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

Thomas F. Coleman
Attorney at Law
Spectrum Institute
May 1, 2015

Disability and Guardianship Project

9420 Reseda Blvd. #240, Northridge, CA 91324
(818) 230-5156 • www.spectruminstitute.org

May 1, 2015

Probate and Mental Health Advisory Committee and
Probate and Mental Health Education Committee (CJER)
of the Judicial Council of California

Dear Committee Members,

This report and its proposals are being submitted to you pursuant to the suggestion of Justice Harry Hull, Chairperson of the Rules and Projects Committee of the Judicial Council. This is consistent with your recent authorization to review and consider recommendations for changes in law, practice, and procedures in proceedings that affect people with developmental disabilities.

There are more than 40,000 such adults in California with open conservatorship cases. Each year, an additional 5,000 new limited conservatorship cases are filed in the state. Although they are called "limited" conservatorships, our research indicates that too many of these involuntary litigants are being stripped of their constitutional and civil rights, all too often in a wholesale and routine manner. The only thing that may be truly "limited" about these proceedings is the number of hours that court-appointed attorneys are allowed to devote to defending the rights of their clients.

The limited conservatorship system is not working. There are serious defects in the practices of the attorneys, judges, investigators, and others involved in these cases. The problems are outlined in "key findings" we submitted to the Legislature last month. (See p. 35) Since all of these problems cannot be addressed at once, we are submitting proposals to improve the performance of court-appointed attorneys, whether they are public defenders or are in private practice.

This report suggests several new court rules to be adopted. Enacting and implementing new rules may take some time. While changes are in process, attorneys can take steps now to improve the quality and effectiveness of their representation of clients with developmental disabilities. They need not wait for instructions from the Judicial Council. This report contains one suggestion for immediate implementation by court-appointed attorneys in these cases. An advocacy tool, known as an Individual Program Plan (IPP) Review, has been available all along but is not being utilized. IPP Reviews should be occurring now. Attorneys should not wait until the work of these advisory committees is done to start using this process. (See p. 36). Effective representation of counsel is an existing and ongoing duty.

The Disability and Guardianship Project awaits an invitation to engage in conversations with committee members and staff as you review this report and these proposals. We would like to make a formal presentation at your meeting in July and will be available to answer your questions at any time. We look forward to working with you to improve access to justice for people with developmental disabilities.

Very truly yours,

Thomas F. Coleman
Executive Director
Disability and Guardianship Project
Spectrum Institute

Preface

The presence of cognitive disabilities raises many opportunities for miscommunication, misinformation and inadequate representation in judicial proceedings. Some communication difficulties may adversely affect the rights of people with developmental disabilities and the integrity of the judicial process. The risk of inadequate representation increases when a litigant has cognitive disabilities.

The proposals contained in this report are intended to assist the Judicial Branch in fulfilling its constitutional and statutory obligations to take affirmative measures to provide meaningful access to justice for people with intellectual and developmental disabilities.

The Judicial Council and the Superior Court can delegate some of the court's responsibilities to the court-appointed attorneys who serve at the pleasure of the court. Such delegation, with appropriate oversight, can occur through standards of judicial administration.

Compliance with constitutional and statutory obligations can also occur by amending rules of court pertaining to qualifications of court-appointed attorneys in limited conservatorship cases, continuing education requirements, ADA performance standards, and ethical and professional standards. Mandatory training programs for such attorneys, certified for quality and scope, are essential to this process.

This report and the proposals it contains are being submitted to the Probate and Mental Health Advisory Committee of the Judicial Council. The advisory committee has been authorized by the Judicial Council to collaborate with the Center for Judicial Education and Research to review and consider recommendations for changes in law, practice, and procedures for proceedings involving people with developmental disabilities.

The limited conservatorship system was created in 1980. It has been operating without meaningful supervision or oversight for 35 years. A review of the entire system by the Judicial Council is long overdue. This report will start that process by focusing on the most critical component of the system – the performance of court-appointed attorneys. A review of the role of judges, investigators, and regional centers should follow in the near future.

Spectrum Institute

Contents

Report online: www.spectruminstitute.org/attorney-proposals

Summary of Proposals

1. Modify Literature on ADA Accommodations (Page 14)

The Judicial Council has published a brochure for court users about their rights under the Americans with Disabilities Act (ADA). It has also published a brochure for court personnel to explain their duties under the ADA. The brochure for court personnel contains an error. It says that if a request for accommodation is not made, the court has no obligation to provide one. It fails to note that an exception to that rule exists when the court knows that a litigant has a disability, the disability impedes access to justice, and the court knows or should know that the nature of the disability hinders or makes it impossible for the litigant to request an accommodation. The exception would apply to all limited conservatorship proceedings since the proposed conservatee is involuntarily brought into the case, has intellectual and developmental disabilities that impair reasoning and understanding, and is not in a position to request accommodations for cognitive, physical, or communication disabilities. The brochure should delete the statement about a request being required. Another brochure should be created and distributed for court personnel and court users explaining the right, even without request, for modifications of policies and practices to accommodate cognitive and intellectual disabilities.

2. New Rule 7.2002 – ADA Performance Standards (Page 26)

Section 1 of this rule would inform attorneys that when they are appointed by the court to represent proposed limited conservatees, their performance as court-appointed counsel must comply with the Americans with Disabilities Act. Section 2 of this rule would require attorneys, as soon as they are appointed in a limited conservatorship proceeding, to determine the types of disabilities of the client and formulate a plan to enable the client to interact with the attorney and participate in the process (both in and out of court) in the most effective manner possible. The goal is to provide equal access to justice for a litigant who has intellectual, developmental, and/or other disabilities. Section 3 would inform attorneys that failure to comply with disability accommodation and modification requirements of federal and state laws may have legal consequences.

3. New Rule 7.3002 – Ethical and Professional Standards (Page 28)

This rule would inform attorneys who are appointed to represent clients in limited conservatorship proceedings that the normal rules of ethics and professional standards governing attorney-client relationships apply to these proceedings as well. Section 1 would make it clear that even though clients in limited conservatorship proceedings may have

cognitive or intellectual disabilities, they are entitled to the same ethical protections of loyalty and confidentiality as any other client. Section 2 would clarify the professional role of an attorney appointed to represent a client in a limited conservatorship proceedings. Section 3 would clarify that an attorney appointed to represent a client in a limited conservatorship proceeding has a constitutional duty to provide effective representation. It would explain various obligations for preparation of a case, at a contested hearing, and in contemplation of a possible appeal.

4. New Rule 7.4002 – Qualifications and Continuing Education Standards (Page 30)

Whether they are public defenders or private attorneys, lawyers who are appointed by a court to represent clients in limited conservatorship proceedings should be required to take classes on subjects that are necessary for effective advocacy. In order to qualify for continuing education credits, such classes should be certified by the Center for Judicial Education and Research. The Center should develop standards for such training programs to insure that all necessary topics are covered, the content of the trainings are accurate, and the credentials of presenters are sufficient. The Center should work with public defender offices and county bar associations to develop appropriate criteria, in consultation with one or more organizations that advocate for the rights of people with intellectual and developmental disabilities. A new rule on qualifications and continuing education standards for limited conservatorship appointments should go into effect 18 months after the rule is adopted. This would give organizations, agencies, and individuals time to prepare for the transition. Prior to being appointed to represent a client in a limited conservatorship case, an attorney would need to certify that he or she has taken 18 hours of basic training. Basic training would include presentations and materials on each of the specific topics. The topics are listed in the new rule.

5. New Standard 7.4002 – Limited Conservatorship Matters (Page 33)

Article Six, Section 6 of the California Constitution directs the Judicial Council to adopt rules for court administration that are not inconsistent with statute. To implement this directive, the Judicial Council has adopted the Standards of Judicial Administration. The Standards for Probate Proceedings – Title 7 – have not been developed in the way that standards for cases involving children and families have been. There is only one standard in Title 7. Standard 7.10 pertains to settlements or judgements in certain civil actions. We propose that a new standard be created – Standard 7.20 – for limited conservatorship matters. The new standard should be patterned after Standard 5.40 for Juvenile Court matters.

Proposals to Modify the California Rules of Court

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

This report contains several proposals to improve the quality of legal representation received by people with intellectual and developmental disabilities who are represented by court-appointed attorneys in limited conservatorship proceedings in California.[1] The report was prepared by the Disability and Guardianship Project of Spectrum Institute.

The report is being submitted to two advisory committees of the Judicial Council of California. Court of Appeal Justice Harry Hull informed our project that the Probate and Mental Health Advisory Committee has been authorized by the Judicial Council to "review and consider recommendations for changes in law, practice, and procedures for the developmentally disabled."[2] According to Justice Hull, the review process will also involve the Probate and Mental Health Education Committee of the Center for Judicial Education and Research. The Center is an advisory committee to the Judicial Council.

Origins and Purpose of Limited Conservatorships

All states have created judicial proceedings for the protection of adults who are unable to care for themselves because they lack the capacity to make major life decisions. Many states refer to these proceedings as guardianships. Some, including California, call them conservatorships. If a court creates a conservatorship, some or all of these major decisions will be made by a conservator. The authority to control these aspects of life are transferred, pursuant to court order, from the adult who lacks capacity to another person.

---

[1] "The term developmental disability refers to a severe and chronic disability that is attributable to a mental or physical impairment that begins before an individual reaches adulthood. These disabilities include intellectual disability, cerebral palsy, epilepsy, autism, and disabling conditions closely related to intellectual disability or requiring similar treatment." (Website, Department of Developmental Services, "Information About Developmental Disabilities.") "Intellectual Disability is characterized by significantly subaverage general intellectual functioning (i.e., an IQ of approximately 70 or below) with concurrent deficits or impairments in adaptive functioning." (Ibid.)

[2] Letter from Justice Harry Hull to Thomas F. Coleman dated January 6, 2015. (See Exhibit 33.) Justice Hull is the Chairperson of the Rules and Projects Committee of the Judicial Council.

Prior to 1980, the California Legislature had enacted sections in the Probate Code authorizing judges to enter orders for general conservatorships. The orders were very general in nature, transferring authority over all major decisions to the conservator, unless specific areas were exempted by the court. General conservatorships were created to care for adults who lacked decision-making capacities, whether the incapacity was due to illness, accident, age-related degeneration, or because of a developmental disability. Limited conservatorships did not exist prior to 1980.

The Legislature authorized limited conservatorship proceedings for adults with developmental disabilities when it approved Assembly Bill 2898 in 1980.[3] The political impetus for this bill came out of the disability rights and de-institutionalization movements of the 1970s.[4]

The Legislature recognized it was not appropriate to put adults whose incapacities were due to dementia or illnesses associated with old age in the same category as adults whose incapacities were based on developmental disabilities arising when they were children. The newly-created limited conservatorship system, created solely for adults with developmental disabilities, 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."[5]

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. The Lanterman Act is a comprehensive statutory scheme, enacted in the 1970s, guaranteeing essential supports and services for children and adults with developmental disabilities. Regional Centers were created to coordinate these services.

Probate Code Section 1801 states: "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,

---

[3] "Guardianship-Conservatorship Law," California Law Revision Commission (June 1980) (See Exhibit 39)

[4] CEB, California Conservatorship Practice, Section 22.1, at p. 1061 (2005).

[5] Ibid., at Section 22.2, p. 1061.

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."

Welfare and Institutions Code Section 4502 declares: "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.[6]

Various officials, agencies, organizations, and individuals are mandated or authorized by law to participate in limited conservatorship proceedings. Limited conservatorship petitions are filed in the Superior Court. Superior Court judges preside over these proceedings which are governed by the Probate Code.

Most petitions are filed by parents or relatives of an adult who has a developmental disability, although they may also be filed by a public guardian, regional center, or director of the Department of Developmental Services.

When a petition for limited conservatorship is filed, the court must immediately appoint an attorney to represent the proposed conservatee.[7] In some counties, the public defender represents the adult in question, while in other counties private attorneys are appointed by the court.

A court investigator must interview the proposed conservatee, the petitioners, and any proposed conservators, as well as conduct an investigation of whether mental incapacities significantly impair the proposed conservatees ability to understand the nature and consequences of his or her actions in connection with major life decisions.[8]

Within 30 days of the filing of the petition, the proposed conservatee must be assessed by a regional center which must submit its findings and recommendations to the court. The regional center report shall include a description of the specific areas, nature, and degree of

---

[6] Lanterman Act, Statement of Rights (See Exhibit 40)

[7] Probate Code Section 1471(c).

[8] Probate Code Section 1826.

disability of the proposed conservatee.[9]

The primary participants in a limited conservatorship proceeding, therefore, are the petitioners, judge, court-appointed attorney, court investigator, and regional center. In some counties, such as Los Angeles, a self-help center is also involved. Since nearly 90 percent of petitions in Los Angeles are filed by petitioners without an attorney, self-help centers play an important role in the limited conservatorship process.

This report and its proposals focus primarily on the role of court-appointed attorneys. A holistic approach to the limited conservatorships system would have been preferred so that defects and solutions could have been identified for all aspects of these proceedings and all participants. That is the approach that was taken in 2006 when the Judicial Council convened a Probate Task Force to review the general conservatorship system.

That was then. This is now. Due to budget and staffing constraints within the Judicial Branch, a narrower approach was suggested by the Judicial Council in terms of potential reforms to the limited conservatorship system. The Probate and Mental Health Advisory Committee has been given primary responsibility for addressing concerns about the limited conservatorship system. The Center for Judicial Education and Research also has a role.

Since a comprehensive approach to reform is not feasible now, we are giving top priority to improving the performance of court-appointed attorneys. If they provide effective assistance to their clients, defend their rights, adhere to ethics and professional standards, are properly educated on key issues, and obey the mandates of the Americans with Disabilities Act, the system will be improved immensely. Improvement in the performance of court-appointed attorneys will have a domino effect on the performance of all other participants in the system.

Demographics of Limited Conservatorships

Statistics about limited conservatorships were hard to obtain. The Judicial Council and the Administrative Office of the Courts have not published data about limited conservatorships. Some statewide statistics have been published in the past about conservatorships in general, but nothing specifically about limited conservatorships.

The Legislature delegated authority over the limited conservatorship process to the Judicial Branch. Proceedings occur in the Superior Court of the State of California. However, the Superior Court operates on a county by county basis. Therefore, the administrative aspects of limited conservatorship proceedings may vary among the 58 counties in California. There is no cental agency within the Judicial Branch that gathers data or monitors the manner in which these proceedings are conducted by the courts throughout the state.

---

[9] Probate Code Section 1827.5.

The Attorney General's office is not involved in limited conservatorship proceedings, nor is the Department of Developmental Services (DDS) or any other state agency in the Executive Branch. As a result, there is no statewide monitoring of limited conservatorship proceedings by the Executive Branch.

The Legislative Branch provides almost no oversight of limited conservatorship proceedings. An oversight hearing of general conservatorships was held in 2005. Another oversight hearing was conducted this year. That hearing barely mentioned limited conservatorships.

Because of the lack of statewide involvement or oversight by any branch of government, administrative information about limited conservatorships has been obtained with great difficulty. Administrative records requests were submitted to the Los Angeles Superior Court. Public records requests were sent to the Department of Developmental Services. Some very limited information was gleaned from testimony at a recent oversight hearing conducted by the Senate Judiciary Committee.

The best source of information was the response of the Department of Developmental Services to our public records request. DDS receives information from the 21 regional centers about the number of their clients who have open conservatorship cases.

According to DDS, 41,010 regional center clients have open conservatorships in California.[10] There are seven regional centers located in Los Angeles County. Those regional centers report 12,688 clients with open cases. That is nearly 31 percent of cases in the state. About 1,200 new limited conservatorship cases are filed each year in Los Angeles County.[11] As many as 5,000 new limited conservatorship cases may be filed statewide each year.

According to reports from regional centers to DDS, the majority of conservators for adults with developmental disabilities are parents or other relatives. About 63 percent of conservators are related to regional center clients who are under a conservatorship. Public guardians are conservators in only two percent of such cases. In another two percent of cases, there is a professional conservator. Nonprofessional persons who are not related to the limited conservatee are conservators in 29 percent of these cases.

Data about racial and ethnicity characteristics of limited conservatees have not been found. However, according to Judge Maria Stratton, Presiding Judge of the Probate Division of the Los Angeles Superior Court, about half of the limited conservatorships in that court involve parents who only speak Spanish.[12]

---

[10] Response to public records request by Spectrum Institute. (See Exhibit 35)

[11] Presentation by Judge Maria Stratton on March 12, 2015. (See Exhibit 10)

[12] Attachment 2, Transcript of Excerpts from Digital Recording. (See Exhibit 10)

Foundational Considerations for Policy and Practice

The framework for the proposals contained in this report is grounded in several important foundational principles. Some are factual while others are legal.

Trauma Informed Justice

A critical factual consideration in the administration of justice in limited conservatorship proceedings is that the activities of all key participants should be "trauma informed." This term is being borrowed from the fields of medical and mental health services where it has its origins. It's application to the administration of justice is not only appropriate, but necessary, especially when legal proceedings involve a class of individuals who have likely been victims of abuse.

A program, organization, or system that is trauma-informed: (1) realizes the widespread impact of trauma; (2) recognizes the signs and symptoms of trauma; (3) responds by fully integrating knowledge about trauma into policies, procedures, and practices; and (4) seeks to actively resist re-traumatization.[13]

The administration of justice in limited conservatorship proceedings should be "trauma informed" because, as hard as it may be to accept this fact, the majority of adults with developmental disabilities probably have been traumatized as victims of abuse.[14] This reality has not been recognized by participants in the limited conservatorship system.

Research studies show that about 20 percent of the general population have been victims of abuse during their childhood – whether physical, sexual, or emotional. Other research indicates that children with developmental disabilities are 3.4 times more likely to be victims than the generic child population. This suggests that a *majority* of people with developmental disabilities have been victims of abuse by the time they reach the age of 18.[15]

In the general population, more than 80 percent of child abusers were parents.[16] According to Dr. Nora J. Baladerian, a clinical psychologist whose training programs have been funded

---

[13] "Trauma-Informed Approach and Trauma-Specific Interventions," Website, Substance Abuse and Mental Health Services Administration.

[14] "Trauma-Informed Justice: A Necessary Paradigm Shift for the Limited Conservatorship System," Spectrum Institute (2014). (See Exhibit 18)

[15] Ibid.

[16] "What Adults Need to Know About Child Abuse," Website, Office for Victims of Crime, United States Department of Justice.

by state and federal grants, people who abuse victims with developmental disabilities are most likely to be parents, relatives, household members, or service providers.

The administration of trauma-informed justice in limited conservatorship proceedings will require changes in both policy and practice. The proposals made in this report assume that court-appointed attorneys want to be effective advocates. An effective advocate for a client with a developmental disability would incorporate trauma-informed methods into his or her activities, both in and out of the courtroom.

The Right of Access to Justice

The right of people with developmental disabilities to have meaningful access to justice has underpinnings in constitutional doctrines and statutory mandates. This section identifies the sources of this right under federal and state law and explains how this right and these sources apply to limited conservatorship proceedings.

The primary source of the right to have meaningful access to justice is the Due Process Clause of the Fourteenth Amendment.[17] The Due Process Clause requires the states to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings.[18]

The United States Supreme Court has identified the Due Process Clause as the basis of congressional authority to enact the Americans with Disabilities Act (ADA). In doing so, the Court noted "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 of disability discrimination."[19]

Title II of the Americans with Disabilities Act applies to the operations of state and local governments.[20] Title II requires that "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."[21]

---

[17] *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); M.L.B. v. S.L.J., 519 U.S. (1996).

[18] Ibid.

[19] *Tennessee v. Lane*, 541 U.S. 509, 531 (2006).

[20] ADA Title II Technical Assistance Manual, Department of Justice (See Exhibit 23).

[21] ADA Title II Regulations, Department of Justice (See Exhibit 26).

The requirements of Title II apply to state and local courts. The United States Supreme Court made the following observations in upholding the application of the ADA to state courts: "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 rights of access to the courts, [Title II] constitutes a valid exercise of Congress's . . . authority to enforce the guarantees of the Fourteenth Amendment."[22]

Section 504 of the Rehabilitation Act of 1973, which predates the ADA, was the first civil rights legislation in the United States to guarantee that people with disabilities have access to government services. It applies to all government agencies that receive federal financial assistance, including state and local courts. Its provisions are nearly interchangeable with the ADA. However, Section 504 has an additional remedy beyond injunctive relief or damages. If a violation is found to occur, and compliance cannot be obtained through a consent decree, the Department of Justice can terminate any federal financial assistance the state or local court may be receiving.[23]

Title II requires courts to modify the usual court policies and practices so that people with disabilities have meaningful access to justice. This requirement involves more than removing architectural barriers that impair access to courthouses, courtrooms, and other court facilities for people with mobility disabilities. It involves more than providing sign language interpreters for litigants, witnesses, and spectators who are Deaf or hard of hearing. All types of disabilities are covered by Title II, including intellectual and developmental disabilities. The most difficult task for courts in terms of ADA compliance is making modifications of policies and practices in order to accommodate people with cognitive disabilities.[24]

Courts have an obligation to modify policies and practices in order to provide meaningful access to justice for people with cognitive and other mental disabilities.[25] "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."[26] In limited conservatorship

---

[22] *Tennessee v. Lane* 124 S.Ct. 1978, 1993-4 (2004).

[23] "Application of Section 504 to State Court Services." (See Exhibit 28)

[24] "A Meaningful Opportunity to Participate: A Handbook for Georgia Court Officials on Courtroom Accessibility for Individuals with Disabilities." (See Exhibit 28b)

[25] "Ensuring Equal Access for People with Disabilities: A Guide for Washington Courts" (2006). (See Exhibit 28a)

[26] Ibid.

proceedings, court investigators and court-appointed attorneys need to be properly educated on how to interact with and communicate with people who have developmental disabilities.

All of the operations of the state and local courts are subject to section 504 scrutiny, including the administrative decisions of judges.[27] Establishing qualifications and continuing education requirements for attorneys who are appointed to represent people with developmental disabilities in limited conservatorship proceedings is an administrative decision. The content of training programs and the credentials of presenters at such programs are also administrative decisions.

These types of administrative decisions have been and are being made by the Judicial Council and by probate court judges in each county of the state. The proposals contained in this report are intended to assist the Judicial Branch in fulfilling its constitutional and statutory obligations to take affirmative measures to provide meaningful access to justice for people with developmental disabilities.

"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 of the judicial process."[28] "Risks of inadequate representation increase when the client has cognitive disabilities."[29]

"Until lawyers are sensitized to and educated on the needs of people with mental disabilities, they will be ill-equipped to provide adequate representation."[30] Trainings of court-appointed attorneys who represent people with developmental disabilities in limited conservatorship proceedings in Los Angeles County have been totally inadequate.[31] A review of training

---

[27] "Access to the Courts: A Blueprint for Successful Litigation Under the Americans with Disabilities Act and the Rehabilitation Act," p. 346. (See Exhibit 28c)

[28] "Pursuing Justice for People with Cognitive Disabilities," Partners in Justice. (See Exhibit 28e)

[29] Ibid.

[30] "I'm OK – You're OK: Educating Lawyers to 'Maintain a Normal Client-Lawyer Relationship' with a Client with a Mental Disability," Journal of the Legal Profession, 28 J. Legal. Prof. 65 (2003-2004). (See Exhibit 28d)

[31] Whether the training programs and materials in other counties are better or worse is not known. A survey of the probate courts in each county needs to be conducted to determine whether the Superior Court of the State of California is fulfilling its obligations under Section 504 and the ADA to ensure access to justice for people with developmental

programs for court-appointed (PVP) attorneys, delegated by the Superior Court to the Los Angeles County Bar Association, shows that attorneys have not been trained about: (1) the basics of each of the types of intellectual and developmental disabilities; (2) how to effectively interview a client by providing accommodations for his or her specific disabilities; (3) criteria for capacity assessments in each of the seven key areas of decision making; (4) how to challenge capacity assessments by professionals or regional centers; (5) procedures available at regional centers to insure that qualified capacity assessments are done in each case; (6) the requirements of the ADA and section 504 as to courts and court-appointed attorneys; (7) federal voting rights laws; (8) less restrictive alternatives to conservatorship; (8) civil rights and constitutional rights of adults with developmental disabilities and how to defend those rights; (9) how to challenge the lack of an investigation by a court investigator or an inadequate investigation; and (10) the prevalence of abuse against people with developmental disabilities, likely perpetrators, the need for scrutiny of relatives who want to become conservators, and how to investigate allegations of abuse.[32]

Suggestions for improving the performance of attorneys who represent clients with developmental disabilities in limited conservatorship proceedings are available in a report published by Spectrum Institute.[33] The report could assist those who seek to develop more effective training programs for such attorneys. Other publications also explain what an attorney would do as an effective advocate for a proposed conservatee. Providing disability accommodations and modifying policies and practices to ensure equal access to justice are an integral part of the process.[34]

The Department of Justice (DOJ) has jurisdiction to receive complaints and conduct investigations into violations of Title II that occur in "All programs, services, and regulatory

---

disabilities in limited conservatorship proceedings.

[32] "A Missed Opportunity: Training Program Fails to Help Attorneys Fulfill Ethical Duties and Constitutional Obligations to Clients with Developmental Disabilities," Spectrum Institute (2014). (See Exhibit 15) "PVP Training on Limited Conservatorships – Part I," Spectrum Institute (2014). (See Exhibit 11) "PVP Training on Limited Conservatorships – Part II," Spectrum Institute (2014). (See Exhibit 12) "Limited Conservatorship Reform in California: Several Areas That Need Improvement," Spectrum Institute (2014). (See Exhibit 13)

[33] Report, "A Strategic Guide for Court Appointed Attorneys in Limited Conservatorship Cases," Spectrum Institute (2014).

[34] "Zealous Advocacy for the Defendant in Adult Guardianship Cases," Clearinghouse Review, Journal of Poverty Law, Vol. 29, No. 9 (January 1996) (See Exhibit 43)

activities relating to . . . the administration of justice, including courts."[35] A complaint may be filed by an individual who believes that he or she *or a specific class of individuals* has been a victim of a Title II violation.[36]

DOJ regulations explain that the provisions of Title II may be interpreted by reference to analogous provisions of Title I which regulates employment practices.[37] Provisions in Title I are instructive as to whether an entity must only respond to requests for accommodation or whether it has an affirmative duty to provide an accommodation even without request.

As a general rule, under Title I an employer must only provide an accommodation when an employee has made a request for one. However, there is an exception to the general rule. No request is needed if the employee's condition "makes it obvious" that an accommodation is required, or "a condition renders the employee incapable of making a request."[38]

Publications of the Equal Employment Opportunity Commission reinforce the principle that employers must provide accommodations even when no request has been made if the employer: (1) knows 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.[39] The example in the guidance memo involves an employee with an intellectual disability. Another publication of the EEOC, in question and answer format, explains that an accommodation for an employee with an intellectual disability is required even if no request is made by the employee.[40]

A Title II Technical Assistance Manual published by the Department of Justice contains provisions pertaining to the obligations of a government program to provide accommodation for a known mental disability. The manual explains that when a recipient of government benefits or services has a mental disability that is known to program personnel, the agency has an obligation to provide reasonable modifications to its policies and practices to ensure

---

[35] "Title II Regulations, Supplementary Information." (See Exhibit 27)

[36] Ibid.

[37] Ibid. Title II Regulations, Section 35.103 – Relationship to other laws.

[38] Cailler v. Care Alternatives of Massachusetts (U.S.D.C. Mass. 2012) Civil Action No. 09-12040-DJC. (See Exhibit 25)

[39] "EEOC Enforcement Guidance," No. 915.002 (2002). (See Exhibit 24)

[40] "Questions and Answers about Persons with Disabilities in the Workplace and the Americans with Disabilities Act," EEOC, Question 10. (See Exhibit 24)

that the person is not denied services or benefits. Requiring someone with a mental disability to request an accommodation would defeat the purposes of Title II.[41]

The provisions of Section 504 and the provisions of Title II of the ADA apply to limited conservatorship proceedings in California. People with developmental disabilities are involuntarily drawn into complicated court proceedings when a petition is filed in court and a notice is served on them. By the very nature of the proceedings, as amplified by allegations in the petition, the court knows that proposed limited conservatees have a variety of disabilities, including and especially those that impair their ability to reason and understand. Therefore, the mere filing of a petition puts the court on notice that it has an affirmative duty to assess the needs of the proposed limited conservatee and to take actions to ensure that he or she is given meaningful access to justice.

It is beyond the scope of this report to explore what modifications to policies and practices the court, its employees and agents must take to fulfill the requirements of federal disability laws. But regardless of the details, steps must be taken. The judges are in charge of the operations of the Superior Court. Court investigators and court-appointed attorneys respond to the administrative directives of the court. Because of their employment status or their status as court-appointed advocates, these personnel are agents of the court. Therefore, their actions implicate the court in potential Title II and section 504 violations. The actions of such agents would also implicate the court in civil rights violations under color of state law.[42]

The proposals made in this report will help the Judicial Branch fulfill its *sua sponte* obligations under these federal laws. The burden cannot be placed on vulnerable adults with developmental disabilities who are required by court order to participate in limited conservatorships. The administrative obligations of the Judicial Branch are fulfilled through activities of the Judicial Council and judges of the Superior Court of the State of California.

The Judicial Council and the Superior Court can delegate some of the court's responsibilities to the court-appointed attorneys who serve at the pleasure of the court. Such delegation, with appropriate oversight, can occur through standards of judicial administration. It can also occur by amending rules of court pertaining to qualifications of court-appointed attorneys in limited conservatorship cases, continuing education requirements, ADA performance standards, and ethical and professional standards. Mandatory training programs for such attorneys, certified for quality and scope, are essential to this process.

In addition to federal mandates for access to justice, California law also requires courts to ensure that people with developmental disabilities have an opportunity for meaningful

---

[41] "Title II Technical Assistance Manual," Section II-3.61000 Reasonable modifications. (See Exhibit 23)

[42] 42 U.S.C. 1983.

participation in limited conservatorship proceedings. "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."[43] Probate courts receive public funds.

The Judicial Branch recognizes that it has obligations to people with disabilities under state and federal law. "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."[44]

Unfortunately, Chapter 5 of the California Rules of Court is premised on the misunderstanding that the duty to provide accommodations requires a request. Rule 1.100 is titled "Requests for accommodations by persons with disabilities." The rule refers to "applicants" and discusses the "process for requesting accommodations," a "response to accommodation request," and the "denial of accommodation request."[45] No mention is made of the duties of judges, court personnel, or court-appointed attorneys to take appropriate steps, without request, to ensure effective communications and meaningful access to justice to involuntary litigants who have intellectual or developmental disabilities.

Court form MC-410 is titled "Request for Accommodations by Persons with Disabilities and Response." That form may be sufficient for people with mobility or communication disabilities who can formulate a request for an accommodation, but what about people with cognitive disabilities that impair their ability to reason and understand?

In 2007, the Access and Fairness Advisory Committee of the Judicial Council was responsible for preparing a brochure for court users.[46] It mentions "psychological or mental illness" in passing, but says nothing more about those conditions. The brochure is premised on the assumption that people with disabilities, including those with intellectual and developmental disabilities, are able to make requests for accommodations.

---

[43] Welfare and Institutions Code Section 4502.

[44] Rule 1.100(b) of the California Rules of Court. (See Exhibit 19)

[45] Ibid.

[46] "For Persons with Disabilities Requesting Accommodations." (See Exhibit 21)

The same year, a companion brochure was published for court personnel.[47] It incorrectly states: "If no request for an accommodation is made, the court need not provide one."[48] This statement should be deleted or the duty to provide accommodations for litigants with cognitive disabilities, without request, should be mentioned too. Better yet, a new brochure should be created to discuss the duty of court personnel to provide accommodations or engage in modifications of policies and practices for litigants who have cognitive or developmental disabilities. Such a brochure, and a corresponding court rule, would help ensure access to justice in proceedings where litigants with such disabilities are involuntary participants, such as in conservatorship proceedings.

Recommendation

Effective Assistance of Counsel

A proposed limited conservatee has a *statutory* right to be represented by counsel from the moment a petition is filed to establish a limited conservatorship. No request for counsel is required. The right to counsel during the initial proceeding is automatic.

"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."[49] The statute is clear that the role of the attorney is to represent the proposed limited conservatee – not the "interest" of the conservatee or the "best interest" of the conservatee.

Once the initial proceeding has concluded and an order has been entered establishing a limited conservatorship, the *statutory* right to counsel is no longer automatic. The right to counsel is triggered by a request from the conservatee, but only if a new proceeding has been initiated that involves a petition to terminate the conservatorship, removal of a conservator, or if the proceeding is for a court order affecting the legal capacity of the conservatee.[50]

When the statutory *right* to counsel does not apply, the court may still appoint an attorney when the court determines that such appointment may be helpful to the resolution of the case or is necessary to protect the person's interests.[51]

---

[47] "Responding to Requests for Accommodations by Persons with Disabilities." (See Exhibit 22)

[48] Ibid.

[49] Probate Code Section 1471(c).

[50] Probate Code Section 1471(a).

[51] Probate Code Section 1470(a).

The discussion here focuses on the right to counsel and the role of counsel during an initial proceeding to establish a limited conservatorship. As mentioned above, prior to an order establishing a limited conservatorship, the right to court-appointed counsel is automatic. Appointed counsel has a statutory duty to represent the proposed limited conservatee.

At this stage of the proceeding, the proposed conservatee is presumed to be legally competent in all respects. As an adult, he or she is fully vested with an array of constitutional rights – rights which the petition may be seeking to take away. These include the right to make decisions regarding residence, medical care, finances, marriage, and education. They also include the rights of intimate association (sex) and expressive association (social contacts). The right to vote also applies.

The proposed conservatee also has statutory rights guaranteed by the Lanterman Act.[52] These include the right to treatment and habilitation services under the least restrictive conditions; a right to dignity, privacy and humane care; a right to religious freedom and practice; and a right to social interaction. They also include the right to make choices in their lives as to where to live, who to interact with, and how to spend their time.[53]

An attorney who is appointed to represent a proposed limited conservatee is therefore obligated to represent a client who has vested rights – fundamental constitutional rights and specifically delineated statutory rights. The limited conservatorship petition is seeking to remove some or all of these valuable rights.

Effective representation of a proposed limited conservatee, therefore, carries with it major professional responsibilities. As will be discussed further below, the duty to provide effective representation not only involves ethical responsibilities, but requires that professional standards be followed. As will also be discussed, the duty to provide effective advocacy is grounded in the Due Process Clause. Because the client has developmental and other disabilities, effective representation also implicates the requirements of the Americans with Disabilities Act. Furthermore, because appointed counsel represents the client pursuant to a court order and is generally paid by the government, the activities of counsel are also governed by the requirements of Section 504 of the Rehabilitation Act.

The duty of counsel to perform in an effective and professional manner is implicit in the mandatory appointment of counsel.[54] An attorney appointed to represent a conservatee must

---

[52] Welfare and Institutions Code Section 4502. (See Exhibit 40)

[53] Ibid.

[54] Conservatorship of Benvenuto (1986) 180 Cal.App.3d 1030, 1037, fn. 6).

vigorously advocate on the client's behalf.[55]

The right of a proposed limited conservatee to effective assistance of counsel has a constitutional foundation. 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."[56]

"The Fourteenth Amendment to the United States Constitution and article I, section 7, subdivision (a) of the California Constitution ensure that an individual may not be deprived of life, liberty or property without due process of law."[57] A meaningful opportunity to be heard – the core of due process – may require the appointment of counsel regardless of whether an action is labeled criminal or civil.[58]

Although a limited conservatorship is a civil proceeding, the consequences to a person with a developmental disability can be devastating.

"The imposition of a court-ordered guardianship results in the massive deprivation of rights. 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 corporation."[59] "In many ways, the deprivation of liberty through an involuntary guardianship is greater than that suffered by a convicted felon. Prisoners retain basic rights to control medical decisions, bodily integrity, the right to conduct their own business affairs, and retain their estate. Wards do not."[60]

"Due process guarantees are implicated when a protected interest is at stake. Guardianship directly infringes on liberty and property issues; as Congress noted more than two decades ago, despite the seemingly benevolent nature of the guardianship system, the consequences of guardianship are very harsh. When the court appoints a guardian, the ward loses all rights

---

[55] Conservatorship of John L. (2010) 48 Cal.4th 131.

[56] Conservatorship of David L. (2008) 164 Cal.App.4th 701, 710.

[57] Salas v. Cortez (1979) 24 Cal.3d 22, 26-27.

[58] Ibid.

[59] Cavey, "Realizing the Right to Counsel in Guardianship: Dispelling Guardianship Myths," *Marquette Elder's Advisor*: Vol. 2: Iss. 1, Article 5. (2000).

[60] Ibid.

to determine anything about his life (Abuses in Guardianship of the Elderly and Infirm: A National Disgrace, *supra*.")[61]

"The consequences, and concurrent due process requirements, when the ward is a person with mental retardation or developmental disability—rather than an elderly person—are the same. As one federal court noted, 'Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process' (*Heryford v Parker*, 396 F2d 393, 396 [10th Cir 1968])."[62]

With these foundational considerations in mind, it bears re-emphasizing that a proposed limited conservatee is entitled to effective assistance of counsel. Having a "real" advocate is not discretionary; it is required. A real advocate adheres to ethical requirements of confidentiality and loyalty. A real advocate defends existing rights and does not surrender them without the consent of the client. A real advocate does not have a "dual role" and does not serve as a de-facto guardian ad litem or become the "eyes and ears of the court."[63]

Like all lawyers, a court-appointed attorney is obligated to keep a client fully informed about the proceedings at hand, to advise the client of his rights, and to vigorously advocate on his behalf.[64] Vigorous defense of the rights of clients in conservatorship cases requires attorneys to engage in a variety of time-consuming activities.[65]

---

[61] In the Matter of the Guardianship of Mark C.H. (Surrogates Court, NY 2010) 28 Misc.3d, at 766.

[62] Ibid.

[63] An attorney who serves a dual role has a per se conflict of interest. (People v. Austin M. (Ill. 2012) 975 N.E.2d 22). Rule 4.125 of the Los Angeles Superior Court gives court-appointed attorneys in conservatorship cases a "secondary duty" to "assist the court in the resolution of the matter to be decided." This rule is not only inconsistent with ethical requirements and professional standards for attorneys in California, it undermines the statutory duty of counsel to represent the proposed limited conservatee. This rule is also unconstitutional because an attorney with a conflict of interest because of a dual role is not providing effective assistance of counsel as required by due process.

[64] Bus. & Prof. Code, § 6068, subd. (c); Conservatorship of David L., supra, at p. 710.

[65] "California Conservatorship Defense: A Guide for Advocates (2010) California Advocates for Nursing Home Reform. Online. Attorneys for proposed limited conservatees are generally not engaging in the type of vigorous advocacy described in this guidebook, at least not in Los Angeles.

The Los Angeles Superior Court has imposed a presumptive upper limit of 12 hours per case for court appointed attorneys who represent limited conservatees.[66] This presumptive limit is not only unrealistic, it may be pressuring attorneys to put in fewer hours in order to please judges who have become increasingly preoccupied with budget concerns.[67]

It is beyond the scope of this report to explain in detail the types of activities that are required of court-appointed attorneys who represent proposed limited conservatees. However, some of those duties are summarized in a new report published by Spectrum Institute.[68] Among those duties are: (1) learning the types of accommodations needed to communicate effectively with the client in view of his or her variety of cognitive and other disabilities as required by Title II of the ADA and section 504; (2) reviewing school records and regional center records; (3) speaking with the client's medical doctor and psychologist; and (4) requesting the regional center to conduct an Individual Program Plan (IPP) Review to determine the current extent of the client's capacities or lack of capacities in each of seven areas.[69] These are activities that most court-appointed attorneys have not been doing.

An attorney should not represent a client in a matter about which the attorney has not been sufficiently educated. Court-appointed attorneys seem to be relying on training programs

---

[66] "General Order Limiting Hours and Compensation of PVP Attorneys." (See Exhibit 9)

[67] A review of dozens of cases in Los Angeles by Spectrum Institute found that over the course of several months, the average number of hours reported by court-appointed attorneys in their fee claims was about 6.5 hours. Attorneys who strayed from this average were receiving fewer appointments than those who kept the hours low. An attorney who spends less than seven hours on a limited conservatorship case is not providing effective representation to the client. When travel time is considered, and time waiting in court is subtracted, there would only be about two hours allocated for investigation of the case, reading regional center and school records, interviewing the client, speaking with regional center workers, talking to the court investigator, and questioning the proposed conservator. Add to that the need to speak with the doctor who submitted the medical capacity declaration. Plus there is a need to search for clues about the capacity of the client to make decisions, with or without support, in several other areas. Effective advocacy would most likely involve at least 24 hours, not 12 hours, in *each* case. Considering the general order imposing a 12 hour presumptive limit, and with competition or perceived competition among attorneys for appointments to these cases, one would wonder whether these attorneys would dare risk putting in that many hours in each case.

[68] "Individual Program Plan (IPP) for Limited Conservatorships: An Essential Advocacy Tool for Court-Appointed Attorneys," Spectrum Institute (2015). (See Exhibit 17)

[69] Ibid.

mandated by the courts. They probably assume that court-mandated educational programs meet the minimum requirements for competency. Unfortunately, that assumption is not true. The training programs, at least in Los Angeles County, are failing to give attorneys the factual, legal, and scientific information they need in order to provide effective representation.

At the core of limited conservatorship cases are legal and factual issues involving capacity to make major life decisions in several areas: medical, financial, educational, residential, marital, social, and sexual. At the very least, an effective advocate would first acquire legal and scientific knowledge about capacity assessments in these key areas. They would know the legal and scientific criteria for each type of assessment. They would learn the credentials that a "qualified individual" would possess in order to make such forensic assessments. They would determine whether the person who made the assessment in a specific case had proper training, used appropriate criteria, and had the requisite credentials to do so. They would have been taught how to challenge assessments that are lacking in any respect.

From what our study of the limited conservatorship system has revealed so far, court-appointed attorneys are not being trained on these issues nor are they raising appropriate objections in court to evaluations, assessments, and reports that lack a proper evidentiary or scientific foundation.[70] As a result, the core function of the court in a limited conservatorship proceeding – making sure that capacity assessments are based on clear and convincing evidence – lacks integrity. That deficiency alone undermines the right of a proposed limited conservatee to due process of law.

By and large, court-appointed attorneys are not having an expert appointed to assist them in evaluating and assessing the capacities of the client in these key areas, or in helping them determine whether lesser restrictive alternatives to conservatorship are available. Since their clients are generally indigent, these attorneys can ask the court to appoint an expert to assist the court-appointed attorney in defending his client against the allegations in the limited conservatorship petition.

"When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which such expert evidence is or may be required. The court may fix the compensation for such services, if any, rendered by any person appointed under this section, in addition to any services as a witness, at such amount as seems

---

[70] "Comments of a Court-Appointed Attorney on Using the IPP Process." (See Exhibit 17a) "Views of a PVP Attorney on Training Program in Los Angeles." (See Exhibit 34)

reasonable to the court."[71] The costs of medical experts appointed to assist counsel representing a limited conservatee would be paid for by the county.[72]

Alternatively, a court-appointed attorney can ask the regional center to initiate an IPP Review process for the purpose of having an assessment done by a "qualified individual" to determine whether the client lacks capacities in the key areas, and if capacity is lacking, whether a lesser restrictive alternative to conservatorship is available to help the client make decisions (with sufficient supports and services).[73] The costs of an IPP Review are the responsibility of the regional center.

Court-appointed attorneys must act competently in the representation of a proposed limited conservatee. Failure to act competently violates professional standards.[74] To act competently, an attorney must apply the (1) diligence, (2) learning and skill, and (3) mental, emotional, and physical ability reasonably necessary for the performance of such service.[75] If an attorney does not possess the requisite knowledge or skill, the attorney must acquire such before accepting responsibility for a case.[76]

Although the court has an obligation under Title II of the ADA and section 504 of the Rehabilitation Act to make sure that attorneys who are appointed to represent clients with developmental disabilities are competent to do so, a lawyer has an independent obligation in this regard as well. If the training programs mandated by the court are not sufficient, a court-appointed attorney must obtain an education elsewhere. Unfortunately, it appears that neither the courts nor the attorneys are taking the necessary steps to insure that representation of people with developmental disabilities is effective in limited conservatorship proceedings.

Regardless of the reasons for educational deficiencies, performance is deficient when an attorney fails to investigate relevant facts (e.g., capacity, less restrictive alternatives) and fails to consult an appropriate subject matter expert. Such deficiencies would not only be grounds for professional discipline, they could also subject an attorney to civil liability for

---

[71] Evidence Code Section 730.

[72] Evidence Code Section 731. Conservatorship of Scharles (1991) 233 Cal.App.3d 1336, 1341.

[73] See fn. 89.

[74] Rule 3-110 of the Rules of Professional Conduct of the State Bar of California.

[75] Ibid.

[76] Ibid.

malpractice. Furthermore, such a failure would be grounds for an appeal or the filing of a writ by a limited conservatee based on the denial of effective assistance of counsel.[77]

Judges and court-appointed attorneys have been operating under the radar for far too long. No one has been monitoring the limited conservatorship system. There is no one in charge. As a result, participants go through the motions but, especially with budget cuts, their activities are severely lacking in competence. Attorneys are not properly trained on issues crucial to effective advocacy for people with developmental disabilities. The training of court investigators is also deficient. Regional centers file pro forma reports with recommendations made by staff members who lack assessment criteria and who have inadequate training. Judges are overburdened and are too focused on budgetary issues.

Guidance to trial courts and court-appointed attorneys is not coming through the normal appellate process. Contested hearings in limited conservatorships are rare. Appeals are virtually nonexistent.[78] As a result, appellate judges never weigh in to provide guidance on what practices are erroneous or an abuse of discretion.

Judges in each county are allowed to establish policies and engage in practices as they see fit. Such a makeshift approach to the operations of the limited conservatorship system throughout the state raise serious constitutional concerns.[79]

Spectrum Institute is not the only organization with concerns about the limited conservatorship system in California. A report released last year by the Coalition for Compassionate Care of California pointed to significant operational deficiencies in the way limited conservatorship cases are processed.[80] Concerns raised in that report involve the performance of regional centers, court investigators, and court-appointed attorneys.

People with developmental disabilities are bearing the brunt of these deficiencies. Their lives are being adversely affected and their rights are being routinely violated. The Judicial Branch has a constitutional duty, as well as obligations under Title II of the ADA and Section 504 of the Rehabilitation Act to address these problems.

---

[77] In re Conservatorship of David L. (2008) 164 Cal.App.4th 701.

[78] "Legal System Without Appeals Should Raise Eyebrows," Daily Journal, 2-10-15. (See Exhibit 31)

[79] Article IV, Sec. 16 of the California Constitution states that laws of a general nature shall be uniform in operation. (See Exhibit 14)

[80] "*Thinking Ahead Matters*: Excerpts from a New Report on the Limited Conservatorship System." (See Exhibit 37)

Research by Spectrum Institute

The Disability and Abuse Project of Spectrum Institute started reviewing the operations of the limited conservatorship system in California after three specific cases in Los Angeles County came to our attention. Each case involved serious violations of the rights of proposed or actual limited conservatees. The conduct of court-appointed attorneys was implicated in each situation.

The first case (Mickey) involved allegations of abuse being committed by his parents who were his conservators. The allegations were made by Mickey's brother. When we investigated the matter, it appeared that Mickey's court-appointed attorney had not conducted a thorough investigation of the abuse allegations. Mickey, who had been hospitalized after being removed from the home by Adult Protective Services, was returned to the custody of his parents. A few weeks later he died under suspicious circumstances. Had the attorney done a proper investigation, Mickey may have been placed in an alternative living arrangement where he would have received proper care.

The second case (Greg) involved violations of the social rights of a limited conservatee. A court ordered Greg, an autistic young man who has considerable capacities, to visit with his father every third weekend, despite Greg's repeated objections to doing so. Greg's father required him to attend church, notwithstanding Greg's expressed desire not to do so. After ongoing litigation over this mandatory visitation, the court decided to put an end to the litigation by stripping Greg of the right to make any social decisions. Greg's court-appointed attorney failed to protect the constitutional rights of her client. She treated Greg like a hostile witness, trying to get him to make concessions under cross-examination in court. Even though Greg held firm to his desire not to visit with his father, the court removed his social rights. Greg now lives in social servitude.[81]

The third case (Stephen) involved ADA violations by a court-appointed attorney. It also brought to our attention the routine violation of the voting rights of limited conservatees. Stephen is autistic and mostly nonverbal. The attorney refused to honor Stephen's chosen method of communication. Even with our intervention, the attorney still did not want to allow Stephen to use facilitated communication. The voting rights issue was raised when Stephen's mother asked the attorney if her son could keep his right to vote. The attorney said that voting was inconsistent with the concept of conservatorship. Our intervention eventually caused the attorney to back down and Stephen kept his right to vote.

Stephen's case caused us to investigate the voting issue further by looking into court records in dozens of other cases. We discovered that judges in Los Angeles were routinely stripping about 90 percent of limited conservatees of their right to vote. We filed a complaint with the

---

[81] Information about this case is available online. The case also alerted us to the failure of judges to adhere to requirements of the Americans with Disabilities Act.

United States Department of Justice. The complaint is still pending. We also convened a voting rights conference from which came the idea to introduce a bill to make it more difficult for judges to take voting rights away from limited conservatees. That measure, Assembly Bill 1311, was passed by the Legislature and enacted into law in 2014.

Our experiences with these three cases caused us to wonder whether they were symptoms of a larger problem or whether they were exceptions. We decided to inquire further. We examined many more case files, convened another conference, interviewed parents, filed administrative records requests, met with judges and attorneys, and attended training programs for court-appointed attorneys. What we discovered shocked us. We found a system that routinely and systematically violated the rights of people with developmental disabilities. We discovered a system that was on "auto pilot' and that has no one in charge. There is no monitoring or oversight. Although most of our research involved Los Angeles County, we believe similar problems are occurring in other parts of the state.

Our research activities were so time consuming that we eventually had to create a separate project which is now known as the Disability and Guardianship Project.[82] We have published numerous reports and essays identifying the problems we have found and have been making recommendations to improve the situation.

Outreach to Officials and Agencies

Our initial research efforts resulted in the publication of a preliminary report which we sent to various public officials, including the Chief Justice and Judicial Council of California.[83] We also sent letters to the Attorney General, the Director of the Department of Developmental Services, and the President of the State Bar of California. We testified before the Senate Judiciary Committee about the need for reform.[84] We also made a presentation to the Probate and Mental Health Advisory Committee of the Judicial Council.

Other than the enactment of AB 1311 on voting rights, little has changed in the limited conservatorship system. It is pretty much business as usual, with participants engaging in the same practices they have been for the past 35 years when the limited conservatorship system was created. Federal and state constitutional and statutory rights of people with developmental disabilities are routinely violated.

---

[82] The project has a website on which our publications can be found.

[83] See (Exhibit 33)

[84] "Limited Conservatorships: Systematic Denial of Access to Justice," A Report Submitted to the Senate Judiciary Committee on March 24, 2015. Online For key findings of that report, see Exhbit 42.

We asked the Judicial Council to create a task force to review the system and all of its components. That request was rejected due to budget concerns. We suggested that the Legislature create a task force for the same purpose. We have not received a response.

Justice Harry Hull, Chairperson of the Rules and Projects Committee of the Judicial Council, suggested that we direct our findings and recommendations to the Probate and Mental Health Advisory Committee. We were informed that the Advisory Committee would work with the Center for Judicial Education and Research to investigate and respond to our proposals. The Advisory Committee apparently has time and staffing allocated for this purpose.

Having explored all other avenues for relief at the state level of government, we are following Justice Hull's suggestion. While exhausting of state remedies is not a prerequisite for federal relief, we prefer to give state officials in the Judicial Branch an opportunity to take appropriate measures to correct the problems we have identified. The limited conservatorship system was entrusted by the Legislature to the Judicial Branch. It is therefore the responsibility of the judiciary to bring the system into compliance with constitutional mandates, state statutes, and the requirements of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. The proposals that follow should point the Chief Justice and the Judicial Council in the right direction.

Proposals to Judicial Council

Spectrum Institute has been in communication with the Judicial Council of California for more than a year.[85] A conversation about problems with the limited conservatorship system started when we wrote to the Chief Justice in May 2014. We made a presentation to the Probate and Mental Health Advisory Committee in November 2014 in San Francisco.[86] We later met in person with Justice Harry Hull in Sacramento in March 2015.

We presented the Judicial Council with 10 statewide concerns: (1) lack of uniform operation of the law as required by the California Constitution; (2) confusion about the scope of representation of clients by court-appointed attorneys; (3) violations of ethical duties of confidentiality and loyalty by court-appointed attorneys; (4) inadequate requirements for qualifications of court-appointed attorneys and lack of proper training; (5) failure of the Department of Developmental Services to provide adequate oversight of regional centers; (6) lack of sufficient coordination of regional centers by the Association of Regional Center Agencies; (7) inadequate training of court investigators; (8) inadequate training of judges who preside over limited conservatorship proceedings; (9) failure to educate all participants about the federal voting rights of limited conservatees; and (10) lack of oversight of the

---

[85] Communications with the Judicial Council. (See Exhibit 33)

[86] Information about the meeting is found on our website.

limited conservatorship system by any one official or agency – no one is in charge of the system.[87]

Because the concerns were so numerous and involved all participants in the limited conservatorship system, we felt that a task force convened by the Judicial Branch or by the Legislative Branch would be the most appropriate way to study the problems and propose solutions. However, that does not appear to be feasible.

We have therefore decided to follow the suggestion of Justice Hull and to proceed by submitting suggestions to the Probate and Mental Health Advisory Committee and the Center for Judicial Education and Research. Rather than overwhelming these advisory committees with a comprehensive approach that tackles all of the issues at one time, we are focusing our first set of proposals on the role of court-appointed attorneys. Other proposals will be submitted in the future to deal with issues related to the performance of court investigators, judges, and regional centers.

Proposed Changes to Probate Rules

Article Six, Section 6 of the California Constitution directs the Judicial Council to adopt rules for practice and procedure that are not inconsistent with statute. To implement this directive, the Judicial Council has adopted the California Rules of Court.

The California Rules of Court are divided into titles and chapters, each pertaining to a different area of practice. Title 7 focuses on various aspects of probate practice. Conservatorships, including limited conservatorships, are governed by the Probate Code and are processed by probate judges, so our proposals fall under Title 7.

There are no rules that specifically govern the functions of judges, attorneys, and other participants in limited conservatorship proceedings. Chapter 22 contains rules pertaining to all conservatorship proceedings regardless of whether general or limited or whether they are of the person or of the estate. Because these rules focus on a variety of participants in such proceedings, they will not be dealt with here. This report deals solely with court-appointed attorneys in limited conservatorship proceedings.

Chapter 23 is devoted to court-appointed attorneys in probate proceedings. There is only one rule in this chapter. Rule 7.1101 involves the qualifications and continuing education requirements of counsel appointed by the court in guardianships and conservatorships. That rule will be discussed later in this report.

---

[87] "Ten Statewide Concerns About the Limited Conservatorship System." (See Exhibit 14)

We are recommending that the Judicial Council create a new chapter – Chapter 24 – focused solely on limited conservatorships. These proceedings have unique features and pose special challenges to attorneys and judges – different from general conservatorships and guardianships and different than dealing with seniors and children. Limited conservatorships, and the people who are involved in these proceedings, deserve to have their own chapter of rules.

Creating a new chapter of rules for limited conservatorships would be consistent with the current statutory scheme. The Legislature determined some 35 years ago to enact a new set of statutes for people with developmental disabilities who may need the protection of the court. The time has come for the Judicial Council to recognize that differences between seniors who are in their waning years, and people who have developmental disabilities who may have decades ahead of them, warrant specific rules for the latter.

We are proposing three new rules for Chapter 24: Rule 7.2002 for ADA Performance Standards; Rule 7.3002 for Ethical and Professional Standards; and Rule 7.4002 for Qualifications and Continuing Education Standards. If court-appointed attorneys comply with the requirements of these new rules, people with developmental disabilities will receive the quality of counseling and advocacy services to which they are entitled. Adoption of and adherence to these new rules will also give them the access to justice, as the ADA, Section 504, and the Due Process Clause require.

Specific language for these proposals is not being submitted at this time. Developing such specifics is something that the advisory committees and Judicial Council staff would develop. Instead, we are submitting general guidelines for each proposed rule. This framework will inform the specifics as they are developed by committee members and staff.

Recommendation Rule 7.2002 – ADA Performance Standards

(1) Applicable Law

Section 1 of this rule would inform attorneys that when they are appointed by the court to represent proposed limited conservatees, their performance as court-appointed counsel must comply with the Americans with Disabilities Act. Because they are acting under court appointment and are being paid by the government, the provisions of Title II of the ADA apply. Title II governs state and local government services. Corresponding provisions of Section 504 of the Rehabilitation Act also apply since the Superior Court of the State of California receives federal funding. Court-appointed attorneys must also comply with the requirements of the Lanterman Act since the attorneys receive public funds.[88]

[88] Welfare and Institutions Code Section 4502. (See Exhibit 40)

(2) ADA Assessment and Plan

Section 2 of this rule would require attorneys, as soon as they are appointed in a limited conservatorship proceeding, to determine the types of disabilities of the client and formulate a plan to enable the client to interact with the attorney and participate in the process (both in and out of court) in the most effective manner possible. The goal is to provide equal access to justice for a litigant who has intellectual, developmental, and/or other disabilities.

To develop such a plan, a court-appointed attorney should contact the regional center and speak with the case worker. The case worker has had experience with the client and would have valuable information for the attorney on how to develop a meaningful lawyer-client relationship. Regional center records should be obtained and reviewed, including the most recent IPP, IEP, and clinical evaluations.

If the consultation with the regional center and review of records are not sufficient to develop an effective ADA plan, the attorney should ask the court to appoint an ADA accommodation expert pursuant to Evidence Code Section 730. The costs for such an expert would be considered a necessary expense to legal representation and would be reimbursed when the attorney submits a fee claim with the court. The county would pay for the reimbursement.

If ancillary supports and services are needed in order to insure effective communications and access to justice, the attorney should file a request for accommodations form (MC-410) with the court. Since these supports and services are necessary as a component of effective representation, the cost would be reimbursed as a part of the fee claim process and would be paid by the county when court-authorized fees and costs are submitted.

This section would also advise attorneys not to accept appointments to limited conservatorship cases unless they have received the necessary education and training on how to effectively represent clients with intellectual and developmental disabilities. Such training would include ADA requirements and specifics on how to provide disability accommodations for each of the various types of disabilities (intellectual, developmental, communication, mobility) that attorneys may encounter in limited conservatorship proceedings.

Representing clients with intellectual and developmental disabilities presents a challenge to attorneys. It requires special education and training, as well as patience and understanding.

(3) Noncompliance

This section would inform attorneys that failure to comply with disability accommodation and modification requirements of federal and state laws may have legal consequences. Noncompliance could result in the filing of a complaint with the State Bar of California, either for disability discrimination or violation of professional standards. It could also trigger

the filing of a complaint with the United States Department of Justice for a violation of Title II of the ADA or section 504. Anyone can file a complaint with the State Bar or the Department of Justice, whether it is the client, someone on behalf of the client, another attorney, a judge, or an advocacy organization.

Failure to adhere to ADA and Section 504 requirements may also give rise to civil liability for negligent performance of legal services.

Recommendation Rule 7.3002 – Ethics and Professional Standards

This rule would inform attorneys who are appointed to represent clients in limited conservatorship proceedings that the normal rules of ethics and professional standards governing attorney-client relationships apply to these proceedings as well.

(1) Ethics

This section would make it clear that regardless of whether they have cognitive or other disabilities, all clients are entitled to the same ethical protections of loyalty and confidentiality. These ethical standards apply to limited conservatorship proceedings.

Loyalty. This section would clarify that a duty of loyalty to the client precludes an attorney from surrendering the rights of a client without the client's express permission. The duty of loyalty also precludes an attorney from advancing arguments that may be contrary to or undermine the existing constitutional and statutory rights of the client or may result in the loss of those rights.

Confidentiality. This section would clarify that communications between the attorney and the client in a limited conservatorship proceeding are confidential. Information obtained from the client may not be shared with the court, court investigator, or petitioner, without the express approval and informed consent of the client. It would also clarify that reports or pleadings filed with the court may not disclose information obtained through confidential communications with the client or divulge work product materials that may be adverse to the interests or rights of the client.

Conflict of interest. This section would clarify that legal representation must be free of any conflict of interest. An attorney may not have a "secondary duty" of assisting the court in the resolution of a case. Local court rules that attempt to impose such a secondary duty should be preempted. It would also clarify that an attorney may not perform services or give advice to a petitioner as doing so would create a conflict of interest or give rise to the appearance of a conflict of interest.

(2) Professional Standards

This section would clarify the professional role of an attorney appointed to represent a client in a limited conservatorship proceedings.

Advocate. A court-appointed attorney is an advocate for the client, not a guardian-ad-litem or a mediator. As an advocate, the role of the attorney is to advance the stated wishes of the client, to the extent they can be ascertained with or without support and accommodation. Best-interests advocacy is the role of a guardian-ad-litem, not a court-appointed lawyer.

When the wishes of the client are unknown or unclear, an attorney who is acting as an advocate should defend the existing constitutional and statutory rights of the client from infringement. However, an attorney is not required to make frivolous arguments. Clients in limited conservatorship proceedings, prior to adjudication of competency, are presumed to be competent and have the same constitutional and statutory rights as any other person.

In situations when it is factually indisputable that the client lacks the capacity to make decisions in one or more areas, an attorney for a proposed limited conservatee need not object to a limited conservatorship on that aspect of the case. The attorney should require that evidence of such incapacity is supported by clear and convincing evidence and that lesser restrictive alternatives to conservatorship are not feasible. The attorney may submit the matter without presenting evidence on the issue if credible evidence supporting the retention of that right does not exist. The attorney, however, may not stipulate to the loss of rights without the approval and informed consent of the client.

(3) Preparation, Trial, Appeal

An attorney appointed to represent a client in a limited conservatorship proceeding has a constitutional duty to provide effective representation. Fulfilling this duty is essential to maintain the integrity of the judicial process.

This section would clarify that an attorney representing such a client must be prepared. This involves fulfilling the ADA duties described in the prior rule, as well as the types of preparations that are required in any case. The attorney has a duty to investigate all relevant facts pertaining to the client's disabilities, decisional capacities or incapacities, lesser restrictive alternatives to conservatorship, the quality of the professional assessments done by the regional center, and whether the factual allegations in the petition are supported by clear and convincing evidence.

Performance standards would also clarify that in such cases, an attorney should request the appointment of experts if that is necessary to provide effective representation to the client.

This section should contain a provision that part of case preparation requires an attorney to request the regional center to conduct an Individual Program Plan Review (IPP Review) focused on the need for, or alternatives to, a limited conservatorship.[89] A regional center client, or authorized representative, is entitled to request such a review. It is a right, not a discretionary matter. IPP Reviews are sometimes requested for a transition or for a major life event. Conservatorship is such an event. The attorney can request the regional center to hire a qualified individual to assess the capacities of the client and whether supports and services would obviate the need for a conservatorship altogether or make it unnecessary to transfer authority to make some decisions from the client to a conservator. This procedural tool should be used in every case.

IPP Reviews are not alien to the Judicial Council. In the context of Juvenile Court proceedings, the Judicial Council has created court forms that authorize a court to order the development or review of an IPP plan.[90] In the context of a limited conservatorship proceeding, a court order is not necessary since the court-appointed attorney, as authorized representative of the client, can request such a review. The cost of conducting such a review and hiring an qualified individual to conduct an assessment is covered by the regional center. While the attorney may expend a few more hours in services, that cost will be covered by the county, not the court. There is every reason to include the IPP Review process in the performance standards for court-appointed attorneys.

Preparation also requires knowledge of all relevant statutory and all applicable case law pertaining to the issues involved in the case. This includes constitutional protections, rights specified in the Lanterman Act, and legal criteria relevant to an assessment of each of the areas of capacity at issue.

An attorney should request a contested evidentiary hearing on any issue for which the petitioner has not supplied clear and convincing evidence or when evidence is in dispute. A contested hearing should also be requested when there is a dispute as to who should serve as the limited conservator.

Even though an attorney appointed by the Superior Court would not represent the client on appeal, if the attorney believes that an arguable issue exists for an appeal, the attorney should advise the client of the right to appeal and should file a notice of appeal on behalf of the client to preserve the issue for appellate review. During a limited conservatorship proceeding, an attorney should make objections or file motions to preserve any arguable issues for a potential appeal.

---

[89] "Individual Program Plan (IPP) for Limited Conservatorships: An Essential Advocacy Tool for Court-Appointed Attorneys," Spectrum Institute (2015) (See Exhibit 17)

[90] Attachment to Order Designating Educational Rights Holder, Form JV-535(A). (See Exhibit 30)

Recommendation Rule 7.4002 – Qualifications and Continuing Education Standards

Chapter 23 contains a rule on court-appointed attorneys in probate cases. The one rule in that chapter – Rule 7.1101 – deals with qualifications and continuing education required of counsel appointed by the court in guardianships and conservatorships.

This report will not discuss this rule other than to note that its scope is too broad and its provisions too general to insure effective advocacy by attorneys who represent clients in limited conservatorships. Requirements for attorneys who represent children in guardianships, or who represent seniors in financial disputes in estate conservatorships, have little to do with requirements for effective advocacy of people with developmental disabilities in limited conservatorships.

We are not suggesting revisions to Rule 7.1101 as that would implicate other interest groups, such as those who work in children's rights or seniors' rights. Instead, we believe the best approach is to create a new rule to govern the qualifications and education standards for attorneys who represent clients in limited conservatorship proceedings.

Current qualifications and education standards in Rule 7.1101 allow courts to appoint attorneys who know nothing about people with developmental disabilities, the medical and psychological aspects of such disabilities, the services and procedures of regional centers, criteria for capacity assessments, ADA requirements, alternatives to conservatorships, or constitutional and statutory rights of people with developmental disabilities. An attorney could take educational classes in trusts and estates, and represent seniors in some estate conservatorships, and qualify for an appointment in a limited conservatorship case.

The Los Angeles County Superior Court has local rules that contain additional qualifications for attorneys who want appointments to limited conservatorships. Rule 4.124(a)(5) states that "the attorney must understand the legal and medical issues arising out of developmental disabilities and the role of the Regional Center."[91] In theory this is good. In practice it is meaningless.

There is no definition or any guidelines as to what this requirement means. Attorneys self-certify that they are qualified. There is no monitoring or auditing as there is by the State Bar when attorneys self-certify they have met continuing education requirements. At least with the State Bar, there are some random audits. But the most important defect of this rule is that the training programs mandated by the court and conducted by the Los Angeles County Bar Association do not include adequate information on these topics.

---

[91] Rule 4.124: Probate Volunteer Panel – Requirements for Specific Areas of Interest. (See Exhibit 6)

Whether they are public defenders or private attorneys, lawyers who are appointed by a court to represent clients in limited conservatorship proceedings should be required to take classes on subjects that are necessary for effective advocacy. In order to qualify for continuing education credits, such classes should be certified by the Center for Judicial Education and Research.

The Center should develop standards for such training programs to insure that all necessary topics are covered, the content of the trainings are accurate, and the credentials of presenters are sufficient. The Center should work with public defender offices and county bar associations to develop appropriate criteria, in consultation with one or more organizations that advocate for the rights of people with intellectual and developmental disabilities.

A new rule on qualifications and continuing education standards for limited conservatorship appointments should go into effect 18 months after the rule is adopted. This would give organizations, agencies, and individuals time to prepare for the transition.

Prior to being appointed to represent a client in a limited conservatorship case, an attorney would need to certify that he or she has taken 18 hours of basic training. Basic training would include presentations and materials on each of the following topics, which could be grouped appropriately into three seminars.

Seminar I (6 units): the various types of developmental disabilities and how they affect clients; how to effectively interview people with developmental disabilities; how to fulfill ADA requirements and provide disability accommodations to clients with intellectual, developmental, communication, and mobility disabilities.

Seminar II (6 units): regional center functions and services; reviewing regional center records Individual Program Plan, Individual Educational Plan, and clinical evaluations; requesting an IPP Review and appointment of a qualified individual to make assessments; lesser restrictive alternatives; abuse of people with developmental disabilities.

Seminar III (6 units): legal criteria for capacity assessments in all key areas; qualifications of those who make assessments; how to evaluate and challenge capacity assessments; how to understand a medical capacity declaration and how to interview the professional who made the assessment; federal voting rights; constitutional rights of limited conservatees, including freedom of association; rights under the Lanterman Act.

Certified refresher classes of six units involving one or more of the topics mentioned above should be required each year. Every other year, two units of a refresher class should include information on abuse of people with developmental disabilities and how to investigate allegations of abuse.

Proposed Changes to Standards of Judicial Administration

Article Six, Section 6 of the California Constitution directs the Judicial Council to adopt rules for court administration that are not inconsistent with statute. To implement this directive, the Judicial Council has adopted the Standards of Judicial Administration.

The Standards for Probate Proceedings – Title 7 – have not been developed in the way that standards for cases involving children and families have been. There is only one standard in Title 7. Standard 7.10 pertains to settlements or judgements in certain civil actions.

We propose that a new standard be created – Standard 7.20 – for limited conservatorship matters. The new standard should be patterned after Standard 5.40 for Juvenile Court matters. The policies and explanations in Standard 5.40 are impressive.

Recommendation Standard 7.20 – Limited conservatorship matters

The following language is borrowed from Standard 5.40, with minor modifications to make the language relevant to limited conservatorship proceedings.[92] We urge the Judicial Council to adopt a standard such as this.

(a) Standards of representation and compensation

The presiding judge of the probate court should:

(1) 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.

(2) In conjunction with other leaders in the legal community, ensure that attorneys appointed to handle limited conservatorship matters are compensated in a manner equivalent to attorneys appointed by the court in other types of cases.

(b) Training and orientation

The presiding judge of the probate court should:

(1) Establish relevant prerequisites for court-appointed attorneys who represent clients in limited conservatorship matters in the probate court.

---

[92] Standards of Judicial Administration, Standard 5.40 – Juvenile court matters (See Exhibit 29)

(2) Develop orientation and in-service training programs for judicial officers, attorneys, and court personnel, to ensure that all are adequately trained concerning all issues relating to the rights of limited conservatees and proposed limited conservatees under the Lanterman Act, the Americans with Disabilities Act, and federal and state voting rights laws.

(3) Ensure that court-appointed attorneys who appear in limited conservatorship proceedings, 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 such matters; and encourage the leaders of public law offices that have responsibilities in limited conservatorship proceedings to require their attorneys who appear in such proceedings to have at least the same training and continuing legal education required of court-appointed attorneys.

Conclusion

Proposals to improve guardianship and conservatorship systems are not only coming from disability rights organizations and coalitions of service providers. State court administrators realize the need for improvement as well.

"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. 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."[93]

When advocates, service providers, and court administrators all agree on the need for reform, the convergence of such interests suggests that the time for change is here.

We anticipate a thorough review of this report and these proposals by the Judicial Council and its advisory committees. We would like to be a part of the review process. Recommendations endorsed by the advisory committees will likely be circulated among other lawyers and judges for review and comment.

We look forward to the day when attorneys appointed to represent clients in limited conservatorship proceedings are well educated on relevant issues and provide effective representation to their clients. This will have a cascading effect on the other components of the limited conservatorship system.

---

[93] "The Demographic Imperative: Guardianships and Conservatorships," Conference of State Court Administrators (2010). (See Exhibit 44)

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.

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.

Spectrum Institute

A Nonprofit Organization Engaging in
Research, Education, and Advocacy

Executive Committee

Nora J. Baladerian, Ph.D.
Clinical and Forensic
Psychologist

Thomas F. Coleman
Attorney at Law

Jim Stream
Executive Director
Arc of Riverside

Disability and Guardianship Project

Advisors[1]

Tony Anderson
Executive Director
Arc of California
Sacramento, CA

Arlene Diaz
Office of the Public
Guardian
Santa Barbara, CA

Angela Kaufman
ADA Compliance
Officer
City of Los Angeles
Los Angeles, CA

Mark Olson
Parent Advocate
Service Provider
Henderson, NV

John Dickerson
Executive Director
Arc of Indiana
Indianapolis, IN

Mike Danneker
Executive Director
(Retired)
Westside Regional
Center
Los Angeles, CA

Mark Dubin
Attorney at Law
Center for Independent
Living
Miami, FL

Ron Simandle
Parent Advocate
Los Angeles, CA

Anthony Chicotel
Attorney at Law
California Association
for Nursing Home
Reform
San Francisco, CA

Teresa Thompson, Ph.D.
Parent Advocate
Joshua Tree, CA

Patty Ann Murphy
Attorney at Law
Lancaster, CA

Christina Baldwin
Parent Advocates
Viola, ID

Michael Hazeltine
Parent Advocate
Viola, ID

[1] The views expressed in this report are those of the Executive Committee of the Disability and Guardianship Project of Spectrum Institute. They do not necessarily reflect the views of each advisor to the project.

About the Author

Thomas F. Coleman was born in 1948 in Detroit, Michigan. He graduated as salutatorian from Saint James High School in Ferndale. He attended Wayne State University in Detroit where he graduated in 1970 with a Bachelor of Arts degree.

Coleman attended Detroit College of Law (1970-71) and transferred to Loyola University of Los Angeles School of Law where he graduated, cum laude, in 1973. He opened his law practice in 1974.

Coleman has been a pioneer for equal rights and nondiscrimination his entire life. He co-founded the first Gay Law Students Association in the nation in 1972. Through litigation and political action, Coleman sought to stop police entrapment of gay men. His victory in the California Supreme Court voided the sexual solicitation statute. (Pryor v. Municipal Court (1979) 25 Cal.3d 238) His work for sexual civil liberties also culminated in a victory in the United States Supreme Court. (New York v. Uplinger (1984) 467 U.S. 246)

He worked for many years to promote respect for family diversity and to end marital status discrimination against unmarried individuals and couples. He served as executive director of the Governor's Commission on Personal Privacy (1980-82), a member of the California Legislature's Joint Select Task Force on the Changing Family (1987-1990), principal consultant to the Los Angeles City Task Force on Family Diversity (1985-1988), as chairperson of the Los Angeles City Attorney's Consumer Task Force on Marital Status Discrimination (1990-91), and was the author of a report for the Insurance Commissioner's Anti-Discrimination Task Force (1993-94). He successfully defended California's law prohibiting marital status discrimination in housing from a claim for a religious exemption. (Smith v. Fair Employment and Housing Commission (1996) 12 Cal.4th 1143)

Coleman's political and legal work has always had a public awareness dimension. He knew that judges, legislators, and administrators were mindful of public opinion. He therefore worked to shape public opinion through the media. He has appeared on national television shows many times, as well as being a guest on radio talk shows. Coleman has been quoted hundreds of times in newspapers and magazines from coast to coast.

Coleman's work on disability issues began in 1980 in connection with the Governor's Commission on Personal Privacy. It was on that project that he met Dr. Nora J. Baladerian. Often collaborating with Dr. Baladerian, Coleman has been involved in many campaigns to secure justice and equal rights for people with disabilities. He and Dr. Baladerian founded Spectrum Institute in 1987 and have worked on projects of mutual interest ever since.

Coleman has done volunteer work with the Disability and Abuse Project for several years. He was author of "Abuse of People with Disabilities: Victims and Their Families Speak Out," a report on the 2012 National Survey on Abuse of People with Disabilities. More recently, he became executive director of the Disability and Guardianship Project, an endeavor which seeks to reform guardianship laws and practices. Major emphasis has been in California.

Coleman is married to Michael A. Vasquez. Their marriage ceremony occurred on a ship in international waters in 1981. They affirmed it with a state-recognized ceremony in 2008.

Exhibits to Report

Contents

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

B. Los Angeles Superior Court Rules and Forms for Probate Volunteer Panel

C. Reports and Essays on Court-Appointed Attorneys in Limited Conservatorships

Exhibits online at: www.spectruminstitut.org/attorney-exhibits.pdf

D. Americans with Disabilities Act: Court Rules, Brochures, Forms, Authorities

E. Other Materials