

# Probate Conservatorship Indigent Legal Defense Services in Alameda County

by Thomas F. Coleman

## The Basics of Conservatorships

According to data supplied by the Alameda County Superior Court, there were 1,848 adults living under an order of probate conservatorship as of December 31, 2020. Hundreds of new cases are initiated each year. Some 610 new petitions were filed with the court in 2019 and another 420 new petitions were filed in 2020.

A conservatorship proceeding may be initiated in the superior court when a petitioner has good cause to believe that an adult is unable to properly care for their basic personal needs or substantially unable to manage their finances. The petitioner may be a family member, the public guardian, or any interested person.

The petition seeks a court order placing the adult under the care and control of a person known as a conservator. A conservator may be a family member, the public guardian, a professional fiduciary, or any other adult the court deems appropriate.

If a conservatorship of the *person* is sought, the petition must allege that the adult is unable to provide for their shelter, clothing, food, or medical care. If a conservatorship of the *estate* is being sought, the petition must allege that the adult is substantially unable to manage their finances or is susceptible to undue influence. A petitioner may seek a conservatorship of the person or the estate or both.

A petitioner may file for a general conservatorship or a limited conservatorship. If a limited conservatorship is sought, the petition must allege that the adult has a developmental disability. The petition must also specify which of seven powers the court is being asked to transfer from the adult to a conservator. These include the power regarding: choosing a place of residence; access to confidential records; medical care; consent to marriage; entering into contracts; educational decisions; social and sexual contacts and relationships.

In Alameda County, the court appoints the public defender to represent all adults with developmental disabilities regardless of financial status. The public defender is also appointed to represent all other indigent adults.

Regardless of the type of conservatorship, there must be clear and convincing *evidence* to prove the elements necessary for a conservatorship and that there are no less restrictive alternatives available to protect the adult from harm. The petition also asks the court to appoint a specific person to act as the adult's

conservator.

The adult must be served with a citation notifying them of the allegations of the petition. It must inform the adult of their rights, including: the right to have an attorney of their choice; if they cannot afford an attorney to have a court-appointed attorney to represent them; to contest the proceeding; to demand a jury trial; and to present evidence in their own behalf.

If the adult does not retain their own attorney, the court will generally appoint either the public defender or a private attorney. In Alameda County, the court appoints the public defender

to represent all adults with developmental disabilities regardless of financial status. The public defender is also appointed to represent all other indigent adults. A nonprofit known as Legal Assistance for Seniors is appointed to represent adults with assets who do not have developmental disabilities (seniors with dementia and adults with brain injuries or mental disabilities from chronic medical conditions).

Once a petition is granted, a conservatorship order lasts indefinitely. A young adult with developmental disabilities may remain in a conservatorship for decades; a senior may be in a conservatorship for the rest of their lives.

### **The Public Defender**

A legal defense by a competent attorney acting as a zealous advocate is often the only real safeguard against someone being placed in an unwarranted or overreaching conservatorship.

The county is charged with the responsibility to pay for legal defense services for indigent adults in probate conservatorship proceedings. Supervisors have three choices as to how to provide such legal services.

They can create an office of the public defender as a county department and then have the court appoint that office to represent conservatees or proposed conservatees. Alternatively, they can enter into a contract with a nonprofit organization or private law firm to directly provide such indigent legal defense services in these cases or to manage such services by subcontracting law firms. Finally, they can allow the court to operate a panel of attorneys from which lawyers are appointed to individual cases and the county pays these lawyers as ordered by the court.

Large caseloads likely will result in deficient legal services to indigent clients. Supervisors must prevent excessive caseloads, establish performance standards, and have a monitoring system in place.

The Alameda County Board of Supervisors has chosen the first method, namely, to fund an office of the public defender as a county department. The chief public defender is appointed to that position by the board.

The chief public defender decides how much money from the office budget to allocate to these legal services, which attorneys will represent clients in these cases, how large the caseload of the attorneys will be, how the attorneys are trained, what performance standards the attorneys must follow, whether performance will be monitored by supervisors, whether outcomes will be tracked, whether attorneys will have support staff such as investigators to assist them, and whether there will be a complaint system to report substandard services or unethical practices.

### **Bar Association Standards**

The American Bar Association and California State Bar have adopted guidelines for indigent legal defense services. See: "Excerpts from Caseload Reports." These standards apply to the Public Defender's Office.

Large caseloads likely will result in deficient legal services to indigent clients. Responsibility is placed on supervisors to prevent excessive caseloads, to establish performance standards, to have a monitoring system in place, and to have a complaint procedure for clients who receive deficient services.

The operations of the Public Defender's Office do not appear to comply with these standards.

### **Professional Rules**

The Rules of Professional Conduct prohibit

attorneys from willfully or systematically providing deficient legal services. It is a violation of ethics for a supervisor to allow a staff attorney to perform deficiently or to allow excessive caseloads to occur. Attorneys must adhere to constitutional standards. See: "Report of the Funding and Fees Review Project."

The operations of the Public Defender's Office do not appear to comply with these rules.

**Due Process**

Conservatorship proceedings must comply with the requirements of due process of law. This includes the right to have effective assistance of counsel. See: "Report of the Funding and Fees Review Project."

The practices of the Public Defender's Office do not appear to encourage or provide clients in probate conservatorship cases with the type of effective assistance of counsel that is constitutionally required.

**Zealous Advocacy**

AB 1194 becomes effective January 1, 2022. It clarifies that the role of public defenders and appointed attorneys should be that of a zealous advocate. For an explanation of what this requires, see: "Report of the Funding and Fees Review Project."

If the practices of the Public Defender's Office remain in 2022 as they are now, clients in these cases will not receive the type of zealous advocacy that is contemplated by AB 1194.

**Public Defender Operations**

**Funding.** The operations of the Public De-

fender are funded through a budget approved by the Board of Supervisors. The budget does not contain a line item for legal services in conservatorship proceedings.

It appears that the amount of money allocated for attorneys and support staff for legal representation of clients in these cases is determined by the chief public defender. It appears that caseloads are determined by him too.

**Caseloads.** Based on the testimony of Deputy Public Defender John Plaine at a hearing of a committee of the Board of Supervisors in 2021, at the time he testified he had 362 active cases. This was double the caseload of attorneys representing clients in misdemeanor cases. In order to keep up with his workload, Mr. Plaine testified that he often had to work on weekends. Excessive caseloads that cause a lawyer to routinely work overtime raises questions that should be addressed by the county's human resources and risk management departments.

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Contrast 362 conservatorship cases with the caseload standard of 141 per attorney set by the Judicial Council in child dependency proceedings. Conservatorships involving adults with mental or developmental disabilities can be equally challenging and complex as child welfare cases. Attorneys in a legal defense program in Nevada handled, on average, 181 adult guardianship cases per year – and they had ample support staff to assist them.

Persons convicted of a misdemeanor are usually placed on probation for three or fewer years and required to perform community service or pay a fine. In contrast, a proposed conservatee faces the prospect of what may amount to a

“life sentence” in a conservatorship – losing control over finances, residence, marriage, and even social and sexual relationships. And yet, caseloads for these liberty-devouring cases are twice as high as for misdemeanors.

**Performance Standards.** Under a business model, management would establish performance standards so that an employee knows what is expected and supervisors have a benchmark to use in evaluations. The same should hold true for government employees.

The Public Defender’s Office does not have performance standards for probate conservatorship proceedings. This violates indigent defense standards established by the ABA and California State Bar. There is no checklist of advocacy and defense services to consider – and either adopt or rule out – in each case. What the attorney does is determined on an ad hoc basis, putting pressure on an attorney to decide which client gets “full service” and which may be shortchanged due to an excessive caseload.

Furthermore, the Public Defender’s Office reports that it does not have an evaluation process specific to the conservatorship unit. This likely means that evaluations of those practices are done by a supervisor whose primary experience may be criminal defense.

Contrast this with the operations of the Legal Aid Center of Southern Nevada which has comprehensive performance standards for the attorneys who represent clients in adult guardianship proceedings. Cases are later evaluated for quality assurance purposes by a supervisor who has extensive experience in such cases.

**Regional Center Clients.** The bulk of the

conservatorship cases of the Public Defender’s Office are adults with developmental disabilities. Many are transitioning to adulthood. Although they have cognitive, adaptive, or communication disabilities, many are able to improve their intellectual and adaptive functioning. Unlike some seniors with dementia who are in constant mental decline, some of these young adults are just starting out in life and may have the ability to function without a conservatorship if they have proper services and a support team they trust.

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A robust conservatorship defense for adults with developmental disabilities can be very labor intensive. It may take more attorney time. It may require more a more thorough review of records and more interviews with people in the lives of the clients – parents,

secondary relatives, neighbors, school personnel, service providers, regional center workers, medical doctors, social workers, and psychologists.

Much of this investigation and many of these interviews can be delegated – at least in the first instance – to support staff. A social worker student intern and a staff investigator would enable a public defender to provide zealous advocacy to a client with a developmental disability. Does the public defender provide such advocacy? Is there an adequate support staff for this type of analysis? These are questions that should be asked and answered.

Adults with developmental disabilities have a “paper trail” unlike seniors with dementia. Most of them are clients of regional centers who have extensive records documenting the adult’s abilities, disabilities, and service needs.

Many of these adults also have recent school

records since they are allowed to attend special education classes until they are 22 years old. The schools have Individual Educational Plans (IEPs) that contain a wealth of information about their abilities and their progress. The Public Defender's Office should obtain IEP reports for the most recent years of a client. Do they? This is a question that should be asked and answered.

Regional centers conduct a thorough Individual Program Plan review every three years for their clients, with mini-reviews each year. These IPP reports should be based on person-centered evaluations and multi-person meetings that look at the person's abilities, disabilities, aspirations, and needs. The Public Defender's Office should be reviewing the most recent IPP reports as it prepares a legal defense for its client. Is this happening? This is a question that should be asked and answered.

The systematic failure of the Public Defender's Office to invoke an IPP planning process – one that does not come out of the budget of the public defender or the county – raises liability issues for the county.

As the legal representative of a regional center client targeted by a conservatorship proceeding, the Public Defender's Office has the right to demand that a regional center convene an IPP review process to evaluate whether there are less restrictive alternatives to a conservatorship, and if not to determine which of the "seven powers" the client should retain. The public defender can insist that a "qualified professional" be part of the conservatorship IPP review. Is this happening? How often has the Public Defender's Office demanded that the regional center convene a conservatorship planning IPP review process? Never? Seldom? This is a question that should be asked and answered. The systematic failure to invoke a planning process – one that does not come out of the budget of the public defender or the county – raises liability issues for the county.

**Seniors.** Sometimes a cognitive problem can be the result of a treatable medical problem or improper medications for a senior. There would be no cost to the Public Defender's Office for a defense attorney to insist on a current and thorough medical evaluation to rule out these possibilities. How often does the public defender request such an evaluation?

**Outcomes.** The Public Defender's Office reported that it does not track the outcomes of cases. Therefore, it does not know how many conservatorship petitions were granted in 2020 or how many were dismissed.

Contrast this with the practices of the Legal Aid Center of Southern Nevada which tracks its outcomes and was able to report that it succeeded in having 25% of the petitions in 2020 dismissed. Also contrast this with the practices of court-appointed attorneys in child dependency proceedings in California. They are required

to report outcomes to the Judicial Council or other entity that appointed them.

An office without performance standards, that does not track outcomes, without a formal complaint procedure for clients, and that does not have a percentage of cases later evaluated by a supervisor with experience in that type of case is like a rudderless ship.

**Methods of Disposition.** The Public Defender's Office reported that it does not have records on the methods by which cases were disposed. It does not know how many cases reached a disposition as a result of a contested court hearing versus a settlement entered into by the conservatorship defense attorney. This leaves an observer to wonder whether 95% to 100% of the cases were civil-rights-surrendering "settle-

ments” which consume much less attorney time than does a contested hearing.

Proposed conservatees have the right to a jury trial. The Public Defender’s Office reported there were no jury trials in 2019 or in 2020. This is consistent with superior court records showing no conservatorship jury trials during the past 10 years.

This data means that in Alameda County a jury trial is a theoretical right that never translates into a reality. One wonders if this is due, at least in part, to excessively high caseloads since jury trials are extremely time consuming – and time is something that a conservatorship public defender does not have.

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**Appeals.** Once an order of conservatorship is entered, a conservatee has a right to appeal. An appeal would challenge errors or abuses of discretion that may have occurred during the proceedings. An appeal could also reverse the order of conservatorship if the conservatee did not receive effective assistance of counsel.

The Public Defender’s Office reported that it did not file any appeals for clients in 2019 or 2020. That is consistent with research by Spectrum Institute which shows that appeals have never been filed in Alameda County on behalf of a probate conservatee. This deprives the Court of Appeal from knowing what is happening and correcting errors in these cases.

### Active Cases

The public defender is not relieved as counsel when an order of conservatorship is granted and letters of conservatorship are issued to a conservator. The need for legal services do not end

when a person is placed into a conservatorship. In many ways, the need may be just as great or even greater after the person is adjudicated to be a conservatee.

The public defender remains attorney of record for a conservatee for the life of the case. This could be years or even decades. During that time, any number of situations may arise that require the conservatee to have the services of the public defender.

For example, a continuing care plan should be submitted by the conservator and approved by the court within six months of the appointment of a conservator. This plan will determine where the conservatee lives and what services the conservatee will receive. The conservatee needs the active participation of the public de-

fender to ensure that the plan meets the needs of the conservatee and was developed with the full participation of the conservatee. It is unknown what role the Public Defender’s Office plays to ensure there is a timely and appropriate continuing care plan for their clients. This is something that needs investigation.

The court investigator is supposed to visit with the conservatee and conduct a review of the case every two years. The public defender should be involved in this process to ensure that it occurs in a timely manner, that in fact the conservatee was seen by the investigator, that statutory requirements were met, and that issues raised by the investigation are addressed by the court. It is unknown what role the Public Defender’s Office plays to ensure there is a timely and appropriate biennial investigation by the court investigator. This is something that needs to be determined, initially by county executives and ultimately by an outside evaluation.

A conservator may be violating the rights of the conservatee after the order of conservatorship was granted. How is the conservatee supposed to bring this to the attention of the public defender? What mechanisms has the Public Defender's Office put in place to enable a client to communicate with the conservatorship attorney? These clients have serious disabilities – some of which preclude effective communication. The ADA requires that public defender services are accessible to clients with disabilities – including and especially clients with cognitive and communication disabilities.

What procedures does the Public Defender's Office have in place to ensure that conservatorship clients can communicate their legal needs to their attorney? In Nevada, the legal aid office is also attorney of record for the life of the case. They send a staff member to the residence of the client every six months to check on the well-being of the client. During this visit they learn if the client has legal needs they should address. Does the Public Defender's Office systematically have periodic visits with their clients? If not, what liability does the county have for allowing public defenders – who are attorneys of record for the life of the case – to essentially abandon their clients? What liability attaches to the county if a conservatee is being neglected or abused and has no way of communicating this to the attorney? What is the liability if the Public Defender's Office has no protocols to ensure ongoing communication with these clients?

The Nevada legal aid office reported that 25% of its caseload in 2020 involved successful terminations of guardianship. How many termination proceedings did the Public Defender's Office handle in 2020?

## County Risks

The Board of Supervisors has delegated to the Chief Public Defender complete control over the funding, staffing, and delivery of conservatorship indigent defense services.

The board knows that, due to the nature of their mental or developmental disabilities, the ultimate beneficiaries of these services are not likely to know if they are receiving a deficient legal defense or to complain about ineffective assistance of counsel. And yet the board has not had this unique situation evaluated by county risk managers.

Deficient funding, understaffing, excessive caseloads, and a lack of quality assurance controls involving services to clients with significant cognitive or communication disabilities creates significant legal risks to the county.

Deficient legal services can result in clients being ordered into conservatorships they do not need. This causes a loss of liberty, and potentially financial losses, that should not have occurred. The failure of a defense attorney to spend the necessary time to vet a proposed conservator could result in someone prone to abuse gaining control over the life of an adult. This could result in physical harm, medical neglect, or even death to a conservatee. All because the defense attorney had too many cases to juggle or did not have performance standards or proper oversight.

Not only is the county responsible for funding conservatorship indigent defense services, once it assigns this responsibility to a county department, the county is responsible for ensuring that

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such legal services comply with constitutional and statutory mandates. Among those mandates are the Americans with Disabilities Act and the corresponding state-law equivalent.

The county is at risk for civil lawsuits for deficient legal services that result in harm to clients. Such litigation could be initiated by a conservator, by [Disability Rights California](#) under the standing it is given by statute, or by relatives of conservatees who assert “next friend” standing to sue on behalf of their loved ones. The county does not have immunity for legal malpractice by attorneys it hires and services that it funds for clients with significant mental or developmental disabilities.

The county is also at risk for disability discrimination complaints filed on behalf of conservatees or proposed conservatees. These involuntary litigants are not able to represent themselves. They depend on an attorney for communications to and from the court and others involved in their cases. They also depend on their attorney to ensure they have meaningful participation in their cases. Legal services by the public defender are form of disability accommodation.

Providing deficient disability accommodations can give rise to liability to the provider of a service. Complaints against the county for such deficient services to clients with disabilities can be filed with state and federal agencies such as the California Department of Fair Employment and Housing under the Government Code Section 11135 and the United States Department of Justice under Title II of the ADA.

The ACLU recently entered into a settlement of a civil lawsuit against Fresno County for exces-

sive public defender caseloads. As a result, extra money was added to the state budget to enable the county to meet the terms of the settlement.

Spectrum Institute recently issued a report on deficient indigent legal defense services in probate conservatorship proceedings. One of the recommendations asked counties to convene a team consisting of the public defender, county counsel, and risk manager to develop performance standards, caseload limits, and monitoring mechanisms to ensure that county-funded indigent legal defense services in probate conservatorship proceedings conform to constitutional and statu-

tory requirements, state and federal nondiscrimination mandates, and rules of professional conduct with the dual purpose of improving the quality of services for clients and reducing the county’s risk of liability for substandard services. But that may not occur without a push from a civil grand jury.

### **Civil Grand Jury**

The Civil Grand Jury can investigate these deficiencies by asking probing questions and obtaining relevant documents. It can issue a report with recommendations to address systemic flaws, including an audit of the Public Defender’s Office such as was done in Santa Clara County in 2007. It can also encourage the county to consider adopting a Nevada-style conservatorship legal defense program. ♦♦♦

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