Complaint to Sacramento County Superior Court

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

Per Section 504 of the
Rehabilitation Act of 1973

Per California Government
Code Section 11135

User's Guide to Exhibits

Exhibit A: Communications from Alta California Regional Center

A-1 A letter sent to Spectrum Institute from **Alta California Regional Center** on March 17, 2017, drew our attention to a major problem occurring in superior courts located within the Alta service area. This included the Sacramento County Superior Court. The problem involves judges not appointing attorneys to represent many respondents who are involuntarily required to participate in conservatorship cases. It also involves the court not notifying the regional center in some cases that a client has become a respondent in a conservatorship case. As a result, the regional center sometimes is not able to submit an assessment report to the court regarding these clients.

The letter explained that up to 80% of regional center clients who are drawn into conservatorship litigation find themselves involved in general, rather than limited, conservatorship proceedings. This is because many petitioners are filing a petition for a general conservatorship and therefore the cases are processed in that category and under laws and procedures that apply to general conservatorships. The protections offered by limited conservatorship proceedings are not applied, simply because the these petitioners have chosen a strategy of filing for a general conservatorship.

The letter also informed Spectrum Institute that, in the opinion of the legal services manager for Alta California Regional Center, when cases are filed as a limited conservatorship, and when attorneys are appointed to represent the clients, many of the attorneys do not seem to be qualified or properly trained to represent clients with intellectual and developmental disabilities.

A-2 Subsequent communications from **Alta Regional Center** to Spectrum Institute on May 2, 2018, via email, explained that in the year 2017, more than 250 clients of Alta California Regional Center were respondents in general conservatorship proceedings in the Sacramento County Superior Court. It was estimated that in Placer County, up to 100 or more clients were respondents in general conservatorship proceedings. It was also explained that in some nearby counties, judges are granting general conservatorships for regional center clients even though they know that the regional center has not been served with notice of the petition and hearing date, thereby depriving clients with input from the regional center – as well as legal representation by a court appointed attorney.

A-3 An **email from Alta** sent on May 3, 2018, further explained that petitioners are deciding to file for general, rather than limited, conservatorships because of: (1) recommendations from a self-help center; (2) recommendations from some local attorneys; and (3) some attorneys charge a lower fee to petitioners if a general conservatorship proceeding is initiated.

A-4 An **email communication from an attorney** on the panel of court-appointed attorneys in Sacramento explained there are no training requirements to get on or remain on the panel. Attorneys are not appointed in all cases. Usually only when there is a contested matter.

Exhibit B: Probate Notes from Conservatorship Cases (4-13-18 to 5-2-18)

Research was done online to identify cases where no attorney was appointed to represent proposed conservatees. Cases were identified from the docket of Depertment 129 for a period of one month. Based on case numbers for conservatorship proceedings listed on the daily docket of that court, probate notes were examined to determine whether the proposed conservatee had an attorney. Other available court records were examined online to verify whether the conservatee had court-appointed counsel. Some 23 cases were identified where the court did not appoint an attorney to represent the proposed conservatee. It appeared that 8 of these proposed conservatees may have been regional center clients. The other 15 most likely had alleged cognitive disabilities other than developmental.

Due to research limitations, it is not known whether this month is typical of others. However, it is noteworthy that the letter from the regional center indicated that in 2017, more than 250 clients were processed through general conservatorship proceedings.

The superior court should be able to determine the number and percent of conservatorship cases processed through the court each year in which an attorney is not appointed to represent the proposed conservatee.

Exhibit C: Citation for Conservatorship

It is rare that a conservatorship proceeding is initiated by a proposed conservatee. In virtually all cases, the proceeding is initiated by a parent, relative, or staff member of a government agency. The proposed conservatee is served with a copy of the petition and a "Citation for Conservatorship." The citation is issued by the court and informs the proposed conservatee that he or she "is required to appear at a hearing." Thus, proposed conservatees are involuntary litigants in proceedings that may take away their right to contract, to manage and control property, to give informed consent to medical treatment, to fix their place or residence, to consent to sex, to vote, and to marry. These are truly proceedings affecting the fundamental liberties of people with disabilities.

Exhibit D: Statutory Right to Counsel

D-1 **Probate Code Section 1471(a)** requires the court to appoint counsel for a conservatee or proposed conservatee if the person requests the appointment. However, even if the person has not requested counsel, subdivision (b) states that the court shall appoint counsel if, based on information obtained from any source, the court determines that the appointment is necessary to protect the interests of the conservatee or proposed conservatee.

The petition and attachments are other sources of information. Those documents advise the court that it is believed the proposed conservatee lacks the ability to understand and make important decisions. These documents put the court on notice that the proposed conservatee is unlikely to be able to effectively represent himself or herself in a legal proceeding. In other words, the court is informed that the person is unable, without the assistance of

counsel, to protect his or her own interests in the proceeding.

Another source of information is the court's own experience from prior cases. The court can take judicial notice, on its own motion, that the vast majority of conservatorship petitions are granted. Thus, the court knows that the vast majority of proposed conservatees are unable to understand the complexities of conservatorship proceedings and to have meaningful participation in the proceedings without the appointment of counsel.

D-2 The Court of Appeal decision in **Wendland v. Superior Court** (1996) 49 Cal.App.4th 44, is instructive on the duties of the court in determining whether to appoint counsel for a conservatee or proposed conservatee. The decision found the situation in conservatorship cases analogous to the question of appointment of counsel in proceedings to terminate a parental relationship. There, counsel must be appointed at the commencement of the proceeding, absent an immediate showing that appointment of counsel is not necessary. The decision noted that although Section 1471(b) does not expressly require such a showing that counsel is not needed, it implicitly so requires when the court is presented with information from any source that counsel may be required. The petition and other moving papers are such a source of information. They put the court on notice of the significant disabilities of the proposed conservatee. They put the court on notice that it is highly unlikely the proposed conservatee can effectively represent himself or herself in the proceeding. They put the court on notice that in order to ensure access to justice – as required by due process and by the ADA – that counsel may be needed. Thus, the requirement of Section 1471(b) is only satisfied by appointment of counsel or a determination that counsel is not required.

D-3 The Annual Report of the California Law Revision Commission (December 1979) shows that Probate Code Section 1471 was adopted in the 1979 legislative session and went into effect in 1980. The code section was titled "Mandatory appointment of legal counsel." The comment clarifies that unlike Section 1470 where appointment of counsel is discretionary, under Section 1471 the appointment of counsel is mandatory when the conditions specified exist.

D-4 A 1980 report of the California Law Revision Commission – titled "Guardianship-Conservatorship Law" – explains that a new law requires that the court appoint legal counsel for a proposed limited conservatee not having legal counsel. There are no conditions that must be met and no exceptions. All proposed limited conservatee must be given legal counsel. The law also provides that the proposed limited conservatee must be assessed by a regional center unless the person does not consent to such an assessment. A comprehensive set of new statutes were enacted for limited conservatorship proceedings.

Exhibit E: Access to Justice (Jameson v. Desta)

On July 5, 2018, the California Supreme Court rendered a unanimous opinion with broad and sweeping language about access to justice in judicial proceedings. The court ruled that court-devised

policies or practices that have the effect of denying to qualified indigent litigants equal access to justice are subject to invalidation. "To be valid a court policy, like a local court rule, must be consistent with the federal and state Constitutions, statutes, rules of court, and applicable case law."

The practice of the Sacramento Superior Court of not appointing counsel to represent a proposed conservatees would be invalid absent a determination that the proposed conservatee has the ability to request counsel and has intelligently and voluntarily waived the right to counsel. It would also require a determination that appointment of counsel is not required to protect the interests of the conservatee, including his or her interest in having the protections of due process and the federally conferred rights under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and California Government Code Section 11135.

Exhibit F: Government Cod Section 11135

F-1 **Government Code Section 11135**, subdivision (a) prohibits any program or activity that is conducted, operated, or administered by the state to deny full and equal access to the benefits of such program or activity to anyone on the basis of mental or physical disability.

Subdivision (b) such programs and activities are required to meet the protections and prohibitions contained in Title II of the Americans with Disabilities Act (ADA) and the federal rules and regulations adopted in implementation thereof. Subdivision (d) applies these protections to persons who are perceived to have such a disability.

F-2 **Government Code Section 12930**, subdivision (f)(4) gives the Department of Fair Employment and Housing (DFEH) the power and duty to receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful by Section 11135.

F-3 **Court decisions** explain that the protections of the ADA were incorporated into Section 11135 in 1992 – the year after the ADA became law.

F-4 **Minutes of the Fair Employment and Housing Council** explain that authority to enforce Section 11135 was given to DFEH on January 1, 2017.

F-5 The **website of the State of California** has a section on compliance with Section 11135. It states: "Complaints should be filed with the State department or agency alleged to be in noncompliance."

F-6 The **director of DFEH** has the authority to file a complaint for investigation on behalf of a group or class of persons adversely affected, in a similar manner, by a practice made unlawful by a law the department enforced. Receipt of an individual complaint alleging a pattern of discrimination or a request or referral from a source outside the department, may result in the filing of a director's complaint.

Exhibit G: ADA and Section 504 Reference Materials

G-1 A **commentary** on the ADA explains that the access-to-justice requirements of the ADA place a duty on the superior court to appoint counsel for proposed conservatees.

G-2 Excerpts from **Tennessee v. Lane** (2004) 541 U.S. 509 clarify that the requirements of Title II of the ADA apply to state courts.

G-3 Excerpts from **Robertson v. Las Animas County Sherriff's Department** (10th Cir. 2007) 500 F.3d 1185 explains that the ADA requires more than physical access: it requires public entities to provide "meaningful access" to their programs and activities. Courts give substantial deference to ADA regulations adopted by the Department of Justice. A public entity must take steps to ensure effective communication with program participants. What triggers the duties of a public entity under the ADA is knowledge that someone ha a disability, either because: (1) the disability is obvious; or (2) the entity has been informed of the disability.

G-4 Excerpts from **A.G. v. Paraside Valley Unified School District** clarifies that a request for accommodation is not necessary to trigger duties under Section 504 of the Rehabilitation Act of 1973. It is knowledge of the disability that creates liability if no action is taken by a public entity. To determine what type of accommodations may be needed, the entity has "a duty to gather sufficient information from the disabled individual and qualified experts" once an entity knows of the disability. Such notice exists where the need for an accommodation is obvious. Once put on notice, the entity "is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation."

G-5 A **report** published in 2009 revealed that in a sample of conservatorship cases reviewed in 2007, 54% of respondents had no attorney, 73% of respondents did not appear in court, and 84% of the petitions were granted.

G-6 A 2014 **report** found that in a sample of limited conservatorship cases reviewed that year in the Los Angeles Superior Court, about 98% of the new petitions were granted.

G-7 **Summary of DOJ Regulations**: Complaints: ADA Title II regulations specify that a complaint may be filed by an individual who believes that a specific class of individuals has been subjected to discrimination by a public entity. (Sec. 35.170(a)) Complaints may be filed on behalf of classes or third parties. (Sec. 35.104) Procedure: A public entity with 50 or more employees shall adopt grievance procedures for prompt and equitable resolution of complaints alleging any action prohibited by Title II.

G-8 **Excerpts from Title II Regulations**: No Immunity: A state is not immune under the eleventh amendment from an action in federal or state court for a violation of the ADA.

G-9 **Section 504 of the Rehabilitation Act.** Any public entity that receives federal funds must provide people with disabilities meaningful access to all of its programs and services. The entity so funded must have complaint procedures for grievances alleging violations of Section 504 by the public entity.

G-10 In **Franco-Gonzales v. Holder** (C.D. Cal. 2010) 767 F.Supp.2d 1034, the court ruled that appointment of a legal advocate may be required as a reasonable accommodation for aliens who are "mentally incompetent" to represent themselves in removal proceedings. The advocate who is appointed must provide zealous representation; be subject to sanctions for ineffective assistance of counsel; be free of any conflicts of interest; have adequate knowledge of the facts and law involved in the proceeding; and maintain confidentiality. As a result of this decision, there is now a nationwide policy regarding appointment of an advocate for immigration detainees with serious mental disorders or conditions.

G-11 A **commentary** published in 2017 explains how a guidance memo from the Department of Justice is instructive on how the ADA applies to court proceedings involving litigants with cognitive disabilities.

G-12 **Excerpts from a guidance memo** issued jointly by the Department of Justice and the Health and Human Services Agency in 2015 are highlighted to explain how provisions of the ADA would apply to guardianship and conservatorship proceedings involving litigants with cognitive and communication disabilities.

G-13 A **commentary** published in 2018 explains how the Office of Administrative Hearings in Washington State is now using procedures to determine if the appointment of counsel is a necessary ADA accommodation for litigants with cognitive disabilities who are involved in administrative proceedings.

G-14 In **Matter of Leon**, 43 N.Y.S.3d 769 (N.Y. Surr. Ct 2016), the court ruled that a ward has a due process right to the appointment of counsel in adult guardiaship proceedings.

G-15 Concurrent with these complaints being filed with the superior court, two **pre-complaint inquiry forms** are being filed with the DFEH for review. Formal complaints will be filed with DFEH in the event that the Sacramento County Superior Court does not promptly adopt a policy and engage in procedures: (a) to appoint counsel for proposed conservatees in all cases unless there has been a determination by the court that: (1) the right to counsel has been intelligently and voluntarily waived and (2) that appointment of counsel is not required to ensure access to justice as required by the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and California Government Code Section 11135.

Form one is a pre-complaint inquiry regarding the court's failure to appoint counsel for people with developmental disabilities. **Form two** is a pre-complaint inquiry regarding the failure to appoint counsel for people with other types of cognitive disabilities.

Exhibit H: Materials on Standing

Regulations by the Department of Justice to implement the ADA allow administrative complaints to be filed by any individual who believes that he or she or a specific class of individuals has been subject to discrimination on the basis of disability by a public entity. California Govt. Code Section 11135 incorporates into California law the ADA and implementing federal regulations. Thus, persons other than the direct victim of discrimination may file a complaint on behalf of an individual victim or class of victims of discrimination. Such broad standing in understandable, considering that the nature and extent of certain disabilities may preclude victims from filing a complaint on their own behalf or even from knowing that they in fact have been victims of discrimination. So third party standing to complain on their behalf is recognized by Title II regulations.

The materials in this exhibit show that public policy favors a broad and expansive rule on "standing" to advocate for someone with a serious cognitive disability when it appears that the person, due to their disability, cannot advocate for himself or herself.

H-1 **Probate Code Section 1820** does not restrict standing to initiate or participate in a conservatorship proceeding to a parent, spouse, relative, or government agency. Rather, it also grants standing to file a petition to "any other interested person or friend of the proposed conservatee."

H-2 In civil litigation involving federal rights, case law grants standing to someone acting as **"next friend"** to a real party in interest whose disability precludes the person from litigating on his or her own behalf – so long as the next friend is truly dedicated to the best interests of the real party in interest.

H-3 **Rule 7.10** of the California Rules of Court goes even further and allows ex parte communications to the court by a person who is not even a party to the case when the communication brings to the court's attention matters concerning the well-being of a conservatee or proposed conservatee.

H-4 In **Michelle K. V. Superior Court** (2013) 221 Cal.App. 4th 409, the Court of Appeal ruled that when parents or conservators have an actual or potential conflict of interest with a conservatee, someone must be permitted to assert the rights of an adult who has a cognitive or communication disability that prevents the adult from asserting his or her own rights. Without a liberal rule on standing, the rights at stake would be rendered meaningless. The matter involved in this case was the right to independent and competent counsel for the conservatee in a situation where fundamental liberties were at risk.

H-5 **Standing for ADA Administrative Complaints**. Title II Regulations establish broad rules of standing to file ADA administrative complaints. Section 35.170(a) says a complaint may be filed by an individual who believes that a specific class of individuals has been subject to discrimination. Section 35.104 recognizes complaints by third parties on behalf of classes.

H-6 **Commentary on Standing**. This commentary explains the need for a broad rule of standing.