THE JUSTICE GAP

The Judicial Branch Has a Duty to Appoint, Train, and Supervise Attorneys to Effectively Represent Respondents in Guardianship Cases

A Special Report to the Washington Supreme Court

Exhibits

Thomas F. Coleman
Legal Director
Spectrum Institute
March 16, 2016

www.spectruminstitute.org/gap

Contents to Exhibits

RCW 11.88.045

Legal counsel and jury trial—Proof—Medical report—Examinations—Waiver.

(1)(a) Alleged incapacitated individuals shall have the right to be represented by willing counsel of their choosing at any stage in guardianship proceedings. The court shall provide counsel to represent any alleged incapacitated person at public expense when either: (i) The individual is unable to afford counsel, or (ii) the expense of counsel would result in substantial hardship to the individual, or (iii) the individual does not have practical access to funds with which to pay counsel. If the individual can afford counsel but lacks practical access to funds, the court shall provide counsel and may impose a reimbursement requirement as part of a final order. When, in the opinion of the court, the rights and interests of an alleged or adjudicated incapacitated person cannot otherwise be adequately protected and represented, the court on its own motion shall appoint an attorney at any time to represent such person. Counsel shall be provided as soon as practicable after a petition is filed and long enough before any final hearing to allow adequate time for consultation and preparation. Absent a convincing showing in the record to the contrary, a period of less than three weeks shall be presumed by a reviewing court to be inadequate time for consultation and preparation.

(b) Counsel for an alleged incapacitated individual shall act as an advocate for the client and shall not substitute counsel's own judgment for that of the client on the subject of what may be in the client's best interests. Counsel's role shall be distinct from that of the guardian ad litem, who is expected to promote the best interest of the alleged incapacitated individual, rather than the alleged incapacitated individual's expressed preferences.

(c) If an alleged incapacitated person is represented by counsel and does not communicate with counsel, counsel may ask the court for leave to withdraw for that reason. If satisfied, after affording the alleged incapacitated person an opportunity for a hearing, that the request is justified, the court may grant the request and allow the case to proceed with the alleged incapacitated person unrepresented.

(2) During the pendency of any guardianship, any attorney purporting to represent a person alleged or adjudicated to be incapacitated shall petition to be appointed to represent the incapacitated or alleged incapacitated person. Fees for representation described in this section shall be subject to approval by the court pursuant to the provisions of RCW 11.92.180.

(3) The alleged incapacitated person is further entitled to testify and present evidence and, upon request, entitled to a jury trial on the issues of his or her alleged incapacity. The standard of proof to be applied in a contested case, whether before a jury or the court, shall be that of clear, cogent, and convincing evidence.

(4) In all proceedings for appointment of a guardian or limited guardian, the court must be presented with a written report from a physician licensed to practice under chapter 18.71 or 18.57 RCW, psychologist licensed under chapter 18.83 RCW, or advanced registered nurse practitioner licensed under chapter 18.79 RCW, selected by the guardian ad litem. If the alleged incapacitated person opposes the health care professional selected by the guardian ad litem to prepare the medical report, then the guardian ad litem shall use the health care professional selected by the alleged incapacitated person. The

guardian ad litem may also obtain a supplemental examination. The physician, psychologist, or advanced registered nurse practitioner shall have personally examined and interviewed the alleged incapacitated person within thirty days of preparation of the report to the court and shall have expertise in the type of disorder or incapacity the alleged incapacitated person is believed to have. The report shall contain the following information and shall be set forth in substantially the following format:

(a) The name and address of the examining physician, psychologist, or advanced registered nurse practitioner;

(b) The education and experience of the physician, psychologist, or advanced registered nurse practitioner pertinent to the case;

(c) The dates of examinations of the alleged incapacitated person;

(d) A summary of the relevant medical, functional, neurological, or mental health history of the alleged incapacitated person as known to the examining physician, psychologist, or advanced registered nurse practitioner;

(e) The findings of the examining physician, psychologist, or advanced registered nurse practitioner as to the condition of the alleged incapacitated person;

(f) Current medications;

(g) The effect of current medications on the alleged incapacitated person's ability to understand or participate in guardianship proceedings;

(h) Opinions on the specific assistance the alleged incapacitated person needs;

(i) Identification of persons with whom the physician, psychologist, or advanced registered nurse practitioner has met or spoken regarding the alleged incapacitated person.

The court shall not enter an order appointing a guardian or limited guardian until a medical or mental status report meeting the above requirements is filed.

The requirement of filing a medical report is waived if the basis of the guardianship is minority.

(5) During the pendency of an action to establish a guardianship, a petitioner or any person may move for temporary relief under chapter **7.40** RCW, to protect the alleged incapacitated person from abuse, neglect, abandonment, or exploitation, as those terms are defined in RCW **74.34.020**, or to address any other emergency needs of the alleged incapacitated person. Any alternative arrangement executed before filing the petition for guardianship shall remain effective unless the court grants the relief requested under chapter **7.40** RCW, or unless, following notice and a hearing at which all parties directly affected by the arrangement are present, the court finds that the alternative arrangement should not remain effective.

[2001 c 148 § 1; 1996 c 249 § 9; 1995 c 297 § 3; 1991 c 289 § 4; 1990 c 122 § 6; 1977 ex.s. c 309 § 5; 1975 1st ex.s. c 95 § 7.]

NOTES:

Intent—1996 c 249: See note following RCW **2.56.030**.

Effective date—1990 c 122: See note following RCW **11.88.005**.

Severability—1977 ex.s. c 309: See note following RCW **11.88.005**.

Disability and Guardianship Project

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

January 15, 2016

Chief Justice and
Associate Justices
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Request for Modifications (Per ADA and Section 504)
Access to Effective Advocacy in Guardianship Proceedings

To the Court:

The Disability and Guardianship Project of Spectrum Institute submits this request to the Supreme Court of Washington in its administrative role as a "public entity" responsible for ensuring that the judicial branch provides access to justice to people with disabilities in legal proceedings conducted in Washington. A copy of this request is therefore being sent to the court's ADA coordinator.

This request for modification of policies and practices is made pursuant to Title II of the Americans with Disabilities Act. Because the judicial branch of Washington receives federal funding for one or more of its functions, the request is also being made pursuant to Section 504 of the Rehabilitation Act of 1973.

The request is made on behalf of two classes of individuals who have not received or will not receive access to justice in guardianship proceedings. The first class includes adults with intellectual and developmental disabilities who are currently under an order of guardianship due to a finding of incapacity to make decisions in one or more major life activities. The second class includes adults with such disabilities who are currently involved in such a proceeding as a respondent or who will be so involved in the future.

Due to cognitive and communication disabilities, these classes of individuals are not able to make a request for modification of policies and procedures on their own behalf. However, a request for modification is not required when a public entity is aware that persons who use its services have a disability, that the disability impairs them from having meaningful participation in such services, and that the nature of the disability precludes or impairs their ability to request modifications or accommodations that would allow them to have meaningful access to such services. Even though a request is not necessary, this request is being made to alert the court to its sua sponte duties.

The general nature of the services that are the focus of this request involve access to justice in guardianship proceedings. Due to cognitive and communication disabilities, adults who have such conditions are not able to participate in these proceedings in a meaningful way – to defend their

existing rights and to advocate for the retention of such rights – without an appropriate accommodation. One way the judicial branch provides such accommodation is by appointing an attorney to represent a respondent in such proceedings. A court-appointed attorney – if he or she provides effective assistance to the respondent – is an important method of ensuring that such respondents have access to justice.

Because important liberty interests are at stake in these proceedings – the right to make decisions regarding residence, education, health care, sexual relations, social contacts, and marriage are in jeopardy – the appointment of counsel is required by due process and federal mandates under the ADA and Section 504. Appointment of counsel may also be required by state law.

Once counsel is appointed – whether due to statutory or constitutional requirements – due process requires that counsel must provide *effective* assistance. Otherwise, the right to counsel would be an illusory protection.

The judicial branch provides a variety of procedural methods to ensure that the right to effective assistance of counsel is being enforced, including procedural methods for clients to complain when court-appointed counsel is violating professional standards or ethical requirements. Such methods include: (1) a motion for new counsel (known as a "Marsden motion" in California); (2) an appeal; (3) a petition for writ of habeas corpus; and (4) an administrative complaint with the state bar.

These procedures either alone or collectively work well for litigants who do not have cognitive or communication disabilities. It is not uncommon for them to be used by adults in cases involving criminal law, family law, civil law, and probate law. Such procedures are also used by teenagers involved in juvenile delinquency cases. Courts in Washington regularly hear and adjudicate complaints of ineffective assistance of counsel in hearings on motions, writ proceedings, and appeals. The Washington State Bar Association often hears and decides administrative complaints regarding ineffective assistance.

Unfortunately, these procedures are not accessible to respondents in guardianship proceedings due to their cognitive and communication disabilities. Adults with intellectual and developmental disabilities are generally not able to understand the constitutional and statutory protections available to them to defend their existing rights and to advocate for their retention. They do not know when their attorneys are not providing the advocacy services to which they are entitled and which are essential to having access to justice. As a result, they are generally not able to complain through the normal procedures established by the state and administered by the judicial branch – motions, writ petitions, and appeals. They are also not able to file administrative complaints with the state bar.

An investigation by the Supreme Court would confirm that such motions, writ petitions, and appeals by guardianship respondents are virtually nonexistent. An investigation by the State Bar would also confirm that administrative complaints by such respondents are rare, if they ever occur at all.

Although it was stated in a different procedural context, the Eleventh Circuit Court of Appeals recently observed: "it seems fanciful to expect intellectually disabled persons to bring petitions for habeas corpus. We agree with one of our sister Circuits that '[n]o matter how elaborate and accurate the habeas corpus proceedings available under [state law] may be once undertaken, their protection is illusory when a large segment of the protected class i.e., ["gravely disabled" persons committed to mental institutions] cannot realistically be expected to set the proceedings into motion in the first

place." (JR v. Hansen, 803 F.3d 1315, 1326 (11th Cir. 2015)).

A state Court of Appeal in California recognized that respondents in conservatorship cases, due to their disabilities, would be denied access to justice if procedural rules require them to raise the issue of ineffective assistance of counsel on their own.

"[T]he parties agree Michelle is incompetent and unable to personally exercise her right to request new appointed counsel. That inability, however, does not mean Michelle is any less entitled to effective representation or any less entitled to request new appointed counsel if the representation she is receiving is ineffective. '[I]ncompetence does not cause the loss of a fundamental right from which the incompetent person can still benefit.' (Citation omitted)" (Michelle K. v. Superior Court, 221 Cal.App.4th 409 (2013))

The Supreme Court of Washington and the Washington State Bar Association have probably not been aware of the dilemma faced by guardianship respondents with respect to the lack of access to justice associated with the issue of effective assistance of counsel; a procedure exists but they can't access it due to their cognitive and communication disabilities. That lack of awareness is being corrected by this letter, the references cited in it, and the enclosed White Paper.

The issue is not academic. Abuses in guardianship proceedings have been the impetus for reform efforts in states throughout the nation. National conferences have been held. Reports have been written. New WINGS agencies have been created in many states (Working Inter-disciplinary Networks of Guardianship Stakeholders). Although these conferences, reports, and agencies have acknowledged the need for systemic reforms, their focus has not yet included the issue of effective assistance of counsel. That too will soon be changing.

The Disability and Guardianship Project is the leading advocacy organization in the nation on this issue. We have conducted several investigations in California and currently have a complaint against various public entities pending with the United States Department of Justice. We have submitted proposals to the Judicial Council of California and to the Los Angeles Superior Court. These efforts are based on a documented pattern and practice of ineffective assistance of court-appointed attorneys in limited conservatorship proceedings in California.

We do not file complaints without offering potential solutions. Our reports are numerous and they always contain specific and concrete recommendations for improvement. While they have involved virtually all aspects of guardianship or conservatorship proceedings, they are heavily focused on the right to effective assistance of counsel. If court-appointed attorneys were to consistently advocate in a competent manner, the other systemic problems associated with these proceedings would be cleared up through motions, writs, and appeals. Unfortunately, in California there are no motions, writs, and appeals involving the rights of people with intellectual and developmental disabilities in such proceedings. In all likelihood an investigation by the Supreme Court of Washington would show that the same is true in Washington. The lack of such motions, writs, and appeals – and the lack of complaints to the Washington State Bar Association – would confirm our premise that guardianship litigants are not receiving access to justice because they can't use existing remedial procedures. In this case, the specific problem is lack of access to effective advocacy, and lack of institutional procedures to reduce the likelihood of ineffective assistance or to address the problem when it does occur.

It is the responsibility of the Supreme Court to implement modifications of normal procedures to ensure that these involuntary litigants have access to effective advocacy and there are methods to identify deficiencies when they occur and to remedy them. To the extent that the Supreme Court of Washington oversees or gives approval to rules of professional conduct adopted by the Washington State Bar Association or reviews discipline when it is meted out by the State Bar, it is also the duty of the court to ensure access to justice through these rules and administrative proceedings.

We realize that this is a difficult situation for the Supreme Court and the State Bar. Existing policies and procedures are based on an assumption that disgruntled litigants are able to identify deficiencies in attorney performance and complain about them through motions, writ petitions, appeals, or administrative complaints. Courts generally think about disability modifications and accommodations in terms of physical access (e.g. structural modifications) or communication adaptations (e.g., sign language interpreters). Literature about accommodations for litigants with intellectual and developmental disabilities is sparse. Except for publications of Spectrum Institute, literature about the ADA and access to effective advocacy for guardianship respondents is virtually nonexistent.

This issue is only now beginning to receive public attention and official recognition. The Daily Journal – California's leading legal newspaper – published several articles and commentaries on the ADA and the right to effective advocacy last year. The Judicial Council of California is considering proposals, submitted last year, for training and performance standards for court-appointed attorneys in limited conservatorship proceedings. The California Supreme Court received a letter similar to this one two months ago. A complaint against state and local judicial branch agencies in California is currently pending with the U.S. Department of Justice. (http://www.spectruminstitute.org/doj/) Advocacy efforts are gaining momentum and the issue is ready for recognition and remedial action.

Several actions can be taken by the Supreme Court to address this request for modification of policies and practices to provide guardianship respondents access to justice in these proceedings, especially access to effective advocacy. Because of the inherent problem that such litigants are not able to identify ineffective advocacy or complain about it, most of the modifications may have to be pro-active and prophylactic. Nonetheless, whether reactive or preventive, action is needed.

The Supreme Court could convene a Task Force on Access to Effective Advocacy to investigate the adequacy of existing training programs, rules of professional conduct, and ethical standards for court-appointed attorneys who represent guardianship respondents. The task force could investigate the problem and advise the court on whether it should promulgate new training and performance standards for these cases. The court could also ask the State Bar to conduct an audit of a significant sample of such cases to determine, from a review of court records and attorney case files, whether clients are receiving due process and ADA-compliant legal advocacy. An audit of attorney performance in Los Angeles County revealed an embarrassing pattern and practice of inadequate advocacy services by court-appointed attorneys representing respondents in limited conservatorship cases. (http://disabilityandabuse.org/daily-journal.pdf) The same may be true in Washington.

Something needs to be done. The issue of ineffective assistance of counsel for litigants with intellectual and developmental disabilities has been avoided or neglected for too long. With thousands, or even tens of thousands of such cases processed through the courts of Washington for decades – without any attention being given to this issue – one wonders how many more years, or even decades, will pass until the issue gets the attention it deserves. If normal procedures remain,

without appropriate modifications, the issue may continue to be unresolved indefinitely.

We trust that the Supreme Court, now that the problem has been brought to its attention, will fulfill its responsibilities under Title II of the Americans with Disabilities Act and take appropriate action to ensure that guardianship respondents with intellectual and developmental disabilities receive access to justice in these cases – especially access to effective advocacy services.

To assist the Supreme Court in addressing this issue, we have included a White Paper titled "Due Process *Plus*: ADA Advocacy and Training Standards for Appointed Attorneys in Adult Guardianship Cases." (Available online at: http://www.spectruminstitute.org/white-paper/). It discusses the need for access to effective advocacy and offers specific methods to achieve that goal.

We also direct the court's attention to our website: http://spectruminstitute.org/guardianship/ where more information is available on our "what's new" page and our "publications" page.

Whatever steps the Supreme Court or the State Bar may take to investigate this problem, we hope that they will involve disability rights and disability services organizations in Washington. The collaborative approach used in the WINGS agencies is preferable to an approach that is strictly "in house" and that is conducted without public participation. Where they do exist, WINGS projects should add this issue their agenda since this is a core problem affecting access to justice.

We welcome a response from the Washington Supreme Court and are eager to be of assistance as the court takes steps to address the issues affecting these two classes of involuntary litigants who are unable, without appropriate modifications and accommodations, to participate in existing remedial procedures. Access to effective advocacy services is an issue that needs the court's attention.

Respectfully submitted:

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

p.s. We have included an article about a related access-to-justice issue that should be addressed by this court as an administrative matter – the failure of the state to require appointment of counsel in all adult guardianship cases. ("Sitting Ducks: 20 States Violate Federal Law by Not Appointing Attorneys for Guardianship Respondents") Also included is a page of information about projects approved by the Judicial Council of California to review our proposed training and advocacy standards for court-appointed attorneys with a view toward adopting new rules on this topic.

cc: Ms. Paula Littlewood
Executive Director
Washington State Bar Association

Ms. Shirley Bondon
Court Program Accessibility Manager
Washington Courts

Disability and Guardianship Project

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

January 15, 2016

Ms. Paula Littlewood
Executive Director
State Bar Association
111 21st Avenue SW #1B
Olympia, WA 98501

Re: An Invitation to Participate in the Access to Advocacy Outreach Project

Dear Ms. Littlewood:

Today we sent a letter to the Supreme Court of Washington asking the court to ensure that guardianship respondents with developmental disabilities receive access to justice. A copy of the letter and related materials are enclosed for your review.

We are asking the court to exercise its responsibility under Title II of the ADA and Section 504 of the Rehabilitation Act to provide these involuntary litigants a court-appointed attorney and to adopt training and performance standards to ensure that they receive effective assistance of counsel.

Washington is among a minority of states that does not require the appointment of counsel in all adult guardianship cases. Without appointed counsel as an advocate and defender, we cannot imagine how these litigants would have access to justice in these cases – proceedings that may result in the loss of fundamental liberties.

But appointment of counsel would not be enough, in an of itself, to satisfy the court's duty to ensure access to justice for litigants who have cognitive and communication disabilities. As a matter of due process, and to provide *meaningful* access to justice under federal law, counsel must provide effective assistance. This cannot be left to chance. There must be enforceable training and performance standards, and monitoring mechanisms, in place.

We invite you to study the White Paper we have produced on this subject so that you and your colleagues can become more familiar with the issues. We also invite you to support our request to the court and, to the extent that you may have time and resources, participate in our Access to Advocacy Outreach Project in Washington State.

We look forward to hearing from you so that we can discuss this matter further.

Very truly yours,

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

Disability and Guardianship Project

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

February 11, 2016

Chief Justice and
Associate Justices
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Amendment to Request for Modifications (Per ADA and Section 504)
Access to Effective Advocacy in Guardianship Proceedings

To the Court:

The Disability and Guardianship Project of Spectrum Institute sent a letter to this court, dated January 15, 2016, requesting that appropriate modifications be made to ensure access to justice for guardianship respondents, especially access to effective advocacy services.

We made two requests. First, that guardianship respondents should be represented by counsel in all cases. If a respondent does not appear with privately retained counsel, the judge should appoint an attorney to represent the respondent. Second, that this court adopt ADA-compliant training and performance standards for such attorneys as well as effective implementation mechanisms to ensure that guardianship respondents are receiving effective assistance of counsel.

When we wrote to the court, we thought that the lack of counsel for respondents in all cases was the result of legislative policy. We believed that the failure of every judge to ensure that every guardianship respondent had an attorney stemmed from faulty statutory language. We have since been enlightened that legislative policy actually requires counsel in virtually all cases. We now believe that the lack of counsel for all guardianship respondents has two sources: (1) the failure of judges to implement the relevant statute; and (2) the lack of any monitoring mechanism to track compliance with the law and to alert a judge or an administrator that counsel has not been provided in a specific case or to advise this court of a pattern and practice of noncompliance with the law.

An essay on the subject and a copy of RCW 11.88.045 are enclosed. We hope this information will assist the court in evaluating compliance of the judicial branch with this law and with the ADA.

Respectfully submitted:

Thomas F. Coleman

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

Mandatory Attorneys for Guardianship Respondents:
A Historical Moment in the Disability Rights Movement

by Thomas F. Coleman

All 50 states have guardianship proceedings in which, for benevolent reasons, petitioners seek a court order appointing them to make major life decisions for the respondents in such cases. The filing of a petition triggers a series of events that can, an usually does, result in the respondent losing fundamental liberties, including the right to make decisions regarding medical care, finances, marriage, residence, education, sexual relationships, and their social life. A court order granting a guardianship petition restricts a respondent's constitutional rights, including First Amendment rights of freedom of speech and association and Fourteenth Amendment rights of liberty and privacy.

All participants in guardianship cases fully understand the proceedings and are able to communicate and articulate their positions to the court – all, that is, except the respondents who have serious cognitive and communication disabilities. Petitioners can, and often do, hire attorneys to represent them. A guardian ad litem, who is often an attorney, is appointed to assist the court in evaluating the case. Unless an attorney is appointed by the court, a respondent is left to fend for himself or herself though a maze of procedural rules and to sift through a pile of complicated documents. Because of his or her disability, a respondent is obviously at a serious disadvantage.

To overcome this imbalance, and to ensure that a respondent receives due process of law and access to justice, 30 states require that counsel be appointed to represent respondents in all guardianship cases. Washington is in the minority of states that do not require counsel in these cases.

The Disability and Guardianship Project of Spectrum Institute has a mission to promote the right to counsel for all guardianship respondents regardless of where they may live. The appointment of counsel is required by federal law and therefore should not depend on the state in which a guardianship petition is filed. The Fourteenth Amendment to the United States Constitution entitles a guardianship respondent to due process of law. The appointment of counsel is a matter of fundamental fairness when an involuntary litigant with cognitive and communication disabilities is required to participate in legal proceedings that may result in the loss of fundamental liberties.

The Americans with Disabilities Act also comes into play when someone with a serious disability is served with a guardianship petition. Title II of the ADA requires a public entity to take affirmative steps, even without a request, to ensure that someone with known cognitive and communication disabilities receives meaningful access to its services. State and local courts are bound by this Title II mandate. The service provided by a court is the administration of justice. That is a process, not merely a result. The process must be fundamentally fair. The service recipient – in this situation the guardianship respondent – must be afforded an opportunity to have meaningful participation in a guardianship case.

Appointment of counsel, if properly trained and obligated to follow enforceable performance standards, satisfies the requirements of federal due process and of the ADA. Without appointed counsel, a guardianship respondent doesn't have a chance to participate in the case in a meaningful way. Meaningful participation would involve understanding the allegations in the petition, being able to challenge those allegations, analyzing the sufficiency of the evidence supporting the petition, investigating issues of capacity and lesser restrictive alternatives, and developing evidence and finding witnesses to support the retention of some or all of the respondent's rights. Because of the nature of their disabilities, guardianship respondents can't perform those functions without counsel.

Putting the burden on a guardianship respondent to hire his or her own attorney is reminiscent of the proverbial "let them eat cake" remark about people who lack nourishment. Whether for financial, practical, or legal reasons, guardianship respondents are unable to retain counsel – either for a fee or pro bono. Most of them receive financial aid and lack the funds necessary to hire an attorney. They are also unable to go through the process of finding and retaining counsel. They may not understand that they have the right to an attorney or the role of an attorney. They may not be able to make the phone calls and office appointments needed to do so. Most importantly, most attorneys would not be willing to represent them – out of fear of reprisals to them for signing a retainer agreement with someone who allegedly lacks the capacity to contract. Therefore, a guardianship respondent generally will not be represented by an attorney unless one is appointed by the court.

Family members are not a substitute for a trained attorney, especially if one or more of them is the petitioner or is seeking to be appointed as the guardian. A lay person cannot represent someone in court. That would be practicing law without a license. Even if the family member were a licensed attorney, if he or she is the petitioner or wants to be the guardian, there would be a conflict of interest. So, as well meaning as family members may be, they are not a substitute for a court-appointed attorney – someone with legal training and without a conflict of interest.

A guardian ad litem is also not a substitute for an appointed attorney. The role of a GAL is not to defend the rights of the respondent or to advocate for what the respondent wants. Unlike a court-appointed attorney, a GAL does not have a duty of loyalty or an ethical obligation of confidentiality. The GAL must be loyal to the court and fulfill the legally mandated function of being an objective investigator who will render an opinion about what is in the "best interests" of the respondent. Due process entitles guardianship respondents to an advocate whose undivided loyalty is to them and in whom they can confide. A GAL plays an important role in guardianship proceedings, but one that is not the legal or functional equivalent of a competent attorney acting as a diligent and conscientious advocate for someone whose basic rights are in jeopardy.

Many national organizations have taken positions favoring the mandatory appointed of counsel for guardianship respondents. Court rulings say that mandatory counsel is required as a matter of federal constitutional and statutory requirements when fundamental liberties are at stake.

The issue of whether Washington should require counsel to be appointed in guardianship cases is being considered by the WINGS agency in that state (Working Interdisciplinary Network of Guardianship Respondents). WINGS is an advisory body to the Washington Supreme Court. It advises the court in its management capacity, not its adjudicative capacity. In its management capacity, the court has an institutional concern associated with the cost of appointing counsel. WINGS should not involve itself in this issue. Cost is not relevant when it comes to protecting the due process rights of involuntary litigants who are vulnerable and unable to defend themselves.

One question faced by members of WINGS Washington is how do they want to be remembered as the story about the expansion of the rights of people with disabilities is being written. Did members of WINGS vote to recommend that Washington move into the majority of states that protect the due process and ADA rights of guardianship respondents, or did they vote to maintain the status quo favoring efficiency and cost management? Make no doubt about it – history is being made here.

Thomas F. Coleman is the legal director of Spectrum Institute. Its Disability and Guardianship Project is promoting access to justice for guardianship respondents. This essay was written as part of its Access to Advocacy Outreach Project. (www.spectruminstitute.org/outreach) The Disability and Guardianship Project is represented by Christina Baldwin in Washington State. She is a member of WINGS Washington.

Current Law Mandates the Appointment of Counsel: Courts in Washington Just Need to Implement It

By Thomas F. Coleman

RCW 11.88.045

Legal counsel and jury trial—Proof—Medical report—Examinations—Waiver.

(1)(a) Alleged incapacitated individuals shall have the right to be represented by willing counsel of their choosing at any stage in guardianship proceedings. The court shall provide counsel to represent any alleged incapacitated person at public expense when either: (i) The individual is unable to afford counsel, or (ii) the expense of counsel would result in substantial hardship to the individual, or (iii) the individual does not have practical access to funds with which to pay counsel. If the individual can afford counsel but lacks practical access to funds, the court shall provide counsel and may impose a reimbursement requirement as part of a final order. When, in the opinion of the court, the rights and interests of an alleged or adjudicated incapacitated person cannot otherwise be adequately protected and represented, the court on its own motion shall appoint an attorney at any time to represent such person.

Through the enactment of RCW 11.88.045, the Legislature has already established a policy requiring the appointment of counsel for guardianship respondents. To the extent there may be any ambiguity in the statute, or potential conflict with constitutional or statutory protections afforded by federal law, courts should interpret the statute so as to harmonize it with the superior protections of federal due process or the Americans with Disabilities Act.

The first sentence of the statute merely recognizes a longstanding and well-known legal principle that litigants have a right to be represented in court proceedings, whether criminal or civil, by counsel of their choice. This is a matter of fundamental fairness and, as such, is protected by the Due Process Clause of the Fourteenth Amendment.

The problem with the first sentence of the statute is practical, not theoretical. A guardianship respondent, because of cognitive disabilities, probably does not know that he or she has the right to an attorney, or understand the role of an attorney, or realize how an attorney would help protect his or her rights from improper infringement. A respondent, due to physical, cognitive, or communication disabilities, would most likely lack the ability to search for an attorney or to handle the financial matters associated with retaining one.

Furthermore, most attorneys would be reluctant to be retained by a guardianship respondent whose capacity to contract is questionable. Doing so could result in complaints of undue influence by relatives, the initiation of disciplinary proceedings with the state bar, or the expenditure of hours of labor only to have to refund the retainer monies if a contractual capacity challenge were successful.

These obstacles to a respondent's ability to retain counsel are most pronounced for those with intellectual and developmental disabilities.

The Legislature's policy declaration that a guardianship respondent has the right to be represented by counsel of his or her choice looks good on paper but, in practical reality, is unlikely to be available to the overwhelming majority of guardianship respondents – especially seniors with dementia or adults of any age with intellectual and developmental disabilities.

It is likely that a review of court records would confirm the experience of judges and attorneys who participate in guardianship proceedings: hardly any guardianship respondents retain a private attorney to represent them in court.

Moving beyond the first sentence of the statute, an analysis of the rest of the section focuses on whether

counsel should be appointed for those who don't retain an attorney on their own – in other words, for the overwhelming majority of guardianship respondents. When practical reality is considered, and the mandates of due process and the ADA are factored into the analysis, the policy and practice should require the mandatory appointment of counsel for *all* guardianship respondents. Affirming the right to counsel should not be confused with who should pay for the services of appointed counsel. That is a separate consideration.

This part of the statute focuses on two types of respondents: (1) those who can afford counsel but are unable to access funds in a timely manner; and (2) those who are unable to afford counsel.

For those who can afford counsel but lack the practical means to hire one, the statute says "the court shall provide counsel." The term "shall" is mandatory. In those cases, reimbursement for counsel's services shall occur at the end of the case pursuant to a court order. As for those who can't afford counsel, the law says the court "shall provide counsel" to represent them at public expense.

To recap the matter, the statute as a whole contemplates three types of guardianship respondents: (1) those who can and do retain private counsel; (2) those without funds to retain counsel, in which case the court shall appoint counsel at public expense; and (3) those who have funds but cannot access them in a timely manner, in which case the court shall appoint counsel and determine the source of payment at the end of the proceedings.

Under this statutory scheme, virtually all guardianship respondents should be represented by counsel – except in those rare cases where a respondent has the capacity to contract, has access to necessary funds, and voluntarily waives their right to counsel. Those cases would be few and far between.

Having done this statutory analysis, the question arises as to why most guardianship respondents are not represented by counsel. If courts were following the statutory mandates, virtually all guardianship respondents would have an attorney to advocate for them and to ensure their statutory and constitutional rights are protected throughout the proceedings.

The apparent answer to this question seems to rest on the fact that the guardianship system does not have anyone with a duty to monitor the courts and to insist that they follow the statute and appoint counsel as required by law. The Legislature has acknowledged that appointment of counsel is essential for respondents to have access to justice. The policy of the statute is consistent with federal due process and access-to-justice requirements of the ADA and Section 504 of the Rehabilitation Act. It is judicial practices, not legislative policy, that conflicts with federal mandates.

Two corrective actions are necessary: (1) courts should properly implement the law; and (2) a monitoring mechanism should be created to ensure this occurs. Such measures would protect the due process rights of guardianship respondents and enable courts to comply with their ADA duty to provide access to justice for all such litigants.

These actions are unlikely to occur without political advocacy, legislative oversight, and judicial accountability. The status quo doesn't budge easily.

Disability Rights Washington and the State Council on Developmental Disabilities should be asking some tough questions. Appropriate committees of the Legislature should exercise their oversight responsibilities. The Washington Supreme Court should investigate whether RCW 11.88.045 is being faithfully executed by the judicial branch.

Legislative notes to RCW 11.88.045 indicate that it became effective in 1990. Questions arise as to whether judges ever implemented the law as written. If so, when did they stop doing so? Who decided that not all guardianship respondents needed to have an attorney? When? Why? With the rights of thousands of vulnerable adults being affected, surely someone will seek answers to these questions.

Thomas F. Coleman is the legal director of the Disability and Guardianship Project of Spectrum Institute. This essay was written as part of its Access to Advocacy Outreach Project. For more information: http://spectruminstitute.org/outreach/
Contact: tomcoleman@spectruminstitute.org

To: Christopher Henderson, David Lord, Carla Calogero, Patty Croteau
Members of the Subcommittee on Court-Appointed Counsel
of the Long-Range / Strategic Planning Committee of WINGS

From: Tina Baldwin, member of WINGS (cbaldwin@moscow.com)

Re: Appointment, Training, and Performance of Counsel

Date: February 5, 2016

I am submitting recommendations that I would like the Subcommittee on Court-Appointed Counsel to adopt and refer to the Long-Range / Strategic Planning Committee. (See the attached page.)

I have reviewed the framework and materials you have developed on the issue of mandatory appointment of counsel. They do not appear to take into consideration the requirements of federal due process or of the court's duty under Title II of the Americans with Disabilities Act to provide access to justice for involuntary litigants in guardianship proceedings.

The majority of states require the appointment of counsel in adult guardianship proceedings. As the White Paper produced by Spectrum Institute reveals, national organizations and conferences have recommended counsel be appointed in all such cases. (http://spectruminstitute.org/white-paper/) This includes the American Bar Association, National College of Probate Judges, National Guardianship Association, Conference of State Court Administrators, and The Arc of the United States.

The argument that an appointed attorney is not necessary in cases involving severe disabilities is misplaced. Fundamental liberties are put in jeopardy when a guardianship petition is filed. The court will not know the extent of the respondent's disabilities until a proper assessment is done by a licensed professional who is trained and experienced in such forensic assessments. The court will not know whether there are any lesser restrictive options unless someone investigates those possibilities. The court will not know whether the allegations in the petition are supported by clear and convincing evidence unless such evidence is reviewed and tested by an advocate for the respondent. The court will not know whether the person seeking to be appointed guardian is the most appropriate person until someone investigates the matter from the perspective of the respondent. An appointed attorney would do all of these things. A guardian ad litem or a petitioner or other family members are not a substitute for an *advocate and defender* for the respondent – someone who has unique ethical obligations of loyalty and confidentiality to a respondent.

Respondents in civil commitment proceedings may have severe disabilities too. Yet no one would suggest that they do not need an attorney to defend their rights just because they have severe disabilities. In fact, the more serious the disability, the greater the need for legal representation from the access-to-justice perspective of the ADA.

Similarly, no one would suggest that when a preliminary analysis of a criminal case or a juvenile delinquency case or a child dependency case shows overwhelming guilt, that the defendant does not need an attorney. The issue of cost-effectiveness – only providing an attorney in cases where there is some evidence of innocence – would not be a viable issue under due process standards. The same is true in guardianship cases. Each and every person with an intellectual or developmental disability is entitled to have an attorney – loyal only to the client – to review the petition and the evidence for sufficiency, to vet the proposed guardian, and to make sure the client receives all of the constitutional and statutory protections he or she deserves. There is no substitute for appointed counsel.

Working Interdisciplinary Network of Guardianship Stakeholders
Long-Range Planning / Strategic Planning Committee
Subcommittee on Court-Appointed Counsel

Recommendations

1. **Mandatory Appointment of Counsel**

(a) ***New Proceedings***. When a petition is filed to establish an adult guardianship, if the respondent does not already have an attorney, the court shall appoint counsel to represent the proposed ward.

(b) ***Existing Guardianships***. When a ward indicates a desire to make changes in a guardianship, or when someone else makes a request to modify a guardianship that may affect the rights of a ward, the court shall appoint an attorney to provide legal advocacy services for the ward.

Rationale. Research by Spectrum Institute indicates that various courts have ruled that federal due process requires the appointment of counsel for adults in guardianship proceedings. Several national organizations and conferences have recommended the mandatory appointment of counsel as a matter of best practices. Appointment of counsel may be required by the Americans with Disabilities Act for litigants with cognitive and communication disabilities. Some 30 states mandate the appointment of counsel in all adult guardianship cases. Washington should require counsel in all such cases. A guardian ad litem is not a substitute for the confidentiality and loyalty required of a legal advocate.

2. **Training and Performance Standards**

(a) ***New Court Rules***. Training and performance standards should be adopted for attorneys who represent respondents in adult guardianship proceedings. The standards should require such attorneys to provide legal services that give clients with cognitive and communication disabilities access to justice as required by federal due process and the Americans with Disabilities Act (ADA).

(b) ***Monitoring Mechanisms***. Because of the nature of their disabilities, guardianship respondents are not able to identify the deficient performance of an attorney or to file motions, appeals, or administrative complaints when counsel's performance is ineffective. The Supreme Court and the State Bar should develop methods to promote effective assistance of counsel and to monitor the performance of attorneys who represent clients with cognitive and communication disabilities.

Rationale. Spectrum Institute has developed a framework for training and performance standards for attorneys who represent adults with intellectual and developmental disabilities in adult guardianship proceedings (limited conservatorships) in California. The Judicial Council of California has authorized a two-year project to review these proposals and adopt new rules as may be appropriate. Spectrum Institute has also developed specific training and performance standards which it has submitted to the United States Department of Justice for review. Washington State does not have training and performance standards for attorneys who represent guardianship respondents. It does not have mechanisms to ensure effective assistance of counsel or to minimize the risk of sub-standard services by such attorneys. The Supreme Court has a duty under Title II of the ADA to provide access to justice for guardianship respondents, including access to effective advocacy services. In cooperation with the State Bar, the court should review the research materials of Spectrum Institute and adopt new rules to help ensure access to justice for these involuntary litigants.

Submitted by: Christina Baldwin / February 5, 2016 / http://spectruminstitute.org/outreach/

Disability and Guardianship Project

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

February 9, 2016

Patricia W. Griffin, President / Gerald A. Marroney, President-Elect
Conference of State Court Administrators
300 Newport Avenue
Williamsburg, VA 23185

Re: Due Process, the ADA, and the Right to Counsel in Adult Guardianship Proceedings

Dear President and President-Elect:

The Conference of State Court Administrators published a White Paper in 2010 addressing whether it should be mandatory for state courts to appoint counsel for guardianship respondents. This is an issue of continuing interest to state courts. (http://spectruminstitute.org/outreach/)

Noting that appointment of counsel was not required in many jurisdictions, the White Paper asked: "[G]iven that a guardianship restricts control by the person with diminished capacity over liberty and property, should not a constitutional right to counsel exist?" Before answering the question, the report noted: "Because representation is key to providing procedural due process, without adequate representation or the cognitive ability for self representation, a guardianship proceeding could be viewed as unfair and could result in the unjust loss of fundamental rights. A person subject to a guardianship can lose his or her right to vote, marry, contract, make healthcare decisions and decide how to manage his or her assets. In 1987, a congressional committee opined that guardianship could be the most severe form of civil deprivation which can be imposed on a citizen in the United States."

The White Paper, endorsed by the Conference, gave an emphatic and unequivocal answer: "In states where right to counsel has not been addressed, courts should take a leadership role in requiring the appointment of counsel to protect the rights of persons with diminished capacity."

We applaud the Conference for taking a position supporting the due process rights of involuntary litigants with cognitive and communication disabilities – and for implicitly encouraging states to ensure that litigants receive access to justice as required by the Americans with Disabilities Act.

We ask the Conference to expand its recommendation to apply to all states, even where the issue was once considered and courts decided against mandatory counsel. States, such as Washington, should revisit the issue, especially keeping in mind their duties under Title II of the ADA. We also ask the Conference to recommend that all states adopt ADA-compliant training and performance standards for court-appointed attorneys in guardianship cases. (http://spectruminstitute.org/white-paper/)

Very truly yours:

Thomas F. Coleman

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

ENSURING EQUAL ACCESS FOR PEOPLE WITH DISABILITIES: A GUIDE FOR WASHINGTON COURTS

August 2006

Available online at www.wsba.org/atj

PREFACE

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STATE AND FEDERAL LAWS require that government programs be accessible to persons with disabilities (RCW 49.60.010 et seq;, Americans with Disabilities Act, 42 U.S.C. §12131 et. seq.(ADA)).

In 2004, the United States Supreme Court made the following observations in upholding application of the ADA to courts and court services:

> *The unequal treatment of disabled persons in the administration of judicial services has a long history,* and has persisted despite several legislative efforts to remedy the problem.... Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable problem' warranted [the enactment of Title II].... *Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility....* [A]s it applies to the class of cases implicating the fundamental right of access to the courts, [Title II] constitutes a valid exercise of Congress'...authority to enforce the guarantees of the Fourteenth Amendment.

Tennessee v. Lane, 124 S.Ct. 1978, 1993-4 (2004).

Washington courthouses and court services must be accessible to persons with disabilities. This Guide is intended to help.

WHAT THE LAW SAYS

A. Generally

Access to the courts is a fundamental right under the state and federal constitutions. State and federal statutes require that people with disabilities be afforded equal access to courthouses, courtrooms, and court services. Their access must be just as effective as the access provided to other members of the public.

Access to the courts is a fundamental right, preservative of all other rights.

B. Sources of the Law

1. **The Americans with Disabilities Act**. Congress enacted the ADA after finding that people with disabilities encounter discrimination in access to public services, have a history of unequal treatment, and have been relegated to political powerlessness based on stereotypes that do not reflect their true ability to participate and contribute in society. 42 U.S.C. § 12101(a)(7). The ADA is intended to eliminate discrimination against individuals with disabilities, to provide clear, strong, consistent, enforceable standards, to ensure access for those individuals with disabilities, to ensure enforcement of those standards by the federal government, and to provide remedies. 42 U.S.C. § 12101(b); 42 U.S.C. § 12133.

In Title II, the ADA[4] prohibits discrimination in public services, including courts, and mandates that persons eligible for receipt of services not, because of disability, be excluded from participation or from the benefits, services or activities of a public entity.

Administrators of public programs must take steps to accommodate persons with disabilities, unless the accommodation fundamentally alters the nature of an activity or program or constitutes an undue administrative or financial burden. 42 U.S.C. § 12182(b)(2)(A). This obligation may be enforceable by a suit for declaratory or injunctive relief, or money damages. 42 U.S.C. § 12133 (incorporating Rehabilitation Act remedies, 29 U.S.C. § 794(a)); 28 C.F.R. §§ 35.150(a)(3), 164.

2. **The Washington Law Against Discrimination.**[5] Long before the ADA, the Washington State Legislature enacted the Washington State Law Against Discrimination (WLAD):

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[4] A Department of Justice publication, Title II Highlights, provides an excellent summary of the Act. A list of useful DOJ publications may be found in the Appendix.

[5] Many county and city ordinances also prohibit discrimination on the basis of disability.

> The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. RCW 49.60.010.

"[W]ithin the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard in its courts."

— U.S. Supreme Court, 2004

The WLAD declares that "full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement," free from discrimination because of disability or the use of a trained dog guide or service animal, "is recognized as and declared to be a civil right," enforceable by an administrative complaint or a civil action for damages. RCW 49.60.030 et seq. Places of public accommodation are broadly defined. RCW 49.60.040(10).

3. **The United States Constitution.** Because access to the courts is a fundamental right, the United States Supreme Court has held that Title II of the ADA is constitutionally valid. In *Tennessee v. Lane*, 124 S.Ct. 1978 (2004), the Court held that "*Title II unquestionably is valid...as it applies to the class of cases implicating the accessibility of judicial services*[.]" *Id.* at 1993. The Court observed that the "duty to accommodate is perfectly consistent with the well-established due process principle that '**within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts.**" *Id.* at 1994 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

Technologies in the justice system must protect and advance the fundamental right of equal access to justice.

–Washington State Supreme Court, December, 2004

4. **The Washington Constitution.** The Washington State Supreme Court has held that the right of access to the courts is fundamental and preservative of all other rights, and that denial of access on the basis of poverty violates the Washington State Constitution. *Carter v. University of Washington*, 85 Wn.2d 391, 536 P.2d 618 (1975).[6]

5. **The State Supreme Court Access to Justice Technology Principles.** Recognizing that technology can affect access to justice, our supreme court adopted the Access to Justice Technology Principles. The Preamble to the Principles begins by stating that:

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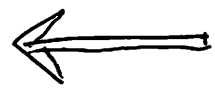
[6]The following year, in *Housing Authority of King County v. Saylors*, 87 Wn. 2d 732, 557 P.2d 321 (1976), the court overruled *Carter* insofar as *Carter* located the source of the right of access to the courts in Art. 1 § 4. The *Saylors* court held Art. 1 § 4 is protective of political rights, not access to courts. But the court observed (at 742) that "[a]ccess to the courts is amply and expressly protected by other provisions" of the State Constitution.

the person involved with dignity and respect, and address him or her directly on matters other than those at issue in the proceeding.

Appointment of counsel. Some lawyers are especially skilled, experienced and motivated in representing people with cognitive limitations, especially in criminal cases, and where possible those attorneys should be appointed for indigent defendants. It is at least arguable that in cases where an indigent pro se civil litigant is unable to participate effectively in the proceedings because of a cognitive disability, the reasonable accommodation is appointment of counsel at public expense. [39]



E. Special Accommodation Issues

1. Guide Dogs and Service Animals

Guide dogs are the most widely recognized kind of service animal, but people with many types of disabilities use animals for assistance. A service animal must be allowed in any area open to the public, including courtrooms.[40]

A service animal is "an animal that is trained for the purpose of assisting or accommodating a disabled person's sensory, mental or physical disability." RCW 49.60.040(23). Service animals may alert a person to sound, pull a wheelchair, carry or fetch things, alert its owner to a seizure or other health issue before the owner is aware of symptoms, or alleviate anxiety by engaging in specific behaviors.[41]

Both the ADA and the WLAD forbid discrimination based on use of a guide dog or service animal.

A service animal is not required to wear a cape, special harness, or other equipment, and there is no requirement that a service animal be licensed or certified as such by any government agency. Where the purpose of the animal is unclear, it is permissible to ask whether the animal is needed because of a disability, and what tasks the animal has been trained to perform. In most cases, court personnel should accept a person's statement that the animal is a service animal. The person using the animal is responsible for supervising the animal, and a service animal can be excluded if it poses a threat to property or to other people.

Valuable guidance may be found in the Department of Justice publication *Commonly Asked Questions About Service Animals in Places of Business.* [42]

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[39] This point is argued by the authors of a recent law review article. *See* Brodoff, L., McClellan, S. and Anderson, E., The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon, 2 Seattle Journal for Social Justice 609 (Spring/Summer, 2004).

[40] The Seattle Office for Civil Rights recently awarded a $21,222 judgment to a woman who was required to leave her dog outside while patronizing a convenience store. *Seattle Times,* May 3, 2005 *"Woman wins bias case over service dog,"* Jennifer Sullivan.

[41] See *Storms v. Fred Meyer Stores*, 129 Wn. App. 820, __ P.3d. __ (Div. I, Sept. 26, 2005)(dog trained to alleviate anxiety disorder met definition of service animal).

[42] Available on the Department of Justice website at www.usdoj.gov/crt/ada/qasrvc.htm (accessed May 13, 2005).

Disability and Guardianship Project

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

February 4, 2016

Ben Orzeske, Chief Counsel
Katie Robinson, Legislative Program Director
Uniform Law Commission
Chicago, Illinois

Re: ADA and the Right to Counsel in Adult Guardianship Proceedings

Dear Mr. Orzeske and Ms. Robinson:

We request that the Uniform Law Commission update the comment to Section 5-305 of the Uniform Probate Code (UPC) pertaining to the appointment of a lawyer to represent the respondent in an adult guardianship proceeding. The comment should be expanded to explain that mandatory appointment of counsel may be required as a matter of federal due process. Mention should also be made that courts may have a duty to appoint counsel for guardianship respondents pursuant to their duty under Title II of the Americans with Disabilities Act to ensure that litigants with cognitive and communication disabilities have access to justice. The same request applies to the parallel Uniform Guardianship and Protected Persons Proceedings Act.

Section 5-305 of the UPC has two alternatives on this issue. In Alternative A, appointment of counsel is discretionary unless the respondent requests an attorney. In Alternative B, appointment of counsel is mandatory in all cases. Some 30 states provide for mandatory counsel while the other 20 either put the burden on the respondent to request counsel or leave the issue to the discretion of the court.

Under the Supremacy Clause of the United States Constitution, these uniform laws must comply with federal civil rights protections. The comment should explain that the failure to appoint counsel may violate the Due Process Clause of the Fourteenth Amendment. It should also mention that the Americans with Disabilities Act requires state and local courts to provide litigants access to justice. Without an attorney to defend and advocate, guardianship respondents are not able to participate in the proceedings in a meaningful manner. The 20 states that do not provide for mandatory counsel in these cases may be exposed to liability under the ADA and Section 504 of the Rehabilitation Act of 1973. (http://spectruminstitute.org/doj/)

Documents on our website provide a thorough analysis of these issues. We recently submitted a White Paper to the United States Department of Justice explaining how the ADA requires not only the appointment of counsel but the adoption of training and performance standards. (http://spectruminstitute.org/white-paper/) Our Access to Advocacy Outreach Project is contacting supreme courts and bar associations in all 50 states asking them to address these issues. (http://spectruminstitute.org/outreach/) Other materials are available on the "publications" and "what's new" pages of our website. (http://spectruminstitute.org/guardianship/)

We welcome an ongoing conversation with the Commission's staff on these important issues.

Respectfully submitted:

Thomas F. Coleman

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

Disability and Guardianship Project

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

February 6, 2016

Ben Orzeske, Chief Counsel
Katie Robinson, Legislative Program Director
Uniform Law Commission
Chicago, Illinois

Re: ADA and the Right to Counsel in Adult Guardianship Proceedings
(Supplemental Information about "Alternative A" to Section 5-305)

Dear Mr. Orzeske and Ms. Robinson:

In addition to the information we supplied to you in our letter dated February 4, 2016, we would like the Uniform Law Commission to consider arguments as to why the adoption of "Alternative A" to Section 5-305 may subject a state to liability for violating Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973.

The Uniform Probate Code "Alternative A" requires appointment of counsel for a guardianship respondent if he or she requests an attorney. This provision violates Title II of the ADA which dispenses with the need for a request for an accommodation when a court knows that a litigant has a disability that impedes his or her ability to make such a request. In such cases, the court has an affirmative duty to provide such accommodation without a request.

Alternative A was developed without considering the requirements of the ADA. Jurisdictions that choose this option are setting their courts up for a federal lawsuit or an investigation by the DOJ.

Most guardianship respondents have serious cognitive and communication disabilities. These disabilities may preclude them from understanding their right to an attorney, the role of an attorney, or the desirability of being represented by one. Due to their disability, they are unlikely to request an attorney. Not having an attorney adversely affects their ability to have access to justice in these cases. By conditioning their right to be represented by counsel on a request, while knowing they may be unable to do so, a court would be violating Title II of the ADA.

We invite you to review our White Paper for more information about the ADA and the right to effective advocacy services. (http://spectruminstitute.org/white-paper/)

Very truly yours:

Thomas F. Coleman

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

Disability and Guardianship Project

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

February 8, 2016

Hon. John E. Conery, President
Hon. Russell Otter, President-Elect
American Judges Association
300 Newport Avenue
Williamsburg, VA 23185

Re: ADA and the Right to Counsel in Adult Guardianship Proceedings

Dear ADA President and President-Elect:

The American Judges Association prides itself on being a leader in advancing the concept of "procedural fairness." Access to justice, whether as a matter of due process or as a requirement of the Americans with Disabilities Act, is another way to describe the principle of procedural fairness.

Because the AJA attaches such importance to this principle, we believe the organization would have a major interest in our Access to Advocacy Outreach Project. (http://spectruminstitute.org/outreach/) We are in the process of contacting the supreme courts in all 50 states to ask them to ensure that guardianship respondents – involuntary litigants with cognitive and communication disabilities – receive access to justice in such proceedings. That cannot occur unless they have access to effective advocacy services.

Our research indicates that procedural fairness is lacking in the 20 states that do not require the appointment of counsel for guardianship respondents in all cases. It is also lacking when courts do not have training and performance standards when such attorneys are appointed, either as a matter of right or as a matter of judicial discretion. Regardless of whether the reason for appointing an attorney is statutory or constitutional, due process requires that these attorneys provide effective assistance. Without training and performance standards, the right to effective assistance of counsel is left to chance. Procedural fairness cannot be an arbitrary hit or miss prospect. Other than Massachusetts which has such standards, or California which is now considering them, this issue has not been on the agenda of supreme court justices or court administrators anywhere in the nation.

More information is available on our website at: http://spectruminstitute.org/guardianship/ and http://disabilityandabuse.org/whats-new.htm. Finally, should you ever need a speaker at a seminar or conference, please let us know. (http://disabilityandabuse.org/ada-guardianship-presentation.pdf)

Very truly yours:

Thomas F. Coleman

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

Disability and Guardianship Project

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(818) 230-5156 • www.spectruminstitute.org

February 9, 2016

Rebecca Cokley, Executive Director
National Council on Disability
1331 F Street, NW
Washington, DC 20004

Re: A federal role in guardianship reform

Dear Ms. Cokley:

We were pleased to learn that the quarterly meeting of the National Council on Disability will focus on guardianship and supported decision making. Demographics alone make this an issue worthy of the attention of the Council since it is estimated that about 1.5 million adults are currently under an order of guardianship in the United States. Many of them are people with intellectual and developmental disabilities. Tens of thousands of new cases are opened each year.

Guardianship is usually considered an issue for state governments since it is state courts that process these cases. However, federal law is, or should be, a major consideration of state and local officials who investigate and litigate these cases and for the guardians who are appointed to administer them.

Federal law requires that guardianship respondents are ensured access to justice in these proceedings. This is required by the Due Process Clause of the Fourteenth Amendment as well as Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. And yet, officials in most states act as though federal law is irrelevant to guardianship proceedings.

Our organization is working to educate state judges and court administrators of their responsibilities under applicable federal laws – especially their duty to ensure that guardianship respondents have access to effective advocacy services. (http://spectruminstitute.org/outreach/) We have developed a framework for training and performance standards for appointed attorneys who represent guardianship respondents. (http://spectruminstitute.org/attorney-proposals/) We have also published a White Paper to the Department of Justice in which we offer specific ADA-compliant training and performance standards that can be adopted by state courts. (http://spectruminstitute.org/white-paper/)

When our outreach efforts are not successful, we file complaints with the U.S. Department of Justice to seek federal intervention on behalf of guardianship respondents who, individually or as a class, are unable to seek redress for violations of their federal civil rights. (http://spectruminstitute.org/doj/)

We would be pleased to be of help as you develop any programs involving guardianship reform.

Very truly yours,

Thomas F. Coleman

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

Title 11.88 RCW
Guardianship
GUARDIAN AD LITEM *HANDBOOK*

2012 EDITION

For Washington State Superior Courts, 11.88 Guardians ad Litem and 11.88 GAL Training Providers

Written and produced by the
Guardianship & Elder Law Section of the King County Bar Association
With Oversight and Editorial Support Provided by
Department of Social and Health Services, as well as
King and Pierce County Superior Courts,
Consistent with the Goals of the
Title 11 Guardian ad Litem Training Advisory Committee
Established in 1997

2012 TITLE 11.88 RCW GUARDIANSHIP GUARDIAN AD LITEM HANDBOOK

TABLE OF CONTENTS

In uncontested cases, after the GAL report is served and filed, there is a hearing before a judge or court commissioner who may then enter an order on the guardianship petition. That order may adopt the recommendations of the GAL, but is not required to do so.

What is the Definition of a Guardian ad Litem? The GAL is a qualified individual whose name is obtained from a registry maintained by each county. The GAL is appointed by the court to 1) conduct a thorough investigation regarding the allegation of incapacity and 2) make a recommendation to the court regarding the need for a guardianship and the suitability of the proposed guardian.

The GAL should report to the court what the GAL believes is in "the best interests of the person [AIP or IP] for whom he or she is appointed." GALR 2(a); RCW 11.88.090(3). The GAL's conclusion regarding the "best interests may be inconsistent with the *wishes*" of the AIP. *Id.* (Emphasis added).

What is the Difference Between a Guardian ad Litem and a Guardian? The GAL investigates, interviews, evaluates, and makes recommendations to the court regarding the necessity of appointing a guardian, the scope of a guardianship, and the identity of a guardian. The duties of the GAL are limited to those outlined in the *Order Appointing Guardian ad Litem.* GALR 4. Except for the power to authorize emergency *life saving* procedures, the authority of the GAL to act on behalf of the AIP is strictly limited. At the appointment of the guardian, the role of the GAL is concluded unless the court orders that the Guardian ad Litem remain active in the case. By contrast, once appointed, the *Guardian* is granted authority -- limited or sometimes nearly unlimited -- to *act on behalf of* the Incapacitated Person into the future.

What is the Role of the Attorney for the Alleged Incapacitated Person? The duties of an attorney appointed to represent an AIP are set out at RCW 11.88.045(1)(b) (emphasis added), as follows:

> Counsel for an alleged incapacitated individual shall act as an advocate for the client and shall not substitute counsel's own judgment for that of the client on the subject of what may be in the client's best interests. Counsel's role shall be distinct from that of the guardian ad litem, who is expected to promote the *best interest* of the alleged incapacitated individual, rather than the alleged incapacitated individual's *expressed preferences*.

In contrast, the Guardian ad Litem Rule 2(a) states:

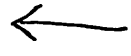
> The guardian ad litem shall not advocate on behalf of or advise any party so as to create in the mind of a reasonable person the appearance of representing that person as an attorney.

What are the Alternatives to Guardianship? The specific legislative intent of the guardianship statute is to restrict the liberty and autonomy of an incapacitated person "only to the minimum extent necessary to adequately provide for" the health, safety or adequate management of the financial affairs of the AIP. A GAL must always be cognizant of the need to seek a resolution of the guardianship petition that recognizes and appropriately deals with risks to the AIP, but which least restricts that individual's liberty and autonomy. As a result, the scope of a guardianship should be crafted to permit the least possible intrusion upon the independence of the AIP. Chapter V deals with limitations on guardianships. Chapter VII addresses alternatives to guardianship.

The guardianship statute recognizes that some persons may be partially or fully incapacitated only with respect to handling their financial affairs. Other individuals may be fully or partially incapacitated with respect to management of personal care but have capacity to manage their financial affairs. Therefore the statute provides that the court may appoint a full or limited guardian of the estate and/or a full or limited guardian of the person. The Guardian of the Estate and Guardian of the Person may be the same person or entity or not, depending on the needs of the AIP, the recommendations of the GAL, and the court's final determination. *See* Chapter V.

B. DUE PROCESS RIGHTS OF THE ALLEGED INCAPACITATED PERSON

Throughout the guardianship proceeding, the GAL must be alert to the protection of the Alleged Incapacitated Person's right to fundamental due process of law. A person should not be deprived of the significant rights at stake in a guardianship without due process of law. The duty to assert these rights lies with counsel for the AIP, if one has been appointed. Since it is the duty of the GAL to represent the best interests of the AIP, however, the GAL must report to the court any concerns the GAL has about fundamental due process that affect the AIP.



The GAL's investigation, especially in cases in which the AIP is not represented by counsel, should include a determination that the court has jurisdiction to hear the guardianship, that the venue is appropriate, and that all steps have been taken to ensure the rights of the AIP.

Venue and Jurisdictional Requirements

Jurisdiction. The court must have subject matter jurisdiction and also jurisdiction over the person. Subject matter jurisdiction is authorized under RCW 11.88.010(1). It grants the superior court "power to appoint guardians for the persons and/or estates of incapacitated persons, and guardians for the estate of nonresidents of the state who have property in the county needing care and attention."

Service of Petition and Notice. Notice that a guardianship proceeding has been brought and a copy of the petition *must be personally served* on the Alleged Incapacitated Person and the Guardian ad Litem **within 5 court days after the petition has been filed.** RCW

CHAPTER IX
ALLEGED INCAPACITATED PERSON'S RIGHT TO COUNSEL

The Right to Counsel. The AIP has the right to be represented by willing counsel at any stage of the guardianship proceedings. RCW 11.88.045. Thus, even though an AIP may initially decline to be represented, the AIP may change his or her mind later and request that an attorney be appointed. As soon as practicable after the GAL learns that the AIP wants or needs representation, the GAL should take steps to ensure that counsel of the AIP's or the court's choosing, whichever is appropriate, is appointed.

Counsel for an Alleged Incapacitated Person ("AIP counsel") must have adequate time for consultation with the AIP and preparation prior to the final hearing. Absent a convincing showing in the record to the contrary, a period of less than three weeks prior to the final hearing is presumed to be inadequate time for AIP's counsel to consult with the AIP and prepare for the hearing. RCW 11.88.045(1)(a).

Who can serve as the AIP's attorney? An attorney for the AIP *must* be appointed by the court. RCW 11.88.045(2) states in part as follows:

> During the pendency of any guardianship, any attorney purporting to represent a person alleged or adjudicated to be incapacitated shall petition to be appointed to represent the incapacitated person or alleged incapacitated person.

When is the AIP's attorney appointed? Since the guardianship petition under RCW 11.88.030 is filed *ex parte*, the appointment of an attorney for the AIP will occur after the commencement of the guardianship action. As soon as practicable following appointment, the GAL should meet with the AIP and inform the AIP of his or her right to independent legal counsel. RCW 11.88.090(5)(a). If the AIP objects to the guardianship proceeding or requests legal counsel, the GAL has the duty to inform the court of the need for appointment of counsel for the AIP within five court days unless any of the following have occurred: 1) counsel has appeared; 2) the AIP has affirmatively communicated his or her wish to not be represented by counsel after being advised of the right to representation and the conditions under which court-provided counsel may be available; or 3) the AIP was "unable to communicate at all on the subject," and the GAL is satisfied that the AIP "does not affirmatively desire to be represented by counsel." RCW 11.88.090(5)(g).

When the AIP affirmatively states that he or she does not wish to be represented by counsel, but the GAL believes it to be in the AIP's best interest to have an attorney appointed, the GAL should petition the court for instructions. It is very important for the GAL to be aware that *ex parte* communications are grounds for the GAL's removal. RCW 11.88.093. Thus, if the GAL intends to seek appointment of an attorney for the AIP or instructions from the court, the GAL must inform the petitioner and any other party of the GAL's intentions. The GAL should be prepared to inform the court of any

objections to the appointment of counsel if a party who objects is not present at the hearing.

The AIP may inform the GAL that he or she already has an attorney and wishes to be represented by him or her. If the AIP is unable to ascertain the name of the attorney, the GAL should consult with the petitioner, friends, and family regarding the name of the attorney. The GAL should contact the attorney to inquire as to whether or not he or she would be willing to represent the GAL in the guardianship action. The attorney may decline to serve if the representation is beyond the attorney's expertise or would pose a conflict of interest.

The attorney designated by the AIP may seek his or her own appointment. If he or she is unable to do so within five court days after the GALs initial meeting with the AIP, the GAL should offer to seek the appointment on behalf of the attorney so that the GAL complies with his or her statutory duty and does not duplicate efforts and expense.

If the GAL is ever contacted at any point during the guardianship action by an individual claiming to be the attorney for the AIP, the GAL should politely inform such individual that he or she must be appointed by the court before he or she can act on behalf of the AIP in the guardianship action.

When the AIP does not request a specific attorney, the court chooses the attorney who will represent the AIP. How the court selects the counsel may vary from county to county. It is not unusual for the court to appoint the next attorney on the Guardian ad Litem Registry. If the GAL believes the situation warrants appointment of counsel with special expertise, the GAL should inform the court of that fact. There are situations in which it is in the best interest of the AIP to have a court-appointed attorney who is not necessarily on the GAL Registry. Should the GAL seek the appointment of a specific attorney due to the complexities of the guardianship, it is important for the GAL to first contact that attorney to determine whether the attorney is willing to serve and does not have a conflict should he or she be appointed.

Under what circumstances may the court appoint counsel for the AIP on its own motion? The court may, on its own motion, appoint an attorney for the AIP or IP at any time during the guardianship proceeding if it determines in its opinion that the rights and interests of an AIP or IP cannot "otherwise be adequately protected and represented". RCW 11.88.045(1)(a).

How is the court-appointed counsel for the AIP compensated? Counsel is paid by the county: 1) if the AIP is unable to afford counsel; 2) the expense of counsel would result in substantial hardship to the AIP; or 3) the AIP does not have practical access to funds with which to pay counsel. If the AIP can afford counsel but lacks practical access to funds, the court will provide for the attorney to be compensated at public expense and may impose a reimbursement requirement as part of the final order. RCW 11.88.045 (1)(a). In all other cases, court-appointed counsel will be compensated from the estate of the AIP. The statute regarding attorney fees for the representative of an AIP (RCW

11.88.045(2)) incorporates the fee review provisions of RCW 11.92.180, which governs payment of guardian's fees. This has recently been interpreted to mean that the fees of an attorney for an AIP who is presumed competent or who has a competent attorney in fact are subject to court review only if a guardian is ultimately appointed for the AIP. In the event a guardian is not appointed for the AIP, [the AIP] has the same autonomy and rights as any other person. Thus, if there is no adjudication of incapacity, the AIP's attorney fees are not subject to court review. *In re Guardianship of Beecher*, 130 Wn. App. 66 (2005).

What if the AIP refuses to communicate with his or her court-appointed counsel? Although the court may determine it to be in the best interest of the AIP to be represented by counsel, the AIP may refuse to cooperate with his or her court-appointed counsel. In that situation, it is impossible for the court-appointed counsel to advocate the AIP's expressed preferences. The attorney cannot then effectively represent the AIP and may ask the court for permission to withdraw. RCW 11.88.045(1)(c). If court-appointed counsel seeks to withdraw, the AIP must be given an opportunity for a hearing. The court may grant the request of the AIP's counsel to withdraw and then select new counsel for the AIP, the Court may order counsel to continue his or her representation of the AIP, or the court may allow the guardianship proceedings to continue with the AIP unrepresented by counsel.

What are the duties of the court-appointed counsel for the AIP? The attorney for the AIP must advocate the expressed preferences of the AIP, regardless of whether the attorney believes those preferences are in the AIP's best interest. RCW 11.88.045(1)(b). The AIP's attorney has the ethical duty to provide competent counsel to the AIP and must not substitute his or her own judgment for that of the AIP. The role of the attorney for the AIP is distinguished from the GAL's role in that the GAL makes recommendations based upon the perceived best interests of the AIP, and not on the basis of the AIP's expressed preferences.

In addition to advocating the AIP's expressed preferences, the AIP's counsel should ensure compliance by all parties and the GAL with procedural and substantive requirements of the statute. The AIP's counsel should confirm that the following have occurred during the course of the guardianship action:

1. Personal service of the petition and notice of a guardianship proceeding upon the AIP and GAL within five court days of filing the petition. RCW 11.88.030(4)(a); the petition and notice must contain all of the information required by RCW 11.88.030(1) (a) through (l) and RCW 11.88.030(4) (b).

2. Personal service of notice of the hearing upon the AIP and the GAL at least ten days prior to the hearing. RCW 11.88.040; and the hearing date within 60 days of the filing of the petition, unless extended by the court at the request of one of the parties for good cause. RCW 11.88.030(6).

3. The GAL report must be filed and served 15 days prior to the hearing date and within 45 days following appointment, unless an extension or reduction of time has been granted by the court for good cause, RCW 11.88.090(5)(f)(ix)(5)(f))(ix), and contain all of the information required in RCW 11.88.090(5)(f)(i)-(ix). The GAL must file a public report and a confidential report as required by GR 22.

4. The medical report must be prepared by a physician, psychologist or ARNP who has been chosen by the GAL or the AIP and who has expertise in the type of disorder or incapacity that the AIP is alleged to have. RCW 11.88.045(4). *See* Chapter IV. The report must be prepared within 30 days of the physician's, psychologist's, or ARNP's examination of the AIP and must contain all of the information described in RCW 11.88.045(4)(a)-(i). **Except in cases of minor guardianships, the court does not have jurisdiction to appoint a guardian unless a medical or psychological report meeting the statutory requirements has been filed.** RCW 11.88.045(4).

5. Once counsel for the AIP is appointed, when the GAL seeks contact with the AIP, the GAL shall notify the attorney in advance of such contact. The GAL's contact with the AIP shall be permitted by the AIP's attorney, unless otherwise ordered by the court, pursuant to GALR4(a).

6. GALR 2(p) requires the GAL to maintain documentation to substantiate recommendations and conclusions. The GAL's file shall be made available for review upon the written request of a party or the court on request, pursuant to GALR 2(p).

When is the court-appointed counsel for the AIP discharged? In most cases, the court-appointed attorney for the AIP is discharged by the court at the hearing. In some cases, there is good cause for the attorney to continue to represent the IP for some period of time; for example, until the initial personal care plan and inventory prepared by the guardian are filed, and in some cases, approved by the court. In certain cases, the IP or the Guardian may request the appointment of the attorney to last indefinitely. In such cases, the attorney may request his or her discharge should the IP become no longer able to express his or her preferences.

ModelsforChange
Systems Reform in Juvenile Justice

Innovation Brief

Special Counsel: Enhancing Juvenile Indigent Defense in Washington State

When addressing the issue of indigent defense for juvenile respondents in Washington State, an initial reaction was that the cost for needed improvements would be formidable. Reducing caseloads and improving training alone came with large price tags. However, with a relatively modest investment from the MacArthur Foundation, the leadership of TeamChild and the collaboration of multiple partners, Washington *Models for Change* has significantly improved the quality of juvenile indigent representation in Washington State.

The Issue

In October 2003, the American Bar Association published the report: *Washington – An Assessment of Access to Counsel and the Quality of Representation in Juvenile Offender Matters*[1]. This assessment found:

- Most counties had not adopted public defense standards.
- High caseloads reduced the quality of representation.
- Most jurisdictions lacked comprehensive and regular training or supervision of attorneys.
- Under Washington law, children were permitted to waive their right to counsel.

When the *Models for Change* initiative launched in Washington State in 2007, little had changed with regard to this assessment. Statewide adoption of public defense standards had yet to occur. Uniform training and access to supervision and mentoring from experienced practitioners was a luxury for most juvenile public defenders, especially those practicing outside of Washington's largest urban areas. Approximately 15 percent of juvenile respondents waived their right to legal representation.

Additionally, despite defense and advocacy agencies' efforts and the wealth of knowledge and experience within the state, attempts to improve juvenile defense policy and practice lacked coordination and a plan for sustainability and statewide impact. Similarly, the lack of a strong, visible and coordinated voice for juvenile indigent defense left juvenile public defenders in Washington State ill-equipped to work collectively on system reform issues. It was also difficult to ensure that reform efforts did not inadvertently erode the constitutionally protected rights afforded to youth.

Innovations

To address the shortcomings of juvenile indigent representation in Washington State, with the support of the MacArthur Foundation, TeamChild created the position of *Special Counsel for Enhancing Juvenile Indigent Defense*. In collaboration with the juvenile indigent

defense community in Washington State, the Special Counsel was charged with: improving indigent juvenile defenders' access to training, mentoring and technical assistance; coordinating and building models of high-quality holistic defense practices; and increasing indigent juvenile defenders' leadership and meaningful participation in system reform efforts.

To fill this position, TeamChild hired a leader in the public defense community with more than 20 years of experience in matters relating to juvenile indigent defense. This person has worked as a front line public defender, a unit supervisor, a clinical law professor and the leader of a model juvenile defense project in a small, rural eastern Washington State county.

To improve representation for indigent juvenile respondents, the Special Counsel conducted the following activities:

- Coordinated state and national partners to deliver continuing legal education programs for juvenile defense attorneys throughout the state.
- Developed an outline for a comprehensive training curriculum and skill assessment tool, created supplemental Washington State training modules and provided state-based material to enhance the National Juvenile Defender Center's Juvenile Training Immersion Program.
- Provided a high-quality, accessible, centralized resource for short-term, case-related technical assistance.
- Convened a series of Juvenile Defense Leadership Summits, which developed into a permanent Washington Juvenile Defender Leadership Network. This strong network of defenders works to advance defense-initiated solutions to systemic problems in the juvenile justice system.
- Advocated for the Washington Supreme Court's adoption of revisions to:
  - Juvenile Court Rule (JuCR) 7.15, *Waiver of Right to Counsel*;
  - JuCR 9.2, *Additional Right to Representation by a Lawyer*, and the corresponding indigent representation standards; and
  - JuCR 1.6, *Use of Physical Restraints in the Courtroom*, which limited the circumstances under which a juvenile respondent may be shacked in a courtroom.

Since the enactment of JuCR 7.15, in juvenile court, the entry of guilty pleas without consultation with counsel has been all but eliminated.

Results and Lessons:

Over the six years of the project:

- The number of free training hours relevant to juvenile defense practice more than tripled.
- The Special Counsel fielded three or four requests per week for case-specific assistance. Some of this workload is now addressed through the list-serve hosted by the Washington Defender Association. With the confidence gained by those defenders who participated in the Washington Juvenile Defender Leadership Network, this list-serve has become more robust with increasing numbers of questions being answered and more materials being shared.
- The Washington Juvenile Defender Leadership Network developed a coordinated approach for addressing system reform, bringing together multiple partners (e.g., Columbia Legal Services, ACLU of Washington, UW Legislative Clinic, TeamChild) and establishing workgroups targeting specific areas such as automatic transfer, collateral consequences, gang intervention and use of restraints.
- Since the enactment of JuCR 7.15, the entry of guilty pleas in juvenile court without prior consultation with counsel has been all but eliminated.
- With the adoption of JuCR 1.6, the practice of presumptive shackling of juveniles in Washington's courtrooms has been eliminated.

With the support and leadership of Washington *Models for Change*, juvenile defenders now have access to more and better training, and the Washington Juvenile Defender Leadership Network is taking more responsibility for supporting defenders, providing technical assistance where needed and advancing system reform. The enactment of revised court rules ensure that all juvenile respondents have legal consultation at the beginning of a case and that juvenile defenders meet certain qualification standards before they can be appointed to cases.

"It was one of the few conferences or meetings that I have participated in that facilitated meaningful discussions between advocates representing individuals and advocates working on 'systemic change'. I think it helped in forming connections that will facilitate 'bottom up, top down and horizontal' collaborations."—LEADERSHIP SUMMIT PARTICIPANT

Looking Forward

In 2013, the Special Counsel position was added to the workforce of the Washington State Office of Public Defense. The position is now embedded in a state agency and supported with public funding. The Special Counsel continues to serve as a technical assistance resource responding to case-specific inquiries, assisting with defender trainings and participating on various system reform workgroups. Among these efforts is the implementation and refinement of the indigent defense standards and corresponding training.

Resources

Comprehensive Training Curriculum for Juvenile Court Practitioners (Washington State)

JuCR 7.15 – Wavier of Right to Counsel
http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=sup&set=JuCR

JuCR 9.2 – Additional Rights to Representation by a Lawyer
http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=JuCR&ruleid=supJuCR09.2

Indigent Defense Standards
http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=sup&set=JuCR

JuCR 1.9 – Physical Restraints in the Courtroom
http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=348

1. Elizabeth M. Calvin, Esq. et al. Washington – An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters, October 2003, American Bar Association, Criminal Justice Section, Juvenile Justice Center, Washington DC.

For more information contact Justice Bobbe J. Bridge, Founding President and CEO, Center for Children & Youth Justice, bjbridge@ccyj.org. Editor: George Yeannakis, Special Counsel, Washington State Office of Public Defense at george.yeannakis@teamchild.org

This brief is one in a series describing new knowledge and innovations emerging from *Models for Change*, a multi-state juvenile justice reform initiative. *Models for Change* is accelerating movement toward a more effective, fair, and developmentally sound juvenile justice system by creating replicable models that protect community safety, use resources wisely, and improve outcomes for youths. The briefs are intended to inform professionals in juvenile justice and related fields, and to contribute to a new national wave of juvenile justice reform.

From: Terra Nevitt [mailto:terran@wsba.org]
Sent: Wednesday, February 17, 2016 7:20 AM
To: Thomas F. Coleman <tomcoleman@earthlink.net>
Subject: RE: access to justice for guardianship respondents

Thank you for reaching out Mr. Coleman. I have searched our files and don't see that the ATJ Board has recently taken up the issue of right to counsel for guardianship matters. I will be happy to share your article with the Board and let you know if they would like additional information.

Warmly,

Terra Nevitt| **Access to Justice Board Manager**
Preferred pronouns: she/her/hers
Washington State Bar Association | 206.727.8282| TerraN@wsba.org
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101 | www.wsba.org/ATJ

From: Thomas F. Coleman [mailto:tomcoleman@earthlink.net]
Sent: Friday, February 12, 2016 8:13 AM
To: Terra Nevitt
Subject: access to justice for guardianship respondents

Terra Nevitt
Access to Justice Board

Dear Ms. Nevitt,

I came across a webpage about your agency today. http://www.wsba.org/atj/

I am wondering if the Access to Justice Board has ever focused on the right to counsel for guardianship respondents as an aspect of access to justice for civil litigants.

If so, I would be interested in learning more about what the Board has done on this issue.

If not, I invite the board to consider this problem and to address it in some way.

I am attaching a copy of an essay I have written and request that you share it with members of the Board.

I look forward to hearing from you.

Thomas F. Coleman
Spectrum Institute
www.spectruminstitute.org/outreach

Duty of Loyalty: Appointed Attorney v. GAL

A Court-Appointed Attorney Must Have Undivided Loyalty to the Respondent

Washington Rules of Professional Conduct require an attorney to have loyalty solely to the client. The fact that a lawyer is appointed by the court or paid from public funds does not diminish the duty of loyalty to the client. (Comments to Rule 1.7)

The Guardian Ad Litem is an Agent of the Court, Owing Loyalty to the Court, Not the Respondent

Quote from
Guardianship of Matthews
156 Wash.App. 201, 210-211 (2010)

"A GAL appointment exists at the will of the court.... Thus, a GAL is an agent of the court with duties and obligations flowing from the GAL to the court with a duty to protect the interests of an incapacitated person. We hold that a GAL ... has an agency relationship with the court much like a permanent guardian or limited guardian appointed under the Trust and Estate Dispute Resolution Act (TEDRA) (ch. 11.96A RCW) has with the court."

Dictionary Definition of Agency

"A consensual relationship created by contract or by law where one party, the principal [court], grants authority for another party [GAL], the agent, to act on behalf of and under the control of the principal to deal with a third party [respondent]. An agency relationship is fiduciary in nature . . . . This relationship requires the agent to exercise a duty of loyalty to the principal ." (Bracketed words added) http://legal-dictionary.thefreedictionary.com/agency

Official Response: No Mandatory Training or List for Appointed Attorneys in Spokane County

Spokane County does not have an official list of attorneys to serve as an attorney for a person alleged incapacitated.

I do not know of mandatory training for attorneys in regards to being an attorney for a person alleged incapacitated. However, we do have a Title 11 Guardian Ad Litem registry, and yearly mandatory training is required. Often the appointed attorney is one of these GALs.

Ana Kemmerer, Coordinator
Spokane County Superior Court
Guardianship Monitoring Program
Spokane, WA 99260 0350

Contact from Spokane County Public Website

Do not reply to this email - this email was sent from the public web server and any reply will be undeliverable. Use the contact information below to respond.

Request

Request date:	2/29/2016 6:57:50 AM
Request type:	Question
Directed to:	Guardianship Monitoring Program
Request text:	I am researching guardianship issues for Spokane County. I have a question regarding attorneys who are appointed to represent Alleged Incapacitated Persons (AIPs). 1. Is there an official list of attorneys who are deemed to be qualified to serve as an attorney for a person who is alleged to be incapacitated? 2. Is there any type of mandatory training for attorneys who are appointed to represent AIPs in guardianship cases? I would appreciate a reply via email if at all possible. Thank you

Lisa Norris-Lampe
Appellate Legal Counsel

Oregon Supreme Court

February 19, 2016

Thomas Coleman
Legal Director, Spectrum Institute
Spectrum Institute
9420 Reseda Blvd #240
Northridge, CA 91324

Re: Disability and Guardianship Project

Dear Mr. Coleman,

Thank you for your letter and packet sent to the Oregon Supreme Court and others in the Oregon Judicial Department, regarding access to effective advocacy services in guardianship proceedings. I have reviewed your materials with Chief Justice Balmer, and he asked me to provide you with this response.

Your submission raises important issues, and it has been directed to an internal committee that examines issues relating to inclusion in the state courts, as well as the state Office of Public Defense Services, in light of the issues that you have identified relating to representation by counsel. Those entities then can consider the issues that you have raised and evaluate whether any related budget or statutory proposal perhaps should be drafted. I also have shared your materials with the Oregon State Bar, in particular relating to the procedure for pursuing a complaint against a lawyer.

Oregon does have several statutory protections for persons in guardianship proceedings, but your effort to point out additional issues that may arise is appreciated. Our department will let you know if additional assistance on these issues is desired.

Sincerely,

Lisa Norris-Lampe
Appellate Legal Counsel

cc via email:
Kingsley Click
Karen Hightower
Brenda Wilson
Nancy Cozine
Helen Hierschbiel

Oregon Supreme Court
1163 State Street
Salem OR 97301

Disability and Guardianship Project

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

March 16, 2016

House Judiciary Committee
Washington Legislature
P.O. Box 40600
Olympia, WA 98504-0600

Re: Need for Legislative Oversight on the Implementation of RCW 11.88.045; Appointment and Performance of Counsel for Guardianship Respondents

Dear Committee Members:

Our organization filed a report today with the Washington Supreme Court. The primary focus of the report is the failure of the Judicial Branch to implement RCW 11.88.045 which provides for the appointment of counsel to represent respondents in adult guardianship proceedings. The report demonstrates how the failure of the courts to appoint attorneys for all respondents, to adopt performance standards for the attorneys, to require them to attend proper training programs, and to implement a monitoring mechanism violates Title II of the Americans with Disabilities Act.

We are providing a copy of *The Justice Gap* to the Senate Law and Justice Committee and the House Judiciary Committee. The report and related reference materials document a huge gap between the policy established by the Legislature in RCW 11.88.045 requiring attorneys for all vulnerable adults in these proceedings – presumably attorneys who are qualified and who perform services in a competent manner – and the day-to-day practices of the courts in processing these cases.

There are 20,000 adults under guardianship in Washington State, with hundreds being added to the guardianship rolls each year. Many are seniors while a significant segment of these respondents are people with intellectual and developmental disabilities. Our research shows the implementation of RCW 11.88.045 varies from county to county. This is contrary to constitutional requirements that laws of statewide application should be implemented uniformly throughout the state so that respondents receive equal protection of the law regardless of their geographic location.

Spectrum Institute is willing to conduct an informational briefing on "Access to Advocacy Services in Guardianship Proceedings." It would inform legislators and staff about what the Legislature can do to ensure that the courts are complying with the letter and spirit of RCW 11.88.045, the Americans with Disabilities Act, and the Washington Law Against Discrimination in the context of guardianship proceedings. Please let us know if this is something you would like to schedule.

Respectfully submitted:

Thomas F. Coleman

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

Disability and Guardianship Project

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

March 16, 2016

Senate Law and Justice Committee
Washington Legislature
P.O. Box 40466
Olympia, WA 98504-0466

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Respectfully submitted:

Thomas F. Coleman

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

Excerpt from
WINGS STEERING COMMITTEE PRESENTATION

March 3, 2016

Steps to Commence a Guardianship through Entry a/the Order Appointing

Robert B. Nettleton
Harlowe & Falk LLP
One Tacoma Avenue, Suite 300
Tacoma, WA 98403

Excerpt:

f. Right to Legal Counsel.

The person over whom guardianship is sought is entitled to be represented by legal counsel of his or her own choice. If the person does not select legal counsel, the court can appoint legal counsel. RCW 11.88.045(I)(a).

Comment by Spectrum Institute:

The summary is not complete. Not only "can" the court appoint legal counsel, but in subdivision (a) the statute says "The court shall provide counsel . . ."

Subdivision (b) of the statute clarifies that "counsel's role shall be distinct from that of the guardian ad litem" and counsel "shall act as an advocate for the client . . . ."

Without the appointment of counsel, a respondent is left with only a "best interests" investigator for the court (guardian ad litem) and is missing a key component of access to justice, namely, an attorney who can defend his or her rights, present favorable evidence, vet the proposed guardian, and make sure all participants in the proceeding (petitioner, GAL, capacity expert, and judge) perform their roles in conformity with due process and statutory mandates.

Excerpts from
A.G. v. Paradise Valley Unified School District No. 69
Case No. 13-16239 / Filed March 3, 2016

United States Court of Appeals for the Ninth Circuit

Ruling on Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973

No Request for Accommodation Is Needed

Quotes: The district court also observed that A.G.'s parents never requested some of the services she later argued the school district should have provided. We agree with this observation, but it overlooks that A.G.'s parents did not have the expertise—nor the legal duty—to determine what accommodations might allow A.G. to remain in her regular educational environment. *See* 1 Americans with Disabilities: Practice and Compliance Manual § 1:247 (2015) ("[A] plaintiff's failure to expressly 'request' an accommodation is not fatal to a claim where the defendant otherwise had knowledge of an individual's disability and needs but took no action."); *Duvall*, 260 F.3d at 1136 (Section 504 "create[s] a duty to gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary.").

Deliberate Indifference if No Accommodation Once Put on Notice

Quotes: Thus, a public entity can be liable for damages under § 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons." *Lemahieu*, 513 F.3d at 938 .... "Where, as here, the plaintiff seeks damages under section 504 and the ADA, she must show the defendant had notice of her need for an accommodation and "fail[ed] to act." *Duvall*, 260 F.3d at 1139. She can establish notice by showing that she "alerted the public entity to [her] need for accommodation;" or that "the need for accommodation [was] obvious, or required by statute or regulation." *Id.* When an entity is on notice of the need for accommodation, it "is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation." *Id.*

Comment by Spectrum Institute

Washington State is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. Just as a school district is a "public entity" within the ADA and Section 504, so is a state court system. By its recent letter to the Washington Supreme Court, Spectrum Institute has placed Washington courts on notice that modifications and accommodations are needed to give guardianship respondents, as a class, access to justice. This includes the appointment of trained attorneys who provide effective advocacy services to respondents with cognitive and communication disabilities. Failure to take appropriate remedial action to ensure effective advocacy services for this class of individuals with disabilities would constitute willful indifference. Due to their disabilities, these litigants are unable to request modifications and accommodations in their individual cases.

ATTORNEY INSTRUCTION RELATED TO GUARDIANSHIP ISSUES

TEXAS GOVERNMENT CODE ANN. § 81.114 :

(a) The state bar shall provide a course of instruction for attorneys who represent parties in guardianship cases or who serve as court-appointed guardians.

(b) The state bar shall adopt the rules necessary to accomplish the purposes of this section.

(c) The instruction must include information about:

(1) statutory and case law relating to guardianships;

(2) the aging process and the nature of disabilities;

(3) the requirements of the Americans with Disabilities Act (42 U.S.C. Section 12101 et seq.) and related case and statutory law, rules, and compliance methods;

(4) the principles of equal access and accommodation;

(5) the use of community resources for the disabled; and

(6) avoidance of stereotypes through a focus on people's individual abilities, support needs, and inherent individual value.

(d) The instruction may include information about:

(1) substantive areas of law concerning the needs of elderly persons and persons with disabilities;

(2) barriers to physical access and methods to overcome those barriers;

(3) communication needs of elderly persons and persons with disabilities and the technology available to provide access to communication;

(4) duties and responsibilities of guardians, guardians ad litem, attorneys, and court personnel in guardianship proceedings;

(5) standard definitions and procedures for determining incapacity;

(6) standards for surrogate decision making;

(7) the doctrine of the least-restrictive alternative;

(8) the dispute resolution process, especially its application to elderly persons and persons with disabilities; and

(9) successful programs and funding efforts for addressing the court-related needs of elderly persons and persons with disabilities.

Added by Acts 1993, 73rd Leg., ch. 905, Sec. 3, eff. Sept. 1, 1993.

Comment by Spectrum Institute:

Washington State has a mandatory course for lay guardians, certified professional guardians, and guardians ad litem – but not for court-appointed attorneys who represent respondents. The state Supreme Court should have mandated such a course long ago. It has supervisory power over the proceedings, the attorneys, and the state bar. Since the court has not done this, the Legislature should include this issue in an oversight hearing about appointment, training, performance, and monitoring of court-appointed attorneys in guardianship proceedings. The next legislative session should have such an oversight hearing as a first step to develop legislative remedies to deficiencies in these areas.

Washington State Court Rules
Excerpts from GR RULE 33

Requests for Accommodation by Persons with Disabilities

(a) Definitions. The following definitions shall apply under this rule: (1) "**Accommodation**" means measures to make each court service, program, or activity, when viewed in its entirety, readily accessible to and usable by an applicant who is a qualified person with a disability, and **may include** but is not limited to: (A) making reasonable modifications in policies, practices, and procedures; (B) furnishing, at no charge, auxiliary aids and services, including but not limited to equipment, devices, materials in alternative formats, qualified interpreters, or readers; and (C) as to otherwise unrepresented parties to the proceedings, **representation by counsel, as appropriate or necessary to making each service, program, or activity, when viewed in its entirety, readily accessible to and usable by a person with a disability.**

Comment [1] Access to justice for all persons is a fundamental right. It is the policy of the courts of this state to assure that persons with disabilities have equal and meaningful access to the judicial system. Nothing in this rule shall be construed to limit or invalidate the remedies, rights, and procedures accorded to any person with a disability under local, state, or federal law.

Comment by Spectrum Institute

This court rule was adopted by the Washington Supreme Court in 2007. It is included in the Guardian Ad Litem Handbook. The handbook says that an alleged incapacitated person has a right "to have special assistance if disabled under the Americans with Disabilities Act." Nothing more is said on this topic other than inclusion of GR 33.

The comment to the rule says that it is the policy of the courts that persons with disabilities have equal and "meaningful" access to the judicial system. Meaningful access to justice in a guardianship proceeding includes access to effective advocacy services. RCW 11.88.045 gives respondents the right to an attorney and specifies that an attorney shall be an advocate and shall not act as a guardian ad litem. Thus, access to advocacy services is a statutory right. And yet, our research shows that the vast majority of guardianship respondents do not receive court-appointed attorneys.

The practice seems to be to appoint counsel only if requested by the respondent or recommended by the guardian ad litem. GR 33 contemplates appointment of counsel as an accommodation to ensure access to justice. GR 33 is premised on an assumption that a litigant with a disability can request counsel as an accommodation. It totally ignores a fact that is either obvious or well known to the court and judicial administrators – that many, if not most, guardianship respondents have cognitive and communication disabilities that impair or preclude them from requesting counsel. They lack the ability to understand the importance of counsel and they lack the capacity to waive counsel.

Rule 33 and the Handbook fail to mention the court's duty under Title II of the ADA to provide an accommodation, *without request*, when the court knows the litigant has a disability that requires accommodation and that such disability impairs their ability to request an accommodation. Without the accommodation of an appointed attorney, respondents are unable to investigate alternatives to guardianship, challenge capacity assessments, evaluate the sufficiency of evidence, present witnesses on their own behalf, and ensure that all participants (including the GAL) are performing their duties as required by law. These advocacy functions are essential to having *meaningful* access to justice.

Excerpts from

ENSURING EQUAL ACCESS FOR PEOPLE WITH DISABILITIES: A GUIDE FOR WASHINGTON COURTS

REVISED 2011

Appointment of counsel. Some lawyers are especially skilled, experienced and motivated in representing people with cognitive limitations, especially in criminal cases, and where possible those attorneys should be appointed for indigent defendants. It is at least arguable that in cases where an indigent pro se civil litigant is unable to participate effectively in the proceedings because of a cognitive disability, the reasonable accommodation is appointment of counsel at public expense. (Fn 42) As noted earlier in this Guide, **GR 33 permits appointment of counsel where necessary to ensure that a disability does not prevent access to the court process**. (From page 32)

Fn. 42: This point is argued by the authors of a recent law review article. See Brodoff, L., McClellan, S. and Anderson, E., The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon, 2 Seattle Journal for Social Justice 609 (Spring/Summer, 2004).

E. Pro Se Litigants with Disabilities. When a person with a disability represents him- or herself, there may be no intermediary between the court and the litigant on the subject of necessary accommodations. It is acutely important that judicial officers, clerk's staff, and courtroom staff be alert, communicate effectively and respectfully, and determine appropriate accommodation if needed. The recently adopted court rule on accommodation, GR 33, provides that **counsel may be appointed where necessary to ensure access to the court process by a person with a disability**. GR 33 (a) (1) (C). (From page 10)

Administrative access issues are addressed in a new publication, ―Ensuring Equal Access for People with Disabilities: A Guide for Administrative Hearings.4 Appendix F of the Guide for Administrative Hearings contains specific recommendations for how to assess the need to appoint counsel as an accommodation in administrative hearings. **These recommendations may also be useful in assessing the need to appoint counsel in court.** (From page 11)

Comment by Spectrum Institute:

GR 33 suggests that appointment of an attorney to represent a litigant with cognitive disabilities **may** be an appropriate accommodation under the ADA. Unfortunately, the rule puts the burden on the litigant to request an accommodation. The Guide for Washington Courts says that GR 33 **permits** appointment of counsel where necessary to ensure access to the court process. Neither GR 33 nor the Guide indicate that appointment of counsel is the only accommodation that will suffice when a litigant has cognitive and communication disabilities that preclude the litigant from *effectively* representing himself or herself in the proceedings (e.g. conducting an investigation, presenting evidence, etc.)

On page 11 of the Guide for Courts there is a slight reference that **A Guide for Washington Administrative Proceedings** "**may** also be useful" in assessing the need to appoint counsel in court. The term "may" reinforces GR 33 which suggests appointment of counsel is permissible but does not give any indication that failure to do so, sua sponte, could be a violation of Title II of the ADA.

Excerpts from

Ensuring Equal Access for People with Disabilities:
A Guide for Washington Administrative Proceedings

May 2011

3. Best Practices: When the Litigant Is Not Capable of Representing Herself Because Of A Disability (From page 8)

A hearing officer's duty to develop the record includes the responsibility to determine if the litigant has the capacity to effectively present her/his case *pro se*. This capacity includes not only the ability to provide oral testimony, but also the ability to gather and submit relevant evidence and present a cogent argument. It may not be clear initially that the litigant lacks the capacity to appear and represent her/himself *pro se*. For example, many persons with psychiatric or cognitive disorders are able to mask their disability effectively. Refer to the "*Pro Se* Capacity Questionnaire" in Appendix F to help determine a person's capacity to represent one's self.

When a litigant's disability prevents her/him from effectively representing her/himself, providing the services of a legal advocate is the only effective accommodation. A wide variety of disabilities could require a legal advocate as an accommodation. Some examples:
- A person with an intellectual disability does not understand the proceeding . . . .
- A person with a learning disability cannot submit relevant documents as evidence because s/he cannot read them.

Once it becomes clear that the litigant lacks the capacity to represent her/himself due to a disability, the following steps are recommended:
- Immediately stop the hearing and continue it to a later date. **If the proceedings commence before an accommodation is provided, it could be a violation of Title II of the ADA**.
- Try to ascertain if the litigant currently has a guardian, legal advocate, or other representative who is not present at the hearing. If so, that person should be contacted to determine if they will be representing the litigant at the re-scheduled hearing.
- If the litigant does not currently have a representative, provide for the appointment of a legal advocate.

Comment by Spectrum Institute:

This Guide for Washington Administrative Proceedings comes much closer to explaining the actual requirements of the ADA than do GR 33 and the Guide for Washington Courts, both of which mention appointment of counsel as a *possible* accommodation for litigants with cognitive disabilities, if requested.

The guide directly tells administrative hearing officers: (1) they have an affirmative duty, without request, to determine if an apparent disability may prevent a litigant from having the capacity to effectively present his or her case; (2) when it appears that a cognitive or other disability does prevent effective self representation, then **appointing an attorney is the only effective accommodation**; and (3) commencing proceedings without the appointment of counsel as an accommodation could be a violation of Title II of the ADA. Unfortunately, this guide only applies to hearing officers in administrative proceedings. GR 33 and the Guide for Washington Courts do not give such unequivocal guidance to judges, court administrators, and guardians ad litem.

ADA Appointment List – Employment Posting

Court Appointed Attorneys in ADA Cases

Pierce County Superior Court is seeking to add to the list of qualified local attorneys who are willing to accept appointment by the court to represent civil litigants with eligible disabilities under GR-33. Appointments under GR-33 are nearly always for disabled individuals who are eligible due to severe psychological or neurological impairments and have subsequently been found after an evaluation and review of healthcare records to qualify for court appointed counsel as an ADA accommodation. The court appointment rate is currently set by Superior Court at $85.00 per hour.

Any attorney who is interested in being placed on the ADA Appointment List, should provide the below listed information to Bruce S. Moran, Deputy Court Administrator, at Pierce County Superior Court, 930 Tacoma Avenue South, Room 334, Tacoma, WA. 98402. If you have questions please contact Mr. Moran at (253) 798-4193.

- Full Name (First, M.I. Last)
- WSBA#
- Business Mailing Address
- Business Physical Address (if different from the mailing address)
- Business Phone
- Business Fax
- Business E-Mail Address
- Practice Emphasis (i.e. what are your areas of expertise and what types of cases are you willing to accept for court appointment?)

PLEASE NOTE: ATTORNEYS WHO ARE ALREADY ON THE SUPERIOR COURT ADA LIST DO NOT NEED TO RE-APPLY!!

Comment by Spectrum Institute:

This employment posting on the court's website is encouraging, but raises many questions. Do other counties have an ADA Appointment List for attorneys to represent litigants with severe psychological or neurological impairments in civil cases? Do guardianship respondents automatically qualify since it is alleged, with medical poof, that the respondents are so lacking in capacity that they cannot provide for basic needs and cannot make medical, financial, or other major decisions? If not, why not? Who evaluates whether a litigant is eligible and what criteria are used? Does someone need to request an ADA appointment attorney as an accommodation in order for the evaluation process to begin? If no request is made and it is obvious the litigant lacks the ability to question the petitioner's evidence or investigate the case or present evidence in support of the retention of his or her rights, does the court initiate the appointment process on its own motion? What qualifications are needed other than a license to practice law? Is attendance at a training program required for appointed attorneys just as it is for guardians and guardians ad litem? Are there performance standards for the attorneys? Are there any quality assurance methods?

Excerpts from
Weems v. State Board of Industrial Appeals
Washington Court of Appeals, Case No. 44713-4-11

BRIEF OF AMICUS CURIAE FRED T. KOREMATSU
CENTER FOR LAW AND EQUALITY

Assessment Qualifications Statement

(For determining ADA Accommodation Requests for Attorneys)

When a request for appointment of an attorney at court expense is made by a person with a disability, the following criteria will be used as a guideline during the assessment process in determining whether the requestor qualifies for the appointment of an attorney under GR-33: [15]

The person with a disability is a party to the proceeding and the following factors exist:

Psychological or Neurological impairments, that are documented by a qualified expert diagnosis, which significantly interfere with the applicant's ability to comprehend the proceedings and/or communicate with the court.

AND

The cognitive interference is to a degree that the applicant is functioning at a level that is substantially below that of an average pro se litigant. (From Appendix A)

FN 15 *Pierce County Superior Court Assessment Qualifications Statement* (for determining ADA Accommodation Requests for Attorneys), obtained from Deputy Court Administrator Bruce S. Moran and attached as Appendix A. Pierce County Superior Court GR-33 procedure and forms available at http://www.co.pierce.wa.us/index.aspx?nid=l027. (From page 13 of brief)

Using the GR 33 process, over the last six years Pierce County Superior Court has approved a total of 46 ADA representational accommodation requests. That averages around eight people per year receiving counsel accommodations. (From page 14 of brief)

FN 18 Over the course of seven years of providing the GR 33 representational accommodation to qualified parties (2008-2013), Pierce County spent a total of$163,058. That averages $24,294 per year. *Pierce County Superior Court Report of GR-33/ADA Attorney Cases and Costs by Year . . .* (From page 14 of brief)

Comment from Spectrum Institute

This brief was filed in 2014. It suggests that appointing an attorney as an accommodation in a civil case is rare and is only done upon request. An average of 8 appointments out of a total of nearly 16,000 civil filings per year amounts to such an accommodation, upon request, in .0005% of all civil cases. Available information does not suggest that attorneys are appointed as a accommodation, without request, when it appears to the court that a civil litigant has a cognitive or other disability that precludes meaningful participation in the case as a pro se litigant.