

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 State
Administrative Oversight
=
No Local
Administrative Accountability



Solution 1:
Annual Conservatorship
Survey of Local Courts
(Cal. Const. Art.VI, Sec.6)

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
- Court trials
- Jury trials
- Open cases
- Appeals

Filings, Dispositions, and Caseload Clearance Rate

Fiscal year	Probate	
	Total	Conservatorship & Guardianship
	(A)	(B)
Filings		
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:

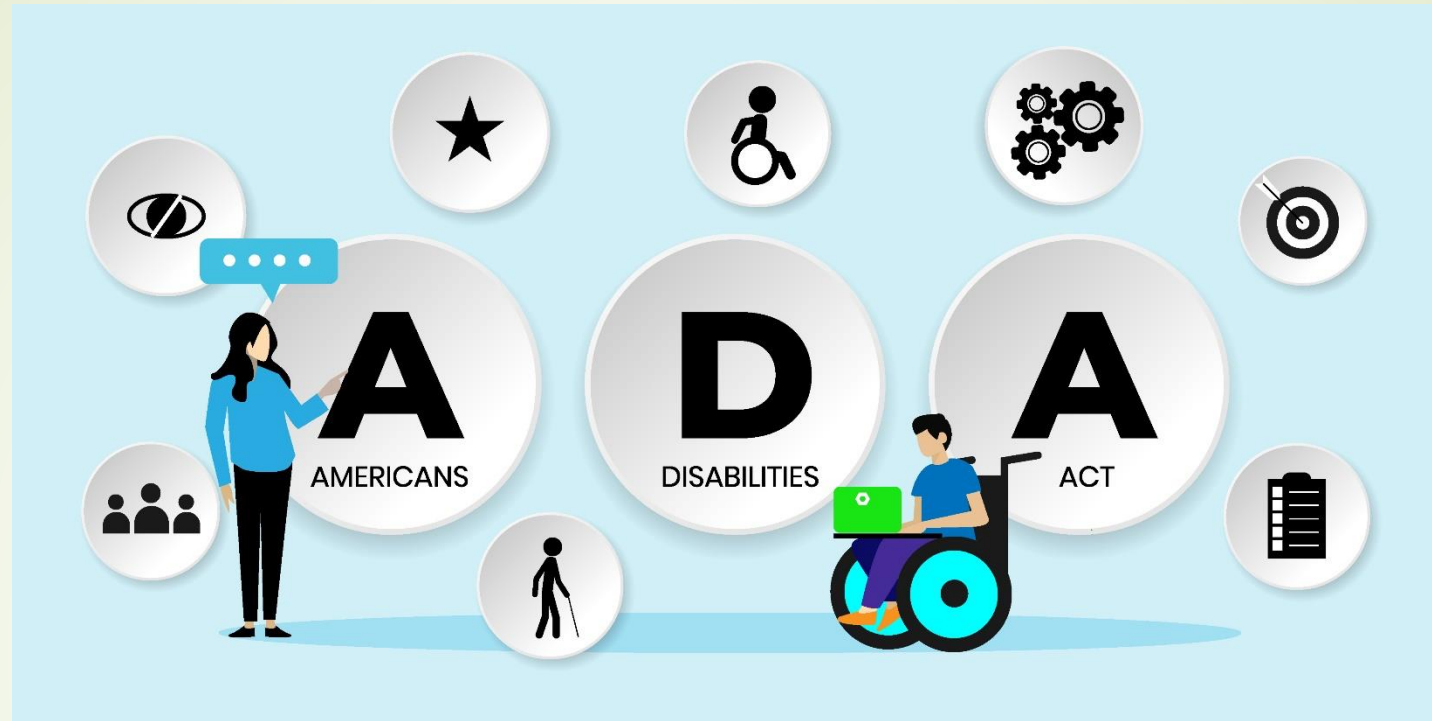
Britney Spears
Theresa Jankowski
Elizabeth H.

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:

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**
Recruit, Appoint, Fees, Quality Assurance Standards, Monitoring

**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**

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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/>