

Disability & the Law

A Compendium of Commentaries

By Thomas F. Coleman



Educating California's lawyers,
judges, and lawmakers through
legal analysis and persuasion

December 31, 2020

The Daily Journal is California's premier legal newspaper. It is read by attorneys, judges, and lawmakers. The following commentaries by Thomas F. Coleman have been published in the Daily Journal over the past four years. The subject matter covers different aspects of disability and the law: conservatorship reform, access to justice, ADA accommodations, professional responsibility, voting rights, disability and abuse, the right to therapy, appellate practice, legal education, and capacity to marry. Coleman has been practicing law in California since 1973. He is the legal director of Spectrum Institute – a nonprofit organization advocating for the rights of seniors and people with disabilities. (www.spectruminstitute.org)

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Reform Long Overdue for State Conservatorship Process

By Thomas F. Coleman

The conservatorship process for adults with developmental disabilities is broken. There are about 40,000 such adults currently in conservatorships in California, and about 5,000 new cases are added to the system each year. There are many systemic and operational problems with the processing of these cases.

It's not too soon to get the number crunchers into the conversation about "supported decision-making" and guardianship reform. The best laid plans by policy people and rights advocates never gain real traction without also having financial analysts in the mix too.

Proponents of supported decision making have been focusing on issues of self determination and equal rights for people with intellectual and developmental disabilities. The idea is that, with proper support, people with disabilities have the capacity to make their own decisions without guardianships.

Those proposing reform of adult guardianships for people with developmental disabilities, known in California as limited conservatorships, have been complaining that the system has structural flaws and operational deficiencies of a magnitude that violate constitutional guarantees and statutory requirements.

The conversations about supported decision-making and guardianship reform are now moving from academic discussions and idealistic dialogues among like-minded individuals into the realm of politics, which adds another set of considerations.

The Disability and Abuse Project has been in contact with the Judicial Council of California – the state agency that makes rules, develops forms, and provides education to judges and attorneys. That agency is only now realizing the seriousness of the many problems existing within the limited conservatorship system.

To address these problems, the Judicial Council has designated two advisory committees to work with its educational institute to discuss possible training programs for the judges and attorneys who process limited conservatorship cases. This approach is like painting an airplane that has major mechanical problems. In the end, the plane looks nice, but the unfixed defects continue to place passengers at risk.

Proponents of supported decision-making and conservatorship reform should insist that defective parts be replaced and that periodic inspections be done by trained

mechanics. Pilots and navigators also need to receive training, plus the entire team must be accountable to someone.

Without systemic changes in policies and procedures, and without ongoing supervision and routine monitoring, the educational programs under discussion by the Judicial Council will be little more than cosmetic.

Budget planners need to have a seat at the table along with judicial overseers. Reform advocates also need to be involved in the process of creating what should be meaningful and lasting reform. Ongoing discussions and planning should be inclusive and transparent.

Evaluating supported decision-making as a less restrictive alternative in thousands of individual cases will cost money. So will the processing of conservatorship cases if supported decision-making is not adequate to protect vulnerable adults.



Insuring that proposed conservatees receive equal access to justice – as required by the Americans with Disabilities Act and by the Fourteenth Amendment – will cost money too.

Budgets will need to be increased for agencies that play or should play a role in the limited conservatorship system. At the state level, that would include the Judicial Council, the Department of Developmental Services, and the system of

Regional Centers, as well as the federally-funded Disability Rights California.

At the local level, superior courts that employ judges and investigators will be financially affected. County governments pay the fees of court-appointed attorneys and public defenders. So room should be made at the table for presiding judges and county supervisors.

There will come a time for educational programs – but only *after* decisions have been made about systemic changes and their estimated costs. First things first. ◇

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Legal System Without Appeals Should Raise Eyebrows

By Thomas F. Coleman

Our legal system presupposes a considerable number of contested hearings and a fair number of appeals. Appellate courts play a vital role in keeping the system honest.

Published appellate decisions create a body of case law that instructs trial judges and the entire legal profession about the correct interpretation of statutes and constitutional mandates. Appeals are essential to the life blood of the legal system – judicial precedent.

Having served as a court-appointed appellate attorney for over 15 years, I know the critical role that appellate courts play in monitoring the activities of trial judges and attorneys. Alleged errors are scrutinized on appeal and the opinion of the appellate court determines whether the rules were violated by the participants in the trial court.

Knowing that proceedings are being recorded and might be appealed can have a prophylactic effect. People are more careful when they believe their actions may be seen by others, especially by people in higher authority. The reverse is also true. When people believe they are not being watched or when they think their actions are not subject to review, they act differently.

I have looked at statistics published by the Los Angeles Superior Court and by the Judicial Council of California. Annual reports verify that contested hearings or trials occur in large numbers on virtually every subject matter and every type of case. Statistics also verify that the Courts of Appeal in California are kept busy deciding appeals from judgments involving child custody disputes, divorces, civil litigation, wills and estates, juvenile dependency, juvenile delinquency and criminal convictions.

Contested hearings and appeals should not only be expected, they should be valued. Appeals correct policy defects and operational flaws. They instruct judges and attorneys on how to conduct themselves within the law.

Now comes the kicker. There is a category of cases that has almost no contested hearings and virtually no appeals – limited conservatorship proceedings for adults with intellectual and developmental disabilities. Some 5,000 of these cases are processed in California each year, with 1,200 of them in Los Angeles County alone.

I found that, at least in Los Angeles, these cases are handled with “assembly line” efficiency. Petitions are filed to take away the rights of adults to make decisions regarding finances, residence, medical care, social contacts, and sexual relations. Opposition is rare.

Court-appointed attorneys for proposed conservatees are given a “dual role” by local court rules. One duty is to help the court resolve the case. The attorneys seem to be very good in that role, and not so good at defending

the rights of the clients, since nearly all cases are settled with the clients losing their decision-making rights.

These attorneys *never* file an appeal for their clients, so the Court of Appeal never sees how the judges or the attorneys handle these limited conservatorship cases. The probate court judges who process these cases know their actions will not be reviewed on appeal.

A probate judge recently told a group of court-appointed attorneys at a training last year that they are not required to advise clients about their right to appeal. Attorneys are usually released as counsel when the conservatorship order is granted. Clients, therefore, have no attorney to assist them in filing an appeal.

The California Appellate Project states it has never seen an appeal by a limited conservatee. A search of case law shows there are no published opinions deciding appeals filed by limited conservatees.

Show me a legal system that has no appeals and I will show you a rigged system. Consider me a whistle-blower if you wish, but this cannot continue. Something must be done.

One solution would be to pass a bill clarifying that a “next friend” can file an appeal for someone who lacks competency to do it for himself or herself. Such a proposal, known as Gregory’s Law, is being circulated now.

Gregory’s Law would allow a relative or friend to file a “next friend” appeal to challenge the orders of judges or the conduct of appointed attorneys that infringe the rights of limited conservatees. Clarification is needed because a published opinion (Conservatorship of Gregory D. 214 Cal.App.4th 62 (2013)) declared that only the limited conservatee may appeal to complain about these issues.

That creates a Catch 22 for limited conservatees. Because of the nature of their disabilities, they lack the understanding of how to appeal. Their appointed attorneys won’t appeal because it is they who surrendered the rights of their clients. So ongoing violations of the rights of people with disabilities are never reviewed on appeal.

The best solution would be for attorneys to serve their primary duty, defending the rights of their clients. This should be their only focus. The court rule giving them a secondary duty to help settle cases should be eliminated.

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Daily Journal

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Deja Vu for Disability Rights at the Justice Department

By Thomas F. Coleman

One year ago I stood with other disability rights advocates outside of the federal courthouse in Los Angeles to announce the filing of a voting rights complaint against the Los Angeles County Superior Court. After the press conference, we walked to the office of the U.S. attorney where we delivered evidence that the court had been stripping conservatees of the right to vote in violation of federal laws.

In May, the Department of Justice notified the chief justice and the secretary of state that a formal investigation was being conducted, but instead of focusing on Los Angeles, the inquiry was broadened to the entire California judiciary. The state has until June 30 to turn over scores of records about the policies and practices of the court in disqualifying conservatees from voting.

Today we returned to the same spot on the sidewalk across from the federal courthouse to make two new announcements. The first is a follow up to the voting rights complaint. The second concerns ongoing violations of the Americans with Disabilities Act by court-appointed attorneys who represent people with developmental disabilities in limited conservatorship cases.



The courts have a duty to restore the voting rights of thousands of conservatees who lost those rights due to an illegal literacy test used by court investigators, appointed attorneys, and judges.

Consider the case of Gregory Demer, an autistic 28-year-old who was disqualified from voting 10 years ago. Although a court investigator filed a report in 2012 stating

that Demer's voting rights should be restored, neither the court-appointed attorney nor the judge on the case responded to that recommendation. They read the report but did not take remedial action. A similar report was filed last year when Judge Daniel Murphy was assigned to the case. Again, neither he nor the

court-appointed attorney followed their legal duty to have Demer's voting rights restored. As a result of these failures, Demer was deprived of his right to vote for president, governor, mayor and county supervisor.

There are about 12,000 people with developmental disabilities who have open conservatorship cases in Los Angeles County alone, not to mention the rest of the state. Thousands of them may need to have their voting rights restored.

But reform must go beyond voting rights. More fundamental rights, such as the right to having a competent attorney, are at stake. The superior court does not properly train these attorneys on the basics of disabilities and how to effectively interact with clients who have cognitive and communication difficulties. Training programs have not included segments on the legal requirements of the ADA. The court has not adopted performance standards for these attorneys, thus leaving them to comply with the ADA or not, as they wish. Many attorneys are putting in five hours or less on a case, when it would take 20 or more hours to do a proper job.

Title II of the ADA gives public agencies, including state and local courts, an obligation to use affirmative measures to ensure litigants with disabilities receive access to justice. Courts must take proactive steps to ensure that involuntary litigants such as proposed limited conservatees, can participate in their cases in a meaningful way. These cases are critical for these litigants since a judgment may take away the right to control their finances, make medical decisions, choose their friends, marry or have intimate relations with a romantic partner.

A class action filed Friday with the DOJ alleges that the court has been failing miserably in fulfilling its duty to provide litigants with developmental disabilities access to justice. An independent investigation by the DOJ should confirm those allegations.

During the Watergate scandal, “deep throat” famously told a reporter with the Washington Post to “follow the money” to get to the bottom of the matter. Here, the trail of money that funds the court-appointed attorneys leads to the Los An-

geles County Board of Supervisors. State judges appoint the attorneys and run the legal services program, but the county funds it. These supervisors should attach strings to the funding to stop ADA violations. As the funding source for the program, the county also has a duty under Title II of the ADA to make sure that the program complies with the requirements of federal law.

County officials and state judges must explore ways to overcome the deficiencies in the limited conservatorship system, including potentially having the public defender represent these clients and eliminating private attorneys from the picture altogether.

We have only gone to the door of the Department of Justice, now twice, because the state and local doors to political power and the machinery of justice would not open for us. Perhaps those in positions of judicial power in California will open the door when the feds come knocking again. ◇◇◇

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Legal Services Program Appears to Violate the ADA

by Thomas F. Coleman

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<http://disabilityandabuse.org/daily-journal.pdf>

A legal services program operated by the Los Angeles County Superior Court does not appear to comply with Title II of the Americans with Disabilities Act. Adults with developmental disabilities are receiving deficient legal services in limited conservatorship proceedings.

The court operates a Probate Volunteer Panel (PVP) from which attorneys are appointed to represent clients who have intellectual and developmental disabilities. It is responsible for the deficient performance of these attorneys because the court approves who gets on the list, appoints them to specific cases, reviews and approves their fee claims, and mandates them to attend court-approved training programs.

Yet the court has been willfully indifferent to the failure of attorneys to provide effective assistance to these clients and has knowingly allowed deficient training programs to operate for many years.

Conducting [my own investigation](#) using the court's computers, I discovered that mandatory procedures to protect the rights of proposed conservatees are frequently waived. Optional procedures that would increase the likelihood of a just result often are not utilized, even though they could have been without exceeding the court's time guidelines.

In short, proposed conservatees are not afforded the process they are due. Cases are rushed through the system. Shortcuts are used. Steps are missed. Efficiency, not quality, seems paramount to both the court and the attorneys it appoints.

In the 18 cases I looked at of one attorney, services that could have been performed but were not include: (1) objecting to the lack of an investigation by a court investigator and the lack of an investigator's report even when no investigator was involved; (2) reviewing school records for clients who were enrolled in school; (3) interviewing any staff members at these schools; (4) reviewing the regional center report in several cases; (5) interviewing the doctor who submitted the medical capacity declaration in any of the cases; (6) interviewing any of the relatives, other than the custodial parents, who were identified in the petition; (7) reviewing the most recent Individual Program Plan or any clinical evaluation reports in the regional center files in any of the cases; (8) asking for an expert to be appointed under Evidence Code Section 730 as authorized by law in any of these cases — especially in cases where the right to make sexual decisions was retained by the client upon recommendation of the attorney; and (9) developing an ADA accommodation plan for clients.

For all practical purposes, the only accommodation the court provides to these litigants is a court appointed attorney.

An evaluation of 25 additional cases handled by six other attorneys who represented proposed limited conservatees shows a similar pattern of waiving procedural protections (court investigator reports and regional center reports) and failing to take advantage of procedures that were available and that would have increased access to justice and a fair result — many of which could have been utilized without exceeding the presumptive 12-hour limit for attorney services (per the general order of the presiding judge). This pattern was known to and ratified by a judge.

Title II of the ADA and Section 504 of the Rehabilitation Act place an affirmative duty on state and local courts to ensure that litigants with cognitive and communication disabilities receive access to justice. This is especially so when the litigants are forced to participate in legal proceedings. The duty is amplified, and requires the court to take action on its own motion, when the court is aware that these involuntary litigants have mental or emotional difficulties that impair their ability to participate in legal proceedings in a meaningful manner unless they receive accommodations.

Under circumstances such as those associated with limited conservatorship proceedings, the court must provide accommodations, and modify usual policies and practices, to ensure access to justice for these litigants. For all practical purposes, the only accommodation the court provides to these litigants is a court-appointed attorney.

Having provided such an accommodation, it is the responsibility of the court to ensure these attorneys are properly trained to represent clients with intellectual and developmental disabilities. But my research sug-

gests the court has failed to ensure proper training of these attorneys.

Proposed conservatees lack the ability to know when their attorneys are performing in a deficient manner, and lack the ability to complain and demand a new attorney — so it is the responsibility of the court to put various quality assurance controls in place to ensure these attorneys are giving the clients access to justice. The court has not done so. Judges are rubber stamping the fee claims and ignoring the deficiencies evident in the reports submitted by the attorneys to the court.

There is a clear pattern of ADA violations by court-appointed attorneys, by the legal services program operated by the court, and by the training programs mandated by and implicitly approved by the court. The Los Angeles Superior Court is ultimately responsible for these violations. ◇◇◇

***Comment:** After this was published in the Daily Journal, I gave the matter further thought and realized that, as the funding source of this legal services program, the **County of Los Angeles** is ultimately responsible for these ADA violations. The county is willfully allowing this to happen.*



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Delay and Denial of Voting Rights in California

By Thomas F. Coleman

When the author of a historic voting rights reform measure crafted the bill, he included provisions to restore the voting rights of tens of thousands of people with disabilities. He knew the state was under investigation by the Department of Justice for stripping people in conservatorships of voting rights in violation of federal voting rights and disability rights laws.

State Sen. Marty Block included a provision in Senate Bill 589 to give voting rights back to these potential voters. The bill was signed by Gov. Jerry Brown on Oct. 10, 2015 and became effective on Jan. 1. It had the support of Secretary of State Alex Padilla, the state's chief elections officer.

Block and Padilla knew there was a presidential election scheduled for November. Chief Justice Tani Cantil-Sakauye and the California Judicial Council – also under investigation by the DOJ – started preparing new court forms to be ready on Jan 1.

Unfortunately, it appears that none of these elected officials developed plans to restore the voting rights of upwards of 32,000 or more disenfranchised people with disabilities in time for them to vote in November. The issue of voting rights restoration was not a priority for them.

It appears that the state's major disability rights agencies and organizations did not make voting reinstatement a priority either. This includes the State Council on Developmental Disabilities, Disability Rights California, and a network of 21 regional centers that coordinate services for more than 140,000 adults with developmental disabilities. As a result, 32,000 conservatees who had been stripped of voting rights by probate court judges over the years have fallen between the bureaucratic cracks.

The court must develop a voting rights restoration plan that would get disenfranchised conservatees back on the voting rolls soon.

This week, my organization, the Spectrum Institute, filed a complaint with the DOJ against the state judiciary for failing to restore these voting rights in a timely manner. The lead individual in the class action

complaint is David Rector, a former producer with National Public Radio who was stripped of his voting rights by a probate court judge in 2011 during a conservatorship proceeding. David, who has quadriplegia and is unable to speak, is able to read and comprehend. Through an eye-tracking communications device, he informed a court clerk in San Diego that he wants his voting rights restored immediately. The request is pending.

Two weeks ago, David was unaware of SB 589. No one from the court or from any of the disability rights groups his fiancée sought help from mentioned the new law to her. It is likely that most other conservatees who lost their voting rights like David did are also unaware that all they have to do to regain the franchise is to say or write four words – “I want to vote” – and have those words transmitted to the superior court. This is the best kept secret in California.

Less than two months from the voting registration deadline for the Nov. 8 election, and the courts still do not have a plan for timely restoration of voting rights. The disability rights groups and the regional centers are scratching their organizational heads wondering what to do. The judiciary has no comment. The secretary of state responds in vague generalities.

In the meantime, 32,000 people with disabilities in California will be kept from the polls in November. Surely this is not what Sen. Marty Block had in mind when he successfully moved SB 589 through the legislative process. Surely, this is not the type of reasonable accommodation contemplated by the Americans with Disabilities Act. ♦♦♦

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David Rector, Roz Alexander-Kasparik and Tom Coleman at rally in San Diego

Daily Journal

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Disability awareness all day, every day

We Need to Fix Complaint Procedures for Disabled Litigants

by Thomas F. Coleman

Did you know that October was Disability Awareness Month? That designation provides an opportunity for private-sector businesses to recognize the contributions and needs of workers and customers with disabilities. In terms of the public sector,

Disability Awareness Month is a time that judges and attorneys are reminded they may need to take extra steps to provide access to justice to litigants with disabilities.

In keeping with the spirit of that month, I sent a letter to the State Bar of California in October 2015 to bring to its attention deficiencies in legal services provided by court-appointed attorneys representing clients with cognitive disabilities in conservatorship proceedings. I sent a similar letter to the California Supreme Court. Now that another Disability Awareness Month has come and gone, I am still waiting for a reply from the bar association and the court.

For judges and attorneys who interact with litigants who have cognitive disabilities, every single day must be disability awareness day. Awareness of the special needs of such litigants is not optional or something that should be considered one month each year. The Americans with Disabilities Act – and its mandate that litigants with disabilities are provided access to justice – require that each day must be disability awareness day for the judiciary and the legal profession.

Attorneys who represent clients with cognitive disabilities are bound by the same rules governing attorney-client relationships as are attorneys who represent clients without disabilities. Rules of professional conduct, promulgated by the Supreme Court and enforced by the State Bar, require attorneys to perform competently, avoid conflicts of interest, and adhere to ethical duties of undivided loyalty and utmost confidentiality. They must also

communicate effectively with their clients. A violation of any of these duties – rooted in common law, statutes, and rules of court – may be addressed through a variety of complaint procedures.

In a criminal proceeding, for example, a disgruntled defendant can ask the court to replace a court-appointed attorney who the defendant feels is performing incompetently. This triggers what is known as a “Marsden” hearing where the defendant can air any grievances in a confidential hearing. A “Marsden” procedure is theoretically available to respondents in conservatorship cases. If the complaint is found to have merit, a new attorney is appointed.

A client who has received ineffective assistance of counsel in a legal proceeding has the right to appeal to bring the complaint to the attention of an appellate court. If the appeal is successful, a new trial may be ordered.

A client who has been victimized by an attorney’s misconduct or incompetent services can file a complaint with the State Bar. If an investigation shows probable cause that statutes or court rules were violated, an administrative hearing is conducted which may result in discipline to the attorney.

These complaint procedures are theoretically available to all clients, but in reality they are not accessible to litigants with cognitive disabilities. Because

of the nature of such disabilities, litigants in conservatorship proceedings, for example, would not know whether their attorneys are performing incompetently, have a conflict of interest, have been disloyal, or have violated the duty of confidentiality. This type of a disability also makes them unaware that complaint procedures are available or to understand how to go about filing such a complaint.

Clients with cognitive disabilities are, in a practical sense, unable to make a Marsden motion, file an appeal, or lodge a complaint with the bar association. Unless the judiciary and the legal profession take affirmative measures to provide such clients meaningful access to these complaint procedures, litigants with cognitive disabilities will continue to be excluded from this aspect of the administration of justice.

Solutions are available if only they are sought. There are three public entities in California – each of which has obligations under Title II of the ADA – that should seek solutions so that litigants with cognitive disabilities have access to these attorney complaint procedures.

The Judicial Council of California adopts rules governing trial and appellate court procedures. It should consider a new rule to give “next friend” standing to a third party to make a Marsden motion on behalf of a respondent in a conservatorship proceeding. A more liberal rule on standing should also be adopted to allow a third party to file an appeal when the rights of a litigant with a cognitive disability have been violated due to attorney misconduct or judicial error or abuse of discretion.

The State Bar of California has a major role to play. Knowing that clients with cognitive disabilities will generally not be aware of attorney misconduct or incompetent services, the bar association should allow a third party to initiate a complaint against an attorney suspected of violating rules of professional conduct.

The State Bar can also take pro-active measures to minimize deficient legal services to litigants with cognitive disabilities. For example, it can monitor

training programs for public defenders and court-appointed attorneys who represent respondents in conservatorship proceedings to ensure they are ADA-compliant and that they make the attorneys qualified to handle such cases. MCLE credits should only be allowed for ADA-certified educational programs.

The State Bar also can annually audit a sample of conservatorship cases throughout the state to verify, after the fact, that the attorneys truly provided the clients effective advocacy services. Knowing that his or her case might be selected for an audit could have a positive effect on attorney performance.

In addition to its adjudicative role in litigation, the California Supreme Court has an administrative function as well. It is a “public entity” with responsibilities under Title II of the ADA to ensure access to justice for litigants with disabilities. It should exercise its administrative responsibilities by convening, or instructing the State Bar to convene, a Task Force on Access to Attorney Complaint Procedures. Such a task force – composed of attorneys, judges, and representatives of organizations advocating for seniors and people with intellectual disabilities – would delve deeper into how to give clients with cognitive disabilities better access to justice if and when their attorneys fail them.

If the state judiciary and the legal profession heed this call to action, perhaps when Disability Awareness Month rolls around in October 2017, the Supreme Court, the State Bar, and the Judicial Council will have found some viable methods of providing meaningful access to these complaint procedures for litigants with intellectual disabilities. ◇◇◇

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Something That's Actually Rigged: The Conservatorship System

By Thomas F. Coleman
November 18, 2016

During the last few weeks of the presidential campaign, voters heard Donald Trump repeatedly tell audiences at his rallies that “the system is rigged.” As applied to voting systems operated by state governments, that was a gross exaggeration.

Even so, the notion of a system being “rigged” did not seem far-fetched to me. I have been fighting oppressive and overbearing economic and legal systems my whole life.

My first experience was with an unfair economic situation in Detroit. A major newspaper was taking advantage of newspaper delivery boys who were under my supervision. I was fired when I tried to organize the boys into a union so they could collectively demand fair working conditions.

Intervention by the National Labor Relations Board caused my reinstatement, but I dropped the union organizing because, as a teenager myself, I lacked the resources to press the matter further. To me, that system was rigged. A battle between a group of teenagers and a large corporation had a predetermined outcome. As expected, the system won.

My next encounter with a rigged system occurred a decade later in California. This time it was with an unfair criminal justice system that sent undercover vice officers to gathering spots for gay men to entrap and arrest them. I was fresh out of law school and started defending these victims of the vice squad.

That system was definitely rigged. The police and the judges knew the men would not fight back. The legal system could count on a plea bargain in almost every case because the deck was stacked against homosexuals even though the crimes involved consenting adults.

The legal profession provided these defendants with a lawyer, but the attorneys counseled their clients that plea bargaining was the only viable option. Few

lawyers took cases to trial to contest the charges. None of them challenged the system itself. None, that is, until I took up the cause.

I decided to challenge the constitutionality of the system itself. It took several years of litigation – with plenty of losses along the way – but I finally got a case to the California Supreme Court.

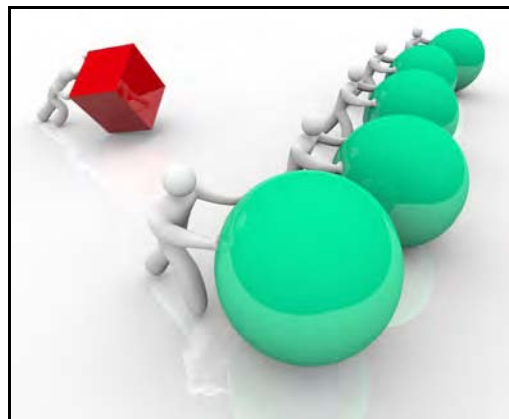
After 18 months of review, the court handed down a landmark decision in *Pryor v. Municipal Court* – a ruling where it declared that the law and the system of enforcement were unconstitutional. It set new rules that all but ended undercover entrapment and the resulting need for defendants to plea bargain.

Fast forward to 2013 when I was confronted with another rigged system. This time it was one that was operated by the probate courts in California. The victims of the rigging were vulnerable adults with intellectual and developmental disabilities and seniors with other cognitive impairments. The legal machine in question was the conservatorship system.

Conservatorship proceedings are initiated, often by parents or relatives, for the protection of seniors or adults with cognitive disabilities who are at risk of neglect because they cannot make major life decisions for themselves. Some states call them guardianship proceedings.

Over the course of 18 months, three cases came my way. Mickey's case was the first. It involved alleged abuse by his conservator. Greg's case was the second. He was being forced to spend time with a parent against his will – a parent whom he said he feared. Stephen's case involved numerous rights violations, including the threatened loss of his voting rights.

In each situation, I was asked to give advice about whether the disabled adult was receiving proper legal representation from a court-appointed lawyer.



My investigation showed a pattern of negligent representation. I began to wonder if these were isolated incidents or if perhaps I was being introduced to another rigged system.

Three years later, and after 3,000 hours of analyzing the conservatorship system in California and similar systems in other states, I have concluded the probate courts are operating a rigged system that is all too often meting out assembly line injustice to hundreds of thousands of seniors and adults with disabilities.

When a conservatorship petition is filed with the court and served on a senior or an adult with a developmental disability, the adult is involuntarily drawn into complicated legal proceedings. Because of cognitive and communication disabilities, there is no way these individuals can question or challenge the petition, much less produce evidence that they should retain some or all of their fundamental rights. The proceedings seek to take away their right to make decisions we all take for granted as adults, involving medical, financial, educational, residential, social, sexual, and marital matters.

“Protective” systems like this exist in all 50 states. There are more than 1.5 million adults in the United States who are currently under an order of guardianship or conservatorship.

In at least 20 states, it is not mandatory for the court to give these adults a lawyer. How rigged is that? Imagine yourself with a cognitive disability, perhaps even unable to speak, and then being served with legal papers in a proceeding that seeks to remove your decision-making rights and confer them on another person. The proposed guardian may even be someone who has been abusing you physically or exploiting you financially.

Then there are 30 states that do give a lawyer to the adult in question. My auditing of the system in California, and consultations with advocates who are ringing alarm bells in other states, has caused me to conclude that the policies and practices in state courts throughout the nation are not truly giving clients adequate advocacy and defense services.

These state-run probate court systems remain perpetually rigged because of a perfect storm of circumstances. Legislators turn a blind eye to the situation because their primary concern is limiting judicial budgets. Judges feel trapped because they must manage huge caseloads. They resist developing a system where

properly trained lawyers who act as zealous advocates file motions and demand hearings – proceedings which will take up precious court time.

Court-appointed lawyers depend on a flow of future cases from the judges who appoint them and so they are afraid to rock the boat. Trouble makers or those who put in “too many hours” on cases fear they may not be appointed to future cases.

Another element of this perfect storm of circumstances perpetuating the status quo is the inability of these litigants to complain. Because of their cognitive and communication disabilities, they do not file appeals with higher courts or lodge complaints with state bar associations. Thus the usual corrective systems are never activated and the pattern of deficient advocacy services continues indefinitely.

Whether these three cases came to me by coincidence or “cosmic design,” I have taken up the call of reform. My goal is that litigants with cognitive or communication disabilities will routinely receive individualized justice and due process of law. My hope for a better future rests more with the U.S. Department of Justice than with state officials.

The DOJ could open a formal inquiry into the California policies and practices that violate the Americans with Disabilities Act – a federal law requiring courts, and the attorneys they appoint to these cases, to provide access to justice to people with disabilities.

That is not systematically occurring in California now, has not occurred in the past, and is not likely to happen in the future unless and until California is required to answer to a higher authority. The ADA, as administered by the DOJ, is that higher authority.

The DOJ has seen and tackled rigged systems before. Federal intervention now could stimulate conservatorship reform in California, which in turn could launch a domino effect to unrig state guardianship systems throughout the nation. ♦♦♦



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Daily Journal
California's premiere legal newspaper

Access to Justice: E(quality) = MC410

By Thomas F. Coleman
Daily Journal – January 6, 2017



An attorney does not have to be an Einstein to realize that a client with an intellectual or communication disability may need an accommodation in order to receive access to justice in a legal proceeding. When such disabilities become apparent, a lawyer has an obligation under state and federal law to take appropriate remedial action.

With the commemoration of the 25th anniversary of the Americans with Disabilities Act in the rear-view mirror, all attorneys should be aware that federal law requires government entities and businesses to provide reasonable accommodations to people with disabilities. This includes court-appointed and privately-retained attorneys.

Title II of the ADA requires courts to take appropriate actions to ensure that litigants with disabilities have access to justice and have an opportunity for meaningful participation in legal proceedings. Title II applies to attorneys who are appointed by the court and whose fees are paid with public funds.

Title III of the ADA requires professional offices, including law offices, to provide reasonable accommodations to clients with disabilities that necessitate such accommodation in order for them to receive the benefit of the services being provided.

There are several California statutes that impose a duty on lawyers to provide reasonable accommodations to clients with disabilities. Civil Code Section 51.4 (California Access Law) protects the right of people with physical or mental disabilities to “equal access” to business establishments. Civil Code Section 51 (Unruh Civil Rights Act) says that a violation of the federal ADA is also a violation of this statute.

The Rules of Professional Conduct also apply to legal services performed for clients who have disabilities. Under Rule 3-110, a lawyer shall not intentionally fail to perform legal services with competence. In order to show competence in a matter, a lawyer must “apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.”

When these state and federal legal mandates are applied to the representation of clients with cognitive and communication disabilities, several principles become evident.

First, when a lawyer becomes aware that his or her client has such a disability, the lawyer should assess whether he or she has the skill necessary to provide competent services to a client with such special needs. Does the attorney have knowledge about this type of a disability? Can the attorney effectively interview the client and ascertain the client’s true wishes? What types of accommodations should be used to ensure that the client receives access to justice and can have meaningful participation in the case?

If a lawyer does not have the requisite skill – or the necessary mental and emotional disposition for that matter – he or she might still represent the client if the lawyer acquires the skill before the service is scheduled to begin. (Rule 3-110, (c). The lawyer may not need to become personally skilled to provide competent services if other professionals can be associated who will help fill the accessibility gap.

For example, if a client is deaf or hard of hearing, a sign language interpreter may be all that is necessary to ensure that the client receives access to justice in courtroom proceedings. However, for clients with intellectual or developmental disabilities, other accommodations will be necessary. Additional steps must be taken to ensure that such clients have the most effective communications with their attorneys that are possible and that they understand the court proceedings and participate in them in the most effective way that is reasonably possible.

Providing disability accommodations to clients with cognitive and communication disabilities is especially important in conservatorship cases. Lawyers appointed to represent proposed conservatees know from the get-go that the client probably has a significant mental disability and may have serious problems communicating and understanding. These lawyers also know that important liberty interests are in jeopardy. Court-appointed conservatorship lawyers, therefore, have an even stronger incentive to acquire the skills necessary to provide effective representation to clients with special needs.

There is a tool available to attorneys to assist them in meeting the needs of these clients, and at the same time fulfilling their legal duty to provide competent representation and ensure access to justice for such litigants. It is Judicial Council Form MC-410. It was formulated under the authority of Rule 1.100 of the California Rules of Court which regulates disability accommodations in judicial proceedings.

This form may be used by attorneys to request the court to provide disability accommodations for their clients. The form is submitted by the attorney to the court on an ex-parte basis. The request for accommodation is confidential. A brochure published by the Judicial Council explains that “The process for requesting accommodation under Rule 1.100 is not adversarial.”

My research suggests that MC-410 is seldom used in conservatorship cases. That is probably because the form is never mentioned in training programs for court-appointed attorneys who represent disabled clients in such cases. That is shame. The use of this form should be routine in such proceedings, or for that matter in any case where the client has a significant disability.

One use of the form would be for an attorney to request the appointment of an accommodation-assessment expert to assist the attorney in formulating a disability-accommodation plan for the client – to ensure access to justice in the proceeding, from the beginning to the end. If the client is indigent – which many conservatees are – the attorney would be entitled to have an expert appointed for such purpose, at county expense, under Evidence Code Section 730.

Perhaps it is time for bar associations to shine a spotlight on the MC-410 form, not only for the benefit of clients with disabilities, but for the benefit of lawyers who might someday find themselves on the receiving end of a complaint to the State Bar of California for violating state and federal disability rights laws and rules of professional conduct.

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Elder Abuse Bills Are a Start: Reform at State and Federal Level Should Include *All* Vulnerable Adults

By Thomas F. Coleman
Los Angeles Daily Journal / February 28, 2017

United States Sen. Amy Klobuchar has introduced a bill (S. 182) encouraging states to improve access to justice for seniors in guardianship and conservatorship proceedings. Sen. Charles Grassley is sponsoring a related measure (S. 178) to improve the way states respond to elder abuse.

These bills were introduced in response to a growing chorus of individuals and organizations calling for major reforms in state guardianship and conservatorship systems they allege are abusing the rights of seniors and other adults with cognitive and communication disabilities.

Reform of guardianship and abuse response systems requires a carrot-and-stick approach. Awarding grants to entice states to create demonstration projects to reform guardianship systems and abuse response practices is the carrot. The stick already exists in the form of lawsuits and adverse publicity.

Both bills are good, but they don't go far enough. As currently written, they would only apply to state projects intended to improve guardianship and abuse-response systems for adults who are over 60. Protecting seniors is a laudable goal, but vulnerable adults under 60 need to be included, too.

There is ample evidence of abusive guardianship and conservatorship practices violating the rights of people with disabilities under 60. It makes logical and practical sense for these bills to be amended to include this entire population of protected adults in the scope of federal grants to stimulate state improvements.

For anyone who might wonder if guardianship systems are really denying access to justice to vulnerable adults under 60, reading a short summary of a few cases should erase any doubt.

Michael, age 19, lives in Staten Island, New York. He has cerebral palsy, a disability he acquired due to negligent hospital procedures at birth. He received a hefty award from the hospital. The money was placed in a trust during his childhood years.

Michael's disability has not impaired his mental functioning. He is currently finishing his last year in high school where he has been receiving excellent grades in general education classes.

When Michael turned 18 and became an adult, he wanted to make his own economic decisions, just as all adults do. Two days before his 18th birthday, a court-appointed guardian from his parents' divorce proceeding filed a petition to appoint a conservatorship guardian to control Michael's finances during adulthood.

Michael objected and retained his own attorney. He had the support of his mother and his grandmother. As a counter move, the court removed Michael's chosen attorney and replaced him with a court-appointed lawyer.

A journalist caught wind of the case and decided to write a story. When he contacted the guardian for comment, the guardian sought and obtained a "gag order" from the court. The case file is now sealed. Court proceedings are closed to the public. The parties have been ordered, under threat of criminal contempt, not to speak or share documents with the media.

These protective measures effectively shield the court's actions from public scrutiny. Michael's due process right to an attorney of his choice and his constitutional rights to freedom of speech and press are being violated by a court in "star chamber" proceedings.



The type of institutional abuse perpetrated by the judicial system in New York occurs in California too, as the following four cases illustrate.

For many years, David worked on the East Coast as a producer for National Public Radio. When he turned 58, David moved to San Diego so that he and his fiancée Roz could start a new life together. Soon thereafter, David was unexpectedly stricken with an illness that caused what is sometimes called “locked-in syndrome.” He became quadriplegic and lost his ability to speak. He could hear, see and process information internally, but could not communicate with the outside world. However, with ongoing therapy he was able to regain some use of a finger and thumb on one hand.

In order to assist David with financial and medical decision-making, Roz filed a petition asking to be appointed as his conservator until he was able to communicate more effectively. Her good intentions resulted in a nightmare for her and David.

At the time, David had \$78,000 in life savings. The court refused to make Roz the temporary conservator and instead appointed a paid professional. The conservator then hired an attorney. As proceedings dragged on, they drew their fees from David’s savings until his funds were totally depleted.

Then the conservator and the attorney withdrew from the proceeding and the court appointed Roz to be David’s conservator. David, who had voted consistently in elections throughout his life, was summarily stripped of his right to vote.

Stephen got a taste of California’s oppressive conservatorship system when he turned 18. Because of Stephen’s autism, his mother felt it would be best if she became his conservator so that she could handle complex decisions involving finances and medical care. She planned to allow him to make his own social decisions.

Their experience with the system was horrific. Stephen almost lost his right to vote when his court-appointed attorney claimed that “voting is inconsistent with conservatorship.” The attorney planned to have Stephen’s right to make social decisions taken away so that the court could order

him to visit his father — a parent whom Stephen feared. The attorney would not allow Stephen, who was then nonverbal, to use his chosen method of communication. The violations of the Americans with Disabilities Act were too numerous to describe here.

It was only intervention by a disability rights organization that turned things around. Pressure forced the attorney to start advocating for his client. Stephen kept the right to vote and the right to make his own social decisions.

Gregory was drawn into a conservatorship when he turned 18. His parents filed a petition as a way to protect their autistic son. Unfortunately, the court summarily stripped Gregory of his right to vote despite the fact that he did not have an intellectual disability. Later, when the parents divorced and Gregory did not want to visit his father — due to fears he expressed over and over — the court ordered Gregory to spend time with his father anyway. When Gregory resisted, the court stripped Gregory of his right to make all social decisions. His court-appointed attorney advocated against Gregory, ignoring letters from many professionals in support of Gregory’s ability to make social choices.

These cases are the tip of the chilly conservatorship iceberg. An audit of dozens of conservatorship cases in Los Angeles County reveal a pattern and practice of deficient legal services and a lack of judicial oversight. The “protection” court is not protecting the rights of vulnerable adults as it should.

Reform at the state level is needed, not only in California and New York but throughout the nation. Perhaps federal grants to promote such reform will help. The grants and the reform, however, should include all vulnerable adults. These two senate bills could do so if they are amended to become “seniors plus” reform measures.

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Third-Party Standing as an ADA Accommodation on Appeal

By Thomas F. Coleman
Los Angeles Daily Journal / March 13, 2017

As a preliminary matter, sometimes an appellate court must resolve an issue of “standing” before it ever reaches the merits of an appeal. Standing to appeal is different than standing to participate as a litigant at the trial court level.

This difference was illustrated in the gay marriage case challenging the constitutionality of Proposition 8 – the initiative that prohibited the State of California from issuing marriage licenses to same-sex couples. Several couples filed a lawsuit in federal court to challenge the constitutionality of Prop 8. When the state declined to defend the initiative, the court allowed the proponents of the ballot measure to intervene to defend its legality.

After the trial court declared Proposition 8 unconstitutional, the proponents appealed. When the case eventually reached the U.S. Supreme Court, the justices ruled that the proponents lacked standing to appeal. The court explained that to have standing to appeal, a litigant must show personal and tangible harm to his or her rights. Yes, the proponents may have been offended by the ruling of the trial court, but the court had not ordered them to do or refrain from doing anything. A generalized grievance is not sufficient to confer appellate standing in the federal court system. (*Hollingsworth v. Perry*, [133 S.Ct. 2652](#) (2013).

California also has strict rules on appellate standing. ([Conservatorship of Gregory D.](#), 214 Cal.App.4th 62 (2013)). The case of Gregory D. involved a limited conservatorship proceeding in which a trial court entered an order restricting the constitutional rights of a young man with autism. Both parents were also parties to the proceeding in the trial court.

Although Gregory was an adult and had repeat-

edly objected to being [forced to visit](#) with his father, Gregory’s court-appointed attorney did not advocate on behalf of his client’s stated wishes. Instead, the attorney submitted the matter to the court without presenting evidence or legal arguments in defense of Gregory’s freedom of association. When the trial court ordered Gregory to visit his father despite Gregory’s objections, the attorney essentially surrendered his client’s rights. The attorney did not object or file an appeal.

Gregory’s mother filed an appeal to vindicate her son’s constitutional rights of liberty and privacy. No matter how unconstitutional the order forcing Gregory to visit his father may have been, the Court of Appeal did not reach the merits of the appeal. Instead, it declared as a preliminary matter that Gregory’s mother lacked standing to appeal.

The court said the judge’s order did not affect the mother. It only implicated Gregory’s rights. Relying on Code of Civil Procedure Section 902, the court affirmed the judgment below. The statute declares that “any party aggrieved” by a judgement may appeal. The Court of Appeal ruled that a party may not assert error that injuriously affected only non-appealing co-parties.

Her status “as Gregory’s concerned mother does not confer standing to appeal on his behalf,” Presiding Justice Joan Dempsey Klein wrote for the court. Because she is not “personally aggrieved by said order,” the mother “lacks standing to assert error on Gregory’s behalf.”

At first glance, the court’s opinion in Gregory D. seems like a garden variety application of the normal rules of appellate standing. However, just beneath the veneer of normalcy lurk potential violations of federal law.



The appellate court assumed that, just because his court-appointed attorney chose not to object or appeal from the potentially unconstitutional order, that Gregory did not feel aggrieved by being forced to associate with his father. In reality, however, Gregory was not a party to the appeal because his attorney decided to surrender his rights in the trial court.

Because of the nature of the trial court proceeding – a limited conservatorship – the appellate court knew that Gregory had a developmental disability that affected his ability to make decisions. This knowledge triggered a duty for the court, under the [Americans with Disabilities Act](#), to inquire further as to whether to provide Gregory with an accommodation so that he would have access to justice in the appeal. The court should have appointed an attorney to represent him in the appellate proceeding so that, through the attorney, Gregory’s position on the issue of standing or on the merits could have been presented.

An appointed appellate attorney could have argued that Title II of the ADA may require the modification of normal procedural rules in order to give a litigant with a developmental disability access to justice on appeal. Even without appointing an appellate attorney to represent Gregory, the court should have recognized its obligations as a public entity to sometimes modify normal rules, on its own motion, to ensure that a litigant with a disability has meaningful participation in an appeal.

Because there are [never any appeals](#) by people with disabilities in limited conservatorship proceedings, appellate judges have probably not given any thought to their obligations under Title II of the ADA in such cases. Without any appellate oversight, judicial errors and abuses of discretion are allowed to exist and may be repeated [indefinitely](#).

The published opinion of Gregory D. is binding law statewide. Unfortunately, the opinion failed to recognize that cognitively-disabled litigants cannot appeal on their own. When their rights are violated by a trial court and their appointed attorney is indifferent or surrenders their rights,

their only hope for redress is by allowing a third party to have appellate standing. A concerned parent who is a party to the case in the trial court would be a logical advocacy surrogate on appeal.

The opinion in Gregory D. is an ADA violation in need of a remedy. Because the case is final, it is too late to secure an individualized remedy for Gregory. But it is not too late for state officials to craft a general remedy for limited conservatees in future appeals.

Several remedial actions can be taken by the Supreme Court, Judicial Council, and Legislature to modify normal rules of appellate standing so that litigants with cognitive and communication disabilities receive access to appellate justice.

The Supreme Court has authority, on its own motion, to order a published appellate opinion to be de-published at any time. See California Rules of Court, [Rule 979\(d\)](#). An order de-publishing the opinion in Gregory D. would help eliminate any misimpression that third-party standing is not available in an appeal involving a conservatee.

The [Judicial Council](#) could adopt a rule allowing a [third-party to have standing](#) to protect the constitutional rights of litigants with cognitive disabilities. Such a rule would implicitly incorporate the requirements of the ADA into state appellate procedure.

If the judicial branch fails to take these actions, the Legislature could enact “[Gregory’s Law](#)” amending Code of Civil Procedure Section 902 so that third-party appellate standing is clearly available to assert the rights of cognitively-disabled litigants.

In any event, whether or not these actions are taken, there is nothing to prevent appellate court judges from applying the requirements of the ADA to cases that come before them now.◇◇◇

<http://spectruminstitute.org/ada-standing.pdf>

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Case Tests Limits of Right to Marry

By Thomas F. Coleman
Los Angeles Daily Journal / Feb. 1, 2018

Throughout California's history as a state, same-sex couples were excluded from the statutory right to marry. State law always declared that marriage is a personal contract between "a man and a woman."

Then in May 2008, the California Supreme Court issued a landmark ruling declaring that the gender restriction in the statute violated the California Constitution. *In re Marriage Cases*, 43 Cal.4th 757. In the months that followed this historic court decision, scores of same sex couples entered into legal marriages in California. Then came Proposition 8 – an initiative that sought to restrict marriage to opposite-sex couples. The initiative was approved and in November 2008, legal marriage was again defined as a contract between a man and a woman.

Fast forward to 2013. Same-sex marriage litigation arising out of California and elsewhere was the basis of rulings by the U.S. Supreme Court. *Hollingsworth v. Perry*, 133 S.Ct. 2652, and *United States v. Windsor*, 133 S.Ct. 2675. The nation's highest court declared that regardless of the gender of the parties, two consenting adults had a federal constitutional right to marry. The floodgates opened and in the years since this Supreme Court ruling was handed down, thousands of same-sex couples throughout the country, including California, have exercised their constitutional right to marry – a freedom the court found inherent in the concept of liberty and in the promise of equal protection embedded in the 14th Amendment.

The freedom to marry, however, is not unlimited. No constitutional right is. The state may impose reasonable restrictions on a fundamental constitutional right so long as there is a compelling need to do so and the restriction is implemented in the least restrictive manner.

Since its inception, the right to marry has had statutory limitations. Marriages that are bigamous or incestuous are void. Other types of marriages are voidable.

Now that same-sex marriage is legal in California, gay couples must adhere to the same rules that have applied to opposite-sex couples in terms of prerequisites for entering into a valid marriage.

In 2014, the California Legislature amended Family Code Section 300 to read: "Marriage is a personal relation arising out of a civil contract between two persons, to which the consent of the parties capable of making that contract is necessary." The requirements of "consent" and that the parties are "capable of making that contract" have been part of California's marriage laws since their inception.

On Feb. 9, a Riverside County Superior Court judge will be asked to test the limits of same-sex couples to marry in California. The case involves Ryan, a young man in his mid-20s who has serious intellectual and developmental disabilities. *In re The Conservatorship of Morris*, MCP1100783.

Four years ago, Ryan married a man who was nearly twice his age in a marriage ceremony that one government investigator found disturbing. At the time of the marriage, Ryan was under an order of conservatorship. Ryan's new spouse subsequently became his conservator. As a result of the marriage, Ryan lost all of his federal benefits under SSI and Medi-Cal – benefits that were never replaced with sufficient income from his new husband.

Ryan's twin brother and his aunt are asking the court to declare the marriage invalid due to Ryan's lack of capacity to enter into this contract and because he



was subject to undue influence by his fiancé and his former conservator. The case requires the court to weigh the facts for and against Ryan's right to marry, to weigh the facts for and against his need for protection from abuse and exploitation, and then decide whether a just result would be to affirm or invalidate the marriage.

To be sure, Ryan and all adults with intellectual and developmental disabilities have constitutional and statutory rights. Those rights are not diminished simply because they have disabilities. Among the rights specified in the Lanterman Act is "a right to make choices in their lives" as well as "a right to be free from harm" including from abuse or neglect.

The relatives of Ryan are alleging that he has been a victim of abuse and neglect. As for neglect, they cite his current living conditions – the mobile home of his in-laws where violence is a recurring problem. As for abuse, they point to the "sham marriage" – a ceremony that was video taped and which appears on YouTube. The video shows that Ryan had to be continually coached to repeat the vows and coaxed to put a ring on the finger of his fiancé. It also reveals that at one point in the process, Ryan thought the ceremony was a baptism. An investigator for the Public Guardian who watched the video concluded that Ryan clearly did not give legal consent to the marriage and undoubtedly lacked the capacity to marry.

The California Probate Code specifies that the fact a person is under an order of conservatorship does not, in and of itself, deprive him or her of the right to marry. However, that code also allows for relatives of a conservatee to ask a court to invalidate the marriage on the ground that purported consent was not valid or that the person lacked the capacity to consent due to serious mental disabilities. That is what Ryan's brother and aunt are asking the court to do.

The fact that Ryan reportedly has the mental capacity of a 5-year-old would not, in and of itself, preclude him from having the capacity to consent to marriage. Nor would his diagnoses of cerebral palsy, intellectual disability, schizophrenia, attention deficit/hyperactivity disorder, behavior disorder, and epilepsy. Nor would the fact that he is "emotionally fragile" or substantially unable to resist undue influence.

The evaluation of a medical doctor documenting that he has the following conditions would also not necessarily preclude him from having the capacity to consent to marriage or actually consenting to marriage: disorientation as to time and place; short-term and long-term memory deficits; major impairment in his ability to reason using abstract concepts; and unwanted compulsive thoughts and behaviors – all of which were constant problems which did not significantly vary in frequency, severity or duration.

This information, however, helps to explain his demonstrated functional deficits, including his actions on the video of the marriage ceremony.

The court has a variety of options to insure that many important legal issues are properly addressed – options that can be exercised before it even calls the matter for a formal hearing. The judge can refer the matter to a court investigator to gather more facts about Ryan's ability to consent to marriage and whether he truly understood the consequences of a decision to marry. A guardian ad litem could be appointed to seek an evaluation by a capacity assessment professional about these issues. The matter could be referred to Adult Protective Services to determine whether Ryan is a victim of abuse or neglect caused by his conservator or household members. A referral could also be made to the district attorney to investigate whether any criminal activity occurred when Ryan was coached through a marriage ceremony that he clearly did not understand and which had serious financial consequences to him.

This may be a case of first impression in the California courts – a case involving the right of people with developmental disabilities to marry as well as the right not to be pressured into marriage through undue influence. The court should take whatever steps are necessary to ensure that it reaches a just result. ♦♦♦

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Proposed Rule Aims to Improve Legal Advocacy in Conservatorship Proceedings

By Thomas F. Coleman
Los Angeles Daily Journal
April 13, 2018

When it comes to reforming the conservatorship system in California, the legal bureaucracy moves slowly and incrementally.

In 2014, a small group of advocates made a presentation to an advisory committee of the California Judicial Council asking for new rules to ensure access to justice for people with cognitive and communication disabilities who find themselves entangled in conservatorship proceedings.

In 2015, the California Judicial Council approved a two-year project for the Probate and Mental Health Advisory Committee to develop performance and training standards for attorneys in conservatorship cases. A year later, the committee dropped the performance standards aspect and limited its scope to training and experience requirements.

The committee's work product was posted on the Judicial Council's website on Monday. The deadline for public comment is June 8.

A close reading of the proposal left me mildly pleased. After further study, I felt cautiously hopeful.

This rule change would not ensure access to justice for people with disabilities in conservatorship proceedings. But the proposal is a step in the right direction.

One good aspect is that the revision to Rule 7.1101 of the California Rules of Court would apply to attorneys appointed in general and limited conservatorships. This could have a beneficial effect on seniors as well as adults with developmental disabilities. Thus, more people could potentially benefit.

Another positive aspect is the training requirements included in the committee's proposal. Among the most important training requirements are subject matters that are crucial to effective advocacy and defense practices for people who have serious cognitive and communication disabilities.

According to the committee's proposal, subjects that must be covered in mandatory continuing education courses include the rights of persons with disabilities under state and federal law, like the Americans with Disabilities Act. Training on strategies for communicating with a client who has cognitive disabilities, ascertaining the client's wishes, and presenting those wishes to the court is also required.

The recognition, evaluation, and understanding of abuse of people with disabilities is a must. Training is required on the effects of physical, intellectual, and developmental disabilities on a person's capacity to function and make decisions. How to identify and effectively collaborate with experts from other disciplines is also part of the mandatory training.

So far so good. But some significant problems remain.

As currently worded, existing Rule 7.1101 declares that its continuing education requirements "are minimums." Local courts are allowed to establish more stringent continuing education requirements for court-appointed attorneys in these cases. This proposal takes away that flexibility for local courts. That is a step backward. Local courts should continue to have the authority to demand more from the attorneys they appoint to represent special needs litigants.



One major omission in subject matter is the failure to require training on less restrictive alternatives to conservatorship, including the identification of community resources that would make such alternatives feasible. There is a growing movement for supported decision-making as an alternative to guardianship and conservatorship in California and throughout the nation. It is essential to have attorneys who are trained on such alternatives and that they insist that court investigators, petitioners, and judges consider them. This subject matter should be added to the committee's proposal.

Even if the committee were to make these suggested changes, there is much more work to do to ensure access to justice for seniors and people with disabilities in conservatorship proceedings.

Attorneys could sit through such trainings but not implement the principles in actual practice. Without detailed requirements for training contents, without performance standards, without adequate funding for legal services, and without effective monitoring mechanisms, the training components in the committee's proposal are only theoretically beneficial to these vulnerable clients.

The State Bar of California needs to put flesh on the bones of this educational framework. Specific content needs to be required by the State Bar before authorizing CLE credits for any training program. There should not be a blanket authorization to local bar associations allowing them to include whatever they want in such trainings. That is what has been happening now and some of the training programs are sorely lacking.

There should be performance standards to which the trainings relate. Attorneys need to know in no uncertain terms exactly what is expected of them in each of the areas of training. These should not be seminars on "best practices" which can be ignored. It may take legislation to specify performance standards, or the county governments that pay the attorneys can attach performance standards to the money flow. However it occurs, performance standards are a must.

Speaking of funding for legal services, it must be adequate enough to enable court-appointed attorneys

to perform the legal services they are told they should deliver to these clients. It would be unfair for a court to authorize 10 hours of services in a case when, in fact, it would take 20 hours to do all of the things mentioned in the training program or detailed in the performance standards.

Most of these clients cannot complain to the court or to the State Bar about ineffective assistance of counsel, conflicts of interest, or violations of ethical standards such as confidentiality and loyalty. The nature of their disabilities precludes them from understanding such things, much less filing formal complaints about deficiencies in legal services.

In order to make the complaint process accessible to clients with such disabilities, there should be random audits of a sample of attorneys in each county. As the funding source for the legal services – and as the public entity responsible for ensuring ADA-compliant legal services – the county could contract with the State Bar to conduct such audits.

Indeed, there is much more work to do in order for seniors and people with disabilities to have meaningful access to effective advocacy and defense services in conservatorship proceedings. The committee's proposal is an honorable first step.

The next step is for the Probate and Mental Health Advisory Committee to adopt the modifications suggested here. But most importantly, once these changes go into effect on Jan. 1, 2019, advocates for conservatorship reform need to work closely with the State Bar, the Legislature, and boards of supervisors in all of the counties to implement the additional reforms upon which true access to justice depends.◇

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(Correction: After this op-ed was published, the author realized that local courts do retain authority under the proposal to require additional training. An email was sent to the editor correcting the error. A letter was sent to the committee with an apology for the error. It also asks that the issue of disability and sexuality be included in the mandatory training.)

HELP WANTED: Brave Lawyers to Challenge State Guardianship Systems

By Thomas F. Coleman
Daily Journal / Dec. 13, 2018

Two years ago I wrote a commentary that exposed my frustration and captured my hope. (“Something That’s Actually Rigged: the Conservatorship System,” Daily Journal, Nov. 18, 2016)

In the commentary, I expressed my frustration that several years of challenging the limited conservatorship system in California was being met with avoidance and denial by government officials despite clear evidence that policies and practices of the probate courts were denying justice to adults with developmental disabilities. I was hopeful that perhaps the U.S. Department of Justice might intervene, just as it had done the prior year by accepting my complaint and opening a formal investigation regarding voting rights violations by the conservatorship system in California. What I failed to consider in 2016 was the impact on the DOJ that Donald Trump’s election victory would have.

There were, and still are, good reasons to challenge the conservatorship system in California and adult guardianship systems elsewhere. Many seniors and adults with disabilities are being pushed into conservatorships and guardianships they do not need. Fundamental rights are being taken away that should be retained. The process is generally unfair and the result is often unjust. Seniors are being stripped of their assets by guardians and lawyers who enrich themselves at the expense of these vulnerable adults. People with developmental disabilities who generally do not have many assets are rushed through the process by judges who often do not even give them an attorney. These probate proceedings are being operated in violation of the access-to-justice requirements of the Americans with Disabilities Act.

There is an analogy between the “rigged” criminal law enforcement system I encountered when I was

a law student and young lawyer in the 1970s and the guardianship systems I challenge today. Back then, the criminal law and its enforcement were unfairly rigged against gay men. Vice cops were paid to entrap them. Prosecutors got easy convictions and more notches in their belts by threatening jail and securing plea bargains which still gave them conviction statistics. Judges were biased and saw gay men as sick, sinful, and criminal. A judge who challenged the “system” would pay a political price at the next judicial election. Defense attorneys made lots of money representing defendants – most of whom were in the closet and fearful of publicity and loss of jobs, not to mention jail time and registration as a sex offender if they were convicted. Thousands of men were arrested and prosecuted each year in California alone. The same was happening in all states throughout the nation. These were easy arrests. Cops did not fear violence. Gay men went silently in the paddy wagons to jail. Bail bondsmen got rich. Defense attorneys got rich. The pattern and cycle repeated itself over and over.

Although I was not personally affected by any of this, I was appalled by the injustice. I saw a class of people who were being victimized. I was angry that the defense attorneys – including closeted gay attorneys – were profiting on the system. I was upset that no one was challenging the constitutionality of the statutes and the discriminatory enforcement of the laws. I vowed to devote my professional life to changing this. I “came out” as a law student and co-founded the first gay law student association in the nation. Some of us were able to align with a few good lawyers who were willing to participate in the reform process. We formed a National Committee for Sexual Civil Liberties.

After getting my law license in December 1973, I



became one of a handful of openly gay lawyers who decided to take on the system of entrapment and oppression of gay men. I filed constitutional challenges – attacking the system and all the moving parts of it – police, prosecutors, judges, and defense attorneys. Despite experiencing loss after loss, I persisted. Then one day the right case came along. I took it to the top and in 1979 I won a major victory in the California Supreme Court. The victory occurred for a few reasons: (1) the string of losses nonetheless had an educational effect on the judiciary; (2) a few other lawyers joined the movement and we persisted in our challenges; and (3) a courageous member of the Supreme Court – Justice Mathew Tobriner – decided to side himself with justice and reform rather than the status quo. He wrote a compelling and brilliant opinion for the Supreme Court. *Pryor v. Municipal Court*, 25 Cal.3d 238 (1979)

Today, I find myself feeling the same frustration with the prospect of guardianship and conservatorship reform. I got involved in 2012 when one case came my way. After seeing a few more individual injustices in 2013 and 2014, I decided to devote myself to *systemic* reform – first with California’s limited conservatorship system and later with state guardianship systems throughout the nation. Having devoted more than 7,000 hours of volunteer time to this cause so far, I still remain frustrated. Unlike three years ago when I felt hopeful for federal intervention, I am not as hopeful. However, I have not lost all hope and have not given up on the vision of reform. I just realize now that it will be harder and taken longer than I originally had thought.

My advocacy activities have been supported by a handful of others – most of them are family members victimized by abusive guardianship proceedings. Very few people who have not been personally touched by the guardianship system have joined the cause. One exception is my friend and colleague, Dr. Nora J. Baladerian. Until very recently, I could not find even one lawyer in California who was willing to join me in challenging the conservatorship system.

For the past few years I have been asking: Where are all the lawyers?

Every successful civil rights cause has had a coalition of lawyers participating in, supporting, and leading the charge. But when it comes to the movement to reform abusive guardianship and conservatorship systems, there is an advocacy void when it comes to attorneys willing to challenge these systems – file complaints, draft legislation, write commentaries, give television interviews, etc. The National Disability Rights Network has recently tiptoed into these troubled waters – but ever so gently and tentatively. Elder law attorneys may write some academic articles, but where are they when it comes to actually filing lawsuits?

This civil rights advocacy vacuum must be filled. All of the wonderful non-lawyers who are fighting for this cause deserve to have the support of a cadre of dedicated and committed attorneys who assume the mantle of civil rights advocates. Unless and until there is a strong network of lawyers who become leaders in this reform movement, progress will be minimal and victories will remain local.

We cannot count on government civil rights enforcement agencies to do the heavy lifting. For example, state attorneys general are advisors to and defenders of state officials, including the judges who are running these guardianship systems. So we won’t get help from the chief law enforcement officers in the 50 states. What we need is an army of private attorneys general.

So again, I ask: Where are all the lawyers?

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Daily Journal
California’s premier legal newspaper

Conservatorship Reform: More Than Attorney Education is Needed

By Thomas F. Coleman
Daily Journal / Dec. 19, 2018

The Judicial Council has just released for public comment a set of new educational requirements for court-appointed attorneys in probate conservatorship proceedings. The proposals have been under consideration by its Probate and Mental Health Advisory Committee for several years.

There may be as many as 60,000 adults living under an order of conservatorship in California. They include seniors with mental challenges, adults with developmental disabilities, and others who have cognitive disabilities due to medical illnesses or injuries. The Spectrum Institute, a nonprofit organization advocating for conservatorship reform, estimates that some 5,000 new probate conservatorship petitions are filed annually in California.

Spectrum Institute presented the advisory committee with a list of deficiencies in the conservatorship system in November 2014. At the top of the list was the failure of court-appointed attorneys to advocate effectively for conservatees and proposed conservatees. The advocacy group asked the Judicial Council to adopt new training requirements and performance standards for court-appointed attorneys in these cases. In May 2015, a detailed proposal for such requirements and standards was submitted to the advisory committee.

Later that year, the Judicial Council authorized a multi-year project for the advisory committee to develop new rules in this area. After months of review, the committee dropped the idea of performance standards because it believed only the Legislature and State Bar have authority to do so. The committee decided to limit its focus to new educational requirements.

The work product of the committee, proposing amendments to Rule 7.1101 of the California Rules of Court, was released by the Judicial Council on

Dec. 13. The subject matter on which attorneys would be required to receive training are quite extensive.

Topics include: (1) the rights of conservatees, persons alleged to lack legal capacity, and persons with disabilities under state and federal law, including the Americans with Disabilities Act; (2) a lawyer's ethical duties to a client, including a client who has or may have diminished functional ability, under

the California Rules of Professional Conduct and other applicable law; and (3) techniques for communicating with an older client or a client with a disability, ascertaining the client's wishes, and advocating for those wishes in court.

In addition, attorneys would be required to have training on special considerations for representing older clients or those with disabilities, including: (1) risk factors that make a person vulnerable to undue influence, physical and financial abuse, and neglect; (2) effects of physical, intellectual and developmental disabilities; (3) mental health disorders; (4) major neurocognitive disorders; (5) identification and collaboration with professionals with other professions; and (6) identification of less restrictive alternatives to conservatorship, including supported decision-making.

While these requirements, if adopted, are necessary to improve the quality of legal representation of clients in conservatorship proceedings, they are not sufficient to ensure they have access to justice. However, the authority to mandate more than new educational requirements may not be in the purview of the Judicial Council.

The California Advocates for Nursing Home Reform asked the advisory committee to propose a new rule clarifying the role of an appointed attorney for a

A New Law Should

- Mandate appointment of counsel for all conservatees and proposed conservatees without an attorney
- Specify that the role of counsel is to act as a zealous advocate
- Direct the State Bar to adopt performance standards for lawyers assigned to represent such clients

conservatee or proposed conservatee as a “zealous advocate.” Both Spectrum Institute and the California Advocates for Nursing Home Reform suggested new rules on performance standards for such attorneys to ensure they provide effective advocacy and defense services. The advisory committee declined to follow these suggestions, arguing that only the Supreme Court or the Legislature has the authority to specify the role of an attorney and adopt performance standards.

Clarifying the role of appointed attorneys is crucial to litigants with disabilities receiving equal protection and access to justice. Some judges expect attorneys to be zealous advocates, while others want attorneys to override the stated wishes of clients if they believe a client’s best interests require such an approach. Attorneys representing non-disabled clients would never dream of advocating against their client’s wishes and promoting their own beliefs instead. If they did, attorneys could be the target of a malpractice lawsuit or a complaint to the State Bar. Clients with disabilities deserve the same type of advocacy as those without disabilities. New legislation should clarify this.

Legislation is also needed to clarify that all conservatees and proposed conservatees are entitled to an appointed attorney, even if they don’t request one. Under current law, even without a request, litigants with developmental disabilities *automatically* receive an attorney if a petitioner files for a *limited* conservatorship. However, if a petitioner files for a *general* conservatorship, a developmentally disabled litigant may be required to represent himself or herself. Giving a petitioner this type of control does not make sense.

Appointment of counsel for litigants in general conservatorship proceedings is not required under current law, unless they specifically request one. The problem is that many, if not most, of these litigants do not know the role or value of an attorney and so they will not ask for one. As a result, in some areas of the state, judges are not appointing attorneys even though they know these involuntary litigants have serious disabilities that make it impossible to effectively represent themselves. This “catch 22” – you must request even though you can’t request – needs to be eliminated. Probate Code Section 1471 should require appointment of counsel

regardless of whether a petitioner files for a general or a limited conservatorship.

A bill is currently being developed by a coalition of advocacy groups that will build upon, and move beyond, the new educational requirements likely to be adopted by the Judicial Council in 2019. The bill would: (1) guarantee appointed counsel for all conservatees and proposed conservatees; (2) specify that the role of counsel is that of a zealous advocate; and (3) direct the State Bar to develop performance standards for such attorneys. The State Bar can look for guidance to Maryland and Massachusetts where such standards already exist.

The Judicial Council should be applauded for developing these new educational requirements. But how will they help litigants with disabilities receive access to justice if they do not have an attorney, or if appointed attorneys advocate for what they think is best and ignore the stated wishes of a client? New legislation can and should fill this access-to-justice void in probate conservatorship proceedings.

Spectrum Institute, California Advocates for Nursing Home Reform, and The Arc of California recently filed a complaint with the Sacramento County Superior Court for failing to appoint attorneys in many general conservatorship proceedings. Spectrum Institute has also filed a complaint with the U.S. Department of Justice against the Los Angeles County Superior Court. The complaint cites deficient advocacy services of court-appointed attorneys there. These complaints allege that courts are violating their obligations under Title II of the Americans with Disabilities Act by failing to provide equal access to justice to persons with known disabilities.

Having an attorney – one that performs competently – is an essential component of access to justice under the ADA. New legislation entitling litigants in general conservatorship proceedings to effective representation by zealous advocates will bring California closer to compliance with the ADA.

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New Training Rules for California Conservatorship Attorneys

One Step on a Long Path to Reform

By Thomas F. Coleman
September 18, 2019

The California Judicial Council is scheduled to adopt new rules requiring conservatorship attorneys to receive education on a wide range of topics not mandated under current law. The changes will affect public defenders and private attorneys who are appointed to represent seniors and people with disabilities in probate conservatorship proceedings.

The matter is Item 19-220 on the consent agenda for the Judicial Council's meeting on Sept. 24.

The Probate and Mental Health Advisory Committee is including several crucial topics in the training requirements. For too long important issues have been ignored or misrepresented in seminars sponsored by some local bar associations. An investigation into faulty trainings is being considered by the Civil Rights Division of the United States Department of Justice.



Under the new rules, conservatorship attorneys will be required to gain knowledge about: (1) state and federal statutes including the ADA, rules of court, and case law governing probate conservatorship proceedings, capacity determinations, and the legal rights of conservatees, persons alleged to lack legal capacity, and persons with disabilities; (2) ethical duties to a client under Rules of Professional Conduct and other applicable law; (3) special considerations for representing seniors and people with disabilities, including individualized communication methods; and (4) less restrictive alternatives to conservatorships, including the use

of non-judicial supported decision-making arrangements.

But this new training framework is just the first step in a much needed and multi-faceted process to reform the dysfunctional probate conservatorship system. Structural flaws in this system have been brought to the attention of the chief justice, Judicial Council, Supreme Court, State Bar, attorney general, governor, and other state and local officials on many occasions during the last 15 years. And yet, despite some minor tinkering around the edges, the failure of officials to institute fundamental changes has resulted in the

unnecessary victimization of thousands of seniors and people with disabilities who have been treated unfairly in these proceedings.

The next step leading to reform is to ensure that the training materials used in new educational programs are both accurate and complete. Quality education cannot be left to chance. There

is a crucial need for the State Bar to approve only those trainings that meet specific standards. Training providers should submit the content of seminars and qualifications of presenters to the State Bar for pre-approval. Providers should not be given carte blanche like they are now.

New educational standards sound good in theory, but without the adoption of performance standards, conservatorship attorneys are free to use or ignore what they learn. Attorneys are often not providing their clients with effective representation. The pattern of deficient advocacy is also

part of a pending ADA complaint with the Department of Justice (filed by my organization, Spectrum Institute). Adherence to performance standards should be mandatory, not optional.

The California Supreme Court has the authority to direct the State Bar to develop performance standards for attorneys appointed to represent clients in conservatorship proceedings. In developing such standards, the State Bar will not have to start from scratch. Excellent standards have been adopted in Massachusetts and Maryland. The State Bar can also consider the ADA-compliant performance standards submitted to the DOJ.

Once standards are developed by the State Bar and approved by the Supreme Court, then a method to monitor compliance will need to be developed. Due to the nature of cognitive disabilities, respondents in conservatorship proceedings generally lack the ability to complain about the deficient performance of their attorneys. As a result, they lack meaningful access to the complaint procedures of the State Bar.

To meet its ADA responsibilities to make its services accessible, the State Bar will need to find ways to address this problem. Perhaps performance audits of a representative sample of cases handled by these attorneys can help fill this access-to-justice gap. The State Bar could also require public defender offices to routinely conduct performance audits of staff attorneys who represent clients in probate conservatorship proceedings.

Each of these steps will help ensure that seniors and people with disabilities receive due process in legal proceedings in which their fundamental freedoms are placed at risk. But none of these measures will do anything to help litigants who do not receive an appointed attorney and are therefore required to represent themselves in complex legal proceedings.

As hard as it is to believe, some people with serious cognitive disabilities are not receiving

court-appointed counsel in these cases. An audit of cases in the Sacramento County Superior Court confirmed that judges there do not appoint attorneys in a significant number of cases.

Disability and seniors organizations filed a complaint with that court arguing that the failure to appoint counsel for probate conservatees violated the ADA. The court's response was a shameful denial that people with cognitive disabilities are entitled to an appointed attorney as an ADA accommodation. A state civil rights agency declined to open an investigation into the matter. As a result, it appears that the court's denial of access to justice for seniors and people with disabilities is a problem that will have to be addressed by the Legislature or by the DOJ.

It has been said that a journey of a thousand miles begins with a single step. The Judicial Council is about to take a step on a long journey toward comprehensive conservatorship reform.

This is an important step, to be sure, but one that may lead nowhere unless the Supreme Court, State Bar, and Legislature adopt additional reform measures. The question now is whether the justices, bar association officials, and state legislators have the will to do so.

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Judicial Council, Teach Thyself

By Thomas F. Coleman

President George H.W. Bush signed the Americans with Disabilities Act into law on July 26, 1990. The measure went into effect on Jan. 1, 1992.

Even though nearly 30 years have passed since Congress approved this landmark disability rights law, the judicial branch of California still does not understand it and as a result courts throughout the state are not implementing it properly.

This problem was the focus of my remarks at a meeting of the California Judicial Council last week. I explained that actions of this rule-making body are violating Title II of the ADA provisions that apply to state and local courts. In *Tennessee v. Lane*, 541 U.S. 509 (2004), the U.S. Supreme Court upheld the power of Congress to regulate the courts in this manner.

Along with my verbal remarks, I submitted a report asking the Judicial Council to make changes to court rules and educational materials so that judges and court employees are correctly advised of their duties under the ADA. The Judicial Council has been misinforming the judiciary about the requirements of the ADA since the time it adopted Rule 1.100 (formerly Rule 989.3) in 1996. It is time for the chief justice and other members of the Judicial Council to acknowledge this problem and take corrective action.

So what's the problem? What exactly does the Judicial Council misunderstand? Essentially, the error rests on its insertion of a premise into the ADA that does not exist. The Judicial Council believes that unless a request for an accommodation is made by a litigant or witness or other user of court services, that judges and court staff have no obligations under the ADA. That is a false premise.

Rule 1.100 is titled "Requests for Accommodations by Persons with Disabilities." It contains procedures the courts should use if and when someone asks for an

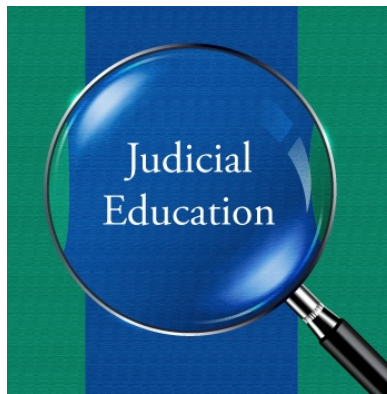
accommodation. The rule is silent on what should happen when judges or court employees become aware that an individual has a serious disability that interferes with his or her participation in legal proceedings but the person does not make a request. Perhaps individuals are unable to do so because they have cognitive or communication disabilities that preclude them from asking.

Reports, brochures, and other materials on the website of the judicial branch all give the impression that courts have ADA obligations only when requests for accommodations are made. In fact, one brochure comes right out and states: "If no request for accommodation is made, courts need not provide one." You can't get more explicit than that.

The Center for Judicial Education and Research (CJER) publishes educational materials, produces training videos, and conducts seminars to educate judges and court employees of their duties under the ADA. I reviewed these materials pursuant to an administrative records request. What I discovered confirmed that the misunderstanding of the ADA permeates everything that CJER has produced on this topic.

Judges throughout the state are relying on the Judicial Council and CJER for guidance. Unfortunately, when it comes to judicial duties under the ADA, this reliance has been misplaced.

The statutory language of Title II of the ADA says nothing about requests for accommodations. Regulations adopted by the Department of Justice to implement Title II also do not mention the need for a request. Numerous federal court decisions have clarified that a request is not required in order for service providers to have a duty to provide an accommodation.



To reiterate, statutory provisions, DOJ regulations, and a long line of federal precedents all send the same message to state and local courts: requests are not required. Rather, federal law tells courts they have a duty to provide an accommodation, even without a request, when they know that a litigant has a disability that interferes with effective communication or meaningful participation in a court proceeding. It is the *knowledge* of such a condition, not a request, that triggers ADA duties.

State and federal law could not be clearer. Any program or activity that is funded by the state shall meet the protections and prohibitions of Title II of the ADA and federal rules and regulations implementing the ADA. (Government Code Section 11135) The Judicial Council, appellate courts, and superior courts are funded by the state.

A public entity must offer accommodations for *known* physical or mental limitations. See Title II Technical Assistance Manual of DOJ. Even without a request, an entity has an obligation to provide an accommodation when it knows or reasonably should know that a person has a disability and needs a modification. See DOJ Guidance Memo to Criminal Justice Agencies, January 2017.

Some people with disabilities are not able to make an ADA accommodation request. A public entity's duty to look into and provide accommodations may be triggered when the need for accommodation is obvious. *Uptike v. Multnomah County*, 930 F.3d 939 (9th Cir 2017)

It is the knowledge of a disability and the need for accommodation that gives rise to a legal duty, not a request. *Pierce v. District of Columbia*, 128 F.Supp.3d 250 (D.D.C. 2015)

The import of the ADA is that a covered entity should provide an accommodation for *known* disabilities. A request is one way, but not the only way, an entity gains such knowledge. To require a request from those who are unable to make a request would eliminate an entire class of disabled persons from the protection of the ADA. *Brady v. Walmart*, 531 F.3d 127 (2nd Cir. 2008)

The erroneous interpretation of the ADA by the Judicial Council has its most severe impact on seniors with cognitive challenges and adults with developmental disabilities who are implicated in probate conservatorship proceedings. The moment a verified petition is filed, the court knows that the target of the proceeding most likely needs an accommodation in order to participate in the proceeding in a meaningful way. Despite this knowledge, judges and court staff are not conducting an assessment of what those accommodations should be. Instead, relying on erroneous advice from the Judicial Council, they do nothing.

At last week's meeting of the Judicial Council, a new rule was adopted requiring court-appointed attorneys in probate conservatorship proceedings to receive training on a variety of important topics. Among them is training on the requirements of the ADA.

How ironic. Attorneys will be required to take ADA training classes, while the Judicial Council continues to instruct judges, attorneys, and the public with an erroneously narrow court rule and misleading educational materials.

Before this new training requirement goes into effect on Jan.1, 2020, I have a bit of advice to share: "Judicial Council, teach thyself." ◇◇◇

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We Count What We Care About

By Thomas F. Coleman
Daily Journal / Oct. 20, 2019

Bankers know to the penny how much money they are managing in their financial institution. Elections are based on the actual number of votes cast, not vague estimates. Workers know exactly how much money should be in their monthly paycheck.

Schools keep tabs on how many students are enrolled. Employers track how many workers they employ. Jailers count how many inmates they have in their custody, and whether anyone is missing. Mental hospitals know if any patients have eloped.

If we care about something, we devote attention to it. When it comes to quantity, we know the exact amount and whether it is increasing or decreasing. In terms of quality, we know the condition and whether it is improving or deteriorating.

Since I have been studying the probate conservatorship system in California which is now going on seven years, I have been asking myself an important question. How much does the judiciary care about the thousands of probate conservatees who are under its protection?

In a world of “counting equals caring” the answer appears to be that these judicial protectors are not really concerned about their protectees. Part of my opinion is based on the fact that, in terms of adults who are under an order of conservatorship, the judicial branch does not care enough to even count them.

The chief justice is not aware of how many adults are under an order of conservatorship in California. Neither is the Judicial Council. They do not know the number of new probate conservatorship petitions that are filed annually in the state. Even various estimates from the judicial branch differ

greatly when it comes to the number of probate conservatees in California.

Probate courts are sometimes referred to as “protection courts” because they are charged with protecting the lives and well-being of the individuals whom they order into conservatorships. By law, probate courts are required to send investigators out to the homes of conservatees to check into their status every two years.

Considering this mandate, and considering the vulnerability of the seniors and adults with developmental disabilities who are under the “protection” of these courts, it would seem logical – indeed imperative – that the chief justice and the Judicial Council would know how many conservatees the 58 superior courts are protecting in California. Surprisingly, they don’t.

One would think that local courts would have an obligation to report to someone at the state level the number of conservatees who are missing. How many conservatees are these local courts unable to locate? Obviously, if a court can’t locate someone it can’t protect them.

Information that I have gathered from the Los Angeles County Superior Court suggests that there may be hundreds, if not thousands, of conservatees who are missing – who simply cannot be located by court investigators. These adults are no longer considered part of the court’s “active” inventory of probate conservatees. Just what category are these missing people placed into? “Inactive” inventory?

In 2015, the presiding judge of the probate division of the Los Angeles Superior Court told the State



Senate that the Los Angeles court had 10,000 “active” probate conservatorship cases. As I sat in the hearing room and heard this number, my ears perked up.

Data gathered by Spectrum Institute from the Department of Developmental Services earlier that year showed that, just counting adults with developmental disabilities, there were more than 12,500 such adults in open conservatorship cases in Los Angeles County. Add to that seniors and other adults and there easily could have been another 3,000 open cases in Los Angeles County. By my calculations there could have been 15,000 or more adults under the protection of the Los Angeles probate court in open conservatorship cases.

In her remarks to the Senate Judicial Committee, the presiding judge alluded to the inability of the court to properly monitor probate conservatees. She advised senators that the court was severely understaffed. The case loads of court investigators were unmanageable.

The whistle the presiding judge was blowing with her bated breath, barely audible to me, was not heard at all by the senators. Fortunately, my ears were sensitive to her encoded message because of my own prior research into these numbers. My interpretation of her testimony alarmed me: “Conservatees are missing, and the court needs more resources to find them and check on their well-being.”

Let us remember that these protectees are vulnerable adults, not old computers or other forms of devalued property being counted by court administrators. They are people who have been involuntarily ordered into the protection of the courts.

Since this many people may be unaccounted for in Los Angeles, how many probate conservatees have unknown whereabouts in the entire state?

This is a serious problem. These adults could be victims of ongoing abuse. It is imperative that a “protector” notify law enforcement when a “protectee” cannot be located. Resources should be allocated to ensure that courts know the location

and the condition of each and every adult who is under their protection.

My plea to the judiciary is simple: “Don’t pretend to protect. Actually do it.”

The first step to fixing a problem is to acknowledge there is one. This issue of missing conservatees is something that needs to be addressed, without delay, by the chief justice and the Judicial Council. The judicial branch should demonstrate that it sincerely cares about seniors and people with disabilities. For starters, it needs to begin counting the people it is protecting. The judicial branch also has a legal obligation to know where these individuals are living, and to determine their physical, medical, and psychological condition.

The judges can’t do the protecting themselves. They rely on court investigators to monitor these cases. Investigators are supposed to see conservatees in person every two years and conduct an assessment of their well-being. According to the report issued by the Senate Judiciary Committee in 2015, in some areas of the state these biennial investigations are sometimes delayed for years.

What should be done about the problem of missing conservatees, unreasonably high caseloads of court investigators, and the backlog of biennial reviews?

For starters, the chief justice should direct the Judicial Council to conduct a statewide survey of all 58 superior courts to gather information about these protectees. How many new probate conservatorship cases are filed each year? How many open cases are there? How many of these conservatees are missing? Are the statutorily-mandated biennial reviews being conducted in a timely manner? What is the caseload of each court investigator?

It is time for the judicial branch to show that it cares about probate conservatees. It should gather essential information about them. In other words, it should start counting. ◇◇◇

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The Right to Counsel Needs a Legislative Fix

By Thomas F. Coleman

For several years I have been studying the probate conservatorship system in California. After extensive legal research, many interviews, and several audits of scores of cases, I have concluded that access to justice in these proceedings is illusory without a meaningful right to counsel.

The system looks good on paper. However, in actual practice it is terrible. The rights of seniors and other adults with disabilities are being routinely violated in probate conservatorship proceedings.

Less restrictive alternatives are not seriously considered. Professional capacity assessments are not being conducted in most areas of decision-making. Some proposed conservatees never appear in court. Many individuals are not provided with an attorney.

The biggest take away from my research is quite clear. If each conservatee and proposed conservatee had a well-trained and competent attorney who provided legal services as a zealous advocate, a new era of accountability would significantly reduce the systematic errors, omissions, and abuses that have been occurring on a routine basis.

What is keeping this era of accountability on the distant horizon? Why is access to justice out of the reach of the 5,000 or so vulnerable adults who are targeted by newly filed conservatorship petitions each year? Why are the other 60,000 or so of them who are living under an order of conservatorship doomed to accept their fate without the ability to challenge illegal court orders?

The answer is simple. They are not guaranteed the right to a competent attorney who will advocate for and defend them with the same care and vigor that attorneys do for non-disabled litigants who privately retain them in other types of civil cases.

The cause of this problem is easily identifiable. The probate code does not explicitly affirm the right of such litigants to retain an attorney of their choice, nor does it mandate the appointment of counsel if they can't retain one. The law currently does not specify that such attorneys must act as zealous advocates. There are not existing performance standards to guide the advocacy practices of these attorneys. The law does not expressly require the appointment of counsel for conservatees on appeal.

The failure of the conservatorship system to provide competent counsel to conservatees at each and every critical stage of the proceeding is not theoretical. It impacts real people in very significant ways.



When 34 year-old conservatee Michael P. was removed from the home of his parent-conservators in 2012, an attorney was appointed to represent him by the court in Lancaster. Due to a half-baked investigation by the lawyer, Michael was returned home. Just a few weeks later, he died under circumstances the coroner found concerning. Had there been performance standards for appointed attorneys, a more thorough investigation might have saved Michael from a premature death.

That same year, 26 year-old Gregory D. was in the midst of a visitation dispute initiated by his father in Los Angeles – a parent whom Gregory said he feared. His court-appointed attorney surrendered Gregory's constitutional right to freedom of association by agreeing, over Gregory's objection, to an order requiring Gregory to spend every third weekend with his father. During those visits, Gregory was forced to attend church services – something Gregory despised.

Gregory's mother appealed, arguing that the order should be reversed as a violation of her son's First Amendment rights. Of course, the attorney who

surrendered Gregory's rights did not file an appeal to challenge his own flawed advocacy. Instead of appointing an attorney to represent Gregory on appeal, the appellate court dismissed the appeal, ruling that Gregory's mother lacked standing to appeal for her son. Had Gregory been provided an attorney on appeal, the court would have reached the merits of the issues and Gregory could have been freed from this ongoing forced visitation.

The following year, 19 year-old Stephen L. was drawn into a conservatorship proceeding in Los Angeles. His court-appointed attorney made allegations to the court that would have resulted in Stephen losing the right to vote – a right that Stephen had indicated he wanted to keep. The only reason Stephen was not disenfranchised was because the attorney reluctantly withdrew his allegations after intervention by Spectrum Institute. The jeopardy to Stephen's right to vote would not have occurred had the law specified that appointed attorneys must advocate for the stated wishes of their clients.

About the same time, 59 year-old David R. was not as fortunate as Stephen. David, a former producer with National Public Radio, was stripped of his right to vote by a judge in San Diego. The appointed attorney did not seek to protect David from disenfranchisement. A few years later, when David asked the court to reinstate his right to vote, the court did not appoint an attorney for him. It was only through media exposure and persistent outside agitation that David regained his right to vote. Had attorney performance standards existed, David likely would never have lost his right to vote in the first place.

Consider 81 year-old Theresa J. When she was forced to participate in conservatorship proceedings in Los Angeles, Theresa hired an attorney. The court refused to acknowledge her chosen lawyer. Over Theresa's objection, another attorney was appointed to represent her. He ignored Theresa's opposition to a conservatorship and instead advocated for one. Had California law specifically affirmed the right of proposed conservatees to retain counsel, or had performance standards existed, these transgressions never would have happened.

The case of 80 year-old Katherine D. is instructive. About three years ago, the Alameda County Superior Court conducted probate conservatorship proceed-

ings without appointing an attorney to represent Katherine, despite the fact that her dementia precluded her from representing herself and defending her estate. Even though she had a pre-arranged trust, Katherine and her estate were placed under the control of a conservator.

Ashley E., a 26-year-old autistic woman, was ordered into a conservatorship earlier this year. Ashley did not appear in court and the public defender she was assigned never once met her. Ashley's case cries out for performance standards.

Violations of the right to counsel are widespread. Two years ago, a whistle-blower report revealed that in Sacramento and surrounding counties, proposed conservatees routinely are not being provided with an attorney. When attorneys are appointed, many of them perform incompetently.

The problem at the appellate level is a policy failure. No statute or court rule specifically directs the Court of Appeal to appoint counsel when it learns that a conservatee does not have a lawyer on appeal.

The right to counsel for conservatees, both in the trial court and on appeal, should be spelled out in statute. The role of such attorneys should be defined and performance standards should be developed. There can be no access to justice for conservatees without the assistance of competent counsel.

The Legislature should pass the right-to-counsel bill being developed by Spectrum Institute. It is endorsed by various seniors and disability rights organizations. The Judicial Council should support the bill and the governor should sign it into law.

The right of conservatees to competent counsel at every stage of conservatorship proceedings should be affirmed by all three branches of government. The time to fix this problem is now.

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Crafting Better Legal Services in Conservatorship Cases

By Thomas F. Coleman
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“This call may be monitored for quality assurance purposes.” We have all heard this statement when we are on the phone with private-sector businesses that sell products or provide services to consumers.

Businesses often make the quality of products or services a priority when they have stiff competition. But when a monopoly exists or when there is a captive audience, quality may take a back seat to efficiency.

Quality assurance is not what most of us think about in terms of government services. This is especially true when it comes to judicial services in court proceedings. Whether judges and attorneys are actually implementing the minimum standards established by the legislature is not something that most litigants feel they have much control over.

Think about public attitudes regarding public defenders. What comes to mind for most people are large caseloads, plea bargains, and assembly-line justice. Even though there are excellent public defenders who deliver quality services, they are thought of as the exception and not the rule. No one would expect to find a customer service representative or quality assurance department in the office of a public defender.

For decades, the same expectation existed for legal services being provided to litigants in juvenile dependency proceedings. When one or both parents were hauled into court for abuse or neglect, they were provided with a court-appointed attorney to defend them. These parents had no control over the quality of legal services they were provided. It was a take-it-or-leave-it situation. The children

were also completely at the mercy of their court-appointed lawyers.

Local judges had total control over the recruitment and payment of the attorneys they appointed in dependency cases. This was a “spoils system” where there were favorites who received many appointments and other attorneys who received very few cases. Attorneys had an incentive to please the judges so they would be appointed in future cases and thereby increase their revenue stream. Pleasing the judges often meant negotiating settlements in order to help the judges move cases through the system quickly and efficiently.

The court-appointed attorney system worked well for the judges who controlled it and for the attorneys they favored. It did not work so well for the parents or children who were pushed through the system with settlements that may not have been in their best interest. For them, efficiency often

took precedence over justice.

Eventually some lawyers and child welfare organizations started to push back against this court-appointed attorney system controlled by local judges. The momentum for change grew to the point that systemic deficiencies could no longer be swept under the rug.

With the advent of a pilot project called DRAFT, quality legal services went from an oxymoron to an expectation in child dependency proceedings. Authorized by the legislature, the Judicial Council started the Dependency, Representation, Administration, Funding, and Training Program in 2004. The goal of DRAFT was to stabilize costs related to appointed dependency counsel and to test



the use of performance and compensation standards for attorneys in juvenile dependency cases. When it was started in 2004, ten court systems volunteered to participate. Staff of the Judicial Council worked with participating courts, attorney providers, and an oversight committee to create new standards for dependency counsel caseloads, compensation, and performance. The pilot project was so successful that just three years later ten more courts were added to the program.

Components of the DRAFT program include: competitive bidding from law firms that want to represent clients in juvenile dependency proceedings; caseload standards; compensation standards that rationalize compensation and allow for regional differences due to cost-of-living expenses; performance standards that are written into the contracts with participating law firms; and comprehensive training programs.

The DRAFT program also uses social services data to evaluate the impact of the program on well-being outcomes for the children. The subliminal message to the families involved in these proceedings could well be: “This proceeding may be monitored for quality assurance purposes.”

When I was recently at a meeting of the Judicial Council to speak to its members about the need for reforms in the conservatorship system, I sat in the audience listening to reports by several committees. During one presentation I heard mention of the DRAFT program. My ears perked up. Perhaps this approach to legal services for children and parents in dependency cases could be a model for legal services in probate conservatorship proceedings.

Under current probate law, judges in each superior court appoint attorneys to represent seniors and other adults with disabilities in conservatorship cases. In some locations, this is done on an ad hoc basis without any systemic checks and balances. In other places, such as Los Angeles County, the court-appointed attorney system smacks of cronyism without any demonstrated concern for quality or accountability.

One major benefit of the DRAFT program is that it focuses more on justice than efficiency. Another is that by having a state agency administer the program, local judges can focus exclusively on what they are elected to do – judging cases. DRAFT eliminates actual or potential violations of judicial ethics that are inherent in a legal services program operated by judicial officers.

California needs a similar program to administer legal services for conservatees and proposed conservatees. These involuntary and vulnerable litigants would benefit immensely if judges no longer appointed, coached, and paid the attorneys who appear before them in conservatorship proceedings. Justice would be much better served if these lawyers were no longer dependent on appointments by local judges for a steady stream of income.

The legislature should authorize the Judicial Council to develop a Conservatorship, Representation, Administration, Funding, and Training Program (CRAFT). In addition to all of the benefits of the DRAFT program, this pilot project would eliminate the incentive that currently exists in conservatorship proceedings for attorneys to protract litigation when there are assets they can tap into for their fees, or to expedite the cases of indigent clients due to financial disincentives or excessive caseloads. CRAFT could start with a few court systems, be evaluated, and then expand to others.

It is time for the State of California to craft a legal services program for conservatorships that reduces the possibility of financial exploitation and that eliminates judicial favoritism. Seniors and other adults with disabilities caught up in conservatorship proceedings deserve the same quality assurance protections the state has been giving for more than a decade to children and parents in juvenile dependency proceedings. ◇◇◇

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Making the State Bar Complaint System ADA Accessible

By Thomas F. Coleman
Daily Journal / November 29, 2019

The California State Bar has its main office in a commercial building in San Francisco. Such structures must comply with the physical access requirements of the Americans with Disabilities Act.

Common areas of the entire building as well as the offices of the State Bar must be accessible to people with disabilities. Being an association for lawyers, I have no doubt that State Bar employees are very familiar with ADA's physical access requirements. But I have reason to doubt their awareness of the organization's duties to ensure that people with mental disabilities have full and equal access to services of the State Bar.

As an arm of the Supreme Court, the State Bar is a government agency. Government Code Section 11135 requires all state-funded agencies to obey Title II of the ADA. This includes compliance with regulations and judicial decisions implementing Title II and other federal disability rights laws.

Federal regulations and judicial opinions make it clear that the ADA protects more than physical access. People with physical *and* mental disabilities must be provided meaningful participation in all services that a public entity offers.

Because State Bar officials know that clients of some attorneys have mental disabilities that diminish their access to bar association services, federal law requires the organization to remove unnecessary barriers to participation by these individuals in those services.

One of the most important programs of the State Bar is its complaint system, the primary purpose of which is to assure the protection of the public. (*Tenner v. State Bar*, 28 Cal.3d 202, 206 (1980))

Investigating complaints serves other goals too, such as protecting the integrity of the judicial system and legal profession, maintaining high professional standards for attorneys, and preserving public confidence in the legal profession. (*Gold v. State Bar*, 49 Cal.3d 908, 913 (1989)) These goals are frustrated when a segment of the public lacks meaningful access to this system.

The State Bar professes a policy that people with disabilities should have full and equal access to its proceedings, services, and programs. Its website says that people with disabilities can contact the State Bar for "help or reasonable accommodation in connection with filing a misconduct complaint against an attorney licensed by the State Bar."

The website is silent, however, about how someone with a cognitive disability would gain access to the complaint process. Some disabilities make it impossible for people to make a request for assistance

or to even know when they are a victim of attorney misconduct.

Research by Spectrum Institute into the practices of court-appointed attorneys representing seniors and other adults with disabilities in conservatorship proceedings has revealed a pattern of ethical violations and many instances of blatant malpractice. Family members involved in conservatorship proceedings also have observed such violations being committed against their disabled loved-ones.

When witnesses to attorney misconduct have filed complaints with the State Bar against court-appointed attorneys, they have been told they lack standing to complain. They have been informed that only the actual client or an authorized representative may initiate the investigation process.



This is a Catch-22 for clients with mental disabilities. A complaint will only be investigated when the actual client files it, but some clients with such disabilities are unable to do so.

I recently raised this issue with an official at the State Bar and got the same response – no third party standing is allowed. Reference was made to Business and Professions Code Section 6093.5.

Section 6093.5 says no such thing. That statute deals with communications *from* the State Bar to third parties, not communications *to* the State Bar. Once I realized this statutory rationale was illusory, I did some more research. What I found were authorities that completely contradict this unjustified excuse for denying investigations.

Business and Professions Code Section 6044 authorizes the State Bar, with or without the filing of a complaint, to initiate and conduct investigations of all matters relating to the discipline of a lawyer or any other matter within its jurisdiction. Business and Professions Code Section 6077 gives it the power to discipline attorneys who willfully breach the rules of professional conduct. Therefore, even if a communication to the State Bar about attorney misconduct were not considered to be a formal complaint, an investigation could be initiated anyway.

The State Bar is sending inconsistent messages. When it wants to close a complaint without investigation, staff members tell families or others that only the actual client can file a complaint. This advice directly contradicts a website statement that “The State Bar’s Office of Chief Trial Counsel handles complaints from clients, members of the public, and other attorneys over unethical professional conduct.”

So there it is in black and white. Members of the public are authorized to file complaints when they become aware that an attorney has breached ethical or professional duties.

Attorneys who become aware of such misconduct can also file complaints. Although they may not have a legal duty to do so, attorneys may have a

moral or ethical obligation to report known improprieties of other lawyers to the State Bar (San Francisco Bar Association Opinion 1977-1). A moral obligation is even more imperative when the victim is someone with a cognitive disability.

The failure of the State Bar to process third-party complaints undermines its own policies on accessibility, is inconsistent with provisions of the State Bar Act, and also violates Title II of the ADA. This failure not only tarnishes the organization’s own reputation but also implicates the California Supreme Court since the State Bar operates under the supervision of that court.

By giving bad information to the public about who may file complaints, employees of the State Bar are violating Business and Professions Code Section 6092.5. That statute obligates the State Bar to “Inform the public, local bar associations and other organizations, and any other interested parties about the work of the State Bar and the right of all persons to make a complaint.” *All persons*. There is no ambiguity in that.

New legislation is not needed to fix this problem. Business and Professions Code Section 6086 delegates authority to the board of trustees to adopt rules for “the mode of procedure in all cases of complaints against licensees.”

The first step to make the complaint process accessible to people with cognitive disabilities is for the trustees to implement what the law already allows – third party standing to initiate complaints. Other measures should also be explored, such as annual audits of attorney performance in a random sample of conservatorship cases and imposing discipline when an audit reveals misconduct.

If the State Bar does not initiate such reforms on its own volition, the California Supreme Court should direct it to so, thereby making ADA accessibility to the complaint and disciplinary system a reality.

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Conservatees Are Legally Entitled to Better Therapy Options

By Thomas F. Coleman
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More than 43,000 adults with intellectual and developmental disabilities are living under the protection of California courts. Judges have adjudicated them as unable to care for their own basic needs and therefore have appointed conservators to take charge of their lives. About 5,000 new probate conservatorship proceedings are initiated each year in the state.

Statistics on the prevalence of abuse of people with disabilities indicate that a high percent of such adults – perhaps a majority – have been victims of emotional, physical, or sexual abuse. Many have experienced such abuse during their childhood years.

Studies show that adverse childhood experiences can have lifetime consequences. The after-effects of such childhood trauma can result in harmful medical conditions as well as serious mental illnesses. This may manifest as chronic anxiety, aggression, PTSD, or depression.

Other studies indicate that people with intellectual and developmental disabilities experience a higher rate of mental illness than the general population.

Parents, relatives, and service providers may witness individuals with developmental disabilities engaging in troubling behaviors – actions that make life difficult for the individuals and those around them. They often seek professional help to change these behaviors.

Applied behavior analysis (ABA) may be seen as way to make troubling behaviors disappear. However, as Dr. Karyn Harvey told an audience of mental health professionals in Texas: “When we only address behaviors, we miss the true cause and root of difficulties.” Harvey is a psychologist with decades of experience in providing therapy to children and adults with developmental disabilities.

Dr. Nora J. Baladerian, a clinical and forensic psychol-

ogist and director of the Disability and Abuse Project of Spectrum Institute, also teaches this in her training programs for therapists and other service providers. Dr. Baladerian is critical of ABA because it asks the wrong question. She says that healing can only occur when the focus shifts from behaviors to causes.

When conservatees have a medical problem, they are entitled to the benefit of a full range of treatment options. All causes of the medical problem are explored. When bleeding is the problem, medical doctors look for the cause of the bleeding. They don't just apply a Band-Aid or prescribe a clotting medication to make the bleeding nuisance go away.

Conservatees who have troubling symptoms, including behavioral problems, are entitled to mental health services that address the symptoms as well as the causes. Simply referring them to an ABA specialist is not sufficient.

The state of California, through the judicial branch, has a duty under the due process clause of the U.S. Constitution to ensure the well-being of persons taken into its custody or placed under its protection. When this duty is violated by the state, federal intervention is warranted. This occurred, for example, when courts placed the state's prison health care system under receivership.

California judges have removed the right of these 43,000 adults to make their own medical decisions. The authority to select medical providers and choose forms of medical or mental health treatment has been delegated by the state to conservators. The decisions made by these agents of the state may cause liability not only to themselves but to the state government that gave them such power.

Depriving conservatees of the full range of mental health therapies that would be available to persons



without disabilities also may violate laws prohibiting disability discrimination. This includes the federal Americans with Disabilities Act and the state Unruh Civil Rights Act. Conservators and regional center case managers should consider the potential for civil liability under these laws before depriving a conservatee of meaningful psychological services from qualified mental health professionals.

There is also the potential for criminal liability if conservators or regional centers ignore a conservatee's obvious need for psychological therapy or if they choose to focus on behavior modification rather than mental health evaluation and treatment that addresses the underlying causes of those symptoms.

Penal Code Section 368 makes dependent adult abuse a crime. Conservatees are considered dependent adults. It would be a criminal offense for a conservator to willfully permit the health of a conservatee to be injured. Failing to secure treatment from a qualified mental health professional to address the underlying causes of troubling behaviors is clearly permitting the health of a conservatee to be injured.

Under Welfare and Institutions Code Section 15610.57, a conservator would be guilty of neglect for failing to provide medical care for the mental health needs of a conservatee. Someone who is displaying adverse behavioral, medical, or emotional symptoms from prior abuse needs a proper evaluation of the causes as well as a treatment plan that focuses on more than just suppressing the disturbing symptoms.

If a conservatee were crying out in pain, nobody would dare claim that gagging the patient to suppress the noise would be an appropriate form of treatment. A conservator who permitted such an approach could be subjected to civil and criminal liability. The same should hold true for the willful failure of a conservator to identify qualified mental health professionals and transport a conservatee to that professional for evaluation of the causes and development of a treatment plan that considers a full range of therapeutic options.

In theory this is all rather straightforward. What may be difficult, however, is finding a qualified mental health professional with experience treating people with developmental disabilities and who is acquainted with treatment options other than ABA methods.

Identifying such professionals and making that list available to regional centers, conservators, conservatees, parents, relatives, and service providers is a project that should be undertaken immediately. The Secretary of the California Health and Human Services Agency should convene an inter-agency task force to address this issue. It should involve the Association of Regional Center Agencies and the Department of Developmental Services. The California Psychological Association should be invited to participate as a consultant.

Because this matter involves individuals who are under the protection of the superior courts in ongoing legal proceedings, the HHS Secretary should invite the Judicial Council, California Public Defenders Association, County Counsels Association, Professional Fiduciaries Bureau, and the California State Association of Public Administrators, Public Guardians, and Public Conservators to participate too. Organizations that provide advocacy or services for people with intellectual and developmental disabilities should also be invited to participate.

The adequacy of mental health services for conservatees with developmental disabilities is an issue that also should be addressed by the California Legislature. A hearing by the Assembly's Select Committee on Intellectual and Developmental Disabilities would be an appropriate way for the Legislature to begin to address this important topic.

Such a legislative hearing should focus not only on the current availability of qualified mental health professionals who use trauma-informed care in their practices, but should explore ways in which the state can make such care more available. This includes creating incentives to develop better training programs for professionals so they can provide trauma-informed services to this population as well as encouraging more university students to go into this field after they graduate. ♦♦♦

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The GAL Process Raises Serious Constitutional Issues

By Thomas F. Coleman
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The appointment of a guardian ad litem in civil litigation is usually done under the radar and therefore avoids public scrutiny. Selecting, appointing, and directing a GAL is a technical process that seems so legalistic that its constitutional implications have mostly gone unnoticed by civil libertarians.

In reality, however, the guardian ad litem process is sometimes a Trojan horse whereby someone can seize control of litigation and steer it in a desired direction. The person initiating the GAL tactic could be an opposing party or even the judge. In either event, a GAL appointment infringes on constitutional rights and in some cases is done without giving a litigant the benefit of an evidentiary hearing into the issue of capacity.

California courts provide individuals an opportunity to be heard in civil cases. Once someone becomes a party in a case, the individual may make motions, file objections, and demand an evidentiary hearing on the matter in dispute. During such a hearing, the litigant may engage in various procedures such as confronting adverse witnesses, objecting to the admission of evidence, and presenting evidence.

With the assistance of an attorney of choice, it is the individual litigant who controls the direction and presentation of the case. This right to litigate, however, can be taken away in a probate proceeding if the court finds the litigant is “an incapacitated person.” Probate Code Section 1003(a)(2). In other types of civil litigation, a court may take away an individual’s right to litigate if the court determines the person is “lacking legal capacity to make decisions.” Code of Civil Procedure Section 373(c).

Thousands of cases involving seniors and other adults with actual or perceived disabilities are processed through the probate division of the Los Angeles County Superior Court each year. According to the court’s 2018 Annual Report, more than 3,700 conservatorship and trust cases were processed that year. Since the Los Angeles court accounts for about 25% of probate cases in the state, there could be 15,000 such cases processed each year throughout California.

According to the website of the Los Angeles County Bar Association, guardians ad litem, aka GALs, are playing an increasingly frequent role in probate matters. The increasing use of GALs, and the constitutional intrusions they create, call for greater scrutiny of the process by which they are appointed.

Replacing a litigant with a GAL infringes on the constitutional right to manage one’s own litigation. “Due process considerations attend an incompetency finding and the subsequent appointment of a guardian ad litem.” *Ferrelli v. River Manor Health Care Center*, 323 F.3d 196, 203 (2d Cir. 2003). “The appointment of a guardian ad litem deprives the litigant of the right to control the litigation and subjects him to possible stigmatization.” *Thomas v. Humfield*, 916 F.2d 1032, 1034 (5th Cir. 1990).

An order appointing a GAL also infringes on the First Amendment rights of a litigant. Every person has a constitutionally protected right to petition the government for redress of grievances. This is not limited to seeking redress through the legislative process. The First Amendment also protects an individual’s right to have access to the courts to vindicate his or her rights.



Foisting a GAL on a litigant also infringes on freedom of speech because, once appointed, it is the GAL and not the litigant and his or her chosen counsel who shapes the messages delivered to the court through pleadings, presentation of evidence, motions, objections, and oral argument. Freedom of speech contemplates effective communication. *United Farm Workers etc. Committee v. Superior Court*, 254 Cal. App. 2d 768, 773 (1967). Making a GAL the spokesperson for a litigant interferes with a litigant's right to control the messaging, thereby rendering the communications to the court ineffective.

For litigants in probate court who are not indigent, the appointment of a GAL also involves the confiscation of assets. A court may order the reasonable expenses of a GAL, including compensation and attorney fees, to be paid from the assets of the litigant for whom a GAL is appointed. Probate Code Section 1003(c). This could require a litigant to pay tens of thousands of dollars in fees to someone who may be using strategies objected to by the litigant or advocating for a result contrary to the litigant's wishes.

While the Legislature has enacted statutes authorizing courts to appoint a guardian ad litem to control civil litigation for someone determined to be "an incapacitated person" or "who lacks the capacity to make decisions," there are no statutes specifying the criteria or the procedures to be used in making this determination in civil litigation.

If the court believes there is reasonable doubt based on substantial evidence of incapacity to litigate, then due process requires the court to give notice to the party of the court's concern and to provide a meaningful opportunity to be heard on the matter. This issue would generally arise when the court on its own motion or on request of another party is considering the appointment of a GAL to litigate on behalf of a party who lacks the capacity to litigate even with the assistance of counsel.

When the issue of appointing a GAL arises, the court has two issues to determine. One is substantive and the other is procedural. The substantive

issue is what level of incapacity must exist to deprive an individual of the right to control and direct litigation and to communicate to the court through retained counsel. The procedural issue involves the methods to be used in making this substantive determination.

Once a GAL is appointed in a civil case, a litigant becomes little more than a bystander or observer in the case. While California law may allow the party to appeal from an order appointing a GAL, statutory and case law are ambiguous as to whether the order is immediately appealable or only after a final judgment is rendered.

Since the appointment of a GAL is a drastic measure that undermines fundamental constitutional rights, the criteria and procedures for this process should be clearly spelled out in law, including the right to an immediate appeal.

Current law is ambiguous on all of these issues. That is why Spectrum Institute will be submitting a capacity assessment report to the governor, chief justice, and legislature later this year, recommending clarifications to protect the rights of seniors and people with actual or perceived disabilities who become involved in court proceedings. (<https://spectruminstitute.org/capacity/>)

That is also why Spectrum Institute recently filed an amicus curie letter with the Supreme Court asking the justices to grant review in the case of *Bradford Lund. v. First Republic Trust Company* (S261165) to decide the immediate appealability of an order appointing a GAL, in this case one that was entered without an evidentiary hearing on the issue of Mr. Lund's actual capacity.

It's time for officials in all three branches of government to recognize the seriousness of the GAL process and to clarify the law so that unnecessary constitutional intrusions are avoided. ♦ ♦ ♦

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