections 1470, 1471, 1954, 2356.5, 2357, 2620.2, 3140, or 3205;

(D) ☐ Represented fiduciaries in three cases for settlement of a court-filed account and report, through filing, hearing, and settlement, in any combination of probate conservatorships or guardianships, decedents' estates, or trust proceedings under division 9 of the Probate Code; or

(E) ☐ Prepared five wills or trusts, five durable powers of attorney for health care, and five durable powers of attorney for asset management.

d. *(Choose item d(1) or d(2). If you check item d(2) and are otherwise qualified under items 3a–c, you do not also need to complete item 5.)*

(1) ☐ I am covered by professional liability insurance in the amount of at least $100,000 per claim and $300,000 per year. My insurer is *(specify):*

(2) ☐ I wish to be considered for appointment by a court with four or fewer authorized judges. I am not covered by professional liability insurance in at least the minimum amounts stated in (1), but I believe that I would be adequately self-insured against any damage claim arising from my representation of any person on appointment of the court under Probate Code sections 1470–1472 and rule 7.1101. Facts supporting my belief are specified in Attachment 3d(2).

e. I will, if requested, provide the case names and numbers, courts, and parties I represented in the court proceedings identified above and, if item 3c(2)(E) is checked, redacted copies of the estate planning documents prepared.

4. ☐ I am a deputy public defender of *(name of county):*

a. ☐ I would be directly responsible for performing legal services for minors in probate guardianships on the appointment of my county's public defender under Probate Code section 1470. I certify that I am qualified to perform those services under rule 7.1101(c)(1) of the California Rules of Court, in that:

(1) ☐ I satisfy the experience requirements for attorneys in private practice for appointment to represent minors in probate guardianships identified in item 3b above, as shown by the boxes checked in that item *(check the box for item 3b above and as many of the boxes for items 3b(1), 3b(2), or 3b(3) as apply to you, but do not check the box for item 3);* or

(2) ☐ I have at least three years' experience representing minors in juvenile dependency or delinquency proceedings or patients, proposed conservatees, or conservatees in postcertification judicial proceedings or conservatorships under the Lanterman-Petris-Short Act.

b. ☐ I would be directly responsible for performing legal services for conservatees or proposed conservatees in probate conservatorships on the appointment of my county's public defender under Probate Code sections 1470 and 1471. I certify that I am qualified to perform those services under rule 7.1101(c)(1) of the California Rules of Court, in that:

CERTIFICATION OF ATTORNEY *(Name):*

CONCERNING QUALIFICATIONS FOR APPOINTMENT IN ☐ **CONSERVATORSHIPS** ☐ **GUARDIANSHIPS**

4. *(cont.)* b. (1) ☐ I satisfy the experience requirements for attorneys in private practice for appointment to represent conservatees or proposed conservatees in probate conservatorships identified in item 3c above, as shown by the boxes checked in that item *(check the box for item 3c above and as many of the boxes for items 3c(1) and 3c(2)(A)–(E) as apply to you, but do not check the box for item 3);* or

(2) ☐ I have at least three years' experience representing minors in juvenile dependency or delinquency proceedings or patients, proposed conservatees, or conservatees in postcertification judicial proceedings or conservatorships under the Lanterman-Petris-Short Act.

c. I am covered by professional liability insurance in the amount of at least $100,000 per claim and $300,000 per year or at an equivalent level by a self-insurance program for the professional employees of my county. My insurer or self-insurance program is *(specify):*

d. I will, if requested, provide the case names and numbers, courts, and parties I represented in the court proceedings identified in item 3 above, if any, and, if item 3c(2)(E) is checked, redacted copies of the estate planning documents prepared.

5. ☐ *(Complete this item if you do not qualify for appointment under items 3 or 4 above but wish to be considered for an appointment in a conservatorship or guardianship by a court with four or fewer authorized judges under rule 7.1101(e) of the California Rules of Court. If you qualify for appointment under items 3a–c but are not covered by professional liability insurance in the minimum amounts specified in item 3d(1), do not complete this item but complete item 3d(2).)*

a. I wish to be considered by the court for appointment as legal counsel in ☐ conservatorships ☐ guardianships on a waiver under rule 7.1101(e) of the California Rules of Court.

b. ☐ I am an attorney in private practice.

(1) Facts supporting my appointment are stated in attachment 5 to this certification. I certify that the facts stated are true and correct.

(2) ☐ I am covered by professional liability insurance in the amount of at least $100,000 per claim and $300,000 per year. My insurer is *(specify):*

(3) ☐ I am not covered by professional liability insurance in at least the minimum amounts stated in (2), but I believe that I would be adequately self-insured against any damage claim arising from my representation of any person on appointment of the court under Probate Code sections 1470–1472 and rule 7.1101. Facts supporting my belief are specified in Attachment 5b(3).

c. ☐ I am a deputy public defender who would be responsible for performing legal services on the appointment of my county's public defender.

(1) Facts supporting my appointment are stated in attachment 5 to this certification. I certify that the facts stated are true and correct.

(2) I am covered by professional liability insurance in the amount of at least $100,000 per claim and $300,000 per year or at an equivalent level by a self-insurance program for the professional employees of my county. My insurer or self-insurance program is *(specify):*

6. ☐ Additional information required by the court ☐ is provided in attachment 6. ☐ is submitted separately with this certification. ☐ is as follows:

Additional space provided and signature required on next page.

CERTIFICATION OF ATTORNEY *(Name):*

CONCERNING QUALIFICATIONS FOR APPOINTMENT IN ☐ **CONSERVATORSHIPS** ☐ **GUARDIANSHIPS**

6. (*cont.*) Additional information required by the court :

I certify that the foregoing, including statements made in all attachments and other documents submitted with this certification, is true and correct.

Dated:

(TYPE OR PRINT NAME OF CERTIFYING ATTORNEY)

(SIGNATURE)

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GC-011

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE:	*(Do not file or lodge in case file)*
CERTIFYING ATTORNEY *(Name):* State Bar No.:	

ANNUAL CERTIFICATION OF COURT-APPOINTED ATTORNEY

NOTICE TO ATTORNEYS APPOINTED BY THE COURT IN PROBATE CONSERVATORSHIPS OR GUARDIANSHIPS

1. Beginning in 2008, you must complete three hours of continuing education each calendar year that qualifies for Minimum Continuing Legal Education (MCLE) credit for California State Bar–certified specialists in estate planning, trust, and probate law. (See Cal. Rules of Court, rule 7.1101(f).)
2. Beginning in 2009, you must certify to the court before the end of March of each year that (1) you completed the required continuing education during the previous calendar year, and (2) your State Bar disciplinary history and professional liability insurance or self-insurance coverage either have or have not changed since your qualification certification or last annual certification was filed. You must also describe any changes in your disciplinary history and insurance or self-insurance coverage. (See rule 7.1101(h)(4) and (5).)

I certify as follows *(check all boxes that apply):*

1. a. ☐ I have had no State Bar discipline imposed since the date of my qualification certification or my last annual certification.
   b. ☐ I have had State Bar discipline imposed since the date of my qualification certification or my last annual certification. The circumstances are described in Attachment 1b.
2. a. ☐ My professional liability insurance coverage (rule 7.1101(b)(3)), adequacy of self-insurance (rule 7.1101(e)(2)), or self-insurance program coverage (rule 7.1101(c)(2)) has not changed since the date of my qualification certification or my last annual certification.
   b. ☐ My professional liability insurance, adequacy of self-insurance, or self-insurance program coverage has changed since the date of my qualification certification or my last continuing education certification. My current circumstances are described in Attachment 2b.
3. My contact information is ☐ as stated in my qualification certification or last annual certification. ☐ as follows:
   a. Firm or employer name:
   b. Address:
   c. Telephone number: d. Fax number:
   e. E-mail address:
4. During calendar year _____, I completed a total of *(specify):* _____ hours of continuing education that qualifies for MCLE credit for State Bar-certified specialists in estate planning, trust, and probate law, as follows:

Provider	Subject	Hours
		_____
		_____
		_____

I certify that the foregoing is true and correct. Total hours: _____

Dated:

▶ _____

(TYPE OR PRINT NAME OF CERTIFYING ATTORNEY) (SIGNATURE)

Form Adopted for Mandatory Use
Judicial Council of California
GC-011 [New January 1, 2009]

ANNUAL CERTIFICATION OF COURT-APPOINTED ATTORNEY
(Probate—Guardianships and Conservatorships)

Probate Code, §§ 1456, 1470, 1471;
Cal. Rules of Court, rule 7.1101
www.courtinfo.ca.gov

OTHER SERVICE/INFORMATION

Probate Volunteer Panel

WHAT IS THE PROBATE VOLUNTEER PANEL?

The Probate Volunteer Panel (PVP) consists of attorneys who are appointed to represent persons, as required by law, in the following types of proceedings:

- Conservatorships
- Guardianships
- Petitions filed pursuant to Probate Code section 3100 et seq. for a particular transaction
- Petitions for Capacity Determinations for Adults without Conservators brought pursuant to Probate Code section 3200 et seq.
- Proceedings to establish special needs trusts brought pursuant to Probate Code section 3600 et seq.
- Tuberculosis Detention proceedings pursuant to Welfare and Institution Code section 12365 et seq.

Panel attorneys may also be appointed as counsel, guardian ad litem, referees, special masters, court experts or fiduciaries as may be mandated or appropriate under the circumstances.

HOW DO I BECOME A MEMBER OF THE PANEL?

Probate Volunteer Panel (PVP) consists of attorneys who have applied to the panel and met the qualifications set forth in Chapter 10 of Los Angeles Superior Court Rules. You will need complete an application to be considered for appointment to the panel. There are additional forms you will complete if you are appointed to the panel.

Probate Volunteer Panel Forms	Form Description
Attorney Application for Appointment to Probate Volunteer Panel	Application for the Probate Volunteer Panel Complete Form
Probate Volunteer Panel Attorneys Annual Compliance Statement	Annual statement of compliance with requirements for attorneys serving on the Probate Volunteer Panel Complete Form
PVP Counsel's Report For Developmentally Disabled Adults	Report that is completed after meeting with developmentally disabled adults Complete Form
PVP Counsel's Report For Developmentally Disabled Adults - Dementia Attachment	Attachment to report for developmentally disabled adults with dementia Complete Form

Superior Court of California
County of Los Angeles
Los Angeles Superior Court Local Rules
Old Rule Number to New Rule Number

Old Rule Number	Old Rule Title	New Rule Number	New Rule Title
	Appraisals—Conservators and Trustees of Trusts Subject to the Court's Continuing Jurisdiction		Appraisals—Conservators and Trustees of Trusts Subject to the Court's Continuing Jurisdiction
10.75	Multiple Probate Code Section 17200 et seq. Petitions Concerning One Trust	4.106	Multiple Probate Code Section 17200 et seq. Petitions Concerning One Trust
10.76	Petitions to Confirm Sale of Trust Real Property	4.107	Petitions to Confirm Sale of Trust Real Property
10.77	Settlements Involving Charitable Trusts	4.108	Settlements Involving Charitable Trusts
10.78	Testamentary Trustees' Accounts	4.109	Testamentary Trustees' Accounts
10.79	Settlements or Judgments Relating to Claims of Minors or Persons with Disabilities (Including Establishment and Funding of Trusts)	4.115	Settlements of Claims of Minors or Persons with Disabilities (Including Establishment and Funding of Trusts)
10.80	Trusts Created or Funded Pursuant to Court Order Including Civil Judgment	4.116	Trust Created or Funded Pursuant to Court Order
10.81	Special Needs Trust Created by Court Order / Judgment	4.117	Special Needs Trust Created by Court Order / Judgment
10.82	NEW Court Proceedings Required for Trusts Established Under Probate Code Section 2580 or 3100	4.118	Court Proceeding for Trusts Established Under Probate Code Section 2580 or 3100
10.83	Probate Volunteer Panel General Eligibility Requirements and Procedures for Appointment to the Panel	4.123	Probate Volunteer Panel General Eligibility Requirements and Procedures for Appointment to the Panel
10.84	Probate Volunteer Panel—Requirements for Specific Areas of Interest	4.124	Probate Volunteer Panel—Requirements for Specific Areas of Interest
10.85	Ethical Guidelines	4.125	Ethical Guidelines
10.86	PVP Attorney Appointments are	4.126	PVP Attorney Appointments are

4.118 COURT PROCEEDING FOR TRUST ESTABLISHED UNDER PROBATE CODE SECTION 2580 OR 3100

When a trust is created under Probate Code section 2580 *et seq.* in a conservatorship proceeding, or pursuant to Probate Code section 3100 *et seq.*, all future proceedings relating to that trust must be filed as a new separate case.

(Rule 4.118 new and effective July 1, 2011)

4.119 **RESERVED**
4.120 **RESERVED**
4.121 **RESERVED**
4.122 **RESERVED**

PROBATE VOLUNTEER PANEL ATTORNEYS

4.123 PROBATE VOLUNTEER PANEL GENERAL ELIGIBILITY REQUIREMENTS AND PROCEDURE FOR APPOINTMENT TO THE PANEL

All Probate Volunteer Panel ("PVP") Attorneys must meet the following general requirements:

(a) Active Status with the State Bar. The attorney must have maintained active status with the State Bar of California for each of the preceding three years and have no disciplinary proceedings pending or filed against him or her during the preceding twelve months.

(b) Submit Application and Compliance Statement. The attorney must complete and submit the following:

(1) An Application for Appointment to the Probate Volunteer Panel;

(2) A Compliance Statement with the Application, and annually thereafter;

These forms may be obtained on-line at www.lasuperiorcourt.org, see "Probate," from the Probate Division, Stanley Mosk Courthouse, or by calling telephone number (213) 974-5471; and

(3) If seeking appointment in Conservatorship and/or Guardianship proceedings, Judicial Council form GC-010, Certification of Attorney Concerning Qualifications for Court Appointment in Conservatorship/Guardianships. Annually thereafter, the attorney must submit Judicial Council form GC-011, Annual Certification of Court Appointed Attorney. These forms may be obtained by calling telephone number (213) 974-5501 or on-line at www.courts.ca.gov/forms.

(c) Educational and MCLE Requirements.

(1) The attorney must complete at least twelve hours of MCLE during his/her State Bar reporting period in the subjects of decedent estates, conservatorships/guardianships, or trust administration;

(2) The attorney must complete the mandatory PVP training course(s) within one year from submission of his or her application; and

(3) To qualify for appointment in conservatorship or guardianship proceedings, the attorney must satisfy the qualifications and continuing education requirements in California Rules of Court, rule 7.1101.

(d) Professional Liability Insurance. The attorney must carry professional liability insurance with policy limits consistent with the value of the matters handled, and at a minimum an amount of $100,000 per claim and $300,000 per year.

(Rule 4.123 new and effective July 1, 2011)

4.124 PROBATE VOLUNTEER PANEL - REQUIREMENTS FOR SPECIFIC AREAS OF INTEREST

(a) General Requirements for Specific Areas of Interest. PVP Attorneys must meet the following general requirements for specific area(s) of interest:

(1) Decedent Estate and Trust Administration. Prior to filing the application and within the past three years, the attorney must have represented parties in at least six different probate or trust administration court proceedings, including three decedent estate or trust proceedings from inception through final account and/or order for distribution.

The attorney must have experience and/or training in tax-related issues sufficient to enable him or her to identify tax issues from the facts of the case and to competently represent the client's interests concerning the potential tax consequences of the particular matter.

(2) Conservatorships. Attorneys representing conservatees in Conservatorship proceedings must satisfy the requirements of California Rules of Court Title Seven, rule 7.1101(b)(2).

(3) Guardianships. Attorneys representing conservatees in Guardianship proceedings must satisfy the requirements of California Rules of Court Title Seven, rule 7.1101(b)(1).

(4) Conservatorships of the Person. Prior to filing the application and within the past five years, the attorney must have represented parties in at least four conservatorship of the person matters (including at least two proceedings from their inception) which involve securing the appointment and qualification of the conservator of the person.

(5) Limited Conservatorships. Attorneys representing limited conservatees in Conservatorship proceedings must satisfy the requirements of California Rules of Court Title Seven, rule 7.1101(b)(2). In addition, the attorney must understand the legal and medical issues arising out of developmental disabilities and the role of the Regional Center.

(6) Estate Planning and Taxation. Prior to filing the application and within the past three years, the attorney must have extensive experience in matters regarding estate planning, estate, gift, or income tax or related tax matters pertaining to trusts and decedent estates. The attorney must have represented parties in at least three substituted judgment (Prob. Code, § 2580 *et seq.*) or particular transactions matters. (Prob. Code, § 3100 *et seq.*)

(7) Medi-Cal Planning. Prior to filing the application and within the past three years, the attorney must have represented parties in at least three Probate Code section 3100 petitions, including at least two in which there was a request to increase either the Community/Spouse Resource Allowance and/or increase the Minimum Monthly Maintenance Need Allowance. The attorney must be familiar with the laws and regulations for Medi-Cal eligibility, and shall be knowledgeable on the rules regarding the increase of the CSRA/MMMNA, exempt assets, gifting rules, and tax ramifications related to Medi-Cal planning.

(8) Compromises/Judgments and Special Needs Trusts for Minors/Persons with Disabilities. Prior to filing the application and within the past three years, the attorney must have represented parties in at least three petitions for approval of compromise under Probate Code section

3500 or Code of Civil Procedure section 372, three of which involved creation of special needs trusts. The attorney must be familiar with the advantages and disadvantages of the various funding alternatives available under Probate Code section 3600 *et seq.*, and the application of MICRA to medical malpractice settlements.

(9) Fiduciary Appointments/Guardians *ad Litem*. The attorney must have at least ten years in practice, with recent experience serving as a fiduciary or guardian *ad litem*.

An attorney who acts as a guardian *ad litem* or fiduciary may not be covered by his or her professional liability insurance. Although insurance coverage is not a requirement, the attorney may wish to consult his or her professional liability insurance carrier prior to accepting such appointment.

(10) Evidence Code Section 730 Experts/Referees/Special Masters. The attorney must have at least ten years in practice, with experience serving as an Evidence Code section 730 expert, Code of Civil Procedure section 638 referee, or special master. The attorney also must have substantial expertise in the substantive area of law involved in the matter.

(11) Health Care Decisions for Adults Without Conservators and Tuberculosis Detention Proceedings/Capacity Determinations. Prior to filing the application and within the past three years, the attorney must have extensive experience in matters relating to medical treatment and bio-ethical issues. The attorney must be familiar with Probate Code section 3200 or Health and Safety Code section 121365 proceedings. These cases often involve complex treatment issues and may require immediate attorney response to medical emergencies. Consequently, the attorney must become familiar with the medical parameters underlying these issues in order to adequately represent the client's interests.

(b) MCLE Requirements for Specific Areas of Interest. PVP Attorneys must meet the following MCLE requirements for specific area(s) of interest:

(1) Conservators. The attorney must satisfy the educational requirements found in California Rules of Court Title Seven, rule 7.1101(f)(1).

(2) Guardians of the Estate. The attorney must satisfy the educational requrements found in California Rules of Court Title Seven, rule 7.1101(f)(1).

(3) Guardians of the Person. The attorney must satisfy the educational requirements found in California Rules of Court Title Seven, rule 7.1101(f)(2).

(4) Estate Planning and Taxation. The attorney must have at least ten hours of MCLE in the areas of estate planning and taxation during the attorney's State Bar reporting period.

(5) Limited Conservatorships/Conservatorships for Developmentally Disabled Adults. The attorney must have at least three hours of MCLE in the areas of guardianships/conservatorships during the attorney's State Bar reporting period, and have attended the Limited Conservatorships PVP Training Program.

(6) Medi-Cal Planning. The attorney must have at least three hours of MCLE in the areas of guardianships/conservatorships during the attorney's State Bar reporting period.

(7) Compromises/Judgments and Special Needs Trust for Minors/Incompetent Adults. The attorney must have at least three hours of MCLE in the areas of guardianships/conservatorships during the attorney's State Bar reporting period.

(8) Health Care Decisions for Adults Without Conservators and Tuberculosis Detention Proceedings/Capacity Determinations. The attorney must have at least three hours of

MCLE in the areas of guardianships/conservatorships during the attorney's State Bar reporting period.

(Rule 4.124 new and effective July 1, 2011)

4.125 ETHICAL GUIDELINES

PVP counsel's primary duty is to represent the interests of his or her client in accordance with applicable laws and ethical standards. The PVP attorney's secondary duty is to assist the court in the resolution of the matter to be decided. The PVP attorney must, if practical, ensure that the client is afforded an opportunity to address the court directly.

(Rule 4.125 new and effective July 1, 2011)

4.126 PVP ATTORNEY APPOINTMENTS ARE PERSONAL

PVP Attorney appointments are personal and cannot be delegated to other attorneys. Only the PVP attorney appointed by the court may render legal services to the client and appear at hearings.

(Rule 4.126 new and effective July 1, 2011)

4.127 WRITTEN REPORT AND COMPENSATION FOR PVP ATTORNEYS

(a) Written Report. PVP attorneys appointed by the court must file a written report with a verified statement that:

(1) The PVP attorney is an active member of the State Bar of California and no disciplinary actions are pending and none were filed against him or her during the past twelve months;

(2) The PVP attorney has professional liability insurance coverage in effect with policy limits consistent with the value of the matter being handled; and

(3) The PVP attorney has not represented any party to the proceeding except as stated in the report. The statement must include the name of the party represented and a brief explanation of the representation. Cases where a PVP attorney has represented a private professional conservator in the proceeding must be included.

(b) Compensation for PVP Attorneys. A PVP attorney's request for compensation may be made as part of the written report filed with the court or otherwise orally at the hearing.

(1) A request for compensation for services in excess of five hours must be supported by a written fee declaration and served upon the appearing parties. The declaration must include a listing of services rendered by date, the service rendered, and the time devoted to that service.

(2) The PVP attorney will be awarded compensation at an hourly rate below market rates except in cases involving unusual problems requiring extraordinary expertise, or where the value of the estate warrants otherwise.

(3) If the person represented by the PVP attorney is unable to pay, the court may order the fees to be paid by the estate, a party, or the County where authorized by statute. A form requesting County-paid compensation may be obtained from the clerk.

(4) If the PVP attorney does not appear in court as part of his or her representation, he or she must file and set for hearing a petition for compensation.

(Rule 4.127 new and effective July 1, 2011)

CONFIDENTIAL – FOR COURT USE ONLY

LOS ANGELES SUPERIOR COURT
PROBATE DEPARTMENT

ATTORNEY APPLICATION FOR APPOINTMENT TO PROBATE VOLUNTEER PANEL

I, _____, apply for appointment to the Probate
(print name)
Volunteer Panel and declare as follows:

1. **State Bar Membership**

A. I was admitted to the California State Bar on _____.
(date)
I am currently an active member. My Bar number is _____.

_____
(Initial)

B. As of the date of this Application, I have no disciplinary proceedings pending with the California State Bar, and I have had no discipline imposed on me within the 12-month period immediately preceding that date.

_____
(Initial)

Check one:

☐ I have previously been subject to State Bar disciplinary proceedings.

☐ I have not ever been subject to any State Bar disciplinary proceedings.

_____
(Initial)

If applicable, please explain any prior State Bar disciplinary proceedings in a separate attachment.

C. If, at any time that I am a member of this panel and my status as a member of the State Bar changes, I agree to notify the Court, in writing, within 10 days of that change.

_____
(Initial)

2. **Professional Liability Insurance**

A. I carry professional liability insurance with policy limits consistent with the values of the matters to be handled, at a minimum amount of $100,000 per claim and $300,000 per year.

_____
(Initial)

B. If, at any time that I am a member of this panel, I am no longer covered by professional liability insurance in the amounts specified above, I agree to notify the Court, in writing, within 10 days of that change.

_____
(Initial)

3. **California Rules of Court**

A. Requirements for appointment as counsel in conservatorship cases: I am qualified to accept appointments by the Court to represent conservatees or

proposed conservatees under Probate Code §§ 1470 and 1471. Pursuant to Rule 7.1101(b)(2) of the California Rules of Court, I have filed or am filing herewith mandatory Judicial Council form GC-010, Certification of Attorney Concerning Qualifications for Court Appointment in Conservatorships and Guardianships.

_____
(Initial)

B. Requirements for appointment as counsel in guardianship cases: I am qualified to accept appointments by the Court to represent wards or proposed wards under Probate Code § 1470. Pursuant to Rule 7.1101(b)(1) of the California Rules of Court, I have filed or am filing herewith mandatory Judicial Council form GC-010, Certification of Attorney Concerning Qualifications for Court Appointment in Conservatorships and Guardianships.

_____
(Initial)

4. **Los Angeles Superior Court**

A. I have read California Rules of Court Rule 7.1101 and Los Angeles Superior Court Rules 4.123 through 4.124 regarding eligibility requirements for Probate Volunteer Panel members.

_____
(Initial)

B. I comply with the educational requirements as follows:

i. Check one:

☐ I have completed the mandatory PVP training program.

☐ I have NOT yet completed the mandatory PVP training program. I agree to complete the mandatory PVP training program within one year from submission of my initial application.

_____
(Initial)

ii. I have completed at least 12 hours of MCLE during my State Bar reporting period in the areas of decedents' estates, conservatorships, guardianships, or trust administration as required.

_____
(Initial)

C. I request appointment to the Probate Volunteer Panel in the following area(s):

☐ Decedents' estates and trust administration

☐ Conservatorships and guardianships of the estate *

☐ Guardianships of the person (minor's counsel – custody only) *

☐ Conservatorships of the person *

☐ Limited conservatorships for developmentally disabled adults *

☐ Capacity determinations and health care decisions for adults without conservators

☐ Estate planning and taxation

☐ Medi-Cal planning (Probate Code §§ 3100 and 3600)

- ☐ Compromises/judgments, special needs trusts, minors' trusts (probate)
- ☐ Compromises/judgments, special needs trusts, minors' trusts (civil)
- ☐ Tuberculosis detention proceedings
- ☐ Fiduciary appointments
- ☐ Guardians ad litem
- ☐ LASC Probate Cases
- ☐ LASC Civil Cases
- ☐ U.S. Federal District Court Cases, Central District of California

  I authorize Los Angeles Superior Court to provide a copy of this application to the Federal District Court, Central District of California. _____ (Initial)
- ☐ Evidence Code § 730 experts/referees/special masters
- ☐ Other (specify): _____

* Attorneys accepting appointments as counsel in conservatorship and guardianship proceedings must meet the qualifications and continuing education requirements set forth in California Rules of Court Rule 7.1101.

D. I certify that I meet the requirements specified in Los Angeles Superior Court Rules, Rule 4.124, for each area of interest marked above. _____ (Initial)

E. I am willing to accept appointments in the following Los Angeles Superior Court districts:

- ☐ Central (Los Angeles)
- ☐ North (Antelope Valley)

F. I understand and agree that an Annual Compliance Certification must be filed as required by Los Angeles Superior Court Rules, Rule 4.123. In addition, if my areas of interest include appointments in guardianship or conservatorship proceedings, I will submit each year the mandatory Judicial Council form GC-011, Annual Certification of Court-Appointed Attorney. _____ (Initial)

G. I am a Certified Specialist in:

- ☐ Estate planning, probate, and trust law
- ☐ Taxation
- ☐ Family law
- ☐ Other (specify): _____

H. Approximately _____% of my current practice consists of estate planning, estate administration, trusts, guardianships, or conservatorships.

I. Private Professional Fiduciary Representation

I am or have been the attorney of record for the following private professional fiduciaries:

Name: Estimate Number of Cases:

_____

_____

_____

_____

_____

(Attach additional pages if needed.)

J. I have the following special skills, training, and/or experience relating to decedents' estates, trust administration, conservatorships, or guardianships: _____

_____

K. I speak the following languages (other than English): _____

Members of my staff speak the following languages (other than English):

_____

L. Check one:

- ☐ I am willing to accept appointments for ex parte and other urgent matters.
- ☐ I am NOT willing to accept appointments for ex parte and other urgent matters.

5. **Compensation**

Attorney Compensation in Los Angeles Superior Court Proceedings
I have reviewed and agreed to be bound by the terms of Los Angeles Superior Court General Order Re: Probate Volunteer Panel Appointments dated May 20, 2011 concerning the court's policies of accepting (or continuing) any PVP appointments to represent proposed conservatees, conservatees, proposed wards or wards or any other individual in Los Angeles Superior Court Proceedings.

_____
(Initial)

Compensation for services as fiduciaries, guardians ad litem (including appointments in U.S. Federal District Court, Central District of California), and Evidence Code 730 experts will be determined on a case-by-case basis. By accepting such appointments, I agree that, except in cases involving unusual problems requiring extraordinary expertise, the hourly rates shall not exceed $250.00.

_____
(Initial)

6. **Conflicts**

I understand that I may not represent any other party in cases in which I have been appointed as counsel or in cases that are related to cases in which I was appointed as counsel (for example, representation of an executor after the death of a conservatee whom I was appointed to represent).

_____
(Initial)

7. **Appointments within the Court's Discretion**

I understand that submission of an Attorney Application for Appointment to Probate Volunteer Panel and/or Annual Compliance Certification for Probate Volunteer Panel Attorneys does not guarantee entitlement to appointments as counsel and acknowledge that all appointments of court appointed counsel are entirely within the discretion of the Los Angeles Superior Court.

_____
(Initial)

Name _____

Address: _____

_____

Telephone: _____(office) _____(cell) _____(fax)

Email: _____

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

_____ _____
(date) (signature)

Revised 12/02/13

CONFIDENTIAL – FOR COURT USE ONLY

LOS ANGELES SUPERIOR COURT
PROBATE DEPARTMENT

ANNUAL COMPLIANCE CERTIFICATION FOR PROBATE VOLUNTEER PANEL ATTORNEYS

1. **Personal Information**

Name _____
Last First Middle

Address: _____
Firm Name

_____
Street/P.O. Box City State Zip

Telephone: _____(office) _____(cell) _____(fax)

Email: _____

2. **State Bar Membership**

A. I am an active member of the California State Bar.
My Bar number is _____.

_____
(Initial)

B. As of the date of this Certification, I have no disciplinary proceedings pending with the California State Bar, and I have had no discipline imposed on me within the 12-month period immediately preceding that date.

_____
(Initial)

C. If, at any time that I am a member of this panel and my status as a member of the State Bar changes, I agree to notify the Court, in writing, within 10 days of that change.

_____
(Initial)

3. **Professional Liability Insurance**

A. I carry professional liability insurance with policy limits consistent with the values of the matters to be handled, at a minimum amount of $100,000 per claim and $300,000 per year.

_____
(Initial)

B. If, at any time that I am a member of this panel, I am no longer covered by professional liability insurance in the amounts specified above, I agree to notify the Court, in writing, within 10 days of that change.

_____
(Initial)

4. **California Rules of Court**

The California Rules of Court establish qualifications for attorneys accepting appointments in conservatorship and guardianship cases.

A. I am qualified to accept appointments by the Court to represent conservatees or proposed conservatees under Probate Code §§ 1470 and 1471. Pursuant to Rule 7.1101(b)(2) of the California Rules of Court, I have filed or am filing herewith mandatory Judicial Council form GC-010, Certification of Attorney Concerning Qualifications for Court Appointment in Conservatorships and Guardianships.

_____
(Initial)

B. I am qualified to accept appointments by the Court to represent wards or proposed wards under Probate Code § 1470. Pursuant to Rule 7.1101(b)(1) of the California Rules of Court, I have filed or am filing herewith mandatory Judicial Council form GC-010, Certification of Attorney Concerning Qualifications for Court Appointment in Conservatorships and Guardianships.

_____
(Initial)

5. **Los Angeles Superior Court**

A. Check one:

- ☐ I have completed the mandatory PVP training program.
- ☐ I have NOT completed the mandatory PVP training program.

_____
(Initial)

B. I have completed at least 12 hours of MCLE during my State Bar reporting period in the areas of decedents' estates, conservatorships, guardianships, or trust administration.

_____
(Initial)

C. My specific areas of interest during this compliance period are:

- ☐ Decedents' estates and trust administration
- ☐ Conservatorships and guardianships of the estate *
- ☐ Guardianships of the person (minor's counsel – custody only) *
- ☐ Conservatorships of the person *
- ☐ Limited conservatorships for developmentally disabled adults *
- ☐ Capacity determinations and health care decisions for adults without conservators
- ☐ Estate planning and taxation
- ☐ Medi-Cal planning (Probate Code §§ 3100 and 3600)
- ☐ Compromises/judgments, special needs trusts, minors' trusts (probate)
- ☐ Compromises/judgments, special needs trusts, minors' trusts (civil)

- ☐ Tuberculosis detention proceedings
- ☐ Fiduciary appointments
- ☐ Guardians ad litem
- ☐ LASC Probate Cases
- ☐ LASC Civil Cases
- ☐ U.S. Federal District Court Cases, Central District of California

  I authorize Los Angeles Superior Court to provide a copy of this application to the Federal District Court, Central District of California. _____ (Initial)
- ☐ Evidence Code § 730 experts/referees/special masters
- ☐ Other (specify): _____

* Attorneys accepting appointments as counsel in conservatorship and guardianship proceedings must meet the qualifications and continuing education requirements set forth in California Rules of Court Rule 7.1101.

D. I certify that I meet the requirements specified in Los Angeles Superior Court Rules, Rule 4.124, for each area of interest marked above. _____ (Initial)

6. **District Appointments**

I am willing to accept appointments in the following Los Angeles Superior Court districts:

☐	Central (Los Angeles)	☐	South (Long Beach)
☐	Northwest (Van Nuys)	☐	Southwest (Torrance)
☐	Northeast (Pasadena)	☐	Southeast (Norwalk)
☐	West (Santa Monica)	☐	East (Pomona)
☐	North (Antelope Valley)	☐	All districts

7. **Private Professional Fiduciary Representation**

I am or have been the attorney of record for the following private professional fiduciaries:

Name	Estimated Number of Cases

(Attach additional pages if needed.)

8. **Compensation**

Attorney Compensation in Los Angeles Superior Court Proceedings
I have reviewed and agreed to be bound by the terms of Los Angeles Superior Court General Order Re: Probate Volunteer Panel Appointments dated May 20, 2011 concerning the court's policies of accepting (or continuing) any PVP appointments to represent proposed conservatees, conservatees, proposed wards or wards or any other individual in Los Angeles Superior Court Proceedings.

_____
(Initial)

Compensation for services as fiduciaries, guardians ad litem (including appointments in Central District U.S. Federal District Court cases), and Evidence Code 730 experts will be determined on a case-by-case basis. By accepting such appointments, I agree that, except in cases involving unusual problems requiring extraordinary expertise, the hourly rates shall not exceed $250.00. _____
(Initial)

9. **Conflicts**

I understand that I may not represent any other party in cases in which I have been appointed as counsel or in cases that are related to cases in which I was appointed as counsel (for example, representation of an executor after the death of a conservatee whom I was appointed to represent).

_____
(Initial)

10. **Appointments within the Court's Discretion**

I understand that submission of an Attorney Application for Appointment to Probate Volunteer Panel and/or Annual Compliance Certification for Probate Volunteer Panel Attorneys does not guarantee entitlement to appointments as counsel and acknowledge that all appointments of court appointed counsel are entirely within the discretion of the Los Angeles Superior Court.

_____
(Initial)

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

_____ _____
(date) (signature)

Revised 11/27/12
(New Applicant)

Superior Court of the State of California

County of Los Angeles

Court Order

General Order Re: Probate Volunteer Panel Appointments

[Probate Code sections 1470 and 1471]

A court-wide policy has been established to ensure that available resources are allocated in a manner that promotes access to justice for all members of the public, provides a forum for the fair and expeditious resolution of disputes, maximizes the use of available resources, and carries out the direction of the Legislature that courts adopt cost effective plans for the appointment of publicly compensated counsel. [See Cal. Rules of Court, Rule 10.603(a) and Pen. Code sec. 987.2.] Pursuant to the responsibility of the Presiding Judge through California Rule of Court, Rule 10.603(a) to establish court-wide policy in this regard, the authority for establishing this court-wide policy has been delegated to the Supervising Judge of the Probate Division pursuant to California Rule of Court, Rule 10.603(d).

The Probate Code requires the appointment of counsel for a proposed conservatee under certain circumstances. [Prob. Code sec. 1471.] In other cases, the court may appoint counsel where the proposed conservatee is not otherwise

represented by counsel and the appointment of counsel would be helpful to the resolution of the matter or is necessary to protect the proposed conservatee's interests. [Prob. Code sec. 1470, subd. (a).]

In Guardianship proceedings, the Probate Code provides that the court may appoint counsel for a proposed ward if the proposed ward is not otherwise represented by counsel and the appointment of counsel would be helpful to the resolution of the matter or is necessary to protect the proposed ward's interests. [Prob. Code sec. 1470, subd. (a).]

Effective July 1, 2011:

As a condition of accepting or continuing any Probate Volunteer Panel ("PVP") appointment to represent a proposed conservatee, conservatee, proposed ward, or ward or other individual, counsel must agree to the policies set for the in this order as follows:

1. The hourly rate for cases in which the court determines that the adult client or his/her estate, or a minor client's parent(s) or the minor's estate has no ability to pay, shall not exceed $125.

2. The hourly rate for cases in which the court determines that the adult client or his/her estate, or minor client's parent(s) or the minor's estate has sufficient assets to pay, shall not exceed $250, except in cases involving unusual problems requiring extraordinary expertise.

3. Except as otherwise authorized by the court, services for PVP counsel related to a petition for appointment of a conservator or guardian (including a temporary appointment), shall not exceed 12 total hours.

4. Except as otherwise authorized by the court, services for PVP counsel reappointed to represent a conservatee or ward in a matter, shall not exceed 10 total hours.

5. On cases in which the court has determined that the adult client or his/her estate, or a minor client's parent(s) or the minor's estate has no ability to pay his/her counsel and the County of Los Angeles is ordered to pay for such services, PVP counsel shall be compensated through the Court's PACE program.

a. No further payments shall be made by PACE to any counsel who has received compensation for Probate Code 1470 and 1471 appointments (including reappointments) in an amount of more than $100,000 for any fiscal year (July 1 to June 30) without the written approval of the Supervising Judge for the Probate Division.

b. No further payments shall be made by PACE to any counsel who has received combined compensation for (1) Probate Code 1470 and 1471 appointments (including reappointments) and (2) Family Code section 3153, subd. (b) (minor's counsel) in an amount of more than $150,000 for any fiscal year (July 1 to June 30) without the written approval of the Supervising Judge for the Probate Division.

c. All PVP counsel are required to certify at the time of appointment that the total compensation billed by counsel, for payment by PACE, (whether or not received) for Probate Code section 1470, 1471, and Family Code section 3153, subd. (b) appointments, does not exceed the annual (July 1 to June 30) limits herein.

d. PVP counsel shall submit all PACE claims within 90 days from the date of the order approving fees. PACE claims submitted more than 90 days after the date of the order approving fees are subject to a fifty percent reduction.

e. It is the responsibility of appointed counsel to fully apprise the Court at every hearing of the status of all fees incurred. Failure to do so may impact the amount of the fee awarded.

GOOD CAUSE APPEARING, IT IS SO ORDERED

Date: May 2, 2014

Michael I. Levanas
Supervising Judge, Probate Division

///

Key Findings

1. There is no agency or official in charge of the limited conservatorship system in California.

2. The Department of Developmental Services, Disability Rights California, and the State Council on Developmental Disabilities do not monitor this system or advocate for reform in general or intervene in individual cases where violations of rights are occurring.

3. There are never any appeals in limited conservatorship cases, so errors and abuses by judges and attorneys are not corrected by the normal appellate process.

4. Court-appointed attorneys are routinely violating their ethical obligations of loyalty and confidentiality to their clients, are surrendering rather than defending the rights of their clients, and are not providing effective assistance of counsel as required by due process of law.

5. Although the core function of a conservatorship proceeding is to assess whether an adult has capacity to make decisions in seven areas of functioning, and despite a legislative mandate for regional centers to make these assessments and report the findings to the court, regional center workers have no guidelines or training on how to make accurate capacity assessments.

6. Judges, attorneys, and court investigators are not trained on their duties under the Americans with Disabilities Act and it appears they are not providing equal access to justice to adults with intellectual and developmental disabilities in limited conservatorship proceedings.

7. The trainings of court-appointed attorneys and court investigators about their core functions are seriously inadequate. Whether judges who process limited conservatorship cases receive any training on issues critical to the administration of justice involving people with intellectual and developmental disabilities is not known.

8. Letters requesting intervention by the State Bar of California, the Attorney General of California, and the Department of Developmental Services have not been answered.

9. Despite having convened a statewide Task Force in 2006 in response to complaints of mistreatment of seniors in conservatorship proceedings, the Judicial Council has declined to convene a similar Task Force on Limited Conservatorships to investigate the manner in which cases involving people with intellectual and developmental disabilities are being processed.

10. Despite having constitutional authority to conduct surveys of the courts throughout the state, and despite having been asked to conduct a survey of the practices of courts in limited conservatorship proceedings in all 58 counties, the Judicial Council has no plans to do so.

11. The Legislature has authority, by joint resolution, to convene a Task Force on Access to Justice in Limited Conservatorships to assess the condition of the limited conservatorship system and to direct the Bureau of State Audits to assist the Task Force by conducting a survey of the county courts and by performing an audit of the practices of the Los Angeles Superior Court.

PVP Training on Limited Conservatorships – Part I

by Thomas F. Coleman

The Disability and Abuse Project has been researching the extent of training received by PVP attorneys in Los Angeles on legal and medical issues involved in limited conservatorships.

The only training program we discovered is one that is sponsored by the Los Angeles County Bar Association. This training is authorized by the Probate Court for attorneys who want to be placed on the limited conservatorship PVP appointment list or who want to stay on that list.

When I initially asked the Probate Court for information about attorney training programs, the Presiding Judge directed me to Jonathan Rosenbloom, a volunteer attorney with the Los Angeles County Bar Association who coordinates the bar association's training programs.

Jonathan informed me that one PVP training program on limited conservatorships was conducted in 2013. A general PVP training program will be conducted on April 26, 2014, but it only contains about 45 minutes of information about representing clients in limited conservatorship cases.

The 2013 training occurred on January 24, 2013, at the downtown courthouse. It lasted for two hours.

During this brief training program, five attorneys made presentations. The main presentation was made by Steven Beltran. Short presentations by the other four attorneys followed.

Bertha Sanchez Hayden familiarized attorneys with some new local court forms on various technical procedural issues.

Steven Awakuni discussed an example of a court order granting a petition and specifying which of the "seven powers" would be given exclusively to the conservators, which exclusively to the conservatee, and which would be shared powers. He also discussed a section of a practice guide published by the Continuing Education of the Bar, advising attorneys that they must submit an attachment to any proposed order and that such attachment must specify which of the "seven powers" will be taken away from the limited conservatee.

Jeffrey Shuwarger discussed "dual diagnosis" issues when a person is diagnosed with a mental disorder (LPS Conservatorships) and a developmental disability (Limited Conservatorships).

Jeffrey Marvan discussed PVP attorney interactions with the client and the family. He also stressed the importance of the attorney understanding that the purpose of a limited conservatorship is to promote as much self-reliance and independence for the conservatee as possible. This portion of the presentation was helpful. However, two portions of his presentation were troubling.

He said that a secondary role of the PVP attorney is to help the petitioners (usually parents) get their case handled efficiently.

He encouraged the PVP attorney to "help petitioner fill out the Order Appointing Conservator, Duties and Liabilities, Letters, and Care Plan." Of course, having a licensed attorney advise a party to the case and help them complete legal forms is a form of legal representation.

Another area of his presentation focused on contested cases. One item is that area stated: "PVP as a mediator."

Marvan's presentation suggested three possible roles for the PVP attorney: an advocate for the client; assisting the petitioner in preparing essential legal forms; and as a mediator in a contested proceeding.

An attorney cannot represent a proposed conservator and a proposed conservatee. This presents a classic conflict of interest. So I question the assertion that PVP attorneys play a "dual role" in a limited conservatorship case.

As for the possible third role as a mediator, that would also conflict with the role as an advocate for the proposed limited conservatee.

A PVP attorney should have only one role: to advocate for and give advice to the proposed conservatee.

From my review of the materials provided by Jonathan, it appears that the presentation by Steven Beltran was more extensive than the others. His talk was titled: 'PVP Attorney Considerations for Persons with Special Needs."

He addressed: the general definition of special needs; the entitlement of people with developmental disabilities to Regional Center services; government benefits available to Regional Center clients; guardianships; general conservatorships; special education and individual education plans; special needs trusts; and estate planning.

A small portion of his presentation focused on limited conservatorships. He listed the "seven powers" involved in these proceedings. He also discussed the role of the Regional Center in preparing a report with recommendations as to which of the "seven powers" the conservatee should retain.

Nowhere in the training program were any of the following topics addressed:

* constitutional rights of limited conservatees and how to protect those rights;
* voting rights of limited conservatees and federal laws protecting voting rights of people with disabilities;
* Americans with Disabilities Act and ADA accommodation requirements for the Probate Court and for PVP attorneys;
* criteria for assessing client capacities on each of the "seven powers" or how to challenge assessments which are not scientifically valid or not supported by substantial evidence;
* how to conduct a forensic interview of a client with a developmental disability.

There was also no presentation about ethical rules and professional standards governing the confidentiality of client communications to the PVP attorney and the confidentiality of information gathered by an attorney on behalf of his or her client.

Also not discussed in the training program were these important topics:

* how to understand, interpret, and use a "capacity declaration" submitted by a medical doctor or psychologist;
* understanding the various types of intellectual and developmental disabilities and their impact on daily living and capacity for decisions (Autism Spectrum Disorder, Cerebral Palsy, Fragile X Syndrome, Down Syndrome, Epilepsy, Fetal Alcohol Syndrome, and Intellectual Disabilities (formerly called Mental Retardation), among others.); understanding various communication methods and behavioral characteristics.

Nor did any speaker address these issues:

* limits on time allocated to a case and when to ask for more;
* standards for ineffective assistance of counsel (IAC) as applied to a limited conservatorship case; the right of a client to a "Marsden" hearing to ask for a new attorney or complain about an attorney's performance;
* appellate rights of clients, including habeas corpus to challenge an order due to IAC.

The only presenters at this training were these five attorneys. There were no presenters from a Regional Center. Not included in the program were presentations by disability rights advocates, social workers, psychologists, or medical professionals.

PVP Training on Limited Conservatorships – Part II

by Thomas F. Coleman

Part I of the PVP training essay focused on my review of materials used in the training of court-appointed attorneys in 2013. After completing that essay, I attended a PVP training conducted by the Los Angeles County Bar Association on April 26, 2014.

While much of the content of the training was harmless procedural or technical information, some aspects of the presentations were critical to effective advocacy. Unfortunately, some of the "practice tips" by attorneys were contrary to rules of professional conduct and ethics, while some of the comments by judges were incorrect or harmful to appropriate advocacy.

An opening presentation by Michael Levanas, Presiding Judge of the Probate Court, was very helpful in its early stages. He emphasized how the job of a PVP attorney was so important because the proposed conservatee faces the prospect of having his or her liberty taken away and losing various rights. Even though the probate court is a "protection" court, it is dealing with major encroachments on a person's freedom.

Judge Levanas also got it right when he reminded attorneys that a probate judge cannot make good decisions without the help of competent PVP attorneys. "How we do our job is largely in your hands," he stated.

The first substantive topic of the seminar – The Role of the PVP Attorney – was the focus of extensive remarks by Judge Levanas. He spent a great deal of time discussing whether a PVP attorney should advocate for the "stated wishes" of the client or for what the attorney personally believes to be the "best interests" of the client.

Unfortunately, at the end of his presentation, the attorneys were left with the impression that they could chose to do either, and that they could not get into trouble with the Supreme Court or the State Bar regardless of the choice of advocacy they made.

To be fair, Judge Levanas did explain that his personal preference was for an attorney to advocate for the "stated wishes" of the client. However, he went on to say that if the attorney disagrees with the client's wishes, then the attorney should tell the court the client's wishes as well as the attorney's own opinion of what is in the client's best interests.

Giving such advice to attorneys does not make them better advocates for clients. In fact, from the perspective of the rights of a client, and from the perspective of the wishes of a client, it makes them worse advocates. Court-appointed lawyers are supposed to be advocates for the client, not advocates for their own opinions.

When an attorney tells the court that they disagree with the client's stated wishes, and explains why they disagree, the attorney is sharing information adverse to the existing rights of the client. Would it be permissible for a criminal defense attorney to tell the court that his client pleads not guilty, but that the attorney personally believes that the client is guilty? Obviously, that is a rhetorical question.

The centerpiece of the "you get to choose the type of advocacy" message of Judge Levanas, was his citation of the case of *Conservatorship of Drabik* (1988) 200 Cal.App.3d 185.

Approximately five times during his discussion of "stated wishes" versus "best interest" advocacy, Judge Levanas said that the *Drabik* decision was a ruling by the California Supreme Court. He said that the Supreme Court ruled that, in cases where a conservatee can communicate, but has questionable capacity, it is "unclear" whether an attorney should advocate for the clients wishes or his best interests.

More than once he said that since attorneys can only get into trouble if they do something that is disapproved by the Supreme Court or the State Bar, and since the Supreme Court said that the type of advocacy for clients with questionable capacity is "unclear," attorneys can decide for themselves the type of advocacy they will provide to a client.

There are two major problems with what Judge Levanas said. First, *Drabik* was not a ruling by the California Supreme Court. It was a decision by an intermediate appellate court.

Second, and just as important, the opinion of the Court of Appeal in *Drabik* did not *decide* or *rule* on the type of advocacy that attorneys must provide to a client with questionable capacity.

The decision before the Court of Appeal in *Drabik* involved a man in a coma. So the actual ruling in *Drabik* is limited to conservatees in a coma – conservatees who cannot communicate. In such a situation, the court did *rule* that an attorney can advocate for the best interests of the client, since it is impossible to discern what the client wants.

That was the only situation briefed by the parties, argued to the court, and ruled on by the judges. The discussion by the court of other scenarios was just that: a discussion. One without the benefit of briefing or argument. It has no more precedential value than an interesting law review article written by a jurist. It is called "dicta."

Judge Levanas did mention a ruling by the Supreme Court of Connecticut declaring that attorneys for a conservatee must advocate for the client's stated wishes and may not advocate for what the attorney believes to be the client's best interests. But he undercut the usefulness of that information in several ways. He did not mention the citation or name of the case. He also emphasized that despite the direct pronouncement of the court on the issue, it was an out of state ruling, and that our Supreme Court says that the answer is "unclear" and so attorneys are free to decide for themselves.

Later in the program, an attorney and a different judge specifically discussed the role of PVP attorneys in limited conservatorship cases. This was one of two panels that focused exclusively on conservatorships for adults with developmental disabilities, whereas the rest of them were geared toward conservatorship proceedings in general.

The judge on this panel reminded attorneys that the court investigators are not doing investigations and reports in limited conservatorships, at least not in initial filings. Therefore, the PVP attorney report will be used "in lieu of" a court investigators report.

This point was reiterated by the attorney on this panel. She said that prior to starting a PVP investigation, attorneys should ask themselves "What would a Probate Investigator do?"

"You are a substitute for the Probate Investigator," she said. "The court is relying on you to do what the Probate Investigator does."

While what she said may be true, in practice, it is also contrary to rules of professional conduct for attorneys, ethical principles, and constitutional standards for effective assistance of counsel.

An attorney cannot be a de-facto court investigator and an effective advocate at the same time. An investigator should be neutral and objective, and takes direction from the court. Communications to an investigator are not privileged. The work product of an investigator will be shared with the court regardless of whether the information is harmful or helpful to what the conservatee wants.

Under the requirements of the Sixth Amendment to the United States Constitution, attorneys must be diligent and conscientious advocates for their clients. Communications to attorneys are privileged. The work product of attorneys is confidential and may not be disclosed to the court or anyone else without the informed consent of the client. An attorney may not disclose information that could harm the interests of the client.

Telling PVP attorneys to do what a Probate Investigator would do is basically advising attorneys to violate Rule 3-100 of the Rules of Professional Conduct of the State Bar of California.

That rule prohibits an attorney from disclosing confidential information without prior informed consent of the client. That rule is not limited to communications from the client to the attorney. It includes the attorney's work product. Work product is any information, from any source, obtained by the attorney during the course of the attorney-client relationship.

An attorney-client relationship is established between a PVP attorney and a proposed conservatee from the moment the court enters an order appointing the attorney to represent the proposed conservatee. It continues until the court enters an order relieving the attorney as counsel of record.

Business and Professions Code Section 6068 (e)(1) mandates that attorneys preserve the secrets of the client. "Secrets" are not limited to attorney-client communications, but include attorney work product.

Confidentiality applies regardless of the nature or source of the information gathered by the attorney. It applies to anything that might be detrimental to the client.

Thus, any information a PVP attorney gathers from reading records, interviewing people, or from any other source, is confidential and may not be disclosed without the informed consent of the client.

Although two or three presenters vaguely mentioned the notion of "confidentiality," none of them discussed Rule 3-100 or Section 6068. These provisions, as applied to limited conservatorship proceedings, would result in radical changes in the way PVP attorneys are expected to perform.

No more could PVP attorneys act as de-facto court investigators and blab everything they learn to the court and the other parties (and the public) in their PVP reports. No longer could PVP attorneys use information they gather to assist the court in taking rights away from their clients.

Another aspect of the seminar disturbed me greatly. This had to do with the voting rights of proposed conservatees.

A judge mentioned that the issue of voting rights arises in limited conservatorship cases. He said the test for voting rights being retained by a conservatee is whether he or she is capable of completing an affidavit of voter registration.

The judge gave an example of a mother who told the judge: "That's not a problem. I can fill out the form for him." Having said that, the judge began to laugh, adding: "That's not the way it works." Following his lead, the audience began to laugh. The judge then moved on to another topic.

I did not find the story amusing or educational. Not only was it misleading, it was detrimental to effective advocacy by PVP attorneys. The "take away" from the judge's remarks was that if limited conservatees cannot fill out the forms themselves, they should be disqualified from voting.

The judge must be unaware of federal voting rights laws that restrict the authority of states from limiting the voting rights of people with disabilities.

People with a disabilities may have someone else help them fill out a voter registration application or help them fill out a ballot in an election. Also, states may not use any test or device to make someone show they can read or write or show they can interpret or understand any matter. So it would be a violation of federal law for a probate court make someone prove they can understand and complete a voter registration application on their own.

Another problem with this seminar is that not once did any speaker mention what probate courts and attorneys must do to comply with the Americans with Disabilities Act – in court or out of court – in a limited conservatorship proceeding. Not one word on reasonable accommodations under the ADA.

Limited Conservatorship Reform in California: Several Areas That Need Improvement

by Thomas F. Coleman

Education of Parents

Most limited conservatorships are initiated when parents or family members of an adult with a developmental disability file a petition with the Probate Court. Some 90% of these petitions are filed "pro per" which means the petitioner does not have an attorney.

The law does not require "pro per" petitioners to educate themselves about the duties of a conservator and the rights of a conservatee prior to initiating a limited conservatorship proceeding. In Los Angeles County, educational programs on these topics are not available.

Bet Tzedek Legal Services does offer a Self-Help Conservatorship Clinic, but this is not an educational forum. It is a class that helps people fill out forms. Legal issues are not discussed. Legal questions are not answered. It is strictly a form-filling service.

1. Attending an educational seminar on limited conservatorships should be required, before a petition is filed, for anyone who will be named in the petition as a proposed conservator. The Superior Court could contract with a nonprofit agency, such as Bet Tzedek, Regional Centers, or the County Bar Association, to conduct these seminars. Topics should include: (1) duties of conservators; (2) general rights of conservatees; (3) voting rights of adults with developmental disabilities; and (4) how to assess capacity of a proposed conservatee regarding the "seven powers," especially on their ability to make social and sexual decisions.

Education of PVP Attorneys

Having court-appointed attorneys who are effective advocates for limited conservatees is critical for the rights of adults with developmental disabilities to be protected.

Currently, PVP attorneys are not receiving adequate education and training on issues that often arise in limited conservatorship proceedings. For example, in 2013 there was only one training in Los Angeles County – 3 hours in duration – for PVP attorneys who handle limited conservatorship cases.

2. Attendance at a series of 3 to 5 hour classes should be required before an attorney is placed on the limited conservatorship PVP list. Once on the list, a 5 hour refresher and update class should be required each year in order to stay on the list. Topics should include: (a) constitutional rights of limited conservatees and how to protect those rights; (b) voting rights of limited conservatees and federal laws protecting voting rights of people with disabilities; (c) Americans with Disabilities Act and ADA accommodation requirements for the Probate Court and for PVP attorneys; (d) criteria for assessing client capacities on each of the "seven powers" and how to challenge assessments which are not scientifically valid or not supported by substantial evidence; (e) how to conduct a forensic interview of a client with a developmental disability; (f) ethical rules and professional standards governing the confidentiality of client communications to the PVP attorney and the confidentiality of information gathered by an attorney on behalf of his or her client; (g) how to understand, interpret, and use a "capacity declaration" submitted by a medical doctor or psychologist; (h) understanding the various types of intellectual and developmental disabilities and their impact on daily living and capacity for decisions (Autism Spectrum Disorder, Cerebral Palsy, Fragile X Syndrome, Down Syndrome, Epilepsy, Fetal Alcohol Syndrome, and Intellectual Disabilities (formerly

called Mental Retardation), among others.); (i) understanding various communication methods and behavioral characteristics (j) limits on time allocated to a case and when to ask for more; (k) standards for ineffective assistance of counsel (IAC) as applied to a limited conservatorship case; the right of a client to a "Marsden" hearing to ask for a new attorney or complain about an attorney's performance; (l) appellate rights of clients, including habeas corpus to challenge an order due to IAC.

Replacing the PVP System

The current system for appointing, paying, and monitoring the performance of PVP attorneys is not doing what it should be doing. It gives the appearance of favoritism rather than fairness in the way attorneys are selected. It gives incentives to attorneys to please the judges who appoint them and pay them. And it does not have any quality assurance procedures.

Appointment of attorneys should be done on a fair rotational basis, selecting attorneys on lists that match their skills and training with the complexity of the case. Such lists can also note language abilities that match attorneys with clients who do not speak English. The person who selects the attorney should not have any direct connection with the judge who will make decisions in the case.

There should be some form of quality assurance oversight procedures. This should be done by an entity or person with knowledge of limited conservatorship advocacy and, again, by someone who is not working for the judges who hear such cases.

Payment of court-appointed attorneys should be based on the quality of performance and the quantity of work done. Recommendations for the amount of payment should come from someone knowledgeable about these types of cases. The judge who orders payment to a particular attorney should not be the judge who heard the case, so as not to create an appearance of conflict of interest created by payment decided by someone the attorney would not want to offend by objecting, demanding hearings, or advising the client to appeal.

3. A system similar to that operated by the Los Angeles County Bar Association for appointed attorneys in criminal cases should be adopted for use in conservatorship cases, both limited and general. The Indigent Criminal Defense Appointments Program has been operating successfully for several years. It achieves all three objectives mentioned above: a fair selection process, quality assurance procedures, and a payment method that removes incentives for pleasing judges rather than providing vigorous advocacy. The system could be called the Conservatorship Appointments Program. Perhaps it could be grafted to the current criminal appointments program so that it uses the same administrative mechanisms but with additional staff who have expertise in conservatorship litigation. The Conservatorship Appointments Program of the Los Angeles County Bar Association would select attorneys for specific cases, monitor performance and conduct quality assurance audits, provide trainings, and recommend payments.

Effective Advocacy by Attorneys

In the current system, PVP attorneys are acting in two or three different roles. They often serve as a de-facto court investigator and their reports are even used as substitutes for those of official Probate Investigators. They also may view themselves as the "eyes and ears of the court" with the aim of helping the court resolve cases. They also may act as an unofficial guardian-ad-litem, advocating for what they believe is in the best interest of the client.

4. Court appointed attorneys for limited conservatees should have one role only – vigorous advocacy for the client. They should advocate for what the client says he or she wants. Absent an express wish from the client on any particular issue, they should strongly defend and protect the rights of the client from being diminished or removed. They should be no different than privately retained attorneys. The client's wishes and rights should come first. The fact that they are paid by county funds should not alter their undivided loyalty to the client.

Bet Tzedek

Bet Tzedek performs a valuable service by helping petitioners complete the paperwork needed to obtain an order and letters of administration for a limited conservatorship. However, in the process, the clinics may be inadvertently suggesting that petitioners unnecessarily take rights away from conservatees and improperly seek more authority than they truly need.

5. The Self Help Conservatorship Clinic should not suggest, directly or indirectly, that proposed limited conservatees are unable to complete an affidavit of voter registration (with or without help from someone else). The clinics also should not lump all "seven powers" together as a package deal, or group them together as an attachment to the petition. Each power should be listed separately, with a yes or no box next to it, so that each is considered separately by the petitioner.

Bet Tzedek sometimes provides direct legal representation to petitioners in conservatorship cases that are more complicated than usual. However, the organization does not provide attorneys to represent limited conservatees. The rationale for this policy is that limited conservatees can have court-appointed attorneys at county expense. However, sometimes PVP attorneys are not capable of, or simply do not provide effective representation. The blanket policy of not representing limited conservatees should be reconsidered.

6. Bet Tzedek should sometimes represent limited conservatees upon request in cases that offer an opportunity to create a precedent on important issues such as voting rights, social rights, or sexual rights of people with developmental disabilities. It should also represent limited conservatees, from time to time, in appeals that may set important policy precedents, or in writ proceedings to challenge ineffective assistance by PVP attorneys when that happens. Periodic involvement by such an outside organization, on behalf of limited conservatees, would be a beneficial addition to the Limited Conservatorship System.

Regional Centers

At this time, it appears that the only role that Regional Centers play in limited conservatorship cases is that of assessing the capacity of clients to make decisions regarding the "seven powers." There is so much more these nonprofit organizations can do to protect the rights of their clients who they find themselves the subject of such a proceeding. And even in the role of assessing clients, there are ways Regional Centers can improve.

8. Regional Centers should file capacity assessment reports in a timely manner. Such reports are sometimes filed with the court weeks or even months after the court grants a petition. This is not an acceptable practice, either for the court or for the Regional Center.

9. Regional Centers should do more to protect the right to vote of their clients. Educational materials about the right to vote of people with developmental disabilities should be distributed a few months prior to a client turning 18. Group seminars about the right to vote should be conducted at least every two years, several months before the deadline for registration for a general election.

10. Regional Centers, perhaps through or with the assistance of their statewide association (ARCA) should consult with medical, psychological, and legal professionals to develop criteria and guidelines for assessing each of the seven powers. Training programs for Regional Center staff should be developed and implemented regarding these issues. It appears that currently there are no such guidelines or training programs being used.

11. Regional Centers should become acquainted with the various federal laws governing the right to vote as they apply to people with disabilities. These protections should be considered as Regional Center staff include in their assessment report an opinion on the capacity of the client to complete a voter registration affidavit, with appropriate help. Currently, Regional Center reports are silent on the issue of voting capacity.

Disability Rights California

A nonprofit legal services organization known as Disability Rights California receives state and federal money to protect the rights of people with developmental disabilities.

Some of this money is channeled to DRC through the State Department of Developmental Services. The annual budget of DRC is nearly $20 million.

DRC employs a staff of Clients Rights Advocates whose role is to protect and advocate for the rights of Regional Center clients. Staff members are generally housed with Regional Centers, even though they are employed by DRC.

These Clients Rights Advocates currently play no role in the Limited Conservatorship System. Apparently this is so because such a role is not part of the contract of DRC with the State Department of Developmental Services. Perhaps this absence from contractual duties is why none of the CRA's housed in the seven Regional Centers in Los Angeles County attended the first conference on limited conservatorship sponsored by the Disability and Abuse Project.

12. Disability Rights California, and its Clients Rights Advocates, should play an active role in monitoring the Limited Conservatorship System and in advocating for Regional Center clients when their rights are threatened or are actually infringed. Clients Rights Advocates should be informed when social, sexual, marriage, or voting rights of Regional Center clients are in jeopardy. They should advise attorneys at DRC when this occurs and the attorneys should intervene, as an interested agency or as an amicus curiae in the trial court. DRC should also file a "next friend" appeal or writ when it learns that the constitutional rights of a limited conservatee have been violated or the conservatee has not received effective assistance of counsel. Such involvement by an outside agency funded by the Executive Branch of government would have a beneficial effect on the Limited Conservatorship System which, up to now, is not monitored by any agency outside of the Judicial Branch.

Los Angeles Superior Court

The Los Angeles Superior Court is aware of but has not cooperated with the study being conducted by the Disability and Abuse Project.

One short interview with the Presiding Judge of the Probate Court was granted. But subsequent requests of the Project for interviews with key personnel received no response. A formal request for information and access to records, per Rule 10.500, received a cursory response which mostly declined to provide information or access to records. The minimal information that was provided to the Project was ambiguous.

13. The Superior Court should welcome inquiries from advocacy organizations about its operations. Interviews should be granted. Information about fiscal matters, policy, procedure, and administrative practices should be shared without reluctance or resistance. More transparency is needed.

Adult Protective Services

Complaints of abuse of adults with developmental disabilities are reported to either Adult Protective Services (APS) or to the Sheriff. Each of these agencies cross reports complaints to the other, as required by law.

However, a top management official at APS has stated that APS is not require to cross report to the Probate Court in cases where the alleged victim is a limited conservatee. This may be done as a matter of "best practices" but the agency does not consider it to be mandatory.

14. The State Council on Developmental Disabilities, or a state legislator, should ask the Attorney General or the Legislative Council or both for an opinion on the APS duty to report to the Probate Court. If the opinion concludes that mandatory reporting is not required, then legislation should be introduced to make it mandatory. Limited conservatees need such additional protection.

Involvement by Other Agencies is Needed

15. The Limited Conservatorship System is not receiving attention from the Legislature, especially the judiciary committees in each house. It is not being monitored by the State Department of Developmental Services. Nor has the Department of Justice given this system any attention.

16. The State Council on Developmental Services has a mandate to protect the rights of children and adults with developmental disabilities, to monitor agencies that provide services to this constituency, and to seek systemic changes where needed. Despite this mandate, the State Council has not yet focused any of its attention or resources to the Limited Conservatorship System.

17. The Judicial Council of the State of California created a Task Force focusing on the General Conservatorship System in 2006. It is time for such an inquiry into the Limited Conservatorship System – and it should not require a series of articles in the Los Angeles Times for it to initiate such a review.

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Other Conference Materials:

www.disabilityandabuse.org/conferences

Ten Statewide Concerns About the Limited Conservatorship System

by Thomas F. Coleman

State Constitutional Requirement
– Uniform Operation

Article IV, Sec. 16 says that laws of a general nature (such as the Probate Code) have uniform operation.

Court Appointed Attorneys
– Scope of Representation

The Probate Code entitles limited conservatees to a court-appointed attorney. This is not uniform if some attorneys are doing "stated wishes" advocacy while others are doing "best interests" advocacy. The Presiding Judge in Los Angeles tells attorneys it is up to them as to which type of advocacy to give. The judge from Orange County said that "best interests" advocacy is not allowed and that there is a California Supreme Court decision that requires "stated wishes" advocacy. This is not uniform operation of law.

State Bar Standards
– Confidentiality and Loyalty

Confidentiality and loyalty are ethical standards for the entire state. A trainer at a recent PVP training told attorneys "you can't rat out your client." And yet, attorneys are told to use the PVP report form on the LA Probate website to advise the court of their findings regarding the client. On that form, they "rat out" their client by disclosing confidential information and by sharing information adverse to their client retaining rights. I have not found any clear guidance from the State Bar as to the role of court-appointed attorneys in conservatorship cases, despite the assertion of a committee member that such guidance exists. If it exists, why are the attorneys in Los Angeles violating these standards. Since the practices of attorneys in Los Angeles violate the duties of confidentiality and loyalty, it is clear that laws of a general nature (state bar standards) are not uniform in operation.

California Rules of Court
– Attorney Qualifications

Court form GC-010 must be filed by attorneys who want appointments to represent conservatees or proposed conservatees. The form is premised on Rule 7.1101(b). The minimum standards of this rule and as stated in this form are totally inadequate, especially for attorneys who will represent people with developmental disabilities. A private attorney qualifies by having represented three LPS conservatees, proceedings which are completely different from limited conservatorships and which usually have involved a conservatee without a developmental disability.

Another way to qualify is by having done three of five tasks, including: (1) having prepared several estate planning documents; (2) having represented fiduciaries; and (3) having represented a petitioner in two contested probate conservatorships. None of these three things shows qualifications to represent a proposed conservatee who has a developmental disability.

There are absolutely no educational or training requirements at all, especially none concerning interviewing people with developmental disabilities, complying with ADA requirements, abuse of people with developmental disabilities, voting rights laws, Lanterman act rights, or constitutional rights of any nature. These state rules on attorney qualifications are TOTALLY inadequate and allow for a lack of uniform operation of law.

Department of Developmental Services
– Oversight of Regional Centers

The Probate Code requires Regional Centers to assess clients and file reports in limited conservatorship cases. Judges must consider these reports in making decisions. There are 21 Regional Centers and each one is a separate corporation. We have been told that each one is free to do as it wishes in terms of these evaluations and reports.

Although Regional Centers are supposed to be accountable to the Department of Developmental Services, from whom they receive their funding and with whom they contract, it appears that DDS has no regulations for the evaluation criteria, the number of hours needed for evaluations, the minimum qualifications for evaluators, or the training standards for evaluators when it comes to limited conservatorship

evaluations. Laws of a general nature are not operating uniformly in this area.

ARCA
– Not Coordinating Regional Centers

Regional Centers have a voluntary statewide association known as the Association of Regional Center Agencies. We reached out to them on the problems with the limited conservatorship process. We invited them to our conferences. They showed no interest at all.

Court Investigators
– Local Control and Not Statewide Uniformity

Court investigators are required by statute to investigate initial filings in limited conservatorship cases and conduct biennial reviews. The statute must assume competency in the performance of their duties. Some local courts, such as in Los Angeles, completely stopped using investigators in initial filings. This function stopped for at least three years. Other counties did not stop using investigators – thus a breach of the uniform operation requirement of the state constitution, plus a violation of statutory requirements. A review of training materials used in Los Angeles to train investigators shows a total deficiency of training for their role in limited conservatorship cases. Some courts use a training manual published in 2009 by the state court investigators association. That manual is inadequate in many ways. It appears that the court investigator association is all but defunct. A review of its website shows that most pages have not been updated for years.

Judicial Education
– A Complete Void

From the manner in which some local judges are functioning, it must be assumed that they have not been educated about the administration of justice involving people with developmental disabilities. There appears to be no training on federal voting rights laws, on federal ADA requirements, on Lanterman Act rights, on the constitutional rights of conservatees, on professional standards and ethics for attorneys, or on the basics of developmental disabilities. They may know a lot about wills and trusts, or general conservatorships involving money disputes regarding seniors, but when it comes to *Developmental Disabilities 101*, they are not educated. Any judge who is educated has received the education on his or her own. Judicial functions should be uniform throughout the state. They are not, and a lack of uniform judicial educational standards is part of the problem.

Voting Rights
– Hit and Miss

Federal voting rights laws govern the entire state. The Elections Code governs the entire state. The voting disqualification provision in the Probate Code is a statewide provision. Yet the disqualification of limited conservatees from voting appears to be a function of the individual interpretations of the law by judges, attorneys, court investigators, and petitioners. Until the passage of AB 1311, state law was extremely ambiguous. Now there is some clarification, in policy, but who is going to educate the judges, attorneys, and other participants about this clarification? Who will educate them about the "literacy test" prohibition of federal law? The Presiding Judge of Probate in Los Angeles told a group of PVP attorneys that if they want to raise a federal law issue, they should file a federal lawsuit. What? This statement is completely unacceptable. These attorneys can raise such an objection in state court by objecting to a proposed disqualification order on federal constitutional grounds and then by appealing from an adverse order. Who is training public defenders or court-appointed attorneys on how to defend the voting rights of their client? Nobody is.

Lack of Oversight

Every other part of the judicial system has some oversight, some checks and balances. Sometimes the checks come from an executive branch agency involved in the process, such as District Attorneys or Public Defenders involved in LPS conservatorships. Other times it comes from the appellate process, so appellate judges can publish decisions that correct judicial or attorney errors or abuses. There are no executive branch agencies involved in limited conservatorships, so there are no checks and balances from the executive branch. There are no appeals in limited conservatorship cases, especially not by court-appointed attorneys whose appointments expire before an appeal can be taken. We have all heard that "power corrupts and absolute power corrupts absolutely." Probate Court judges have absolute power – and they know it.

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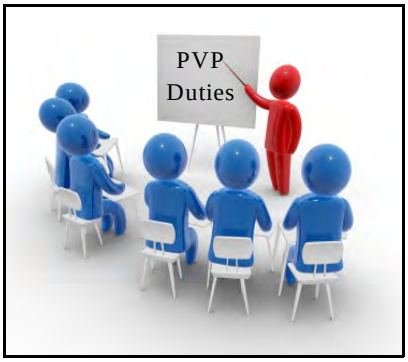
A Missed Opportunity

Training Program Fails to Help Attorneys Fulfill Ethical Duties and Constitutional Obligations to Clients with Developmental Disabilities



Thomas F. Coleman
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Spectrum Institute

September 20, 2014
www.disabilityandabuse.org/pvp-training

Preface

The Disability and Abuse Project has been engaged in an intense study of the Limited Conservatorship System in California, with a special focus on the Los Angeles Superior Court.

We engaged in independent research by reviewing court records, interviewing litigants, observing court proceedings, consulting experts, having conversations with judges, attending training seminars, and convening conferences.

Our work has resulted in a series of reports in which we have revealed our findings and made a significant number of recommendations to improve the system. We shared our concerns with officials and agencies, including: Chief Justice of California, Attorney General of California, Director of the California Department of Developmental Services, Board of Trustees of the State Bar of California, Presiding Judge of the Probate Court in Los Angeles, and the Public Defender of Los Angeles County. We also reached out to the State Council on Developmental Disabilities and its Area Boards, as well as the Association of Regional Center Agencies (ARCA) and the 21 Regional Centers.

Despite our best efforts, little has changed. In fact, in terms of the training of court-appointed attorneys, things have become worse.

This report examines the most recent Training Program conducted by the Probate Court with the assistance of the County Bar Association. The training program failed to help attorneys gain "comprehension of the legal and medical issues arising out of developmental disabilities" as required by local court rule 10.84.

Our next outreach will be to the Board of Supervisors of Los Angeles County. They have been paying the fees of these court-appointed attorneys with no questions asked and with no quality assurance controls in place. Instead of enabling poor performance with no-strings-attached fee payments, the Supervisors have the power to turn things around by imposing conditions on the funding of these attorneys to help insure that the intended beneficiaries of this funding receive effective assistance of counsel.

To use a phrase coined for the Watergate film *All the President's Men*, the next step for those of us seeking reforms in the Limited Conservatorship System is to "follow the money."

Contents

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A Missed Opportunity

Training Program Fails to Help Attorneys Fulfill Ethical Duties and Constitutional Obligations to Clients with Developmental Disabilities

by Thomas F. Coleman

The Los Angeles County Bar Association and the local Probate Court have come under heavy criticism for failing to properly educate court-appointed attorneys who represent clients with developmental disabilities in limited conservatorship cases.

Los Angeles Superior Court judges appoint limited conservators in more than 1,200 cases per year. In the overwhelming majority of these cases, the adults who become limited conservatees lose their right to make decisions regarding their residence, education, finances, health care, marital status, sexual activities, and even their social relationships.

Although the proceedings are called "limited conservatorships" there is really nothing limited about what happens in most cases. In addition to losing these "seven powers," about 90 percent of these adults are also stripped of their right to vote.

Petitions for limited conservatorships are usually initiated by parents who routinely ask the court to transfer authority over all decisions from their adult sons and daughters to them. They also routinely make allegations in the petition that result in the loss of voting rights for these proposed limited conservatees. The overwhelming majority of these petitioners are not represented by an attorney.

The law requires the court to appoint a probate investigator to screen these cases to determine if a conservatorship is needed, if it is the least restrictive alternative for providing protection to the proposed conservatee, whether any of these seven powers should be retained by the adult in question, and whether the person seeking to be appointed as conservator is a risk to the adult and whether someone else would be a better choice for this position of trust and authority.

Unfortunately, court investigators have not been appointed in limited conservatorship cases for the past few years. Why? Because a former Presiding Judge of the Probate Court wanted to save money and eliminating these investigators was the answer. Presiding Judges in subsequent years, including 2014, have continued this practice.

As a result, the only person who might oppose the need for a conservatorship, or the transfer of any of the seven powers, or the loss of voting rights, or the choice of conservator, is the attorney appointed by the court to represent the proposed conservatee.

When a petition for a limited conservatorship is filed, the law requires the court to appoint an attorney to represent the proposed conservatee. In some counties, this role is filled by the Public Defender.

In Los Angeles County, the Probate Court has created a panel of attorneys from which it selects a lawyer to represent a client in a specific limited conservatorship case. This is called the Probate Volunteer Panel and the lawyers are commonly called "PVP Attorneys."

Court rules require that attorneys who represent clients in limited conservatorship cases "must have comprehension of the legal and medical issues arising out of developmental disabilities and an understanding of the role of the Regional Center." (Local Court Rule 10.84)

Since these clients have a statutory right to counsel, they also have a due process right to have an attorney who provides "effective assistance." To fulfill these obligations, PVP attorneys must acquire skills necessary to investigate, interview, and raise legal objections relevant to this specialized area of law.

No doubt about it, this is a very specialized area of law – one that requires attorneys to learn and acquire knowledge and skills that are not required in garden variety cases.

The Lanterman Act, on which the Probate Code's regulation of limited conservatorships is based, guarantees that adults with developmental disabilities have the same statutory and constitutional rights as adults without disabilities. It requires that a limited conservatorship be the last alternative, not the first choice for protecting a vulnerable adult. It insists that such adults should retain as many rights as possible.

The Probate Code sets a high evidentiary standard for the granting of petitions for limited conservatorship and for the transfer of any of the seven powers. Clear and convincing evidence must be shown before a judge grants such requests.

On each of the seven powers, such evidence must show that the adult in question lacks the capacity to make decisions in that area. For example, before authority over social decisions is transferred from the adult to the conservator, there must be clear and convincing evidence that the adult lacks the capacity to decide who to be friends with or who the adult does not want to socialize with.

Taking away the right to make such social decisions obviously implicates federal and state constitutional rights of freedom on speech, freedom of association, liberty, and privacy. A training designed to educate attorneys on how to be effective advocates for proposed limited conservatees surely would discuss the rights afforded by the Lanterman Act and relevant constitutional case law that may support challenges to the loss of constitutional rights.

There must be criteria for deciding whether a person has or lacks capacity to make decisions in each of these seven areas. What are those criteria? Who is qualified to render a professional opinion on capacity in each of these seven areas? What type of objections can an attorney raise to whether this criteria is supported by substantial evidence or whether the person rendering the opinion is qualified to do so? Certainly a training of attorneys who represent proposed limited conservatees would address these important medical, psychological, and legal issues.

The role of PVP attorneys, and the need for effective representation, is critical to the integrity of the limited conservatorship process. The PVP attorney is generally the only lawyer in the courtroom on these cases. Most parents are not represented by counsel. Although the law mandates their involvement, court investigators have been omitted by an ex-parte judicial fiat.

The PVP attorney is all there is to keep the system honest, to ensure that constitutional and statutory rights are protected, to determine that lesser restrictive alternatives won't work, to analyze whether capacity assessments are accurate, and that clear and convincing evidence supports these determinations.

Once the court grants a limited conservatorship petition, and the powers are transferred and voting rights determined, the role of the PVP attorney is terminated by court order. Clients are not advised of their right to appeal. Even in rare cases when one of the parents objects to the court's order as violating the rights of their adult child, the parent is not allowed to challenge the order on appeal. The parent is said to lack "standing" to appeal. (In re Gregory D. (2013) 214 Cal.App.4th 62, 67-68) Therefore, the order goes unchallenged and a conservatee suffers.

So in most cases, there is only one opportunity to "get it right" and that is when the PVP attorney is representing the client before the petition is granted. This reality underscores the importance that PVP attorneys be well trained in "the legal and medical issues arising out of developmental disabilities."

This requires trainings to focus on statutory and constitutional rights, evidentiary requirements, and objections that can challenge a conservatorship or the transfer of particular powers. Seminars need speakers skilled on these issues. In-depth analysis and debate, not surface discussions, are needed.

The Advertised Program

The Los Angeles County Bar Association sent out an email on August 18, 2014, announcing a "Mandatory PVP Training Program for Limited Conservatorship Proceedings."

The description of the seminar said: "This program provides training and education to PVP attorneys representing proposed conservatees in limited conservatorship proceedings. It is the course required by LASC Local Rule 4.124(b)(5) and helps to satisfy the educational requirements set forth in CRC 7.1101. The program will give an overview of the duties of PVP attorneys in limited conservatorship proceedings, with emphasis on voting rights, reasonable accommodations, confidentiality, Probate Code 2351.5 powers, and interviewing and communications skills."

I had attended a "Mandatory/Refresher PVP Attorney Training Program" in April 2014 and was sorely disappointed by the presentations. I had also reviewed the handouts given at trainings in prior years and was likewise disappointed. In response, I wrote a review of the inadequacy of these training programs and pointed out issues that had been neglected. The review was sent to the Presiding Judge of the Probate Court (who mandates and oversees the trainings) and the Trusts and Estates Section of the County Bar Association (that produces the trainings under contract with the court).

My review complained that many important issues had been ignored in prior trainings, such as the constitutional and statutory rights of limited conservatees, voting rights, reasonable accommodations of disabilities, ethical duties of confidentiality and loyalty, interviewing and communication skills with clients who have developmental and other disabilities, and assessments of capacity in connection with the "seven powers."

When I saw the agenda for the new training, I was elated. Most of the topics I had highlighted in my review were scheduled to be discussed.

I immediately signed up to attend the training program. I was eager to observe the PVP attorneys receive in-person training and to read the printed material in the handout they would receive.

Then I called my colleague, Dr. Nora J. Baladerian, a clinical psychologist who provides therapy to clients with developmental disabilities. She also conducts training programs for attorneys, law enforcement, and service providers on issues involving developmental disabilities.

Nora was especially interested in the agenda item on interviewing and communication skills since she does trainings and has produced written materials and training videos on this topic. So she registered to take the PVP training.

Nora and I were both optimistic about the training. We sincerely hoped that it would contain valuable information that would enhance the ability of PVP attorneys to provide effective representation to their clients with developmental disabilities.

Effective representation would require these attorneys to raise any arguably meritorious issues in order to protect the procedural, statutory, and constitutional rights of their clients. It would require them to understand the dynamics of each of the various disabilities their client may have, to learn how to interview such clients effectively, to evaluate the assessments of capacity on each of the seven powers, and how to raise objections and preserve issues for any potential appeal.

We knew that there was no way that such issues could be competently presented in a three-hour seminar. At a minimum, a series of 8 three-hour presentations would probably be needed. But if the handout materials the PVP attorneys received at this training program included the right documents, this training could lay the groundwork for the series that would be necessary. We remained optimistic.

On September 13, we drove to the offices of the Bar Association, registered, and received the packet of materials the organizers had prepared.

The Training Program

About 80 attorneys attended the training. About 20 percent of them indicated they had never handled a limited conservatorship case before, so for them this training was essential. The others had handled such cases, but I knew that in previous trainings they had received incorrect information on some issues and had never been trained on other vital issues. So for them, this training was important too.

What follows is my review of the overall program, the various presentations, and the handout materials. The review compares the content that was delivered with the content of the agenda that was advertised. It also discusses what the content of a competent presentation would be on each agenda item.

Unfortunately, once the handout was reviewed and presentations were heard, optimism was shattered and hope was replaced with profound disappointment. The handouts were woefully inadequate. Some agenda items that were advertized were either not covered at all or were handled in a surface and perfunctory manner. Information presented contained statements that were incorrect and sometimes contradictory.

To be successful, a training program would have to teach attorneys to provide effective representation on a variety of legal, medical, and psychological issues. Raising arguably meritorious issues would require attorney to spot such issues first. A training that would help attorneys meet due process standards for effective advocacy would help them identify potential deficiencies in the system itself as well as analyze procedural and substantive matters in individual cases.

At a minimum, a training program would help attorneys to "have comprehension of the legal and medical issues arising out of developmental disabilities and an understanding of the role of the Regional Center," as required by court rules.

This training did an adequate job of giving the attorneys an "understanding of the role of the Regional Center," but failed miserably in helping them to understand and comply with the due process requirement of effective representation and their obligations under the court rule for "comprehension of the legal and medical issues arising out of developmental disabilities."

Interviewing and Communication Skills

None of the trainings of PVP attorneys conducted in the past few years has included a presentation on interviewing clients with developmental disabilities. This is a critical function for PVP attorneys, perhaps the most important task of all.

So when I saw "interviewing and communication skills" on the advertisement for the seminar, I was very pleased – especially since we had criticized the court for not including this issue in prior trainings.

The online description of the program listed someone with a Ph.D. as a presenter. Since he was the only presenter who was not an attorney and not a Regional Center employee, I assumed that he had been selected to make the presentation on interviewing and communication skills.

I asked my colleague, Dr. Baladerian, if she knew of him. She said she had heard his name but really did not know anything of his expertise on this topic. She searched for information about him online but the only thing she could find was that he was a licensed psychologist. No curriculum vitae. No website. No published articles. And really no mention of him professionally in any way. It seemed that this psychologist had kept a very low profile.

I called his office and left a voice mail message, asking him to call me back. I wanted to suggest that he contact Dr. Baladerian who often does presentations to attorneys and first-responders on this topic. He would benefit from brainstorming with her. He never returned the call.

When we looked in the printed program at the seminar, we saw this segment listed for a 30–minute

presentation by the psychologist. Nora and I looked at each other and grimaced. There is no way that such a presentation could be done in a professional and effective manner in that short time frame. When Dr. Baladerian presents on this topic the workshop lasts two days.

We looked in the program for the biographical summary of presenters, hoping to learn more about the credentials of the psychologist. Unfortunately, the program contained biographies of presenters from the PVP training given in April 2014, but nothing about the presenters for this training.

When I pointed this out to the clerical staff, an apology was soon made to the group and a new handout with biographies was distributed. The new pages contained no information on this psychologist. So everyone was about to hear a presentation from a speaker about whom we knew nothing.

For 30 minutes, the presenter read his remarks from a printed script, looking up at the audience from time to time. His presentation consisted of his own story – from childhood to the present time. He talked about his personal experiences in interacting with people who have developmental disabilities.

As for interviewing clients with developmental disabilities, his message was simple. Treat them like people.

The attorneys assembled in the room should have felt extremely disappointed. It was an interesting personal story, but they had paid good money to learn about and to acquire skills in interviewing and communicating with clients who have cognitive, emotional, and communication disabilities. They received no information on that topic.

The seminar moderator thanked the speaker, but did not apologize to the audience that the presentation did not respond to the agenda. People politely pretended that all was well.

Dr. Baladerian and I were extremely disappointed. I was embarrassed for the conference organizer, knowing that he had to be aware that the presentation did not deliver on what had been promised.

Nora and I wondered how this all came to pass. What was the presenter told by the organizers? What was he asked to speak about? What were his credentials and was he properly vetted?

Nora offered to call him so she could inquire how he came to be a speaker and why he felt that his presentation would be acceptable, given the fact that a specific topic was advertised.

A few days later, Dr. Baladerian had a phone conversation with the presenter. She learned that he has a general clinical practice. He does not have experience or expertise in treating clients with developmental disabilities. He has never made a presentation on interviewing people with developmental disabilities.

Apparently, he was selected to be a speaker because he has two daughters with developmental disabilities and he knows someone at the County Bar Association.

Considering the importance of the topic, and the need for PVP attorneys to acquire knowledge about interviewing clients with developmental disabilities, the speaker should have been properly vetted. A person should have been chosen with academic credentials and professional experience in this area.

If the topic was how to conduct brain surgery for tumors, and the audience was medical doctors who wanted to learn about such surgery, a speaker would not be chosen because he was a family practitioner with a child who had undergone brain surgery. A conference organizer would not ask someone a personal favor to speak on a topic for which they were not qualified. Vetting would be done and a surgeon with experience would be selected to speak.

The Limited Conservatorship System in California was created more than 30 years ago. That system processes more than 5,000 cases each year throughout the state. Considering these facts, it is astound-

ing that educational materials do not exist specifically for court-appointed attorneys on how to effectively interview and communicate with clients who have intellectual and developmental disabilities. Apparently they don't.

Therefore, the next best approach would have been for the seminar organizer to hand out materials on the subject but which were developed for other legal contexts, such as interviewing victims of crimes or representing defendants with such disabilities in criminal cases. Some of the information presented in such materials would be relevant and helpful to PVP attorneys in their interviews and other communications with their clients.

For example, the Journal of the National Center for the Prosecution of Child Abuse has an article titled "Forensic Interviews of Children Who Have Developmental Disabilities." The Office for Victims of Crime of the United States Department of Justice has a free DVD and a guidebook that explain "Techniques for Interviewing Victims with Communication and/or Cognitive Disabilities."

There is a powerpoint presentation available online, prepared by a professional training and consulting organization, on "Effective Interviewing and Communication with Children with Disabilities." Although it applies to children, it contains valuable information that would pertain to adults with such disabilities as well.

The Florida Bar Foundation produced a handbook for defense attorneys titled "Developmental Disabilities and the Criminal Justice System." One section discusses communicating with an individual with an intellectual disability. Another focuses on communicating with a client who has autism.

Unfortunately, no resource materials on this topic were given to the attorneys who attended this training program. All they walked away with was the story of one psychologist about his experiences with people with developmental disabilities. Since it was read by the presenter, it could have been given to the lawyers rather than making them sit for a half hour to listen as the presenter read it to them.

It is amazing, since effective communications between attorney and client are critical to competent representation, that the Bar Association has not paid to have materials on this subject developed for training programs.

The Association charges attorneys for the training programs but apparently does not pay its presenters. Therefore, each training program probably has a financial surplus. Some of that surplus could be used to pay experts to develop training materials and perhaps even pay experts to conduct trainings that are professionally prepared and that are delivered in a sufficiently long time frame.

As it now stands, we are left with a situation where court-appointed attorneys have not received any formal training on how to interview or communicate with clients who have cognitive and communication disabilities. They did not receive proper training at the most recent seminar nor did they at prior trainings.

Attorneys must now fend for themselves, leaving to chance whether clients with developmental disabilities receive effective assistance of counsel.

Disability Accommodation

Reports issued by the Disability and Abuse Project have criticized both the Probate Court and the Bar Association for failing to educate PVP attorneys about the need to provide accommodations to clients who have physical and/or intellectual and developmental disabilities.

Previous trainings made no mention of the ADA and its application to the court system and to attorneys who represent clients with disabilities. So I was pleased when I read in the advertisement for the Mandatory PVP Training that the agenda included the topic of "reasonable accommodation."

I wondered who the presenter would be and whether the conference planners would reach out to Angela

Kaufman for suggestions on how to educate attorneys on this topic. Angela is the ADA Compliance Officer for the City of Los Angeles.

The conference planners knew that Angela had attended a Roundtable Conference on Limited Conservatorships earlier this year. Because she attended that conference, it was clear that she was interested in the topic of ADA accommodations and modifications as applied to limited conservatees.

When I contacted Angela, she said that no one from the Probate Court or the County Bar Association had approached her about the PVP Training Program. Again, I wondered who the presenter would be and how he or she would train the attorneys.

When Nora and I looked at the agenda in the printed program, we discovered there was no specific presentation on disability accommodation. So we listened attentively to each of the several presentations to see who would mention the topic and what they would say about it.

Disability accommodation was mentioned briefly, perhaps for no more than two minutes, in the presentation of an attorney on "The Role of the PVP Attorney in Limited Conservatorships."

He mentioned that attorneys should find out how their client communicates in order to take appropriate steps to accommodate their needs. He referred to court form MC410 which an attorney can use to request a disability accommodation from the court staff for times when the client is in court. A copy of the form was not included in the materials he supplied in the printed program.

Speaking of his materials, his handout was titled "PVP Attorney Considerations for Persons with Special Needs." Despite the title, the content appears to be something that had been prepared for another purpose.

Much of the information in his handout was not relevant to limited conservatorships. For example, there was information on guardianships, general conservatorships, conservatorships of the estate, special education, special needs trusts, estate planning, and government benefits. Of the eight pages, only one was directly relevant to the topic of limited conservatorships.

The presenter had not included written materials on the Americans with Disabilities Act, its application to the court system, its requirements on practicing attorneys in the delivery of services to their clients, or the consequences to attorneys for failure to give reasonable accommodations. Either he had not been asked to make a presentation on disability accommodation or he was asked to do so but did not include this topic in any meaningful way.

Judge Levanas mentioned disability accommodation for about two minutes in his presentation on the issue of voting. He made reference to the court form, MC 410, and said the court had a compliance officer. He mentioned assisted technology and sign language interpreters. He emphasized that people are entitled to have someone assist them in completing an affidavit of voter registration. That was it. He devoted about two minutes to disability accommodation in a most general way.

With Judge Levanas on the voting panel was an attorney who spoke about the voting registration process. In that context, the attorney said that conservatees are entitled to have help in registering to vote and that the Regional Center can help them. There were materials from Disability Rights California that people with disabilities are entitled to help in registering to vote and in the voting process itself.

Other than the mention of voter assistance, and a brief mention of form MC410, the topic of disability accommodation was not covered in any meaningful way by any presenter. It was advertised in a manner that lead me to believe that there would be a special presentation on that topic. It certainly deserved a separate presentation.

Like the topic of interviewing and communication with clients who have developmental disabilities, the subject of accommodations for the clients of lawyers

– in and out of court – could consume an entire day or more to be done responsibly. There is just so much area to cover.

Legal requirements and consequences for failure to provide disability accommodations would need to be addressed. Applicable state and federal law would be discussed. How the law applies to the court system itself would be examined. How it specifically applies to attorneys in their interactions with clients would be a major focus of a presentation. Adverse consequences to attorneys who do not comply properly, including complaints to the State Bar, lawsuits against them in state court, and actions against them by the United States Department of Justice would be included.

Then there would be a lengthy and detailed explanation of the various types of physical, cognitive, and communication disabilities, how they affect clients, and how those specific disabilities can be accommodated. This portion of the presentation alone could consume a few hours.

Even with a cursory presentation, perhaps a brief overview of the issues and an outline of what a longer training would entail, a presenter could have given the attorneys printed materials they could study after the training. Such materials are plentiful.

The printed program could have included a nine-page journal article titled "How to Make Your Lawfirm Accessible to People with Disabilities." Published in 2011 by the State Bar of California, it includes information on how the ADA and its California counterpart apply to lawfirms. It explains how reasonable modification of policies and practices is required by lawfirms. It contains a wealth of information, and cites many authorities in the 59 endnotes.

It could have included an article from a special disabilities publication of the American Bar Association, released just last year, titled "Serving Clients with Disabilities: An Accessibility Guide for Lawfirms." The article was co-written by Michelle Uzeta, a disability rights lawyer who practices right here in Los Angeles.

The ABA article contains valuable information on sensory disabilities, mobility disabilities, mental health disabilities, even on cognitive disabilities.

There is a lengthy and detailed analysis by the Oregon Attorney General on whether the court system must provide a "process interpreter" upon request to assist a litigant with a cognitive disability to understand the proceedings. The information in this analysis could be very helpful to PVP attorneys who want to increase the prospects of their clients understanding what is going on in court in a limited conservatorship proceeding.

Considering the special needs of clients in limited conservatorship proceedings, the critical importance of accommodating those needs, and the failure of prior trainings to address the requirements of the Americans with Disabilities Act to PVP attorneys, the meager few minutes allocated to disability accommodation at the current training was appalling. What is especially disturbing is that resource persons, such as Angela Kaufman and Michelle Uzeta, were not utilized.

Capacity Assessments and Determinations

There are two critical aspects involved in limited conservatorship proceedings. One is process. The other is outcome.

We want the process to have integrity. Having effective assistance of counsel is essential to the integrity of the process.

We want the outcome to be correct. Having accurate capacity assessments and determinations are necessary in order to have a correct outcome.

A program to train attorneys on so-called "2351.5 powers" must be designed to help attorneys understand the criteria required for a capacity assessment on each of the seven powers, who is qualified to make such assessments, the process used to assess capacity on a specific power in a particular case, and

how to challenge improper assessments.

Presenters for a training on capacity assessments must be carefully chosen. Not only must they have knowledge of legal, medical, and psychological criteria and evaluation processes, they must also be able to discuss strategies for challenging shoddy evaluations and inadequate reports to the court.

Each Regional Center is a separate non-profit corporation. Each has its own polices and practices. Therefore, an employee of one Regional Center may be able to discuss the practices of that particular agency, but he or she lacks the knowledge needed to discuss or evaluate the practices of a sister agency.

Furthermore, Regional Center employees are not going to disclose the flaws and weaknesses in the processes used by their agency or advise attorneys on how to challenge those processes. The employees have a vested interest to discuss the issues in a way that puts the agency in the best light possible.

An attorney for a Regional Center is not going to reveal deficiencies in the evaluation process used by the agency he or she represents. In discussing section 2351.5 powers and capacity evaluations, the Regional Center attorney will not speak as an advocate for the rights of the proposed conservatee. That attorney's job is to protect the interests of his or her client – the Regional Center.

So while it is appropriate to have the Executive Director and the attorney for a Regional Center speak on the issue of 2351.5 powers, the most they can do is to discuss the process used by the specific Regional Center they work for.

Their role is not to train attorneys for proposed conservatees on how to be critical of evaluations, how to challenge the credentials of the evaluator, and how to cross-examine those who submit Regional Center reports to the court. But those are the very issues that are essential to a proper training of attorneys on section 2351.5 powers.

After listening to the presentations of the Regional Center attorney and the Regional Center Executive Director, the PVP attorneys had a general idea of what this one Regional Center does in evaluating the capacities of proposed conservatees. A very general and vague presentation was made on this process. But no detail was given on the exact criteria used on each power, on whether there is a manual used, or whether staff receives trainings on this.

The general impression I received from this presentation was that sometimes a core staff meeting is held, sometimes not. IPP and IEP reports and other client records are reviewed by someone, but the credentials of that someone were not disclosed. It was all very vague and nonspecific.

The presentation of Judge Cowan involved sidebar comments, throwing out questions to the other two presenters from time to time. He noted various inconsistencies in Regional Center recommendations, such as a recommendation to take away the right to contract but to allow the client to retain the right to marry. When questioned about the inconsistency, and that marriage is a contract, the Executive Director said the Regional Center thinks of marriage as a form of romance, a relationship type of thing, but not as a contract. The level of analysis was just too casual for a legal training program for lawyers.

Someone should have mentioned, but did not, that PVP attorneys can ask the court to appoint a psychologist or psychiatrist under Evidence Code Section 730 to evaluate the capacity of the client in any or all of the seven areas under scrutiny – decisions regarding residence, medical treatment, finances, education, marriage, social relationships, and sexual activities.

A professional training of legal advocates on how to evaluate the adequacy of capacity assessments and how and when to challenge them was what PVP attorneys needed – not a vague presentation on how one Regional Center generally operates.

It was emphasized that each Regional Center functions differently. Therefore, the training session should have provided information on how each of

the seven Regional Centers in Los Angeles County make evaluations and submit reports on which of the seven powers should be retained and which should be transferred to a conservator.

The Probate Court could have gathered such information and passed it along to the PVP attorneys. The Presiding Judge could have sent a letter to the seven Regional Centers, instructing them to submit a report to the court, in declaration form, on: (1) criteria used to determine capacity in each of the seven areas; (2) protocols for making such evaluations; (3) which staff person is responsible for such evaluations; (4) credentials of that person or persons; (5) training materials used to educate these evaluators on how to conduct the evaluations; (6) amount of time spent in evaluating the seven powers and writing the report, on average, in a limited conservatorship case; (7) guidelines or regulations of the Department of Developmental Services (DDS) for making such evaluations and preparing such reports by Regional Centers; and (8) specific language in their contracts with DDS on the subject of 2351.5 evaluations.

The court could have directed its investigations unit to compile the responses from the Regional Centers into a booklet to be distributed to PVP attorneys, along with a summary prepared by the investigations unit. That would have been educational and truly would have helped attorneys to fulfill the requirement that they understand the role of the Regional Center. (Local Rule 10.84)

The handout did not fill any gaps in the verbal presentations. No written information or resources of any substance on capacity assessments were provided, although many were readily available.

There are resources developed jointly by the American Bar Association and American Psychological Association for assessing capacity of older adults that are relevant to assessments of an adult of any age with a cognitive disability.

A handbook for psychologists titled "Assessment of Older Adults with Diminished Capacity" could have been referenced in the program materials. There is also a handbook for judges titled "Judicial Determination of Capacity of Older Adults in Guardianship Cases." In addition, there is a handbook for lawyers titled "Assessment of Older Adults with Diminished Capacity."

This set of handbooks would have pointed PVP attorneys in the right direction in terms of the issues and considerations they should consider in evaluating the capacities of their own clients or challenging the opinions of petitioners or the recommendations of Regional Centers.

There are other resources, such as an article in the American Family Physician titled "Can the Patient Decide? Evaluating Patient Capacity in Practice."

In 1995, the California Legislature enacted the "Due Process in Competency Determination Act" which is embodied in sections 810 to 814 of the Probate Code. This could have been referenced in the presentation on "The Role of the PVP Attorney" but was not mentioned there or anywhere else.

A discussion of the requirements of the Due Process Act is contained in an article written by Patrick Fitzsimmons, M.D. titled "Legal Mental Capacity – A Psychiatrist's Perspective."

According to an article written by Robert Allen, Ph.D. "Attorneys wishing to protect their clients by providing the most comprehensive scientific assessment, and conversely, avoid malpractice entanglements are obliged to consider the Due Process in Competency Determinations Act code changes and the following evaluation methods."

Another excellent resource for attorneys is a publication by the California Advocates for Nursing Home Reform titled ""Determining Capacity and Representing Clients with Diminished Capacity: An Advocates Guide." It also has a guide for advocates titled "California Conservatorship Defense." These materials would have been great resources for PVP attorneys to utilize in preparing themselves to be effective advocates for their clients.

Voting Rights

The issue of voting rights probably found its way onto the agenda of the training program because of complaints that the April training had misinformed PVP attorneys about the right of a conservatee to have assistance in completing an affidavit of voter registration.

The fact that a complaint had been filed against the Los Angeles Superior Court with the United States Department of Justice just two months ago probably also had something to do with it. The complaint alleged that state law, as administered by the Probate Court, violated federal voting rights protections. In particular, it was alleged that PVP attorneys had been advised that someone could not help their clients complete a voter registration form.

It was also alleged that the court was using an illegal "literacy test" in determining whether proposed conservatees should be disqualified from voting. Federal law prohibits states from making the right to vote depend on whether someone can "read, write, interpret, or understand any matter." That is exactly what judges do when they disqualify someone from voting because he or she is unable to show an ability to complete an affidavit of voter registration.

The segment on voting rights was presented by an attorney from a non-profit legal services organization, and Judge Michael Levanas, Presiding Judge of the Probate Court. The non-profit organization was mentioned in the DOJ complaint as being complicit in the violation of voting rights in that their self help clinics had routinely prompted parents to make allegations in the petition that were likely to result in the loss of voting rights for the proposed conservatee.

The presenters did a good job of clarifying, in no uncertain terms, that conservatees have the right to have someone assist them in completing a voter registration form and that they cannot be disqualified from voting because they had such assistance. But on the issue of the illegal literacy test, Judge Levanas aggravated the problem.

Neither he nor the other presenter mentioned the pending complaint with the DOJ. However, Judge Levanas did allude to the fact that there is a theory out there that California law violates federal prohibitions against literacy tests.

The problem is with what he said next. Judge Levanas told the attorneys that the Probate Court would not be deciding any federal constitutional issues. He emphasized that if anyone wanted to raise such issues, they should do so in federal court.

In effect, Judge Levanas was telling PVP attorneys not to waste their time raising federal voting rights objections in limited conservatorship cases. His statements were both ethically inappropriate and procedurally incorrect.

Federal issues are raised in state court every day. Evidentiary objections based on assertions of Fifth Amendment rights, or motions to suppress based on Fourth Amendment rights are routine. State and federal courts have concurrent jurisdiction over federal constitutional issues.

The United States Constitution declares: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." (Art. VI, cl. 2)

It is settled law that "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . ." (Robb v. Connolly (1884) 111 U.S. 624, 637)

For the Presiding Judge of the Probate Court to advise court-appointed attorneys that the judges will not consider federal voting rights objections in limited conservatorship proceedings is itself a violation of the voting rights of people with disabilities. The United States Department of Justice has been duly advised of his remarks. The court should notify the PVP attorneys who heard these remarks that they were made in error and that the court will rule on relevant federal objections.

Confidentiality

The advertised agenda listed confidentiality as an issue that would be covered in the training program. However, the printed program handed out at the event did not have a specific presentation on that topic.

Instead, the issue of confidentiality was mentioned directly, or implicated indirectly, in the comments of three speakers: an attorney in private practice, Judge David Cowan, and Judge Michael Levanas. There were no materials on confidentiality in the printed program booklet.

A proper training on this issue would have cited statutes, professional rules of conduct, and case law governing confidentiality. The confidentiality of attorney-client communications and attorney work-product would have been discussed. Opinions of the Ethics Committees of state and local bar associations would have been mentioned. Law review and journal articles would have been referenced.

None of that happened. Rather, some brief comments were made, mostly stated in passing.

In what appeared to me to be an indirect reference to criticisms that when attorneys file PVP reports with the court, they are breaching the rule of confidentiality, Judge Levanas stated there is no mandate for an attorney to file a PVP report. Forms exist, but you don't have to use them. A report is optional and up to each attorney, he emphasized.

The fact that filing such a report is not mandatory does not alter the conclusion that the discretionary filing of a report that includes information protected by the rule of confidentiality would be a violation of ethics. It just gets the court off the hook from an allegation that the court is mandating the violation.

Judicial statements have been made that underscore the breaches of confidentiality (and loyalty) inherent in filing a PVP report that contains attorney opinions gained from confidential communications or that are based on attorney work product.

Information that a client is unable to complete an affidavit of voter registration, even with help, is something that should be confidential, not disclosed in a PVP report. How would the attorney know this unless the attorney unsuccessfully tried, with appropriate accommodations, to have someone help the client complete such a registration form?

A statement in a PVP report that the attorney believes the client lacks capacity to make decisions in one or more areas is also something based on information gathered in the course of representation. A portion of that opinion would be based on the attorney's observations of the client and his or her personal and professional interpretations of those observations.

At the mandatory training in April 2014, a judge told the attorneys that the court preferred them to use the standard PVP report form that is found on the court's website. No one at the current training rescinded or contradicted or retracted that statement.

Judge Cowan reminded the attorneys that court investigators are not appointed on limited conservatorship cases, therefore the court expects them to "be the eyes and ears of the court." Another presenter confirmed that such investigators are not involved.

Having PVP attorneys serve as de-facto court investigators, to gather information about the client and share it with the court, is a breach of confidentiality (and loyalty) of the highest order.

In the question-and-answer session at the end (after dozens of attorneys left the seminar because they were given permission to leave), Judge Levanas explained how and why a decision was made to stop using court investigators and to start relying on PVP attorneys as substitute investigators.

He said that a presiding judge before his time stopped using court investigators for budgetary reasons. I was surprised when he admitted that it was improper to expect PVP attorneys to assume such a role. But despite this opinion, the fact is that for several years, and right up to the present time,

that is what PVP attorneys are doing because court investigators are not assigned to these cases.

One presenter tried to justify the filing of PVP reports as not being a violation of confidentiality by branding them as responsive pleadings. He said that in civil cases a responsive pleading is required so it cannot be a confidentiality violation for a PVP attorney to file a report. This is a non sequitur.

First, Judge Levanas stated that attorneys are not required to file a PVP report. Secondly, they are not a responsive pleading, but contain large amounts of personal and confidential information that are not general admissions or denials of allegations in the petition. Third, the inclusion of information based on confidential communications or work product is not transformed into non-privileged information simply because an attorney decides, without permission of the client, to disclose it.

For example, in a personal injury lawsuit a defense attorney would not be allowed to state his opinion in an answer that the client was liable – based on communications with the client and investigations by the attorney – without obtaining permission from the client first. This would violate the duties of confidentiality and loyalty. That fact that the violations occurred in a civil case in a responsive pleading would not transform them into an acceptable practice.

A question was raised about the federal health care confidentiality law known as HIPAA. Would not the inclusion of the client's medical diagnosis in a public document such as a PVP report be a violation of the confidentiality and privacy requirements of HIPAA? Without citing any authority and without any hesitation, one presenter stated that it was not a violation because the information was obtained by the attorney from a third party. Not so.

The diagnosis of the client is sensitive medical information. If it was found by the attorney in Regional Center records, it would be confidential information since such records are confidential and governed by HIPAA when they contain medical information. So if the source of the third party information is protected by HIPAA, then the redisclosure of it by the attorney would logically be a violation of medical confidentiality.

The appropriate response would have been to say "I do not know the answer to that question. It is something that we need to look into further. It probably depends on whether the third party records from which the attorney got the information were governed by HIPAA. I will get back to you."

The bottom line is that the issue of confidentiality was not covered as its own topic, no resource materials or references were provided, and the sporadic mention of confidentiality was very brief and surface. The training on this issue was not done professionally.

Conclusion

Dr. Baladerian and I started out with optimism. We hoped that the training would be professionally done. We wanted the attorneys to receive information to help them to be effective advocates for clients with developmental disabilities.

We left the training program with our hopes dashed. Some of the advertised agenda items were not covered at all. Others were handled in a very surface manner. Speakers contradicted each other on various issues. Incorrect information was given to the attorneys.

The written materials are of little use to PVP attorneys. Many valuable materials, resources, and references could have been included but were not.

This was a missed opportunity. If they were being graded for the quality of the training, the Probate Court and the Bar Association would receive a failing grade by any objective standards. ◊◊◊

Thomas F. Coleman is the Legal Director of the Disability and Abuse Project. He can be contacted at: tomcoleman@earthlink.net. The website of the Project is found at: www.disabilityandabuse.org.

Appendix

Letters Written to Public Officials
(with links to documents online)

Chief Justice of California
May 15, 2014
June 15, 2014
June 23, 2014
September 23, 2014

California Attorney General
May 23, 2014

Director
Department of Developmental Services
June 1, 2014

Board of Trustees
State Bar of California
August 29, 2014

Presiding Judge, Probate Division
Los Angeles County Superior Court
May 15, 2014
August 28, 2014

Public Defender
Los Angeles County
June 2, 2014

Attorney General
U. S. Department of Justice
July 10, 2014

Thomas F. Coleman

People with Disabilities Have Been Part of His Advocacy for Decades

Thomas F. Coleman has been advocating for the rights of people with disabilities since he met Dr. Nora J. Baladerian in 1980. That was the year when Coleman became the Executive Director of the Governor's Commission on Personal Privacy.

Coleman wanted the Commission to focus on the privacy rights of a wide array of constituencies, one of which was people with disabilities. On his recommendation, Dr. Baladerian became a Commissioner and Chaired its Committee on Disability.

The Commission's Report, issued in 1982, contained recommendations to clarify and strengthen the rights of people with disabilities. One of its proposals was that "disability" be added to California's hate crime laws. That happened in 1984.

Coleman's next project involving disability issues was his work as a Commissioner on the Attorney General's Commission on Racial, Ethnic, Religious, and Minority Violence. In addition to focusing on violence motivated by racial prejudice and homophobia, the Commission's work – spanning several years from 1983 to 1989 – also included violence against people with disabilities.

The next phase of Coleman's work with disability issues involved family diversity. Coleman was the principal consultant to the Los Angeles City Task Force on Family Diversity. He directed this 38-member Task Force from 1986 to 1988. He wrote its final report, which included a major chapter on Families with Members Who Have Disabilities. Recommendations were made on how the city could improve the quality of life for all families, including people with disabilities.

A few years later, he and Dr. Baladerian created a Disability, Abuse, and Personal Rights Project, which was organized under the auspices of their nonprofit organization, Spectrum Institute.

Coleman's advocacy shifted to other issues for several years, focusing on widely divergent subjects such as promoting the rights of single people, to fighting the abuse of troubled teenagers by boot camps and boarding schools.

Several years ago, Coleman began working again with Dr. Baladerian, devoting more of his time to the disability and abuse issues which she has championed for decades. As he learned more about these issues, he dedicated more of his time and talent to abuse of people with disabilities.

A few years ago, Coleman and Dr. Baladerian instituted a new Disability and Abuse Project, which recently conducted the largest national survey ever done on abuse and disability.

Although most of the work of the Project involves research and advocacy on policy, Coleman has become involved in several individual cases. One challenged a plea bargain as too lenient to serve justice for the sexual assault victims. Another sought to reduce the 100 year sentence of an 18 year old man with a developmental disability as disproportionately harsh. The other three involved adults whose rights were not being protected by the conservatorship system.

The most recent campaign is an ambitious Conservatorship Reform Project, which seeks to better protect the rights of adults with developmental disabilities who become conservatees.

Spectrum Institute

Disability and Abuse Project
2100 Sawtelle, #204, Los Angeles, CA 90025
(310) 473-6768 • www.spectruminstitute.org

February 16, 2015

Honorable Maria Stratton
Presiding Judge, Probate Division
Los Angeles Superior Court
111 N. Hill Street
Los Angeles, CA 90012

Dear Judge Stratton:

I am writing to inform you of my experience attending a mandatory training for PVP attorneys that was sponsored by the Los Angeles Superior Court and conducted with the assistance of the Los Angeles County Bar Association.

When my colleague, Tom Coleman, informed me that the advertised agenda for the training included a presentation by a psychologist on "interviewing and communication skills" for clients with developmental disabilities, I registered for the event. Although I have done trainings for attorneys and law enforcement officers on this topic for many years, I am always eager to learn what other experts have to say.

I had never heard of Dr. Richard Brightman, but since this was a training mandated by the Superior Court, I assumed that he was a subject-matter expert and that he had been properly vetted by the seminar organizer. I was very surprised to learn that there was such a qualified expert since I had never heard of anyone other than myself doing this work in my 37 years of experience.

My first clue that something might be wrong was when I looked in the program to read a biographical summary of Dr. Brightman's credentials. What I found were short biographies for speakers at a prior training. Tom Coleman brought this to the attention of the seminar staff. A few minutes later, the correct biographical summaries were distributed. Unfortunately, they did not include any information about Dr. Brightman, or a syllabus or learning objectives for his presentation.

When it was Dr. Brightman's turn to speak to the group, I sat up in my chair and was ready to take notes. Unfortunately, what I heard in Dr. Brightman's presentation was absolutely nothing of substance. In fact, I do not remember if he even mentioned the term "interviewing skills" more than the one time when he said that it was such a big topic it could not be covered in 45 minutes, so he would instead do another presentation.

The presentation he did was read from a prepared text in a binder. It was his personal early-career life experience during which he met several people with intellectual and developmental disabilities, and also several psychologists and other practitioners who provide services to them. He was struck with the depth of feelings of the folks with disabilities, and learned that they have the same hopes and dreams as those who do not have disabilities. I found it odd that he had to read text to tell his personal story. He did not relate his story to the topic he was slated to address.

Following this early career experience, he did not indicate ongoing work with people with disabilities. Nor did he, at any time, reference the fact that there are professionals who conduct training programs on this topic for attorneys, law enforcement, protective services and other related professionals, and that there are both books and training videos available for them from the U. S. Department of Justice and CDAA. I produced the two videos under a grant from USDOJ using the wisdom of an advisory group, and this was part of the reason that in 2008 I was selected by DOJ to receive their National Victims Services Award from the Office for Victims of Crime. The videos are available on the NCJRS website, along with training guidebooks.

Neither the training host, Jonathan Rosenbloom, nor Judge Michael Levanis, when addressing the audience after Dr. Brightman's talk, apologized to the audience for him not addressing the promised and critical topic, or even acknowledged that the promised information was not delivered. The audience went home with a certificate from LACBA (CLE's) confirming that they had received training in interviewing skills with individuals with intellectual and developmental disabilities.

A few days later, I called Dr. Brightman. I wanted to know more about his background, training and expertise that would have caused him to be selected to be the presenter on this topic. Dr. Brightman returned my call. He said that he actually has "no expertise in interviewing individuals with developmental disabilities, no training, does not do that type of work and does not conduct trainings on the topic." He did not know of any resources on the topic that he might have shared with the audience. After finishing his studies, he said, he opened a private practice in Westwood where he treats individuals and couples, not including people with intellectual disabilities. He stated that the reason he was selected was likely that he and Jonathan are friends, and that because Dr. Brightman has kids with developmental disabilities, Jonathan probably thought he was a good choice.

I did not point out to Dr. Brightman that he should have declined the invitation as he does not have the requisite skills and background as was required by the invitation and would be required by professional ethics. But, he said, it was all very informal and he was "doing a favor" for Jonathan. I have no quarrel with someone doing a favor for a friend. I do have a quarrel with promising essential training content, then not providing it at all. And, making no apology for it, and not making up for it later. The whole thing was far below any level of quality that I had imagined would be supported by the court and/or the LACBA. I never have in the past attended a training program that they offered. I have personally, however, designed and taught dozens of training programs for attorneys and law enforcement officers and officials in which CLE's were provided, for which the content was delivered.

While Dr. Brightman may be a nice man, that is not the qualification training attendees would expect or value. They came in order to learn the skills that are needed in their critical role as legal representative of proposed conservatees. Who are the real losers? The proposed conservatees, whose attorneys have received absolutely no training to understand them and effectively converse with them.

I really hope that, with your leadership, the training operations will change.

Sincerely,

Nora J. Baladerian, Ph.D.
Executive Director
Disability and Abuse Project
nora@disability-abuse.com

Individual Program Plan (IPP) for Limited Conservatorships: An Essential Advocacy Tool for Court-Appointed Attorneys

by Thomas F. Coleman

A procedure known as an IPP is available for court-appointed attorneys in limited conservatorships. Although requesting an IPP review will improve the prospects of a favorable outcome for clients, attorneys have not been making such requests. Using an IPP procedure will not increase costs for the probate court, so judges should endorse it.

Before explaining how an IPP review would work in this context, a discussion of the history and purposes of limited conservatorships is appropriate.

- ✓ Available but unused procedure
- ✓ Improves outcome for client
- ✓ Needed for effective advocacy
- ✓ May save the court money
- ✓ Should be used in each case

Limited Conservatorships

The California Legislature established a system of limited conservatorships for adults with developmental disabilities in 1980. The new system grew out of the disability rights and de-institutionalization movements of the 1970s. (CEB, California Conservatorship Practice, Section 22.1, at p. 1061 (2005))

The newly-created limited conservatorship system was designed to serve two purposes.

"First, it provides a protective proceeding for those individuals whose developmental disability impairs their ability to care for themselves or their property in some way but is not sufficiently severe to meet the rigid standards of Prob. Code § 1801(a)-(b) for creation of a general conservatorship. Second, in order to encourage maximum self-reliance and independence, it divests the limited conservatee of rights, and grants the limited conservator powers, only with respect to those activities in which the limited conservatee is unable to engage capably." (Id., at Section 22.2, p. 1061)

The rights of people with developmental disabilities found in the Lanterman Act were incorporated by the Legislature into the limited conservatorship system which is regulated by the Probate Code.

"A limited conservatorship may be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. The intent of the Legislature, as expressed in Section 4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives is the underlying mandate of this division in its application." (Probate Code Section 1801)

Role of Appointed Attorneys

The Probate Code specifies that when a limited conservatorship petition is filed, the proposed conservatee is entitled to be represented by an attorney in the proceeding.

"In any proceeding to establish a limited conservatorship, if the proposed limited conservatee has not retained legal counsel and does not plan to retain legal counsel, the court shall immediately appoint the public defender or private counsel to represent the proposed limited conservatee." (Probate Code Section 1471)

"Implicit in the mandatory appointment of counsel is the duty of counsel to perform in an effective and professional manner." (Conservatorship of Benvenuto (1986) 180 Cal.App.3d 1030, 1037, fn. 6) An attorney appointed to represent a conservatee must vigorously advocate on the client's behalf. (Conservatorship of John L. (2010) 48 Cal.4th 131)

Once a statutory right to counsel has been conferred, "a proposed conservatee has an interest in it which is protected by the due process clause of the Constitution." (Conservatorship of David L. (2008) 164

Cal.App.4th 701, 710)

These precedents confirm that adults who are subjected to a limited conservatorship proceeding not only have a statutory right to appointed counsel, but have a constitutional right under the due process clause of the United States Constitution to receive effective assistance of counsel. This article explains how an IPP is an essential component of effective advocacy in these proceedings.

When an attorney is appointed to represent a client with a developmental disability after a petition for a limited conservatorship is filed, the attorney knows the client has special needs. Along with this knowledge comes special obligations for the attorney.

Allegations in the petition put the attorney on notice that the client may have a variety of disabilities that interfere with the client's ability to make decisions, to communicate, and to adapt behavior to social norms. The disabilities may involve mobility, communication, cognitive, or emotional limitations.

To provide the client with effective representation, an attorney should immediately request a variety of documents from the client's regional center. This would include the most recent IPP as well as any clinical evaluations or reports the regional center has about the client. The attorney should have a conversation with the client's case manager to determine the types of communication or other accommodations the attorney will need to use in order to have meaningful interaction with the client. If the client is still enrolled in school, the most recent Individual Educational Plan (IEP) should also be obtained.

A review of the petition, IPP, IEP, and other regional center documents, coupled with a conversation with the case manager, should give the attorney enough information to develop a preliminary plan for making attorney-client interactions as effective as possible.

The attorney should be mindful that the outcome of the limited conservatorship proceeding could effect the client for many years. The proceeding begins with a legal presumption that the client has capacity to make all decisions in his or her life. The Lanterman Act and Probate Code specify that the client has a legal interest in keeping as many rights as possible and in obtaining the supports and services necessary to exercise those rights. It is the duty of the attorney to protect those rights to the extent the client has the capacity, with or without support, to make decisions in each of seven areas.

It is not the duty of the attorney for a proposed limited conservatee to prove anything. The petitioner has the burden of proof.

A limited conservatorship "shall be ordered only to the extent necessitated by the individual's *proven* mental and adaptive limitations." (Probate Code Section 1801)

Proposed conservatees need an attorney to make sure the petitioner and the court investigator demonstrate, with *clear and convincing proof*, that: (1) a conservatorship is necessary; (2) lesser restrictive alternatives have been explored and why they will not work; (3) the proposed conservatee is unable to make decisions, even with help, in any of the areas where authority will be transferred to the conservator; and (4) the person seeking such authority is the best person to be appointed conservator.

Clear and convincing proof requires a finding of high probability, based on evidence so clear as to leave no substantial doubt, sufficiently strong to command the unhesitating assent of every reasonable mind. (Conservatorship of Wendland (26 Cal.4th 519, 552.) That is a very high standard.

To provide effective representation to a proposed limited conservatee, an attorney must conduct an independent investigation on the four critical issues mentioned above. Fortunately, an investigative tool is available and it is without cost to the attorney. It is called an IPP or Individual Program Plan.

Requesting an Individual Program Plan

A regional center client or an authorized representative may request an IPP review at any time. (Welfare and Institutions Code Section 4646.5(b)) Once such a request is made, a review meeting must be scheduled within 30 days.

The statutory purpose of the IPP process coincides with the type of assessment needed for a conservatorship proceeding: "Gathering information and *conducting assessments* to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities." (Welfare and Institutions Code Section 4646.5(a)(1))

Assessments pursuant to an IPP process "shall be conducted by qualified individuals." (Welfare and Institutions Code Section 4646.5(a)(1))

The attorney should send a letter to the regional center requesting a formal IPP review: (1) to assess whether the client lacks the capacity to make independent decisions in each of several areas – residence, confidential records, education, medical,

contracts, marriage, and social and sexual decisions; (2) if capacity is found to be lacking, then to assess whether the client would have capacity to make decisions in any of these seven areas with appropriate supports and services; and (3) if the answer to question 2 is yes, to identify the types of supports or services that would enable the client to engage in supported decision making so that conservatorship would be unnecessary or would enable the client to keep decision-making rights in one or more of the seven areas.

The letter should specify that the assessment should only be done by a "qualified individual" as required by law. The Legislature has indicated that conservatorship assessments may be done by a licensed medical practitioner, or by a licensed *and qualified* social worker or psychologist. (Health and Safety Code Section 416.8) Whether professionals are qualified to conduct such an assessment would depend on the extent of their training in this area.

The attorney should include in the letter the names of individuals, such as parents or others, who the client wants to attend the IPP review meeting. The meeting should occur after the assessment report has been submitted to the attorney and the regional center. Ideally, the professional who conducted the assessment should be at the meeting to answer questions, even if only by telephone.

Since the process of the court has been invoked by the filing of the petition, an updated IPP agreement cannot be signed and implemented without court review. If the petition is withdrawn or dismissed, the client would be able to sign the IPP update. If the case is set for a hearing, or if a conservator is appointed, the court could approve the updated IPP or the conservator would be able to sign it after letters of conservatorship have been issued.

If the regional center declines to appoint a qualified individual to conduct an assessment, or if there is a disagreement about whether the regional center will provide the supports and services necessary for supported decision making, the attorney has procedural options to resolve the dispute.

The attorney could file an administrative appeal on behalf of the client under the fair hearing procedure. Alternatively, the attorney could ask the probate court to issue an order to show cause directing the regional center to provide the service or to appear in court to show cause why it should not do so.

Regional centers are authorized by statute to conduct an assessment of the specific areas, nature, and degree of disability of the proposed conservatee and to submit a report to the court with findings and recommendations. (Probate Code Section 1827.5(c)) Since the law requires that assessments for IPP purposes must be done by "qualified individuals," an assessment for a court proceeding should be done by a *qualified* professional as well.

Current practices for regional center assessments, at least in Los Angeles County, are very informal. Methods vary from one regional center to another. Criteria and trainings for assessments are lacking. Sometimes reports are filed *after* a conservatorship order is granted. Requests by attorneys for IPP reviews would improve the process considerably.

In Los Angeles, local court rules require attorneys who represent proposed limited conservatees to be "familiar with the role of the regional center." (Rule 4.124) There must be a purpose underlying this rule. Presumably having such knowledge enables attorneys to utilize the services of a regional center in the context of a limited conservatorship case.

There would be no cost to the probate court for IPP reviews requested by attorneys. Regional centers would pay for staff time, capacity assessments, and supported decision making services if needed. The attorneys would spend a few additional hours on a case, but those fees would be paid by the county and would not come from the court's own budget.

Ongoing court supervision of a conservatorship case can be expensive over time. An IPP review may determine that appropriate services for supported decision making completely obviate the need for a conservatorship. The possibility of eliminating ongoing court supervision should itself cause judges to endorse this available, but not utilized, IPP review process in conservatorship cases.

With so much riding on the outcome, effective representation requires attorneys to request an IPP review and an assessment of capacities by a qualified professional. This should become a standard practice for all court-appointed attorneys in limited conservatorship cases. Judges who appoint such attorneys should not just support it, they should require it. ◊◊◊

Attorney Thomas F. Coleman is the Executive Director of the Disability and Guardianship Project of Spectrum Institute. www.spectruminstitute.org
See also: [*A Strategic Guide for Court-Appointed Attorneys in Limited Conservatorship Cases*](#).

Comments of a Court-Appointed Attorney on Using the IPP Process in Limited Conservatorship Cases

After reviewing the article recommending that court-appointed attorneys should use the IPP process at regional centers during the initial stage of a limited conservatorship proceeding, here is what one longtime member of the Probate Volunteer Panel in Los Angeles said in an email on April 16, 2015.

Got to read at the article. Actually got to see an IPP report (i.e. a report labeled such) very recently in connection with a PVP appointment in another county in a limited conservatorship where the public defender got conflicted out. The report was *extremely helpful* in understanding my client's disabilities and the extent of his functioning. But again, this is not something that the regional center in Los Angeles "advertises" as available nor do I recall it being mentioned at any of the seminars I attended – even the minor's counsel seminar where folks from a Los Angeles regional center were speakers.

What we get in Los Angeles County is on or before the court date, the regional center sends a letter report which basically outlines the proposed conservatee's developmental disability, their functioning (to a limited extent) and then specifically addresses each of the Probate Code Section 2351.5 powers that are requested but … this report has nowhere near the detail of the IPP that I saw. In fact, these reports appear to be "canned" in the sense that they follow a very specific outline and in many instances the paragraphs are nearly identical in wording, regardless of the nature of the disability.

I have never seen such a report contain information on how the proposed conservatee's capacity could be preserved through the provision of appropriate supports and services. The only way I have ever obtained that type of information was through a conversation with their case worker (if that person was willing to talk to me) or if the family/petitioner was enlightened enough to even understand or be concerned about this issue as opposed to being so concerned about being able to obtain medical care or other financial support or respite that they were just desperate to get the petition granted.

Because we don't get these reports until – frequently – the day of the hearing, what I have been doing to get information to understand my client's functioning (beyond what the petitioners are able to give you which often is extremely limited and non-helpful although sometimes they do have IEP's and even regional center evaluations and I also ask for medical records if they have) is to identify the regional center worker and then speak with him or her.

For the most part, lately, they've been pretty cooperative with me (its mostly two people here, so you develop a relationship and they are comfortable talking to you I guess). But still, I often don't know what I should really be asking for since I am working from a blank slate when I make that kind of phone call, and the case worker probably doesn't have the time to spend going through the proposed conservatee's entire file.

Thus, no one at the regional center has ever mentioned the IPP as a tool available to me or my client. Even though I asked for written information from the regional center in the past, this type of evaluation/report was not volunteered (although in a recent case the case worker did send me an evaluation, so presumably someone had requested it in the past – I clearly didn't know my client's rights or specifically what to ask for!). Wonder why the regional center doesn't mention this, when its so helpful? Is there some budgetary issue in Los Angeles County?

The article is very helpful, in my view. This should *definitely* be part of the training for a PVP; in fact, it appears there needs to be a protocol for court-appointed attorneys to follow in handling these matters so they can get educated *before* even the initial interview of the client.

Trauma-Informed Justice: A Necessary Paradigm Shift for the Limited Conservatorship System

by Thomas C. Coleman

"Trauma-informed justice" is a relatively new concept in the law. It has been discussed and applied in the context of criminal, family, and juvenile courts. Not so with respect to the administration of justice in probate courts.

Many mental health and substance abuse professionals have used a trauma-informed approach for some time now in counseling and therapy programs. It is in this context that much has been written on the subject.

"A *trauma-informed approach* refers to how a program, agency, organization, or community thinks about and responds to those who have experienced or may be at risk for experiencing trauma; it refers to a change in the organizational culture. In this approach, all components of the organization incorporate a thorough understanding of the prevalence and impact of trauma, the role that trauma plays, and the complex and varied paths in which people recover and heal from trauma." (Website, Substance Abuse and Mental Health Services Administration, "Trauma Definition: Part Two: A Trauma Informed Approach.")

Three elements occur in a trauma-informed approach: (1) realizing the prevalence of trauma in the population being served; (2) recognizing how trauma affects this population; and (3) responding by putting this knowledge into practice in the delivery of services. (SAMHSA, supra.)

A system that is trauma informed must realize the widespread impact of trauma, recognize the signs and symptoms of trauma, and fully integrate knowledge about trauma into policies, procedures, and practices.

The first step in delivering trauma-informed justice in the Limited Conservatorship System is for the participants – judges, attorneys, investigators, case workers, and program volunteers – to acknowledge that the majority of proposed conservatees are probably trauma victims.

As difficult as it may be to make this mental and emotional shift, participants also need to be aware that the trauma to these victims was likely caused by those who are close to them – members of their household, school, or day programs.

From what I have seen in the way the Limited Conservatorship System currently operates, there is an assumption by participants that all is well, that proposed conservatees have a normal life, and that proposed conservators have been doing a good job of raising their children. Research shows that such assumptions are not warranted.

The most recent report on abuse of people with disabilities was published by our own Disability and Abuse Project in 2013. (Website, Victims and Their Families Speak Out: A Report on the 2012 National Survey on Abuse of People with Disabilities.) More than 7,200 people throughout the nation responded to this survey, including thousands of people with disabilities and their families.

Over 70 percent of people with disabilities reported that they had been victims of abuse. More than 63 percent of family members said their loved one with a disability had been an abuse victim. Focusing exclusively on those with developmental disabilities, 62.5 percent of this group said they had experienced abuse of one type or another.

Of the various types of abuse, victims with disabilities reported verbal-emotional abuse (87.2%), physical abuse (50.6%), sexual abuse (41.6%),

neglect (37.3%), and financial abuse (31.5%).

Although this was not a random sample of the nation, the results of the survey certainly should be enough to cause concern within any system that is supposed to protect people with developmental disabilities. The Probate Court is such a system.

Dr. Nora J. Baladerian, Executive Director of the Disability and Abuse Project, was not surprised by the results of our national survey. She is a recognized expert on abuse and disability and lectures on the subject at professional conferences throughout the nation. She trains law enforcement personnel, psychologists, social workers, and service providers.

Dr. Baladerian cites retrospective studies that summarize the accounts of adults about their experiences of abuse as children. These studies show that one in four women, and one in six men, report that they were victims of sexual abuse as a child. (Centers for Disease Control and Prevention, 2006)

In another study of adults retrospectively reporting adverse childhood experiences, 25.9 percent of respondents reported verbal abuse as children, 14.8 percent reported physical abuse, and 12.2 percent reported sexual abuse. (Center for Disease Control and Prevention, 2009)

The findings of these studies are for the generic population. But what are the rates of abuse for people with developmental disabilities?

Dr. Baladerian refers to a study by her Canadian colleague, Dr. Dick Sobsey, whose research found that people with developmental disabilities (adults and children) are 4 to 10 times more likely to be victims of abuse than the generic population.

Other studies cited by The Arc of the United States confirm these high rates of abuse for children with disabilities, especially children with developmental disabilities. (Davis, Abuse of Children with Intellectual Disabilities.)

The data on perpetrators is also very instructive. Perpetrators of abuse are generally not strangers. Most often, they are people close to the victim.

In the generic population, more than 80 percent of child abusers were parents. (Office for Victims of Crime, United States Department of Justice, 2009) According to Dr. Baladerian, victims with developmental disabilities are most likely to be abused by household members.

This data alone should cause a paradigm shift in the Limited Conservatorship System, which currently assumes that proposed conservatees, as a class, are being treated well at home, and that proposed conservators, as a class, are treating their children well. Those assumptions are based on wishful thinking, not statistical probabilities.

I am not suggesting that judges, attorneys, and investigators should automatically view each parent or relative who wants to be a conservator as a likely abuser. But I am suggesting that the system should interact with a prospective conservator in a procedural context of caution and verification.

Perhaps 20 percent of generic children are victims of child abuse. Children with developmental disabilities are at least 3.4 times more likely to be victims than the generic child population. Do the math. A large majority of prospective limited conservatees may have been victims of sexual abuse.

Add to that the other forms of abuse, such as physical or emotional abuse. Then, just to be conservative, subtract a few percentage points. We still end up with 60 percent or more of prospective limited conservatees who may have been victims of abuse.

When we add the perpetrator statistics to our new understanding of child abuse dynamics, we should be stopped in our tracks. As a class, on the whole, and statistically speaking, a majority of would be conservators may have perpetrated abuse against the people whose life they are seeking to control in adulthood. Although this information is hard to digest, it requires a paradigm shift in the way the Limited Conservatorship System currently operates.

Questions begin to arise as to what changes should occur in policies and practices as a result of the paradigm shift from assuming that probably all is well to assuming that all may not be well. What should judges, attorneys, investigators, and service providers do differently with this newly acquired information about the likelihood that people with developmental disabilities have been abused?

A trauma-informed approach to the administration of justice in probate courts would require a complete review of all polices and practices, from top to bottom, from start to finish, in the Limited Conservatorship System. That is beyond the scope of this essay. But some aspects of the system that are crying out for attention do come to mind.

Let's look at form GC-314, the "Confidential Conservator Screening Form." This form must be completed by any person seeking to be appointed as a conservator. It must be filed with the petition.

A cursory review of this form suggests that it was originally designed to screen potential conservators for elderly conservatees in which cases the conservator is likely to be taking charge of the finances of the conservatee. So it contains questions asking if the proposed conservator has filed for bankruptcy protection. It also asks about arrests of the proposed conservator for theft, fraud, or taking of property.

Limited conservatorships are generally restricted to conservatorships of the person, not of the estate, of an adult with a developmental disability. So questions that pertain to the ability of a proposed conservator to manage finances have little relevance.

What is not asked by the screening form is very instructive. Proposed conservators are asked if they have ever been arrested for or charged with elder abuse or neglect. But they are not asked about arrests or prosecutions for dependent adult abuse or child abuse! They are also not asked if anyone in the household has been arrested for such offenses.

Proposed conservators are asked if they are required to register as a sex offender. But they are not asked if anyone else in the household is a registered sex offender. So the mother of a proposed conservatee can honestly answer "no" to this question, even though her husband, who lives in the home, is a registered sex offender. Since he is not seeking to be a conservator, this information is not provided to the court on form GC-314.

The form does ask if the proposed conservator has anyone living in the home who has a probation or parole officer assigned to him or her. A parent could answer "no" even though she has two adult sons living there who have a long history of felony convictions for drugs and violent crimes, but they are not currently on probation or parole.

Although the form does ask limited questions about bankruptcy proceedings and criminal proceedings, it asks nothing about juvenile court proceedings. So proposed conservators do not have to reveal that they have had a child taken away by the Juvenile Dependency Court (Children's Court). Nor do they have to reveal that they have had two children processed through Juvenile Delinquency Court – one for drug sales and the other for prostitution – and both of them spent time at the Youth Authority. Both children are now living in the same home with the parents and the proposed conservatee.

Since court investigators no longer conduct interviews, review records, and submit reports to the Probate Court in limited conservatorship cases, I have no idea of how these so-called "screening" forms are used. Presumably they are reviewed by the judge. Perhaps by the PVP attorney.

It would appear that this is a declaration system that relies on the proposed conservator to tell the truth. But even if the truth is told, critical information is missing due to the failure to ask the right questions, and to ask the questions of all people living in the household. Does the court run a criminal background check? Are the names of household members checked against the sex registration database? Are these names checked against the databases of Child Protective Services or Adult Protective Services? These questions are worthy of answers.

A so-called "protection" system that eliminates the use of court investigators to screen and evaluate petitions for limited conservatorships must be a system that assumes that child abuse or dependent adult abuse cases are rare, rather than probable.

A system that uses reports of court-appointed attorneys in lieu of reports of court investigators must be a system that has closed its eyes to statistics regarding the prevalence of abuse against people with developmental disabilities. Only a system in a state of disbelief could expect court-appointed attorneys to screen out potentially abusive conservators, and yet not train such attorneys about the prevalence and dynamics of abuse.

Only a system in denial could expect these attorneys to be the front line of defense against the appointment of dangerous conservators, and yet not train them with the special skills needed to interview people with developmental disabilities. Only such a system would fail to emphasize the importance of talking personally and privately with all relatives of the first degree in order to find any dissenting views in the family about how wonderful the proposed conservator is.

A trauma-informed conservatorship system would not only require court investigators in every new case, it would also train them properly and thoroughly so they would have a better chance of identifying risky applicants. Such a system would also require court-appointed attorneys to acquire interviewing skills appropriate to the task, to interview proposed conservatees in a private setting away from their parents, to review all Regional Center records and not just the three-page report prepared for the court, and to run a criminal background check on everyone who lives in the household.

In a trauma-informed conservatorship system, the staff and volunteers at Bet Tzedek Legal Services would not assume that parents who come to the Self Help Clinic are wonderful people who should have all "seven powers" granted to them. They should be aware that a significant portion of those who attend the clinic either are or will be perpetrators of abuse.

If those who operate the training programs of the County Bar Association were trauma-informed educators, they would act differently when they select topics and speakers for PVP training programs.

Trauma-informed training coordinators would provide more seminars because of the need to include much more information than is currently transmitted during the few training programs that are offered now. They would include speakers on the dynamics of each type of disability and how to interview people who have each type of disability.

Seminars would include a presentation on the prevalence of abuse against people with developmental disabilities and who the likely perpetrators are. They would also include requirements of the Americans with Disabilities Act and what the courts and attorneys must do to accommodate the special needs of clients with disabilities.

Court-appointed attorneys would be informed that most cases of child abuse or dependent adult abuse are not reported. In many cases, the victim is too embarrassed, or too afraid of consequences, or thinks they will not be believed.

The fact that no report has been made to Child Protective Services or Adult Protective Services does not mean that abuse has not occurred. Such knowledge would inform the actions of the attorneys, prompting them to do more thorough investigations and not to be distracted by smooth-talking and friendly-appearing proposed conservators. A trauma-informed PVP training session would advise court-appointed attorneys not to be fooled by pleasant appearances. Too much is at stake.

Many other changes in the Limited Conservatorship System would be required if the probate court shifts paradigms from the current model that assumes benevolence to one that is trauma informed. Such a trauma-informed justice system would operate with more caution and scrutiny. Thousands of people with developmental disabilities would then have a greater degree of protection from the probate court.

Rule 1.45 amended and renumbered effective January 1, 2007; adopted as rule 982.1 effective January 1, 1982; previously amended effective July 1, 1995, July 1, 1996, January 1, 1997, July 1, 1999, and January 1, 2005; amended and renumbered as rule 201.2 effective January 1, 2003.

Chapter 5. Accommodations

Rule 1.100. Requests for accommodations by persons with disabilities

Rule 1.100. Requests for accommodations by persons with disabilities

(Subd (a) repealed effective January 1, 2007; previously amended effective January 1, 2006.)

(a) Definitions

As used in this rule:

(1) "Persons with disabilities" means individuals covered by California Civil Code section 51 et seq.; the Americans With Disabilities Act of 1990 (42 U.S.C. §12101 et seq.); or other applicable state and federal laws. This definition includes persons who have a physical or mental impairment that limits one or more of the major life activities, have a record of such an impairment, or are regarded as having such an impairment.

(2) "Applicant" means any lawyer, party, witness, juror, or other person with an interest in attending any proceeding before any court of this state.

(3) "Accommodations" means actions that result in court services, programs, or activities being readily accessible to and usable by persons with disabilities. Accommodations may include making reasonable modifications in policies, practices, and procedures; furnishing, at no charge, to persons with disabilities, auxiliary aids and services, equipment, devices, materials in alternative formats, readers, or certified interpreters for persons with hearing impairments; relocating services or programs to accessible facilities; or providing services at alternative sites. Although not required where other actions are effective in providing access to court services, programs, or activities, alteration of existing facilities by the responsible entity may be an accommodation.

(Subd (a) amended and relettered effective January 1, 2007; adopted as subd (b) effective January 1, 1996; previously amended effective January 1, 2006.)

(b) Policy

It is the policy of the courts of this state to ensure that persons with disabilities have equal and full access to the judicial system. To ensure access to the courts for persons with disabilities, each superior and appellate court must delegate at least one person to be the ADA coordinator, also known as the access coordinator, or designee to address requests for accommodations. This rule is not intended to impose limitations or to invalidate the remedies, rights, and procedures accorded to persons with disabilities under state or federal law.

(Subd (b) adopted effective January 1, 2007.)

(c) Process for requesting accommodations

The process for requesting accommodations is as follows:

(1) Requests for accommodations under this rule may be presented ex parte on a form approved by the Judicial Council, in another written format, or orally. Requests must be forwarded to the ADA coordinator, also known as the access coordinator, or designee, within the time frame provided in (c)(3).

(2) Requests for accommodations must include a description of the accommodation sought, along with a statement of the impairment that necessitates the accommodation. The court, in its discretion, may require the applicant to provide additional information about the impairment.

(3) Requests for accommodations must be made as far in advance as possible, and in any event must be made no fewer than 5 court days before the requested implementation date. The court may, in its discretion, waive this requirement.

(4) The court must keep confidential all information of the applicant concerning the request for accommodation, unless confidentiality is waived in writing by the applicant or disclosure is required by law. The applicant's identity and confidential information may not be disclosed to the public or to persons other than those involved in the

accommodation process. Confidential information includes all medical information pertaining to the applicant, and all oral or written communication from the applicant concerning the request for accommodation.

(Subd (c) amended effective January 1, 2007; previously amended effective January 1, 2006.)

(d) Permitted communication

Communications under this rule must address only the accommodation requested by the applicant and must not address, in any manner, the subject matter or merits of the proceedings before the court.

(Subd (d) amended effective January 1, 2006.)

(e) Response to accommodation request

The court must respond to a request for accommodation as follows:

(1) The court must consider, but is not limited by, California Civil Code section 51 et seq., the provisions of the Americans With Disabilities Act of 1990, and other applicable state and federal laws in determining whether to provide an accommodation or an appropriate alternative accommodation.

(2) The court must inform the applicant in writing, as may be appropriate, and if applicable, in an alternative format, of the following:

(A) That the request for accommodation is granted or denied, in whole or in part, and if the request for accommodation is denied, the reason therefor; or that an alternative accommodation is granted;

(B) The nature of the accommodation to be provided, if any; and

(C) The duration of the accommodation to be provided.

(Subd (e) amended effective January 1, 2007; previously amended effective January 1, 2006.)

(f) Denial of accommodation request

A request for accommodation may be denied only when the court determines that:

(1) The applicant has failed to satisfy the requirements of this rule;

(2) The requested accommodation would create an undue financial or administrative burden on the court; or

(3) The requested accommodation would fundamentally alter the nature of the service, program, or activity.

(Subd (f) amended effective January 1, 2007; previously amended effective January 1, 2006.)

(g) Review procedure

(1) An applicant or any participant in the proceeding in which an accommodation request has been denied or granted may seek review of a determination made by nonjudicial court personnel within 10 days of the date of the response by submitting, in writing, a request for review to the presiding judge or designated judicial officer.

(2) An applicant or any participant in the proceeding in which an accommodation request has been denied or granted may seek review of a determination made by a presiding judge or another judicial officer within 10 days of the date of the notice of determination by filing a petition for extraordinary relief in a court of superior jurisdiction.

(Subd (g) amended effective January 1, 2006.)

(h) Duration of accommodations

The accommodation by the court must be provided for the duration indicated in the response to the request for accommodation and must remain in effect for the period specified. The court may provide an accommodation for an indefinite period of time, for a limited period of time, or for a particular matter or appearance.

(Subd (h) amended effective January 1, 2006.)

Rule 1.100 amended and renumbered effective January 1, 2007; adopted as rule 989.3 effective January 1, 1996; previously amended effective January 1, 2006.

APPLICANT'S INFORMATION TO BE KEPT CONFIDENTIAL

MC-410

APPLICANT *(name):* APPLICANT is ☐ Witness ☐ Juror ☐ Attorney ☐ Party ☐ Other *(Specify)* Person submitting request *(name):* APPLICANT'S ADDRESS: TELEPHONE NO.:	*FOR COURT USE ONLY*
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
JUDGE:	
CASE TITLE:	DEPARTMENT:
REQUEST FOR ACCOMMODATIONS BY PERSONS WITH DISABILITIES AND RESPONSE	CASE NUMBER:

Applicant requests accommodation under rule 1.100 of the California Rules of Court, as follows:

1. Type of proceeding: ☐ Criminal ☐ Civil ☐ Other:
2. Proceedings to be covered (for example, bail hearing, preliminary hearing, trial, sentencing hearing, family, probate, juvenile):
3. Date or dates needed *(specify):*
4. Impairment necessitating accommodation *(specify):*
5. Type or types of accommodation requested *(specify):*
6. Special requests or anticipated problems *(specify):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE)

RESPONSE

The accommodation request is **GRANTED** and the court will provide the

☐ requested accommodation, in whole

☐ requested accommodation, in part *(specify below):*

For the following duration:

☐ For the above matter or appearance

☐ From *(dates):* to

☐ Indefinite period

The accommodation is **DENIED** in whole or in part because it

☐ fails to satisfy the requirements of rule 1.100.

☐ creates an undue burden on the court.

☐ fundamentally alters the nature of the service, program, or activity.

For the following reason *(attach additional pages, if necessary):* [See Cal. Rules of Court, rule 1.100(g), for the review procedure]

☐ The court will provide the alternative accommodation as follows:

Date response delivered in person or sent to applicant:

(TYPE OR PRINT NAME) (SIGNATURE)

☐ SIGNATURE FOLLOWS THE LAST PAGE OF THE RESPONSE.

Form Approved for Optional Use
Judicial Council of California
MC-410 [Rev. January 1, 2010]

Cal. Rules of Court, rule 1.100
www.courtinfo.ca.gov

Rule 1.100 of the California Rules of Court states: "It is the policy of the courts of this state to ensure that persons with disabilities have equal and full access to the judicial system." Under this rule, any person who has a physical or mental impairment that limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment may request an accommodation. According to the rule, access can mean physical accommodation to go into and move about buildings and use accessible restrooms. Access can also mean full participation in the court's programs, services, and activities, with the assistance of technology or other services. To provide both kinds of access, courts in California are responsible for providing reasonable accommodations to court users.

Accommodations can be provided in a variety of ways. Because people and disabilities are unique, the courts and persons with disabilities must interactively discuss each person's needs and the effective accommodations that the court can provide.

Both California and federal law require that state and local governments, including courts, provide appropriate accommodations for persons with disabilities.

The Judicial Council of California, the policymaking body for the courts, adopted rule 1.100 to implement the federal Americans With Disabilities Act (ADA) and related state law in the courts. Following are some questions commonly asked about rule 1.100.

What is rule 1.100?

Rule 1.100 is a California court rule that enables lawyers, parties in a case, witnesses, jurors, and other people with disabilities to request accommodations from a court.

Who can get an accommodation?

Individuals can receive reasonable accommodations from the courts if they have a disability, have a record of a disabling condition, or are regarded as having a disability that limits one or more major life activities. Such activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Examples of disabilities include mobility or other motor impairments, psychological and mental illness, visual impairments, and hearing loss.

How do I get an accommodation? What is form MC-410 and can I get help filling it out? What if I can't read the form?

You can request an accommodation by completing form MC-410, *Request for Accommodations by Persons With Disabilities and Response*, available in the court clerk's office. The form and instructions should be available in alternative formats, such as Braille and large print, on request. If the form is unavailable, you can direct an accommodation request in writing or orally to the court's ADA or access coordinator.

You can make a request anytime. You should make your request as far in advance as possible in order to allow the court time to review your request and make arrangements for the accommodation, if needed. In any event, you must give the court a minimum of five court days' notice. Courts may, in their discretion, not insist upon this five-day requirement. If you need assistance in filling out the form, you may ask a clerk or other court personnel to help you write down the information. You may wish to attach documents, such as a doctor's letter, to the form.

After completing the form, you must sign it under penalty of perjury, which means that everything you state in the form is true under oath, to the best of your knowledge.

What kinds of accommodations may the court provide?

Rule 1.100(a)(3) provides that accommodations may include:

- Making reasonable modifications to policies, practices, and procedures (for example, alternative time schedules, conferences by phone);
- Furnishing, at no charge to persons with disabilities, auxiliary aids and services, equipment, devices, materials in alternative formats, readers for the blind or others, or certified interpreters for persons with a hearing loss;
- Relocating services or programs to accessible facilities; and
- Providing services at alternative sites.

The court, however, cannot exceed the law in granting a request for an accommodation. For example, the court cannot extend the statute of limitations for filing an action because someone claims that he or she could not make it to the court on time because of a disability. Additionally, the court cannot provide free legal counsel as a medical accommodation. (For specific cases, free legal counsel is mandated by law to provide legal assistance, but it is not an accommodation for a disability.)

What can court personnel ask about my disability? Do I have to let everyone know about my medical problems?

Under most circumstances, the court or its employees will not need additional medical or other personal information. Rule 1.100 allows the court to request further information if it needs to. Only those persons in the court who need to know about your disability to make a decision or provide you with an accommodation will learn the details of your request and the personal information that you give. The courts will not share your personal information with members of the public unless you tell the court that you give up your right to confidentiality concerning your request.

Should I tell the court that I need an accommodation?

Yes. It is in your best interest to contact the courts to request accommodations that would best suit your situation. The courts are obligated to inform the public of the availability of accommodations. But if you do not request an accommodation, the courts will not know that you need one and, as a practical matter, will not be able to provide one.

What if the court offers a different accommodation? Do I have to accept it?

The court can offer a different or alternative accommodation. For example, if a juror is blind and requests that written material introduced at trial be transcribed into Braille, the court may consider alternatives, such as providing a reader or a tape-recorded transcript of the written material. The

accommodation offered may not be your first or preferred choice and the court will not require that you accept it. Although the court is not required to provide the best accommodation, it must provide one that will effectively allow you to participate in court proceedings.

Can the court deny my request?

Yes, the court can deny your request in certain circumstances. The court is not obligated to provide personal devices (e.g., wheelchairs, prescription eyeglasses, hearing aids) to individuals with disabilities. Neither is it obligated to provide services of a personal nature (e.g., assistance with eating, toileting, and dressing). The request can be denied if providing the accommodation would place an excessive burden on the court's financial or staff resources. The request can also be denied if providing the accommodation would significantly change the kinds of services that judicial officers normally provide to court users. If the court denies your request, you may seek review by following the process explained in detail in rule 1.100(g).

What if I'm called as a juror?

In addition to the rule, California law specifically authorizes persons who have a visual impairment or a hearing loss to participate as jurors in trials. They may be assisted by readers, interpreters, or available technology in the jury assembly area, courtroom, and jury deliberation room.

PLEASE NOTE

The Judicial Council of California adopts rules of court, provides policy direction to the courts, and presents recommendations to the Governor and the Legislature concerning court practice, procedure, and administration. As its staff agency, the Administrative Office of the Courts provides support to the council. This document is not intended to be a full statement of the law concerning persons with disabilities and is not meant to be legal advice or to substitute for it.

RESOURCES AVAILABLE

U.S. DEPARTMENT OF JUSTICE/ADA HOME PAGE

The full text of the Americans With Disabilities Act (ADA) (42 U.S.C., § 12101 et seq.) can be found at *www.ada.gov/pubs/ada.htm*.

The ADA home page (a part of the U.S. Department of Justice Web site) is located at *www.ada.gov*.

JUDICIAL BRANCH OF CALIFORNIA/CALIFORNIA COURTS WEB SITE

The full text of rule 1.100 of the California Rules of Court can be read at *www.courtinfo.ca.gov/rules/index.cfm?title=one&linkid=rule1_100*.

The Access and Fairness Advisory Committee home page (part of the California Courts Web site) is located at *www.courtinfo.ca.gov/programs/access*.

Most county courts have Web sites that provide additional information on accommodations, including phone numbers for their ADA or access coordinators. Access your own court's Web site through *www.courtinfo.ca.gov/otherwebsites.htm*.

This publication and the Access and Fairness Advisory Committee's other publications are available on the committee's Web site at *www.courtinfo.ca.gov/programs/access/publications.htm*.

This pamphlet is the creation and responsibility of the Access and Fairness Advisory Committee of the Judicial Council of California. Points of view expressed herein do not necessarily represent the official positions or policies of the Judicial Council of California or the Administrative Office of the Courts.

Judicial Council of California
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, California 94102-3688

OGC0002.07.1

For Persons With Disabilities Requesting Accommodations

Questions and Answers About Rule of Court 1.100 for Court Users

Do you have to go to court?

Have you been called to be a witness at a trial?

Have you received a jury summons?

Do you want to watch court proceedings?

If you answer yes to any of these questions, this pamphlet will provide you with useful information.

JUDICIAL COUNCIL OF CALIFORNIA
ACCESS AND FAIRNESS ADVISORY COMMITTEE

INTRODUCTION

This pamphlet on rule 1.100 of the California Rules of Court was developed by members of the Judicial Council's Access and Fairness Advisory Committee to respond to the questions that court personnel most frequently ask about the rule. This pamphlet updates an earlier version and focuses on amendments to that rule that became effective January 1, 2006.

The Americans With Disabilities Act (ADA) is a federal civil rights statute (42 U.S.C., § 12101 et seq.) that requires all state and local governmental entities, including the courts, to accommodate the needs of persons with disabilities who participate in court activities, programs, and services. The ADA also requires the government to modify programs to integrate persons with disabilities, eliminate discriminatory practices or procedures, and provide alternatives to communications limitations and differences. Since 1990, when Congress adopted the ADA, California has amended or adopted legislation that further enhances access for persons with disabilities and has expanded the obligations of government, including the courts, to fully integrate persons with disabilities into society.

Rule 1.100 seeks to provide a workable and orderly framework for compliance with the ADA and state laws. The rule provides the mechanism for anyone with disabilities participating in court activities, programs, or services—lawyers, parties, witnesses, jurors, and any other participants—to request accommodations by making a written or oral request to a court's ADA or access coordinator.

1 Who is entitled to receive an accommodation?

According to rule 1.100(a)(1), "persons with disabilities" means "individuals covered by California Civil Code section 51 et seq.; the Americans With Disabilities Act of 1990 (42 U.S.C., § 12101 et seq.); or other applicable state and federal laws. This definition includes persons who have a physical or mental impairment that limits one or more of the major life activities, have a record of such an impairment, or are regarded as having such an impairment."

Anyone with a disability who has business with the courts, including public observers of court activities or sessions, may be entitled to receive an accommodation. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Examples of disabilities include mobility or other motor impairments, psychological and mental illness, vision impairments, hearing impairments, and environmental sensitivities.

2 What kind of showing of the disabling condition must be provided by an applicant seeking an accommodation?

State and federal statutes and regulations do not specify the nature of a showing needed to confirm the existence of a disabling condition that requires an accommodation. Similarly, rule 1.100 does not require a particular showing. However, all requests for accommodations must include a description of the accommodation sought, along with a statement of the impairment that necessitates such accommodation. The court, in its discretion, may require the applicant to provide additional information about the impairment. Requests for accommodations may be made orally, on a *Request for Accommodations by Persons With Disabilities and Response* (form MC-410), or in another written format. A judge, an ADA or access coordinator, or court staff, as authorized by the court, may review the request and provide a determination.

3 Does rule 1.100 require an evidentiary hearing on the request for accommodation?

No. The process is purely administrative and does not call for a hearing. Rule 1.100(c)(1) states: "Requests for accommodations under this rule may be presented ex parte on a form approved by the Judicial Council, in another written format, or orally."

The process for requesting accommodations under rule 1.100 is not adversarial. If the request is made by a litigant, by counsel, or by a witness for a party, neither the rule nor federal laws and regulations authorize third parties to object to the request.

4 Do court personnel have to guess about the type and nature of the accommodation required?

No. The courts are obligated to inform the public generally of the availability of accommodations. If no request for an accommodation is made, the court need not provide one. The court is encouraged to ask the person with the disability to suggest an accommodation. Federal regulations state, "In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities." (28 C.F.R., § 35.160(b)(2).) Furthermore, the court may offer an accommodation that is different from the accommodation requested by a person with a disability, so long as the accommodation offered permits the individual to effectively participate in the court's programs, activities, or services.

The court, therefore, is not prohibited from offering an accommodation on its own. It is required to provide not the best accommodation, but rather an *effective* one.

5 What kind of accommodations are the courts be required to provide?

According to rule 1.100(a)(3), "accommodations" is defined as "actions that result in court services, programs, or activities being readily accessible to and usable by persons with disabilities. Accommodations may include, but are not limited to, making reasonable modifications in policies, practices, and procedures; furnishing, at no charge to persons with disabilities, auxiliary aids and services, equipment, devices, materials in alternative formats, readers or certified interpreters for persons with hearing impairments; relocating services or programs to accessible facilities; or providing services at alternative sites. Although not required where other actions are effective in providing access to court services, programs, or activities, alteration of existing facilities by the responsible entity may be an accommodation."

Accommodations must address diverse disabilities, which can vary in nature and degree from person to person. Accordingly, the type of accommodation granted can vary from person to person. Some examples of the type of accommodations that may be provided include the following:

- Changes in schedules to accommodate accessible public transportation, medication schedules, or other time-sensitive needs;
- Someone to read documents or to write on court forms the information dictated by persons with visual, hearing, manual dexterity, cognitive, or other disabling conditions;
- Hearings by telephone for people who have environmental sensitivities or mobility or other limitations; and
- Assistive listening systems, sign language interpreters, real-time captioning, written material on computer-readable discs, telecommunication devices for the deaf (TTY), reader services, and the like.

6 Is the court responsible for providing forms in Braille or real-time transcriptions, as well as other accommodations?

Yes. The court may not charge persons with disabilities for court services, programs, and activities if persons without disabilities are not charged for those same services. Federal and California law requires courts to provide, upon request by an individual who is hearing impaired, and without charge, a functioning assistive listening system, a computer-aided transcription system, or materials in Braille. However, the court need only provide the mode that permits the court user to effectively participate in the court service, program, or activity.

Federal regulations state, "[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." (28 C.F.R., § 35.160(b)(1)).

7 May the court suggest alternative accommodations?

Yes. As discussed in question 4 above, nothing prohibits the courts from suggesting other means of accommodation to the applicant as alternatives to the requested one. In offering an alternative accommodation, the court should first determine the applicant's ability to use the accommodation provided.

For example, if a juror is blind and requests that written material introduced at trial be transcribed in Braille, the court may also consider whether providing a reader or tape-recorded transcripts of the written material would be an effective alternative. The courts are required to provide an accommodation that will allow a court user to effectively participate in the court proceedings. The court is not required to provide the user's first or preferred choice.

8 If a request for accommodation seems too intrusive on court time and management, may the court summarily deny the request?

No. It is a violation of the rule to ignore or to summarily deny requests for accommodation. Rule 1.100(f) states: "A request for an accommodation may be denied only when the court determines that: (1) The applicant has failed to satisfy the requirements of this rule; or (2) The requested accommodation would create an undue financial or administrative burden on the court; or (3) The requested accommodation would fundamentally alter the nature of a service, program, or activity." The court is not obligated to provide personal devices (e.g., wheelchairs, prescription eyeglasses, hearing aids) to individuals with disabilities. Nor is it obligated to provide them with services of a personal nature (e.g., assistance in eating, toileting, dressing). The court may appropriately deny a request for accommodation based on other limitations on the court's duty to accommodate.

An applicant who disagrees with a decision made by the court's ADA coordinator may submit a request to have that decision reviewed by the presiding judge or other designated judicial officer. An applicant who disagrees with a decision made by a judicial officer may seek immediate review from the appropriate reviewing court by extraordinary writ to compel consideration of the accommodation request, and may bring an action for injunctive relief and damages in state or federal court.*

9 What happens if, when a case is set for trial, it turns out that a party or the party's attorney uses a wheelchair, but the courthouse has no restrooms suitable for a wheelchair user?

The case should not proceed until facilities are made available. For example, the court may offer the use of alternate, accessible restroom facilities available within the courthouse such as in jury rooms, court chambers, or other administrative areas of the court. Or it could transfer the case to another courthouse or branch that has suitable facilities. If alternative accessible restrooms are made available to parties or attorneys who use wheelchairs, the court should also provide longer trial breaks and rest periods to allow people enough time to travel between these restrooms and the courtroom.

10 Should proceedings stop if a witness is called who needs an accommodation that is not available?

No. The court is not prohibited from proceeding with other witnesses or matters until the needed accommodation is available. The court maintains its authority to set the order of witnesses and otherwise administer trials and proceedings. As a practical matter, unexpected needs for witness accommodations can be avoided by questioning attorneys and parties about whether they will be calling witnesses with disabilities who may need accommodations.

The court is, however, responsible for providing all accommodations needed by individuals, including witnesses and jurors, who use court facilities and services. For example, all courts should have lists of certified interpreters for persons with a hearing loss and of readers for the blind. Technological equipment should be available, such as assistive listening systems, printed matter in Braille, tape recordings, computer discs, real-time captioning, and other enhanced communications methods.

Tennessee v. Lane (2004) 541 U.S. 509.

RESOURCES AVAILABLE

U.S. DEPARTMENT OF JUSTICE
The full text of the Americans With Disabilities Act (ADA) (42 U.S.C., § 12101 et seq.) is located at *www.usdoj.gov/pubs/ada.txt*.

AMERICANS WITH DISABILITIES ACT (ADA) HOME PAGE
The ADA home page (a part of the U.S. Department of Justice site) is located at *www.ada.gov*.

QUESTIONS
Additional questions are welcome. They may be submitted to Linda McCulloh, Attorney, Administrative Office of the Courts, and Statewide ADA Resources Coordinator, by e-mail to linda.mcculloh@jud.ca.gov, or by fax to 415-865-4335.

This publication is available exclusively to judicial branch employees on the Serranus Web site at *serranus.courtinfo.ca.gov/reference*.

PLEASE NOTE

These questions and answers are a 2007 revision prepared to inform court personnel about rule 1.100, which the Judicial Council adopted as rule 989.3 effective January 1, 1996, amended effective January 1, 2006, and renumbered effective January 1, 2007, and about Request for Accommodations by Persons With Disabilities and Response *(form MC-410), which was revised January 1, 2006.*

This pamphlet is the creation and responsibility of the Access and Fairness Advisory Committee of the Judicial Council of California. Points of view expressed herein do not necessarily represent the official positions or policies of the Judicial Council of California or the Administrative Office of the Courts.

Judicial Council of California
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, California 94102-3688

OGC0003.07.1

Responding to Requests for Accommodations by Persons With Disabilities

Questions and Answers About Rule of Court 1.100 for Court Personnel

JUDICIAL COUNCIL OF CALIFORNIA
ACCESS AND FAIRNESS ADVISORY COMMITTEE

The Americans with Disabilities Act

Title II Technical Assistance Manual

Covering State and Local Government Programs and Services

(Excerpt Regarding Known Mental Disability)

Introduction

This technical assistance manual addresses the requirements of title II of the Americans with Disabilities Act, which applies to the operations of State and local governments. It is one of a series of publications issued by Federal agencies under section 506 of the ADA to assist individuals and entities in understanding their rights and duties under the Act.

This manual is part of a broader program of technical assistance conducted by the Department of Justice to promote voluntary compliance with the requirements not only of title II, but also of title III of the ADA, which applies to public accommodations, commercial facilities, and private entities offering certain examinations and courses. The purpose of this technical assistance manual is to present the ADA's requirements for State and local governments in a format that will be useful to the widest possible audience.

The guidance provided in the Department's regulations and accompanying preambles has been carefully reorganized to provide a focused, systematic description of the ADA's requirements. The manual attempts to avoid an overly legalistic style without sacrificing completeness. In order to promote readability and understanding, the text makes liberal use of questions and answers and illustrations. The manual is divided into nine major subject matter headings with numerous numbered subheadings. Each numbered heading and subheading is listed in a quick reference table of contents at the beginning of the manual.

II-3.6000 Reasonable modifications

II-3.6100 General. A public entity must reasonably modify its policies, practices, or procedures to avoid discrimination. If the public entity can demonstrate, however, that the modifications would fundamentally alter the nature of its service, program, or activity, it is not required to make the modification.

ILLUSTRATION 2: A county general relief program provides emergency food, shelter, and cash grants to individuals who can demonstrate their eligibility. The application process, however, is extremely lengthy and complex. When many individuals with mental disabilities apply for benefits, they are unable to complete the application process successfully. As a result, they are effectively denied benefits to which they are otherwise entitled. In this case, the county has an obligation to make reasonable modifications to its application process to ensure that otherwise eligible individuals are not denied needed benefits. Modifications to the relief program might include simplifying the application process or providing applicants who have mental disabilities with individualized assistance to complete the process.

[redacted]		Number 915.002
EEOC	NOTICE	
[redacted]		October 17, 2002

1. SUBJECT: EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act
2. PURPOSE: This enforcement guidance supersedes the enforcement guidance issued by the Commission on 03/01/99. Most of the original guidance remains the same, but limited changes have been made as a result of: (1) the Supreme Court's decision in US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516 (2002), and (2) the Commission's issuance of new regulations under section 501 of the Rehabilitation Act. The major changes in response to the Barnett decision are found on pages 4-5, 44-45, and 61-62. In addition, minor changes were made to certain footnotes and the Instructions for Investigators as a result of the Barnett decision and the new section 501 regulations.
3. EFFECTIVE DATE: Upon receipt.
4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, . a(5), this Notice will remain in effect until rescinded or superseded.
5. ORIGINATOR: ADA Division, Office of Legal Counsel.
6. INSTRUCTIONS: File after Section 902 of Volume II of the Compliance Manual.

Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act

40. Must an employer ask whether a reasonable accommodation is needed when an employee has not asked for one?

Generally, no. As a general rule, the individual with a disability -- who has the most knowledge about the need for reasonable accommodation -- must inform the employer that an accommodation is needed.[108]

However, an employer should initiate the reasonable accommodation interactive process[109] **without being asked** if the employer: (1) **knows that the employee has a disability**, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or **has reason to know, that the disability prevents the employee from requesting a reasonable accommodation**. If the individual with a disability states that s/he does not need a reasonable accommodation, the employer will have fulfilled its obligation.

Example: An employee with mental retardation delivers messages at a law firm. He frequently mixes up messages for "R. Miller" and "T. Miller." The employer knows about the disability, suspects that the performance problem is a result of the disability, and knows that this employee is unable to ask for a reasonable accommodation because of his mental retardation. The employer asks the employee about mixing up the two names and asks if it would be helpful to spell the first name of each person. When the employee says that would be better, the employer, as a reasonable accommodation, instructs the receptionist to write the full first name when messages are left for one of the Messrs. Miller.

U.S. Equal Employment Opportunity Commission

Questions & Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (ADA)

INTRODUCTION

The Americans with Disabilities Act (ADA), which was amended by the ADA Amendments Act of 2008 ("Amendments Act" or "ADAAA"), is a federal law that prohibits discrimination against qualified individuals with disabilities. Individuals with disabilities include those who have impairments that substantially limit a major life activity, have a record (or history) of a substantially limiting impairment, or are regarded as having a disability.[1]

The U.S. Equal Employment Opportunity Commission (EEOC) enforces the employment provisions of the ADA. This document, which is one of a series of question-and-answer documents addressing particular disabilities in the workplace,[3] explains how the ADA applies to job applicants and employees with intellectual disabilities.

10. Are there circumstances when an employer must ask whether a reasonable accommodation is needed when a person with an intellectual disability has not requested one?

Yes. An employer has a legal obligation to initiate a discussion about the need for a reasonable accommodation and to provide an accommodation if one is available if the employer: (1) knows that the employee has a disability; (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.[19]

Example 16: A flower shop employee with an intellectual disability is in charge of stocking the containers in the refrigerators with flowers as they arrive from the suppliers. Each type of flower has a designated container and each container has a specific location in the refrigerator. However, the employee often misplaces the flowers and containers. The employer knows about the disability, suspects that the performance problem is a result of the disability, and knows that the employee is unable to ask for a reasonable accommodation because of his intellectual disability. The employer asks the employee about the misplaced items and asks if it would be helpful to label the containers and refrigerator shelves. When the employee replies that it would, the employer, as a reasonable accommodation, labels the containers and refrigerator shelves with the appropriate flower name or picture.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JEANNINE CAILLER,)

Plaintiff,)

v.

CARE ALTERNATIVES OF MASSACHUSETTS, LLC,
Defendant.

MEMORANDUM AND ORDER
Civil Action No. 09-12040-DJC
March 23, 2012

CASPER, J.

Generally, "[i]t is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one." Russell, 437 Mass. at 457 (internal quotation marks and citation omitted). "An employee's obligation to request an accommodation stems from the basic principle that an employer is not required to accommodate a need that it does not know exists." Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination, 441 Mass. 632, 649 n. 21 (2004).7 Although the precise scope of the employer's obligation is unclear, "'[o]nce a qualified individual with a disability has requested provision for a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation . . . through a flexible, interactive process that involves both the employer and the qualified individual with a disability.'" Russell, 437 Mass. at 457 (quoting 29 C.F.R. § 1630 App. (2001)).8 An employee's request may be unnecessary to trigger the employer's obligation in the rare circumstance that the employee's condition "**makes it obvious that accommodation is required**, or a condition . . . renders the employee incapable of making a request." Leach, 63 Mass. App. Ct. at 567; Reed v. LePage Bakeries, Inc., 244 F.3d 254, 261 n. 7 (1st Cir. 2001) (noting that an employee may not be required to request an accommodation when the **employee's need for an accommodation is "obvious"**). Under such circumstances, the MCAD has noted that "an employer has a duty to ask the employee whether (s)he is in need of an accommodation of his or her disability in order to be able to perform the essential functions of her job." Johansson v. Dep't of Corr., 2010 WL 2320632, at *6 (MCAD May 28, 2012).9

Americans with Disabilities Act Title II Regulations

Part 35 Nondiscrimination on the Basis of Disability in State and Local Government Services

(as amended by the final rule published on September 15, 2010)

Subpart B—General Requirements

§ 35.130 General prohibitions against discrimination

- (a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

Title II Regulations
Supplementary Information

DEPARTMENT OF JUSTICE

28 CFR Part 35
[CRT Docket No. 105; AG Order No. 3180– 2010]
RIN 1190–AA46
Nondiscrimination on the Basis of Disability in State and Local Government Services
AGENCY: Department of Justice, Civil Rights Division.
ACTION: Final rule.

http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm#a35170

Subpart F—Compliance Procedures

§ 35.170 Complaints

- (a) *Who may file.* An individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.

§ 35.171 Acceptance of complaints

- (a) *Receipt of complaints.*
  - (1)
    - (i) Any Federal agency that receives a complaint of discrimination on the basis of disability by a public entity shall promptly review the complaint to determine whether it has jurisdiction over the complaint under section 504.

Subpart G—Designated Agencies

§ 35.190 Designated Agencies.

- (b) The Federal agencies listed in paragraph (b)(1)-(8) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.

(6) ***Department of Justice***: All programs, services, and regulatory activities relating to law enforcement, public safety, and the **administration of justice, including courts** and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); state and local government support services (*e.g.*, audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies.

§35.103 Relationship to other laws.

Section 35.103 is derived from sections 501(a) and (b) of the ADA. Paragraph (a) of this section provides that, except as otherwise specifically provided by this part, title II of the ADA is not intended to apply lesser standards than are required under title V of the Rehabilitation Act of 1973, as amended (29 U.S.C. 790-94), or the regulations implementing that title. The standards of title V of the Rehabilitation Act apply for purposes of the ADA to the extent that the ADA has not explicitly adopted a different standard than title V. Because title II of the ADA essentially extends the antidiscrimination prohibition embodied in section 504 to all actions of State and local governments, the standards adopted in this part are generally the same as those required under section 504 for federally assisted programs. **Title II, however, also incorporates those provisions of titles I and III of the ADA that are not inconsistent with the regulations implementing section 504.** Judiciary Committee report, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt.3, at 51 (1990) [hereinafter "Judiciary report"]; Education and Labor Committee report, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 84 (1990) [hereinafter "Education and Labor report"]. Therefore, this part also includes appropriate provisions derived from the regulations implementing those titles. The inclusion of specific language in this part, however, should not be interpreted as an indication that a requirement is not included under a regulation implementing section 504.

Excerpts from Subpart E:

Subpart E—Communications

Section 35.160 Communications.

Section 35.160 of the 1991 title II regulation requires a public entity to take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. 28 CFR 35.160(a). In addition, a public entity must ''furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." 28 CFR 35.160(b)(1).

The Department cautions public entities that without appropriate auxiliary aids and services, such individuals are denied an opportunity to participate fully in the judicial process, and denied benefits of the judicial system that are available to others.

The general nondiscrimination provision in § 35.130(a) provides that no individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity. The Department consistently interprets this provision and § 35.160 to require effective communication in courts, jails, prisons, and with law enforcement officers. Persons with disabilities who are participating in the judicial process as witnesses, jurors, prospective jurors, parties before the court, or companions of persons with business in the court, should be provided auxiliary aids and services as needed for effective communication.

Because the appropriateness of particular auxiliary aids and services may vary as a situation changes, the Department strongly encourages public entities to do a communication assessment of the individual with a disability when the need for auxiliary aids and services is first identified, and to reassess communication effectiveness regularly throughout the communication.

A public entity has a continuing obligation to assess the auxiliary aids and services it is providing, and should consult with individuals with disabilities on a continuing basis to assess what measures are required to ensure effective communication.

Application of Section 504 to State Court Services

"Section 504 of the Rehabilitation Act of 1973, as amended, applies to all entities that receive federal assistance and contains provisions that are nearly interchangeable with the Americans with Disabilities Act of 1990. Section 504 was the first civil rights legislation in United States designed to protect individuals from disability-based discrimination. The broad reach of Section 504 is indicated in the statutory language which states that **"no otherwise qualified individual with a disability in the United States…shall, solely by reason of his or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."** Section 504, 29 U.S.C. §794. All functions of a state department or agency are subject to Section 504 if "any part…is extended Federal financial assistance" (see Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988)). Each federal agency that distributes federal financial assistance has adopted Section 504 regulations covering entities that receive federal aid. Most of the court system's federal funding comes through the Department of Justice; therefore, the applicable federal regulations are located in Title 28 Code of Federal Regulation – Judicial Administration. In addition to other remedies that may be available, administrative remedies available under Section 504 include suspension or termination of Federal financial assistance (29 U.S. C. §794a) for the particular program or part thereof that is not in compliance (28 C.F.R. §42.108(c))." (Supreme Court of Florida – Commission on Trial Court Performance and Accountability, Recommendations for the Provision of Court Interpreting Services in Florida's Trial Courts (2010))

Investigation and Remedies by Department of Justice

The Department is authorized under 28 C.F.R. Part 42, Subpart G, to determine the County's compliance with section 504 of the Rehabilitation Act of 1973, to issue findings, and, where appropriate, to negotiate and secure voluntary compliance agreements. Furthermore, the Attorney General is authorized, under 29 U.S.C. § 794 and 28 C.F.R. §§ 42.530 and 42.108-110, to suspend or terminate financial assistance to the County provided by the Department of Justice should the Department fail to secure voluntary compliance pursuant to Subpart G or to bring a civil suit to enforce the rights of the United States under applicable federal, state, or local law. (Settlement Agreement, United States of America and Madison County, DJ 204-72-48 http://www.ada.gov/madisontnsa.htm)

ENSURING EQUAL ACCESS FOR PEOPLE WITH DISABILITIES: A GUIDE FOR WASHINGTON COURTS

August 2006

Available online at www.wsba.org/atj

PREFACE

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STATE AND FEDERAL LAWS require that government programs be accessible to persons with disabilities (RCW 49.60.010 et seq;, Americans with Disabilities Act, 42 U.S.C. §12131 et. seq.(ADA)).

In 2004, the United States Supreme Court made the following observations in upholding application of the ADA to courts and court services:

> *The unequal treatment of disabled persons in the administration of judicial services has a long history,* and has persisted despite several legislative efforts to remedy the problem.... Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable problem' warranted [the enactment of Title II].... *Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility....* [A]s it applies to the class of cases implicating the fundamental right of access to the courts, [Title II] constitutes a valid exercise of Congress'...authority to enforce the guarantees of the Fourteenth Amendment.

Tennessee v. Lane, 124 S.Ct. 1978, 1993-4 (2004).

Washington courthouses and court services must be accessible to persons with disabilities. This Guide is intended to help.

D. Cognitive and Other Mental Disabilities

People with cognitive and other mental disabilities often encounter paternalistic attitudes and condescending responses. They may therefore be unwilling to acknowledge a need for help, and may be suspicious or skeptical about offers of help. At other times, the presence of a mental disability may go unrecognized, and behavior may be misinterpreted.

A history of paternalistic attitudes, or condescending responses...

Many conditions can affect learning and decision-making: cerebral palsy, autism and Down's syndrome; traumatic brain injuries; epilepsy or other seizure disorders; or mental illness, to name just a few. Individuals with these disabilities may be of normal intelligence or may have cognitive limitations.

The major barriers to access for persons with cognitive disabilities are unnecessary complexity and ineffective communication.

The major barriers are unnecessary complexity and ineffective communication.

1. Recognizing the Presence of a Disability

The clues indicating cognitive limitations may be subtle, and persons with this disability are often very good at masking it because of the stigma that comes with such disabilities. Be sensitive to behavior, and don't make assumptions. Respond to indications that assistance is needed, ask before intervening, and respect a "no" response.

2. Independence

Most persons with cognitive disabilities are capable of making (and are entitled to make) their own choices and decisions. Very few have guardians who act for them. A person who has a guardian will still have preferences and want to make choices, and often the authority of a guardian is limited.

Family members, friends and service providers may play a major supportive role. Court personnel can look to these individuals for help, so long as care is taken to preserve confidentiality and avoid conflicts of interest between the person with the disability and his or her helpers. Court staff should consult the person with the disability before asking others for information or decisions.

3. The Importance of Respectful Language

Many people with cognitive disabilities have been teased and exploited throughout their lives. Court staff should be careful about language. The term "retarded" persists in legal documents and medical practice, but it is a common taunt and is often a slur. Labels can usually be avoided. Where a descriptive term is necessary, "developmental disability," "cognitive disability," "intellectual disability," or "learning disability" are fine. Staff may ask for and use the term the person uses when referring to his or her disability. (Further discussion of communication issues follows below.)

4. Navigating

Courthouse interiors are confusing to anyone who is unfamiliar with the justice system, and for those with cognitive disabilities, these mysterious places may be wholly intimidating.

Courthouse interiors are just plain confusing.

The key is to eliminate complexity wherever possible and to communicate clearly in signs and other materials.

If possible, court services should be located in close proximity to public transportation, and court personnel who have contact with the public should have bus schedules available. Clear signage should identify the courthouse, and indicate entrances.

Provide simple and understandable directions. The courthouse directory should be clear, should use symbols where possible, and should use consistent language (i.e., the words in the directory should match those on the wall signs). Signs with well-known symbols are preferable to signs with words only. Signs should be clear and uncluttered, and should use simple, common language or obvious symbols. Signs for the clerk's office, for example, could include a graphic symbol of a paper file or a cash register; signs for courtrooms could show a gavel and the judge's name.

5. Documents and Forms

Assistance with the completion of documents can make all the difference.

For those with cognitive disabilities, legal language is a particular challenge. A few steps will make a big difference:

- Content: Again, eliminate unnecessary complexity. Most laypeople have trouble understanding court notices, or completing court forms — those who have disabilities are truly at a disadvantage. Get rid of unnecessary jargon and legalese.
- Simplicity: Shorten forms — ask only for information that is needed.
- Font: Small print (less than 12 point) is especially hard for slow readers to follow.
- Assistance: Assistance with the completion of documents can make all the difference to a person with limited literacy who is trying to navigate an unfamiliar system. Information is always appropriate ("this form is for people who have children."). Remember to avoid giving advice as to what the person should choose when there are options.[36] In such cases, have referrals to legal services or the local bar association available.

6. The Role of Court Staff

Training is crucial.

The single most important means of ensuring access for people with cognitive disabilities is to educate and motivate court staff so they can provide effective assistance. Local advocacy organizations can be a resource for training in effective communication. Completing a program for all staff may take time, but the first and most important step is to include such training in the court's ADA compliance plan.

Training should include the following:

Recognizing cognitive disabilities. Some people have physical characteristics associated with a well-known cognitive disability. Usually, however, you cannot tell by looking. Recognizing the presence of these disabilities is

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[36] The Committee consulted with the Practice of Law Board in drafting this section.

particularly challenging because many people try to conceal difficulties with writing, reading, or other skills. Staff should learn to look for signs of decreased ability to reason and/or think independently, and how to offer help.

Tips for Communicating.

Communicating. Courthouses are busy places, and staff is often rushed. When assisting a person with a cognitive disability, however, it is imperative to be calm, speak slowly and clearly, and use concrete, simple language. Staff should be taught how to show respect and patience while using their time well, how to communicate effectively in non-technical and jargon-free language, how to notice signs of frustration or loss of focus that may indicate a need for a break, and how to get other assistance when it is needed.

Some suggestions about what to do:

- Use short sentences and basic, concrete vocabulary. Speak slowly. Break it down. Use pictures or actions to convey meaning.
- Speak directly to the person, in a neutral manner.
- Recognize "false positive" answers. Many people with cognitive disabilities have learned that it is easiest to just say yes, and so may indicate they understand or agree when really they are completely lost or confused. A question like, "Do you understand?" often will get a false "yes" response, whereas "Would you like me to show you the way?" may produce a truly grateful response.
- Open-ended questions are usually better.
- Repeat instructions or questions using different phrasing.
- Be discreet. A person who is confused and lost may try to hide the fact, or be too embarrassed to say she cannot read the form she must fill out. Usually, however, there are signs of difficulty for those who are alert. Staff should not wait to be asked, but should offer help if it appears to be needed.

Well-intentioned people can sometimes make things worse...

What not to do. Some responses encountered by people with cognitive disabilities are ineffective or counter-productive.

- Don't ignore the person with the disability and instead address a personal assistant, family member, or other accompanying person. This can be offensive and demeaning. Respond to the person involved. If a question is asked by an assistant on behalf of another, both individuals should be addressed.
- Don't use labels such as "retarded."
- Don't be indiscreet. For many people it is profoundly humiliating to admit illiteracy.

Training is available!

Education and guidance for court personnel may be available from groups such as The Arc of Washington State and People First. The National Arc

offers numerous publications, including a brochure titled "When People with Mental Retardation Go to Court."[37]

The Language and Behavior section of the Appendix contains further tips for effective communication.

7. Psychiatric disabilities

Mental illness can in some cases affect learning, judgment, and communication, but many people with mental illness have no cognitive limitations, and, when they are not experiencing symptoms, are fully capable of understanding the court system.

People with mental illness are often wrongly stigmatized as dangerous, and sometimes it is assumed that there is no recovery from a mental illness. In fact, the causes and symptoms of mental illness vary greatly. Many people experience symptoms episodically, and are able to work and actively participate in the community most of the time. There are effective treatments for most mental illnesses. Unfortunately, many people with psychiatric disabilities come in contact with the justice system while symptomatic. Behaviors associated with their symptoms may lead to misunderstanding and prejudice.

Staff will benefit from learning how to recognize and respond to individuals exhibiting the symptoms or effects of a mental illness, including techniques for de-escalation of volatile situations.

8. Other considerations

The vocabulary, etiquette, dress, and schedule of courts have no parallel anywhere else in life.

Court customs. Like our courthouses, our complex rules are mysterious to all laypersons, and the vocabulary, etiquette, dress, and schedule of courts have no parallel anywhere else in life. People with cognitive disabilities who are represented by a lawyer will have a personal guide to the etiquette of the courtroom, but others will depend on the judge and court staff for guidance. Support persons can provide an effective adjunct to the lawyer. (See Specialized Accommodation Issues, below.)

Courtroom communication. Judges, lawyers, and court staff should ensure that communication is effective by requiring parties and witnesses to speak clearly and use straightforward vocabulary, by giving additional time for responses, and by allowing additional recesses if needed.

Guardian *ad litem*. Where the disabled person is a party and is unable to comprehend the proceedings, appointment of a guardian *ad litem* is required.[38] On such occasions, however, court staff should continue to treat

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[37] These may be found at http://www.thearc.org/publications (accessed September 18, 2005).

[38] See *Graham v. Graham*, 40 Wn.2d 64, 66-67, 240 P.2d 564 (1952)(court should appoint GAL "when reasonably convinced that a party litigant is not competent, understandingly and intelligently, to comprehend the significance of legal proceedings and the effect and relationship of such proceedings in terms of the best interests of such party litigant"); *Vo v. Pham*, 81 Wn. App. 781, 784-785 (Wash. Ct. App. 1996)(same).

the person involved with dignity and respect, and address him or her directly on matters other than those at issue in the proceeding.

Appointment of counsel. Some lawyers are especially skilled, experienced and motivated in representing people with cognitive limitations, especially in criminal cases, and where possible those attorneys should be appointed for indigent defendants. It is at least arguable that in cases where an indigent pro se civil litigant is unable to participate effectively in the proceedings because of a cognitive disability, the reasonable accommodation is appointment of counsel at public expense. [39]

E. Special Accommodation Issues

1. Guide Dogs and Service Animals

Guide dogs are the most widely recognized kind of service animal, but people with many types of disabilities use animals for assistance. A service animal must be allowed in any area open to the public, including courtrooms.[40]

A service animal is "an animal that is trained for the purpose of assisting or accommodating a disabled person's sensory, mental or physical disability." RCW 49.60.040(23). Service animals may alert a person to sound, pull a wheelchair, carry or fetch things, alert its owner to a seizure or other health issue before the owner is aware of symptoms, or alleviate anxiety by engaging in specific behaviors.[41]

Both the ADA and the WLAD forbid discrimination based on use of a guide dog or service animal.

A service animal is not required to wear a cape, special harness, or other equipment, and there is no requirement that a service animal be licensed or certified as such by any government agency. Where the purpose of the animal is unclear, it is permissible to ask whether the animal is needed because of a disability, and what tasks the animal has been trained to perform. In most cases, court personnel should accept a person's statement that the animal is a service animal. The person using the animal is responsible for supervising the animal, and a service animal can be excluded if it poses a threat to property or to other people.

Valuable guidance may be found in the Department of Justice publication *Commonly Asked Questions About Service Animals in Places of Business.* [42]

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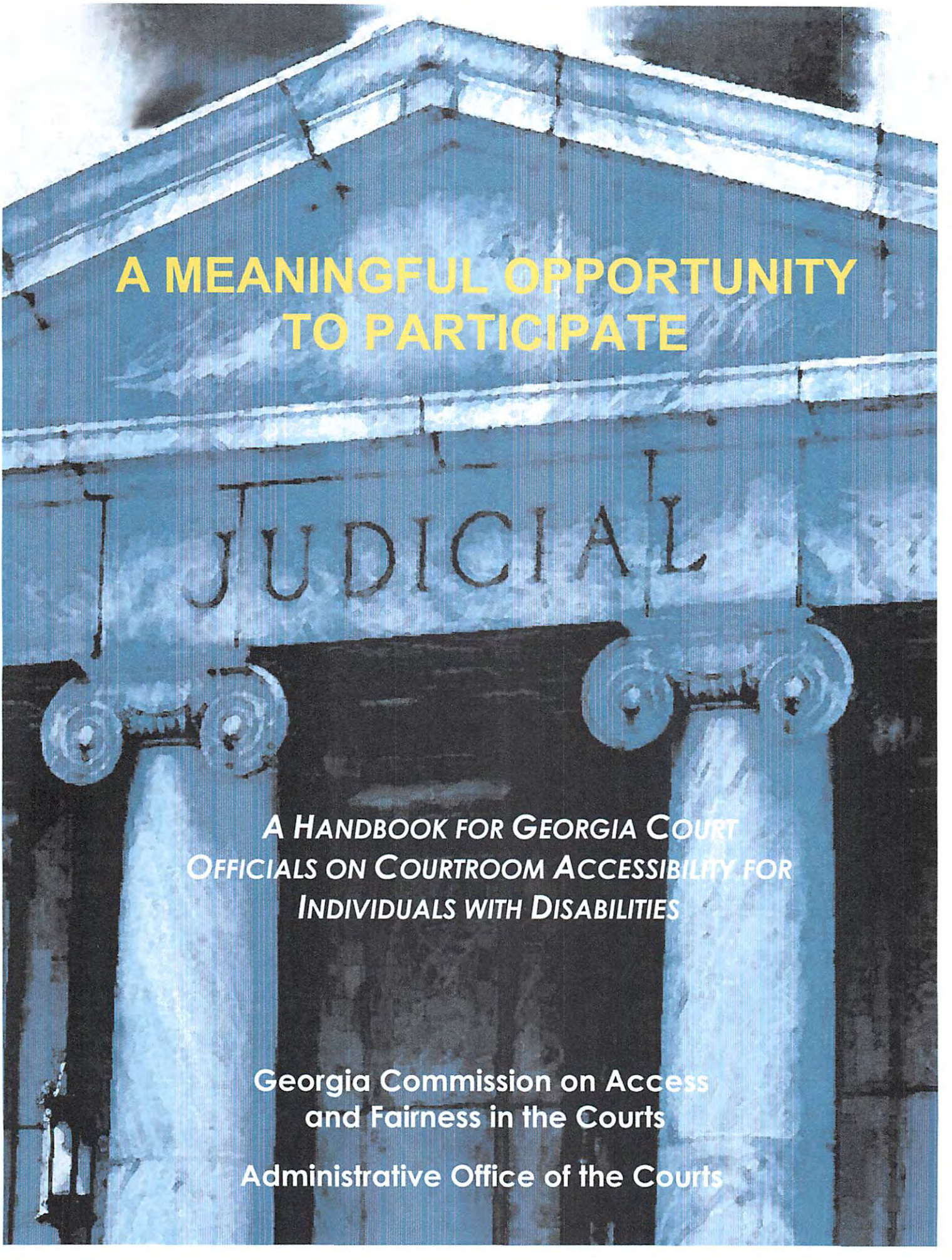
[39] This point is argued by the authors of a recent law review article. *See* Brodoff, L., McClellan, S. and Anderson, E., The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon, 2 Seattle Journal for Social Justice 609 (Spring/Summer, 2004).

[40] The Seattle Office for Civil Rights recently awarded a $21,222 judgment to a woman who was required to leave her dog outside while patronizing a convenience store. *Seattle Times,* May 3, 2005 "*Woman wins bias case over service dog*," Jennifer Sullivan.

[41] See *Storms v. Fred Meyer Stores*, 129 Wn. App. 820, __ P.3d. __ (Div. I, Sept. 26, 2005)(dog trained to alleviate anxiety disorder met definition of service animal).

[42] Available on the Department of Justice website at www.usdoj.gov/crt/ada/qasrvc.htm (accessed May 13, 2005).



A MEANINGFUL OPPORTUNITY TO PARTICIPATE

A Handbook for Georgia Court Officials on Courtroom Accessibility for Individuals with Disabilities

Georgia Commission on Access and Fairness in the Courts

Administrative Office of the Courts

PERSONS WHO HAVE MENTAL OR COGNITIVE DISABILITIES

One of the most difficult matters Georgia courts face in accommodating persons with disabilities is in the area of mental illness or cognitive disability. Cognition refers to "understanding," the ability to comprehend what you see and hear and the ability to infer information from social cues and "body language." People with these impairments may have trouble learning new things, making generalizations from one situation to another and expressing themselves through spoken or written language. Cognitive limitations of varying degrees can often be found in people who have been classified in school as learning disabled, mentally retarded, autistic or who have been diagnosed as having a head injury or Down Syndrome.

Because the issues facing individuals with mental illness or cognitive disability often touch on basic rights, especially for criminal defendants, it is difficult to address them effectively in the scope of this handbook. What follows are three basic steps Georgia courts can take in their efforts to ensure that people with mental or cognitive disabilities have equal access to justice.

In many cases, courts must first determine whether an individual is a "qualified individual with a disability" under the ADA. For a criminal defendant, this will usually be a determination of whether the individual is competent to stand trial. In other situations involving a person with a mental disability appearing as a witness or as a potential juror, the court must determine whether or not that individual can carry out his or her duties in a courtroom. For example, if an individual is unable to understand testimony as a juror because of mental retardation, or if an individual disrupts the courtroom frequently as a spectator because of behavioral problems or delusions, those individuals are not "qualified" and can be excluded from the courtroom. However, it is important to remember that mental retardation or a traumatic brain injury will not always leave individuals unqualified to serve as witnesses, spectators or jurors. Courts should conduct an individualized inquiry to determine whether an individual is "qualified."

Courts must next determine whether it is possible to provide reasonable accommodations for an individual with mental or cognitive disabilities without a fundamental alteration of court programs and services. Keep in mind that many people with mental or cognitive impairments may not be able to request accommodations effectively and may need assistance in constructing appropriate accommodation requests, whether from the court or from their legal representatives.

The third step is determining whether an individual with a mental or cognitive disability poses a "direct threat" to himself or others in the courtroom. The ADA requires Georgia courts to make a knowing, individualized determination – not based on myth, fear or stereotype – of whether an individual poses a threat, and to consider any possible, available accommodations for this threat. Courts may choose to exclude individuals who pose a threat but only in a manner consistent with their civil rights and other protections.

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Access to the Courts: A Blueprint for Successful Litigation Under the Americans With Disabilities Act and the Rehabilitation Act

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ACCESS TO THE COURTS: A BLUEPRINT FOR SUCCESSFUL LITIGATION UNDER THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT

MARC CHARMATZ AND ANTOINETTE MCRAE*

I. INTRODUCTION

For individuals with disabilities, "access to the courts" involves more than hiring a lawyer, filing a complaint, or proceeding through the numerous stages of the litigation process. "Access to the courts," in this context, means finding an accessible parking place, getting up the steps, opening courthouse doors, finding the courtroom, sitting at counsel tables, entering the jury box, sitting on the bench, and communicating effectively with judges, lawyers, courtroom personnel, and the jury. This article explores the obligations of state and local courts to provide reasonable modifications and auxiliary aids and services to ensure that parties, witnesses, judges and lawyers, and jurors with disabilities are guaranteed meaningful participation in judicial proceedings. These rights have been strengthened through lawsuits based upon two key federal statutes, Section 504 of the Rehabilitation Act (section 504)[1] and The Americans with Disabilities Act (ADA).[2]

Since 1973, section 504 has prohibited discrimination on the basis of disability by programs and activities that receive federal funds.[3] The statutory definition of "program or activity" is very broad.[4] Section 504 is implemented by comprehensive regulations promulgated by federal agencies. The regulations detail section 504 obligations for recipients of

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1. 29 U.S.C. § 794 (2000).
2. 42 U.S.C. §§ 12101-12213 (2000).
3. 29 U.S.C. § 794(a) (2000).
4. A "program or activity" includes "a department, agency, special purpose district, or other instrumentality of a State or of a local government" that receives federal financial assistance federally funded educational institutions; private entities and corporations; and health care, housing, social service, or recreational organizations. *See* 29 U.S.C. § 794(b).

federal aid.[5] For example, programs and activities receiving federal financial assistance must "evaluate and modify [their] policies and practices that do not meet the [nondiscrimination] requirements."[6] Specifically, section 504 covers the operations of state and local courts that receive federal financial assistance because such courts are considered "instrumentalit[ies] of a State or of a local government."[7] Thus, courts are not permitted to exclude, deny benefits to, or discriminate against an individual with a disability solely because of that disability.[8]

The ADA, enacted on July 26, 1990,[9] built on section 504 by providing comprehensive anti-discrimination protection for individuals with disabilities. The ADA's coverage is not limited to programs and activities that receive federal financial assistance, but extends the anti-discrimination mandate to covered employers under Title I,[10] all of the functions of state and local governments under Title II,[11] and public accommodations under Title III,[12] regardless of whether they receive federal support. Some state and local courts may be covered under both the ADA and section 504. In other words, state and local courts are always covered under the ADA and are covered under section 504 when they receive federal financial assistance.

Individuals seeking protection under the ADA and section 504 have met with some adversity in federal courts throughout the United States. A core issue—the definition of an individual with a disability, i.e. who is entitled to protection under both federal statutes, has been whittled away by the United States Supreme Court.[13] A survey by the American Bar Association's Mental and Physical Disability Law Reporter of cases

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5. 28 C.F.R. §§ 42.501-.540 (2003).
6. 28 C.F.R. § 42.505(c)(1).
7. 29 U.S.C. § 794 (b)(1)(A).
8. 29 U.S.C. § 794(a); *see also* 45 Fed. Reg. 37,620, 37,630-31 (June 3, 1980).
9. Pub. L. 101-336, 104 Stat. 327 (1990).
10. 42 U.S.C. §§ 12111-12117 (2000).
11. 42 U.S.C. §§ 12131-12165 (2000).
12. 42 U.S.C. §§ 12181-12189 (2000).
13. *See* Toyota Motors Mfg., Kentucky, Inc. v. Williams, 534 U.S 184 (2002) (holding that individual with carpal tunnel syndrome was not disabled because of her ability to perform manual tasks in everyday life); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (holding that individuals with 20/200 uncorrected vision corrected with eyeglasses were not disabled); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (holding that individual with monocular vision was not disabled); Murphy v. United Parcel Service, 527 U.S. 516 (1999) (holding that individual with hypertension was not disabled). *But see* Bragdon v. Abbott, 524 U.S. 624 (1998) (holding that individual who was HIV positive qualified as disabled under ADA); School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (holding that individual with tuberculosis qualified as disabled under §504).

brought under Title I[14] reveals, "of 328 decisions that resolved the claim (and have not been changed on appeal), 94.5 percent resulted in employer wins and 5.5 percent in employee wins."[15] The United States Supreme Court has further reduced the rights of employees with disabilities under Title I.[16] The situation has become so grave that disability advocates are attempting to have cases accepted for review by the United States Supreme Court withdrawn.[17]

Perhaps one of the few areas where individuals with disabilities have prevailed, at least for purposes of declaratory and injunctive relief, is in Title II[18] and section 504 cases dealing with "access to the courts." The relative success by individuals with disabilities in these cases stems from the statutory and regulatory language in both Title II[19] and section 504.[20] The terms "reasonable modifications"[21] and "auxiliary aids and

14. 42 U.S.C. §§ 12111-12117 (2000). Title I of the ADA deals with discrimination on the basis of disability in the context of employment, as opposed to Title II, which involves disability discrimination in the context of the programs, services, and activities of public entities, i.e. state and local governments.

15. Amy L. Albright, *2002 Employment Decisions Under the ADA Title 1-Survey Update*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 387 (2003). The ABA surveyed 442 cases; 309 cases resulted in employer wins, 18 in employee wins, and 115 in decision in which the merits of the claim were not resolved. *Id.* at 387. The Fourth Circuit heard thirty-two Title I cases in 2002. *Id.* at 388. Employers won twenty-five of the cases on summary judgment and one case on the merits. *Id.* Employees did not win one case, and in six cases there was no resolution. *Id.*

16. *See* US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (holding that when an employer requests an accommodation under Title I of the ADA that interferes with seniority rights, a rebuttable presumption is created that the accommodation is not reasonable); Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002) (holding that Title I of the ADA covers disabilities that pose direct threats to one's own health); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that states are entitled to Eleventh Amendment immunity from monetary damages under Title I of the ADA); Hernandez v. Hughes Missile Syss. Co., 298 F.3d 1030 (9th Cir. 2002), *cert. granted sub nom.* Raytheon Co. v. Hernandez, 537 U.S. 1187 (2003) (considering whether Title I of the ADA confers preferential rehire rights for employees lawfully terminated for misconduct, such as illegal drug use).

17. Hason v. Med. Bd. of Cal., 279 F.3d 1167 (9th Cir. 2002), *cert. granted*, 537 U.S. 1028 (2002). In *Hason*, the Supreme Court granted certiorari to consider the first question in the writ of certiorari – whether Eleventh Amendment immunity bars suit under Title II of the ADA for denial of a medical license based on the applicant's mental illness. Med. Bd. of Cal. v. Hason, 537 U.S. 1028 (2002). *See also* Petition for Writ of Certiorari, 2002 WL 32101143 (Sept. 23, 2002). The Ninth Circuit had ruled that the applicant could sue the medical board because Congress, in enacting Title II of the ADA, had validly abrogated the states' Eleventh Amendment immunity. *Hason*, 279 F.3d at 1171. *See also* Kimel v. Fl. Bd. of Regents, 528 U.S. 62 (2000); Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002).

18. 42 U.S.C. §§ 12131-12165 (2000).

19. *Id.*

20. 29 U.S.C. §794 (2000).

21. "Reasonable modifications" may include modifications to "rules, policies, or practices." *See* 42 U.S.C. § 12131(2).

services"[22] are linchpins enabling individuals with disabilities to have a genuine opportunity to be present, participate, and enjoy the benefits of court programs, activities, and services.[23] Additionally, courts have held that the Due Process Clause of the Fourteenth Amendment also protects an individual's right to "access to the courts."[24]

Part II of this article presents an overview of the federal statutes and regulations that protect an individual's "access to the courts" rights, focusing on Title II and section 504. In Part III, this article examines the Constitutional framework that supports the right to "access to the courts." Part IV examines federal cases where the above statutes were used to protect the "access rights of individuals" with disabilities.

II. FEDERAL STATUTORY PROTECTION OF ACCESS TO STATE, LOCAL, AND FEDERAL COURTS.

A. The ADA

In enacting the ADA, Congress entered specific findings and purposes:

> [I]ndividuals with disabilities . . . have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment . . . based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[25]

Further, Congress found persons with disabilities "continually encounter . . . [the] failure to make modifications to existing facilities," such as courthouses, and that discrimination against individuals

22. "Auxiliary aids and services" include "qualified interpreters . . . qualified readers, taped texts . . . acquisition or modification of equipment or devices; and . . . other similar services and actions." 42 U.S.C. § 12102(1) (2000).

23. 42 U.S.C. §§ 12131-12132. Under the ADA, public entities may not discriminate against an individual with a disability who "with or without reasonable modifications . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131.

24. *See, e.g.*, Lane v. Tennessee, 315 F.3d 680 (6th Cir. 2003) *cert. granted*, 123 S. Ct. 2622 (2003).

25. 42 U.S.C. § 12101(a)(7).

a property tax imposition if the county refused to fund the renovations.[65] The *Kroll* case offered early support to plaintiffs by highlighting the explicit link between courtroom access and the ADA.[66]

B. Section 504 of the Rehabilitation Act

Section 504 was the first civil rights law ensuring the legal rights of individuals with disabilities, but, unlike Title II, the statute applies only to recipients of federal financial assistance. As initially enacted, there was some legal authority for the now absurd proposition that if, for example, a state or local court received federal funds for improving jury service, but not child support, then the former, but not the latter, would be subject to section 504.[67] This proposition has been overruled by statute,[68] and today all operations of state and local courts are covered under section 504, which provides comparable protections to Title II.[69]

1. The Statutory Language of Section 504

Section 504 provides: "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[70] Section 504 does not define the term "otherwise qualified individual with a disability",[71] and does not use the terms "reasonable

65. *Id.* at 753.

66. *See also Matthews v. Jefferson*, 29 F. Supp. 2d 525 (D. Ark. 1998). Mr. Matthews, who has paraplegia, had three hearings in a county court house and had to be carried up and down the stairs to get to a second floor courtroom. *Id.* at 528. He developed a urinary tract infection due to inaccessible restrooms. *Id.* The court granted summary judgment for Mr. Matthews under Title II of the ADA and 504, holding that the county failed to make its court facilities readily accessible to and usable to individuals with mobility impairments. *Id.* at 534.

67. *See* Grove City Coll. v. Bell, 465 U.S. 555 (1984).

68. 29 U.S.C. §794(b) (2000).

69. *See* Consol. Rail Corp. v. Darrone, 465 U.S. 624, 636 (1984).

70. 29 U.S.C. § 794(a) (2000). Section 504 is a civil rights statute that prevents discrimination against "*all* handicapped individuals . . . in employment, housing, transportation, education, health services, or any other Federally-aided programs." Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1107 (9th Cir. 1987) (emphasis added) (citations omitted). The thrust of this mandate is "built around fundamental notions of equal access to state programs and facilities." Smith v. Robinson, 468 U.S. 992, 1017 (1984). Congress "made a commitment to the handicapped, that, to the maximum extent possible they shall be fully integrated into the mainstream of life in America." Strathie v. Dep't of Transp., 716 F.2d 227, 229 (3d Cir. 1983) (quoting S. REP. NO. 95-890, at 39 (1978)). The mainstream of American life includes state and county courthouses and judicial proceedings that occur within those settings. *See* DeLong v. Brumbaugh, 703 F. Supp. 399 (D. Pa. 1989); Kroll v. St. Charles County, 766 F. Supp. 744 (D. Mo. 1991).

71. The term "qualified handicapped person" is defined in the regulations implementing

modifications" or "auxiliary aids and service" in the text of the statute.[72] For purposes of section 504, it should not matter whether a particular courthouse or program in question receives federal financial assistance, so long as the court system itself receives this funding. The Civil Rights Restoration Act of 1987[73] amended various civil rights statutes, including section 504, by defining the term "program or activity" to mean "all of the operations of . . . a department, agency . . . or other instrumentality of a State or of a local government."[74] In other words, "all of the operations" of the state and local courts are subject to section 504 scrutiny, from parking to courthouse entry, to entering and exiting the courtroom, and including the administrative, as opposed to the judicial, decisions of a judge.[75]

2. The DOJ Regulations Implementing Section 504

The DOJ Regulations implementing section 504 (the "section 504 Regulations") contain a "general" prohibition on discrimination similar to the Title II Regulations.[76] Furthermore, the section 504 Regulations are entitled to substantial deference.[77] The regulations generally provide that "no qualified individual with a disability shall, because a public entity's

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§504 to mean: "(a) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and (b) With respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services." 28 C.F.R. § 41.32 (2003).

72. The definition of an individual with a disability under the ADA is the same for §504. *See* 29 U.S.C. §705(9) (2000); 42 U.S.C. 12102(2) (2000).

73. Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (1988). The Civil Rights Restoration Act legislatively overturned the United States Supreme Court decision in *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), and *Consol. Rail Corp. v. Darrone*, 465 U.S. 624 (1984), dealing with program specificity. The receipt of federal funding obligates the recipient to ensure all of its operations comply with section 504, and not just those specific programs that benefited from the federal financial assistance. 29 U.S.C. § 794(b) (2000).

74. 29 U.S.C. § 794(b)(1)(a). Moreover, in *Galloway v. Superior Court*, the federal district court held that "[I]t is readily apparent that the Superior Court jury system falls within the purview of Section 504 of the Rehabilitation Act." 816 F. Supp. 12, 15 (D.D.C. 1993). The court cited the definition of "program," 29 U.S.C. § 794(b)(1)(A), noting that the Superior Court received federal financial assistance from the U.S. Department of Justice. *Id.*

75. *See, e.g.*, Avraham v. Zaffarano, 1991 WL 147541 (D. Pa. July 25, 1991).

76. *See* 28 C.F.R. pt. 42. In a 1981 letter, the Department of Justice advised the administrator of the Alaska court system that its administrative rule that deaf litigants pay the cost for sign language interpreter services in civil cases violated section 504 and the section 504 regulations. Letter from James P. Turner, Acting Ass't Attorney General, Civil Rights Division, U.S. Dep't of Justice, to Arthur T. Snowden, Administrative Director, Alaska Court System, at 2 (Mar. 6, 1981) (on file with author). The DOJ noted that the Alaska court system's failure to provide any auxiliary aids–interpreters or telephonic devices–may have precluded effective participation by deaf and hard of hearing persons in conducting business in the court system. *Id.*

77. Alexander v. Choate, 469 U.S. 287, 304 n.24 (1985); Consol. Rail Corp. v. Darrone, 465 U.S. 624, 635 and nn. 14-16 (1984).

facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity."[78] The regulations also provide that:

> A recipient that employs fifteen or more persons *shall provide appropriate auxiliary aids* to qualified handicapped persons with impaired sensory, manual, or speaking skills where a refusal to make such provisions would discriminatorily impair or exclude the participation of such persons in a program receiving Federal financial assistance. Such auxiliary aids may include may include brailled and taped material, qualified interpreters, readers, and telephonic devices.[79]

Like Title II, the non-discrimination requirements of section 504 mean more than "you are free to enter." If a party with impaired sensory, manual, or speaking skills can not understand the judge, the court system—not the party—must take the steps necessary to ensure effective participation.

The Analysis of the section 504 regulations is especially applicable, as it mandates "full accessibility" in state and local courts for "judges, jurors, plaintiffs, defendants, witnesses, or...spectators."[80] The plain language of section 504 is just as complete as that of Title II. There are no definitions of "qualified individual with a disability", "auxiliary aid or service", or "reasonable modifications" in the text of section 504. Yet, the statutory language of section 504, combined with the detailed regulatory provisions and analysis, provide effective tools for individuals with disabilities to ensure "court access."

3. Early Judicial Interpretation of section 504: Access Expanded

While the first United States Supreme Court decision to consider the meaning of section 504 took a rather limited view, other early United States Supreme Court decisions recognized the importance of section 504

78. 28 C.F.R. § 35.149 (2003).

79. 28 C.F.R. § 42.503(f) (2003) (emphasis added).

80. 45 Fed. Reg. 37,620, 37,627-33 (June 3, 1980) (Appendix B) (Analysis of Final Rule). The Analysis of the rule also addresses the provision of services, emphasizing that individuals with disabilities must receive court-provided services (e.g., appointed counsel) on an equal basis with non-disabled individuals. *Id.* The Analysis even explain when auxiliary aids and services would not be required, such as when a participant in a judicial proceeding continues to need a service outside the context of the proceeding. *Id.* at 37,630-31.

in vindicating the legal rights of individuals with disabilities. The Court first analyzed section 504 in 1979 when it decided *Southeastern Community College v. Davis.*[81] The Court held that, section 504 did not require a community college to make fundamental alterations to its registered nurse training program in order to accommodate an applicant with severe hearing loss.[82] The Court also held that the applicant failed to meet the legitimate and necessary physical requirements of the nursing program as established by the community college. Finally, the Court held that there was no section 504 violation when the college concluded that the applicant was unqualified.[83] Referencing 45 C.F.R. §84.3(k)(3), the applicable section 504 regulation, the Court defined a qualified handicapped individual as "a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity."[84]

Under *Davis*, the seminal case in all of civil rights jurisprudence as it relates to individuals with disabilities, the groundwork was laid for successful litigation in "access to the court" cases. Unlike postsecondary education, where colleges and universities have leeway in establishing their legitimate admission standards, the "fundamental alteration" defense has not worked when the due process rights of court access are at stake.[85] The definition of "qualified individual with a disability" is a key factor in any postsecondary education or employment case, but, again, the standard for who is qualified in a court access case is far less strenuous.[86] In other words, a criminal defendant is always "qualified" for purposes of section 504, as is a party in a civil case.

In the next section 504 case,[87] the United States Supreme Court held that:

> [A]n otherwise qualified handicapped individual must be provided with *meaningful access* to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; *to assure meaningful access,*

81. 442 U.S. 397 (1979).
82. *Id.* at 409-10.
83. *Id.* at 406-7, 414.
84. *Id.* at 406.
85. *See, e.g.*, Lane v. Tennessee, 315 F.3d 680 (6th Cir. 2003), *cert. granted*, 123 S. Ct. 2622 (2003).
86. *Id.*
87. Alexander v. Choate, 469 U.S. 287 (1985).

reasonable accommodations in the grantee's programs or benefits will have to be made.[88]

Here, the Court introduced a key phrase not found in the text of the statute: "meaningful access." Access must be real, and not merely a written policy with no "teeth." Again, the overly simplistic notion that the "Courthouse is Open To All" will not survive scrutiny if there is no ramp to get into the building, because the "benefit"—access to the court—can not be defined so as to exclude individuals with mobility impairments.

C. Statutory Protection in Federal Courthouses

Ironically, litigants with disabilities in federal courts have fewer court access rights than litigants in state and local courts. This is because the ADA and section 504 are federal laws that do not apply to the federal court system.[89] Unlike state and local entities, federal judicial agencies, i.e. the federal courts, do not fall within the purview of the ADA. Section 504 is also inapplicable to the federal judiciary, as this statute applies only to federally assisted programs, and federally conducted programs of executive agencies of the federal government.[90] Since the federal judiciary, a separate branch of government, is not an executive agency, section 504 is inapplicable to the federal courts.

While the ADA and section 504 cannot be enforced against federal courts, other federal laws and policies provide some court access rights in federal courts. The Architectural Barriers Act of 1968,[91] mandates removal of architectural and communication barriers in buildings and facilities that are constructed or altered with federal funds.[92] In addition, the Court Interpreters Act[93] governs access to federal courts for deaf, hard-of-hearing, and speech impaired individuals.[94] The Court Interpreters Act is limited to "judicial proceedings instituted by the United States, " i.e. criminal, civil, pre-trial, and grand jury proceedings.[95] If a deaf or speech-impaired person is a

88. *Id.* at 301 (emphasis added).

89. Both acts refer to state and local government, and neither refers to federal courts. *See* 29 U.S.C. § 794(b); 42 U.S.C. § 12131(1).

90. 29 U.S.C. § 794(a), (b) (2000).

91. 42 U.S.C. § 4151-4157 (2000).

92. *Id.*

93. 28 U.S.C. § 1827 (2000).

94. 28 U.S.C. § 1827(b)(1) (2000).

95. *Id. See also* 28 U.S.C. § 1828 (providing for special interpretation services in

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Article

*65 "I'M OK-YOU'RE OK" [FN1]: EDUCATING LAWYERS TO "MAINTAIN A NORMAL CLIENT-LAWYER RELATIONSHIP" WITH A CLIENT WITH A MENTAL DISABILITY

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The tools of the mind become burdens when the environment which made them necessary no longer exists.
---- Henri Bergson [FN2]
If you wish to converse with me, define your terms.
---- Voltaire [FN3]

I. INTRODUCTION

In a society where people are uncomfortable around people with mental disabilities, lawyers must take the lead in protecting their rights and treating them with respect. Discrimination remains prevalent in this country, but in most circumstances, the discrimination is subtle and covert. However, discrimination against people with mental disabilities is still overt. Because people are ignorant about mental disabilities, they are fearful of people who have such disabilities. Lawyers are just as uninformed as most citizens. Discrimination against people with mental disabilities continues to be a major problem, and they are under-represented by lawyers.

This Article discusses the importance of providing effective representation to clients with mental disabilities and the need for bar associations to provide further guidance to lawyers. The Article is limited to a discussion *66 of those clients with mental disabilities who, with effective communication and accommodations, can participate in a discussion of their legal rights. The situation of clients whose mental incompetency requires a guardian or guardian ad litem is not addressed. First, the Article reviews and critiques ABA Model Rule of Professional Conduct 1.14, which requires a lawyer to maintain a "normal client-lawyer relationship" with the client under a disability. The Article will then discuss the definition of mental disability and the different classifications of such disabilities. The Article will review the historical treatment of people with disabilities and the legislative response to the mistreatment of people with disabilities which has impacted lawyers' professional responsibility to their clients with mental disabilities. Further, the Article discusses the importance of effective communication with clients with disabilities. Finally, the Article concludes that most lawyers are not properly educated to effectively represent people with mental disabilities and that ethical rules should provide additional guidance. Moreover, the American Bar Association needs to provide more emphasis on educating lawyers about the needs of people with disabilities. Lawyers should be required to participate in mandatory training regarding clients with mental disabilities.

II. OVERVIEW AND CRITIQUE OF ABA MODEL RULE 1.14: CLIENT UNDER A DISABILITY

inability to engage in any substantial gainful activity by reason of any ... physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. [FN120] Because of the different definitions of "disability," it is important that lawyers closely review the statutes to assure appropriate protection.

V. LAWYER'S RESPONSIBILITY WHEN REPRESENTING A CLIENT WITH A MENTAL DISABILITY

As discussed earlier, a lawyer's duty to her client does not change because the client has a mental disability. However, a lawyer does need a heightened sense of awareness to the needs of a client with a mental disability and may need to be more diligent in assuring effective communications and respecting the objectives of the client. The lawyer should acknowledge that there are differences between clients with mental disabilities and clients *82 without mental disabilities; however, this acknowledgment is consistent with respect for the clients and their rights. The difference does not mean that the relationship between the lawyer and client is different, but it does mean the lawyer may have to change the way he or she communicates with the client to ensure that the client understands the legal issues so the client can make meaningful decisions. Lawyers have a tendency to usurp decisions that should be left to the client, and this problem is more prevalent when the lawyer is representing a client with a mental disability. [FN121] Throughout the lawyer-client relationship, the client retains the right to make the decision regarding the objective of the representation, but the lawyer retains the right to determine the means. [FN122]

Lawyers are faced with two potential approaches they can take in their representation of clients: One approach is for the lawyer to act in the "best interest" of the client, while another approach is to act as an "advocate" for the expressed interest of the client. In the "best interest" approach, the lawyer takes a paternalistic role and usurps the decisions of the client. A lawyer who takes this approach rationalizes that she has expertise and knows what is best for the client. [FN123] The "advocate" approach requires the lawyer provide legal advice in order to assure that the client has sufficient information to make an informed decision. The desired outcome is for the client to make the decision that is in his or her best interest. [FN124] The "advocate" approach is the widely accepted approach and provides for a client-centered relationship. [FN125] When representing a client with a mental disability, the "advocate" approach is consistent with the requirement that the lawyer maintain a "normal" lawyer-client relationship. [FN126]

As a lawyer develops a relationship with his or her client, it is imperative that he or she has effective communication skills and that the lawyer makes the client feel that he or she is as important as the case. [FN127] The tone that is set in the initial meeting is important to establish the tone of the entire relationship. At the initial meeting, the lawyer must establish trust with the client and convey to the client the client's importance in the case. [FN128] The lawyer should also use this opportunity to measure the client's cognitive ability to assure that the client understands the matters being discussed. The lawyer may be able to answer the threshold questions as to whether the *83 client has an impairment. [FN129] However, the lawyer must find out the client's cognitive ability in a way that is not offensive and patronizing. The lawyer can establish a good relationship and learn about the client's legal problem and cognitive ability through effective communication.

When a lawyer is communicating with a client with a disability, it is important that the person is treated with respect. When a lawyer is referring to a person with a disability, it is important that the lawyer uses "people first" language. In "people first" language, the person is put first, and the disability is put second, therefore reflecting respect for the person. [FN130] For instance, the lawyer should say a "person with mental illness," as opposed to a "mentally ill person." It is important to the client for the lawyer to see the client first and not the client's disability. People with disabilities do not want to be portrayed as helpless or oppressed. [FN131] The lawyer must appreciate that the disability does not describe or identify the person, but the person may have a disability

which is one of many of his or her characteristics. [FN132]
If a lawyer does suspect that a person has a disability, the lawyer should determine whether the person has a communicative or a cognitive disability or both. [FN133] The lawyer should not be afraid to discuss the disability with the client and ask the client the best way to convey information. People frequently make presumptions about the limitations and skills of a person with a disability, where the best way to determine his or her limitations and skills is to ask the person directly. The lawyer should not direct questions to a third person when the client is present and can speak on his or her own behalf. However, if a lawyer learns that a client has a disability prior to an interview, it would be beneficial if the lawyer could learn as much as possible about the characteristics associated with the disability prior to an interview. [FN134]
Lawyers should be aware that many clients will not be candid and forthcoming about a mental disability because of the negative stigma attached to it, the misclassification of the disability, or because they have an honest perception that their disability is not relevant to the discussion. The denial of a disability is particularly prevalent with clients who have mental retardation. [FN135] Clients who are mentally retarded are hurt by being called *84 retarded and "will do almost anything to disconnect themselves from it." [FN136] This effort to deny the disability will occur when a mentally retarded person is interacting with the police or any other person in the criminal justice system. Moreover, "many of these individuals will go to great lengths to hide their disability." [FN137]
When a lawyer is communicating with a client with mental retardation, the lawyer must be cognizant of the communication difficulties confronted by such clients. The client's ability to communicate and understand the judicial process will affect the client's rights and ability to seek appropriate justice. [FN138] There are a number of communications difficulties that will adversely affect the rights of a client with mental retardation. [FN139] The following three examples highlight some of the problems that affect the rights of a client with mental retardation: eagerness to please, inability to understand abstract thoughts, and communication through mimicking. Individuals with mental retardation are eager to please others, particularly people in authority. Because individuals with mental retardation seek the acceptance of authority figures, they will accept the blame for things that they have not done. [FN140] Obviously, in the judicial process such behavior can be dangerous. An individual with mental retardation may state that she or he has committed a crime or accept responsibility for a liability in a civil case. [FN141] Individuals *85 with mental retardation may be unable to understand abstract terms or concepts, and they may only think concretely. [FN142] For example, if told the cliché "that's the way the cookie crumbles," a person with mental retardation may focus on the concrete word "the cookie" and may not understand the abstract concept of consequences. [FN143] Or if asked by a police officer, "Do you waive your right to be silent and waive your right to have an attorney present?," individuals with mental retardation may quickly say yes and waive their rights because they may not understand the abstract meaning of the term "right." They may think of "right" versus "left." Further, they may not understand the term "waive," and think of the concept to "wave." [FN144] Because of their abhorrence to the term "mental retardation" and the possible detection of their disability, they will not tell the police officer that they do not understand. [FN145] Consistent with the desire to please others and the inability to understand abstract terms and concepts is the tendency of individuals with mental retardation to copy others. They will listen for words, look into the face of the person talking to them and copy the mood in order to give the "right" response. [FN146] For instance, if a police officer said, "You weren't at home at 9:00 p.m., right?," they would listen to the tone of the officer's voice and seek to give the answer they think the officer wants and respond, "Yes." They also learn to communicate by affirming the choice that has been suggested to them last. [FN147] In order to assure effective communication, *86 lawyers must be aware of these difficulties and take measures to get accurate information from individuals with mental retardation.
A lawyer's failure to be aware of the communications difficulty and failure to educate the courts on their client's needs can lead to an innocent person going to jail or being held civilly liable for something that they may not have done. This point can be illustrated by

two cases decided by the North Carolina Supreme Court two years apart in the 1980s. [FN148] In both cases, the defendants were mentally retarded, the defendants were charged with serious felonies which carried mandatory life imprisonment, and the prosecution relied heavily on the defendant's confession to get a conviction. [FN149] In the first case, State v. Massey, [FN150] the defendant was found guilty of murder in the first degree and armed robbery. The court concluded that "after being advised of his Miranda rights the defendant voluntarily, knowingly and intelligently waived his right to an attorney and voluntarily, knowingly and intelligently made a statement to the Deputy Sheriff." [FN151] The court recognized that the defendant was mildly retarded, but held that the trial court's refusal to provide funds for an additional psychiatric evaluation was not an error, where the defendant has been examined by a state psychiatrist. [FN152] Moreover, the court concluded that the "[d]efendant has not shown that there is a reasonable likelihood that an additional psychiatrist would have materially aided in the preparation and presentation of his case or that he was denied a fair trial." [FN153] The court made this finding despite the fact that the pivotal issue was whether the defendant had the capacity to "voluntarily" and "intelligently" waive his rights and whether his confession was made "knowingly" and "intelligently." [FN154] In the second case, State v. Moore, [FN155] the defendant was convicted of first-degree sexual offense, first-*87 degree burglary, and assault with a deadly weapon with the intent to kill inflicting serious injury. The court concluded that the "[d]efendant showed that the credibility of his confession was pivotal in the state's case against him" [FN156] and that he had "a particularized need for the assistance of a psychiatrist in the preparation of his defense." [FN157] The court recognized that the defendant had an IQ of fifty-one, which places him at the lowest level of mild retardation and "that he [was] 'easily led and easily influenced' by those exercising authority." [FN158]

The difference in the two outcomes can be explained by the level of information provided to the North Carolina Supreme Court and the court's appreciation of the communication difficulties with individuals with mental retardation. [FN159] Former Chief Justice of the North Carolina Supreme Court, James G. Exum, candidly admits "that judges, by and large, don't know much about mental retardation." [FN160] He added that lawyers are not well informed, including defense counsel. [FN161] He stated:

[T]he difference in the outcome in the two cases rested in part on a difference in the level of general knowledge on the part of the court about mental retardation. But, more important, it rested on the specific factual and detailed information that counsel in Moore was able to gather and present at the trial level.

As is illustrated by these two cases, the judiciary has a need for more information, more knowledge, and more understanding. We need lawyers who understand the difficulties and can present rich, meaningful, and detailed evidence like that in Moore for the edification of both the trial court initially and the appellate court ultimately. [FN162] Because the court was more fully informed in the Moore case, the court was better able to address the communication difficulties of the defendant who has mental retardation. In State v. Moore, the court stated that State v. Massey differed because the defendant in that case "failed to make a sufficiently specific demonstration *88 of his need for the assistance of a psychiatrist" and the "defendant did not specify the precise degree of his retardation, neither did he put on any evidence indicating the effect his particular mental condition might have had on his ability to understand either his rights or the implications of his statement." [FN163] Moreover, in State v. Moore, the court had a better appreciation of the needs of defendants with mental retardation and recognized that "even when a mentally retarded suspect's responses appear normal, his answers may not be reliable." [FN164] The court noted that:

many people with mental retardation are predisposed to 'biased responding' or answering in the affirmative questions regarding behaviors they believe are desirable, and answering in the negative questions concerning behaviors they believe are prohibited. The form of a question can also directly affect the likelihood of receiving a biased response .... [FN165]

The court concluded that the assistance of a psychiatrist would enable the trial court to

better assess more fully and accurately the validity of the defendant's responses, particularly, in the instant case where the defendant waived his right in response to a series of "yes-no" questions. [FN166]
The two cases clearly illustrate that the judiciary as well as lawyers need education into the rights of an individual with mental retardation. [FN167] The lack of knowledge and information by the bench and bar could lead to continued injustice.

A. Determining the Client's Objective

The lawyer's first task during the initial meeting with the client is to determine the objective of the client. People come to lawyers because they have some legal problem and they need the lawyer's expertise to assist them in solving the problem. [FN168] It is at this first meeting, that the client-lawyer *89 relationship is established, even if the lawyer decides not to take the case. [FN169] The lawyer must appreciate that the appropriate phrase for the relationship being established is "client-lawyer" and not "lawyer-client" because it is the client's interests that are "primarily to be furthered." [FN170] The lawyer must immediately establish to the client that the client's interest and concerns are the primary reason to establish this relationship. [FN171] As stressed earlier, the primary reason for the relationship is the same when representing a client with a mental disability, and the lawyer must refrain from usurping the client's role.
There are established ways for initiating the client-lawyer relationship; a lawyer representing a client with a mental disability does not have to abandon those methods, but may have to accommodate the particular needs of clients with mental disabilities. An effective way to determine the client's objective and legal problem is through a three-staged interview. The three stages are "Preliminary Problem Identification," "Chronological Overview," and "Theory Development and Verification." [FN172]
The three-stage approach allows the lawyer to receive a thorough explanation of the legal problem and sufficient information to allow the lawyer to analyze the legal problem. [FN173] The three-stage approach is effective when representing a client with a mental disability because it allows the lawyer to establish respect and concern for the client's legal problems, as well as allows the lawyer to measure the skills and limitations of the client. [FN174] The lawyer should explain to the client that the interview will be conducted in a three-stage manner and explain to the client why the lawyers is proceeding in that manner.
During the "Preliminary Problem Identification stage," the lawyer asks the client open-ended questions to allow the client to relay the legal problem and the relief he or she seeks in a way that is most comfortable for the client. [FN175] In the "Chronological Overview stage," the lawyer asks the client to relay the legal problem in a systematic successive manner which begins when the legal problem was created to the present. [FN176] After the "Chronological Overview stage," and the lawyer moves to the "Theory Development and Verification stage," the lawyer determines the possible causes of action *90 available or defenses available. [FN177] While this approach may not work for all cases, it provides a good framework for most situations. [FN178]

B. Explaining the Role of the Lawyer to the Client and the Scope of the Representation

After the lawyer has decided to represent the client and has determined the client's legal problem, the lawyer should make certain that the client understands the roles of the lawyer and the client. Because a person with a mental disability may have some cognitive limitations, the lawyer should avoid any temptation to usurp the client's role and should ensure that the client understands that it is his or her role to make the decision regarding the objective of the representation. [FN179] Moreover, the lawyer should make sure the client understands the scope of the representation. For instance, if the lawyer is only representing the client for a personal injury suit that arises out of a slip and fall at a supermarket, the lawyer must make sure that the client understands the limitation of the representation. [FN180] The lawyer must make sure that the client understands the limitations placed upon the lawyer. Particularly the lawyer can only bring meritorious

claims that are based in law and fact. [FN181] To the extent that the client's mental disability may be used by the opposing party to attack the credibility of the client, the lawyer should have a candid conversation with the client about that possibility. [FN182] If the lawyer fails to explain the potential problems as soon as possible, it will lead to problems in the lawyer's relationship with the client and a lack of trust.

C. Lawyers Need to Consult Experts when Representing a Client who has a Mental Disability

Lawyers should solicit the assistance of experts when representing a client with a mental disability. If a lawyer is representing a client who has a cognitive disability, the lawyer should contact a disability rights advocate, *91 or other expert in the field, and find out the most effective way to communicate with a client with a cognitive disability. The lawyer will learn that there are many suggestions available that will allow him or her to start an effective relationship with such a client. [FN183] Moreover, the preparation by the lawyer will assure the client that he or she has a lawyer who will listen and in whom the client can trust. Further, if a lawyer has a client who has a mental illness, such as bipolar disorder, the lawyer should consult an expert. It is important for the lawyer to treat the person as an adult and respect the person's intelligence. An expert in the field has suggestions as to how to best communicate with a client who has a mental illness, like bipolar. [FN184] There may be times where the lawyer may need to postpone a session because of symptoms associated with bipolar disorder. Further, the client may request an objective that is inconsistent with the law. If so, the lawyer must respectfully explain the law to the client and the limitations on the remedies available. The lawyer's interaction with the client will require patience and understanding. Finally, as discussed earlier, if a lawyer represents a client who has mental retardation, the lawyer should consult an expert and be assured that he or she can provide effective communication. [FN185]

*92 VI. CONCLUSION

Until lawyers are sensitized to and educated on the needs of people with mental disabilities, they will be ill-equipped to provide adequate representation. Lawyers must avoid the temptation to substitute their judgment for the client's judgment, particularly when the lawyer is representing a client with a mental disability. Although the ethical rules have progressed in requiring lawyers to respect the rights of clients with disabilities, the rules need to provide more guidance. Furthermore, the American Bar Association and local bars, through continuing legal education and mandatory training, should provide more training for lawyers. Lawyers should be required to participate in mandatory training that allows them to be better informed about the communication needs of clients with mental disabilities and the characteristics associated with different mental disabilities.

[FN1]. THOMAS A. HARRIS, I'M OK--YOU'RE OK: A PRACTICAL GUIDE TO TRANSACTIONAL ANALYSIS (1969). "This book [was] the product of a search to find answers for people who are looking for hard facts in answer to their questions about how the mind operates, why we do what we do, and how we can stop doing what we do if we wish." Id. at xiii.

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INTRODUCTION

Every day, North Carolina lawyers and their staff meet and serve persons with disabilities of body and mind. All people have the right to equal access to justice irrespective of individual variations in their ability to encounter, observe or comprehend the legal system. As lawyers, we are required to ensure competent and understandable legal advice and zealous representation to every client. A necessary first step is to educate ourselves about the special challenges to zealous representation we may face with some of our clients

One of the goals of the Partners in Justice Project, and of this presentation, is to improve communication between lawyers and judges and people with cognitive disabilities who encounter the court system as victims, witnesses, or criminal defendants. Many professionals in our justice system lack a basic understanding of mental retardation and related disabilities; and do not know of referral sources, training, and technical assistance to help people with cognitive disabilities obtain justice. Writing in 1992, Justice Exum described the problem as a "great need to know" about mental retardation, a problem his "eyes opened to" at an ABA meeting:

> "An ABA speaker eloquently described how it is almost impossible to accord people with mental retardation due process in our courts, although that is a constitutional guarantee for all of us. . . The judiciary has a need for more information, more knowledge, and more understanding. We need lawyers who understand the difficulties and can present rich, meaningful, and detailed evidence like that in [*State v.*] *Moore,* [321 N.C. 327, 364 S.E. 2d 648 (1988)] for the edification of both the trial court initially and the appellate court ultimately."[1]

The term cognitive disability is used to describe limitations in intellectual functioning and the way a person is able to adapt to various social and practical situations. People with mental retardation have cognitive impairments and deficits in adaptive behavior which may limit meaningful interactions with people in the justice system. We hope to help you learn how to recognize when a person has a cognitive disability, and then learn how to accommodate that disability so that, especially in the criminal process, due process is ensured.

The presence of cognitive disabilities raises many opportunities for miscommunication, misinformation and inadequate representation. Some communication difficulties may adversely affect the rights of persons with cognitive disabilities and the integrity and functioning of the judicial process, such as:

- Incriminating, but inaccurate "confessions" because the individual is confused or wants to please authority figures;
- Incompetence to stand trial;
- Inability to assist the defendant attorney; and

[1] *The Criminal Justice System And Mental Retardation Defendants And Victims* by Ronald W. Conley, Ruth Luckasson and George N. Bouthilet, published by Paul H. Brookes Co., Baltimore, MD. (1992), Chapter 1, Points of View, Perspectives on the Judicial, Mental Retardation Services, Law Enforcement and Corrections Systems.

- Modify your language and manner of questioning.

    - Avoid legal jargon. For example, rather than asking, "Were you coerced?", ask, "Did someone scare you?"
    - Simplify your language - divide complex ideas into subparts, and give explanations in "bite-size chunks".
    - Ask open-ended questions, avoiding "yes" or "no" questions and leading questions.
    - Rather than asking, "Do you understand?" have the person repeat in his/her own words what he/she understands, and do so periodically - do not wait until the end of a 20 minute explanation to determine the person's comprehension.
    - Allow the person extra time to process questions/comments.

Other simple exercises to ascertain the client's academic knowledge and thinking processes include:

- Requesting to see the client's driver's license – an individual with mental retardation may have the skills to drive but not those necessary to obtain a license.
- Ask for the client's address and telephone number - difficulty recalling basic personal information is an indicator of cognitive disabilities.

ETHICAL CONSIDERATIONS

Risks of inadequate representation increase when the client has cognitive disabilities. Therefore, N.C. Rules as well as the ABA Model Rules now include 1.14: Client under a Disability. The rule for this special category of client was necessary because clients with cognitive disabilities may be unable to monitor the attorney's performance, and studies have found that attorneys spend less time interviewing clients with cognitive disabilities than other clients. In addition, the tendency of attorneys to usurp decisions that should be left to the client increases when the client has cognitive disabilities.

Pursuant to the model rules, a lawyer must maintain a "normal" relationship with client as far as reasonably possible and make special efforts to accommodate the needs of the client, which includes ensuring that the client understands the consequences of his/her decisions.

Attorneys face a dilemma when representing a client with cognitive disabilities. They must use their best professional judgment to balance between accommodating the autonomy of individuals with disabilities by allowing them to make their own decisions affecting their lives, and protecting individuals with cognitive disabilities from the adverse consequences of potentially unwise, ill-informed, or incompetently made decisions.

California Rules of Court (Revised January 1, 2015)

Standards of Judicial Administration

2015 California Rules of Court

Standard 5.40. Juvenile court matters

(a) Assignments to juvenile court

The presiding judge of the superior court should assign judges to the juvenile court to serve for a minimum of three years. Priority should be given to judges who have expressed an interest in the assignment.

(b) Importance of juvenile court

The presiding judge of the juvenile court, in consultation with the presiding judge of the superior court, should:

(1) Motivate and educate other judges regarding the significance of juvenile court.

(2) Work to ensure that sufficient judges and staff, facilities, and financial resources are assigned to the juvenile court to allow adequate time to hear and decide the matters before it.

(Subd (b) amended effective January 1, 2007.)

(c) Standards of representation and compensation

The presiding judge of the juvenile court should:

(1) Encourage attorneys who practice in juvenile court, including all court-appointed and contract attorneys, to continue their practice in juvenile court for substantial periods of time. A substantial period of time is at least two years and preferably from three to five years.

(2) Confer with the county public defender, county district attorney, county counsel, and other public law office leaders and encourage them to raise the status of attorneys working in the juvenile courts as follows: hire attorneys who are interested in serving in the juvenile court for a substantial part of their careers; permit and encourage attorneys, based on interest and ability, to remain in juvenile court assignments for significant periods of time; and work to ensure that attorneys who have chosen to serve in the juvenile court have the same promotional and salary opportunities as attorneys practicing in other assignments within a law office.

(3) Establish minimum standards of practice to which all court-appointed and public office attorneys will be expected to conform. These standards should delineate the responsibilities of attorneys relative to investigation and evaluation of the case, preparation for and conduct of hearings, and advocacy for their respective clients.

(4) In conjunction with other leaders in the legal community, ensure that attorneys appointed in the juvenile court are compensated in a manner equivalent to attorneys appointed by the court in other types of cases.

(Subd (c) amended effective January 1, 2007; adopted effective July 1, 1992.)

(d) Training and orientation

The presiding judge of the juvenile court should:

(1) Establish relevant prerequisites for court-appointed attorneys and advocates in the juvenile court.

(2) Develop orientation and in-service training programs for judicial officers, attorneys, volunteers, law enforcement personnel, court personnel, and child advocates to ensure that all are adequately trained concerning all issues relating to special education rights and responsibilities, including the right of each child with exceptional needs to receive a free, appropriate public education and the right of each child with educational disabilities to receive accommodations.

(3) Promote the establishment of a library or other resource center in which information about juvenile court practice (including books, periodicals, videotapes, and other training materials) can be collected and made available to all participants in the juvenile system.

(4) Ensure that attorneys who appear in juvenile court have sufficient training to perform their jobs competently, as follows: require that all court-appointed attorneys meet minimum training and continuing legal education standards as a condition of their appointment to juvenile court matters; and encourage the leaders of public law offices that have responsibilities in juvenile court to require their attorneys who appear in juvenile court to have at least the same training and continuing legal education required of court-appointed attorneys.

(Subd (d) amended effective January 1, 2001; adopted effective July 1, 1989; previously amended and relettered effective July 1, 1992.)

(e) Unique role of a juvenile court judge

Judges of the juvenile court, in consultation with the presiding judge of the juvenile court and the presiding judge of the superior court, to the extent that it does not interfere with the adjudication process, are encouraged to:

(1) Provide active leadership within the community in determining the needs of and obtaining and developing resources and services for at-risk children and families. At-risk children include delinquents, dependents, and status offenders.

(2) Investigate and determine the availability of specific prevention, intervention, and treatment services in the community for at-risk children and their families.

(3) Exercise their authority by statute or rule to review, order, and enforce the delivery of specific services and treatment for at-risk children and their families.

(4) Exercise a leadership role in the development and maintenance of permanent programs of interagency cooperation and coordination among the court and the various public agencies that serve at-risk children and their families.

(5) Take an active part in the formation of a communitywide network to promote and unify private and public sector efforts to focus attention and resources for at-risk children and their families.

(6) Maintain close liaison with school authorities and encourage coordination of policies and programs.

(7) Educate the community and its institutions through every available means, including the media, concerning the role of the juvenile court in meeting the complex needs of at-risk children and their families.

(8) Evaluate the criteria established by child protection agencies for initial removal and reunification decisions and communicate the court's expectations of what constitutes "reasonable efforts" to prevent removal or hasten return of the child.

(9) Encourage the development of community services and resources to assist homeless, truant, runaway, and incorrigible children.

(10) Be familiar with all detention facilities, placements, and institutions used by the court.

(11) Act in all instances consistent with the public safety and welfare.

(Subd (e) amended effective January 1, 2007; adopted effective July 1, 1989; previously relettered effective July 1, 1992.)

(f) Appointment of attorneys and other persons

For the appointment of attorneys, arbitrators, mediators, referees, masters, receivers, and other persons, each court should follow rule 10.611 and the guidelines of standard 10.21.

(Subd (f) amended effective January 1, 2007; adopted effective January 1, 1999.)

(g) Educational rights of children in the juvenile court

The juvenile court should be guided by certain general principles:

(1) A significant number of children in the juvenile court process have exceptional needs that, if properly identified and assessed, would qualify such children to receive special education and related services under federal and state education law (a free, appropriate public education) (see Ed. Code, § 56000 et seq. and 20 U.S.C. § 1400 et seq.);

(2) Many children in the juvenile court process have disabilities that, if properly identified and assessed, would qualify such children to receive educational accommodations (see § 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794; 34 C.F.R. § 104.1 et seq.]);

(3) Unidentified and unremediated exceptional needs and unaccommodated disabilities have been found to correlate strongly with juvenile delinquency, substance abuse, mental health issues, teenage pregnancy, school failure and dropout, and adult unemployment and crime; and

(4) The cost of incarcerating children is substantially greater than the cost of providing special education and related services to exceptional needs children and providing educational accommodations to children with disabilities.

(Subd (g) adopted effective January 1, 2001.)

(h) Role of the juvenile court

The juvenile court should:

(1) Take responsibility, with the other juvenile court participants at every stage of the child's case, to ensure that the child's educational needs are met, regardless of whether the child is in the custody of a parent or is suitably placed in the custody of the child welfare agency or probation department and regardless of where the child is placed in school. Each child under the jurisdiction of the juvenile court with exceptional needs has the right to receive a free, appropriate public education, specially designed, at no cost to the parents, to meet the child's unique special education needs. (See Ed. Code, § 56031 and 20 U.S.C. § 1401(8).) Each child with disabilities under the jurisdiction of the juvenile court has the right to receive accommodations. (See § 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794; 34 C.F.R. § 104.1 et seq. (1980)].) The court should also ensure that each parent or guardian receives

information and assistance concerning his or her child's educational entitlements as provided by law.

(2) Provide oversight of the social service and probation agencies to ensure that a child's educational rights are investigated, reported, and monitored. The court should work within the statutory framework to accommodate the sharing of information between agencies. A child who comes before the court and is suspected of having exceptional needs or other educational disabilities should be referred in writing for an assessment to the child's school principal or to the school district's special education office. (See Ed. Code, §§ 56320-56329.) The child's parent, teacher, or other service provider may make the required written referral for assessment. (See Ed. Code, § 56029.)

(3) Require that court reports, case plans, assessments, and permanency plans considered by the court address a child's educational entitlements and how those entitlements are being satisfied, and contain information to assist the court in deciding whether the right of the parent or guardian to make educational decisions for the child should be limited by the court under Welfare and Institutions Code section 361(a) or 726(b). Information concerning whether the school district has met its obligation to provide educational services to the child, including special educational services if the child has exceptional needs under Education Code section 56000 et seq., and to provide accommodations if the child has disabilities as defined in section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794; 34 C.F.R. § 104.1 et seq. (1980)) should also be included, along with a recommendation for disposition.

(4) Facilitate coordination of services by joining the local educational agency as a party when it appears that an educational agency has failed to fulfill its legal obligations to provide special education and related services or accommodations to a child in the juvenile court who has been identified as having exceptional needs or educational disabilities. (See Welf. & Inst. Code, §§ 362(a), 727(a).)

(5) Make appropriate orders limiting the educational rights of a parent or guardian who cannot be located or identified, or who is unwilling or unable to be an active participant in ensuring that the child's educational needs are met, and appoint a responsible adult as educational representative for such a child or, if a representative cannot be identified and the child may be eligible for special education and related services or already has an individualized education program, use form JV-535 to refer the child to the local educational agency for special education and related services and prompt appointment of a surrogate parent. (Welf. & Inst. Code, §§ 361, 726; Ed. Code, § 56156.)

(6) Ensure that special education, related services, and accommodations to which the child is entitled are provided whenever the child's school placement changes. (See Ed. Code, § 56325.)

(Subd (h) amended effective January 1, 2007; adopted effective January 1, 2001; previously amended effective January 1, 2004.)

Standard 5.40 amended and renumbered effective January 1, 2007; adopted as sec. 24 effective January 1, 1989; previously amended effective July 1, 1992, January 1, 1999; January 1, 2001, and January 1, 2004.

Advisory Committee Comment

Subdivision (a). Considering the constantly evolving changes in the law, as well as the unique nature of the proceedings in juvenile court, the juvenile court judge should be willing to commit to a tenure of three years. Not only does this tenure afford the judge the opportunity to become well acquainted with the total juvenile justice complex, but it also provides continuity to a system that demands it.

Dependency cases under Welfare and Institutions Code section 300 for the most part last 18 months. The juvenile court judge has a responsibility to oversee these cases, and a single judge's involvement over this period of time is important to help ensure positive results. The ultimate goal should be to perfect a system that serves the needs of both recipients and providers. This can only be done over time and with constant application of effective energy.

Subdivision (b)(2). The juvenile court is an integral part of the justice system. It is only through the constant exertion of pressure to maintain resources and the continuous education of court-related personnel and administrators that the historic trend to minimize the juvenile court can be contained.

Subdivision (c)(4). The quality of justice in the juvenile court is in large part dependent on the quality of the attorneys who appear on behalf of the different parties before the court. The presiding judge of the juvenile court plays a significant role in ensuring that a sufficient number of attorneys of high quality are available to the parties appearing in juvenile court.

Juvenile court practice requires attorneys who have both a special interest in and a substantive understanding of the work of the court. Obtaining and retaining qualified attorneys for the juvenile court requires effective recruiting, training, and employment considerations.

The importance of juvenile court work must be stressed to ensure that juvenile court assignments have the same status and career enhancement opportunities as other assignments for public law office attorneys.

The presiding judge of the juvenile court should urge leaders of public law offices serving the juvenile court to assign experienced, interested, and capable attorneys to that court, and to establish hiring and promotional policies that will encourage the development of a division of the office dedicated to working in the juvenile court.

National commentators are in accord with these propositions: "Court-appointed and public attorneys representing children in abuse and neglect cases, as well as judges, should be specially trained or experienced. Juvenile and family courts should not be the 'training ground' for inexperienced attorneys or judges." (Metropolitan Court Judges Committee, National Council of Juvenile and Family Court Judges, *Deprived Children: A Judicial Response-73 Recommendations* (1986) p. 14.)

Fees paid to attorneys appearing in juvenile court are sometimes less than the fees paid attorneys doing other legal work. Such a payment scheme demeans the work of the juvenile court, leading many to believe that such work is less important. It may discourage attorneys from selecting juvenile court practice as a career option. The incarceration of a child in a detention facility or a child's permanent loss of his or her family through a termination of parental rights proceeding is at least as important as any other work in the legal system. Compensation for the legal work in the juvenile court should reflect the importance of this work.

Subdivision (d)(4). Juvenile court law is a specialized area of the law that requires dedication and study. The juvenile court judge has a responsibility to maintain high quality in the practice of law in the juvenile court. The quality of representation in the juvenile court depends in good part on the education of the lawyers who appear there. In order to make certain that all parties receive adequate representation, it is important that attorneys have adequate training before they begin practice in juvenile court and on a continuing basis thereafter. The presiding judge of the juvenile court should mandate such training for all court-appointed attorneys and urge leaders of public law offices to provide at least comparable training for attorneys assigned to juvenile court.

A minimum of six hours of continuing legal education is suggested; more hours are recommended. Education methods can include lectures and tapes that meet the legal education requirements.

In addition to basic legal training in juvenile dependency and delinquency law, evidentiary issues, and effective trial practice techniques, training should also include important related issues, including child development, alternative resources for families, effects and treatment of substance abuse, domestic violence, abuse, neglect, modification and enforcement of all court orders, dependency, delinquency, guardianships, conservatorships, interviewing children, and emancipation. Education may also include observational experience such as site visits to institutions and operations critical to the juvenile court.

A significant barrier to the establishment and maintenance of well-trained attorneys is a lack of educational materials relating to juvenile court practice. Law libraries, law offices, and court systems traditionally do not devote adequate resources to the purchase of such educational materials.

Effective January 1, 1993, guidelines and training material will be available from the Administrative Office of the Courts.

Subdivision (e)(11). A superior court judge assigned to the juvenile court occupies a unique position within California's judiciary. In addition to the traditional role of fairly and efficiently resolving disputes before the court, the juvenile court judge is statutorily required to discharge other duties. California law empowers the juvenile court judge not only to order services for children under its jurisdiction, but also to enforce and review the delivery of those services. This oversight function includes the obligation to understand and work with the public and private agencies, including school systems, that provide services and treatment programs for children and families. As such, the juvenile court assignment requires a dramatic shift in emphasis from judging in the traditional sense.

The legislative directive to juvenile court judges to "improve system performance in a vigorous and ongoing manner" (Welf. & Inst. Code, § 202) poses no conflict with traditional concepts of judicial ethics. Active and public judicial support and encouragement of programs serving children and families at risk are important functions of the juvenile court judge that enhance the overall administration of justice.

The standards in (e) are derived from statutory requirements in the following sections of the Welfare and Institutions Code as well as the supplementary material promulgated by the National Council of Juvenile and Family Court Judges and others: (1) Welfare and Institutions Code, sections 202, 209, 300, 317, 318, 319, 362, 600, 601, 654, 702, 727; (2) California Code of Judicial Conduct, canon 4; (3) Metropolitan Court Judges Committee, National Council of Juvenile and Family Court Judges, *Deprived Children: A Judicial Response-73 Recommendations* (1986), Recommendations 1-7, 14, 35, 40; and (4) National Council of Juvenile and Family Court Judges, Child Welfare League of America, Youth Law Center, and the National Center for Youth Law, *Making Reasonable Efforts: Steps for Keeping Families Together* pp. 43-59.

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ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILD'S NAME:	
ORDER DESIGNATING EDUCATIONAL RIGHTS HOLDER	CASE NUMBER:

Educational Rights Holder for Child or Youth

1. ☐ The following adult(s) is (are) designated as the educational rights holder(s), as defined in rule 5.502.

a. Name:	a. Name:
b. Address:	b. Address:
c. Telephone:	c. Telephone:
d. E-mail:	d. E-mail:
e. Relationship to child or youth:	e. Relationship to child or youth:

2. The adult(s) identified in 1. is (are) *(check all that apply)*
   a. ☐ The first educational rights holder identified by the court for this child or youth.
   b. ☐ The same educational rights holder as last identified by the court. ☐ New contact information in item 1, above.
   c. ☐ A different educational rights holder from the one last identified by the court.
   d. ☐ The successor guardian or conservator and, as such, holds decisionmaking rights.
   e. ☐ The caregiver in a planned permanent living arrangement and holds ☐ educational ☐ developmental-services decisionmaking rights under section 361(a)(1)(E). See item 6 for limitation of parental decisionmaking rights.

Having considered the evidence and made the findings required by law, THE COURT ORDERS that

3. ☐ The responsible adult identified in 1. is appointed the educational rights holder for the child or youth and is authorized to make ☐ educational ☐ developmental-services decisions for the child or youth to the extent permitted by law.

4. ☐ *(Check only if 1, 2, and 3 do not apply.)* The court cannot identify a parent, guardian, or other responsible adult to act as the educational rights holder.
   a. ☐ The court hereby refers the child to the local educational agency for appointment of a surrogate parent under section 7579.5 of the Government Code.
   b. ☐ The court, with input from any interested person, will make ☐ educational ☐ developmental-services decisions.
      ☐ The appointment of a surrogate parent is not warranted.
      ☐ *(Before the dispositional hearing)* The child's attorney and the social worker or probation officer must make every effort to identify a responsible adult to make future educational or developmental services decisions for the child.

5. ☐ The appointment of any previous educational rights holder or developmental-services decision maker is terminated.

NOTICE

☐ Provision of the information on this form—as well as on forms JV-535(A), JV-536, JV-537, JV-538, JV-539, JV-540, or any equivalent form—to the parent(s) or guardian(s) named in 6 ***will*** create a safety risk (for example, because of the placement's confidentiality). The information ***may not*** be disclosed to the parent or guardian.

Form Adopted for Mandatory Use
Judicial Council of California
JV-535 [Rev. January 1, 2014]

Welfare and Institutions Code, §§ 361, 726
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

6. ☐ The rights of *(name):*
   - ☐ mother
   - ☐ father
   - ☐ guardian

   (name):
   - ☐ mother
   - ☐ father
   - ☐ guardian

   to make ☐ educational ☐ developmental-services decisions for the child or youth

   a. ☐ are retained.
   b. ☐ are fully restored.
   c. ☐ are temporarily limited under section 319(g).
   d. ☐ are limited under section 361(a) or 726(b).
   e. ☐ have been terminated under section 366.26 or 727.31.
   f. ☐ transferred to the youth on his or her 18th birthday.

Appointed Educational Rights Holder—Rights and Duties

7. The appointed educational rights holder is authorized to have access to the child's or youth's ☐ educational ☐ developmental-services records and information to the extent permitted by law.

8. The appointed educational rights holder may authorize the release of ☐ educational ☐ developmental-services records to the child's attorney or CASA volunteer to the extent permitted by law.

9. The appointed educational rights holder must comply with all applicable state and federal confidentiality laws, including sections 362.5, 827, 4514, and 5328 and Government Code section 7579.5(f), and may share information only to the extent necessary to further the interests of the child or youth.

10. The appointed educational rights holder must meet with the child or youth; investigate the child's or youth's educational and developmental-services needs and whether those needs are being met; and, before each scheduled review hearing, provide information and recommendations to the social worker or probation officer **OR** make written recommendations to the court **OR** attend the review hearing and participate in any part of the hearing that concerns the child's education or development **OR** all of these. The rights holder may submit written recommendations on *Educational Rights Holder Statement* (form JV-537) or in any other suitable format. To the greatest extent possible, the educational rights holder must consult and collaborate with the educational liaison or regional center service coordinator, as applicable, to gather information needed to meet the needs and protect the rights of the child or youth.

Service of Order

11. If this is the first form JV-535 completed in this case or it includes any information different from information on the previous JV-535, the clerk will provide a copy of this form and any attachments to the child (if 10 years old or older) or youth; the attorney for the child or youth; the social worker or probation officer; the Indian child's tribe, if applicable; the local foster youth educational liaison; the county office of education foster youth services coordinator; the regional center service coordinator, if applicable; and the educational rights holder or surrogate parent in person or by first-class mail no later than five court days after the order is signed. The clerk may also make the form available to the parent or guardian (unless otherwise indicated on this form, or parental rights have been terminated, or the child has reached 18 years of age and reunification services have been terminated), to the CASA volunteer, and if requested, to any other person entitled to notice under section 293.

12. The assigned social worker or probation officer must notify the educational rights holder of the date, time, and location of each court hearing.

This order applies to any local educational agency, school, school district, or regional center serving the child or youth in the State of California.

☐ Related findings and orders are attached on form JV-535(A) or its equivalent.

Date:

▶ _____
JUDICIAL OFFICER

CHILD'S NAME:	CASE NUMBER:

General Information

1. Child's or youth's date of birth:

2. School information
   a. School district:

   b. School *(name and address):*

   c. Foster youth educational liaison (Ed. Code, § 48853.5) *(name and contact information):*

   d. ☐ The child is currently expelled from school and may be eligible for readmission on or after *(date):*

3. Regional center *(name and address):*

   Service coordinator *(name and contact information):*

4. County placing agency *(specify):*

   a. Assigned social worker or probation officer *(name and contact information):*

   b. Supervising social worker or probation officer *(name, address, and contact information):*

5. Child's or youth's attorney *(name, address, and contact information):*

THE COURT FINDS AND ORDERS

6. ☐ The child or youth is the subject of a petition filed under section 325. The child's parent or guardian is unavailable, unable, or unwilling to exercise educational or developmental services rights; the agency has made diligent efforts to locate and secure the participation of the parent or guardian in educational and developmental-services decisionmaking; and the child's or youth's educational and developmental-services needs cannot be met without the temporary appointment of a responsible adult as educational rights holder.

7. ☐ Limitation of the rights of the parent(s) or guardian(s) to make ☐ educational ☐ developmental-services decisions is necessary to protect the child or youth.

8. ☐ The youth is at least 18 years old and
   a. ☐ has chosen not to make ☐ educational ☐ developmental-services decisions for himself or herself.
   b. ☐ is deemed incompetent to make educational or developmental-services decisions for himself or herself.

9. ☐ *(If 8a. or 8b. is checked):* The appointment of an educational rights holder to make developmental-service decisions for the youth is in his or her best interests.

10. ☐ The court has not ordered or has terminated reunification services for the parent or guardian, and the child or youth is placed in a planned permanent living arrangement under section 366.21(g)(5), 366.22, 366.26, 366.3(i), or 727.3(b)(5)–(6).

11. There ☐ is ☐ is not a responsible adult relative, nonrelative extended family member, or other adult known to the child who is available and willing to serve as the educational rights holder.

Form Approved for Optional Use
Judicial Council of California
JV-535(A) [New January 1, 2014]

ATTACHMENT TO ORDER
DESIGNATING EDUCATIONAL RIGHTS HOLDER

Welf. & Inst. Code, §§ 361, 726
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

12. The child or youth is receiving special education, general education accommodations and modifications, early intervention services, or developmental services. ☐ Yes ☐ No

13. ☐ The child or youth is receiving services under the following plan *(check all that apply):*
    a. ☐ Individualized education program (IEP)
    b. ☐ Section 504 plan
    c. ☐ Individualized family service plan (IFSP)
    d. ☐ Individual program plan (IPP)
    e. ☐ Other *(explain):*

    The LEA or regional center must ensure that a copy of any plan is provided to the designated educational rights holder.

14. ☐ The child or youth needs the following educational or developmental assessments or services *(check all that apply):*
    a. ☐ The child is 0–3 years old, is at risk for a disability or has a developmental delay, and needs assessment for services.
    b. ☐ The child is 0–3 years old, has a disability, and needs the development of an IFSP.
    c. ☐ The child or youth is 3 years old or older, may have a disability, and needs intake and assessment for services.
    d. ☐ The child or youth is 3 years old or older, has a disability, and needs the development or revision of an IEP, IPP, or Section 504 plan.

15. The appointed educational rights holder must *(check all that apply):*
    a. ☐ Submit to the LEA a written referral for assessment for special education and related services or for services under section 504 of the Rehabilitation Act of 1973.
    b. ☐ Submit to the regional center a written referral for an initial intake and eligibility assessment or evaluation.
    c. ☐ Submit to the LEA a written referral for assessment or services, or a written request to convene the IEP team to develop, review, or revise the pupil's IEP.
    d. ☐ Submit a written request to the regional center to convene the IFSP team to develop, review, or revise the IFSP.
    e. ☐ Submit a written request to the regional center to convene the IPP team to develop, review, or revise the IPP.
    f. ☐ Other:

16. ☐ The following person is directed under rule 5.649(c)–(d) to take whatever steps are necessary to request any assessments or services identified in item 14 or 15 *(name and address unless confidential):*

17. ☐ The current educational program and school placement are in the best interests of the child or youth.

18. ☐ The current IFSP, IPP, or other developmental services plan is in the best interests of the child or youth.

19. ☐ The child or youth ☐ is ☐ is *not* attending his or her school of origin. If not,
    a. The educational rights holder ☐ has ☐ has *not* waived the child's or youth's right to attend the school of origin.
    b. The child or youth ☐ has ☐ has *not* waived his or her right to attend the school of origin.

20. ☐ The county placing agency has considered educational stability and the opportunity to be educated in the least restrictive educational program when making placement decisions for the child or youth.

Daily Journal

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Conservatorships reviewed

Judicial committee mulls whether to recommend that the state revamp training

By Paul Jones
Daily Journal Staff Writer

SAN FRANCISCO — A judicial committee may recommend the state revamp judge and attorney training in the wake of a disability rights group's allegations of problems with how California courts award parents and guardians control over developmentally disabled people.

That's the potential upshot of a meeting Friday by the Judicial Council's Probate and Mental Health Advisory Committee, where judges heard from attorney and disability rights advocate Thomas F. Coleman of the nonprofit Disability and Abuse Project. Coleman said he's uncovered numerous problems with the handling of conservatorship cases, and he wants a special task force to investigate alleged conflicts of interest in the manner in which courts treat developmentally disabled parties.

Conservatorship cases involve courts granting legal authority to guardians to take control over elements of a person's life, such as medical and financial matters. Developmentally disabled people are often subject to conservatorship cases when they reach legal adulthood and parents seek to continue caring for them. But some disability rights advocates, including Coleman's group, complain disabled people's rights are often undermined in court.

Specifically, Coleman claimed he has found problems in Los Angeles County Superior Court that include the court's decision to end the use of independent investigators who verify if a developmentally disabled person needs to be taken care of, and to what extent. He also said attorneys who are hired by courts to represent disabled parties are pushed to provide sensitive information about their clients to the court in order to speedily resolve conservatorship matters.

"Any attorney is supposed to represent their clients' wishes and protect their clients' rights. These attorneys don't do that," he said. "A local court rule tells them they have a secondary duty ... to help the court resolve the cases ... They gather information about their clients' strengths, weaknesses, abilities and inabilities" and then present potentially damaging information to the court.

Statewide, Coleman said regional centers set up to assist disabled people are poorly equipped to provide important information about parties in conservatorship cases.

Contra Costa County Superior Court Judge John Sugiyama chairs the Probate and Mental Health Advisory Committee. Despite the Disability and Abuse Project's goal for a statewide task force to review court practices in conservatorship cases, Sugiyama and other judges said the money wasn't available, and indicated the committee wouldn't recommend such a task force to the Judicial Council. However, Sugiyama said he wanted to pursue the possibility of altering training for judges and attorneys to highlight some of the issues raised by Coleman.

"As you're aware, being a lawyer facing courtrooms that are being darkened, staff members that are being laid off, it's going to be very difficult for the judicial branch to find money to support a task force," Sugiyama said, urging Coleman to pursue the idea with lawmakers.

However, "This is what I suggest — one thing we can do immediately pertains to the training of judicial officers and court-appointed counsel," Sugiyama said. "That is something we can enforce. We can impose the requirement on judges overseeing limited conservatorships and court-appointed counsel."

The commission members also suggested pursuing new standards for regional centers, whose reports can influence the outcome of conservatorship cases.

Coleman said he'd work with the committee to develop changes that could help address some of the issues raised by his group. That could lead to the judicial branch formally enacting new training requirements to improve protection of disabled parties' rights.

However, outside of the meeting he said he still wants a broader review of the conservatorship system.

"I feel that they are sincerely interested in seeing reform occur in some areas," he said. But "the powers that be should be able to find the money to staff such a task force. A comprehensive review is long overdue and needed."

In 2006 the judicial branch created a task force to look into general conservatorships, which mainly involve senior citizens, he said.

Coleman said he and the Disability and Abuse Project were previously successful in pushing for changes to state law that clarified a disabled person's right to vote couldn't be removed simply because they required assistance filling out a voter registration form. AB 1311 was signed by Gov. Jerry Brown earlier this year. The group has also filed a Department of Justice complaint more generally alleging the state's voter competency laws amount to literacy tests. Coleman said he might consider pursuing a Department of Justice complaint if the conservatorship system isn't more broadly reviewed.

paul_jones@dailyjournal.com

Reform Long Overdue for State Conservatorship Process

By Thomas F. Coleman

The conservatorship process for adults with developmental disabilities is broken. There are about 40,000 such adults currently in conservatorships in California, and about 5,000 new cases are added to the system each year. There are many systemic and operational problems with the processing of these cases.

It's not too soon to get the number crunchers into the conversation about "supported decision-making" and guardianship reform. The best laid plans by policy people and rights advocates never gain real traction without also having financial analysts in the mix too.

Proponents of supported decision making have been focusing on issues of self determination and equal rights for people with intellectual and developmental disabilities. The idea is that, with proper support, people with disabilities have the capacity to make their own decisions without guardianships.

Those proposing reform of adult guardianships for people with developmental disabilities, known in California as limited conservatorships, have been complaining that the system has structural flaws and operational deficiencies of a magnitude that violate constitutional guarantees and statutory requirements.

The conversations about supported decision-making and guardianship reform are now moving from academic discussions and idealistic dialogues among like-minded individuals into the realm of politics, which adds another set of considerations.

The Disability and Abuse Project has been in contact with the Judicial Council of California – the state agency that makes rules, develops forms, and provides education to judges and attorneys. That agency is only now realizing the seriousness of the many problems existing within the limited conservatorship system.

To address these problems, the Judicial Council has designated two advisory committees to work with its educational institute to discuss possible training programs for the judges and attorneys who process limited conservatorship cases. This approach is like painting an airplane that has major mechanical problems. In the end, the plane looks nice, but the unfixed defects continue to place passengers at risk.

Proponents of supported decision-making and conservatorship reform should insist that defective parts be replaced and that periodic inspections be done by trained mechanics. Pilots and navigators also need to receive training, plus the entire team must be accountable to someone.

Without systemic changes in policies and procedures, and without ongoing supervision and routine monitoring, the educational programs under discussion by the Judicial Council will be little more than cosmetic.

Budget planners need to have a seat at the table along with judicial overseers. Reform advocates also need to be involved in the process of creating what should be meaningful and lasting reform. Ongoing discussions and planning should be inclusive and transparent.

Evaluating supported decision-making as a less restrictive alternative in thousands of individual cases will cost money. So will the processing of conservatorship cases if supported decision-making is not adequate to protect vulnerable adults.

Insuring that proposed conservatees receive equal access to justice – as required by the Americans with Disabilities Act and by the Fourteenth Amendment – will cost money too.

Budgets will need to be increased for agencies that play or should play a role in the limited conservatorship system. At the state level, that would include the Judicial Council, the Department of Developmental Services, and the system of Regional Centers, as well as the federally-funded Disability Rights California.

At the local level, superior courts that employ judges and investigators will be financially affected. County governments pay the fees of court-appointed attorneys and public defenders. So room should be made at the table for presiding judges and county supervisors.

There will come a time for educational programs – but only *after* decisions have been made about systemic changes and their estimated costs. First things first. ◊

Thomas F. Coleman is the legal director of the Disability and Abuse Project of Spectrum Institute. Contact him at: tomcoleman@disabilityandabuse.org

Daily Journal

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Legal System Without Appeals Should Raise Eyebrows

By Thomas F. Coleman

Our legal system presupposes a considerable number of contested hearings and a fair number of appeals. Appellate courts play a vital role in keeping the system honest.

Published appellate decisions create a body of case law that instructs trial judges and the entire legal profession about the correct interpretation of statutes and constitutional mandates. Appeals are essential to the life blood of the legal system – judicial precedent.

Having served as a court-appointed appellate attorney for over 15 years, I know the critical role that appellate courts play in monitoring the activities of trial judges and attorneys. Alleged errors are scrutinized on appeal and the opinion of the appellate court determines whether the rules were violated by the participants in the trial court.

Knowing that proceedings are being recorded and might be appealed can have a prophylactic effect. People are more careful when they believe their actions may been seen by others, especially by people in higher authority. The reverse is also true. When people believe they are not being watched or when they think their actions are not subject to review, they act differently.

I have looked at statistics published by the Los Angeles Superior Court and by the Judicial Council of California. Annual reports verify that contested hearings or trials occur in large numbers on virtually every subject matter and every type of case. Statistics also verify that the Courts of Appeal in California are kept busy deciding appeals from judgments involving child custody disputes, divorces, civil litigation, wills and estates, juvenile dependency, juvenile delinquency and criminal convictions.

Contested hearings and appeals should not only be expected, they should be valued. Appeals correct policy defects and operational flaws. They instruct judges and attorneys on how to conduct themselves within the law.

Now comes the kicker. There is a category of cases that has almost no contested hearings and virtually no appeals – limited conservatorship proceedings for adults with intellectual and developmental disabilities. Some 5,000 of these cases are processed in California each year, with 1,200 of them in Los Angeles County alone.

I found that, at least in Los Angeles, these cases are handled with "assembly line" efficiency. Petitions are filed to take away the rights of adults to make decisions regarding finances, residence, medical care, social contacts, and sexual relations. Opposition is rare.

Court-appointed attorneys for proposed conservatees are given a "dual role" by local court rules. One duty is to help the court resolve the case. The attorneys seem to be very good in that role, and not so good at defending the rights of the clients, since nearly all cases are settled with the clients losing their decision-making rights.

These attorneys *never* file an appeal for their clients, so the Court of Appeal never sees how the judges or the attorneys handle these limited conservatorship cases. The probate court judges who process these cases know their actions will not be reviewed on appeal.

A probate judge recently told a group of court-appointed attorneys at a training last year that they are not required to advise clients about their right to appeal. Attorneys are usually released as counsel when the conservatorship order is granted. Clients, therefore, have no attorney to assist them in filing an appeal.

The California Appellate Project states it has never seen an appeal by a limited conservatee. A search of case law shows there are no published opinions deciding appeals filed by limited conservatees.

Show me a legal system that has no appeals and I will show you a rigged system. Consider me a whistle-blower if you wish, but this cannot continue. Something must be done.

One solution would be to pass a bill clarifying that a "next friend" can file an appeal for someone who lacks competency to do it for himself or herself. Such a proposal, known as Gregory's Law, is being circulated now.

Gregory's Law would allow a relative or friend to file a "next friend" appeal to challenge the orders of judges or the conduct of appointed attorneys that infringe the rights of limited conservatees. Clarification is needed because a published opinion (Conservatorship of Gregory D. 214 Cal.App.4th 62 (2013)) declared that only the limited conservatee may appeal to complain about these issues.

That creates a Catch 22 for limited conservatees. Because of the nature of their disabilities, they lack the understanding of how to appeal. Their appointed attorneys won't appeal because it is they who surrendered the rights of their clients. So ongoing violations of the rights of people with disabilities are never reviewed on appeal.

The best solution would be for attorneys to serve their primary duty, defending the rights of their clients. This should be their only focus. The court rule giving them a secondary duty to help settle cases should be eliminated.

Thomas F. Coleman is the legal director of the Disability and Abuse Project of Spectrum Institute.

Daily Journal
Published in California's largest legal news provider on February 10, 2015.

Disability & Abuse Project

2100 Sawtelle, Suite 204, Los Angeles, CA 90025 • (818) 230-5156
www.disabilityandabuse.org • nora-baladerian@verizon.net

August 29, 2014

Louis J. Rodriguez
President, California State Bar
c/o Public Defender
320 W. Temple Street
Los Angeles, CA 90012

Re: Request for a State Bar Task Force on Limited Conservatorships

Dear Mr. Rodriguez:

The Disability and Abuse Project has been studying the Limited Conservatorship System in California. Limited conservatorship proceedings are used to determine whether to appoint a conservator for an adult with a developmental disability, and if so, which rights to take away from the conservatee. People are generally conserved as young adults and remain conserved for life.

Earlier this year we issued a report – "Justice Denied: How California's Limited Conservatorship System is Failing to Protect the Rights of People with Developmental Disabilities." That report (online at www.disabilityandabuse.org/conferences/justice-denied.pdf) found systemic failures and numerous rights violations committed by judges and the attorneys they appoint to represent limited conservatees.

A new report, released in the form of an educational guidebook, details constitutional infringements and ethics violations by these court-appointed attorneys. Breaches of confidentiality and loyalty and conflicts of interest are allowed to occur – indeed they are affirmatively encouraged – by policies and practices of the Probate Court in Los Angeles. They may also be occurring in other counties throughout the state. (See: "A Strategic Guide for Court Appointed Attorneys in Limited Conservatorship Cases" which is found online at www.disabilityandabuse.org/pvp).

We are asking that the Board of Trustees to convene a Task Force on Limited Conservatorships to look into this matter. The Task Force could make recommendations on how to improve the performance of attorneys who represent limited conservatees and recommend changes in policies and practices to guard against constitutional and ethical violations of the type documented by our studies.

Thousands of limited conservatees are affected by these practices. These vulnerable adults do not have the ability to file complaints against the system in general or against specific attorneys appointed to represent them in individual cases. We are therefore making this request on their behalf. We hope that our request is favorably received by the Board of Trustees and that appropriate action is taken.

Very truly yours,

Thomas F. Coleman
Legal Director

cc: All Trustees

Disability & Abuse Project

2100 Sawtelle, Suite 204, Los Angeles, CA 90025 • (818) 230-5156
www.disabilityandabuse.org • tomcoleman@disablityandabuse.orgt

November 25, 2014

Mr. Craig Holden
President, State Bar of California
Lewis, Brisbois, Bisgaard, & Smith
221 N. Figueroa Street, Suite 1200
Los Angeles, CA 90012

Re: Task Force on Limited Conservatorships

Dear Mr. Holden:

In August I wrote a letter to the State Bar President and the Board of Trustees with a request that a Task Force on Limited Conservatorships be convened. (See the enclosed letter.) The purpose of the Task Force would be to investigate whether public defenders and court-appointed attorneys are fulfilling ethical duties, adhering to professional standards, and following constitutional requirements for effective assistance of counsel in limited conservatorship proceedings.

Some counties use the services of public defenders in such cases, while other counties appoint private attorneys to represent adults with developmental disabilities in limited conservatorship cases. An analysis of the performance of court-appointed attorneys in Los Angeles County shows that serious deficiencies exist in the performance of such attorneys and that the training of the attorneys is deficient as well. Because some of the problems with the Limited Conservatorship System are systemic and pertain to defects in statutes and court rules, it is likely that conservatees in other counties are also receiving ineffective assistance of counsel.

I invite you, and new members of the Board of Trustees, to visit a page on our website with more information about the problems we have identified with attorney performance in these cases. See: www.disabilityandabuse.org/pvp The problems with the Limited Conservatorship System are much greater and run much deeper than the performance of attorneys. A new report by the Coalition for Compassionate Care of California confirms the findings of our own report, *Justice Denied*, that such problems involve the practices of judges, court investigators, and Regional Centers, as well. (See the enclosed press release about the new report, *Thinking Ahead Matters.*)

This issue should be placed on the agenda of a meeting of the Board of Trustees. I recently spoke to an advisory committee of the Judicial Council and would be pleased to make a similar presentation to the State Bar Board of Trustees. (See the enclosed Daily Journal news story.)

Very truly yours,

Thomas F. Coleman

THOMAS F. COLEMAN
Legal Director

Disability & Abuse Project

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www.disabilityandabuse.org • nora-baladerian@verizon.net

May 15, 2014

Hon. Tani G. Cantil-Sakauye
Chief Justice of California
350 McAllister Street
San Francisco, CA 94102

Re: Request for Judicial Council to Convene a Task Force on Limited Conservatorships

Dear Chief Justice:

I am writing to you in your capacity as Chair of the Judicial Council.

In January 2006 Chief Justice Ronald M. George convened a Probate Conservatorship Task Force and directed it to conduct a comprehensive review of the probate conservatorship system in California. The actions of the Chief Justice were prompted, in large measure, by a series of articles published by the Los Angeles Times that called public attention to major problems with the general conservatorship system.

The stories published by the Los Angeles Times also caught the attention of the California Legislature. Hearings were conducted and new legislation was enacted.

The actions of the legislative and judicial branches focused almost entirely on general conservatorships. No particular attention was given to limited conservatorships for people with developmental disabilities.

The time has come for a comprehensive review of the limited conservatorship system. Our Project has done its own "mini-audit" of this system as it is operated by the Los Angeles Superior Court. Our preliminary findings have caused us to convene a conference on May 9, 2014, and another is scheduled for June 20. A copy of our preliminary report, *Justice Denied*, is enclosed. A copy is being sent to all members of the Judicial Council. We are also reaching out to the Legislature and to other statewide elected officials.

We do not know how limited conservatorships are processed in other counties, but if what is happening in the largest Superior Court in the state is any indication, there is a major statewide deprivation of justice that is happening to a very vulnerable population – one that is unable to adequately advocate for itself. If Los Angeles County is unique, then thousands of people with disabilities in that jurisdiction are being deprived of equal protection of the law (in addition to violations of other constitutional and civil rights).

Our Project is calling on you to convene a Task Force on Limited Conservatorships to review the limited conservatorship system statewide, with a special focus on Los Angeles County. Members of the Task Force should include a wide range of perspectives, from inside and outside of the legal profession. My colleagues and I at the Disability and Abuse Project are willing to be of assistance. We have considerable experience in working with study commissions and task forces on matters involving policy and law reform.

What we do to solve these problems will affect tens of thousands of existing limited conservatees in California and thousands more whose cases are processed each year. Therefore, we should act with all deliberate speed. I look forward to your reply.

cc: Judicial Council members

Very truly yours,

Thomas F. Coleman

THOMAS F. COLEMAN
Legal Director
(818) 482-4485 / tomcoleman@earthlink.net

From: O'Donnell, Patrick [mailto:patrick.o'donnell@jud.ca.gov]
Sent: Friday, May 30, 2014 4:12 PM
To: tomcoleman@earthlink.net
Subject: Proposal for a Task Force on Limited Conservatorships

Dear Mr. Coleman,

Chief Justice Tani G. Cantil-Sakauye has received your letter dated May 15, 2014 on behalf of the Disability and Abuse Project proposing the establishment of a task force to review the limited conservatorship system statewide.

Justice Harry Hull, the Chair of the Judicial Council's Rules and Projects Committee, has reviewed the letter and accompanying materials. He has referred the proposal to the Probate and Mental Health Advisory Committee for a recommendation.

The chair and staff of the advisory committee have been sent a copy of your letter and the accompanying materials. The committee will consider the proposal and be making a recommendation.

Thank you very much for your interest in the administration of justice.

Patrick O'Donnell
Supervising Attorney
Legal Services Office
Judicial Council of California - Administrative Office of the Courts
455 Golden Gate Avenue, San Francisco, CA 94102-3688
415-865-7665, Fax 415-865-7664
patrick.o'donnell@jud.ca.gov

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STATE OF CALIFORNIA

Court of Appeal

THIRD APPELLATE DISTRICT
STATE LIBRARY AND COURTS BUILDING
914 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814

HARRY E. HULL, JR.
ASSOCIATE JUSTICE

PHONE: (916) 654-0228
E-MAIL: harry.hull@jud.ca.gov

6 January 2015

Thomas F. Coleman
Legal Director
Disability and Abuse Project
2100 Sawtelle, Suite 204
Los Angeles, CA 90025

Re: *Disability and Abuse Project*

Dear Mr. Coleman;

I chair the Judicial Council Rules and Projects Committee, which committee oversees the work of the Judicial Council Probate and Mental Health Committee. I am responding to your further letter to the Chief Justice dated 29 December 2014 regarding reforms to the Adult Guardianship System in the state of Indiana after a task force convened in Indiana reported its findings to the Indiana Supreme Court.

When your concerns over California's handling of limited conservatorships were first brought to our attention last year, those concerns were forwarded to the Probate and Mental Health Committee for its consideration.

I am advised by that committee that, at its November 2014 public meeting, the Probate and Mental Health Advisory Committee heard you and your supporters state your concerns to the committee directly. You asked the committee to recommend to the Judicial Council that the council convene a task force on limited conservatorships similar to the one convened in 2006 that reviewed and made recommendations on the subject of probate conservatorships in general. I am told that, at the November meeting, there was considerable discussion of the issues you raised, including a discussion of the cost of convening your requested task force.

I am further advised that, following your presentation, the Probate and Mental Health Advisory Committee decided that it, along with the California Center for Judicial Education and Research and the Probate and Mental Health Education Committee, would

undertake a review of some of your most prominent concerns.

The committee will go forward with its consideration of the issues you raise. I note the Rules and Project Committee, in its review of the 2015 annual agenda proposed by the Probate and Mental Health Advisory Committee, approved continued work on the issues you raise, specifically, the committee was authorized to "review and consider recommendations for changes in law, practice, and procedures for the developmentally disabled."

As perhaps you know, the Legislature and the Governor have reduced judicial branch funding by an amount in excess of $1 billion over the last four years. We have had to close courtrooms and, indeed, courthouses, all over the state and we continue to struggle with the resources that we have to insure as best we can access to justice for people throughout the state. That profound underfunding of the courts is far from being resolved. Simply put, the branch does not presently have the funds to commit to a task force such as the one that you have requested.

It would appear that your sincere concerns relating to California's handling of limited conservatorship proceedings are being heard and considered by the Probate and Mental Health Advisory Committee and will be heard in the future by the Rules and Projects Committee and the Judicial Council itself, chaired by the Chief Justice. I have every confidence in a full and fair examination into the issues you raise.

If you have further questions, please let me know directly since matters such as these eventually come to me in any event.

Thank you.

Very truly yours,

Harry E. Hull, Jr.

cc: Chief Justice Tani Cantil-Sakauye
Honorable John H. Sugiyama
Douglas C. Miller, Esq.

Disability and Guardianship Project

9420 Reseda Blvd. #240, Northridge, CA 91324
(818) 230-5156 • www.spectruminstitute.org

April 2, 2015

Honorable Harry Hull
Chair, Rules and Projects Committee
Judicial Council of California
914 Capitol Mall
Sacramento, CA 95814

Dear Justice Hull:

Thank you for the time and attention you have been giving to the concerns we have raised with the limited conservatorship system in California – a system that has been entrusted to the Judicial Branch.

When I first wrote to Chief Justice Tani Cantile-Sakauye about our concerns, she forwarded my letter to you as Chair of the Rules and Projects Committee. Having been in communication with you for the past several months, I realize that you are the most appropriate representative of the Judicial Branch for discussions about improvements to the limited conservatorship system.

Your letters have been thoughtful and detailed. The meeting that Dr. Nora Baladerian and I had with you in Sacramento was warm and constructive. We appreciate the amount of time you gave us.

You suggested that we work through the Probate and Mental Health Advisory Committee to address the issues we have been raising. We will follow your suggestion. I will be writing to Judge John Sugiyama, chairperson of that committee, to offer our first specific proposal and to request time on the committee's agenda to discuss it and to answer any questions. Assuming this process is mutually satisfactory, other specific proposals will be submitted to the committee in the future.

I am pleased that Judge Maria Stratton was appointed by the Chief Justice to serve on the advisory committee. Even though she has only been the presiding probate judge in Los Angeles for three months, she has shown great leadership. I sent her a letter today to acknowledge some of the actions she has taken and to request that she work with us and take advantage of the ideas we have to offer for improvements to the limited conservatorship system.

I will write to you from time to time to keep you posted on any progress that is made by working with Judge Sugiyama on statewide issues and Judge Stratton on local issues.

Very truly yours,

Thomas F. Coleman

Thomas F. Coleman
Executive Director
tomcoleman@spectruminstitute.org
(818) 482-4485 (cell)

cc: Judge John Sugiyama
Judge Maria Stratton

Disability and Guardianship Project

9420 Reseda Blvd. #240, Northridge, CA 91324
(818) 230-5156 • www.spectruminstitute.org

April 2, 2015

Judge John Sugiyama
Chair, Probate and Mental
Health Advisory Committee
Judicial Council of California

Dear Judge Sugiyama:

Several months have passed since we made a presentation about the limited conservatorship system at the meeting of the Probate and Mental Health Advisory Committee.

Justice Harry Hull wants us to direct specific proposals to that committee. He informed us that he has complete confidence in the ability of the committee to give us a fair hearing and to formulate recommendations which it will forward to the Rules and Projects Committee for consideration.

Therefore, we are asking the advisory committee to recommend that the Judicial Council support a proposal that we recently submitted to the Senate Judiciary Committee. We would like both houses of the Legislature to adopt a resolution creating a legislative Task Force on Access to Justice in Limited Conservatorships. I am attaching materials we submitted to the Judiciary Committee, including a report demonstrating the need for a task force and a description of how such a task force could operate.

The idea for a legislative task force was formulated after considering statements made by you at the conclusion of the committee meeting in November, fiscal concerns raised by Justice Hull in letters and emails to me, and additional statements made by Justice Hull in person when we met last month.

No one has suggested that a statewide review of the limited conservatorship system is unnecessary. The main concern about a task force was the lack of funding to staff and operate it. An additional consideration was the composition of a task force. We insisted that public members with experience in the field of developmental disabilities should participate and that members should not be limited to judges and attorneys associated with the Judicial Council. A task force convened by the Legislature would handle both of these issues. The task force would include judges and attorneys as well as self-advocates, parent-advocates, and people who provide advocacy for and services to people with intellectual and developmental disabilities. The Legislature would fund the operations of the task force and would provide the necessary staffing. Also, since the limited conservatorship system has been operated solely by the Judicial Branch, a review of it by the Legislative Branch would be more objective.

We are asking the advisory committee to support this proposal. We would like to attend any meeting at which this matter is considered.

Very truly yours,

Thomas F. Coleman

Thomas F. Coleman
Executive Director
tomcoleman@spectruminstitute.org
(818) 482-4485 (cell)

cc: Justice Harry Hull

Views of a PVP Attorney on the Training Program in Los Angeles

"In reviewing the website [of the Disability and Guardianship Project] last night I realized how scanty my education was concerning the LAWS that protect our clients that I should be using as the basis for advocacy. An eye opener. There was absolutely no training on those laws in any of the PVP stuff that I have attended so far. And I've been part of the program in LA since I think 2008 …. That's a lot of years to get basically updates on conservatorship case law that I can get elsewhere and rehashing of how to write a report. In reality, I have gotten more from the minor's counsel training that I attend every year in terms of at least learning some sensitivity to cultural issues of which disability could be considered a 'culture'.

"Don't know what other counties do (ie. what training they give their PD's), but since LA is so heavily dependent on private attorneys in this area, it seems that the need is definitely there. And frankly, there have been times when I have been handling the conservatorship for the petitioner where I look at what the PVP's have done and I'm going – is that all there is?? Or what was this person doing that wasn't rote?"

– PVP Attorney
Email to Spectrum Institute
April 14, 2015

How Many DDS Consumers Are Conserved and Who Are Their Conservators?

In considering the extent of conservatorship of adults with I/DD in California and the impact of conservatorship on healthcare decision-making, it is useful to quantify the number of persons under conservatorship, and who serves as conservators. The California Department of Developmental Services provides the following information regarding the legal status of consumers in its system:

Figure 2: Legal Status of DDS Consumers

Legal Status	Age 18+ yrs
No Conservator	100,979
Parent or Relative	25,500
Has Conservator - not DDS	11,597
Has Conservator - not DDS (Public Guardian)	871
Other (Has Conservator, Such as Private Conservator)	791
Ward of Court	522
Director of DDS	511
Unknown	344
Regional Center Director	168
Miscoded	1
TOTAL ADULT CLIENTS	**141,284**

Source: California Department of Developmental Services, July 2014

About 40,000 Adults with Intellectual Disabilities Have Open Conservatorship Cases in California

Information Taken from This Report:

THINKING AHEAD MATTERS

Supporting and Improving Healthcare Decision-Making and End-Of-Life Planning for People with Intellectual and Developmental Disabilities

August 2014
Updated January 2015

Laurel A. Mildred, MSW
Mildred Consulting

COALITION FOR COMPASSIONATE CARE OF CALIFORNIA

1331 Garden Highway, Suite 100
Sacramento, CA 95833
CoalitionCCC.org

Response of DDS to Public Records Request by Spectrum Institute

Total adults served by DDS 145,414
Those who are not adult conservatees (Status 5 and Status N) . . . 104,404
Total adults with I/DD who are conservatees 41,010

Los Angeles County DDS clients who are conservatees 12,688 (30.9%)
(ELARC + FDLRC + HRC + NLACRC + SCLARC + SGPRC + WRC)

Adult Regional Center Consumers (Age 18 and Up)
Client Master File Data as of December 1, 2014

Request 1: The number of adult clients served by each regional center.
Request 2: The number of adult clients served by each regional center who are conservatees.

See table below and corresponding key on the following page.

Regional Center	Legal Status 2	Legal Status 3	Legal Status 4	Legal Status 5	Legal Status 7	Legal Status 9	Legal Status N	Legal Status R	Other	Grand Total
ACRC	125	769	54	43	3	42	7,392	2,295	67	10,790
CVRC	59	739	18	24	2	8	7,216	837	40	8,943
ELARC	39	425	8	15	21	15	2,752	1,506	24	4,805
FDLRC	3	246	15	14	49	4	2,309	1,163	8	3,811
FNRC	39	733	6	8	1	1	2,959	460	29	4,236
GGRC	40	602	10	15	-	7	3,846	535	35	5,090
HRC	24	473	42	25	1	19	3,788	1,322	16	5,710
IRC	59	224	21	53	49	15	11,445	3,272	44	15,182
KRC	4	329	27	9	9	4	3,447	251	37	4,117
NBRC	21	590	13	22	1	19	3,789	306	17	4,778
NLACRC	11	837	23	33	2	8	7,090	1,262	35	9,301
RCEB	53	452	27	45	7	19	6,127	2,899	74	9,703
RCOC	8	1,359	34	21	-	-	8,056	6	2	9,486
RCRC	62	195	-	3	2	15	1,479	245	15	2,016
SARC	51	974	25	15	4	79	4,575	1,898	25	7,646
SCLARC	81	414	45	60	2	28	4,599	910	40	6,179
SDRC	18	1,639	62	29	-	36	7,893	1,787	10	11,474
SGPRC	27	701	37	43	5	-	4,699	986	22	6,520
TCRC	47	449	25	6	1	8	4,150	1,312	37	6,035
VMRC	33	249	13	18	-	9	4,292	1,012	177	5,803
WRC	54	182	15	26	17	17	1,974	1,487	17	3,789
Grand Total	**858**	**12,581**	**520**	**527**	**176**	**353**	**103,877**	**25,751**	**771**	**145,414**

Legal Status Key

'Legal Status' answers the question: "Does the consumer have a judicially appointed guardian or conservator?"

Legal Status	Description	Definition
2	Public Guardian	The public guardian for the county of residence of the consumer is the consumer's conservator. (Probate Code sections 2920, 2921)
3	Has Conservator -- Not DDS	The consumer has a conservator who is not the director of the Department of Developmental Services (DDS).
4	Director of DDS	The director of DDS is appointed as either guardian or conservator of the consumer and/or estate of a consumer. (Health and Safety Code sections 416, 416.5, 416.9)
5	Court (dependent child)	A minor consumer who is adjudged by the court to be a dependent of the court because of parental issues or the child's criminal conduct. (Welfare and Institutions Code section 300 or 601)
7	Regional Center Director	The director of a regional center that is the actual probate conservator or guardian of a consumer, as contrasted with being delegated the responsibility of performing conservatorship duties by DDS when DDS is the actual conservator. (Health and Safety Code section 416.19, Probate Code sections 1500, 1514, 1801, 2351.5)
9	Unknown	
N	No Guardian/Conservator	The consumer does not have a judicially appointed guardian or conservator.
R	Consumer's Parent or Relative	A family member of the consumer has been appointed probate conservator (for an adult) or guardian (for a minor). (Probate Code sections 1500, 1514, 1801, 2351.5)
Other		The consumer has a guardian or conservator other than the possibilities above, such as a private conservator.

SHERRI R. CARTER
EXECUTIVE OFFICER / CLERK

111 NORTH HILL STREET
LOS ANGELES, CA 90012-3014

Superior Court of California
County of Los Angeles

April 30, 2014

Thomas F. Coleman
c/o Dr. Nora J. Baladerian
2100 Sawtelle, #204
Los Angeles, CA 90025

Re: Requests per Rule 10.500

Dear Mr. Coleman:

The following is written in response to your inquiry dated April 24, 2014 for per Rule 10.500.

On April 26, 2014, we had the following conservatorship cases in active inventory:

Conservatorship – Limited 7,643
Conservatorship – Dementia 2,093
Conservatorship – Other 3,341

The Probate Code mandates first annual, annual and biennial reviews, based on the type of conservatorship ordered by the court.

The information regarding guardianship cases "Subject to Annual Reviews" or "Biennial Reviews" is not available in any document or report.

Sincerely,

Margaret Little, Ph.D.
Senior Administrator
Family Law & Probate Administration

ML:rma

To: Central Civil Operations Administration
Administrative Records Request

From: Thomas F. Coleman
c/o Baladerian
2100 Sawtelle, #204
Los Angeles, CA 90025
(818) 482-4485

Re: Request per rule 10.500

Date: April 22, 2014

Request 1: Access to Records – Open Cases – Subject to Annual Reviews

Please provide me access to records, and/or copies of records, in possession of or under the control of the Superior Court (memos, letters, reports, data sheets, etc.) which show:

a. The number of "open" conservatorship cases which are subject to annual review by court investigators for the current fiscal year and/or the current calendar year. By open, I refer to probate code conservatorship cases (general and limited) in which a conservator has been appointed and the conservatee or limited conservatee is still living.)

b. The number of "open" guardianship cases which are subject to annual review by court investigators for the current fiscal year and/or the current calendar year. By open, I refer to probate code guardianship cases in which a guardian has been appointed and the ward is still living and has not turned 18 years of age yet.

Request 2: Access to Records – Open Cases – Subject to Biennial Reviews

Please provide me access to records, and/or copies of records, in possession of or under the control of the Superior Court (memos, letters, reports, data sheets, etc.) which show:

a. The number of "open" conservatorship cases which are subject to biennial review by court investigators for the current fiscal year and/or the current calendar year. By open, I refer to probate code conservatorship cases (general and limited) in which a conservator has been appointed and the conservatee or limited conservatee is still living.)

b. The number of "open" guardianship cases which are subject to biennial review by court investigators for the current fiscal year and/or the current calendar year. By open, I refer to probate code guardianship cases in which a guardian has been appointed and the ward is still living and has not turned 18 years of age yet.

Disturbing Details Revealed at Legislative Hearing on the Ability of California Courts to Protect Vulnerable Adults

by Thomas F. Coleman

As each of the 16 witnesses testified before the Senate Judiciary Committee this week, a common theme emerged. Bulging caseloads and shrinking budgets were interfering with the duty of state and local agencies to protect seniors and adults with disabilities from abuse and neglect.

The occasion was an oversight hearing into the role of the courts in protecting a growing population of seniors and dependent adults. Presiding over the hearing was state Senator Hannah-Beth Jackson (D-Santa Barbara).

Senator Jackson started the hearing by reminding everyone that the last such oversight hearing on conservatorships was in 2005. That hearing was prompted by articles published by the Los Angeles Times revealing mismanagement of conservatorships for seniors by the judges, attorneys, and conservators in such cases.

While the scheduled speakers mostly read from prepared scripts, and senators came and left the room from time to time, no one acknowledged the "elephant in the room" – a report issued that morning by Spectrum Institute criticizing the Judicial Branch for operational deficiencies in processing limited conservatorship cases.

Limited conservatorships are proceedings used exclusively for adults with intellectual and developmental disabilities. There are 40,000 such adults under conservatorship in California, with 5,000 new cases being opened each year.

The Legislature has never conducted an oversight hearing about the condition of the limited conservatorship system in California. Limited conservatorships and people with disabilities were barely mentioned by scheduled speakers.

That changed when I spoke at the end of the hearing. I presented the committee with a new report – *Limited Conservatorships: Systematic Denial of Access to Justice* – detailing how judges, attorneys, court investigators, and regional centers are failing to protect the rights of people with developmental disabilities.

The report calls on the Legislature to convene a Task Force on Access to Justice in Limited Conservatorships to investigate the findings of the study by Spectrum Institute. It also asks for the Bureau of State Audits to survey the courts in each county to document their policies and practices in handing these cases, and to conduct an audit of the system in Los Angeles.

Testimony by Judge Maria Stratton, Presiding Judge of the Probate Court in Los Angeles, underscored the need for such an audit. She told legislators that there are 10,000 open conservatorship cases in Los Angeles. This contradicts data released by the Department of Developmental Services which shows there are more than 12,000 open cases involving adults with developmental disabilities. In addition, there are thousands of other cases for seniors. There is a major discrepancy that needs to be reconciled.

Judge Stratton disclosed that many vulnerable adults under the court's protection cannot be found. Thousands of them? For a protection court to lose track of that many people is very unsettling news.

She said the 20 court investigators have only one day a week to conduct field investigations. That means there are only 52 days a year to conduct field investigations on 2,100 new conservatorships, 2,100 annual reviews, and 5,000 biennial reviews, not to mention guardianships for minors. Do the math. Each investigator would have to do nine home visits on the only day each week assigned for field work. Really?

The proposals offered by Spectrum Institute were endorsed by the testimony of Greg deGiere who represented the Arc of California. The Arc is a statewide organization advocating for the rights of people with intellectual and developmental disabilities.

Legislators listened intently during my testimony. They were given the new report as well as a guide on how such a task force could function.

A task force was convened in 2006 to address the needs of seniors. The question now is whether people with disabilities will get the oversight they truly need – and deserve. The answer lies with the members of the Senate Judiciary Committee. ◊◊◊

Attorney Thomas F. Coleman is Executive Director of the Disability and Guardianship Project of Spectrum Institute. www.spectruminstitute.org (March 27, 2015)

Thinking Ahead Matters: Excerpts from a New Report on the Limited Conservatorship System

Except where otherwise noted as a comment, the language contained in this document are paragraphs taken from various parts of the Thinking Ahead Matters report published in August 2014 by the Coalition for Compassionate Care of California.

These excerpts serve as an executive summary of those parts of the 97-page report that focus on the Limited Conservatorship System. The findings reported here are consistent with those contained in essays and reports published by the Disability and Abuse Project.

Introduction

These are the questions considered in this report:

> * What is the process of conservatorship for people with developmental disabilities in California?
>
> * How large is the impact of conservatorship on healthcare decision-making for this population?
>
> * What strategies would improve self-determination in healthcare decisions for people with developmental disabilities?

This paper considers these issues through the lens of people with developmental disabilities themselves as well as their advocates; including family members, attorneys, disability rights advocates, Regional Centers, bioethicists and providers who work closely with them. It relies on 21 qualitative interviews with a total of 22 key informants from these groups, as well as assembling background resources with strategies and policy recommendations on relevant topics that are intended to enhance the agency, dignity and choice of disabled individuals. The essential purpose is to strengthen the opportunity for the disabled person to make or actively contribute to making decisions important to themselves, up to and including the end of life.

Background

Today, with the reduction in institutionalization and over-crowded, understaffed and under-funded conditions, people with I/DD have a life expectancy near that of other adults, with an average life of 65 years compared to 70 in the general population.

Nationally, over 75% of people with I/DD live with their families, and more than 25% of family caregivers are over the age of 60.

A Pro-Disability Philosophy

Surrogate healthcare decisions, when needed, should be made by caregivers who know the patient well and attempt to view quality of life from the patient's perspective.

Legal Issues

In the late 1970's a series of reforms was instituted to the conservatorship process, intended to create due process and protect the rights of conserved persons. In 1977 the position of court investigator was created, and courts received authority to appoint an attorney to represent proposed conservatees.[36] In 1980, California established the "Limited Conservatorship" specifically for adults with I/DD.

According to conservatorship attorney Stephen Dale, Limited Conservatorships are intended to give "just the right amount of powers – not too much, not too little."

While the general conservatorship process begins with an assumption that all powers will be given and the judge may reserve some rights as the process unfolds, Limited Conservatorship does not presume the disabled person is incompetent. Limited

Conservatorships are designed to help persons with I/DD lead more independent, productive and normal lives, and the disabled person retains all legal and civil rights except for those the court specifically grants to the conservator. It requires consideration of the person's abilities in seven fundamental areas, and awards the conservator rights to just those powers where the person needs assistance.

Limited Conservatorships involve a number of discrete steps. A recent report, *Justice Denied: How California's Limited Conservatorship System is Failing to Protect the Rights of People with Developmental Disabilities* by the Disability & Abuse Project of Spectrum Institute, provides a general outline of the transactions associated with Limited Conservatorships.

Adults with I/DD Who Are Conserved

(Comment: Data obtained from the Department of Developmental Services show that out about 141,000 adults with intellectual and developmental disabilities in California, slightly more than 40,000 are conserved. Of those conserved, some 25,500 have a parent or relative servicing as conservator, nearly 900 have the Public Guardian, and nearly 800 have a private non-relative conservator.)

Critiques of the Limited Conservatorship Process

Attention has begun to focus on Limited Conservatorships and how they operate, raising concerns that they do not function as intended. There was strong feedback from informants involved in conservatorship about the negative impact of California's diminished funding of both the courts and the Regional Centers. One described the court-funding crisis in particular as resulting in "chaos" in court processes. Several attorneys also believe that cuts to Regional Centers have diminished the assessment of the disabled person's capacities. They believe that Regional Center assessments have become less individualized and more pro-forma, with boilerplate language submitted in many cases rather than accurate personalized reporting on client capacity in each of the seven powers. Other informants identify a lack of training and knowledge of the population amongst attorneys and court officials as a complicating factor. And while there are differences of opinion about the location of the dysfunction and how it is evidenced within the system, there is widespread agreement that lack of proper oversight and remediation are difficulties in cases where conservatorships are bad. Informants report that this is a significant problem that is hard to remedy, with serious consequences for vulnerable conservatees. All informants saw funding cuts as a core contributor to these problems and stated that they cannot be resolved without an appropriate level of funding for both systems.

Informants also provided feedback that there are many instances where the ideal process and legal requirements are not implemented. Copies of the petition are not always provided to the person with a disability and close relatives. One informant reports never having seen a court investigator review psychological and medical records as part of the process. One stated that disabled persons are frequently not in attendance at the court hearing even though they are medically able to attend, and proposed conservatees are rarely consulted about who should be appointed as conservator. Informants noted that annual or biennial in-person visits to the conservatee to check on their welfare only occur rarely, and reported that the initial in-person interview with the court investigator is often conducted without privacy, in the presence of the parent or potential conservator, thereby making it difficult for the disabled person to provide candid information.

The *Justice Denied* report outlines some additional ways that problems have manifested in the Limited Conservatorship process. Utilizing a review of Limited Conservatorship cases in the Los Angeles Superior Court, the report sees that the following problems have occurred.

First, there are too few court investigators to carry out the work. The law requires a court investigator to conduct investigations on all initial petitions, conduct an annual review one year later and a biennial investigation thereafter. One informant has called this investigation the most important information in the Limited Conservatorship process. If there

is a report of suspected abuse of a conservatee, that should also prompt an investigation. However, court investigators are paid by the court directly. Due to ongoing court funding constraints, an overwhelming caseload and consequent understaffing, the court investigator report appears to be frequently waived in Los Angeles, with substitution of the Regional Center report or the report of the attorney who serves as the conservatee's court-appointed attorney, in place of the court investigator report.

This approach diminishes the impartial investigation of the circumstances and appropriateness of the conservatorship, and also creates a conflict-of-interest for the court-appointed attorney, who is ethically obligated to represent the rights of the client rather than the interests of the court.

Another issue called out is that in its minimal training, the Los Angeles Court gives court-appointed attorneys instruction that if they disagree with the "stated wishes" of the client, they should advocate for what they believe are the client's best interests.[58] While project informants point out that experienced conservatorship attorneys understand the duty to represent the proposed conservatee as specified in the Probate Code, this report concludes that such instructions can result in attorneys acting as de-facto guardians *ad litem*, advocating for what they believe are the best interests of the client rather than advocating for what the client expressly wants.[59] That outcome does not appear to be consistent with the intention and purpose of the Limited Conservatorship process.

In addition, Limited Conservatorships are sometimes granted when the Regional Center report has not even been filed. Even when they are filed, these reports lack criteria and guidelines to make standardized and valid assessments of client capacities.[60] Furthermore, ongoing biennial investigations by the court investigator, required by state law, do not appear to be occurring in Los Angeles.[61] Informants to this project report this lapse is occurring in other counties as well.

The *Justice Denied* report finds, and informants to the current study concur, that education about the I/DD population as well as about the conservatorship process itself, are severely lacking. Courts and attorneys need better education about the population, including the requirement and importance of providing reasonable accommodations under the Americans with Disabilities Act, in order for disabled persons to be able to communicate their views and wishes in the process.[62] Parents and other potential conservators who file petitions need training about the conservatorship process and the duties and responsibilities of conservators, including the responsibility to take the disabled person's wishes into account even when they are conserved. All parties need better information about supported decision-making and appropriate alternatives to conservatorship. Finally, neither the Department of Developmental Services nor a client rights advocacy agency has a formalized role in monitoring the Limited Conservatorship process.

Although some of these findings may be unique to Los Angeles County, many appear to have validity in other counties. As far as we are aware there is no quantitative study of the outcomes of Limited Conservatorships across the state of California; however, differing county-to-county processes are a significant problem in the applicability of statewide legal standards and of equity across counties. Each county's courts have differing policies and administration, which are often vastly different from one to the next.

The variability in policies of locally administered agencies, both the courts and those under the domain of county boards of supervisors, vastly complicate the real world outcomes of Limited Conservatorships and interventions in situations of abuse and neglect involved with bad conservatorships, and deserve further study and recommendations for improvement.

People with intellectual and developmental disabilities have rights under both state and federal law that protect them in a variety of ways. Among these are the Lanterman Developmental Disabilities Services Act (Appendix C) located in California Welfare and Institutions Code. Section 4502 ensures the same legal rights and responsibilities guaranteed all other

individuals by the United States Constitution and laws of the State of California, with protection against exclusion from participation, denial or discrimination under any program or activity that receives public funds. Section 4502.1 ensures the rights of individuals with I/DD to make choices about their own lives and requires public and private agencies to provide opportunities to exercise decision-making skills in any aspect of day-to-day living, provided in understandable form. Furthermore, Limited Conservatorship statutes require that under a conservatorship, the conservator is responsible to secure services which "will assist the limited conservatee in the development of maximum self-reliance and independence,"[67] and reserves all rights not explicitly granted to a conservator for the disabled person. All of these laws are intentional in preserving the independence and choices of people with I/DD, and providing respect and protection for their decisions. How these laws are administered in practice, however, has a significant impact on the ability of a disabled person to exercise decisions in his or her day-today life.

Medical Issues

The role of conservatorship is seen differently depending on the vantage point of the observer. Conservatorship attorneys express that it is an appropriate tool depending on unique circumstances and individual and family needs; neither good nor bad but sometimes necessary. They emphasize the importance of conservatorship in protecting vulnerable people from harm, exploitation and abuse. Regional Center informants who see many complex situations report that in some cases family members have been the ones abusing disabled adults, and have used their status as conservator to obstruct investigation and intervention by Adult Protective Services. On the other hand, a father whose son is conserved uses the authority of conservatorship to help stand on his son's side and empower his wishes when service providers and social workers try to "browbeat" or coerce his son to do things that are not in his interest.

Explaining the alternatives to conservatorship for healthcare decision-making is not, by itself, a full solution. A conservatorship attorney who works with low-income families reports that tension often exists between parents and Regional Centers; families see conservatorship as a means of empowerment when Regional Centers are not responsive and do not give them a "say" in the type of services they receive. For these families, conservatorship can be seen as a strategy to navigate complex systems and advocate for services their loved one needs. This can be especially important for undocumented families.

(Comment: The statements in the following paragraph are even more significant when one considers the requirement of the California Constitution that laws of a general nature must operate uniformly throughout the state.)

A key challenge to making improvements to processes of medical decision-making for the publicly conserved is the fact that Public Guardians (as well as courts) are locally administered, and each county and jurisdiction interprets and implements laws and policies differently. Drought comments, "The extreme variation in practices noted across counties seems to exceed what the ambiguities in the law might suggest." Another informant stated, "The interlocking gears of these systems are not necessarily a good fit and at times create friction that is unbearable for the people who are caught in it." The Legislature and DDS have an interest in making these gears work more smoothly and ensuring that local policy is implemented with enough consistency so that clients of Regional Centers are protected and afforded the benefits of the Lanterman Act, no matter in which county they reside.

A Regional Center Medical Director notes that without this depth, caregivers sometimes see it as an "assignment" to "sign people up" for an advance directive. This can lead to inappropriate prompting to make choices the caregiver sees as correct rather than a dynamic process of helping the disabled person to understand and express choices.

Supported Decision Making

Supported decision-making (SDM) is a process of seeking assistance from chosen family members,

friends or supporters to understand situations, consider options and use their help to make choices.

Advocates express concern about the appropriateness of systems that are dependent on overbroad conservatorship as a routine part of permanency planning for people with I/DD, asserting that laws are frequently misapplied. Although repeatedly proposed and sometimes implemented, "reforms have had remarkably little effect on judicial behavior," and conservatorships are routinely granted. Research demonstrates that conservatorship can result in harm to the disabled person, hindering self-determination and community inclusion. Overly broad conservatorship can leave people feeling isolated and lonely, can cause depression, decrease motivation, create learned helplessness and undermine the disabled person's physical and psychological well-being by reducing their sense of control over their lives.

It is important to note that the state of the art of SDM exists in the early stages. While several models of formalized SDM operate internationally, there is not much research. One comprehensive review by Kohn et al raises a number of important points: for example, while there is a growing body of literature about how SDM *should* work, there is far less information on how it does work. There is little information about the internal dynamics of SDM discussions, and almost no empirical evidence that SDM systems succeed in achieving their substantive goals.

Most importantly, the review notes that SDM arrangements can create new opportunities for abuse, potentially allowing unaccountable third parties to improperly influence persons with I/DD, disempower them and undermine their rights.

Some propose that SDM could take the place of conservatorship. Alternatively, it could be integrated into the legal system as a less-restrictive option that is implemented prior to the time that a Limited Conservatorship is even considered, resorting to the more restrictive option only when SDM arrangements have not functioned successfully.

The evolution of SDM should include empirical evidence about how to ensure that decisions truly express and effectuate the wishes or preferences of the disabled person and whether SDM decisions are more beneficial to the person compared to decisions made using other approaches such as conservatorship.

Findings and Recommendations

The following recommendations are based on our review of the literature, incorporation of best practices identified in cited works and the practical experience of key informants. They include recommendations in each of five critical areas, and they address both policy and funding that are important to improve the area of healthcare decision-making for people with I/DD.

California Probate Codes governing Limited Conservatorship (Probate Code §§ 1827.5, 1828.5, 1830, & 2351.5) should be amended to require that any client of a Regional Center may be subject only to a Limited Conservatorship rather than a general conservatorship. General conservatorships for Regional Center clients should be prohibited.

These Limited Conservatorship statutes should also be amended to include a meaningful requirement that alternatives to conservatorship were understood, explored and an explanation of the reasons why they were unsuccessful and conservatorship is needed, as part of the process of petitioning for a Limited Conservatorship.

Training about the I/DD population and the process, duties and responsibilities of Limited Conservatorship should be formally initiated for those seeking to petition for conservatorship as well as for attorneys who work on Limited Conservatorship. These trainings should include information about facilitating communication and providing reasonable accommodations under the Americans with Disabilities Act to allow disabled persons to have meaningful participation in the legal process.

The Legislature, in consultation with DDS,

Regional Centers and the state's protection and advocacy agency, should undertake a series of special hearings to consider critical issues that are primarily locally-administered but have a substantial impact on persons with I/DD who may be subject to neglect or abuse. A statewide approach and legislation may be necessary regarding two critical issues: * The role of the Public Guardian and Adult Protective Services in interventions for people with I/DD who may be subject to neglect or abuse; and also in issues of end-of-life decision-making; * The role, processes and effectiveness of courts in investigating, intervening and changing troubled conservatorships.

A disability clients' rights and protection organization with legal experience should be funded through contract with DDS and authorized to provide oversight, monitoring, reporting and policy recommendations on the Limited Conservatorship process statewide.

DDS should refine and improve its data collection on conservatorship, including specifically tracking three vulnerable populations: * Those who have a Limited or general conservatorship as well as an LPS conservatorship. * Those served by a Public Guardian as their conservator. * Those flagged by Regional Centers as having a conservator who has been reported to Adult Protective Services for suspected abuse or neglect.

California should launch and evaluate a pilot study to support implementation of a collaborative model that includes officials of the Court, the Public Guardian, the Regional Center and bioethics professionals, to improve medical decision-making for publicly conserved individuals as recommended in the Drought report.

Regional Center funding that has been cut should be restored in order to ensure that services are adequate, caseloads are manageable, individualized assessments are appropriately conducted and public educational efforts are restored.

Court funding should be restored to eliminate chaos in operations and ensure that the requirements of the 2006 Omnibus reform legislation are fully implemented. Within these restorations, funds should be earmarked to support the proper implementation and oversight of Limited Conservatorships, based on compliance with legal requirements for initial, annual and biennial investigations by court investigators.

Concluding Comments

Though project informants had diverse perspectives about conservatorship, they agreed on a number of points. First, they reported that mainstream society operates from a lack of understanding, experience and acceptance of people with I/DD, often influenced by perceptions of "normalcy" of appearance or behavior. They also report that as a result, people with mild to moderate disabilities are widely underestimated in their capacities for independence and decision-making. In addition, people with moderate to severe disabilities are also underestimated in their ability to make choices, but may require more supports to make their preferences meaningful and effective. These supports span the range of options from good care coordination to intensive supported decision-making to Limited Conservatorship depending on the situation. The optimal solution is the least restrictive intervention that also yields effective results.

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http://disabilityandabuse.org/conservatorship-reform.htm

Members of the Advisory Committee to the *Thinking Ahead Matters* Report and the 2014 Membership in the Coalition for Compassionate Care of California appear on the following pages.

COALITION FOR COMPASSIONATE CARE OF CALIFORNIA

2014 Membership

Organizations

- Alliance of Catholic Healthcare
- Bright Star Care
- Brown & Toland Physicians
- California Assisted Living Association
- California Association of Long Term Care Medicine (CALTCM)
- California Hospice & Palliative Care Association
- California State University (CSU) Institute for Palliative Care
- Camarillo Hospice Corporation
- Carehouse Healthcare Center, LLC
- Cedars-Sinai Medical Center
- Center For Healthcare Decisions
- Channing House
- Children's Hospice and Palliative Care Coalition
- Chinese American Coalition For Compassionate Care
- Citrus Valley Health Partners
- Community Hospice, Inc.
- Healthcare Partners Medical Group
- Health Plan of San Mateo
- Hill Physicians Medical Group
- Hope Hospice
- Hospice By The Bay
- Hospice of Humboldt
- Hospice of the Valley
- Integrated Healthcare Association
- LeadingAge California
- Masonic Homes Of California
- Napa Valley Hospice & Adult Day Services
- NorthBay Healthcare
- Outcome Resources, LLC
- Pallium India – USA
- Salus Hospice
- SCAN Health Plan
- Seniors*at*Home
- Seton Medical Center
- Sharp HealthCare
- Sharp HospiceCare
- Sutter Health
- Tahoe Forest Hospice
- TrueNorth Healthcare

Advisory Committee

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Role of an Attorney for a Conservatee

California Supreme Court
Conservatorship of Person John, 48 Cal.4th 131 (2010)

(Proposed conservatee is entitled to effective assistance of counsel.)

Another important protection is the requirement that the court appoint an attorney for the proposed LPS conservatee within five days after the date of the petition. (§ 5365.) Like all lawyers, the court-appointed attorney is obligated to keep her client fully informed about the proceedings at hand, to advise the client of his rights, and to vigorously advocate on his behalf. (Bus. & Prof.Code, § 6068, subd. (c); Conservatorship of David L. (2008) 164 Cal.App.4th 701, 710 [a proposed LPS conservatee has a statutory right to effective assistance of counsel]; Conservatorship of Benvenuto (1986) 180 Cal.App.3d 1030, 1037, fn. 6 ["Implicit in the mandatory appointment of counsel is the duty of counsel to perform in an effective and professional manner."]; see Mary K., supra, 234 Cal.App.3d at p. 272; Conservatorship of Ivey (1986) 186 Cal.App.3d 1559, 1566.)

Connecticut Supreme Court
Gross v. Rell, 40 A.3d 240 (Conn. 2012)

(Attorney for conservatee must advocate for stated wishes, not best interests, of client)

Even though this choice [between advocating for the client's wishes and protecting the client's best interests] may be difficult to make personally, its resolution among courts and writers has been rather uniform. Most favor advocacy. The most significant reason is the belief that a lawyer using a more selective approach usurps the function of the judge or jury by deciding her client's fate.''); Office of the Probate Court Administrator, ''Performance Standards Governing Representation of Clients in Conservatorship Proceedings,'' (1998) p. 1 (''The attorney is to represent the client zealously within the bounds of the law.... The attorney must advocate the client's wishes at all hearings even if the attorney personally disagrees with those wishes.'').

Accordingly, we conclude that the primary purpose of the statutory provision of § 45a-649 requiring the Probate Court to appoint an attorney if the respondent is unable to obtain one is to ensure that respondents and conservatees are fully informed of the nature of the proceedings and that their articulated preferences are zealously advocated by a trained attorney both during the proceedings and during the conservatorship. The purpose is not to authorize the Probate Court to obtain the assistance of an attorney in ascertaining the respondent's or conservatee's best interests. Because the function of such court-appointed attorneys generally does not differ from that of privately retained attorneys in other contexts, this consideration weighs heavily against extending quasi-judicial immunity to them.

New Jersey Supreme Court:
In the Matter of M.R., 638 A.2d 1274 (N.J. 1994)

(Attorney for conservatee must advocate for client's stated wishes)

Ordinarily, an attorney should "abide by [the] client's decisions concerning the objectives of representation," *RPC* 1.2(a), and "act with reasonable diligence ... in representing [the] client," *RPC* 1.3. The attorney's role is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes. That role, however, does not extend to advocating decisions that are patently absurd or that pose an undue risk of harm to the client.

An adversarial role for the attorney recognizes that even if the client's incompetency is uncontested, the client may want to contest other issues, such as the identity of the guardian or, as here, the client's place of residence. *Agenda for Reform, supra,* 13 *Mental & Physical Disability L. Rep.* at 284. With proper advice and assistance, the developmentally-disabled client may be able to participate in such a decision. *See id.* at 285 (commenting on Recommendation II-C and quoting American Bar Association Model Rules of Professional Conduct (1983), *Rule* 1.14, *Client Under a Disability*). From this perspective, the role of an attorney for a developmentally-disabled person is like that of an attorney representing any other client.

Advocacy that is diluted by excessive concern for the client's best interests would raise troubling questions for attorneys in an adversarial system. An attorney proceeds without well-defined standards if he or she forsakes a client's instructions for the attorney's perception of the client's best interests. Lawrence A. Frolik, *Plenary Guardianship: An Analysis, A Critique and A Proposal for Reform,* 23 *Ariz.L.Rev.* 599, 635 (1981). Further, "if counsel has already concluded that his client needs `help,'" he is more likely to provide only procedural formality, rather than vigorous representation. *Id.* at 634-35; *see also* Maria M. Das-Neves, *Note, The Role of Counsel in Guardianship Proceedings of the Elderly,* 4 *Geo. J. Legal Ethics* 855, 863 (1991) (stating that "[i]f the attorney is directed to consider the client's ability to make a considered judgment on his or her own behalf, the attorney essentially abdicates his or her advocate's role and leaves the *177 client unprotected from the petitioner's allegations"). Finally, the attorney who undertakes to act according to a best-interest standard may be forced to make decisions concerning the client's mental capacity that the attorney is unqualified to make. Frolik, *supra,* 23 *Ariz.L.Rev.* at 635.

In the related context of civil commitment proceedings, other jurisdictions have mandated that counsel zealously protect the wishes of the proposed ward. *See Lynch v. Baxley,* 386 *F. Supp.* 378, 389 (M.D.Ala. 1974) (finding that proposed ward has right "to representative counsel occupying a traditional adversarial role"); *Lessard v. Schmidt,* 349 *F. Supp.* 1078, 1099 (E.D.Wis. 1972) (holding that appointing non-adversarial guardian *ad litem* did not "satisfy the constitutional requirement of representative counsel"), *vacated on other grounds,* 414 *U.S.* 473, 94 *S.Ct.* 713, 38 *L.Ed.*2d 661 (1974); *In re Link,* 713 *S.W.*2d 487, 496 (Mo. 1986) (holding that appointed counsel must "act as an advocate" for proposed ward); *Quesnell v. State,* 83 *Wash.*2d 224, 517 *P.*2d 568, 576 (1974) (noting that guardian *ad litem* must make "affirmative effort to provide protection ... for the fundamental rights of the alleged mentally ill ward"); *State ex rel Hawks v. Lazaro,* 157 *W. Va.* 417, 202 *S.E.*2d 109, 126 (1974) (declaring that guardian *ad litem* must "represent his client as zealously as the bounds of ethics permit"). In *Link, supra,* the Supreme Court of Missouri discussed the role of

appointed counsel in guardianship proceedings and concluded that "to the extent an affected individual appropriately understands what is at stake and expresses a desire to waive or exercise a particular right, that desire must be honored, even if counsel disagrees with the wisdom of the choice." 713 *S.W.*2d at 496.

Until such time as we amend *Rule* 4:86, we offer the following guidelines to assist the attorney for an incompetent. First, a declaration of incompetency does not deprive a developmentally-disabled person of the right to make all decisions. The primary duty of the attorney for such a person is to protect that person's rights, including the right to make decisions on specific matters. Generally, the attorney should advocate any decision *178 made by the developmentally-disabled person. On perceiving a conflict between that person's preferences and best interests, the attorney may inform the court of the possible need for a guardian *ad litem. See 1994 Report, supra,* 3 *N.J.L.* at 36 (noting Comment to proposed amendment to Rules 5:8A and 5:8B). Our endeavor is to respect everyone's right of self-determination, including the right of the developmentally disabled. For those who cannot exercise that right, the courts will protect their best interests.

Massachusetts Supreme Court
Commonwealth v. Patton, 458 Mass. 119 , 128 (2010)

(Conservatee is entitled to effective assistance of counsel.)

"[I]n a proceeding that involves a person's liberty or a fundamental liberty interest, in which a person has a right to appointed counsel, from whatever source, the person is entitled to the effective assistance of counsel whether counsel is appointed or retained."

Illinois Supreme Court
People v. Austin M., 975 N.E.2d 22 (Ill. 2012)

(An attorney serving a dual role has a per se conflict of interest)

When counsel attempts to fulfill the role of GAL as well as defense counsel, the risk that the minor's constitutional and statutory right to counsel will be diluted, if not denied altogether, is too great. See *In re Lisa G.*, 504 A.2d at 5; *In re Dobson*, 212 A.2d 620, 622 (Vt. 1965) ("[A] lawyer attempting to function as both guardian ad litem and legal counsel is cast in the quandry [*sic*] of acting as both attorney and client, to the detriment of both capacities and the possible jeopardizing of the infant's interests."). Even though a delinquency trial is not as adversarial as a criminal trial, the State still has the burden of proving that the juvenile committed the alleged offense beyond a reasonable doubt. Only a dedicated and zealous advocate can hold the State to that burden. We conclude, therefore, that the interests of justice are best served by finding a *per se* conflict when minor's counsel in a delinquency proceeding simultaneously functions as both defense counsel and guardian *ad litem*.

GUARDIANSHIP-CONSERVATORSHIP LAW

with

Official Comments

June 1980

California Law Revision Commission
Stanford Law School
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PREFACE

The 1979 session of the California Legislature enacted a new guardianship-conservatorship law. The new law (Division 4 of the Probate Code) is a comprehensive statute that replaces the former separate guardianship and conservatorship statutes that were found in Divisions 4 and 5 of the Probate Code. The new law—enacted by Chapter 726 of the Statutes of 1979—becomes operative on January 1, 1981.

This pamphlet contains the full text of the new law as enacted in 1979 with the revisions made by Chapters 89 and 246 of the Statutes of 1980. At the time this material was prepared for the printer, Assembly Bill 2898 (relating to limited conservatorships) was pending in the Legislature but had not been enacted; this bill is referred to in this pamphlet by reference to "Assembly Bill 2898." A note is included following each of the sections that will be affected by Assembly Bill 2898, if enacted. The text of those sections as they will read if Assembly Bill 2898 is enacted is set out in the Exhibit contained at the end of this publication. Revisions, if any, made by other laws enacted by the 1980 session of the Legislature are not included. The official Comment to each section is set out following the text of the section.

Legislation also was enacted in 1979 to make revisions (additions, amendments, and repeals) in other code sections to conform to the new guardianship-conservatorship law. See 1979 Cal. Stats. ch. 730. This pamphlet includes a list of the sections affected by the conforming legislation and sets out the official Comment to each section. The text of the sections is omitted, except for a few sections which made significant changes in prior law.

The new guardianship-conservatorship law and the conforming revisions were enacted as the result of two recommendations of the California Law Revision Commission:

proposed change of residence, the court may excuse the temporary conservatee from attending the hearing. This will avoid the need to produce the temporary conservatee at the hearing when to do so would serve no useful purpose.

The proposed law also conforms the standard for excusing the temporary conservatee from the hearing for medical reasons to the standard applicable on appointment of a conservator.[113]

LIMITED CONSERVATORSHIPS

In 1980, Assembly Bill 2898 proposed that the guardianship-conservatorship law be revised to provide for the establishment of a limited conservatorship for a developmentally disabled adult.[113a] *The proposed limited conservatee, with his or her consent, is assessed at a regional center for persons with developmental disabilities and a report is furnished by the regional center to the court concerning the proposed limited conservatee's disability, if any.*[113b] *If a limited conservatorship is established,*[113c] *the powers and duties of the limited conservator are specified so as to permit the limited conservatee to care for himself or herself or to manage his or her financial resources commensurate with his or her ability to do so.*[113d] *In any proceedings to establish a limited conservatorship, the court is required to appoint the public defender or private legal counsel to represent the proposed limited conservatee.*[113e]

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[113] See Prob. Code § 1754. "Medical inability" to attend the hearing is substituted for jeopardy to the temporary conservatee's physical survival. See also discussion in text accompanying notes 63–64 *supra*.

[113a] The bill amended Sections 1471, 1801, 1821, 1822, 1823, 1824, 1828, 1829, 1830, 1851, 1860, 1872, 1873, 1890, 2351, 2400, 2401, 2405, 2600, and 3004 of the Probate Code and added Sections 1410, 1411, 1420, 1431, 1827.5, 1860.5, and 2351.5 to the Probate Code.

[113b] See Sections 1822(f), 1827.5, 1828.5.

[113c] See Section 1801(d).

[113d] See Sections 1821(h), 1828.5, 1830(b), 2351.5. As to termination of a limited conservatorship, see Section 1860.5.

[113e] See Section 1471(c).

Lanterman Developmental Disabilities Services Act

California Welfare and Institutions Code

Statement of Rights

4502. Persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California.

No otherwise qualified person by reason of having a developmental disability shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity, which receives public funds.

It is the intent of the Legislature that persons with developmental disabilities shall have rights including, but not limited to, the following: (a) A right to treatment and habilitation services and supports in the least restrictive environment. Treatment and habilitation services and supports should foster the developmental potential of the person and be directed toward the achievement of the most independent, productive, and normal lives possible. Such services shall protect the personal liberty of the individual and shall be provided with the least restrictive conditions necessary to achieve the purposes of the treatment, services, or supports. (b) A right to dignity, privacy, and humane care. To the maximum extent possible, treatment, services, and supports shall be provided in natural community settings. (c) A right to participate in an appropriate program of publicly supported education, regardless of degree of disability. (d) A right to prompt medical care and treatment. (e) A right to religious freedom and practice. (f) A right to social interaction and participation in community activities. (g) A right to physical exercise and recreational opportunities. (h) A right to be free from harm, including unnecessary physical restraint, or isolation, excessive medication, abuse, or neglect. (i) A right to be free from hazardous procedures. (j) A right to make choices in their own lives, including, but not limited to, where and with whom they live, their relationships with people in their community, the way they spend their time, including education, employment, and leisure, the pursuit of their personal future, and program planning and implementation.

4502.1. The right of individuals with developmental disabilities to make choices in their own lives requires that all public or private agencies receiving state funds for the purpose of serving persons with developmental disabilities, including, but not limited to, regional centers, shall respect the choices made by consumers or, where appropriate, their parents, legal guardian, or conservator. Those public or private agencies shall provide consumers with opportunities to exercise decisionmaking skills in any aspect of day-to-day living and shall provide consumers with relevant information in an understandable form to aid the consumer in making his or her choice.

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Realizing the Right to Counsel in Guardianship: Dispelling Guardianship Myths

Patricia M. Cavey

Realizing the Right to Counsel in Guardianships: Dispelling Guardianship Myths

Criminal defendants have basic rights and proper defense counsel, yet guardianship defendants often do not. The author explores the myths behind the "best interests" approach of guardianship cases.

By Patricia M. Cavey

The imposition of a court-ordered guardianship[1] results in the massive deprivation of rights.[2] Whether limited or unlimited, the result of a court-ordered guardianship is to take away, from an adult, the power to make fundamental life decisions with respect to liberty, property, and one's own life. A guardianship order transfers that decision-making power to another adult or corporate entity.[3] The deprivation can be as profound as the termination of the ward's life[4] or the transfer of an entire estate so that the ward can be placed in a nursing home to preserve the bulk of the estate for the heirs.[5] In many ways the deprivation of liberty through an involuntary guardianship order is greater than that suffered by a convicted felon. Prisoners retain basic rights to control medical decisions, bodily integrity, the right to conduct their business affairs, and retain their estate. Wards do not.

When appropriate, a guardian or conservator can be of invaluable assistance to an incapacitated person. However, the wrong guardian or an inappropriate or premature guardianship can be the very act that triggers a chain of events leading to the unnecessary or premature institutionalization, causing the ward to give up hope. It may be the event that hastens death.[6] Many of us would welcome someone who could serve the role of protector, defender, trustee, and guardian. Unfortunately, there is also the risk that the guardian will become our warden and keeper.

The problem is not with the state of the law as written but as practiced. I have had the opportunity to work as a social worker and lawyer in a state with very progressive mental health laws,[7] yet for almost two decades, I have shared many experiences with attorneys and advocates in states with much less "progressive" laws. Over the last 10 years, many states have modernized their guardianship and adult protective service statutes. Few states fail to provide the theoretical right to either a lawyer for the defendant or a guardian ad litem.[8] However, the benefits of good model statutes or case law protections are not realized for defendants unless the participants in the process know, follow, and enforce the law.

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This article is dedicated to Attorney Jeffery R. Myer, Litigation Director, Legal Action of Wisconsin, Inc., in special appreciation for his commitment to social justice for all people.

In this article, I will explore five myths that undermine the enforcement of the law and undermine even basic access to the court system. The myths are commonly held by attorneys who practice in the field and by judges who hear guardianship cases.

Myth: A Collective Belief Built Up in Response to the Wishes of the Group[9]

Lawyers and judges need a resolution to a problem. They generally will not have a continuing relationship with the parties to the litigation. They will, however, have a continuing relationship with each other. "The group" is susceptible to myths that permit lawyers and judges to process cases and take care of the group. Unfortunately, those with the most at stake, the guardianship defendants, are not members of the group. In the system that purports to protect their best interests,[10] they are outsiders. The very individual who is the subject of the hearing often never appears at the hearing, is least likely to have an attorney, or, if an attorney is appointed, is likely to have a court-appointed attorney who is untrained and unfamiliar with the rehabilitation potential for different disabilities and dementias and is untrained in methods of communicating with disabled persons.[11] Even when a guardian ad litem is appointed, that attorney may meet with the defendant only once, briefly, before (or after) a hearing, and will purport to represent what is the "best interest" for the defendant. An order is entered. A guardian is appointed. Everyone goes home, except the defendant.

Myth 1: We're All Here to Help

On occasion, a guardianship practice seems like a throwback to the days of the "friendly visitor." As a senior becomes more frail and seeks out more assistance, more people are involved in the senior's life and everyone has an opinion on how the senior should live. At some point a crossroads is reached; someone starts a guardianship to gain control of the decision-making process. Sometimes this is a well-intentioned act; other times, it is not.

The Case of Mabel

Mabel[12] has four adult children. She has mild dementia but is independent in her care. Her children all owe her a considerable amount of money that she has loaned them over the years. Mabel has a comfortable estate. She voluntarily requests the assistance of a conservator on a limited basis and for a limited purpose: to compile an inventory of her estate and to make her current in the payment of her living expenses. Her one goal in life is to remain in her lovely home with her dog. Various children file various types of legal proceedings in two different states. All the children have different views on what is best for their mother; all have their own financial interest. The conservator sides with one of the feuding children and decides to sell Mabel's property. The conservator agrees with one child that Mabel should reside in an out-of-state nursing home. Without notice to Mabel, without a hearing, without the appointment of a guardian ad litem, this child obtains an *ex parte* temporary guardianship order. The order permits a "placement" to a nursing home[13] and allows the temporary guardian to censor Mabel's mail, her visitors, and even access to the telephone.

The "we're all here to help" myth serves the needs of the judges and lawyers in the court system. It camouflages the pecuniary interests of the children and their lawyers because, "after all, we're all here to help." It also makes a particular judge's resolution easier because blame, which is apportioned in the simplest negligence case, need not be apportioned in this case since Mabel, by her own request, needs help. Unfortunately, the myth of "we're all here to help" also permits the parties involved to forget the protections of an adversary system. Somehow it seems gentler, kinder, more humane to think of a guardianship as being less harsh if we do not think in terms of an adversarial court system. However, in this case the one who could really "help" Mabel was missing: an attorney representing Mabel. Mabel certainly had the means to hire an attorney; she even had one at the beginning of the case. However, because that lawyer also "helped" the conservator by becoming the conservator's lawyer early on, Mabel lost her own lawyer. Everyone else had a lawyer. The court had the duty to decide the case. Yet it was ill equipped to "help" Mabel because the court did not hear from her, directly or through her attorney. She didn't have one. The adversarial process was not in effect. The court did not hear from all the litigants; Mabel was excluded.

I Know Best

The "we're all here to help" myth also serves the needs of service providers and family members who

do not have a financial motive for their involvement. The following example emphasizes this point.

An elderly woman seeks assistance with errands and housekeeping. The home aide assistance increases to include help with medication and personal hygiene. The employee has opinions on how things should be done. This leads to disagreements with the client. The client feels that it is her house; she's the boss. The home aide, on the other hand, has a paternalistic attitude and believes that, as a professional, she knows what's best. Rather than quit her job, the home aide reports the client to social services because, after all, the client had requested help.

At the same time, the client's out-of-state adult children see that their mother is spending a considerable amount of money on staff to provide assistance in her home. The children fear their mother will deplete her savings. They reason that, if Mom went to a nursing home, she could get great care without the hassles of finding a new home care aide. With the right financial planning, Mom can divest her estate to the family and obtain "free" care in the nursing home.[14]

Everyone has an opinion on how things should be done. The home care agency may well have good ideas about effective methods of in-home long-term care. The children, in perfectly good faith, may believe that a nursing home is best. The client may well be justifiably resistant to leaving her home, memories, familiar surroundings, trusted neighbors, and community for life in the communal setting of a nursing home. The challenge for "the group" is to be sure that the client's best interests can be distinguished from the interests, frustrations, and opinions of others.

If there is a difference of opinion, who will be the first to file a guardianship petition? If a petition is filed, who will tell the client about the expense of fighting the inevitable? How much money will be "wasted" on litigation that could be spent on care or transferred to her children? Wouldn't it be better to compromise and move to the nursing home? Will the judge even hear from the defendant, or do others feel it would it be too upsetting for her to attend the hearing.

The "we're all here to help" myth permits us to justify our own opinions as to what help is needed. It permits us to decide when we've helped enough rather than using an objective measure of what the advance directive was and how close we came to meeting the client's goals by respecting his or her directives as to how he or she chooses to live.

Myth 2: I Can't Hire My Own Lawyer

A variation of the "we're all here to help" myth is the related myth that people adjudicated incompetent cannot hire a lawyer of their choice. This second myth has a superficial appeal. If the ward does not have the ability to make a contract, one of the most significant effects of a guardianship order, how can a ward possibly hire a lawyer?

Like the "we're all here to help" myth, the "you can't choose your lawyer" myth serves some collective interests. It is convenient for everyone to think of the guardian as being in the place of the ward. Courts and service providers have, in the guardian, a mentally competent person who has the legal power to manage the affairs of the ward as the surrogate decision maker. Indeed, that is the whole purpose of the legal proceedings resulting in the guardianship order: to grant authority to another to make decisions for someone who lacks capacity.

In a very real sense, a guardianship is the legal death of the ward, stripping the ward of the freedom and power that adults in a free society are presumed to enjoy. The fundamental liberty and property rights at stake in a guardianship are also exactly the reason why the myth does not apply to the right to counsel.

The deprivations wrought by a guardianship order, the massive curtailment of an adult's liberty and the loss of control over one's property, are of constitutional consequence.[15] Because of the risk of such a massive deprivation, it is inconceivable that the right to hire counsel would not be constitutionally required as a matter of fundamental fairness under the due process clause.[16] In light of the great variations among guardianship statutes among the 50 states, one of the points on which there appears to be unanimity among the states is the right to counsel.[17] Although there are differences about who pays for the defendant's attorney,[18] some states providing public funding and others requiring the defendant to pay, the theoretical right to defense counsel is well established.

The right to counsel is often realized by way of the court appointing defense counsel. However, a defendant is not required to accept court-appointed counsel and may choose to hire counsel independently.[19] There is an obvious reason why the

subject of a guardianship or protective placement does not need the guardian's consent to hire counsel. In some cases, the dispute will be between the guardian and the subject of the proceedings. As a practical matter, the only way a ward can end a guardianship against the wishes of the guardian is by initiating a contested court proceeding.[20]

In light of the essentially universal recognition in the 50 states' statutes of the right to counsel, the obvious importance of a skilled advocate when the most fundamental freedoms are at stake, and the obvious conflict of interests between a ward who wants to end a guardianship and a guardian who wants it continued, why does this myth persist? Part of the explanation is that the constitutional and statutory recognition of the right to counsel is of relatively recent vintage. The leading cases on the constitutional rights in civil commitment proceedings are less than 30 years old.[21] The impetus for much of the statutory modernization is less than 15 years old.[22] This relatively modern trend of recognizing guardianship as an extremely serious deprivation of freedom is at odds with the centuries' old view of guardianship as a paternalistic, *parens patriae,* proceeding, which ties in with the myth that we're all here to help. If the system works, the best help is a strong adversarial system where differing viewpoints are sharply honed and presented so that the court has the benefit of the best arguments for differing positions.[23]

Myth 3: Defense Attorney, Guardian Ad Litem—Same Thing

In addition to the lawyer for the guardianship defendant, there is usually another lawyer with the duty to "help" the defendant. Most states require a guardian ad litem in guardianship proceedings.[24] As discussed below, the guardian ad litem is responsible for advocating for the best interests of the defendant. In most legal proceedings, we assume that the parties are able to determine and protect their own best interests, and, if necessary, protect those interests through an attorney. In guardianship cases, however, because one of the critical issues is whether the party has the ability to determine his or her own "best interests" or whether those interests were previously articulated, there is a distinction that must be clearly understood between the role of the guardian ad litem and the role of defense counsel. The roles are so different, in fact, that for purposes of legal ethics, the roles are presumed to conflict. The same attorney cannot be both the guardian ad litem and defense counsel.[25]

Defense counsel must defend against the guardianship, even if the guardianship would be in the client's best interest, if the client opposes the guardianship.[26] Defense counsel is obligated by the rules of professional conduct to defend against the guardianship petition.[27]

Attorneys should recognize the distinction between defense counsel and guardian ad litem. The differing roles of guardian ad litem and defense counsel are inherently in conflict. The guardian ad litem is not the gatekeeper who can pick and choose how the defendant's own interests will be represented. When the guardian ad litem takes a position contrary to the defendant's own interest, the guardian ad litem is very much an opposing counsel to the defendant within the meaning of the Model Rules of Professional Conduct.[28] Defense counsel may not assume the role of de facto guardian to act against the client's expressed wishes or instructions.[29]

Lawyers in guardianship and conservatorship litigation are not free to change roles.[30] A lawyer who has appeared as defense or advocate counsel on behalf of a proposed ward is barred from appearing as a lawyer in a different capacity such as a "best interests" role as a guardian ad litem. A recent case is illustrative of the distinction that must be understood among advocates. In *Tamara L.P. v. Dane County (In re Guardianship of Tamara L.P.),* a Wisconsin appellate court held that because of the potential conflict of interest, it is reversible error, even in the absence of an actual conflict and even if local custom permits the practice, for an attorney to appear as an advocate for an alleged incompetent, then later switch roles to represent a different interest, even a purported "best interest."[31] This holding is consistent with the Model Rules barring representation where there is a "substantial relationship" between a current and former client.

In *Tamara L.P.,* Attorney Alexander represented Tamara L.P. as defense counsel in a mental commitment action. The representation was not for long. The representation extended from the September 2 filing of the detention petition against Tamara L.P. to the September 18 appointment of Attorney Alexander as the guardian ad litem for Tamara L.P. when the detention proceeding was

converted to a guardianship and protective placement proceeding.[32] Attorney Alexander's appointment as guardian ad litem was pursuant to a county custom of appointing a commitment defendant's attorney to serve as the guardian ad litem when the detention proceeding is converted to a guardianship and protective placement proceeding.[33]

In *Tamara L.P.,* Attorney Alexander represented to the Circuit Court, and the Circuit Court found as a matter of fact, that Alexander did not have confidential information and was able to exercise independent judgment.[34] The trial court denied a motion to disqualify Attorney Alexander.

The Court of Appeals reversed, and did not question the findings of fact that Attorney Alexander had no confidential information and was able to exercise independent judgment. Rather, the court applied the "substantial relationship" test that disqualifies an attorney from appearing in a different capacity involving a former client in every case where the two representations have a "substantial relationship":

> Under the substantial relationship test, disqualification does not require finding that a breach of ethical standards or client confidences has occurred, but only that the *attorney has undertaken representation which is adverse to the interests of a former client.* [citation omitted] We apply the substantial relationship test in attorney disqualification cases where the attorney represents a party in a matter in which the adverse party is the attorney's former client. We conclude that it is appropriate to apply that test to the appointment of a guardian ad litem in incompetency cases because the same principles of confidentiality and propriety apply.[35]

In *Tamara L.P.,* the potential conflict was the conflicting roles between defense counsel and the guardian ad litem, who represents the "best interests" of the proposed ward/defendant. The Court of Appeals held that those were conflicting roles.[36]

The "substantial relationship" test of the ethics rule and the analysis of *Tamara L.P.* is a broad, preventative, prophylactic rule. The rule of *Tamara L.P.* does not turn on wrongdoing by the attorney, or on bad faith, or on some evil design. Instead, the rule of *Tamara L.P.* is broad precisely because of the confidential nature of the attorney-client relationship and because the first client, the proposed ward, is vulnerable. When a competent client has the power and ability to waive a conflict after consultation and consideration, a client with compromised capacity may not be so able. A surrogate decision maker—a guardian ad litem, a guardian, or a conservator—may be appointed. But *that* person and his or her attorney are the ones who have the potential conflict. Thus, the rule of *Tamara L.P.*, which is consistent with the Model Rules, makes irrelevant whether there is an actual conflict.

The right to counsel cannot be realized unless the attorney is a competent advocate who maintains "as far as reasonably possible"[37] a normal attorney-client relationship, including the client's right to hire the attorney of his or her choice. Anything less results in the compromise of a client's right to counsel.

Myth 4: The "Best Interest" Is What I Say It Is

Most states now require that a guardian ad litem, sometimes called a "visitor," be appointed. Just as there is frequently confusion about the different roles of the defendant's attorney and the guardian ad litem, there is frequently confusion about what precisely is the guardian ad litem's role. While the guardian ad litem's role is often described as the "best interests," this shorthand description confuses as much as it illuminates.

The guardian ad litem is not a neutral bystander. The guardian ad litem has two basic duties. First, the guardian ad litem is the initial professional charged with the duty to ensure that the guardianship defendant's legal rights are protected. Ensuring that the defendant has proper notice of the proceedings, understands what is at stake, and is aware of the defendant's right to an independent attorney to represent the guardianship defendant often satisfies this duty. In most cases, the guardian ad litem can rely on the defendant's attorney to protect the defendant's rights.

In an unusual case, however, the guardian ad litem's duty to protect the defendant's legal rights may require further advocacy by the prospective guardian.[38] It is a basic proposition that the defendant's lawyer needs to communicate with the defendant. A trusted lawyer, such as the family attorney who represented the defendant on real estate matters, wills, a divorce, and similar personal legal problems, may not have experience with the conditions loosely referred to as "dementia" or the ability to communicate with a client under a

disability. The trust relationship with a familiar attorney is important, especially when the defendant has so much at stake with the potential loss of liberty and autonomy. Equally important, however, may be some essentially "nonlegal" skills, such as experience in communicating through hand squeezes, eye blinks, or adaptive devices, as well as an understanding of how dehydration, poor nutrition, or medication affect cognition. In these cases, it may fall to the guardian ad litem's duty to ensure that the trusted family lawyer who may have little experience in representing clients under a disability be assisted by an attorney who, although unknown to the guardianship defendant, has more experience in these essential "nonlegal" skills.

Another situation that may require additional advocacy by the guardian ad litem, even when the defendant has an attorney, is illustrated by the case of *Yamat v. Verma L.B. (In re Verma L.B.)*.[39] Verma's recently divorced son moved into Verma's home. Verma felt that her adult children were trying to take her modest home and force her into a nursing home. Verma's children filed a guardianship action against her and placed her in a nursing home. The son continued to live in Verma's home. A guardian ad litem and a defense counsel were appointed. As these lawyers dug into the facts of the case, they were troubled by the gravity of the activity not only on the part of the children but also by the children's lawyers. The trial court appointed a more experienced attorney to serve as an amicus and report to the court, independent of the guardian ad litem and the defense attorney. The advocacy of obtaining a more experienced attorney to assist the court in a complicated case permitted a resolution of the case in a way that was most protective of the person with the most at stake, the defendant. Defendant Verma required protection not only from her children but also from her children's lawyers and the lawyer/temporary guardian who was employed by her children's lawyers.

The second of the guardian ad litem's duties, and the second area in which the guardian ad litem cannot be an innocent bystander, is in being an advocate for the "best interest" of the ward. The duty is to provide the trial court with information that is not based on the self-interest of the litigants. This does not mean, however, that the guardian ad litem is a "free agent" rendering a personal opinion about what the guardian ad litem thinks is best for an incapacitated person.

The starting point in the analysis of the "best interest" is coming to an understanding of the defendant's wishes.[40] Those wishes may have been expressed in an advance directive, such as a durable power of attorney, a "living will" or a directive issued each year at the Thanksgiving dinner table that the children are never to place their mother in a nursing home. If the defendant's wishes are clearly discernible and were made known when the defendant was capable of understanding the expression of those wishes and was not improperly influenced, the guardian ad litem's duty in advocating the best interest of the defendant is to advocate those wishes.

Unfortunately, there is considerable pressure on the guardian ad litem to comply for the smooth operation of a court calendar. Courts are often busy; settlements are encouraged. If the issue of incompetency seems clear, the remaining disputes over who is the guardian, which facility is the placement, and what services are provided may, in the guardian ad litem's personal opinion, seem minor. They are not. Compared to the pressure to resolve any remaining disputed issues, it may not make much difference in the guardian ad litem's personal opinion. That is exactly, however, when the guardian ad litem's duty to advocate for the best interest, starting from the defendant's expression of wishes, is most important. The protection provided by the guardian ad litem, advocating for the best interest of the defendant, is most critical when incapacity prevents the defendant from implementing those wishes or even expressing them.

The defendant's preference may be for a particular person to be the guardian. That choice is one of the most personal decisions a person can make, literally trusting someone with life-and-death health care choices. The choice may be about where the defendant wishes to live. These choices are personal to the defendant; the guardian ad litem does not discharge his or her duty by offering or advocating the personal opinions of the guardian ad litem. The guardian ad litem cannot advocate "best interests" without first investigating whether the defendant had expressed advance directives or whether the defendant's wishes can be discerned.

Two examples of the personal nature of these choices are the companion cases of *Community Care Organization of Milwaukee County, Inc. v.*

Evelyn O. (In re Evelyn O.) and *Community Care Organization of Milwaukee County, Inc. v. Thyra K. (In re Guardianship of Thyra K.).*[41] Evelyn O. had an advance directive and agent pursuant to power of attorney documents she executed. Thyra K. also executed advance directives and an agent pursuant to power of attorney documents. The agents for both women were attorneys.

Evelyn wanted to remain in her apartment, but she recognized her need for assistance. She could afford 24-hour home care. Thyra wanted desperately to remain in her home with her disabled daughter. Her daughter would be receiving in-home care that could have been extended for her mother. A private agency had a different opinion, determining that removal from their homes would be "best" for both women. The guardian ad litem's duty was to advocate for the advance directives. The advocacy of "best interests" is not about the personal opinions of the guardian ad litem, about the convenience of the litigants, the "efficiency" of settling things that do not seem personally important to the guardian ad litem, or preserving the defendant's estate for the heirs. It is about respecting and implementing the advance planning of the defendant.

Myth 5: We'll Protect You, If You Buy the Bullets for Your Adversaries

No, Virginia, in the United States you shouldn't have to hire a good lawyer to prosecute you, a good lawyer for your nephew who wants your money and a good lawyer for your niece who wants your house and that you, the defendant with the most at risk, must settle for the court-appointed lawyer as your "defender."

The basic rule in the United States is that the parties to litigation are responsible for paying their own attorneys.[42] Where the government threatens to take away important liberty interests, the public may have a duty to pay for attorneys for defendants who are indigent.[43] Some statutes force a litigant who has been found to have violated some law, such as a consumer protection, fair employment, or antitrust statute, to pay attorney's fees as part of the remedy for the violation.

One of the final vestiges of the "we're all here to help" myth is that the guardianship defendant should pay for all of these helpers. Some "helpers" really are helpers; some are not. Does the self-appointed "helper" have the legal right to charge the defendant for the helper's lawyer? What happened to the system of services to protect vulnerable adults?

With varying degrees of effectiveness, all states have, in theory, some sort of system to protect vulnerable adults from abuse and neglect, which would include self-neglect. Protection can include services or initiating a guardianship to ensure the availability of a decision maker for an incapacitated adult or a placement order if a particular level of care is required. The system of protective services for adults is a government service. Some states require payment for the service if the client is not indigent.[44]

As discussed above, all 50 states recognize the right of the guardianship defendant to be represented by an attorney. The attorney for the defense in a guardianship case has the same duties of loyalty to the defendant as the attorney for the defense in a criminal case. Even when the defense attorney is paid by the state, as in the representation of indigent defendants charged with crimes that might result in the deprivation of liberty of imprisonment, it is universally recognized that the defense attorney's duty runs to the defendant, not to the person who pays the bill. Expecting a nonindigent guardianship defendant to pay for the defense attorney is no different from the general rule in the United States that a party pays for that party's attorney.

In those states that also require a guardian ad litem, the argument can be made that the guardian ad litem is also providing a service to the defendant and the defendant should pay for the guardian ad litem. Although, as discussed above, the role of defense counsel is fundamentally different from the "best interest" duty of the guardian ad litem, at least it can be said that the guardian ad litem owes the defendant some duty, especially if the defendant does not have separate, independent counsel.

By what theory, however, does a court force a guardianship defendant to pay for the petitioner's attorney? The petitioner's attorney does not represent the defendant; that is the duty of the defendant's attorney. The petitioner's attorney does not represent the "best interest" of the defendant; that is the duty of the guardian ad litem. The theory cannot be that the defendant has some contract or agreement to pay the petitioner's attorney's fees; the petitioner's very premise of a guardianship proceeding is that the defendant lacks the capacity to

make a contract.

To the extent that there is any policy justification to force the guardianship defendant to pay the attorney's fees for the petitioner, it tends to be grounded on the "we're all here to help" myth. Sometimes, the justification is the view that the guardianship proceeding was "necessary" because of the defendant's incapacity, and therefore should be paid under the doctrine of necessaries.[45] Sometimes the justification is that the cost of bringing the guardianship proceeding created a debt of the defendant. Sometimes the justification is that it just is not "fair" that the petitioner should have to pay for the petitioner's attorney.

These justifications were rejected in *In re Evelyn O.*[46] The court applied the standard rule that parties to litigation are responsible for their own attorney's fees. The rule on attorney's fees is particularly appropriate, and the myth that "we're all here to help" is particularly dangerous when applied to fee requests by opposing counsel in guardianship litigation. First, there is no limit on how many litigants will seek to shift their attorney's fees to the defendants. All the potential litigants in a guardianship—hypothetically, the neighbor who is the petitioner, the out-of-state heir, any number of public and private corporations claiming an interest in the protection of the disabled, the bank nominated as guardian by the petitioner, and any actual or would-be creditors—can, with more or less good faith, assert that their particular position in the litigation is in the "best interests" of the proposed ward. All these potential litigants may arguably claim that their litigation position provides some "necessary" to the proposed ward. Standing to file a petition should not be confused with the legal authority, or lack thereof, to shift the costs of litigation.

The rule on attorney's fees protects the proposed ward, just as it does all other litigants, from the risk of underwriting the other litigants' expenses and litigation choices. In the words of the court in *Evelyn O.*, "Evelyn O. and Thyra K. were not obligated by any legal principle . . . to supply the bullets to their adversaries, either before or after the battle, even if the war is fought for what is ultimately determined to be in their benefit."[47] Without the protection of the rule, the hope for due process (which would include a fair hearing with zealous advocacy to ensure that the defendant's advance directives and choices about how he or she chooses to live his or her life are heard) is destroyed. Without the rule, the adversary system is undermined.

Conclusion

Defendants in guardianship actions suffer the same or greater deprivation of liberty as criminal defendants. The general public and the actors in the legal system understand the role and importance of defense counsel for the criminal defendant. It is important to question why there is such confusion about the role of defense attorneys in guardianship matters. Before we lock up the criminal defendant, we make sure the he or she has the right to face his or her accusers and put on a defense. Before we kick Grandma out of her home, sell it, transfer her life savings to someone else, and lock her up in a nursing home, shouldn't she have the opportunity to disagree with her "helpers"? Shouldn't she hear the accusations and have an opportunity to prove that she could continue to reside in her home with care and adaptive equipment? What is the use of advance planning if no one enforces the plan? At what age or level of disability do we lose the right, as citizens, to hear the accusations made against us, and under what authority and process are we deprived of the decisions we've made as to how we choose to live out our lives?

The only hope for a constitutionally sound guardianship system is to ensure that those with the most at stake, the guardianship defendants, are able to access real advocates. For those of us who will age and be subject to this system, we hope that our lawmakers understand the conflicts and self-interest of those who advocate the dissembling of the adversary system. Since we all age, it is in the self-interest of practitioners and policy makers in the field to develop systems in which advocacy is fostered. Very good words on paper are just not enough. There is too much at stake to hope for self-activating justice because the "help" we get isn't always the "help" we need or want.

Endnotes

1. The terminology varies slightly from state to state. Some states use the term "guardian of the person" to refer to the person who has the power to control daily "personal" decisions including medical care and the ward's residence. The term "guardian

of the estate" is used to refer to the person who controls finances and property. Some states use the term "guardian" for the "guardian of the person" concept and the term "conservator" for the "guardian of the estate" concept. Some states prefer the term "conservatorship" to refer to voluntary proceedings initiated by a "competent" person who seeks the assistance of someone to take over certain duties such as managing the "conservatees" finances. This article uses the term "guardian" to refer to the person or corporation that controls either the "personal" decisions or the "property" decisions. It is presumed that someone other than the defendant/ward initiated the legal proceeding to establish the guardianship. The terms "defendant" and "ward" are used interchangeably. The reference to defendant is an attempt to strengthen the promise of the adversarial system (if truly adverse, justice will prevail) for those subject to it.

2. Most jurisdictions provide for limited guardianships in which a ward specifically retains certain rights, such as the right to vote or to marry. Many states also provide for a voluntary proceeding, and the terms "conservatorship" and "voluntary guardianship" denote a proceeding in which the ward (as opposed to a petitioner/plaintiff) requests assistance from the court. The voluntary proceeding enables an individual to seek assistance without a court's factual finding of incompetency. In theory, this would permit an easier standard of review to dismiss the voluntary proceeding if the ward/conservatee decides the request for voluntary assistance is no longer desired.

3. BLACK'S LAW DICTIONARY 706 (6th ed.) defines guardian as "a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person . . . who is considered incapable of administering his own affairs." THE AMERICAN COLLEGE DICTIONARY 537 (1969) lists the following synonyms for guardian: protector, defender, trustee, warden, and keeper.

4. *See, e.g., In re* Quinlan, 355 A.2d 647 (N.J. 1976).

5. *See, e.g., In re* F.E.H., 453 N.W. 882 (Wis. 1990). There is, of course, the inherent conflict of interest between the heir's interest in preserving the estate (his or her inheritance) and using the estate to provide services in the least restrictive environment, since public benefits are readily available for nursing home care but are not available for less restrictive community care. *See generally* State *ex rel.* Watts v. Combined Community Srvs. Bd. of Milwaukee, 362 N.W.2d 104 (Wis. 1985).

6. Thyra, the defendant in Community Care Org. v. Milwaukee County (*In re* Guardianship of Thyra K.), the companion case to Community Care Org. of Milwaukee County v. Evelyn O. (*In re* Evelyn O.), 571 N.W.2d 700 (Wis. Ct. App. 1997), was an elderly woman who lived with her disabled adult daughter. Her daughter's disabling neurological condition prevented her from lifting her arms or transferring herself from her wheelchair. Thyra's life was dedicated to caring for her daughter. Her primary concern was the need to return home so she could ensure that her daughter was properly cared for in their home. Mother and daughter could have shared home care that was being established for her daughter. Her daughter died, however, while Thyra was in the custody of the nursing home. Her daughter had fallen out of her wheelchair and was discovered by a home care aide who was reporting to work at the home after the New Year's holiday. Thyra's fear had come true: Her daughter died without her mother's care. Thyra did not return home; she died during the course of the litigation.

7. *See generally* WIS. STATS. §§ 51.001, 55.001; CHS. 51, 55, 880. The statutes comprising the comprehensive protective service system in Wisconsin were rewritten or developed in response to Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded,* 414 U.S. 473 (1974), *order on remand,* 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds,* 421 U.S. 957 (1975), *order reinstated on remand,* 413 F. Supp. 1318 (E.D. Wis. 1976) (successful constitutional challenge to involuntary commitment statutes). *See also* Agnes T. v. Milwaukee County (*In re* Agnes T.), 525 N.W.2d 268 (Wis. 1995) (guardians cannot institutionalize wards without court approval; the role of the guardian ad litem includes the affirmative right to petition the court to protect the best interest); State *ex rel.* Watts v. Combined Community Srvs. Bd., 362 N.W.2d 104 (Wis. 1985) (successful equal protection challenge requiring that the subject of a guardianship and protective placement receive periodic court review of the placement); Community Care Org. of Milwaukee County v. Evelyn O. (*In re* Evelyn O.), 571 N.W.2d 700 (Wis. Ct. App. 1997) (defendants in guardianship actions cannot be required to fund the litigation of their adversaries; the American Rule on attorney fees applies to guardianship cases); *In re* J.G.S., 465 N.W.2d 227 (Wis. Ct. App.

1990) (ward has the right to community placement regardless of whether the services currently exist).

8. *See* A. Frank Johns, *Ten Years After: Where Is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 ELDER L. J. 33, 110–52 (1999); *see infra* publishing charts by Sally B. Hurme, *Steps to Enhance Guardianship Monitoring* (1991).

9. *See* THE AMERICAN COLLEGE DICTIONARY 805 (1969).

10. The analysis of "best interest" starts with the advance directive of the ward. If the ward's wishes were not explicit, the question becomes whether they can be discerned. *See, e.g.,* Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261 (1990); Spahn v. Eisenberg (*In re* Edna M.F.), 563 N.W.2d 485 (Wis. 1997); *In re* Guardianship of L.W., 482 N.W.2d 60 (Wis. 1992).

11. An interesting and helpful analysis would be the level of experience and training of court-appointed counsel in guardianship proceedings as opposed to the level of expertise of petitioning attorneys or attorneys hired to prosecute guardianships. The level of compensation for court appointments ($40 to $70 per hour) makes a legal practice of court appointments economically prohibitive for most practitioners. In Wisconsin, the prosecution of a guardianship is a government protective service; however, the practice has shifted in the last 10 years to private attorneys petitioning for guardianships because the private bar has been able to establish a lucrative practice of obtaining market-rate attorney fees for their petitions.

12. The examples in this article are based on actual cases.

13. Wisconsin law does not "permit" this type of order, but it was obtained. In Wisconsin, a statute allows a temporary guardianship hearing to be held on shortened notice. *See* WIS. STATS. §§ 880.15, 880.33. The appointment of a guardian ad litem is also required. Wisconsin law permits the placement of an individual, on an emergency basis, for his or her protection, in a nursing home or less restrictive facility. *See* WIS. STAT. § 55.06 (10)(a). Again, a hearing within 72 hours is required, as is the appointment of a guardian ad litem. *See* WIS. STAT. § 55.06(11)(b). Wisconsin law also specifically forbids the placement of a ward in a nursing home without a protective placement proceeding in which, at a hearing, the placement needs of the proposed ward and level of restrictiveness of that placement would be specifically addressed. *See* Agnes T. v. Milwaukee County (*In re* Guardianship of Agnes T.), 525 N.W.2d 268, 269 (Wis. 1995). *See also* WIS. STAT. § 55.05(5)(b).

14. Medicaid funds nursing home care for eligible recipients. There are limited waivers for home care; however, home care is not a covered service as of right and is an extremely difficult benefit to obtain especially when more than a few hours of care per week is required. Home care is easily obtained when an individual has private funds to pay for the care. *See also* State *ex rel.* Watts v. Combined Community Srvs. Bd., 362 N.W.2d 104, 110 (Wis. 1985).

15. *See generally* Vicki Gottlich, *Zealous Advocacy for the Defendant in Adult Guardianship Cases,* 29 CLEARINGHOUSE REV., 879 (1996).

16. *See generally* Anne Pecora, *The Constitutional Right to Court-Appointed Adversary Counsel for Defendants in Guardianship Proceedings,* 43 ARK. L. REV. 345 (1990). *See also* WIS. STATS. §§ 51.001, 55.001, 880.33, 55.06; State *ex rel.* Watts v. Combined Community Srvs. Bd., 362 N.W. 2d 104 (Wis. 1985); *In re* Guardianship of Tamara L.P., 503 N.W. 2d 333 (Wis. Ct. App. 1993).

17. *See* Johns, *supra* note 8, at 97–98.

18. The "incapacity" of an adjudicated ward to retain an attorney is the incapacity to pay the attorney. Payment is subject to court approval under the doctrine of necessaries. *See* Flessas v. Marine Nat'l Exch. Bank of Milwaukee (*In re* Guardianship of Hayes), 98 N.W.2d 430, 431 (Wis. 1959). There may be some cases in which the guardian has provided defense counsel acceptable to the ward and the ward's separate contract is not "necessary." The right to have an attorney of the ward's choosing, however, is a right that the guardian cannot control.

19. A ward recently hired me upon the suggestion of her guardian to serve as defense counsel for the ward. The ward has been subjected to repeated challenges to her limited guardianship by a dysfunctional family member. Every time an action is filed, defense counsel and a guardian ad litem are appointed. Each time, there is a different set of court-appointed attorneys. It is the ward's and

guardian's goal that the ward's right to counsel of her choice will provide her with continuity of representation, which is missing when the same or similar court actions are serially filed but that each filing prompts the involvement of a different judge and new set of court-appointed lawyers.

20. *See, e.g.,* Claus v. Lindemann (*In re* Guardianship of Claus), 172 N.W.2d 643 (Wis. 1969); Flessas, 98 N.W.2d at 430 (Wis. 1959); Warner v. Welton (*In re* Warner's Guardianship), 287 N.W. 803 (Wis. 1939).

21. *See generally* O'Conner v. Donaldson, 422 U.S. 563 (1975); Jackson v. Indiana, 406 U.S. 715 (1972); Lessard v. Schmidt, 406 F. Supp. 1078 (E.D. Wis. 1972).

22. *See* Johns, *supra* note 8, at 68–74.

23. Of course, the adversary system permits and encourages settlement because each party bears his or her own cost for attorney fees and litigation expenses. Good advocacy includes the ability to negotiate creative solutions.

24. *See* Johns, *supra* note 8, at 110–52.

25. *See* Gottlich, *supra* note 15, at 881.

26. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.14 & 1.2 (1995).

27. *See* Gottlich, *supra* note 15, at 881.

28. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7 (1995).

29. *See* Linda Smith, *Representing the Elderly Client and Addressing the Question of Competence,* 14 J. CONTEMP. L. 61, 82 (1988).

30. *See* Tamara L.P. v. Dane County (*In re* Guardianship of Tamara L.P.), 503 N.W.2d 333, 334 (Wis. Ct. App. 1993).

31. *See id.*

32. *See id.* at 334–35.

33. *See id.* at 336.

34. *See id.* at 335.

35. *See id.* at 337.

36. *See id.* at 338.

37. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14(a) (1995).

38. *See generally* Agnes T. v. Milwaukee County (*In re* Guardianship of Agnes T.), 525 N.W.2d 268 (Wis. 1995).

39. *See generally* Yamat v. Verma L.B. (*In re* Verma L.B.), 571 N.W.2d 860 (Wis. Ct. App. 1989).

40. Following the U.S. Supreme Court's decision of Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261 (1990), the Wisconsin Supreme Court considered whether a guardian may refuse treatment for a person who was not in a persistent vegetative state and who had not previously indicated her preferences regarding life-sustaining medical treatment. In defining "best interest," the Court stated: "Certainly the patient's wishes, as far as they can be discerned, are an appropriate consideration for the guardian. If the wishes are clear, it is invariable as a matter of law, both common and statutory, that it is in the *best interests* of the patient to have those wishes honored . . ." *In re* Guardianship of L.W., 482 N.W.2d 60, 70 (Wis. 1992) (emphasis added).

41. *See generally* Community Care Org. of Milwaukee County v. Evelyn O. (*In re* Evelyn O.) and Community Care Org. v. Milwaukee County (*In re* Guardianship of Thyra K), 571 N.W.2d 700 (Wis. Ct. App. 1997). (These are companion cases.)

42. *See generally* Alyeska Pipeline Srv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

43. *See, e.g.,* Argersinger v. Hamlin, 407 U.S. 25 (1972). Outside of the area of criminal prosecution, the constitutional right to public-funded counsel turns on a balancing of competing private and governmental interests. *See, e.g.,* Lassiter v. Dep't of Soc. Srvs., 452 U.S. 18 (1981) (termination of parental rights); Vitek v. Jones, 445 U.S. 480 (1980) (attorney or medical advocate required for transfer to mental institution).

44. *See* WIS. STATS. §§ 55.02, 55.04, 55.043(4)(f), 55.045, 55.05.

45. The doctrine of necessaries imposes, on a third party with a duty to support another person, the cost of goods or services deemed "necessary" that were provided to the dependent. An example is that a parent must pay, under the doctrine of necessaries, for necessary goods and services provided

to a minor child because the parent has a legal duty to support the minor child.

46. *See In re* Evelyn O., 571 N.W.2d at 703.

47. *Id.* at 703–04.

Key Findings

1. There is no agency or official in charge of the limited conservatorship system in California.

2. The Department of Developmental Services, Disability Rights California, and the State Council on Developmental Disabilities do not monitor this system or advocate for reform in general or intervene in individual cases where violations of rights are occurring.

3. There are never any appeals in limited conservatorship cases, so errors and abuses by judges and attorneys are not corrected by the normal appellate process.

4. Court-appointed attorneys are routinely violating their ethical obligations of loyalty and confidentiality to their clients, are surrendering rather than defending the rights of their clients, and are not providing effective assistance of counsel as required by due process of law.

5. Although the core function of a conservatorship proceeding is to assess whether an adult has capacity to make decisions in seven areas of functioning, and despite a legislative mandate for regional centers to makes these assessments and report the findings to the court, regional center workers have no guidelines or training on how to make accurate capacity assessments.

6. Judges, attorneys, and court investigators are not trained on their duties under the Americans with Disabilities Act and it appears they are not providing equal access to justice to adults with intellectual and developmental disabilities in limited conservatorship proceedings.

7. The trainings of court-appointed attorneys and court investigators about their core functions are seriously inadequate. Whether judges who process limited conservatorship cases receive any training on issues critical to the administration of justice involving people with intellectual and developmental disabilities is not known.

8. Letters requesting intervention by the State Bar of California, the Attorney General of California, and the Department of Developmental Services have not been answered.

9. Despite having convened a statewide Task Force in 2006 in response to complaints of mistreatment of seniors in conservatorship proceedings, the Judicial Council has declined to convene a similar Task Force on Limited Conservatorships to investigate the manner in which cases involving people with intellectual and developmental disabilities are being processed.

10. Despite having constitutional authority to conduct surveys of the courts throughout the state, and despite having been asked to conduct a survey of the practices of courts in limited conservatorship proceedings in all 58 counties, the Judicial Council has no plans to do so.

11. The Legislature has authority, by joint resolution, to convene a Task Force on Access to Justice in Limited Conservatorships to assess the condition of the limited conservatorship system and to direct the Bureau of State Audits to assist the Task Force by conducting a survey of the county courts and by performing an audit of the practices of the Los Angeles Superior Court.

Limited Conservatorships: Systematic Denial of Access to Justice

A Report by Spectrum Institute to the Senate Judiciary Committee

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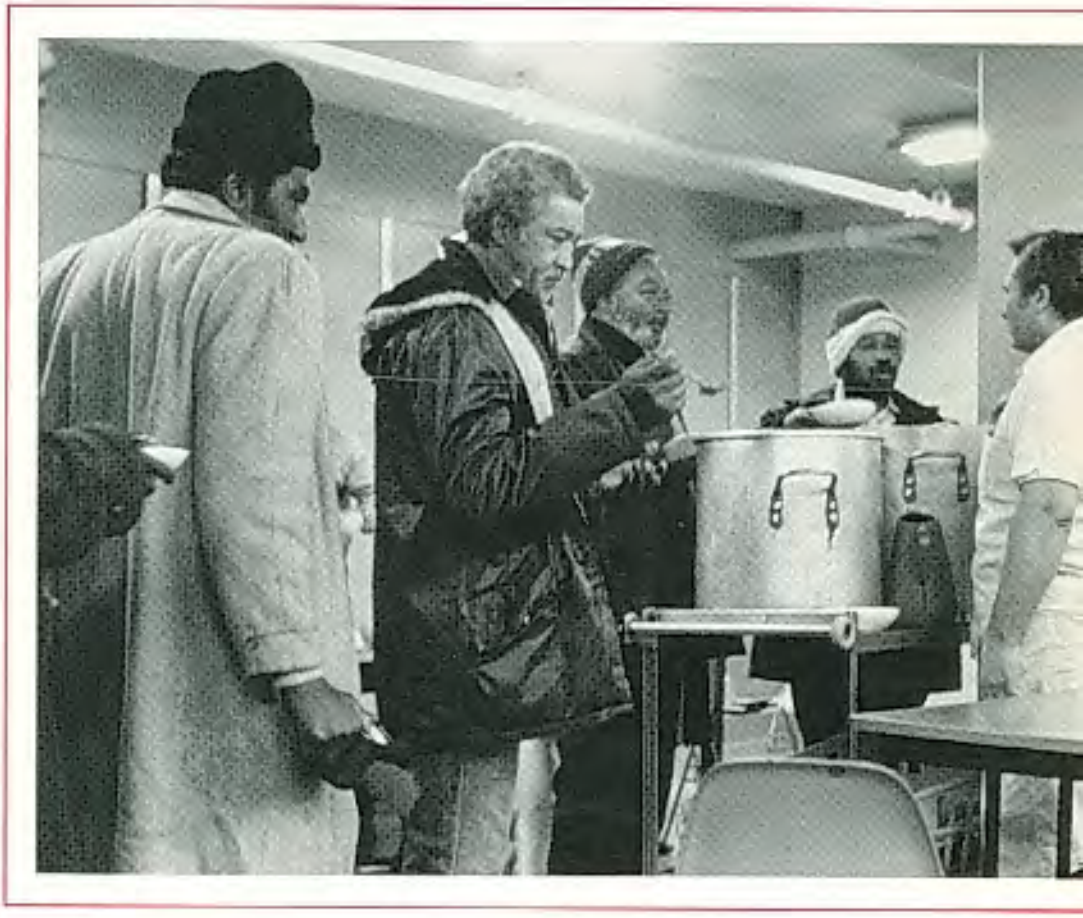

Block Grant Implementation Issues

Zealous Advocacy for the Defendant in Adult Guardianship Cases

By Vicki Gottlich

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I. Introduction

One of the most controversial issues in the ongoing debate about guardianship reform concerns the role of the attorney for the defendant in adult guardianship cases. /1/ Reformers want to ensure that the attorney serves as a zealous advocate for the defendant, and not as a guardian ad litem who investigates for the court. Critics of the advocacy role may be unclear about what acting as an advocate entails. Others object because they view guardianship as a parens patriae proceeding that is in the best interest of the defendant, rather than an adversarial proceeding in which basic civil rights are at stake. /2/ Unfortunately, in some courts guardianship proceedings are still pro forma, and the petition is ratified with little regard for the defendant's rights. Judges and attorneys in these jurisdictions do not want any change in or clarification of guardianship law that would alter their comfortable system for disposing of these cases.

This article addresses the role of the defendant's attorney from an advocate's perspective and why such representation is important.

II. Due Process Requires Representation by an Advocate

It is difficult to understand the need for an attorney advocate in guardianship proceedings without understanding the effect of guardianship on the potential ward. Guardianships are designed to assist individuals who no longer are capable of caring for or making decisions for themselves. Despite the seemingly benevolent nature of the guardianship system, the consequences of guardianship are very harsh. Wards lose all rights to determine anything about their lives, and individual Fourteenth Amendment /3/ considerations come into play. /4/ Guardianship deprives the ward of the liberty /5/ to make important decisions such as where to live, whether to marry, what clothing and necessities to buy, and what friendships to keep. /6/ In one case illustrating the restrictive effect of guardianship, a ward sought to remove the guardian and terminate the guardianship because of the guardian's unwillingness to allow him to live more independently and the restrictions she placed on the ward's visits with the woman he wanted to marry. /7/ Guardianship also deprives a ward of property in that the ward loses control over money and property management, and perhaps even control of how to dispose of assets after death.

Guardianship reform legislation limiting the authority of the guardian may not change the effect of guardianship on the ward. /8/ For example, an Oklahoma law allows a person under a guardianship or conservatorship to execute a will, provided that the will is subscribed and acknowledged in front of a judge. /9/ However, in In re Estate of Goodwin, the law was used to invalidate a will even though the testator was only under a temporary guardianship imposed by an emergency order. /10/

The effect of guardianship on the civil rights and liberties of a ward dramatizes the importance of the guardianship proceeding. Several studies and reports issued in the late 1980s addressed recommended better ways to protect the defendant in the guardianship process. /11/ According to them, due process requires proper notice and hearing, the opportunity to confront and cross-examine adverse witnesses, the mandate for a standard of proof, and the appointment of counsel. /12/ The court must also find that no less restrictive alternatives to guardianship exist and must tailor guardianship orders to maximize the ward's autonomy. Finally, the courts must ensure the effectiveness of guardianship services by training guardians and ordering increased supervision of their activities. /13/

The right to be represented by counsel is foremost among the due process protections necessary to ensure that guardianship proceedings do not needlessly infringe on the defendant's rights. /14/ Without adequate counsel, defendants have no one to assist them through the legal process, to explain their rights, and to advocate their interests. Effective counsel can ensure that proper procedures are followed, that guardianship is imposed only if the plaintiff proves that such a drastic measure is necessary, and that the guardianship is no more restrictive than warranted by the particular defendant's abilities and limitations. A guardian ad litem who acts as the eyes and ears of the court generally will not cross-examine the plaintiff's witnesses or ensure that the clear and convincing evidence /15/ standard for establishment of a guardianship is met. The guardian ad litem does not present an affirmative case for the defendant and, in fact, often serves as the primary witness or evidence source against the defendant. /16/ In any other civil proceeding, an attorney who undertook the role of a guardian ad litem, without another attorney advocating for the client, would be breaching his or her duty to the client and to the court. /17/

III. The Attorney as Zealous Advocate

What does it mean to act as an advocate for the defendant and zealously represent the defendant's interests? Certainly the Model Rules of Professional Conduct set the minimum standard. Some state legislatures and some courts have also tried to codify what a zealous advocate should do.

A. Model Rules of Professional Conduct

Traditional legal practice requires an attorney to advise a client about the available courses of action and to pursue the one chosen by the client after a discussion of the merits of each. /18/ The explanation of the proceedings and issues must be sufficient to allow the client to make informed choices about the representation. /19/ Even if the option chosen by the client is not the option the attorney would have chosen, the attorney is obligated under the rules of professional conduct to

advocate the client’s position on the client’s behalf. /20/ When an attorney represents a client with a disability, Rule 1.14 requires the attorney to maintain a normal client-lawyer relationship with the client "as far as reasonably possible. . . ." /21/ This includes the duty to abide by the client’s decisions regarding the objectives of the representation and whether to accept an offer of settlement. /22/

By definition, many defendants in guardianship proceedings may be considered clients with a disability. Under Rule 1.14, the defendant’s attorney must maintain a traditional attorney-client relationship with that defendant, including explaining the proceeding and options, abiding by the client’s decision, and asserting the client’s position during the course of the proceeding. Thus, even if an attorney thinks that guardianship would be in the client’s best interest, if the client opposes the guardianship the attorney is obligated by the rules of professional conduct to defend against the guardianship petition. Likewise, if the defendant expresses any opinion about the proceeding, including the choice of guardian, the attorney is required to advocate that position before the court. In other words, the rules require attorneys to approach representation of defendants in guardianship proceedings as they would approach representation of any other client.

Attorneys who acts as a guardians ad litem and report their observations to the court assume a role not described under Rule 1.14. The guardian ad litem often describes the nature of the guardianship proceeding and its consequences to the defendant and listens to the defendant ’s concerns about the proceeding. However, the guardian ad litem does not then follow the defendant’s decision concerning the course of the representation and advocate that position. Instead, the guardian ad litem continues the investigation and formulate a decision about the guardianship that the guardian ad litem believes is in the defendant ’s best interest, even if it conflicts with the defendant’s expressed position.

The guardian ad litem function runs afoul of another of the basic tenets of lawyering, that an attorney maintain the client’s confidences. The Model Rules of Professional Conduct admonish attorneys not to reveal information gathered from representation of a client without the client ’s consent. /23/ When attorneys acting as guardians ad litem report to the court, they relate elements of conversations with the defendant and others, as well as their own observations about the defendant’s ability to manage finances or personal affairs. This information is relayed to the court without the client ’s consent -- indeed, sometimes over the client ’s objections -- and often forms the basis for the appointment of a guardian.

The Model Rules of Professional Conduct create exceptions to the general rule of confidentiality. An attorney may disclose information when it is necessary to advance the client’s case; when disclosure may prevent commission of a crime likely to result in death, substantial bodily harm, or substantial injury to property; or when disclosure aids in the defense of a lawsuit or grievance against the attorney. /24/ None of these exceptions is applicable to a guardianship proceeding. /25/

Scholars admonish that the Model Rules of Professional Conduct require attorneys to pursue a course of traditional lawyering tailored to the client’s decision-making capacity. The rules do not allow attorneys to "assume the role of 'de facto guardian’ to act against the client’s expressed wishes or instructions." /26/ Attorneys are obligated to maintain, as nearly as possible, a traditional attorney-client relationship and to preserve their clients’ confidences. An attorney asked to disclose

confidential information about a client or the client's situation owes that client a duty of confidentiality and may not disclose the client's confidences without the client's consent. /27/

B. State Statutes

While most state guardianship statutes make no mention of the attorney's role, a number of states have amended their codes to give attorneys some guidance in guardianship proceedings. Vermont, for example, follows the Model Rules of Professional Conduct and requires the appointment of counsel, who must receive copies of the petition and all relevant documents, consult with the defendant prior to the hearing, and explain to the defendant the meaning of the proceedings. /28/ Alaska specifically requires attorneys "to represent the ward or respondent zealously" and to follow the decisions of the defendant concerning the defendant 's interests. /29/ The District of Columbia also requires the appointment of an attorney to "represent zealously the individual's legitimate interests." /30/

The distinction between the role of the attorney and the role of the guardian ad litem is clearest in Washington State. There a defendant has the right to be represented by counsel at any stage in a guardianship proceeding. Counsel is directed to act as an advocate for the client and not to substitute counsel's own judgment for that of the client concerning what may be in the client's best interests. The guardian ad litem, on the other hand, is directed to promote the defendant's best interest, rather than the defendant's expressed preferences. /31/

Both Alaska and West Virginia set out in their statutes activities the attorney as zealous advocate must undertake. In Alaska, the attorney must meet with and interview the defendant before the hearing and explain the nature and the effect of the guardianship proceeding. The attorney must also present evidence, testimony, and arguments that protect the defendant's rights and interests. /32/ In other words, Alaska has codified in its guardianship statute that the attorney is to assume the traditional role of a lawyer. West Virginia, taking a cue from Alaska, delineated carefully and explicitly in its recently enacted legislation the job of the attorney for the defendant. The statute first sets out the "major areas of concern" or issues upon which legal counsel should focus attention. These are (1) whether the guardianship is necessary; (2) limitations to be placed on the powers of the guardian; (3) if a guardian is needed, whether the recommended guardian is the person with the greatest interest in the individual; (4) whether the bond, if necessary, is adequate; and (5) if needed, the appropriateness of the placement for the individual. /33/ The statute then sets out 20 activities that counsel may perform in pursuing the major areas of concern. It appears that West Virginia legislators decided to avoid uncertainty about the role of the attorney for the defendant by codifying both the issues that might arise in a guardianship proceeding and any function that general good lawyering would require of the advocate.

C. Case Law

In the 1980s, the few reported decisions that discussed the role of the attorney in guardianship proceedings generally did so in the context of other issues. Missouri courts were in the forefront of the discussion. In a case concerning waiver by counsel of a defendant's rights to be present at the

hearing and to a jury trial, the Missouri Supreme Court stated that appointed counsel must act as an advocate for the individual to protect the individual from an erroneous deprivation of rights and to prevent the right to counsel from becoming a "mere formality." /34/ If the defendant understands the right being waived, then the attorney must follow the defendant ’s wishes, even if the attorney disagrees with the defendant ’s decision. If the defendant cannot direct the attorney, counsel may make decisions that "safeguard and advance the interests of the client." /35/

More recently, the Washington Court of Appeals reversed an order authorizing the parents of a minor who lacked capacity to consent to her sterilization. /36/ The guardian ad litem had acted as an investigator and reported her findings to the court. She had waived her client’s presence at the hearing and did not cross-examine adverse witnesses. The court determined that the fundamental right at issue, the defendant’s right to procreate, coupled with the guardian ad litem’s failure to take an adversarial position, warranted the appointment of independent counsel for the minor. /37/

The New Jersey Supreme Court, in one of the most recent cases to discuss the role of the attorney for the defendant, /38/ distinguished the role of the attorney from the role of the guardian ad litem and set forth standards for the attorney as advocate to follow. Noting that the situation of an attorney representing a defendant subject to a guardianship petition is analogous to the situation of an attorney representing a minor, the court found that

> [t]he role of the representative attorney is entirely different from that of a guardian ad litem. The representative attorney is a zealous advocate for the wishes of the client. The guardian ad litem evaluates for himself or herself what is in the best interests of his or her client-ward and then represent[s] the client-ward in accordance with that judgment. /39/

The court noted that the representative attorney and the guardian ad litem may take different positions, the former advocating the client’s preferences and the latter advocating a different position that is in the client’s best interests. While the former uses advocacy techniques traditionally used by an attorney, the latter "may merely file a report with the court. . . ." /40/

The case is particularly relevant because, at the time of the decision, neither the statute nor the New Jersey Rules of Civil Procedure delineated the functions of the attorney as zealous advocate. The supreme court therefore reminded attorneys that a declaration of incapacity does not deprive someone of the right to make decisions and that it is the primary duty of the attorney to protect the person’s rights, including the right to make decisions. The attorney is obligated to advocate any decision made by the client but may in limited circumstances inform the court of the possible need for a guardian ad litem. The court concluded that it intended to respect everyone’s right of self-determination and that it is the function of the court to protect the best interests of those who cannot exercise their right. /41/

D. The Americans with Disabilities Act

The passage of the Americans with Disabilities Act (ADA) adds a new wrinkle to discussion of the role of the defendant’s attorney in guardianship proceedings. /42/ The ADA prohibits attorneys,

along with other businesses open to the public, /43/ from discriminating against persons on the basis of their disabilities. /44/ The ADA goes beyond requiring attorneys (or the courthouse) to equip their places of business so that persons with disabilities have physical access to them. The attorney's service and the activities conducted by the court must also be accessible. /45/ The attorney must make reasonable modifications to the service to allow the person with disabilities to take advantage of it, as long as the modifications do not fundamentally alter the nature of the attorney's service or cause an undue burden on the attorney.

What the ADA really requires of the attorney, then, is compliance with Rule 1.14 of the Model Rules of Professional Responsibility. The attorney must undertake every effort to maintain a normal attorney-client relationship with the defendant, despite the defendant 's actual or perceived disabilities. This includes modifying general office practices -- for example, simplifying forms and legal descriptions, arranging appointments at times and in places that allow the defendant to participate most fully -- to assure the defendant of the same opportunity to receive the same kinds of lawyering services that people without disabilities receive.

By extending the prohibition against discrimination to people with disabilities, the ADA reversed a public philosophy that required only protection and isolation of people with disabilities. The ADA protects and empowers people with disabilities in all aspects of their lives: work, recreation, tasks essential for daily living, and interactions with businesses open to the public and with state and local government. /46/ In a way, the ADA's purpose of empowerment runs counter to the parens patriae philosophy of guardianship, which is meant to protect those thought too incapacitated to protect themselves. The role of the attorney as advocate is more closely aligned with the purpose of the ADA. The attorney promotes empowerment by advocating self-determination for the defendant. The guardian ad litem function is founded more on the notion of parens patriae, the right of the state to protect the welfare and best interests of its citizens, since the guardian ad litem decides what is in the individual's best interest
s. As the ADA changes the notion of how people with disabilities are dealt with by society as a whole, it should also change the way guardianships are viewed and the way in which attorneys for the defendant represent their clients. /47/

E. Practical Considerations

Those who oppose an advocacy role for the defendant's attorney cite examples of unnecessary and protracted litigation that increases costs for all parties and that results in the imposition of a guardianship anyway. Or they express fears that an advocacy role will cause a vulnerable adult to be left unprotected. While those concerns are very grave, the legal system has other mechanisms for addressing them. Courts have authority to impose sanctions on lawyers who abuse the legal process by filing unnecessary and frivolous lawsuits and motions. If a vulnerable adult is left unprotected, this may mean that the plaintiff did not do a good enough job proving the need for guardianship. An advocacy role for defense counsel may lead to improved lawyering for all parties.

The New Jersey Supreme Court likened the role of the defendant's attorney to the role of an attorney representing any other client. While the attorney is required to advocate the client's decision, the attorney is not required to advocate decisions that are patently absurd. The court also

noted that if capacity is not contested, the defendant may want to raise other issues, such as the choice of guardian or the client's place of residence. /48/ In the context of other civil litigation, an attorney will not accept a case when there is no cause of action or seek a remedy that is unavailable in a particular claim, despite the client's desire that the attorney do so. And an attorney and client might concede liability in a contract or tort case but contest zealously the amount of damages or other remedy requested. In advocating the defendant's position in a guardianship proceeding, the attorney, as in other litigation, will act within the bounds of the rules of professional responsibility.

Acting as a zealous advocate in the guardianship contest involves the steps that an attorney ordinarily takes in preparing for litigation. That the West Virginia legislature felt obligated to delineate them in the state's new guardianship law is evidence of how frequently attorneys do not prepare guardianship cases in the same manner as they prepare other civil cases. On a bleaker note, the legislature might have been concerned that, without a codification of the attorney's responsibility, attorneys would not represent guardianship clients any better. The attorney representing the defendant should, at a minimum, do the following.

Meet with the client. The attorney must conduct personal interviews with the defendant and explain in a manner understandable to the client the nature of the guardianship proceedings and their consequences. This includes advising the defendant of the attorney's appointment to represent the defendant's interests, explaining what is meant by the guardianship proceeding, and explaining the consequences of the particular intervention sought. The attorney is obligated to discuss court procedures, including the defendant's right to be present at the hearing and to testify, the possibility of a jury trial, and any potential witnesses. The attorney is also obligated to seek out the client's position. The attorney and defendant should consider any necessary modifications of court procedures to allow the defendant to participate more fully in the proceeding. /49/

The attorney should elicit the defendant's perception of the circumstances that led to the proceeding and determine, if possible, the client's wishes. If the defendant can communicate in any way, the attorney's obligation is to advocate the defendant's wishes, whether or not the attorney thinks they are in the defendant's best interests. It is important to remember that being a zealous advocate does not mean the attorney must contest the guardianship if the defendant does not choose to do so. /50/ The defendant may be concerned only with one of the other major issues identified by the West Virginia legislature, such as limiting the power of the guardian, having a certain friend or relative appointed guardian, or residing (or more likely not residing) in a particular environment. /51/ Some defendants are anxious about smaller details. They may want to make sure that their friends will still be able to visit, that they are not placed in one special nursing facility, or that they can still have their daily candy bar or glass of beer in the nursing facility in which they will be placed.

Use techniques to improve communications when interviewing the defendant. The attorney should meet with the defendant face to face and be cognizant of potential communication problems, such as language barriers, hearing impairments (not all hearing-impaired individuals use sign language or even the same sign language), or aphasia (partial or total loss of the ability to articulate ideas in any form). The environment of the meeting place also may cause sensory problems associated with the defendant's specific disability. Light, noise, print size of legal documents, and other distractions may affect the defendant's ability to understand and discuss the issues. If communication barriers

are present, the attorney should have auxiliary aides during any interview and during all judicial proceedings. /52/

The time of day may affect the defendant's ability to participate effectively at interviews, depositions, and hearings. The attorney should consider whether the client does better in the morning or afternoon, or before or after meals. Location of the interview is also important. Even if the attorney's office is accessible, a defendant may be homebound or more comfortable at home. Interviews may have to be scheduled around a nursing facility's visiting hours, though exceptions should be made if the defendant is not alert during these times. Discussions with the defendant are private; communications with defendants in guardianship proceedings are subject to the same respect and confidentiality given to communications with clients in other types of cases.

Prepare for representation. The attorney should secure and present evidence, testimony, and other arguments to promote the defendant's position and to protect the defendant's rights. Advocacy for the defendant entails the use of traditional lawyering techniques, such as pretrial motions, discovery, stipulations, judicial notice, and evidentiary objections. In the guardianship context, advocacy also involves investigation of possible, less restrictive alternatives to guardianship, /53/ including powers of attorney and advance directives, representative payees, /54/ trusts, and social services. The results of the prehearing investigation may determine the availability of less intrusive assistance and could lead to a negotiated settlement or to dismissal of the case.

As with other civil cases, the attorney should review the file and other relevant information and interview interested persons, neighbors, friends, social workers, and others who may have contact with the defendant. Reviewing medical records may not yield sufficient information, however, and doctors' certificates should not be considered prima facie evidence of disability. Doctors who prepared the medical certificates should be interviewed to determine the extent of their personal knowledge about the defendant and their overall expertise with the kinds of conditions the defendant is alleged to have. When evaluating medical evidence, care should be taken to find out what medications the defendant is taking and to explore the possibility that drug interactions are causing confusion. The attorney may want to obtain independent medical reports.

At the hearing, the attorney should cross-examine all witnesses, especially medical experts. Familiarity with diagnostic techniques and symptoms of common psychological disorders helps in questioning medical personnel. Another potential line of questioning involves whether results of psychological tests administered to defendants are reflective of dementia or of educational and cultural biases, and whether such defendants had any necessary auxiliary aides to enable them to communicate responses to the tests effectively. /55/ Social workers or other investigators may be questioned about whether they investigated all less-restrictive alternatives to guardianship. When appropriate, family members, friends, and other plaintiffs should be questioned about motivations, including pecuniary gain or conflicts of interest, for filing the guardianship petition.

IV. Conclusion

In many ways, the functions performed by the attorney as advocate are similar to the functions performed by the guardian ad litem. Both are supposed to meet with and interview the defendant

before the hearing and explain the nature and effect of the guardianship proceeding. Both should also interview potential witnesses, review evidence, and otherwise investigate the facts of the case. However, the advocate treats the defendant as a client, while the guardian ad litem treats the defendant as another witness in the investigation. The advocate uses the information gathered to develop a strategy of the case, present evidence, testimony, and arguments that protect the defendant's rights and interests. The guardian ad litem uses the same information to formulate an opinion about what should be done in the case and delivers that opinion to the court. It should not be very difficult, therefore, for an attorney who has been acting as a guardian ad litem to assume the responsibilities of an advocate in order to protect
the rights of the defendant.

Most important, no one in the array of individuals involved in a guardianship proceeding other than the defendant's attorney will promote the defendant's views. Without an attorney representing the defendant, an entire proceeding concerning the future of the defendant will be conducted with little or no input from the person most affected by the proceeding. It is the job of the other parties to the proceeding -- the plaintiff, the examining doctor, the social workers -- to explain why the guardianship is needed. Ultimately, after listening to the arguments from the plaintiff and the defendant, it is for the court to determine what is in the defendant's best interests. /56/

Footnotes

/1/ This article uses the term "defendant" instead of "respondent" or "alleged disabled person" to emphasize that guardianships are an adversarial civil proceeding that may result in the loss of the defendant's right to make important personal decisions.

/2/ Several commentators have noted that the benevolent purpose of the parens patriae power works against procedural safeguards and causes harmful results. See, e.g., Peter M. Horstman, Protective Services for the Elderly: The Limits of Parens Patriae, 40 Mo. L. Rev. 215, 247 (1975); Notes on the Delivery of Legal Assistance to Older Persons, 1 Best Practices 5 (1987).

/3/ U.S. Const. amend. XIV Sec. 1.

/4/ Anne Pecora, The Constitutional Right to Court-Appointed Adversary Counsel for Defendants in Guardianship Proceedings, 43 Ark. L.J. 345 (1990).

/5/ "One of the historic liberties which is protected by the due process clause . . . is the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security. Appointment of a guardian results in a massive curtailment of liberty . . . ." In re Guardianship of Deere, 708 P.2d 1123, 1125 (Okla. 1985).

/6/ In re Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991). After protracted litigation, the Minnesota Court of Appeals appointed the ward's lesbian partner as her guardian. The lower court had appointed her father guardian, and he precluded the partner from visiting his daughter.

/7/ In re Hedin, 528 N.W.2d 567 (Iowa 1995).

/8/ Between 1987 and 1995, 17 states enacted some form of guardianship reform legislation. Several states, including Texas, now require that the powers of the guardian be limited so that wards retain more control over their lives. Sally Bache Hurme, Current Trends in Guardianship Reform, Md. J. of Contemp. Legal Issues (forthcoming).

/9/ Okla. Stat. tit. 84, Sec. 41(B) (1991). The purpose of the statute is to offer the kind of protection from financial abuse envisioned by Oklahoma's adult protective services laws. In re Estate of Goodwin, 854 P.2d 390, 392 (Okla. Ct. App. 1993).

/10/ Estate of Goodwin, 854 P.2d 390.

/11/ See, e.g., Abuses in Guardianship of the Elderly and Infirm: A National Disgrace, Hearings Before the Subcomm. on Health and Long-Term Care, House Special Comm. on Aging, 100th Cong., 1st Sess. 4 (1987); American Bar Association, Statement of Recommended Judicial Practices (1986); American Bar Association, Guardianship: An Agenda for Reform (1989).

/12/ See also Hedin, 528 N.W.2d 567.

/13/ See the reports cited supra at note 11.

/14/ Honor v. Yamuchi, 820 S.W.2d 267, 270 (Ark. 1991) (Clearinghouse No. 46,728); Statement of Recommended Judicial Practices, supra note 11.

/15/ Hedin, 528 N.W.2d 567.

/16/ In Shamblin v. Collier, 445 S.E.2d 736 (W. Va. 1994) (Clearinghouse No. 49,606), the lower court granted a petition for incompetency based in large part on the guardian ad litem's testimony that the defendant knew his name, the names of his children and of the president but could not name his care giver or the correct date. The guardian ad litem concluded, based on his own observations, that defendant's scratching problems resulted from a nervous disorder or obsessive-compulsive behavior and that the defendant was unable to manage his own affairs because of his advanced age, his inability to read and write, and his low weight.

/17/ The rules of professional conduct allow the court to appoint a guardian ad litem who will help advise counsel how to proceed when counsel believes the client cannot adequately act in his or her own best interest. Model Rules of Professional Conduct Rule 1.14(b).

/18/ Id. Rule 1.2.

/19/ Id. Rule 1.4(b).

/20/ Id. Rules 1.14, 1.2.

/21/ Id. Rule 1.14(a).

/22/ Id. Rule 1.2

/23/ Id. Rule 1.6(a).

/24/ Id. Rule 1.6.

/25/ Some states give an attorney discretion to reveal confidences to comply with a court order or other law. See, e.g., Md. Rules of Professional Conduct Rule 1.6(b)(4). While this may appear to exonerate attorneys who disclose confidences pursuant to an order of appointment requiring them to report to the court, such a reading is inconsistent with the overall thrust of the rules -- that attorneys accord the same level of representation to a client of questionable capacity as to other clients.

/26/ Linda Smith Representing the Elderly Client and Addressing the Question of Competence, 14 J. Contemp. L. 61, 82 (1988).

/27/ Mark Falk, Ethical Considerations in Representing the Elderly, 36 S.D. L. Rev. 54, 64 -- 65, 67 (1991).

/28/ Vt. Stat. Ann. tit. 14, Sec. 3965(b) (Supp. 1992).

/29/ Alaska Stat. Sec. 13.26.111(a), (b) (1992).

/30/ D.C. Code Sec. 21-2033(b).

/31/ Wash. Rev. Code Ann. Secs. 11.88.045(1)(a), (b) (West Supp. 1992).

/32/ Alaska Stat. Sec. 13.26.11(a)(3) (1992).

/33/ W. Va. Code Ann. Sec. 44A-2-7(b) (Michie 1994 Supp.).

/34/ In re Link, 713 S.W.2d 487, 496 (Mo. 1986).

/35/ Id. at 496.

/36/ In re Guardianship of K.M., 816 P.2d 71 (Wash. Ct. App. 1991).

/37/ Id. at 74.

/38/ In re M.R., 638 A.2d 1274 (N.J. 1994). Other recent decisions have dealt more with the issue of the right to counsel than the role of counsel. See, e.g., Honor, 820 S.W.2d 267; In re St. Luke's Roosevelt Hospital Center, 607 N.Y.S.2d 574 (Sup. Ct. 1993). The New York Supreme Court relied in part on constitutional grounds in determining that an attorney is required when important liberty interests are at stake; it implies at least that an attorney should advocate to protect those interests.

/39/ In re M.R., 638 A.2d at 1283.

/40/ Id. at 1284.

/41/ Id. at 1285, 1286. Because the defendant in the case was a woman with developmental disabilities, the court framed some of its discussion in terms of individuals with developmental disabilities. However, the comments and reasoning apply to all defendants in guardianship proceedings. See also New Jersey Sup. Ct. Judiciary-Surrogates Liaison Comm., Guidelines for Court-Appointed Attorneys to Follow in Incompetency Proceedings (1994).

/42/ Americans with Disabilities Act (ADA), 42 U.S.C. Secs. 12101 et seq.

/43/ Title III of the ADA, 42 U.S.C. Sec. 12181, applies to public accommodations. State courts are covered under Title II, 42 U.S.C. Sec. 12131, which extends the nondiscrimination requirements to state and local governments, regardless of whether they receive federal funding.

/44/ Defendants in adult guardianship proceedings are people with disabilities and are protected by the ADA. Even if they do not actually have a physical or mental impairment that substantially limits a major life activity, they are perceived by the person who initiated the guardianship proceeding to have an impairment and thus satisfy the ADA's definition of person with a disability. 42 U.S.C. Sec. 12102(2).

/45/ Courthouse access is of particular importance in guardianship proceedings. The presence of the defendant is often waived because the defendant's attorney claims the defendant is unable to attend the hearing. Under the ADA, the court has the obligation to modify its practices to ensure participation by the defendant, even if it means moving the hearing to the defendant's nursing home or hospital. New York, recognizing its obligations to the defendant, has codified a requirement that hearings may be held where the defendant is. N.Y. Mental Hyg. Law Sec. 81.11(c) (McKinney Supp. 1994).

/46/ 42 U.S.C. Sec. 12101.

/47/ E.g., more states are adopting the concept of limited guardianship, in which the guardian is granted authority to perform only those functions on which the defendant needs assistance. Sally Bache Hurme, Limited Guardianship: Its Implementation Is Long Overdue, 28 Clearinghouse Rev. 660 (Oct. 1994). Limited guardianship is compatible with the ADA concept of individualized assessment of the needs of the person with a disability.

/48/ M.R., 638 A.2d at 1284, 1285.

/49/ Courts are required under Title II of the Americans with Disabilities Act to make reasonable modifications to their procedures to ensure that people with disabilities can participate fully. 42 U.S.C. Sec. 12131.

/50/ The author has represented clients who did not object to having someone else make decisions for them and, in one particular case, wanted the guardianship to continue even though there was evidence to support a termination of the guardianship or a modification of the powers of the guardian.

/51/ W. Va. Code Ann. Sec. 44A-2-7(b) (Michie 1994 Supp.).

/52/ Auxiliary aids are devices or services that help promote effective communication, including qualified interpreters, qualified readers, audiotapes. 28 C.F.R. Sec. 36.303.

/53/ Maryland law requires the finder of fact in a guardianship proceeding to determine that no less restrictive alternative to guardianship is available. Md. Code Est. & Trusts Sec. 13-705(b).

/54/ A representative payee is designated by the Social Security Administration to receive a beneficiary's social security or supplemental security income check and to pay for all of the beneficiary's necessary expenses. 42 U.S.C. Secs. 405(j), 1383(a)(2). Appointment of a guardian of the estate is not necessary for an individual who has only social security income, who has no assets to administer, and who has a representative payee.

/55/ In one case, the author represented a defendant who was deaf and spoke a pidgin dialect of American Sign Language. A physician who signed one of the medical certificates communicated with the defendant through her hospital roommate, without verifying if her roommate was communicating the questions to her correctly or even in a language that she understood.

/56/ M.R., 638 A.2d 1274; Kicherer v. Kicherer, 400 A.2d 1097 (Md. 1979).

The Demographic Imperative: Guardianships and Conservatorships

An increasing number of persons with diminished capacity are poised to transform American institutions, including the courts. What can state courts do to prepare to meet this challenge?

Adopted December 2010

Conference of State Court Administrators

- Developing coordination between the courts that appoint guardians and the Social Security representative payment system[36] to ensure appropriate services and enhance monitoring and training;
- Exchanging key data elements among courts, adult protective services and care providers to strengthen performance measurement; and
- Creating information technology and case management systems to track guardianship cases and flag potential abuses.

Information about these activities is available from studies that have been conducted, or from courts that have implemented best practices. A valuable resource is NCSC's Center for Elders and the Courts at www.eldersandcourts.org. As the task forces consider their agendas and work plans, they may also want to review practices states have successfully implemented. As discussed below, if federal funding is allocated for the creation of a national guardianship court improvement program, the statewide guardianship task forces and their activities would be subsumed into that program. However, because of the uncertainty of funding for such a national program and the urgent need to address court guardianship issues, each state is strongly encouraged to establish a task force.

2. Provision of Technical Assistance

The NCSC should be the lead provider of technical assistance in matters related to the implementation of recommendations contained in this white paper. Working with other organizations, such as the National Guardianship Association and the American Bar Association, as appropriate, the NCSC, through its Center for Elders and the Courts (CEC), should seek funding aimed at improving the collection and reporting of data, the use of technology, judicial and court staff training, and state task force assistance. Given the work of its Center for Elders and the Courts, the NCSC is in a unique position to ensure that states receive the most current and relevant information about guardianship programs and best practices, and also to provide consulting services to task forces seeking assistance with their initiatives. The NCSC should also develop national performance measures for guardianship cases. Its *Courtools*—with modifications for the guardianship process—can serve as a foundation for performance measures.

3. Appointment of Counsel

Courts should ensure that the person with alleged diminished capacity has counsel appointed in every case to advocate on his or her behalf and safeguard the individual's rights.[37] Appointed counsel should be trained to explain the consequences of guardianship in a manner the person can understand; ensure there is no less restrictive alternative to guardianship which will provide the desired protection; ensure due process is followed; ensure the petitioner proves the allegations in the petition to the standard required in the jurisdiction; confirm the proposed guardian is qualified to serve;

and ensure the order is drafted to afford the person with diminished capacity maximum autonomy.[38]

B. National Actions

1. Support National Data Collection Efforts

Our nation urgently needs reliable data on adult guardianships. Accurate and timely data is required to (1) shape guardianship policy, practice, training and education—and obtain the resources for system improvements; (2) determine effective case processing and monitoring of guardians by the courts; (3) gauge the extent of abuse by guardians and the extent to which guardians protect individuals from abuse; and (4) determine current and future resource needs. As set forth in the 2007 Smith/Kohl report, *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity,* there are two complementary approaches that Congress could take to enhance the collection of data on adult guardianship:

a. **The federal government should authorize and fund a National Guardianship Study, such as that already proposed by the National Center for State Courts (NCSC).** The survey would document the number of guardianships, identify current practices and innovative programs, and provide the basis for the development of court improvement efforts. Results from the survey would inform policymakers, courts, and key stakeholders in current and future needs for guardianship resources, as well as changes in laws, policies and practices. Congress could direct and provide funding for the Department of Health and Human Services (DHHS) Administration on Aging, the Department of Justice Bureau of Justice Statistics, or the State Justice Institute to authorize a survey that will provide an accurate estimate of the number of adults under guardianship in the United States and document current court practices.

   The survey should be guided by an advisory board of national experts and key stakeholder organizations, including members of the National Guardianship Network and include the following components:
   - A representative sample of courts for which data can be extrapolated to produce a national estimate.
   - File reviews that will document background information, key events, the nature of the guardianship, court processes, and timeliness.
   - The collection of the number of guardianships, with extrapolation to the national population, to produce a scientifically-sound estimate of current adult guardianship cases in the United States.
   - Measures of well-being, if feasible, with a particular focus on cases that involve abuse, neglect or exploitation.

b. **The federal government should support the development of local data systems**. State and local courts require assistance in the design and