

## **Spectrum Institute -- Disability and Guardianship Project**

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Zach Keller  
Senior Policy Analyst  
Senator Thomas J. Umberg  
California State Senate  
Sacramento, California

Dear Zach,

It was a pleasure to meet with you yesterday at the Capitol. I am grateful to Lisa MacCarley for the groundwork she has laid for possible new legislation to improve the probate conservatorship system in California – a system that is badly broken and which is in need of major overhaul.

While Lisa continues to develop her proposal for a pilot project to replicate the “Nevada model” for legal advocacy and defense, I want to offer a more limited proposal that would be a step toward larger reform. The proposed bill focuses on the right to counsel for all conservatees and proposed conservatees. People with cognitive and communication disabilities should not be required to represent themselves in complicated legal proceedings. Having them proceed “pro per” is a denial of access to justice in violation of the ADA. For more information on how the ADA relates to this issue, go to: <http://spectruminstitute.org/Sacramento/>

I am attaching a copy of the proposed bill and two op-ed articles that have been published in the Daily Journal on this subject. The draft of the bill contains links to letters of support from a national organization and two California organizations. You can see from these letters that we are not starting from scratch in terms of support.

I also encourage you to read the declarations of several professionals about how it is unfair and unjust to require seniors and people with developmental disabilities to represent themselves in probate conservatorship proceedings. <http://spectruminstitute.org/Sacramento/02-declarations.pdf>

Please submit the draft of this bill to the Legislative Counsel’s Office for a review and workup. As that process proceeds, I will work with Lisa as she develops a proposal for a bill to create a pilot project in one county, perhaps Alameda, to test the “Nevada model” of legal representation here in California.

Thank you for your willingness to assist us in working to secure access to justice for seniors and people with disabilities.

Tom Coleman

cc: Lisa MacCarley

## A Bill to Promote Access to Justice and Effective Assistance of Counsel in Probate Conservatorship Proceedings

This bill protects the rights of people with disabilities to equal access to public services as guaranteed by Title II of the Americans with Disabilities Act, California Government Code Section 11135, Welfare and Institutions Code Section 4502, and Section 50510 of Title 17 of the California Code of Regulations. The objectives of this bill are supported by the [California Advocates for Nursing Home Reform](#), [The Arc of California](#), and the [Public Justice Center](#).

### Section 1 – Findings

The Legislature finds and declares:

1. Tens of thousands of adults in California are living under an order of probate conservatorship. Thousands of new conservatorship petitions are filed each year. These cases involve seniors who may be experiencing cognitive decline, adults with developmental disabilities, or adults of any age who have cognitive or communication disabilities caused by medical illnesses or injuries.
2. Probate conservatorship proceedings are initiated to protect the health and welfare of adults with significant disabilities – conditions that may impact their ability to make major life decisions regarding residence, education, medical care, marriage, social and sexual contacts, and finances.
3. These proceedings implicate the liberty interests of such adults and may ultimately result in the loss of fundamental constitutional and statutory rights.
4. Probate Code Section 1471 mandates the appointment of counsel in all *limited* conservatorship proceedings. In *general* conservatorship proceedings, the appointment of counsel is required only if requested or if the court determines that counsel “is necessary to protect the interests of the conservatee or proposed conservatee.” Some petitioners file for a general conservatorship in order to avoid the requirement that an attorney be appointed for all respondents in limited conservatorship proceedings.
5. Individuals with cognitive disabilities may not request counsel because they do not have the ability to understand the role of or need for an attorney to protect their rights. When a request is not made, some judges allow the individual to represent themselves, without conducting an assessment of the person’s ability to have meaningful participation in the proceeding without legal representation.
6. Litigants with disabilities have an interest in receiving access to justice in probate conservatorship proceedings. Components of access to justice include effective communication and meaningful participation in such litigation. Unless an attorney has been or will be retained by a conservatee or proposed conservatee, courts should appoint counsel in order to protect these legal interests.
7. When a statutory right to counsel exists, due process entitles a person to effective assistance of counsel throughout the proceeding.
8. The right to effective assistance of counsel is enhanced when an attorney receives appropriate education and training and adheres to objective performance standards.
9. On Sept. 24, 2019, the Judicial Council adopted new training and education requirements for attorneys representing conservatees and proposed conservatees in probate court. A report issued by its Probate and Mental Health Advisory Committee indicates that the authority to adopt performance standards for such attorneys is vested in the California Legislature and The State Bar of California.

## Section 2 – Appointment of Counsel

California Probate Code Section 1471 , subdivision (b) is hereby amended as follows:

(b) If a conservatee or proposed conservatee does not plan to retain legal counsel and has not requested the court to appoint legal counsel, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interests of that person in any proceeding listed in subdivision (a). ~~if, based on information contained in the court investigator's report or obtained from any other source, the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee.~~

## Section 3 – Performance Standards

California Probate Code Section 1471 is hereby amended to add the following subdivision:

(d) The role of counsel for a conservatee or proposed conservatee is that of a zealous advocate. The State Bar of California shall develop and periodically update performance standards for attorneys who represent conservatees and proposed conservatees in probate conservatorship proceedings.

### Comments:

The Americans with Disabilities Act requires that courts provide an accommodation to litigants with *known* disabilities in order to enable them to have meaningful participation in a legal proceeding. A *request* is not necessary to trigger the court's duty to accommodate. Verified petitions, medical capacity declarations and other documents put judges on notice that litigants in conservatorship proceedings have cognitive and communication disabilities that affect their ability to understand, deliberate, and communicate. Appointment of counsel, therefore, may be a necessary accommodation to enable access to justice for many, if not most, conservatees and proposed conservatees.

One regional center has reported that judges in several counties are not appointing counsel to represent many litigants in probate conservatorship proceedings. An audit by the Spectrum Institute revealed that the Sacramento County Superior Court does not appoint counsel in a significant number of such cases.

California appellate courts have ruled that once a statutory right to counsel exists, due process entitles a litigant to receive effective assistance of counsel. However, no public entity in California has adopted performance standards for attorneys representing conservatees or proposed conservatees. A report from an advisory committee of the Judicial Council states that the State Bar and the Legislature have the authority to issue such standards. In formulating new standards, the State Bar can draw upon those adopted in Massachusetts and in Maryland. It can also refer to proposals included in a *White Paper* submitted to the U.S. Department of Justice and guidelines contained in a *Strategic Guide for Court Appointed Attorneys*. Both documents were produced and published by the Spectrum Institute.

Mandatory appointment of counsel in guardianship and conservatorship cases is supported by The Arc of the U.S., American Association for Intellectual and Developmental Disabilities, TASH, American Bar Association, National Council on Disability, National Coalition for a Civil Right to Counsel, Conference of State Court Administrators, and the California Advocates for Nursing Home Reform.

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# Conservatorship Reform: More Than Attorney Education is Needed

By Thomas F. Coleman  
Daily Journal / Dec. 19, 2018

The Judicial Council has just released for public comment a set of new educational requirements for court-appointed attorneys in probate conservatorship proceedings. The proposals have been under consideration by its Probate and Mental Health Advisory Committee for several years.

There may be as many as 60,000 adults living under an order of conservatorship in California. They include seniors with mental challenges, adults with developmental disabilities, and others who have cognitive disabilities due to medical illnesses or injuries. The Spectrum Institute, a nonprofit organization advocating for conservatorship reform, estimates that some 5,000 new probate conservatorship petitions are filed annually in California.

Spectrum Institute presented the advisory committee with a list of deficiencies in the conservatorship system in November 2014. At the top of the list was the failure of court-appointed attorneys to advocate effectively for conservatees and proposed conservatees. The advocacy group asked the Judicial Council to adopt new training requirements and performance standards for court-appointed attorneys in these cases. In May 2015, a detailed proposal for such requirements and standards was submitted to the advisory committee.

Later that year, the Judicial Council authorized a multi-year project for the advisory committee to develop new rules in this area. After months of review, the committee dropped the idea of performance standards because it believed only the Legislature and State Bar have authority to do so. The committee decided to limit its focus to new educational requirements.

The work product of the committee, proposing amendments to Rule 7.1101 of the California Rules of Court, was released by the Judicial Council on

Dec. 13. The subject matter on which attorneys would be required to receive training are quite extensive.

Topics include: (1) the rights of conservatees, persons alleged to lack legal capacity, and persons with disabilities under state and federal law, including the Americans with Disabilities Act; (2) a lawyer's ethical duties to a client, including a client who has or may have diminished functional ability, under

the California Rules of Professional Conduct and other applicable law; and (3) techniques for communicating with an older client or a client with a disability, ascertaining the client's wishes, and advocating for those wishes in court.

In addition, attorneys would be required to have training on special considerations for representing older clients or those with disabilities, including: (1) risk factors that make a person vulnerable to undue influence, physical

and financial abuse, and neglect; (2) effects of physical, intellectual and developmental disabilities; (3) mental health disorders; (4) major neurocognitive disorders; (5) identification and collaboration with professionals with other professions; and (6) identification of less restrictive alternatives to conservatorship, including supported decision-making.

While these requirements, if adopted, are necessary to improve the quality of legal representation of clients in conservatorship proceedings, they are not sufficient to ensure they have access to justice. However, the authority to mandate more than new educational requirements may not be in the purview of the Judicial Council.

The California Advocates for Nursing Home Reform asked the advisory committee to propose a new rule clarifying the role of an appointed attorney for a

## A New Law Should

- Mandate appointment of counsel for all conservatees and proposed conservatees without an attorney
- Specify that the role of counsel is to act as a zealous advocate
- Direct the State Bar to adopt performance standards for lawyers assigned to represent such clients

conservatee or proposed conservatee as a “zealous advocate.” Both Spectrum Institute and the California Advocates for Nursing Home Reform suggested new rules on performance standards for such attorneys to ensure they provide effective advocacy and defense services. The advisory committee declined to follow these suggestions, arguing that only the Supreme Court or the Legislature has the authority to specify the role of an attorney and adopt performance standards.

Clarifying the role of appointed attorneys is crucial to litigants with disabilities receiving equal protection and access to justice. Some judges expect attorneys to be zealous advocates, while others want attorneys to override the stated wishes of clients if they believe a client’s best interests require such an approach. Attorneys representing non-disabled clients would never dream of advocating against their client’s wishes and promoting their own beliefs instead. If they did, attorneys could be the target of a malpractice lawsuit or a complaint to the State Bar. Clients with disabilities deserve the same type of advocacy as those without disabilities. New legislation should clarify this.

Legislation is also needed to clarify that all conservatees and proposed conservatees are entitled to an appointed attorney, even if they don’t request one. Under current law, even without a request, litigants with developmental disabilities *automatically* receive an attorney if a petitioner files for a *limited* conservatorship. However, if a petitioner files for a *general* conservatorship, a developmentally disabled litigant may be required to represent himself or herself. Giving a petitioner this type of control does not make sense.

Appointment of counsel for litigants in general conservatorship proceedings is not required under current law, unless they specifically request one. The problem is that many, if not most, of these litigants do not know the role or value of an attorney and so they will not ask for one. As a result, in some areas of the state, judges are not appointing attorneys even though they know these involuntary litigants have serious disabilities that make it impossible to effectively represent themselves. This “catch 22” – you must request even though you can’t request – needs to be eliminated. Probate Code Section 1471 should require appointment of counsel

regardless of whether a petitioner files for a general or a limited conservatorship.

A bill is currently being developed by a coalition of advocacy groups that will build upon, and move beyond, the new educational requirements likely to be adopted by the Judicial Council in 2019. The bill would: (1) guarantee appointed counsel for all conservatees and proposed conservatees; (2) specify that the role of counsel is that of a zealous advocate; and (3) direct the State Bar to develop performance standards for such attorneys. The State Bar can look for guidance to Maryland and Massachusetts where such standards already exist.

The Judicial Council should be applauded for developing these new educational requirements. But how will they help litigants with disabilities receive access to justice if they do not have an attorney, or if appointed attorneys advocate for what they think is best and ignore the stated wishes of a client? New legislation can and should fill this access-to-justice void in probate conservatorship proceedings.

Spectrum Institute, California Advocates for Nursing Home Reform, and The Arc of California recently filed a complaint with the Sacramento County Superior Court for failing to appoint attorneys in many general conservatorship proceedings. Spectrum Institute has also filed a complaint with the U.S. Department of Justice against the Los Angeles County Superior Court. The complaint cites deficient advocacy services of court-appointed attorneys there. These complaints allege that courts are violating their obligations under Title II of the Americans with Disabilities Act by failing to provide equal access to justice to persons with known disabilities.

Having an attorney – one that performs competently – is an essential component of access to justice under the ADA. New legislation entitling litigants in general conservatorship proceedings to effective representation by zealous advocates will bring California closer to compliance with the ADA.

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# New Training Rules for California Conservatorship Attorneys

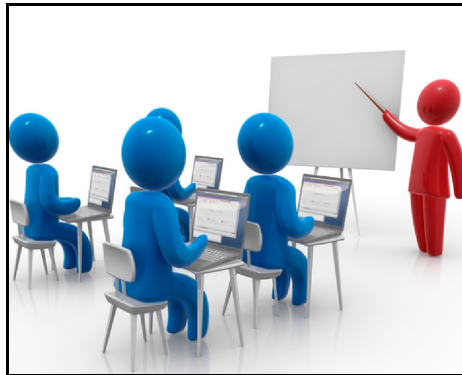
## *One Step on a Long Path to Reform*

By Thomas F. Coleman  
September 18, 2019

The California Judicial Council is scheduled to adopt new rules requiring conservatorship attorneys to receive education on a wide range of topics not mandated under current law. The changes will affect public defenders and private attorneys who are appointed to represent seniors and people with disabilities in probate conservatorship proceedings.

The matter is Item 19-220 on the consent agenda for the Judicial Council's meeting on Sept. 24.

The Probate and Mental Health Advisory Committee is including several crucial topics in the training requirements. For too long important issues have been ignored or misrepresented in seminars sponsored by some local bar associations. An investigation into faulty trainings is being considered by the Civil Rights Division of the United States Department of Justice.



Under the new rules, conservatorship attorneys will be required to gain knowledge about: (1) state and federal statutes including the ADA, rules of court, and case law governing probate conservatorship proceedings, capacity determinations, and the legal rights of conservatees, persons alleged to lack legal capacity, and persons with disabilities; (2) ethical duties to a client under Rules of Professional Conduct and other applicable law; (3) special considerations for representing seniors and people with disabilities, including individualized communication methods; and (4) less restrictive alternatives to conservatorships, including the use

of non-judicial supported decision-making arrangements.

But this new training framework is just the first step in a much needed and multi-faceted process to reform the dysfunctional probate conservatorship system. Structural flaws in this system have been brought to the attention of the chief justice, Judicial Council, Supreme Court, State Bar, attorney general, governor, and other state and local officials on many occasions during the last 15 years. And yet, despite some minor tinkering around the edges, the failure of officials to institute fundamental changes has resulted in the

unnecessary victimization of thousands of seniors and people with disabilities who have been treated unfairly in these proceedings.

The next step leading to reform is to ensure that the training materials used in new educational programs are both accurate and complete. Quality education cannot be left to chance. There

is a crucial need for the State Bar to approve only those trainings that meet specific standards. Training providers should submit the content of seminars and qualifications of presenters to the State Bar for pre-approval. Providers should not be given carte blanche like they are now.

New educational standards sound good in theory, but without the adoption of performance standards, conservatorship attorneys are free to use or ignore what they learn. Attorneys are often not providing their clients with effective representation. The pattern of deficient advocacy is also

part of a pending ADA complaint with the Department of Justice (filed by my organization, Spectrum Institute). Adherence to performance standards should be mandatory, not optional.

The California Supreme Court has the authority to direct the State Bar to develop performance standards for attorneys appointed to represent clients in conservatorship proceedings. In developing such standards, the State Bar will not have to start from scratch. Excellent standards have been adopted in Massachusetts and Maryland. The State Bar can also consider the ADA-compliant performance standards submitted to the DOJ.

Once standards are developed by the State Bar and approved by the Supreme Court, then a method to monitor compliance will need to be developed. Due to the nature of cognitive disabilities, respondents in conservatorship proceedings generally lack the ability to complain about the deficient performance of their attorneys. As a result, they lack meaningful access to the complaint procedures of the State Bar.

To meet its ADA responsibilities to make its services accessible, the State Bar will need to find ways to address this problem. Perhaps performance audits of a representative sample of cases handled by these attorneys can help fill this access-to-justice gap. The State Bar could also require public defender offices to routinely conduct performance audits of staff attorneys who represent clients in probate conservatorship proceedings.

Each of these steps will help ensure that seniors and people with disabilities receive due process in legal proceedings in which their fundamental freedoms are placed at risk. But none of these measures will do anything to help litigants who do not receive an appointed attorney and are therefore required to represent themselves in complex legal proceedings.

As hard as it is to believe, some people with serious cognitive disabilities are not receiving

court-appointed counsel in these cases. An audit of cases in the Sacramento County Superior Court confirmed that judges there do not appoint attorneys in a significant number of cases.

Disability and seniors organizations filed a complaint with that court arguing that the failure to appoint counsel for probate conservatees violated the ADA. The court's response was a shameful denial that people with cognitive disabilities are entitled to an appointed attorney as an ADA accommodation. A state civil rights agency declined to open an investigation into the matter. As a result, it appears that the court's denial of access to justice for seniors and people with disabilities is a problem that will have to be addressed by the Legislature or by the DOJ.

It has been said that a journey of a thousand miles begins with a single step. The Judicial Council is about to take a step on a long journey toward comprehensive conservatorship reform.

This is an important step, to be sure, but one that may lead nowhere unless the Supreme Court, State Bar, and Legislature adopt additional reform measures. The question now is whether the justices, bar association officials, and state legislators have the will to do so.

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