

DUE PROCESS *PLUS*

ADA Advocacy and
Training Standards for
Appointed Attorneys in
Adult Guardianship Cases



Legal Benchmarks are Informed
by Due Process Precedents
and Best Practices Guidelines

User's Guide to
Reference Materials

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Document Set

White Paper to the U.S. Department of Justice

Document One is a policy paper that presents specific *ADA Advocacy and Training Standards* that should be adopted by state and local courts. The Judicial Branch has duties under Title II of the American's with Disabilities Act to provide access to justice to involuntary litigants in adult guardianship proceedings. The focus of the paper is how the courts can provide people with intellectual and developmental disabilities access to justice through proper and effective representation by court-appointed attorneys. (<http://spectruminstitute.org/white-paper/>)

User's Guide to Reference Materials

Document Two is a guide to help readers understand the significance of materials contained in Document Three. Specific segments of documents are quoted or summarized, along with an explanation about how that document or segment of it is relevant to the formulation of one or more of the *ADA Advocacy and Training Standards*. (<http://spectruminstitute.org/white-paper/users-guide.pdf>)

Reference Materials

Document Three contains court cases, statutes, judicial standards, administrative guidelines, policy statements, and legal commentaries relevant to the development of *ADA Advocacy and Training Standards* for guardianship attorneys. These precedents, guidelines, and recommendations serve as the foundation for the White Paper. The due process mandates and best practices approaches found in these materials have informed the development of these policy positions. Because of its length, the print version of Document Three is divided into two parts. Documents in the online version are accessible as individual exhibits through links on a table of contents. (<http://spectruminstitute.org/white-paper/reference-contents.pdf>)

Use by Department of Justice

We encourage the Department of Justice to use the White Paper and the entire document set as resources when it investigates Title II violations by state and local courts in the administration of justice in adult guardianship proceedings. We trust that such DOJ investigations will occur in the coming years and that appropriate settlements will result in greater access to justice for people with intellectual and developmental disabilities who find themselves involved in such proceedings. We also encourage judges, court administrators, and appointed attorneys to use these materials to provide better access to justice for people with developmental disabilities in adult guardianship proceedings.

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Document 1 – Montana Supreme Court Decision (2001)

Key Words: Due Process, Effective Assistance of Counsel, Civil Commitment, Paternalism, Performance Standards, Texas

The case of K.G.F. involved a mental health proceeding in which a woman voluntarily went to a hospital for mental health treatment. While she was there, the woman threatened to commit suicide. A petition was filed against her for an involuntary 90 day commitment. She opposed the petition and counsel was appointed to represent her. The court entered an order of civil commitment and she appealed.

On appeal, the woman argued that the order should be reversed because her court-appointed attorney did not provide her effective assistance as guaranteed by the federal and state constitutions.

The Montana Supreme Court examined the right of a mental health patient to effective assistance of counsel in a civil commitment proceeding. The court ruled that once the legislature granted a statutory right to counsel, it must have intended for such legal services to be effective. Due process guarantees that a client receive effective assistance by court-appointed counsel.

Quote: “[W]here a state statute affords an individual subject to involuntary commitment with the right to counsel, the legislature could not have intended that counsel could be prejudicially ineffective.” **Quote:** “Therefore, we hold that the right to counsel, as provided under our Title 53, Chapter 21 statutes, provides an individual subject to an involuntary commitment proceeding the right to effective assistance of counsel. In turn, this right affords the individual with the right to raise the allegation of ineffective assistance of counsel in challenging a commitment order.” **Quote:** “The fundamental question that must be resolved, as addressed by the parties and Amicus, is *how* effective counsel must be when representing an individual who is facing an involuntary commitment.”

The court found that the quality of representation of court-appointed counsel is the key to whether the adult in question will be afforded due process throughout the proceeding. **Quote:** “[Q]uality counsel provides the most likely way perhaps the *only* likely way to ensure the due process protection of dignity and privacy interests in cases such as the one at bar.”

Before articulating due process standards to guide judges and appointed attorneys in future cases, the court paused a moment to acknowledge systemic failures. **Quote:** “[W]e emphasize that what follows is not meant as a per se indictment of the individual counsel here or appointed counsel in these matters in general; nor is it a tacit censure of the individual professionals involved, who undoubtedly have sound therapeutic objectives in mind. Rather, our aim is on the failure of the system as a whole, one that through the ordinary course of the efficient administration of a legal process threatens to supplant an individual's due process rights that serve to safeguard the fundamental liberty interests discussed thus far.”

The court noted the source of the new standards it was announcing. **Quote:** “[W]hile we may draw

from the collective jurisprudence of both federal and other state's decisions and statutes, as well as an array of thoughtful commentary by scholars and practitioners, we must nevertheless articulate a guiding standard that comports with Montana's unique constitutional and statutory framework . . .”

The court cautioned against over reliance on the concept of paternalism. **Quote:** “[W]e must nevertheless be cautious and critical of signs of paternalism legitimized by the *parens patriae* doctrine, where State actors purport to have an absolute understanding of what is in the best interests of an individual, whose liberty, dignity and privacy are at issue, and whose voice is muted by the swift and overriding authority of court-appointed professionals.”

The court’s new due process standards were drawn in part from the National Center for State Court’s Guidelines for Involuntary Civil Commitment. (See Document 33, Reference Materials, Part Two, p. 257)

Due Process Standards for Court-Appointed Attorneys

Qualifications for Appointment. **Quote:** “To be eligible for appointment, attorneys should have specialized course training . . . At a bare minimum, counsel should possess a verifiably competent understanding of the legal process of involuntary commitments, as well as the range of alternative, less-restrictive treatment and care options available supervised on-the-job training in the duties, skills, and ethics of representing civil commitment respondents.”

Initial Investigation. **Quote:** “[B]efore and after the required meeting with a patient . . . counsel should conduct a thorough review of all available records. Such inquiry must necessarily involve the patient's prior medical history and treatment, if and to what extent medication has played a role in the petition for commitment, the patient's relationship to family and friends within the community, and the patient’s relationship with all relevant medical professionals involved prior to and during the petition process. In sum, we conclude that the rights afforded a patient-respondent . . . without the assistance of diligent, competent, and well-informed counsel at the commencement of the critical investigatory stage of the involuntary commitment process, would have little meaning. . . Prior to or following the initial client interview, counsel should also attempt to interview all persons who have knowledge of the circumstances surrounding the commitment petition, including family members, acquaintances and any other persons identified by the client as having relevant information, and be prepared to call such persons as witnesses. See Guidelines, Part E5(c) at 474. Again, counsel should freely and liberally request a reasonable amount of time for such an investigation prior to the hearing or trial on the petition . . .”

Client Interview. **Quote:** counsel "shall meet with the respondent, explain the substance of the petition, and explain the probable course of the proceedings." As indicated by the Commentary to the Guidelines, the "prehearing services of an attorney are an indispensable prerequisite for protecting a respondent's interests." Guidelines, Part E5 Commentary, at 475. See also Rule 1.2(a), Montana Rules of Professional Conduct (a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be

pursued); Rule 1.14 (providing that when a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client). . . The initial client interview should be conducted in private and should be held sufficiently before any scheduled hearings to permit effective preparation and prehearing assistance to the client.”

Client’s Wishes. **Quote:** “In addition to explaining the petition and commitment process and the various rights at issue to the client, counsel should also ascertain, if possible, a clear understanding of what the client would like to see happen in the forthcoming commitment proceedings, whether it be arguing for dismissal of the petition, seeking a voluntary commitment status, formulating and then negotiating with the State a least-restrictive alternative to commitment, or agreeing to a State-recommended court-ordered commitment. See § 53-21-127(2), MCA (listing options that court may impose following a disposition hearing). The above guideline recognizes that such an understanding may take additional time, due to the client's mental condition and medication, and therefore counsel may need to request a continuation of a scheduled hearing.”

Expert Evaluation. **Quote:** It is also incumbent upon counsel to facilitate the exercise of the client's right . . . to ‘be examined by a professional person of the person's choice’ and to determine whether the evaluation and treatment should be objected to.”

Attorney Role as Advocate. **Quote:** “As the Commentary to the Guidelines states: ‘[w]hen an attorney fails to act as an advocate and assumes a paternalistic or passive stance, the balance of the system is upset, the defense attorney usurps the judicial role, and the defendant’s position goes unheard.’ Guidelines, Part E2 Commentary, at 466 (internal quotations omitted). Accordingly, we agree with the Guidelines as well the approach taken in Texas, that the proper role of the attorney is to ‘represent the perspective of the respondent and to serve as a vigorous advocate for the respondent's wishes.’ See Guidelines, Part E2, at 465. Further: To the extent that a client is unable or unwilling to express personal wishes, the attorney should advocate the position that best safeguards and advances the client's interest. Guidelines, Part E2, at 465. Additionally: In the courtroom, an attorney should engage in all aspects of advocacy and vigorously argue to the best of his or her ability for the ends desired by the client. . . . The foregoing guidelines create the presumption that a client wishes to not be involuntarily committed. The ultimate decision of whether a patient-respondent should be involuntarily committed, therefore, should not be independently made by counsel. . . Thus, we conclude that pursuant to the foregoing guidelines, evidence that counsel independently advocated or otherwise acquiesced to an involuntary commitment in the absence of any evidence of a voluntary and knowing consent by the patient-respondent will establish the presumption that counsel was ineffective.”

Independent Duty of Court. **Quote:** “In so holding here today, we again emphasize that it is not only counsel for the patient-respondent, but also courts, that are charged with the duty of safeguarding the due process rights of individuals involved at every stage of the proceedings, and must therefore rigorously adhere to the standards expressed herein . . .”

Editorial Note. Due process standards requiring effective assistance of counsel have been expanded from criminal cases, to juvenile delinquency cases, to civil commitment cases over the years. Recognizing that probate guardianships also involve serious deprivation of liberty and stigma to the adult in question, courts have been applying standards from civil commitment cases to probate guardianships as well. For this reason, this Montana precedent is relevant to adult guardianships.

Document 2 – Iowa Supreme Court Decision (1995)

Key Words: Stigma, Liberty, Due Process, Utah, North Dakota, Arizona, Arkansas, Iowa

In the case of *Guardianship of Hedin*, 528 N.W.2d 567 (Iowa 1995), the Iowa Supreme Court ruled that, for a variety of reasons, guardianships are analogous to civil commitments. The court held that a proposed ward is entitled to the full array of due process safeguards similar to those associated with civil commitments.

Quote: “One commentator has described guardianship this way: ‘Guardianship is a legal mechanism for substitute decision making which comes in the guise of benevolence, as it was originally intended to protect the disabled individual and his property from abuse, dissipation of resources, and the effects of designing persons. It is an exercise of the state’s role as *parens patriae* for the mentally and physically disabled. Yet, guardianship, in reality, reduces the disabled person to the status of a child. Few incompetent persons ever truly benefit from the guardianship system as practiced in ... most ... states.’ (Sheryl Dicker, *Guardianship: Overcoming the Last Hurdle to Civil Rights For the Mentally Disabled*, U.Ark.L.Rev.L.J. 485, 485-86 (1981))”

Quote: “Today, civil commitment of the mentally ill is considered as ‘[having] a devastating effect on individual liberty, and therefore, stringent procedural safeguards must be applied in those proceedings.’ *Id.* at 487.”

Quote: “Recently, several courts have agreed with commentators that a guardianship ‘involves significant loss of liberty similar to that present in an involuntary civil commitment for treatment of mental illness.’ *In re Guardianship of Reyes*, 152 Ariz. 235, 236, 731 P.2d 130, 131 (Ariz.Ct.App.1986); see also *Youngberg v. Romeo*, 457 U.S. 307, 324, 102 S. Ct. 2452, 2462, 73 L. Ed. 2d 28, 42 (1982) (mentally retarded person committed to state institution has constitutionally protected right to reasonable care and safety, reasonably non-restrictive confinement, and reasonable training ‘to ensure his safety and to facilitate his ability to function free from bodily restraints’); *Heller v. Doe by Doe*, ___ U.S. ___, ___, 113 S. Ct. 2637, 2645, 125 L. Ed. 2d 257, 274 (1993) (‘It is true that the loss of liberty following commitment for mental illness and mental retardation may be similar in many respects.’) (mentally retarded have same liberty interests as mentally ill and may not be constitutionally committed unless dangerous); *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473, 492 (D.N.D. 1982) (‘[M]entally retarded residents [of state institutions] possess a right to free association guaranteed under the First Amendment.’); *In re Guardianship of Braaten*, 502 N.W.2d 512, 518 (N.D.1993) (‘The intrusion upon individual liberty by the involuntary

imposition of a guardianship upon an incapacitated ward sufficiently resembles the involuntary commitment of a mental health patient to call for similar careful standards of decision making.’); In re Boyer, 636 P.2d 1085, 1090 (Utah 1981) (‘Although the restrictions on, and deprivation of, personal freedom by appointment of a guardian are less in extent and in intrusiveness than by involuntary commitment, nevertheless, the loss of freedom may be substantial.’); Functional Evaluation, at 214 (“There can be little doubt that there is considerable potential for violation of the defendant's constitutional rights in the guardianship process.... Although the determination of incompetency is in no way a criminal proceeding, the result in terms of the defendant's liberty interests may be very similar. He may be deprived of control over his residence, his associations, his property, his diet, and his ability to go where he wishes.”).

Quote: “The stigma of incompetence has been compared to that of mental illness. The feeling is that incompetence ‘may be even more egregious since it implies that one is mentally defective, untrustworthy, and irresponsible.’ Dicker, at 488. In addition to this stigma, an adjudication of incompetence causes a multitude of legal disabilities. The adjudication adversely affects an individual's reputation, right to contract, right to enter into chosen occupations, and right to engage in all of the other orderly pursuits of free persons held to involve protected liberty interests. . . . This stigma of incompetence is still another reason to invoke procedural due process guarantees in guardianship proceedings.”

Quote: “Curtis analogizes our guardianship law to involuntary civil commitment. For reasons discussed in division IV of this opinion, we agree they are indeed analogous. Guardianship involves such a significant loss of liberty that we now hold that the ward is entitled to the full panoply of procedural due process rights comparable to those present in involuntary civil commitment proceedings. We think that the stigma of incompetence provides further justification for invoking procedural due process guarantees in favor of the ward.”

Document 3 – Missouri Supreme Court Decision (1986)

Key Words: Due Process, Right to Counsel, Advocate, Investigation

In the case of In re Link, 713 S.W.2d 487 (Mo. 1986), the Missouri Supreme Court ruled that due process requires that appointed counsel in a guardianship proceeding has duty to protect the rights and interests of the client. Counsel must engage in affirmative efforts to investigate and submit all relevant defenses or arguments.

Quote: “[T]he purpose of the statutory and due process requirement of the appointment of counsel is to protect the rights and interests of the alleged incompetent. To accomplish this task it is essential that appointed counsel act as an advocate for the individual. . . . The right to counsel becomes a mere formality, and does not meet the constitutional and statutory guarantee absent affirmative efforts to protect the individual's fundamental rights through investigation and submission of all relevant defenses or arguments.”

Document 4 – California Court of Appeal Decision (2001)

Key Words: Due Process, Arbitrary Adjudicative Procedures

In the case *Ryan v. California Interscholastic Federation*, 94 Cal.App.4th 1048 (Cal. App. 2001), the California Court of Appeal explained that the due process protections afforded by the California Constitution are broader and more inclusive than under the federal Constitution.

The court observed that when a statute confers a benefit or protects an interest, an individual is entitled to freedom from arbitrary adjudicative procedures and are entitled to fair and unprejudicial decision-making and in being treated with respect and dignity.

Quote: “Focused rather on an individual's due process liberty interest to be free from arbitrary adjudicative procedures (*People v. Ramirez*, supra, 25 Cal.3d at pp. 263, 268), procedural due process under the California Constitution is ‘much more inclusive’ and protects a broader range of interests than under the federal Constitution”

Quote: “The *Ramirez* Court further held that “the due process safeguards required for protection of an individual's statutory interests must be analyzed in the context of the principle that freedom from arbitrary adjudicative procedures is a substantive element of one's liberty. [Citation.] This approach presumes that when an individual is subjected to deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudicial decision-making and in being treated with respect and dignity.”

Editorial Comment: If appointed counsel is going to protect the due process rights of a client in a guardianship proceeding, counsel must take affirmative steps to ensure that decisions by the court to grant a guardianship, or remove basic rights, or appoint a particular person as a guardian are not arbitrary decisions. If a court makes decisions that are not supported by clear and convincing *evidence*, then those decisions are arbitrary and unreasonable. The right of a litigant to have decisions that are supported by *evidence*, implicates the role of counsel and requires counsel to conduct factual investigations into all material issues, to have experts appointed where necessary, and to test allegations made by a petitioner or conclusions offered by court investigators or others to make sure they are accurate.

Document 5 – California Court of Appeal Decision (2007)

Key Words: Due Process, Role of Attorney, Stipulation

The case of *Conservatorship of Tian L.*, 149 Cal.App.4th 1022 (Cal. App. 2007), involved a civil commitment procedure under the Lanterman Petris Short Act. The court acknowledged that due process protections apply to LPS conservatorship proceedings. The question was whether an attorney can stipulate away a client’s rights and if so what procedural protections would be necessary before a court would accept such a stipulation.

Before addressing the facts of the instant case, the Court of Appeal summarized an earlier precedent in which it had reversed a commitment order because the actions of a conservatee's attorney violated due process. It then contrasted the facts of the current case with the previous case.

Quote: Tian relies on this court's opinion in *Christopher A.*, supra, 139 Cal. App.4th 604, 43 Cal.Rptr.3d 427, but it is distinguishable. *Christopher A.* involved a contested proceeding in which a jury determined Christopher was gravely disabled within the meaning of the LPS Act. Outside of the jury's presence, a physician then testified on issues of least restrictive placement, disabilities and proposed powers of the conservator. The physician believed Christopher was incapable of safely operating a car, entering into contracts, making decisions about his medical treatment and possessing a firearm, and the least restrictive placement was a locked facility. Before the trial's conclusion, the San Diego County Health and Human Services Agency prepared and submitted to the court and Christopher's counsel (Short) a proposed judgment. Short approved the judgment, and the court entered it without obtaining on the record Christopher's consent. . . . Christopher contended the court violated his due process rights by accepting the stipulated judgment submitted by the attorneys without first consulting him on the consequences of the agreement. We agreed, holding that because 'it is solely the province of the court to determine the proper placement of the conservatee, the disabilities to impose, and the duties and powers of the conservator, a court may not accept a stipulated judgment on these issues without first consulting the conservatee and obtaining on the record his express consent.'"

Quote: "We explained that '[B]y accepting the stipulated judgment, the court allowed Short to waive Christopher's right to a court hearing on the issues of placement, disabilities, and powers of the conservator. The role of an attorney in litigation is to '[protect] the client's rights and [achieve] the client's fundamental goals.' [Citation.] In carrying out this duty, the attorney has the general authority to stipulate to procedural matters that may be necessary or expedient for the advancement of [the] client's interest [s].' [Citation.] However, the attorney may not, without the consent of his or her client, enter into an agreement that 'impair[s] the client's substantial rights or the cause of action itself.'" . . . We noted, '[n]othing in the record shows Christopher consented to the terms of the proposed judgment regarding placement, disabilities, and conservator powers.' (Id. at p. 613, 43 Cal.Rptr.3d 427.) We concluded 'a stipulated judgment approved by the conservatee's attorney and adopted by the court after no formal hearing on the issues of placement, disabilities, and powers of the conservator is not a constitutionally sound safeguard against error.'"

In the current case, the court found sufficient procedural safeguards against error. The attorney submitted a sworn declaration stating that he explained everything to his client and that his client agreed to the placement and the conditions of placement. The court found that, because there was evidence the client understood the terms of the agreement, there was no violation of due process.

Editorial Comment. This case reaffirms the precedent that due process precludes an attorney from stipulating to a conservatorship order or its terms and that the court must affirmatively determine that the client understands and agrees to such a stipulation prior to entering such an order. If a client lacks capacity to understand contractual terms, then such a stipulation would not have her consent.

Document 6 – Maryland Journal of Contemporary Legal Issues (1995-96)

Key Words: Due Process, Role of Attorney, Stipulation

Titled “The Guardianship Puzzle: What Ever Happened to Due Process,” explores reasons for the discrepancy between excellent policies theoretically protecting due process in guardianship proceedings, and the actual practices of attorneys and judges in such proceedings which routinely violate the policies. The article discusses the results and implications of two surveys conducted by the authors in Maryland. One survey examined guardianship file in four counties. The other probed the attitudes of judges about guardianship cases.

Quote: “On one hand, the state has a guardian of the person statute which in many respects is a model of due process for the subject of the proceedings, one which affords the person respect and full due process rights. . . . On the other hand, the actual process in most guardianship cases bears little resemblance to the process promised in the statute.”

Quote: “Hearings are not always held, or if they are, they proceed by stipulation of the attorneys to all issues and are over in minutes. As discussed in this article, the ADP [allegedly disabled person] rarely appears in court and the lawyer representing the ADP frequently agrees to all requests by the petitioner. The lawyer does not advocate for limits to the guardianship order. In fact, orders are seldom limited, and they frequently award all of the powers available to the guardian, whether requested or not.”

Quote: “Role of the attorney. The attorney appointed to represent the ADP is key to solving the guardianship puzzle. Depending on the role that attorney plays, the ADP may not receive substantial due process in the proceeding which deprives her of her rights as an adult citizen. Under the present system, due process is a hit or miss affair. Both of our studies confirm that confusion reigns regarding what role the appointed attorney is to play. The study of case files shows that attorneys generally do not take an advocate's role, though the words of the statute and the legislative history indicate that is what the legislature intended. The survey of judges shows that those who responded are divided about or are unsure of the attorney's proper role.”

Quote: “The evolution of the dual role of the attorney in guardianship cases creates significant questions about the adequate representation of the ADP and due process. The legislature clearly intended that the proceeding would be adversarial, by providing for a hearing, an optional jury trial, and court-appointed counsel. In such a setting, the usual role of the attorney, and the one dictated by the Rules of Professional Conduct, would be to see that a defense, if one is available, is raised; that the client's views are advocated in court; and that the petitioner meets the burden of proof. In short, the attorney would insure that the ADP had his or her day in court. But instead, the role of the ADP's attorney has become that of a court investigator, who provides the court with facts and information that normally would be presented and proven by the petitioner. Why the petitioner has been relieved of the duty to prove his case without assistance from opposing counsel is one of the more puzzling questions surrounding guardianship.”

Quote: “Some are fearful that to assign an advocate's role to the attorney will cause there to be protracted and unnecessary hearings in every case, which will clog court calendars, and will put family members who are acting for the best interest of their loved one through a trying, adversarial ordeal. However, to act as an advocate is not a license to raise frivolous defenses or to stand obdurately on procedural points. This is prohibited by Rule 3.1 of the Maryland Rules Of Professional Conduct which provides that ‘[a] lawyer shall not ... defend a. proceeding . . . unless there is a basis for doing so that is not frivolous.’ The Rule goes on to state however,. that ‘[a] lawyer may nevertheless so defend the proceeding as to require that every element of the moving party's case be established.’ This is the least the attorney for the ADP should do.”

Quote: “Even the attorney who represents an ADP who unquestionably needs a guardian has a role to play. That attorney can advocate by ensuring that all who are interested have received service of process, that no less restrictive alternative is available, that the proposed guardian is a trustworthy fiduciary, and that the order is tailored to meet the specific needs of the client without unnecessarily depriving her of rights. This can be done in the attorney's investigatory stage and through negotiation with opposing counsel. In fact, an attorney who opposes a guardianship because less restrictive alternatives are available will often persuade the petitioner to dismiss the case because a guardianship is not necessary, thus saving the court's time and finding a more expedient, less expensive solution to the problem which prompted the filing of the petition.”

Editorial Comment. The following quote from this law review article hits the nail on the head: “Clarifying the proper role of the attorney for the ADP is the first and most important step in solving the due process puzzle, because that attorney can effect better, more equitable results in all aspects of the guardianship proceeding.”

Nibbling around the edges of guardianship procedures won't bring the type of reform that will ensure that adults with intellectual and developmental disabilities receive due process in such proceedings.

Real reform goes to the core of the problem: the failure to have court-appointed attorneys who are properly trained and who are held to performance standards that ensure effective assistance and provide clients access to justice as required by the ADA. This article was written 20 years ago. The problems identified in the article are present today. That is partially because each state has been allowed to “do its own thing” in terms of processing guardianship cases. Minimum federal standards of access to justice for involuntary litigants in adult guardianship proceedings need to be instituted.

Document 7 – Journal of Poverty Law (1996)

Key Words: Due Process, Role of Attorney, Ethics, Confidentiality, ADA, Accommodation, Standards, Alaska, District of Columbia, Washington, New Jersey, Missouri

An article titled “Zealous Advocacy for the Defendant in Adult Guardianship Cases” discusses an issue at the heart of guardianship reform efforts in the 1990s – the role of the court-appointed

attorney. Reform advocates in that era were pressing for a true advocacy role for such attorneys, while defenders of the status quo wanted attorneys to play a “best interests” role in keeping with the *parens patriae* nature of the proceedings. The article discusses the role of the attorney from a due process perspective which the author says entitles a client to a true advocate.

The article places its first focus on the Model Rules of Professional Conduct of the American Bar Association and their requirement that lawyers who have clients with diminished capacity treat the clients like clients without such disabilities.

Quote: “Traditional legal practice requires an attorney to advise a client about the available courses of action and to pursue the one chosen by the client after a discussion of the merits of each. The explanation of the proceedings and issues must be sufficient to allow the client to make informed choices about the representation. Even if the option chosen by the client is not the option the attorney would have chosen, the attorney is obligated under the rules of professional conduct to advocate the client's position on the client's behalf. When an attorney represents a client with a disability, Rule 1.14 requires the attorney to maintain a normal client-lawyer relationship with the client ‘as far as reasonably possible’ This includes the duty to abide by the client's decisions regarding the objectives of the representation and whether to accept an offer of settlement.”

The article contrasts the attorney-advocate role with the role of a guardian-ad-litem, noting that it would be a violation of professional ethics for a court-appointed attorney to deviate from traditional lawyer-client ethical duties in order to assume the role of a guardian-ad-litem – a role that does not contemplate that communications with the client remain confidential.

Quote: “The guardian ad litem function runs afoul of another of the basic tenets of lawyering, that an attorney maintain the client's confidences. The Model Rules of Professional Conduct admonish attorneys not to reveal information gathered from representation of a client without the client's consent. When attorneys acting as guardians ad litem report to the court, they relate elements of conversations with the defendant and others, as well as their own observations about the defendant's ability to manage finances or personal affairs. This information is relayed to the court without the client's consent -- indeed, sometimes over the client's objections -- and often forms the basis for the appointment of a guardian.”

Various state statutes are cited which specify the duties of an attorney appointed to represent a client in a guardianship case.

Quote: “Alaska specifically requires attorneys ‘to represent the ward or respondent zealously’ and to follow the decisions of the defendant concerning the defendant's interests. The District of Columbia also requires the appointment of an attorney to ‘represent zealously the individual's legitimate interests.’ The distinction between the role of the attorney and the role of the guardian ad litem is clearest in Washington State. There a defendant has the right to be represented by

counsel at any stage in a guardianship proceeding. Counsel is directed to act as an advocate for the client and not to substitute counsel's own judgment for that of the client concerning what may be in the client's best interests. The guardian ad litem, on the other hand, is directed to promote the defendant's best interest, rather than the defendant's expressed preferences.”

Case law from several states was also referenced in the article.

Quote: “In the 1980s, the few reported decisions that discussed the role of the attorney in guardianship proceedings generally did so in the context of other issues. Missouri courts were in the forefront of the discussion. In a case concerning waiver by counsel of a defendant's rights to be present at the hearing and to a jury trial, the Missouri Supreme Court stated that appointed counsel must act as an advocate for the individual to protect the individual from an erroneous deprivation of rights and to prevent the right to counsel from becoming a ‘mere formality.’ If the defendant understands the right being waived, then the attorney must follow the defendant's wishes, even if the attorney disagrees with the defendant's decision. If the defendant cannot direct the attorney, counsel may make decisions that ‘safeguard and advance the interests of the client.’ The New Jersey Supreme Court, in one of the most recent cases to discuss the role of the attorney for the defendant . . . [T]he court found that [t]he role of the representative attorney is entirely different from that of a guardian ad litem. The representative attorney is a zealous advocate for the wishes of the client. The guardian ad litem evaluates for himself or herself what is in the best interests of his or her client-ward and then represent[s] the client-ward in accordance with that judgment.”

The article remarkably refers to the Americans with Disabilities Act and its application to the services of an attorney for a client with a disability. It states, in effect, that by prohibiting lawyers from discriminating on the basis of the disability of a client, the ADA had, in effect, required attorneys to comply with Rule 1.14 of the Rules of Professional Conduct.

Quote: “The attorney must undertake every effort to maintain a normal attorney-client relationship with the defendant, despite the defendant's actual or perceived disabilities. . . . By extending the prohibition against discrimination to people with disabilities, the ADA reversed a public philosophy that required only protection and isolation of people with disabilities. . . . In a way, the ADA's purpose of empowerment runs counter to the *parens patriae* philosophy of guardianship, which is meant to protect those thought too incapacitated to protect themselves. The role of the attorney as advocate is more closely aligned with the purpose of the ADA. The attorney promotes empowerment by advocating self-determination for the defendant. The guardian ad litem function is founded more on the notion of *parens patriae*, the right of the state to protect the welfare and best interests of its citizens, since the guardian ad litem decides what is in the individual's best interests. As the ADA changes the notion of how people with disabilities are dealt with by society as a whole, it should also change the way guardianships are viewed and the way in which attorneys for the defendant represent their clients.”

The article also rebutted arguments that attorneys acting as advocates will result in unnecessary and

protracted litigation in guardianship cases.

Quote: “Those who oppose an advocacy role for the defendant's attorney cite examples of unnecessary and protracted litigation that increases costs for all parties and that results in the imposition of a guardianship anyway. Or they express fears that an advocacy role will cause a vulnerable adult to be left unprotected. While those concerns are very grave, the legal system has other mechanisms for addressing them. Courts have authority to impose sanctions on lawyers who abuse the legal process by filing unnecessary and frivolous lawsuits and motions. . . . While the attorney is required to advocate the client's decision, the attorney is not required to advocate decisions that are patently absurd.”

Implicit ADA Performance Standards. The article discusses the services that attorneys would perform in any civil case and applies this analysis to guardianship cases. These de-facto performance standards are an outgrowth of what the ADA would require – the same type of lawyering for a client with a cognitive disability as for any other client – and what the Model Rules would require.

Quote: “Use techniques to improve communications when interviewing the defendant. The attorney should meet with the defendant face to face and be cognizant of potential communication problems, such as language barriers, hearing impairments (not all hearing-impaired individuals use sign language or even the same sign language), or aphasia (partial or total loss of the ability to articulate ideas in any form). The environment of the meeting place also may cause sensory problems associated with the defendant's specific disability. Light, noise, print size of legal documents, and other distractions may affect the defendant's ability to understand and discuss the issues. If communication barriers are present, the attorney should have auxiliary aides during any interview and during all judicial proceedings. . . . Discussions with the defendant are private; communications with defendants in guardianship proceedings are subject to the same respect and confidentiality given to communications with clients in other types of cases.”

Quote: “Prepare for representation. The attorney should secure and present evidence, testimony, and other arguments to promote the defendant's position and to protect the defendant's rights. Advocacy for the defendant entails the use of traditional lawyering techniques, such as pretrial motions, discovery, stipulations, judicial notice, and evidentiary objections. In the guardianship context, advocacy also involves investigation of possible, less restrictive alternatives to guardianship, including powers of attorney and advance directives, representative payees, /54/ trusts, and social services. The results of the prehearing investigation may determine the availability of less intrusive assistance and could lead to a negotiated settlement or to dismissal of the case.”

Quote: “As with other civil cases, the attorney should review the file and other relevant information and interview interested persons, neighbors, friends, social workers, and others who may have contact with the defendant. Reviewing medical records may not yield sufficient information, however, and doctors' certificates should not be considered prima facie evidence of disability. Doctors who prepared the medical certificates should be interviewed to determine

the extent of their personal knowledge about the defendant and their overall expertise with the kinds of conditions the defendant is alleged to have. When evaluating medical evidence, care should be taken to find out what medications the defendant is taking and to explore the possibility that drug interactions are causing confusion. The attorney may want to obtain independent medical reports.”

The article ends by underscoring the importance of the role of an attorney acting as an advocate for a client in a guardianship case. Without such an advocate, a client will not have meaningful participation in the proceedings. Although the article does not explicitly mention the ADA in this context, it is implicit. Meaningful participation is what the ADA requires the court to provide a proposed ward or conservatee. In most cases, the only vehicle for such access is through an appointed attorney – but only if the attorney is properly trained and adheres to articulated standards.

Document 8 – Role of An Attorney for a Conservatee

Key Words: Due Process, Role of Attorney, Effective Assistance of Counsel, Guardian Ad Litem, New Jersey, Massachusetts, Connecticut, California, Illinois

This document contains quotes from the decisions of five state supreme courts regarding the proper role of an attorney representing an involuntary litigant in an adult guardianship proceeding and the right of the client to effective assistance of counsel. The cases span nearly 20 years, beginning with New Jersey in 1994, Massachusetts and California in 2010, and Connecticut and Illinois in 2012.

Because quotes from those decisions are contained in this three page document, further analysis or repetition of the quotes are not needed here. However, another New Jersey case has been found, from which quotes will be presented below. In that 1997 case, [In re Mason](#), the Superior Court judge wrote an opinion in which he detailed some of the changes made by the New Jersey judiciary in response to the 1994 decision of the New Jersey Supreme Court. Some of those quote appear below.

Quote: “The court-appointed attorney in an incompetency matter represents the client's wishes as an attorney would represent a client in any particular legal dispute. The individual, the subject of the incompetency hearing, has rights, preferences and desires that are not wholly usurped because of the action concerning his or her alleged incompetency. Moreover: [a]ttorneys should also be mindful of the fact that a declaration of incompetency need not necessarily deprive a person of the right to make all decisions. The primary duty of the attorney for such a person is to protect his or her rights, including the right to make decisions on specific matters. The attorney must therefore, advocate for decisions made by such persons unless the decisions are patently absurd or pose an undue risk of harm.[Supreme Court's Judiciary-Surrogates Liaison Committee, Guidelines for Court-Appointed Attorneys in Incompetency Matters, 1 (1995).]”

Quote: “Further,, the Rules of Professional Conduct (RPC) mandate that an attorney representing

a disabled person should maintain, as much as possible, ‘a normal attorney-client relationship’ with that person. R.P.C. 1.14(a) provides: (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.[R.P.C. 1.14(a).]The role of the court-appointed attorney is thus the traditional attorney role. Indeed, as stated by the Judiciary Surrogates Liaison Committee, ‘[t]he representative attorney is a zealous advocate for the wishes of the client.’ Supreme Court's Judiciary-Surrogates Liaison Committee, *Id.* at 7 (1995). Perhaps the only limitation placed upon such representation is that the attorney advocate on behalf of the client ‘unless the decisions are patently absurd or pose an undue risk of harm.’ *Id.* Should such a circumstance arise, the court-appointed attorney ‘may [on perceiving a conflict between the preferences of such persons and their best interests] wish to inform the court of possible need for a guardian ad litem.’” *Id.*

Quote: “The ‘roles’ and purposes of the court-appointed attorney and the GAL [guardian ad litem] are thus separate and discrete. . . . The court-appointed attorney thus acts as an ‘advocate’ for the interests of his client and the GAL acts as the ‘eyes of the court’ to further the ‘best interests’ of the alleged incompetent. Court-appointed counsel is an independent legal advocate for the alleged incompetent and takes an active part in the hearings and proceedings, while the GAL is an independent fact finder and an investigator for the court. The court-appointed attorney, subject to the aforementioned concerns, thus subjectively represents the client's intentions, while the GAL objectively evaluates the best interests of the alleged incompetent.”

Editorial Comment. These cases show a clear trend by state courts to acknowledge the right of a proposed ward or conservatee to a real advocate, one who does not merely go through the motions in a pro forma manner but who truly provides effective assistance. This is what due process requires. When the requirements of Title II of the ADA are added to the mix, additional modifications of policy or accommodations to the client are required to ensure that clients with developmental disabilities receive access to justice. This could be called an ADA duty of “due process plus.”

Document 9 – California Law Revision Commission Memorandum

Key Words: Due Process, Right to Personal Security, Duty to Provide Reasonable Safety

This document contains a section discussing the duty of the state to provide a safe environment to persons with intellectual disabilities over whom the state gains control of care and custody. Although the discussion occurs in the context of civil commitment to a mental health facility, the due process principles should apply to other types of confinement. For example, a person placed under a conservatorship or guardianship usually loses the right to make decisions regarding his or her place of residence. A guardian is appointed by the court and the person is required to reside in a location chosen by the guardian. This loss of liberty should be considered tantamount to confinement for purposes of imposing a duty on the state to ensure that the residence is safe.

Editorial Comment. This document should be considered in conjunction with Document 30 – “The State’s Duty to Ensure the Safety of Adults Who are Placed into Guardianship.” It should also be read while keeping in mind Document 25 regarding “Trauma Informed Justice.” Adults with developmental disabilities are at high risk for abuse. In fact, data suggests that most of them have been victims of abuse as a child. Since likely perpetrators are not strangers but are people in their circle of support – such as parents, relatives, or household members – it is imperative that a court-appointed attorney must fully investigate the persons who are asking to be appointed as guardians, as well as all members of their household or who would have access to the client should that person be appointed as guardian. Failure to properly investigate could have devastating consequences. (See Document 34 – “The Case of Mickey P.”)

Document 10 – National Probate Court Standards

Key Words: Due Process, Right to Counsel, Advocate, Standards, Experts, Less Restrictive Alternatives

This document was published by the National College of Probate Court Judges in 2013. It contains the views of the college regarding best practices in adult guardianship proceedings. It clearly states that once counsel is appointed, the role of the attorney should be that of an advocate for the respondent. The report notes that a majority of states require the appointment of counsel in adult guardianship proceedings.

Quote: “The respondent's due process rights should be afforded full recognition in the course of the hearing. For example, a complete record will protect the respondent should an appeal be necessary. Similarly, the respondent should be able to obtain an independent evaluation prior to the hearing, present evidence, call witnesses, cross-examine witnesses including any court-appointed examiner or visitor, and have the right to be represented by counsel.”

The standards call for clear and convincing evidence to prove incapacity and to show that less intrusive alternatives are not feasible. They also discuss the role of professionals and experts in assessing these issues.

Editorial Comment. An advocate for a client who is facing the loss of significant rights through a guardianship proceeding would request the appointment of qualified professionals to assist the attorney in assessing facts regarding the capacity of the client on a host of decision-making areas and less intrusive alternatives that might be available.

Document 11 – Conference of Chief Justices

Key Words: Standards

This document contains a resolution adopted by the Conference of Chief Justices in 2013

encouraging each state court system to review and consider implementation of the new National Probate Court Standards.

Document 12 – Conference of State Court Administrators

Key Words: Right to Counsel, Role of Attorney, Training

This document, titled “The Demographic Imperative: Guardianships and Conservatorships,” takes a strong position that: “Courts should ensure that the person with alleged diminished capacity has counsel appointed in every case to advocate on his or her behalf and safeguard the individual’s rights.”

It also speaks to the issue of training of court-appointed attorneys.

Quote: “Appointed counsel should be trained to explain the consequences of guardianship in a manner the person can understand; ensure there is no less restrictive alternative to guardianship which will provide the desired protection; ensure due process is followed; ensure the petitioner proves the allegations in the petition to the standard required in the jurisdiction; confirm the proposed guardian is qualified to serve; and ensure the order is drafted to afford the person with diminished capacity maximum autonomy. ‘

Editorial Comment. Although this recommendation does not specifically mention the ADA, it is implicit in order that the attorney explain the consequences of guardianship “in a manner the person can understand.” This calls for effective communication between attorney and client, which means that the attorney must investigate how best to elicit the views of the client and how best to explain concepts involved in guardianship to the client. This requires specialized training about various types of developmental disabilities in a general sense. It also requires the attorney to develop an ADA accommodation plan for each specific client who has such disabilities. Also, in order for an attorney to explore lesser restrictive alternatives, the attorney must have general knowledge about such alternatives and may need to have an expert appointed to help explore such options for a particular client. Further, an attorney will need training about disability and abuse issues in order to investigate whether the client has been a victim of abuse and whether there is a risk of such abuse if a specific person is appointed to be the guardian.

Document 13 – Guardianship Agenda for Reform (American Bar Association)

Key Words: Right to Counsel

This document contains recommendations and policy statements approved by the American Bar Association House of Delegates following a National Guardianship Symposium conducted in 1988. One policy of the ABA is the mandatory appointment of counsel in all guardianship proceedings.

Document 14 – Policy of the American Bar Association

Key Words: Right to Counsel, Expert, Role of Attorney, Investigation

This document is a resolution adopted by the American Bar Association House of Delegates in 1987.

Quote: “Counsel as advocate for the respondent should be appointed in every case . . . Counsel for the respondent should make a thorough and informed investigation of the situation. . . . The respondent, or the court on its own motion, has the right to ask for an independent evaluation by a physician or other mental health or social service professional.”

Editorial Comment. This policy clearly states that an appointed attorney shall be an advocate. It also specifies that counsel has a duty to conduct a thorough investigation so that counsel can be fully informed of the situation. This may include the need for appointment of an expert to assist counsel in assessing the capacity of the client.

Document 15 – Wingspan: The Second National Guardianship Conference

Key Words: Right to Counsel, Role of Attorney, Accommodation

This document includes recommendations from a national guardianship conference conducted in 2001. The conference was cosponsored by the American Bar Association, National Academy of Elder Law Attorneys, National College of Probate Judges, National Guardianship Association, the Arc of the United States, and the Center for Social Gerontology, among others.

The conference recommended that: “Counsel always be appointed for the respondent and act as an advocate rather than as a guardian ad litem.”

Quote: “*Zealous Advocacy* - In order to assume the proper advocacy role, counsel for the respondent and the petitioner shall: (a) advise the client of all the options as well as practical and legal consequences of those options and the probability of success in pursuing anyone of those options; (b) give that advice in the language, mode of communication and terms that the client is most likely to understand; and (c) zealously advocate the course of actions chosen by the client.”

Editorial Comment. The position of this conference could not be made more clear that counsel shall be a zealous advocate for the client and not a guardian ad litem. The recommendations also implicitly incorporate concepts from the Americans with Disabilities Act regarding the need for an attorney to use whatever means are reasonably necessary to insure effective communication with client.

Document 16 – Policy of the National Academy of Elder Law Attorneys

Key Words: Due Process, Right to Counsel, Role of Attorney, Accommodations

This document contains the policy position of this national organization of attorneys regarding guardianship proceedings. In addition to the use of “plain language” and “accommodations” so that the individual in question can understand and participate in the proceedings, the policy recommends other due process rights, including the rights to compel the attendance of witnesses, of cross-examination, of jury trial, and to appeal. It also calls for “mandatory court appointment of counsel at or before notice to act as zealous advocate for the individual.”

Document 17 – North Dakota Law Review (2013)

Key Words: Right to Counsel, Role of Attorney, Accommodation, Model Public Guardianship Act

This law review article on guardianship proposes that North Dakota law be amended to provide that the court appoint an attorney to act as legal counsel and advocate for the proposed ward. The attorney shall zealously advocate the course of actions chosen by the proposed ward.

It also recommends that the law be amended to specifically require the court to “take all necessary steps to make the proceedings accessible and understandable to impaired persons.” The duties of the attorney include: “Explaining the guardianship proceeding to the proposed ward in language, mode of communication, and terms that the proposed ward is most likely to understand”

In support of its recommendations, the article cites similar recommendations made by the Second National Guardianship Conference. It also quotes from the Model Public Guardianship Act which recommends that the alleged incapacitated person should have counsel appointed in each case unless the person knowingly and voluntarily waives counsel and if the person lacks the capacity to waive counsel then counsel shall be appointed by the court.

Document 18 – Adult Guardianships in Georgia

Key Words: Due Process, Stigma, Arizona, Iowa, Utah

This 2003 article from the Canopic Probate Law Journal discusses guardianship reform in Georgia, refers to two statewide guardianship surveys in 1994 and 2000, and considers constitutional and policy interests involved in guardianship proceedings.

Quote: “A judicial finding of incapacity and the granting of a guardianship can result in a grave deprivation of individual liberty interests, legally precluding the right to make and carry out the most

basic decisions about how to live one's life. A ward 'may be deprived of control over his residence, his associations, his property, his diet, and his ability to go where he or she wishes.' A 1987 Congressional study found guardianship 'in many ways to be the most severe form of civil deprivation which can be imposed on a citizen of the United States.' Looked at in stark terms, guardianship, in reality, reduces the disabled person to the status of a child'. In addition, a ward faces the stigma that attaches to an adjudication of 'incompetence,' a label courts have found individuals have a constitutionally protected interest in avoiding."

Quote: "When the government infringes on an individual's liberty, substantive and procedural due process and equal protection guarantees under the Fifth and Fourteenth Amendments to the U.S. Constitution are invoked. This is also the case when the state is acting pursuant to its *parens patriae* power."

Quote: "As Justice Burger stated in his concurring opinion in *O'Connor v. Donaldson*, 'Of course, an inevitable consequence of exercising the *parens patriae* power is that the ward's personal freedom will be substantially restrained, whether a guardian is appointed to control his property, he is placed in the custody of a private third party, or committed to an institution. Thus, however the power is implemented, due process requires that it not be invoked indiscriminately.'"

The article quotes from a decision of the Arizona Court of Appeal. (In re Guardianship of Reyes, 731 P.2d 130 (Ariz. Ct. App. 1986)) There, the court compared guardianship with civil commitment proceedings and found that similarities required that due process protections associated with civil commitment must also apply to guardianships. "The appointment of a guardian often involves significant loss of liberty similar to that present in an involuntary civil commitment for treatment of mental illness where constitutionally proof must be by clear and convincing evidence. *Paddington v. Texas*, 441 U.S. 418, 99 S.C. 1804, 60 LED.2d 323 (1979). In this case, for example, the guardian required that Mrs. Reyes live in a nursing home rather than with her husband at home. This consequence, together with the stigma associated with a judicial finding of incompetence, persuade us that proof of the need for appointment of a guardian must constitutionally be by clear and convincing evidence."

The article also relies on a decision of the Utah Supreme Court which found the disabilities associated with guardianship severe enough to warrant various due process protections, similar to those previously incorporated into civil commitment proceedings. This included proof that incapacity is so aggravated that the person is unable to provide for his own safety or her own necessities of life. Such proof must be established by clear and convincing evidence. There must also be a showing that a lesser restrictive alternative is not feasible.

Comparing guardianship to civil commitment for due process purposes, the court stated: "A legitimate state purpose cannot be accomplished by means that broadly 'stifle fundamental personal liberties when the end can be more narrowly achieved.' The means adopted must be narrowly tailored to achieve the basic statutory purpose. The least restrictive alternative standard has been applied in involuntary commitment proceedings. . . . Although the restrictions on, and deprivation

of, personal freedom by appointment of a guardian are less in extent and in intrusiveness than by involuntary commitment, nevertheless, the loss of freedom may be substantial. Accordingly, a court in appointing a guardian must consider the interest of the ward in retaining as broad a power of self-determination as is consistent with the reason for appointing a guardian of the person.” (In re Boyer, 636 P.2d 1085, 1092 (Utah 1981))

The Iowa Supreme Court decision mentioned in the article is discussed in Document 2 above.

Document 19 – Massachusetts Committee for Public Counsel Services

Key Words: Qualifications, Training, Performance, Standards, Model, Role of Attorney

This document is the most comprehensive set of qualification, education, and performance standards for court-appointed attorneys in guardianship cases in any state in the nation. It is a model and a primary source for the standards proposed by this White Paper. The document is divided into five parts.

Part 1 – Qualification Standards for Mental Health Proceedings

Quote: “IN ORDER TO OBTAIN CERTIFICATION to accept assignments in mental health proceedings (*e.g.*, civil commitments, guardianships, “*Rogers*” cases, “extraordinary treatment” cases), an attorney must apply for admission into the program. At least one year of litigation experience, preferably in mental health proceedings, is typically required. If accepted, he or she must attend the two-part training program described below and then successfully complete a mentor ship program. During an attorney's participation in the mentor ship program, he or she will be provisionally certified.

Part 2 – Training Requirements

A. Mental Health Proceedings and Advocacy for Assigned Counsel

Quote: “A comprehensive five-day review of substantive mental health law and the procedural rules applicable in mental health proceedings. Conducted from a defense perspective, emphasis is placed upon litigation technique and strategy. [Sponsored by CCS and Mass. Continuing Legal Education, Inc. (MALE). Written material: Goldman, S., *Mental Health Proceedings in Massachusetts: A Manual for Defense Counsel*.”

B. Clinical Aspects of Mental Health and Treatment

Quote: “An overview of the clinical perspectives on the diagnosis and treatment of mental illness, with an emphasis on those issues typically raised in mental health proceedings (*e.g.*, the prediction of dangerousness, treatment with antipsychotic medication). [Sponsored by CCS and the University of

Mass. School of Medicine, Dept. of Psychiatry. Instructors: faculty of UMass Dept. of Psychiatry. Written material: Selected articles by the faculty and others.”

C. Continuing Education Requirements

Quote: “IN ORDER TO MAINTAIN MENTAL HEALTH CERTIFICATION, attorneys must attend at least eight (8) hours of approved continuing legal education programs in each fiscal year (*i.e.*, 7/1 - 6/30). Written materials are developed for each program by the respective faculty. Further, attorneys are expected to maintain an active mental health practice. To that end, in order to maintain certification, an attorney must accept at least five (5) new mental health assignments in each fiscal year. Membership in the Mental Health Litigation Unit E-Group also is required.”

Part 3 – Application for Certification

The application process is not routine. Considerable information about an attorney’s education and experience must be submitted, such as: (1) resume describing education and employment history; (2) description of five most recent trials, evidentiary hearings, or appellate proceedings; (3) training programs within the last five years; (4) description of all education or experience representing or working with persons with disabilities; and (5) a short, concise legal writing sample.

Part 4 – Mandatory Mentor Program

Newly certified mental health attorneys, including those who accept guardianship cases, must enroll in the mentor program. The purpose is for them to get hands-on experience in handling such cases under the direct supervision of highly skilled and experienced mental health lawyers. There is no preestablished duration for participation in the program. A lawyer will remain in the program until the Director of Mental Health Litigation determined that the lawyer is able to independently provide his or her clients with the effective assistance of counsel to which they are entitled.

Part 5 – Performance Standards for Guardianship Attorneys

Counsel appointed to represent clients in probate guardianship cases must comply with these performance standards. The standards describe the minimum steps that must be taken by an attorney in each such case. Counsel must also comply with the Rules of Professional Conduct.

Role as Advocate. “The role of counsel is to diligently and zealously advocate on behalf of his or her client, within the scope of the assignment, to ensure that the client is afforded all of his or her due process and other rights.”

Stipulation to Incapacity. “[O]nly in exceptional circumstances may counsel stipulate to the client’s incapacity.”

Limitations on Guardian. “[U]pon a finding of incapacity, the probate court is required to exercise

[its] authority ... so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's limitations or other conditions warranting the procedure. . . . Thus, full or plenary guardianship is to be the exception, rather than the rule. To that end, counsel must ensure that, in those cases in which his or her client is found to be incapacitated, the guardian's authority is strictly tailored to the specific decision-making needs of the client.”

Meet with Client. “At this initial meeting the attorney shall, at a minimum, explain to the client the purpose of and procedures involved in the impending guardianship proceeding, the client's rights and options in respect to the proceeding, and ascertain the client's wishes and perspectives as to the matters that will be at issue. . . . Rule 1.14 of the Massachusetts Rules of Professional Conduct affords attorneys guidance as to their ethical responsibilities in dealing with clients "under a disability. The rule provides that, as with other clients, attorneys generally should follow the wishes of their cognitively, emotionally, or otherwise impaired clients, and provides suggestions as to steps that might be taken when an attorney has serious doubts as to his or her client's ability to competently direct litigation or other legal matters. . . Counsel should follow the client's expressed preference if it does not pose a risk of substantial harm to the client, even if the lawyer reasonably determines that the client has not made an adequately considered decision in the matter.”

Investigating the Facts. “The attorney shall thoroughly investigate the facts. This investigation shall include at a minimum (a) a review of the medical certificate, or the clinical team report, filed with the petition, and an interview of the clinician(s) who conducted the examination(s) upon which the certificate or report is based; (b) for a client who is or has been residing in a mental health, developmental disability or nursing facility, a review of (i) facility records, including medication history, (ii) treatment review notes, including diagnoses, treatment history, and comments regarding the client's capacity, (iii) unit and nursing notes, for notations as to the client's relationship and cooperation with staff and treatment programs, and (iv) the client's Individual Service Plan or similar document; (v) an interview of the petitioner, current treatment providers, staff (including doctors, nurses, and social workers) of current residential programs, if applicable, and of former providers and program staff if reasonably accessible; and (vi) other persons familiar with the client, such as friends and family.”

Appointment of Experts. “In most instances, independent psychiatric or psychological expertise will be of assistance in the preparation and defense of the proceeding, particularly in the assessment of a client's capacity. . . After meeting with the client and investigating the facts . . . , the attorney shall determine whether expert assistance will be of value and, if so, he or she shall move for funds therefor, pursuant to the Indigent Court Costs Act. . . . Upon allowance of the motion for funds, the attorney shall contact the independent clinician and instruct him or her as to the purpose and parameters of his or her role and responsibilities. To the extent appropriate, the attorney should share with the clinician all pertinent information obtained pursuant to [the attorney’s investigation of the facts]. The attorney shall remind the clinician that all information gleaned and opinions formed by the clinician shall remain confidential and may be shared only with the client and the attorney, and that such information and opinions may not be divulged to the court, petitioner, or petitioner's

attorney without the permission of the client's attorney. After the clinician examines the client, reviews the records and speaks with staff and others, as appropriate, he or she and the attorney shall meet to discuss the clinician's findings and opinions. Of particular concern should the clinician opine that the client may indeed be incapacitated to some extent, will be the identification of those areas of decision-making in which the client is not incapacitated and those areas of decision-making in which the client, although perhaps having difficulty, is able to care for him- or herself with assistance, in order that the court may tailor its order to the specific decision-making needs of the client.”

Interviews of Potential Witnesses. “The attorney shall confer with potential witnesses, including but not limited to the petitioner, personally or through counsel, treating psychiatrists and psychologists, nursing and any other staff familiar with the client's care and treatment, the prospective guardian, if one has been nominated, and other possible witnesses suggested by the client. The attorney should also confer with other involved parties, for example, family members. Where necessary, witnesses should be subpoenaed. The attorney should meet with the witnesses in advance of the trial in order to prepare them for direct- and cross-examination. The attorney shall review the medical record to identify those parts of the record that may be inadmissible and, therefore, whose admission should be objected to if proffered at trial. The attorney should identify the petitioner's witnesses and make an effort, if tactically indicated, to interview them on the record and prepare cross-examination.”

Defenses and Motions. “After reviewing the petition and the pleadings, the attorney shall determine if any procedural defenses can be raised, and file appropriate motions with supporting memoranda.”

Negotiations. If it appears likely that the client will be found to be incapacitated, the attorney shall negotiate with petitioner's counsel as to the scope of the guardian's authority. If the parties are able to agree on a proposed guardianship order that is appropriately tailored to the specific decision-making needs of the client, the attorney may stipulate thereto at the hearing.” Editorial Comment. Due process would require that the court not accept a stipulation to a judgment on the merits without first determining that the client agrees to the stipulation and is giving a knowing, intelligent, and voluntary waiver of the right to a trial, to present evidence, and to cross-examine witnesses. If such a waiver cannot be obtained, the stipulation should not be accepted. Instead, the matter might be submitted to the court for a decision on the pleadings and other evidentiary documents if the attorney determines that holding such a hearing or raising objections would be frivolous and futile.

Evidentiary Hearing. “During the hearing the attorney shall act as a zealous advocate for the client, insuring that proper procedures are followed and that the client's interests are well represented. To that end, the attorney shall: (a) file any and all appropriate motions and legal memoranda, including but not limited to motions regarding the assertion of privileges and confidential relationships, and the admission, exclusion or limitation of evidence; (b) present and cross-examine witnesses, and provide evidence in support of the client's position; © make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and (d) take any and all other necessary and appropriate actions to advocate for the client's interests.

Appellate Process. “After the hearing the attorney shall meet with the client to explain the court's decision and, if a guardianship or substituted judgment order has issued, the client's appellate rights. If the client wishes to exercise such appellate rights, the attorney shall file a timely notice of appeal with the trial court. Where an appeal is filed, the attorney shall, without delay, notify CCS's Mental Health Litigation Unit in order that appellate counsel may be assigned.

Document 20 – Texas House Bill 39: Mandatory Training

Key Words: Training, Role of Attorney, Least Restrictive Alternative

This document contains excerpts from a bill passed by the Texas Legislature in 2015 that requires court-appointed attorneys in adult guardianship cases to receive training, in addition to other issues, on “alternatives to guardianship and supports and services available to proposed wards.”

Document 21 – Remarks of Probate Presiding Judge in Los Angeles

Key Words: Training, Role of Attorney

This document contains the remarks of Judge Maria Stratton at a training program for court-appointed attorneys who represent clients in conservatorship cases. She became presiding judge of the probate division of the court in January 2015 after having been a bench officer in the mental health court for several years. The probate court handles adult guardianship cases (conservatorships) while the mental health court handles civil commitment cases. Prior to becoming a judge, she was a federal public defender.

Drawing on her experience as a defense attorney in criminal cases and as a judge in civil commitment cases, Judge Stratton gave the attorneys several tips in terms of best practices for representing clients in probate conservatorships. Some of the tips are grounded in due process requirements while others are based on ethical standards. Although the Los Angeles Superior Court does not have official performance standards for court-appointed attorneys in probate guardianship cases, the tips from Judge Stratton serve as informal standards.

Asking for Additional Hours. “The first thing is, if you need more hours ask for them before you spend them. You don't need to know the paperwork behind all of this, but its just better to ask before instead of asking for forgiveness later. Ask before, and don't be shy. You don't have to use everything you get. Ask for 10, ask for 15, but ask before.”

Advocating for Client’s Stated Wishes. “The second thing I'm going to tell you is the judge really needs to know what your client wants, as crazy as your client may want it. The judge needs to know it. So if your client is telling you "I'm opposed to this conservatorship, I'm fine, I don't need any

help," then the judge needs to know that. . . When people come in and they say in their PVP reports - and I've seen some like this - 'Well, I think my client should have a conservatorship.' Well, you know what, I appreciate your opinion but I need to know what your client wants first, before I know what you want. And maybe I shouldn't even really hear what you think if it's contrary to what your client wants.

Duty of Loyalty. "Your client says "I want a trial" or "I want a hearing" or "I don't want this particular person as my conservator," the judge needs to know that. And maybe you shouldn't be saying, "and by the way judge, even though my client says she doesn't want a conservatorship, she is so demented she doesn't really know what she wants and she really need one." No, you can't say that. That's being disloyal to your client."

Best Interests. "While ultimately the judge is going to take into account, perhaps, what the best interest of your client are, if the client's best interests aren't what the client wants, then you don't have any business telling me what your opinion about what the best interests are. I will get that from the court investigator's report, or I'll get that argument from the other side - the conservator or the conservator's counsel whose coming in to tell me why it's in the client's best interest to have a conservator and to have a particular conservator. . . So as bench officers we need to hear your client's side of the story, because we're already getting the best interests side from the court investigators."

Advisement of Rights. "[T]he judge needs to be able to discern from your PVP report that you advised your client of all of your client's rights, including the right to be present. This is critical in conservatorship cases. And if you read conservatorship cases, whether they are general conservatorships or LPS conservatorships, the biggest issue that comes down the pike in most of these cases is presence - the right to be present - whether the lawyer can act without the client being present. The bench officer wants to know, did you advise your client of all your client's rights - the right to fight the conservatorship, the right to fight who should be the conservator, the right to fight what powers the conservator should have, the right to fight what disabilities are imposed on the conservatee. Your client needs to know all that and the judge needs to know you have told your client all of that - the most important right being the right to be present."

Confidentiality. "A lot of times when we get a PVP report that goes into great length about what would be in the client's best interest, oftentimes there is little discussion of what the client wants, or the client's statements or the client's reactions. It seems like it's more of a narrative of I've looked at all the facts and this is what I think should happen. Some of the PVP reports don't even state whether they've visited the client or talked to the client. Maybe they will state these are the people I talked to and list them, but then I don't really know what the upshot of the discussion was. But that may well be because you feel its privileged information. That's fine. Just let me know it's privileged. Just let me know I have had discussions and I don't think it is appropriate to disclose them to the court what I heard or what was told to me. That's fine. I guess what I'm asking for is a little more detail, especially around the subject of rights, advisement of rights."

More on Confidentiality. "To me, if you don't feel you've got a knowing waiver from your client,

the default position is that you don't reveal the conversation. That's my position. You go in with the attorney-client relationship - with the privilege that attaches - the minute you become their attorney. It attaches as a default position. So if you have a conversation with a 75 year old client who is very impaired because of Alzheimers or dementia or just old age, and you start out with an attorney-client conversation with them, and then in the middle of the conversation you realize that they have no idea what I am talking about. I think you are able to impart your observation to the court that I advised them of all their rights and powers and disabilities and they seemed to not get it. But at that point, I would not go any further because you don't have a waiver.”

Methods of Resolution. “I know that when I was in mental health court, there were actually four ways to resolve an LPS conservatorship. The lawyers would come in and say, the client agrees, go ahead and appoint, judge. I've advised them of their rights, powers, and disabilities, they're fine with it, go ahead, let's do it. That's the first way. The second way is the client just submits on the paperwork. It's kind of like a no contest plea, right? So, the client's just Submitting. That's the second way. The third way is the client is doing a limited submission, which means the client is willing not to contest any of the facts you have before you in the paperwork, but the client wants to talk. And tell you why you shouldn't do what the paperwork is telling you to do. That's almost like guilty with an explanation. It's like, "I understand you may go ahead and do this judge, but I really want to tell you why you shouldn't. That's good. So then the client will talk and the client is able to give their side of the story. The fourth way is a full blown hearing, with live witnesses and the whole thing.”

Less Restrictive Alternative. “[S]ometimes there is another option, which is, my client is okay with the conservatorship but the client really wants to make sure that she retains the right to vote. So she's okay with it if you don't do x, y, and z, or if you do do x, y, and z. So that's kind of turning the conservatorship into an even better least restrictive alternative, which is the other thing that you should be looking at for the second prong of your duties about trying to resolve the cases - is there a less restrictive alternative. Would a power of attorney work? Or would supporting the conservatorship between two acceptable people work? Would extending the temporary conservatorship for six months work to give the client an opportunity to try it out? See if the client likes it or not, and then come back in six months and say "Whoa, I don't want this," or "Yeah, this wasn't as bad as I thought it would be. So you ought to be very creative in coming up with ideas, but to the extent that you can propose different alternatives to your client, and see if that satisfied the one thing that's bothering your client.”

Document 22 – “Thinking Ahead Matters” – Excerpts from a New Report

Key Words: Role of Attorney, Training

This document contains excerpts from a report about deficiencies in the limited conservatorship system in California. The report was commissioned by a coalition of health care and organizations and conducted with the advice of disability rights organizations. The report notes various problems with the training and performance of court-appointed attorneys.

Quote: “Another issue called out is that in its minimal training, the Los Angeles Court gives court-appointed attorneys instruction that if they disagree with the "stated wishes" of the client, they should advocate for what they believe are the client's best interests.⁵⁸ While project informants point out that experienced conservatorship attorneys understand the duty to represent the proposed conservatee as specified in the Probate Code, this report concludes that such instructions can result in attorneys acting as de-facto guardians *ad litem*, advocating for what they believe are the best interests of the client rather than advocating for what the client expressly wants. That outcome does not appear to be consistent with the intention and purpose of the Limited Conservatorship process.”

Quote: “Training about the I/DD population and the process, duties and responsibilities of Limited Conservatorship should be formally initiated for those seeking to petition for conservatorship as well as for attorneys who work on Limited Conservatorship. These trainings should include information about facilitating communication and providing reasonable accommodations under the Americans with Disabilities Act to allow disabled persons to have meaningful participation in the legal process.”

Document 23 – Strategic Guide for Court-Appointed Attorneys

Key Words: Role of Attorney, Accommodation, Due Process

This document focuses on the role of a court-appointed attorney in a limited conservatorship case (guardianship for adults with developmental disabilities) in California. It explains that the activities of these attorneys are crucial to the administration of justice, especially considering that in the vast majority of cases there is only one attorney involved in the proceedings – the attorney appointed by the court to represent the adult who is the respondent to the petition. Most petitions in limited conservatorship cases are filed by parents or other relatives. Most are not represented by an attorney.

Because of cognitive and/or communication disabilities, many respondents are not able to understand the proceedings and none of them are able to represent themselves. They must rely on the court-appointed attorney for access to justice. Their participation in the case is solely dependent on whether the attorney does a proper job, making sure that all of the participants in the case comply with statutory requirements, and whether the attorney provides the client with the accommodations and services necessary for effective communication, understanding, and participation in the case.

This document reviews the constitutional and statutory framework in which limited conservatorship proceedings exist and discusses what an attorney should do to protect the rights of his or her client consistent with ethical duties, statutory protections, and constitutional requirements.

Sections of the “Strategic Guide” include: a proceeding with one attorney; understanding various roles; the Lanterman Act (statutory rights of people with I/DD); the limited conservatorship system; trauma informed justice (risk of abuse); implementing the right to counsel; confidentiality and loyalty; providing reasonable ADA accommodations; conducting interviews; assessing the “seven powers” (capacity assessments); voting rights; contested hearings; and appeals.

Document 24 – Individual Program Plan (IPP) for Limited Conservatorships

Key Words: Role of Attorney, Experts, Capacity Assessment

This document explains to attorneys in California that it is their job to make sure that all participants in limited conservatorship proceedings follow the statutory mandates and protections for such proceedings. The attorney must make sure that the petitioner, court investigator, regional center, and the judge follow the law. The proposed conservatee cannot defend himself or herself but relies completely on the assigned attorney to defend the constitutional and statutory rights to which the proposed conservatee is vested at the beginning of the proceedings.

This document emphasizes that an attorney should use all available tools to investigate the relevant facts concerning the client's abilities and disabilities. One such tool in California is a procedure known as an "Individual Program Plan." This is a statutorily-authorized procedure which is conducted through nonprofit agencies known as regional centers. These agencies find, coordinate, and purchase services for people with intellectual and developmental disabilities who are clients of the regional centers.

Quote: "Proposed conservatees need an attorney to make sure the petitioner and the court investigator demonstrate, with *clear and convincing proof*, that: (1) a conservatorship is necessary; (2) lesser restrictive alternatives have been explored and why they will not work; (3) the proposed conservatee is unable to make decisions, even with help, in any of the areas where authority will be transferred to the conservator; and (4) the person seeking such authority is the best person to be appointed conservator . . . To provide effective representation to a proposed limited conservatee, an attorney must conduct an independent investigation on the four critical issues mentioned above. Fortunately, an investigative tool is available and it is without cost to the attorney. It is called an IPP or Individual Program Plan."

Quote: "A regional center client or an authorized representative may request an IPP review at any time. (Welfare and Institutions Code Section 4646.5(b)) Once such a request is made, a review meeting must be scheduled within 30 days. The statutory purpose of the IPP process coincides with the type of assessment needed for a conservatorship proceeding: 'Gathering information and *conducting assessments* to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities.' (Welfare and Institutions Code Section 4646.5(a)(1)) Assessments pursuant to an IPP process 'shall be conducted by qualified individuals.' (Welfare and Institutions Code Section 4646.5(a)(1))

Quote: "The attorney should send a letter to the regional center requesting a formal IPP review: (1) to assess whether the client lacks the capacity to make independent decisions in each of several areas - residence, confidential records, education, medical, contracts, marriage, and social and sexual decisions; (2) if capacity is found to be lacking, then to assess whether the client would have capacity to make decisions in any of these seven areas with appropriate supports and services; and (3) if the answer to question 2 is yes, to identify the types of supports or services that would enable the client

to engage in supported decision making so that conservatorship would be unnecessary or would enable the client to keep decision-making rights in one or more of the seven areas. The letter should specify that the assessment should only be done by a "qualified individual" as required by law. The Legislature has indicated that conservatorship assessments may be done by a licensed medical practitioner, or by a licensed *and qualified* social worker or psychologist. (Health and Safety Code Section 416.8) Whether professionals are qualified to conduct such an assessment would depend on the extent of their training in this area.”

Quote: “There would be no cost to the probate court for IPP reviews requested by attorneys. Regional centers would pay for staff time, capacity assessments, and supported decision making services if needed. The attorneys would spend a few additional hours on a case, but those fees would be paid by the county and would not come from the court's own budget. Ongoing court supervision of a conservatorship case can be expensive over time. An IPP review may determine that appropriate services for supported decision making completely obviate the need for a conservatorship. The possibility of eliminating ongoing court supervision should itself cause judges to endorse this available, but not utilized, IPP review process in conservatorship cases. With so much riding on the outcome, effective representation requires attorneys to request an IPP review and an assessment of capacities by a qualified professional, This should become a standard practice for all court-appointed attorneys in limited conservatorship cases. Judges who appoint such attorneys should not just support it, they should require it.”

Document 25 – Trauma-Informed Justice

Key Words: Role of Attorney, Abuse, Safety, Training

This document reviews studies documenting that people with disabilities are at much higher risk of abuse than the generic population. One study reports that people with developmental disabilities may be 4 to 10 times more likely to be abused than the population in general. Data on perpetrators is also very instructive. They are generally not strangers. Most often they are people close to the victim

Quote: “In the generic population, more than 80 percent of child abusers were parents. (Office for Victims of Crime. United States Department of Justice, 2009) According to Dr. Baladerian, victims with developmental disabilities are most likely to be abused by household members. This data alone should cause a paradigm shift in the Limited Conservatorship System, which currently assumes that proposed conservatees, as a class, are being treated well at home, and that proposed conservators, as a class, are treating their children well. Those assumptions are based on wishful thinking, not statistical probabilities.”

Quote: “I am not suggesting that judges, attorneys, and investigators should automatically view each parent or relative who wants to be a conservator as a likely abuser. But I am suggesting that the system should interact with a prospective conservator in a procedural context of caution and verification. Perhaps 20 percent of generic children are victims of child abuse. Children with

developmental disabilities are at least 3.4 times more likely to be victims than the generic child population. Do the math. A large majority of prospective limited conservatees may have been victims of sexual abuse. Add to that the other forms of abuse, such as physical or emotional abuse. Then, just to be conservative, subtract a few percentage points. We still end up with 60 percent or more of prospective limited conservatees who may have been victims of abuse. When we add the perpetrator statistics to our new understanding of child abuse dynamics, we should be stopped in our tracks. As a class, on the whole, and statistically speaking, a majority of would be conservators may have perpetrated abuse against the people whose life they are seeking to control in adulthood. Although this information is hard to digest, it requires a paradigm shift in the way the Limited Conservatorship System currently operates.”

The document makes reference to a policy of the probate court that for several years stopped using court investigators in new limited conservatorship cases. Instead, the court accepted the report of the appointed attorney, known as a PVP attorney (Probate Volunteer Panel), “in lieu of” a court investigator report. One problem with this procedure was that the attorneys had received no training about abuse of people with disabilities, how to interview clients with cognitive or communication disabilities, or how to investigate for possible abuse or risk of abuse. Another problem is that the attorneys did not devote any extra time to this task.

Quote: “A so-called "protection" system that eliminates the use of court investigators to screen and evaluate petitions for limited conservatorships must be a system that assumes that child abuse or dependent adult abuse cases are rare, rather than probable. A system that uses reports of court-appointed attorneys in lieu of reports of court investigators must be a system that has closed its eyes to statistics regarding the prevalence of abuse against people with developmental disabilities. Only a system in a state of disbelief could expect court-appointed attorneys to screen out potentially abusive conservators, and yet not train such attorneys about the prevalence and dynamics of abuse.

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

Quote: “ If those who operate the training programs of the County Bar Association were trauma-informed educators, they would act differently when they select topics and speakers for PVP training programs. Trauma-informed training coordinators would provide more seminars because of the need to include much more information than is currently transmitted during the few training programs that are offered now. They would include speakers on the dynamics of each type of disability and how to interview people who have each type of disability. Seminars would include a presentation on the prevalence of abuse against people with developmental disabilities and who the likely perpetrators are. They would also include requirements of the Americans with Disabilities Act and what the

courts and attorneys must do to accommodate the special needs of clients with disabilities. Court-appointed attorneys would be informed that most cases of child abuse or dependent adult abuse are not reported. In many cases, the victim is too embarrassed, or too afraid of consequences, or thinks they will not be believed.”

Editorial Comment. The state has a duty to ensure the safety of adults placed in guardianship. (See Document 30) In addition to constitutional duties to provide effective assistance to the client, an attorney should also consider civil liability issues. The client relies on the attorney to investigate whether the person nominated to be the conservator is qualified to serve in such a capacity. Obviously, if the client has been abused by that person, or the household where he will live poses a serious risk of abuse or neglect, the attorney should oppose the nomination of that person as conservator. That means the attorney must vet that person and that household. If the attorney fails to do so, or is negligent in conducting such an investigation, the attorney could later be sued for professional malpractice if the client is later a victim of abuse or neglect that would not have occurred had a proper investigation been conducted. Therefore, a proper investigation into the risk of abuse is not only constitutionally and statutorily required, it is in the best interest of the attorney to do so, even if only to avoid financial liability.

Document 26 – Proposals to Modify the California Rules of Court

Key Words: Role of Attorney, Training, Qualifications, ADA, Accommodations

This document contains excerpts from a report submitted to the Judicial Council of California in which recommendations were made for new rules of court on qualifications, continuing education requirements, and performance standards for court-appointed attorneys in limited conservatorship cases. The proposals incorporate standards that would be required by the ADA, due process, ethics, and statutory provisions. Citations, which are in the footnotes, are not included here.

Quote: “The Right of Access to Justice. The right of people with developmental disabilities to have meaningful access to justice has underpinnings in constitutional doctrines and statutory mandates. This section identifies the sources of this right under federal and state law and explains how this right and these sources apply to limited conservatorship proceedings. The primary source of the right to have meaningful access to justice is the Due Process Clause of the Fourteenth Amendment. The Due Process Clause requires the states to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. The United States Supreme Court has identified the Due Process Clause as the basis of congressional authority to enact the Americans with Disabilities Act (ADA). In doing so, the Court noted "The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination." Title II of the Americans with Disabilities Act applies to the operations of state and local governments.²⁰ Title II requires that "No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

entity, or be subjected to discrimination by any public entity.”

Quote: “The requirements of Title II apply to state and local courts. The United States Supreme Court made the following observations in upholding the application of the ADA to state courts: "Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility [A]s it applies to the class of cases implicating the fundamental rights of access to the courts, [Title II] constitutes a valid exercise of Congress's ... authority to enforce the guarantees of the Fourteenth Amendment.”

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

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

Quote: “Courts have an obligation to modify policies and practices in order to provide meaningful access to justice for people with cognitive and other mental disabilities. The single most important means of ensuring access for people with cognitive disabilities is to educate and motivate court staff so they can provide effective assistance. In limited conservatorship proceedings, court investigators and court-appointed attorneys need to be properly educated on how to interact with and communicate with people who have developmental disabilities.”

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

Document 27 – California Conservatorship Defense: A Guide for Advocates

Key Words: Role of Attorney

This document contains excerpts from an advocacy manual developed by the California Association for Nursing Home Reform. Representatives from this organization were recently invited to testify before the Senate Judiciary Committee of the California Legislature during an oversight hearing looking into the adequacy of conservatorship proceedings to protect seniors and people with developmental disabilities.

The introduction to the manual, written by staff attorney Tony Chicotel, explains some of the problems he observed with the conservatorship system in California.

Quote: “Before I began representing conservatees in San Diego in 2003, I thought a provident action would be to observe some conservatorship hearings and become familiar with the court and its procedures. I attended a few hearings and was immediately shocked by the poor quality of advocacy on behalf of the conservatees. First, the vast majority of the conservatees did not appear at their own hearings. Neither the judge nor the conservatees' attorneys acknowledged that the absence of the conservatee was a handicap to deciding whether a conservatorship was warranted. Second, conservatee attorneys openly told the judge, *on the record*, what their personal opinion was with respect to the issues at hand and often recommended that a conservatorship be granted without limitation. Not only were the attorneys failing to question the propriety of unnecessary conservator powers, they were actually failing to convey their clients' view at all. Six years of representing conservatees has done nothing but confirm my initial impressions that court-appointed attorneys for conservatees generally do not zealously advocate the positions of their clients.”

Quote: “The tepid advocacy I observed in conservatorship hearings was the product of many influences. Perhaps the most important influence was a local court rule *requiring* court-appointed attorneys for conservatees to give their personal opinion regarding the conservatorship. Another influence was the fact that most attorneys appointed to represent conservatees also represent conservators. These attorneys seemed more inclined to play a passive role in the conservatorship process when representing conservatees. Other influences were less difficult to perceive, but perhaps even more insidious. Representing conservatees, who have often had some recent expression of vulnerability, naturally draws out the protective instincts of their counselors. For that reason, attorneys are more likely to pursue paternalistic aims.”

Quote: “The defense of conservatorships is also weakened by a paucity of coordinated information. The Continuing Education of the Bar's (CEB) two-volume manual on California conservatorship practice has well over 1,500 pages. Only one of those pages discusses the standard of proof required of conservatorship petitioners. Quite simply, the CEB manual is written for people who represent conservators and not conservatees. There is nearly no developed case law, law review articles, or other scholarly review dedicated to the issues of fighting conservatorships.”

This manual is an effort to give conservatorship defense some legitimacy. It is designed to be a first step in what I hope to be an accelerated development of information about fighting for the independence and rights of conservatees. My hope is that this manual will have several revisions, as more and more attorneys undertake zealous conservatorship defense and new advocacy techniques and legal arguments are developed and implemented.

The manual gives specific suggestions to attorneys who represent proposed conservatees and recommends areas that need thorough investigation and strong advocacy. These include: (1) assessing whether the petitioner has supplied clear and convincing evidence on each issue involved in the proceeding; (2) evaluating the validity and strength of the medical capacity assessment produced by the petitioner and obtaining a second opinion regarding the client's functional ability to make decisions in each area the petitioner is seeking to take away the client's right to make decisions; (3) challenging the court investigator's report; (4) ruling out lesser restrictive alternatives; (5) assessing the suitability of where the client would live if the conservatorship is granted; (6) determining who the most suitable person is to be named as conservator should a conservatorship be granted; and (7) placing other limits on the role of the conservator, including limits on the authority to interfere with the client's freedom of association (visitation)."

Document 28 – ADA Materials from Exhibits to Proposals to Modify California Rules of Court

Key Words: ADA, Accommodation, Department of Justice, Washington State, Maryland, North Carolina

This document contains excerpts from court cases and publications from the Department of Justice and other federal agencies regarding the duties of public entities, such as courts, to modify policies and practices and provide accommodations so that people with disabilities have access to their programs and services. When it comes to courts, such programs and services involve modifying policies and practices to provide people with developmental disabilities access to justice so that the administration of justice occurs in a manner that does not discriminate on the basis of disability.

A. Title II Technical Assistance Manual

11-3.6100 General. A public entity must reasonably modify its policies, practices, or procedures to avoid discrimination.

ILLUSTRATION 2: A county general relief program provides emergency food, shelter, and cash grants to individuals who can demonstrate their eligibility. The application process, however, is extremely lengthy and complex. When many individuals with mental disabilities apply for benefits, they are unable to complete the application process successfully. As a result, they are effectively denied benefits to which they are otherwise entitled. In this case, the county has an obligation to make reasonable modifications to its application process to ensure that otherwise

eligible individuals are not denied needed benefits. Modifications to the relief program might include simplifying the application process or providing applicants who have mental disabilities with individualized assistance to complete the process.

B. EEOC Enforcement Guidance on Reasonable Accommodation (Oct 17, 2002)

40. Must an employer ask whether a reasonable accommodation is needed when an employee has not asked for one?

Generally, no. As a general rule, the individual with a disability -- who has the most knowledge about the need for reasonable accommodation -- must inform the employer that an accommodation is needed. However, an employer should initiate the reasonable accommodation interactive process **without being asked** if the employer: (1) **knows that the employee has a disability**, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or **has reason to know, that the disability prevents the employee from requesting a reasonable accommodation**. (Emphasis added)

C. EEOC – Questions & Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (ADA)

10. Are there circumstances when an employer must ask whether a reasonable accommodation is needed when a person with an intellectual disability has not requested one?

Yes. An employer has a legal obligation to initiate a discussion about the need for a reasonable accommodation and to provide an accommodation if one is available if the employer: (1) knows that the employee has a disability; (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

D. Cailler v. Care Alternatives of Massachusetts LLC, U.S. District Court of Massachusetts, Civil Action No. 09-12040-DJC March 23,2012

Generally, "[i]t is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one." . . . An employee's request may be unnecessary to trigger the employer's obligation in the rare circumstance that the employee's condition "makes it obvious that accommodation is required, or a condition ... renders the employee incapable of making a request." Leach, 63 Mass. App. Ct. at 567; Reed v. LePage Bakeries, Inc., 244 F.3d 254, 261 n. 7 (1st Cir. 2001) (noting that an employee may not be required to request an accommodation when the employee's need for an accommodation is "obvious").

E. Title II Regulations

§ 35.130 General prohibitions against discrimination. (a) No qualified individual with a disability

shall , on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity. . . . (g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

F. Title II Regulations Supplementary Information

§ 35.170 **Complaints** (a) *Who may file.* An individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.

§ 35.190 **Designated Agencies.** (b) The Federal agencies listed in paragraph (b)(1)-(8) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas. . . . (6) *Department of Justice:* All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts . . .

§35.103 **Relationship to other laws.** Title II, however, also incorporates those provisions of titles I [employment] and III of the ADA that are not inconsistent with the regulations implementing section 504.

§35.160 **Communications.** Section 35.160 of the 1991 title II regulation requires a public entity to take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. 28 CFR 35.160(a). In addition, a public entity must "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." 28 CFR 35.160(b)(1). The Department cautions public entities that without appropriate auxiliary aids and services, such individuals are denied an opportunity to participate fully in the judicial process, and denied benefits of the judicial system that are available to others.

The Department consistently interprets this provision and § 35.160 to require effective communication in courts, jails, prisons, and with law enforcement officers. Persons with disabilities who are participating in the judicial process as witnesses, jurors, prospective jurors, parties before the court, or companions of persons with business in the court, should be provided auxiliary aids and services as needed for effective communication. Because the appropriateness of particular auxiliary aids and services may vary as a situation changes, the Department strongly encourages public entities to do a communication assessment of the individual with a disability when the need for auxiliary aids and services is first identified, and to reassess communication effectiveness regularly throughout the communication. A public entity has a continuing obligation to assess the auxiliary aids and services it is providing, and should consult with individuals with disabilities on a continuing basis to assess

what measures are required to ensure effective communication.

G. Application of Section 504 to State Court Services

Section 504 of the Rehabilitation Act of 1973, as amended, applies to all entities that receive federal assistance and contains provisions that are nearly interchangeable with the Americans with Disabilities Act of 1990. Section 504 was the first civil rights legislation in United States designed to protect individuals from disability-based discrimination. The broad reach of Section 504 is indicated in the statutory language which states that "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 504, 29 U.S.C. §794. All functions of a state department or agency are subject to Section 504 if "any part ... is extended Federal financial assistance" . . . In addition to other remedies that may be available, administrative remedies available under Section 504 include suspension or termination of Federal financial assistance (29 U.S. C. §794a) for the particular program or part thereof that is not in compliance.

H. Investigation and Remedies by Department of Justice

The Department is authorized under 28 C.F.R. Part 42, Subpart G, to determine the County's compliance with section 504 of the Rehabilitation Act of 1973, to issue findings, and, where appropriate, to negotiate and secure voluntary compliance agreements. Furthermore, the Attorney General is authorized, under 29 U.S.C. § 794 and 28 C.F.R. §§ 42.530 and 42.108-0, to suspend or terminate financial assistance to the County provided by the Department of Justice should the Department fail to secure voluntary compliance pursuant to Subpart G or to bring a civil suit to enforce the rights of the United States under applicable federal , state, or local law.

I. A Guide for Washington State Courts

Training is crucial. The single most important means of ensuring access for people with cognitive disabilities is to educate and motivate court staff so they can provide effective assistance. Local advocacy organizations can be a resource for training in effective communication. Completing a program for all staff may take time, but the first and most important step is to include such training in the court's ADA compliance plan.

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

J. Access to the Courts: University of Maryland Law Review Article

Quote: “This article explores the obligations of state and local courts to provide reasonable modifications and auxiliary aids and services to ensure that parties, witnesses, judges and lawyers, and jurors with disabilities are guaranteed meaningful participation in judicial proceedings. These rights have been strengthened through lawsuits based upon two key federal statutes, Section 504 of the Rehabilitation Act (section 504) and The Americans with Disabilities Act (ADA)”

Quote: “Some state and local courts may be covered under both the ADA and section 504. In other words, state and local courts are always covered under the ADA and are covered under section 504 when they receive federal financial assistance.”

Quote: “Like Title II, the non-discrimination requirements of section 504 mean more than "you are free to enter." If a party with impaired sensory, manual, or speaking skills can not understand the judge, the court system-not the party-must take the steps necessary to ensure effective participation.”

Meaningful Access. **Quote:** “In the next section 504 case, the United States Supreme Court held that: [A]n otherwise qualified handicapped individual must be provided with *meaningful access* to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; *to assure meaningful access*, reasonable accommodations in the grantee's programs or benefits will have to be made.”

K. Journal of the Legal Profession

Quote: “This Article discusses the importance of providing effective representation to clients with mental disabilities and the need for bar associations to provide further guidance to lawyers. . . . Further, the Article discusses the importance of effective communication with clients with disabilities. Finally, the Article concludes that most lawyers are not properly educated to effectively represent people with mental disabilities and that ethical rules should provide additional guidance. Moreover, the American Bar Association needs to provide more emphasis on educating lawyers about the needs of people with disabilities. Lawyers should be required to participate in mandatory training regarding clients with mental disabilities.”

Consulting an expert. **Quote:** “Lawyers should solicit the assistance of experts when representing a client with a mental disability. If a lawyer is representing a client who has a cognitive disability, the lawyer should contact a disability rights advocate, or other expert in the field, and find out the most effective way to communicate with a client with a cognitive disability. The lawyer will learn that there are many suggestions available that will allow him or her to start an effective relationship with such a client. . . . [I]f a lawyer represents a client who has [an intellectual disability], the lawyer should consult an expert and be assured that he or she can provide effective communication.”

Training and standards. **Quote:** “Until lawyers are sensitized to and educated on the needs of people

with mental disabilities, they will be ill-equipped to provide adequate representation. Lawyers must avoid the temptation to substitute their judgment for the client's judgment, particularly when the lawyer is representing a client with a mental disability. Although the ethical rules have progressed in requiring lawyers to respect the rights of clients with disabilities, the rules need to provide more guidance. Furthermore, the American Bar Association and local bars, through continuing legal education and mandatory training, should provide more training for lawyers. Lawyers should be required to participate in mandatory training that allows them to be better informed about the communication needs of clients with mental disabilities and the characteristics associated with different mental disabilities.”

L. Pursuing Justice for People with Cognitive Disabilities

This document contains excerpts from a publication produced by Partners in Justice, a statewide collaborative effort in North Carolina.

Quote: “Writing in 1992, Justice Exum described the problem as a ‘great need to know’ about mental retardation, a problem his ‘eyes opened to’ at an ABA meeting: ‘An ABA speaker eloquently described how it is almost impossible to accord people with mental retardation due process in our courts, although that is a constitutional guarantee for all of us. .. The judiciary has a need for more information, more knowledge, and more understanding. We need lawyers who understand the difficulties and can present rich, meaningful, and detailed evidence like that in [*State v.*] *Moore*, [321 N.C. 327, 364 S.E. 2d 648 (1988)] for the edification of both the trial court initially and the appellate court ultimately.’”

Quote: “The term cognitive disability is used to describe limitations in intellectual functioning and the way a person is able to adapt to various social and practical situations. People with mental retardation have cognitive impairments and deficits in adaptive behavior which may limit meaningful interactions with people in the justice system.”

Risks of ineffective assistance. **Quote:** “Risks of inadequate representation increase when the client has cognitive disabilities. Therefore, N.C. Rules as well as the ABA Model Rules now include 1.14: Client under a Disability. The rule for this special category of client was necessary because clients with cognitive disabilities may be unable to monitor the attorney's performance, and studies have found that attorneys spend less time interviewing clients with cognitive disabilities than other clients. In addition, the tendency of attorneys to usurp decisions that should be left to the client increases when the client has cognitive disabilities.”

Document 29 – ADA Title II Technical Assistance Manual

Key Words: ADA, Accommodation, Department of Justice, Contractors, Joint Ventures

This document contains excerpts from a DOJ technical assistance manual that provide examples which lend to a greater understanding to the requirements of public entities to provide access to their

programs and services. The examples can easily be adapted to access to justice for people with developmental disabilities. The manual explains how a public entity covered by Title II may not avoid its ADA obligations by subcontracting programs and services to private entities. Title II obligations may not be avoided through delegation to private enterprises.

Subcontractors. **Quote:** “ILLUSTRATION 1: A privately owned restaurant in a State park operates for the convenience of park users under a concession agreement with a State department of parks. As a public accommodation, the restaurant is subject to title III and must meet those obligations. The State department of parks, a public entity, is subject to title II. The parks department is obligated to ensure by contract that the restaurant is operated in a manner that enables the parks department to meet its title II obligations, even though the restaurant is not directly subject to title II.”

Lease. **Quote:** “ ILLUSTRATION 2: A city owns a downtown office building occupied by its department of human resources. The building'S first floor, however, is leased to a restaurant, a newsstand, and a travel agency. The city, as a public entity and landlord of the office building, is subject to title II.”

Joint venture. **Quote:** “ILLUSTRATION 3: A city engages in a joint venture with a private corporation to build a new professional sports stadium. Where public and private entities act jointly, the public entity must ensure that the relevant requirements of title II are met; and the private entity must ensure compliance with title III.”

A. 1991 Section by Section Analysis

Individual assessment. **Quote:** “Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.”

Editorial Comment. Courts are required to take affirmative steps to ensure that people with developmental disabilities receive access to justice and have meaningful participation in guardianship cases. These actions must be taken on a case by case basis to enable each individual access to justice. The judges and administrators are not equipped to do this. However, the court can delegate this responsibility to the attorney appointed to represent an individual in a particular case. The attorney, of course, must receive general training on developmental disabilities, interviewing, and communication. But that general knowledge is not enough. An ADA accommodation plan should be developed for each particular client at the beginning of the case. If this is done properly, and implemented properly, and if the attorney also provides effective representation and advocacy, the court will have fulfilled its responsibilities under Title II of the ADA and Section 504 of the Rehabilitation Act of 1973.

Joint activities. “Paragraph (b)(3) prohibits the public entity from utilizing criteria or methods of administration that deny individuals with disabilities access to the public entity's services, programs, and activities or that perpetuate the discrimination of another public entity, if both public entities are subject to common administrative control or are agencies of the same State.”

Editorial Comment. The paragraph about joint activities makes it clear that if the activities of two public entities are intertwined, that both may be subject to penalties for allowing or encouraging violations of the ADA by the other. This, for example, would apply to the situation in Los Angeles County where the County Board of Supervisors has chosen to fund a legal services program providing attorneys for proposed conservatees but not taking any steps to ensure that the program complies with the ADA. The board has delegated responsibility for administration of the program to the Los Angeles Superior Court. The court appoints the attorneys and is responsible for establishing criteria for their eligibility for appointments. The court reviews their fee claims, including the description of services the attorneys have performed. The court orders the county to pay the fees. The court then reappoints the attorneys to new cases, knowing that their performance in prior cases has not been sufficient to satisfy statutory protections, constitutional mandates, or ADA requirements. The county pays the attorneys, without regard or concern as to whether the clients have been afforded access to justice or effective assistance of counsel. The county has no quality assurance controls. The county and the court are “agencies of the same State.” The county and the court are in a symbiotic relationship. It would appear that the county has liability under Title II for violations of the ADA committed by the court in its supervisory role and by the court-appointed attorneys as contractors or service providers of a state agency.

Document 30 – State’s Duty to Ensure Safety of Adults in Guardianship

Key Words: Safety, Due Process, Duty of State

This document contains excerpts from various court cases that recognize a duty of the state, once it takes a person into custody, to protect the person from harm and to provide a safe environment. Although the cases involved the state placing children into foster care, the same “special relationship” between the state and an adult with a disability exists in adult guardianship proceedings. The state turns decision making over to a third party who is appointed by the state. With authority conferred by the state, that person controls the life of the adult, including decisions regarding where the adult lives. For all practical purposes, the adult is in state custody, even if he or she is living in a residence or group home and not an institution.

When she power and control is given by the state to a third party over the life of an adult with cognitive disabilities who is extremely vulnerable and at risk of abuse, the state has a duty – similar to its duty to children and adolescents placed into foster care – to take reasonable steps to make sure the decision maker is able to provide a secure and safe environment. When such a custodial situation may continue for years, even decades, the “special relationship” created between the state and the adult in question requires the state to implement measures to ensure safety for the adult.

Ninth Circuit Court of Appeals

Quote: In *Charles v. Willden*, (9th Circuit 2012), the court wrote: “Generally, ‘the Fourteenth Amendment’s Due Process Clause does not confer any affirmative right to governmental aid’ and ‘typically does not impose a duty on the state to protect individuals from third parties.’ *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971 (9th Cir.2011) (citations and alterations omitted). There are, however, two exceptions to this rule. First, there is the ‘**special relationship**’ exception — when a custodial relationship exists between the plaintiff and the State such that the State assumes some responsibility for the plaintiff’s safety and well-being. *Id.* at 971 (citing *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 198–202 (1989)). Second, there is the ‘state-created danger exception’— when ‘the state affirmatively places the plaintiff in danger by acting with “deliberate indifference” to a ‘known and obvious danger[.]’ *Id.* at 971–72 (quoting *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir.1996)). ‘If either exception applies, a state’s omission or failure to protect may give rise to a § 1983 claim.’ *Id.* at 972.”

Quote: The court in *Willden* added: “It is clearly established that “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *DeShaney*, 489 U.S. at 199–200. When the State asserts this type of custody over a person “and at the same time fails to provide for his basic human needs-e.g., food, clothing, shelter, medical care, and reasonable safety-it transgresses the substantive limits on state action set by the Due Process clause.” *Id.* at 200.

Quote: The *Willden* court further stated: “It is also clearly established that this special relationship doctrine applies to children in foster care. We recently clarified that it has been clearly established since at least 1996 that foster children have “a federal constitutional right to state protection” while they remain in the care of the State. *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 846–47 (9th Cir.2010). Our circuit recognized the State’s duty to protect foster children as early as 1992, when we observed that “[o]nce the state assumes wardship of a child, the state owes the child, as part of that person’s protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child.” *Lipscomb v. Simmons*, 962 F.2d 1374, 1379 (9th Cir.1992).”

Seventh Circuit Court of Appeals

Quote: In *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), the court wrote: “Here . . . the state removed a child from the custody of her parents; and having done so, it could no more place her in a position of danger...without thereby violating her rights under the due process clause...than it could ... place a criminal defendant in a jail or prison in which his health or safety would be endangered In either case the state would be a doer of harm rather than merely an inept rescuer....” (*Id.* at 848-49)

Quote: In *Camp v. Gregory*, 67 F.3d 1286, 1296 (7th Cir. 1995), the court wrote: "Commensurate with the parental obligation to supervise a child’s activities outside the home is a duty on the part

of the state not to place one of its charges with an adult that it knows will not or cannot exercise that responsibility."

Eighth Circuit Court of Appeals

Quote: In *Norfleet v. Arkansas Dep't of Human Serv.*, 989 F.2d 289, 293 (8th Cir. 1993), the court wrote: "In this case, a special custodial relationship . . . was created by the state when it took Taureen from his caregiver and placed him in foster care. Cases from this and other circuits clearly demonstrate that imprisonment is not the only custodial relationship in which the state must safeguard an individual's civil rights. In foster care, a child loses his freedom and ability to make decisions about his own welfare, and must rely on the state to take care of his needs."

Eleventh Circuit Court of Appeals

Quote: In *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987), the court wrote: "In the foster home setting, recent events lead us to believe that the risk of harm to children is high. We believe the risk of harm is great enough to bring foster children under the umbrella of protection afforded by the Fourteenth Amendment. Children in foster homes...are isolated.... The children are helpless... [and] at the mercy of the foster parents.... [I]t is time that the law give to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds."

Illinois Federal District Court

Quote: In *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989), the court wrote: "[A] child who is in the state's custody has a substantive due process right to be free from unreasonable and unnecessary intrusion on both [his or her] physical and emotional well-being."

California State Law:

California Constitution. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Article 1, Section 1)

California Lanterman Act. Persons with developmental disabilities shall have "a right to be free from harm, including unnecessary physical restraint, or isolation, excessive medication, abuse, or neglect." (Welfare and Institutions Code Section 4502(h))

California Penal Code: "The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on

their own behalf.” (Penal Code Section 368(a))

Editorial Comment. The ADA requires state courts to provide litigants with developmental disabilities access to justice. These litigants are entitled to the benefit of statutory and constitutional protections that are intended to ensure their safety while they are under the control and care of the state. When a guardianship order is entered, the litigant is placed under the control and care of the state. The state authorizes a third party to make major life decisions for the adult. As the California Legislature has observed, dependent adults are unable to protect themselves. Therefore, the state has the duty to do so. It must vet the person into whose control the adult is being placed by the state. It must also put into place procedures to monitor that custodial setting on an ongoing basis to ensure that the adult remains safe. Providing these adults with access to justice requires the state to use due diligence in selecting guardians who do not pose a risk of abuse to the adult. Court-appointed attorneys have a constitutional and statutory duty to provide effective assistance to their clients. This places on them a duty, especially since they are appointed by the court, to conduct thorough investigations into the prospective guardians and the households into which their clients may be placed. Failure to do so would constitute gross negligence and could cause substantial harm to their clients. They also have a duty to conduct proper investigations when specific allegations of abuse are raised. Conducting a pro forma investigation, or a negligent one, could result in irreparable harm to their clients. (See Document 34: The Case of Mickey P.) Since Title II places a duty on the court to take affirmative steps to provide access to justice for proposed wards or conservatees, and since the court is delegating much of its responsibility to court-appointed counsel, the court must ensure that these attorneys are properly trained in substantive and procedural issues involving abuse of people with developmental disabilities. It must also provide performance standards on these issues in order to give the attorneys an incentive to perform their functions properly. There must also be some form of monitoring, even if only consistent audits of samples of cases to ensure compliance.

Document 31 – California Code of Regulations

Key Words: Rights, Abuse, Access to Justice, Role of Attorney

This document lists various rights of persons with developmental disabilities. When a petition for limited conservatorship is filed, the proposed conservatee is vested with all of these rights. Since the granting of a conservatorship may infringe on or take away these rights, it would be the duty of court-appointed counsel to defend these rights against unnecessary or improper infringement. To do this, counsel must first be aware of these rights. Training programs for court-appointed attorneys in Los Angeles have never mentioned these regulations of the Department of Developmental Services nor have these mentioned the duty of appointed attorneys to defend and protect such rights.

Advocacy services. The regulations specify that a person has a “right to advocacy services, as provided by law, to protect and assert the civil, legal, and service rights to which any person with a developmental disability is entitled.” The Lanterman Act specifies that people with developmental disabilities are entitled to all statutory and constitutional rights, just as any other person. Therefore,

attorneys appointed in a limited conservatorship case should be advocating that their clients retain their constitutional and civil rights unless clear and convincing evidence is produced by the petitioner or others that infringement of such rights is necessary for the protection of the client and that the manner of infringement is accomplished in the least restrictive way.

Access to the courts. The regulations specify that a person has a “right of access to the courts for purposes including, but not limited to the following: . . . (d) to contest a guardianship or conservatorship, its terms, and/or the individual or entity appointed as guardian or conservator.” Since the person has cognitive or communication disabilities which may preclude them from understanding the proceedings or personally contesting the terms of a conservatorship, it would be the duty of the appointed attorney to develop an ADA access plan to assist the client in defending against the encroachment of rights.

Freedom from abuse. The regulations also specify that a person has a “right to be free from harm, including . . . abuse or neglect.” People with developmental disabilities are not able to assert this right on their own. In the context of a conservatorship proceeding, they are completely dependent on others to assert this right for them. Their appointed attorney must provide the “advocacy services” to which they are entitled as well as providing them “access to the courts” in a manner that will protect and ensure their right to “freedom from abuse.”

Document 32 – State Statutes Providing for a Right to Counsel in Civil Cases

Key Words: Role of Attorney, Training, Standards

This document contains excerpts from a 2006 article in the Journal of Poverty Law and Policy. The article discusses the right to counsel in three types of civil cases: child abuse and neglect proceedings; civil commitment proceedings; and mandatory medical treatment cases.

Absence of National Guidelines. The article notes that generally there are no national guidelines for performance standards for counsel in civil cases, except for attorney representing children in abuse cases and attorneys representing adults in civil commitment cases. The ABA has developed standards for child abuse cases. The National Center for State Courts has standards for attorneys in civil commitment cases. National standards do not exist for counsel in adult guardianship cases.

Criteria for Effective Guidelines. The article suggests seven criteria that must exist for a court-appointed attorney system to function properly. Quote: “For a right-to-counsel system to be effective, the guidelines require, among others, that: • appointed counsel must have adequate experience and training, • appointed counsel must fulfill particular duties, • appointed counsel must be assigned only as many cases as they can competently handle, • appointed counsel must be independent of the appointing authority, • counsel must be adequately compensated, • counsel must be appointed early enough in a particular proceeding, and • the appointment system must be uniform throughout a particular state.”

Lack of training. **Quote:** “Virtually none of the civil right-to-counsel statutes or court rules requires experience, training, or the fulfillment of any particular duties.”

Unmanageable caseloads. **Quote:** “Courts should not assign appointed attorneys more cases than the attorneys can handle competently. However, very few right-to-counsel statutes or court rules provide any caseload limits or guidelines.”

Unfair appointment process. **Quote:** “Appointed counsel should be independent of the court. Commentators generally agree that someone other than the presiding judge should appoint counsel to ensure that counsel's desire to be appointed in other cases does not influence counsel's representation of clients. However, very few civil right-to-counsel statutes provide any guidelines about how judges should appoint counsel. Judges presiding over the cases are free to appoint the attorneys in those cases, and, except in jurisdictions where the public defender is responsible for representing people entitled to counsel in civil cases, that seems to be what generally happens.”

Inadequate compensation. **Quote:** “Counsel must be adequately compensated. Many civil right-to-counsel statutes do not address compensation beyond requiring that it be "reasonable." In practice, funding falls short of need almost everywhere.”

Lack of geographic uniformity. **Quote:** “Where possible, counsel should be provided in a uniform manner throughout a state. Lack of a uniform system can lead to individual judges or county administrators determining who should get counsel on an ad hoc basis. Even when individual counties have written policies, the differences between those policies can lead to vastly different access to counsel in different counties, despite the presence of an applicable statewide law guaranteeing the right to counsel.”

Document 33 – National Center for State Courts

Key Words: Due Process, Right to Counsel, Role of Attorney, Standards, Iowa, North Carolina, Arizona, Investigation

This document contains excerpts from Guidelines for Involuntary Civil Commitment including guidelines for legal representation in such cases. Once the right to counsel in such proceedings was established by state statutes or case law, the National Center for State Courts decided to publish “best practices” performance standards for appointed attorneys.

Effective representation. The first recommendation focuses on an administrative system that purports to ensure effective representation for respondents. **Appointment agency.** Either the public defender or a panel of private attorneys should be established and maintained. **Training.** Attorneys should take specialized courses and receive supervised on-the-job training in the duties, skills, and ethics or representing civil commitment clients; **Investigative resources.** Social workers and mental health screening officers should be available to attorneys to help them investigate the facts of cases

and locate resources for less restrictive alternatives; **Performance Standards.** A clear statement of the role and duties of attorneys in such cases should be prepared by the agency managing the attorneys so that attorneys can effectively represent their clients.

Advocacy role. From a legal perspective, the civil commitment process is adversarial and involves fundamental liberty issues. The primary role of counsel, therefore, should be to serve as vigorous advocate for the client's wishes. To the extent that a client is unable to express personal wishes, the attorney should advocate the position that best safeguards the client's interests.

Quote: "The role of a respondent's attorney is to be an advocate for the respondent's expressed wishes regarding the outcome of the commitment proceedings. Simply put, the attorney stands up for someone who has no one else to stand up for him or her, and who may be ill-equipped to do so personally. This role is often misunderstood. The attorney should not adopt the functions of the judge or jury by attempting to balance the needs of the respondent with those of the community or the family."

Quote: "The attorney also should not act as a guardian *ad litem* because the court, not the attorney should decide whether the respondent is committable. When an attorney fails to act as an advocate and assumes a paternalistic or passive stance, 'the balance of the system is upset, the defense attorney usurps the judicial role, and the defendant's position goes unheard.'"

Quote: "Unfortunately, in practice, the attorney's role often has been ill-defined. One commentator has described the situation as a problem of the attorney's "rolelessness." For example, a recent survey of attorneys who represent respondents in North Carolina indicated that attorneys preferred a paternalistic model of civil commitment proceedings. A study in Arizona revealed that most attorneys viewed their role as one of guarding the procedural rights of the respondent. As one attorney put it, his role was to see that "only those patients needing commitment were committed. Finally, a survey of Iowa attorneys indicated that eighty-two percent viewed their role as being different from representing clients in other kinds of cases, because commitment may be in a client's best interests."

Weight of authority: **Quote:** "The weight of legal authority supports the position taken by Guideline E2, that a respondent's attorney should function as an advocate. Legal scholars recommend that the attorney should be an advocate. Although only four state legislatures have addressed the issue, all four take the position that the attorney should be an advocate. Courts that have addressed the question have taken the same position."

Unknown wishes of client. **Quote:** "The National Task Force takes the position that '[t]o the extent that a client is unable or unwilling to express his or her wishes, the attorney should advocate the position that best safeguards and advances the client's interest in liberty.' . . . In such cases the attorney should advocate the position that best safeguards and advances liberty, that is, the position that provides a realistic probability of acceptance by the court. . . . [T]he attorney should advocate the least restrictive alternative that the court is likely to accept under the circumstances of the case."

Method of Appointing Attorney. **Quote:** “The manner in which attorneys are appointed from the panel of attorneys eligible to represent civil commitment respondents should **safeguard the autonomy of attorneys** in representing their clients. To accomplish this objective, an independent third party, such as the local bar association or a legal services organization, should be responsible for maintaining the panel. The court should appoint attorneys from that panel serially, unless an attorney's absence or other compelling reasons require otherwise.” (Emphasis added)

Quote: “Paragraph (b) provides that an independent third party, such as a local bar association, control the appointment of attorneys. This procedure ensures the attorney's autonomy and avoids undue deference being paid to a judge's or referee's particular views concerning procedure, preparation, and disposition. Attorneys should be sure who their clients are and should **not be beholden to the judge** or the court who selected them.” (Emphasis added)

Investigation by Attorney. The guidelines make it clear that an appointed attorney should fully and thoroughly investigate the facts of the case, including the **client’s wishes** and **lesser restrictive alternatives**. This would require the attorney to **interview** the client’s family members, friends, and acquaintances, social workers, therapists, medical doctors, etc. It also requires interviewing potential adverse witnesses. **Expert witnesses** should be appointed to assist the attorney in evaluating the case, especially where such appointments may be done at state expense.

Review of Records. The ability of an attorney to provide effective advocacy and advice to a client requires the attorney to have access to and review all relevant records. **Editorial Comment.** In California, for example, this would require the attorney to review all diagnostic records in possession of the regional center, as well as the most recent IPP review. It would also require the attorney to examine school records, especially the most recent IEP. Records should be obtained from the doctor who submitted the medical capacity declaration, and if that is not the normal primary care provider for the client, the medical records from that provider should be obtained. Employment records and information from any day programs should also be obtained. A review of these records will give the attorney a better sense of the client’s level of ability in each of the capacity areas in question. It will also give the attorney the names of people with information about the client with whom the attorney should consult.

Negotiations. The attorney should consider negotiations with the petitioner about alternatives, but only if the client consents to such negotiations.

Document 34 – The Case of Michael P

Key Words: Due Process, Abuse, Role of Attorney, Investigation, Safety

This document contains excerpts from a limited conservatorship case in California in which allegations of abuse were raised. The brother of the conservatee alleged that the parent-conservators were engaging in abuse and neglect of their adult son who had severe intellectual disabilities.

Reports were made by the brother to the police and to adult protective services. Pro forma inquiries were made by the authorities but no meaningful investigation was conducted. When additional evidence of alleged abuse was discovered by the brother, he reported the matter to a local disability rights organization which, in turn, pressured authorities to investigate and to remove “Mickey” from the home.

Observations of authorities when they visited the home caused them to remove him and have Mickey transported to a local hospital where he was treated for several days. The probate court was notified and a court-appointed attorney was assigned to represent Mickey. The attorney conducted a half-baked investigation and advised the court that nothing was wrong. In fact, everything was wrong. Based on the cursory review by an untrained attorney, the parents were allowed to remain as conservators. The hospital released Mickey to the parents. Within three weeks, Mickey was dead.

An autopsy report found many suspicious bruises and determined that the level of medical care was questionable. The medical examiner reported that it was impossible to rule out negligent care without an additional investigation by authorities. No further investigation was done.

Editorial Comment. After Mickey was placed into a conservatorship and his parents were appointed as conservators, the state failed to have follow up investigations every two years as required by law. In fact, several years passed without a home inspection by the court investigator. When the parents had Mickey removed from a day program and removed from regional center services, no investigation was done as to why Mickey was being isolated at home.

When authorities learned that the parents sometimes handcuffed Mickey with police-grade handcuffs, and when the parents claimed they did so on the advice of Mickey’s doctor, the authorities did not interview the doctor to determine whether that was true and if it was on what authority the doctor gave such advice.

Neither the court investigator nor the appointed attorney contacted the brother – the person who made the allegations of abuse – to interview him and his wife regarding the evidence in support of the allegations. Alternatives to returning Mickey home to his parents were not fully explored.

Once Mickey was dead, county agencies lacked the will to investigate whether neglect contributed to his death. Of course, if that were true, county agencies might have incurred liability for failing to protect Mickey from harm and for returning him to an abusive environment.

A properly-trained court-appointed attorney who conducted a thorough investigation could have argued for the removal of the parents as conservators, even temporarily, pending a deeper investigation into the matter. The system failed Mickey and Mickey paid dearly for this failure.