

# Probate Conservatorships

## Flaws & Fixes

A Webinar for  
Long Beach Bar Association

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<https://disabilityandguardianship.org/flaws-and-fixes.pdf>

**Problem 1:**  
**No Oversight by State**  
=  
**No Local Accountability**

**Solution 1:**  
**Annual Survey**  
of Local Courts

- **New filings** per year
- **Active cases** at end of year
- **Late** biennial reviews
- # of **unknown whereabouts**
- # of cases with **no attorney**



**We Count What We Care About**

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

## Problem 1:

Annual Court Statistics Report **Hides** Probate Conservatorship Data

## Solution 1:

Create Category **Solely** for Probate Conservatorships

- New filings
- Open cases
- Court trials \* # of late reviews
- Jury trials \* # of unknown whereabouts
- Appeals \* # of cases with no attorney

### Filings, Dispositions, and Caseload Clearance Rate

Fiscal year	Probate	
	Total	Conservatorship & Guardianship
	(A)	(B)
<b>Filings</b>		
FY19	49,221	15,949
FY18	51,478	16,821

### Trials By Type of Proceeding

Court Trials	Jury Trials	Probate and Mental Health
Probate and Mental Health	FY19	(G)
(G)		
37,585		109

### Probate and Mental Health Dispositions

Probate
Conservatorship & Guardianship
(B)
11,820

## **Problem 2:**

Failure to  
Appoint Counsel  
in a Significant  
Number of Cases

## **Solution 2:**

Make Counsel  
**Mandatory**  
To Satisfy  
Due Process  
& the ADA

## Complaint #1 to Sacramento County Superior Court

ADA Title II Regulations  
Sections 35.104, 35.107, 35.170(a)

Section 504 of the  
Rehabilitation Act of 1973

California Government  
Code Section 11135



**The Failure of the Court to Appoint Counsel  
to Represent Conservatorship Respondents  
Violates State and Federal Disability Laws**

**Problem 3:**  
Deliberate **Bypass**  
of Statutory Protections



### **Problem 3:**

## Deliberate **Bypass** of Statutory Protections (Denial of **Counsel** & Regional Center **Evaluations**)

At our agency, for example, approximately 80% of our conserved clients are under general conservatorship, and not, as you might imagine under limited conservatorship, an arrangement which was designed specifically for Californians with developmental disabilities. And the law and probate courts treat general and limited conservatorships quite differently.

For example, proposed general conservatees are not provided a court-appointed attorney, as are proposed limited conservatees. Further, the Probate Code does not require the regional center to assess the proposed conservatee and file an assessment report for general conservatorship petitions, whereas this is mandatory for limited conservatorship petitions.

### **Problem 3:**

Deliberate **Bypass** of Statutory Protections  
(Denial of **Counsel** & Regional Center **Evaluations**)



### **Solution 3:**

A Legislative Fix is to **Deem All Cases** Involving Litigants with Developmental Disabilities to Automatically be Considered **Limited** Conservatorship Petitions.

**Problem 4:**


Refusal of Judges  
To Recognize a  
**Chosen** Attorney

**Examples:**

Britney Spears  
Theresa Jankowski  
Elizabeth H.

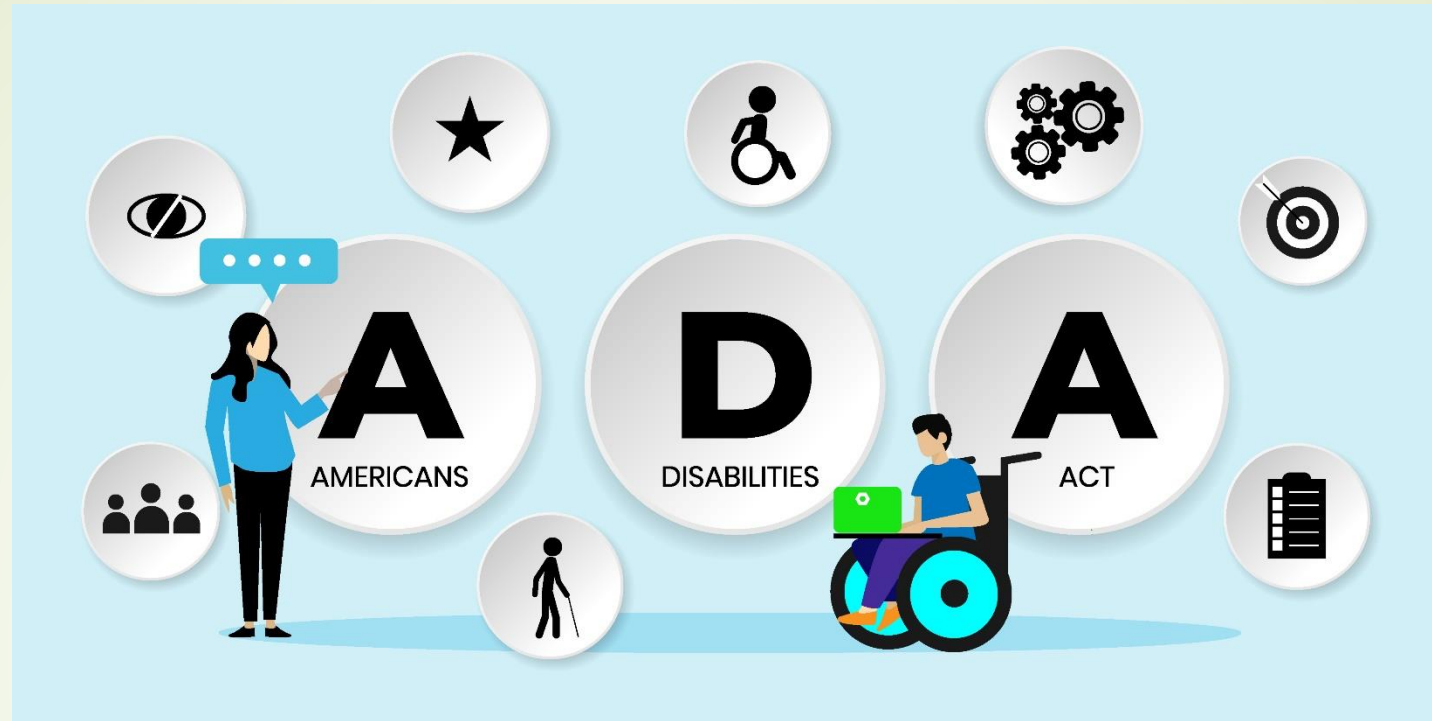
**Solution 4:**

Enact SB724  
Senator Ben Allen



*(d) If a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses any preference for a particular attorney to represent them, the court shall allow representation by the preferred attorney, even if the attorney is not on the court's list of a court appointed attorneys.*





### Problem 5:

Failure of Judges & Attorneys to Fulfill Mandatory ADA Responsibilities

### Solution 5:

Clarify Rule 1.100 to Include Requests and **Known** or Obvious Disabilities; **Training** for Judges & Attorneys

## **Problem 6:**

Failure of Appointed Counsel to Use Qualified Professionals

## **Capacity Experts – Social Workers – Regional Center IPP Team**



## **Solution 6:**

Training Programs Should Emphasize the **Need for Experts** in a Legal Toolkit:

**Psychologists:** on more than medical

**Social Workers:** on less restrictive options

**IPP Team:** for regional center clients

## Problem 7:

Failure to Clearly Define Counsel's Role as **Zealous Advocate**;  
Lack of **Performance Standards** to Guide Their Advocacy



## Examples:

### LA Rule 4.125

Dual Role for Counsel

### Arguing Against Client

- Britney Spears
- Theresa Jankowski
- Greg Demer

## Solution 7:

**Pass** amended **SB724**

**Repeal** LA Rule 4.125

**Authorize** Judicial Council to  
Develop Performance Standards

**Make** the State Bar Complaint  
Procedure Accessible to Litigants  
with Cognitive Disabilities

## **Problem 8:** Lawyers Surrender to **Judicial Pressure** to Settle

### **10 Year Probate Court Survey**

**L.A.** Only 2 Jury Trials in 20,000 cases

**Alameda.** 98% of cases = no court trial

### **L.A. Administrative Order**

Presumed Limit of 10 hours

### **Presiding Judge Warning**

“Keep Hours Low or Else”

### **Power to Appoint & Pay**

Incentive to Please Judge  
to Get \$\$\$ Appointments



### **Solution 8:**

- **Clarify Code of Judicial Ethics**  
Judges should decide cases, not manage legal services programs
- **Create an Independent Entity**  
To Recruit, Appoint, Fees, Quality Assurance Standards, Monitoring
- Set of Approved **Jury Instructions**

## **Problem 9: Appeals by Conservatees Are Rare**

This Deprives Conservatorships of the Normal Appellate Correction Process



**Limited Conservatorships: 2 appeals** by conservatees from 1980 to 2018

**General Conservatorships: 3 appeals** by conservatees from 2015-2019

**Juvenile Dependency: 33 appeals** by minors from 1989 to 2019

**Juvenile Delinquency: 67 appeals** by juveniles just in 2017-2018

**LPS Conservatorships: 41 appeals** by conservatees from 2015-2019

## **Solution 9:**

**Streamline the notice of appeal process.** Now it is timely and expensive.

**Zealous Advocacy** with objections, motions, trials (create an appellate record)

**Third-Party Standing** as an ADA Disability Accommodation

## Problem 10:

### There Are No Protocols to Appoint Appellate Attorneys for Conservatees



#### Were Interventions Successful?

**Olivia B. – appellant (yes)**

**Ashley H. – respondent (yes)**

**Betty R. – respondent (yes)**

**Catherine D. – respondent (no)**

#### Solution 10:

**Court of Appeal** to adopt protocols for appointing attorneys for litigants with known cognitive disabilities

**Judicial Council** to Amend Rule 1.100 to remind the trial and appellate courts of *their affirmative* duty to ensure access to justice for litigants with known cognitive disabilities

## **Problem 11:**

### **Excessive Attorney Fees Are Depleting Rather Than Conserving Assets**

- **Lack of uniform rules to regulate hourly rates and hours**
- **Lack of fee controls for attorneys for petitioners & conservators**
- **No safeguards against judicial cronyism or retaliation**



## **Solution 11:**

- **Mandate procurement process for selecting appointed counsel**
- **Create independent agency to appoint/pay conservatee's attorneys**
- **Implement Medicare-type controls on conservatorship attorney's fees**

**Problem 12:  
Unreasonably High Case Loads for Public Defenders**

**Domino Effect:**

- **County Supervisors Underfund Public Defender Agencies & Contractors**
- **PD Managers Require Staff Attorneys to Handle Too Many Cases**
- **Steps Are Skipped, Compromises Are Made, and the Client Suffers**



**Solution 12:**

- **State Bar to Set Caseload Standards**
- **Adequate Funding by Supervisors**
- **Whistle Blower Protections for PD Attorneys**
- **Periodic Auditing of Cases by State Bar**



# Probate Conservatorships

## Flaws & Fixes

### For More Information

A comprehensive bibliography of reports and commentaries on the topics covered in this presentation is found on the website of Spectrum Institute.

<https://spectruminstitute.org/publications/>